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Certified Rule 31 Mediator (Civil)
Tennessee Supreme Court ADR Commission

September 23, 2005

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

Re: Written Comment on Proposed Change to TRCP 32.01(3)

Dear Mr. Catalano:

I understand that an amendment to TRCP 32.01(3) is being considered to incorporate, by cross-reference, all of the "unavailability" grounds listed in TRE 804(a). I believe it important to consider the incorporation, **in TRCP 32.01(3) itself**, the following (or similar) language: "...unless it appears that the absence or unavailability of the witness was procured by the party offering the deposition." While TRE 804(a) does incorporate an exception for "procurement or wrongdoing" in the final, unnumbered paragraph of the rule, this equitable concept does not appear to be explicitly included in the definition of "unavailable." The addition of such language in TRCP 32.01(3) would expressly reflect that the Court does not condone the use of deposition testimony which is offered by a party who "procured" the absence of the deponent, or whose "wrongdoing" resulted in the absence of the witness at the time the deposition testimony is offered. Such additional language would also serve emphasize the desirability of live testimony, subject to "in person"evaluation by the trier of fact, versus deposition testimony delivered by someone other than the witness.

Thank you for your time and attention. Should you have any questions or need any further information, please do not hesitate to contact me at your convenience.

Sincerely yours,

PENN, STUART & ESKRIDGE

By: Richard E. Ladd, Jr.

RELjr/das
Abingdon: 595774-1

cc: Hon. Richard E. Ladd, Chancellor
Courthouse
801 Anderson Street
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October 6, 2005

Michael W. Catalano, Clerk
Tennessee Appellate Court
100 Supreme Court Building
401 7th Avenue, North
Nashville, TN 37219-1407

Dear Mr. Catalano:

We are writing this letter to oppose the proposed Amendment to Tennessee Rule of Civil Procedure 8.01.

The proposed amendment to Rule 8.01 to require a specific dollar sum sought to be stated in the complaint is a bad idea and contrary to the current state of the law in Tennessee. (See enclosed brief excerpt we recently filed.) Tennessee case law holds that a post trial amendment to increase the ad damnum will not be allowed. Indeed, an amendment close to trial is likely to be disallowed. In other words the recovery of a plaintiff who takes it upon themselves to plead a specific dollar amount is capped at the artificial dollar amount stated in the complaint. If the plaintiff is to be held estopped to recover more than whatever dollar sum is stuck in the complaint, their counsel is forced to put a big number down. The alternative is that you risk having to explain to your client why their judgment is for less than the value the jury puts on the case. It is one thing to have the court remit an award and quite another to have to explain to a client (and malpractice carrier) that you didn't sue for enough money to cover a jury verdict.

Thus, by making it a rule that the plaintiff must artificially cap with specificity the dollar amount of their pain, suffering and other unliquidated damages, the system forces inflated "cya" damages claims. Defendants don't assess their actual exposure according to such claims. They rely on discovery to assess exposure. The harm is to the system. The court and all the lawyers in a case understand that the ad damnum is a number picked out of the air, but to the public and later to the jury it looks like the system is out of control. Of course, in an ideal world, a prescient

lawyer would plead the dollar amount that they plan to ask the jury to award in closing argument, but few of us can predict that number a year or two before trial. The alternative would be to start with a low number and amend up after the medical proof. The defense would often argue, however, that they would have defended the case quite differently if they had only known this was a case with so much money at issue.

Fundamentally, the problem is that it is unfair and inappropriate to ask a plaintiff to treat unliquidated damages as if they were liquidated. The present rule requires the plaintiff to state with specificity the nature of the relief sought (i.e. money, injunction, accounting). That is all that fairness requires. The rules of discovery are there to provide the other details about the plaintiff's injuries.

Sincerely,

Philip N. Elbert

Cynthia S. Parson

PNE/CSP/kac

Enclosure

A. Tennessee Law Does Not Require Plaintiff To Allege A Specific Ad Damnum.

Plaintiff is not required to allege a specific ad damnum. Tenn. R. Civ. P. 8.01 requires only that a complaint state: "(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 pleader seeks." See Tenn. R. Civ. P. 8.01. The demand for judgment need not state a specific dollar amount of damages. By its plain language, Rule 8.01 requires only that the claimant specify the type of relief sought. Plaintiff's proposed Second Amended Complaint fulfills all of the rule's requirements by specifically requesting, compensatory damages, punitive damages, costs, and other general relief. See proposed Second Amended Complaint at Prayer for Relief ¶¶ 1-5.

Rule 8.01 of the Tennessee Rules of Civil Procedure is very similar to the comparable Rule 8(a) of the Federal Rules of Civil Procedure.[1] Authorities construing the federal pleading rule, Fed R. Civ. P. 8, have said that the Federal Rules follow a system of "notice pleading" such that "the only function left exclusively to the pleadings ... is that of giving notice." See 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure §1202 (3d ed. 2002) (citing, *inter alia*, Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Boston & Maine Corp. v. Town of Hampton, 987 F.2d 855 (1st Cir. 1993); Barnhart v. Compugraphic Corp., 936 F.2d 131 (3rd Cir. 1991); Aquatherm Indus., Inc. v. Florida Power & Light Co., 971 F.Supp 1419 (M.D. Fla. 1997) *aff'd*, 145 F.3d 1258 (11th Cir. 1998)). "Notice pleading" is distinguishable from the "fact

[1] "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 ground upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim need no new ground of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded." Fed. R. Civ. P. 8(a).

pleading" required under the common law codes in that a notice pleading allows great generality when stating the circumstances "so long as the defendant is given fair notice of what is being asserted against him." See Wright & Miller at §1202.

Davidson County judges have properly declined to require that plaintiffs state a specific dollar amount in an ad damnum in their complaint. See, e.g., Exhibit A (Order of Chancellor Lyle, State Automobile Insur. Co. v. Jones Stone Co., Docket No. 04-1925-III, November 24, 2004); and Exhibit B (Order of Judge Kurtz, Mangrum v. Radde, Docket No. 00C-3605, February 12, 2001 (denying defendant Radde's motion asking the Court to order the plaintiff to indicate the particular numerical amount sought)). As Chancellor Lyle specifically held in her order: "Tennessee law does not require the statement of a specific dollar amount of damages and recovery." State Automobile Insur. Co., No. 04-19-25-III, at 1. As Chancellor Lyle correctly observed the "remedy to obtain information about the damages claimed by the defendant in its counterclaim is to request such information in discovery." Id.

The allegations in Plaintiff's proposed Second Amended Complaint are sufficient to apprise Defendants of the nature of the claims against them. Defendants are aware that they will have to defend themselves against a charge that they should compensate Plaintiff for multiple physical injuries, to include but not limited to head, neck, shoulder, back and leg; radiating pain and numbness; extreme fright and shock; permanent disfigurement; past, present, and future physical pain and suffering and mental anguish; past, present and future diminution in the enjoyment of life; past, present and future loss of earnings and earning capacity; permanent loss of earning capacity; permanent disability; property damage; medical bills incurred; and future medical bills. See

proposed Second Amended Complaint at ¶ 13 (a) - (k). The specific amount of damages Plaintiff seeks will not change the legal defense Defendants' are required to mount.

While a plaintiff who voluntarily chooses to plead a specific dollar amount may properly be held estopped to recover a judgment for more than they asked for, there is no reason in equity or requirement in the rules that a plaintiff arbitrarily assign a dollar cap to the damages the jury may properly award.

Thus, Plaintiff should not be required to state a specific ad damnum in his Second Amended Complaint.

COMMENT SUBMISSION FORM

OCT 2 5 2005

ATTN: MICHAEL W. CATALANO, CLERK
TENNESSEE APPELLATE COURT
100 SUPREME COURT BUILDING
401 SEVENTH AVENUE NORTH
NASHVILLE, TN 37219-1407

JUDGE: WALTER KURTZ

ADDRESS: 509 METRO COURTHOUSE
NASHVILLE, TN 37201

COMMENTS: (Please include number of rule to which comment applies)
Rule 23, T.R.Civ Pro - Class Actions.

There is no reason other than abject opposition to class action cases to seperate the attorney fee issue from the procedures governing the administration of the entire case. If class members object they should be required to register their objection at the front end of the proceeding and not allowed to only participate later on the attorney fee issue. The proposed procedure would also require two(2) notices to the class which adds to the expense. This proposal is consistent with the hostility expressed in some quarters to class actions and their use. This rule should not be amended.

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October 31, 2005

VIA FACSIMILE & U.S. MAIL

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

Re: Proposed Amendments to Tennessee Rules of Procedure and Evidence

Dear Mr. Catalano:

Pursuant to the Tennessee Supreme Court's Order soliciting comments on the 2005 proposed "Amendments To The Tennessee Rules Of Procedure & The Tennessee Rules of Evidence," the Knoxville Bar Association submitted the proposed amendments to a committee for review. Following its committee's report to the KBA Board of Governors, the Knoxville Bar Association submits the following comments on certain of the proposed amendments to the Court for its consideration and possible action.

Tennessee Rules of Civil Procedure 13.01: If any change to TRCP 13.01 is necessary, then further consideration and study should be exercised before eliminating the proposed language as to how this might impact cases where a prior claim is pending arising out of the same occurrence.

Tennessee Rules of Civil Procedure 28: This proposed amendment to the rules of Civil Procedure with instructions pertaining to "Interpreters" should be withdrawn as it appears to be a misplaced Rule of Criminal Procedure and inconsistent with present Tennessee Rule of Civil Procedure 28 entitled "Persons Before Whom Depositions May Be Taken" which the proposed amendment would replace in its entirety.

Tennessee Rules of Civil Procedure 34A.02: The word "conceals" should be eliminated from the list as that act technically seems not to involve spoliation of evidence. Alternatively, that the phrase "or unreasonably withholds" should be added to the list of spoliation acts.

Tennessee Rules of Evidence 604: The KBA objects to the proposed amendment, and submits that TRE 604 should be left as is with the word "translation" as that word more accurately reflects full and precise testimony than does the proposed word "interpretation."

Tennessee Rules of Juvenile Procedure 33: In every instance under TRJP 33 of a determination of what is:

(a) information protected from disclosure by law; or

(b) possibly "sensitive" or "detrimental" information

in a predisposition report, such determination should be made by a judge and mandatory language should be added to the TRJP 33 for this requirement.

The Knoxville Bar Association respectfully submits the foregoing comments for the Court's further consideration and possible revision. As always, we appreciate the opportunity to comment on proposed amendments to the rules promulgated by the Tennessee Supreme Court.

With kind regards,

Sincerely yours,

Timothy C. Houser, Co-Chair
KBA Professionalism Committee

cc: David M. Eldridge, Esq., KBA President

November 3, 2005

To: Hon. Mike Catalano
Clerk of the Tennessee Appellate Clerks
From: James Curwood Witt, Jr., Judge,
Tennessee Court of Criminal Appeals

Re: Proposed amendment to Tennessee Rule of Appellate Procedure 18

Dear Mike:

This letter expresses my objections to implementing the proposed amendment to Tennessee Rule of Appellate Preocedure 18. The proposed amendment authorizes an application to the appellate court for an "indigency" determination. The amendment appears to apply to criminal, as well as civil, cases on appeal.

My first observation is that the amendment confuses the terms "indigency" and "poverty." Indigency refers to a litigant's inability to afford counsel. *See* Tenn. Code Ann. § 40-14-202(b)(2003); R. Tenn. S. Ct. 13 §1(e). The terms "poverty" and "pauper" have been used in connection with a litigant's inability to pay a filing fee or front-end court costs or taxes. *See, e.g.,* Tenn. Code Ann. § 8-21-401(c).

That aside, in failing to exclude appeals in criminal cases, the proposed amendment ignores the long-standing practice in appeals of criminal convictions that the appellant is automatically allowed to proceed on appeal without the assessment of any filing fee for prepayment of costs or litigation taxes. Thus, in such appeals, there is neither any need nor any utility in mandating that the appellate court adjudicate an inability to bear the expense of the appeal.

Notwithstanding that the amendment would prove useless in appeals from criminal convictions, it is inimical to established law that serves to adjudicate cost issues when proceedings to collaterally attack criminal convictions are appealed. We have repeatedly stated in our orders addressing cost issues that "the prerogative for making original determinations about the indigency status of [an appellant] rests with the trial court, not the appellate court, even if the issue at hand is the defendant's indigency status on appeal." *Larry C. Corum v. State*, No. E2000-01076-CCA-OT-CD, slip op. at 2 (Tenn. Crim. App., Knoxville, July 5, 2000) (order); *see* Tenn. Code Ann. §§ 40-25-129, -130 (2003). Even though the concept of indigency does not equate to that of poverty, the implementation of the amendment to Rule 18 will engender motions in the appellate court for indigency determinations aimed toward the appointment of counsel.

Moreover, the "jurisdiction of the court of criminal appeals is appellate only." *Larry C. Corum*, slip op. at 2; Tenn. Code Ann. § 16-5-108(a) (1994). A rule change that would mandate the appellate courts' making original determinations of a litigant's ability to pay costs is at odds with Code section 16-5-108. The determination contemplated requires a finding of fact. In my view,

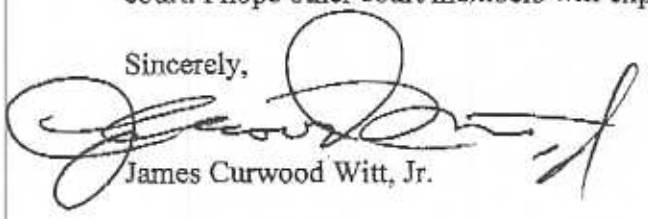
exceptions to the rule of appellate-only jurisdiction are ill-advised.

Additionally, I point out that, pursuant to past practice, no determination of a person's inability to pay court costs on the front end of a court proceeding binds the appellate court in taxing costs after the proceeding ends. *See* Tenn. R. App. P. 40(a). Nevertheless, the proposed amendment could be viewed as a mechanism for "taxing" appellate court costs. If so, we could expect motions in most cases that would seek the "indigent" or "pauper" imprimatur as a prelude to proceeding on appeal, despite that the record may not evince such a status finding by the trial court.

It may be that the amendment's real impact in the criminal realm would be to disturb some established principles that have worked well, but that alone prompts me to oppose its adoption.

Of course, I speak for myself only in expressing the above opinions and do not speak for the court. I hope other court members will express their own views.

Sincerely,



James Curwood Witt, Jr.

copy by fax: Presiding Judge Gary R. Wade

CHAMBERS OF
DAVID G. HAYES
JUDGE
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NOV 1 [illegible] 2005

COURT OF CRIMINAL APPEALS

STATE OF TENNESSEE

SUPREME COURT BUILDING
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JACKSON, TN 38302-0909

November 14, 2005

The Honorable Michael W. Catalano
Clerk of the Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

RE: Proposed amendment to Rule 18, Tennessee Rules of Appellate Procedure

Dear Mike:

On behalf of a number of our court members, I wish to express concerns regarding a proposed amendment to Rule 18, Tennessee Rules of Appellate Procedure. The proposed amendment authorizes a party to seek leave from the appellate court to proceed on appeal as a poor person. Proposed amendment (d) appears to apply to both criminal and civil appeals. While the Rule perhaps facilitates civil concerns, we believe that on the criminal side, it could impede the orderly and timely disposition of appellate criminal proceedings. For the reasons below, in addition to those reasons addressed by Judge Witt's letter of November 3, we would urge that the proposed rule change not be adopted.

1. T.C.A. § 40-14-202(b) currently requires that before a criminal defendant may be declared indigent, a hearing must be held. The statutorily-provided hearing thus implicates obvious due process rights of the defendant, including the right to be present at the hearing. The cases impacted by the proposed rule change would arise from those criminal cases in which the defendant was found not indigent at the trial level, but whose status has changed after the filing of the notice of appeal. This is not an uncommon event in criminal cases, particularly in those cases in which the family retains counsel for an indigent family member and immediately upon conviction and incarceration, the defendant moves for a change of indigency status for purposes of appeal. The practical effect of this amendment in these cases would require, for example, that a person housed in Brushy Mountain Correctional Facility be transported to the Supreme Court Building in Jackson, Tennessee, for indigency determination in his or her West Tennessee direct or post-conviction appeal. This situation would involve transport, housing, and security concerns, which would be enormous.

2. A determination of indigency is a mixed question of law and fact. *See Charles Smith v. State*, No. CR-92-702, 1992 WL 172149 (Ark. Jul 13, 1992); *City of Madison v. Uhlman*, 340 N.W.2d 204 (Wis. Ct. App. 1983). *But see State, Dept. of Children's Services v. RDV*, 2005 WL 623246, *4

(Tenn. Ct. App. 2005)("Whether a person is indigent is a question of fact, and as such, the standard of review is *de novo* with a presumption of correctness of the trial court's findings, unless the evidence preponderates otherwise."). The conclusion of indigency is a matter of law reviewable for correctness. *See State v. Vincent*, 883 P.2d 278, 280 n.3 (Utah 1994). However, the underlying factual determinations supporting the legal conclusion of indigency are clearly findings of fact. *Id.; see also State v. Nieves-Gonzalez*, 625 N.W.2d 913 (Wis. Ct. App. 2001)

3. Jurisdiction of the intermediate courts is "appellate only." *See* T.C.A. § 16-5-108; *Peck v. Tanner*, – S.W.3d –, 2005 WL 1491000, *3 (Tenn. 2005); *In re Askew*, 993 S.W.2d 1 (Tenn. 1999) (would be improper to function as fact-finding court); *Earls v. State*, No. M2003-01741-CCA-R3-PC, 2005 WL 901144 (Tenn. Crim. App., at Nashville, Apr. 19, 2005); *State v. Housler*, No. M2002-00419-CCA-R3-CD, 2004 WL 367724 (Tenn. Crim. App., at Nashville, Feb. 27, 2004). Accordingly, the intermediate appellate courts possess no fact-finding authority and cannot exercise original jurisdiction.

4. While the assessment of appellate court costs has traditionally been influenced by the trial court's determination of indigency or non-indigency status, this court has been granted discretion in the taxing of costs on appeal. *See* Tenn. R. App. P. 40(a). Thus, no amendment is necessary to remedy a change in indigency status in criminal cases on appeal.

Thank you for your consideration of these matters.

Sincerely,

David G. Hayes, Judge

DGH/jll

c: The Honorable Gary R. Wade, Presiding Judge
The Honorable Joseph M. Tipton
The Honorable David H. Welles
The Honorable Jerry L. Smith
The Honorable Thomas T. Woodall
The Honorable James Curwood Witt, Jr.
The Honorable John Everett Williams
The Honorable Norma McGee Ogle
The Honorable Alan E. Glenn
The Honorable Robert W. Wedemeyer
The Honorable J. C. McLin

State of Tennessee
Council of Juvenile & Family Court Judges
511 Union Street, Suite 600
Nashville, Tennessee 37219
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NOV 1 0 2005

November 14, 2005

Michael W. Catalano
Appellate Court Clerk
401 7th Avenue North
Nashville, TN 37219

RE: Proposed Amendments to the Tennessee Rules of Juvenile Procedure

Dear Mr. Catalano:

Members of the Executive Committee of the Tennessee Council of Juvenile and Family Court Judges ("Council") have reviewed the Supreme Court's proposed amendments to the Tennessee Rules of Juvenile Procedure ("TRJP") and would offer the following comments. Firstly, we would like to acknowledge our appreciation to the Supreme Court for its appointment of Judge Betty Adams Green as an advisory member of the Rules Commission representing juvenile courts. We believe her appointment and the participation of other members of the juvenile court judiciary had a positive impact on the development of the proposed amendments.

The Council discussed the original proposal regarding discovery in juvenile courts that was submitted by the Knoxville Bar Association to the Rules Commission several times during the past two years. During each discussion, there was strong sentiment that the current Rules of Juvenile Procedure work well in the environment of juvenile court in which most litigation is brought by *pro se* litigants. In fact, the Council was somewhat perplexed in the effort to address what appeared to be a local issue by amending the court rules applicable to all juvenile courts. Nonetheless, members of the Council worked diligently to participate in the amendatory process as it moved forward.

The members of the Executive Committee who reviewed the Supreme Court's proposed amendments believe the amendments as proposed represent a fair compromise to the disparate interests expressed during the Rules Commission amendatory process – with one exception. As drafted, the amendment to TRJP 1 has the potential for disservice particularly in child custody cases in juvenile courts involving *pro se* parties. This is especially true if only one party is represented. Therefore, we suggest the addition of the following sentence immediately prior to the last sentence of the proposed amendment to Rule 1: *The Rules of Civil Procedure may be suspended by the court in a given case if the interests of justice so require.*

If we can provide any further information, please feel free to contact Rebecca Montgomery, AOC Assistant Director/Legal Council who provides advice and counsel the Council.

Sincerely,

James F. Watson

James F. Watson
President

Cc: Executive Committee
Rebecca S. Montgomery, AOC Assistant Director