

IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE

**FILED**

January 30, 1998

Cecil W. Crowson  
Appellate Court Clerk

IN RE: AMENDMENTS TO TENNESSEE )

RULES OF CIVIL PROCEDURE ) No. \_\_\_\_\_

)

ORDER

The Court adopts the attached amendments effective July 1, 1998, subject to approval by resolutions of the General Assembly.

Enter this the 30th day of January, 1998.

FOR THE COURT:

\_\_\_\_\_  
E. Riley Anderson, Chief Justice

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 3

COMMENCEMENT OF ACTION

[Change the third sentence to read as follows:]

If process remains unissued for 30 days or is not served within 30 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.

**Advisory Commission Comment**

The amendment to the third sentence removes the former eventuality of failure to return process within 30 days

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 32

USE OF DEPOSITIONS IN COURT PROCEEDINGS

32.01. Use of Depositions

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(3) [Change subsection (D) to read as follows:]

that the witness is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process

**Advisory Commission Comment**

Under the earlier version of Rule 32.01(3)(D), a deponent who could claim exemption from a trial subpoena under T.C.A. §24-9-101 was considered "unavailable"--even though the deponent was in the courtroom and wanted to testify. The new language comes from Evidence Rule 804(a)(5), requiring both physical absence from trial and inability to subpoena..

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 4

PROCESS

4.03 Summons: Return

[Change the first sentence to read as follows:]

The person serving the summons shall promptly make proof of service to the court and shall identify the person served and shall describe the manner of service.

4.06 Service by Publication Upon Defendant Whose Identity or Whereabouts is Unknown or Who is Attempting to Evade Service of Process.

(1) When Appropriate. Service may be effected in the manner prescribed in subpart (2) of this Rule when it appears by the affidavit of a party or a party's attorney that, after diligent inquiry:

- (a) it is affiant's information and belief that the person to be served:
  - (1) has left the county of the defendant's residence to avoid the service of a summons; or
  - (2) conceals himself or herself so that a summons cannot be served upon him or her; or,
- (b) the identity or whereabouts of the defendant remains unknown.

This subpart (1), however, shall not apply to actions against unknown tortfeasors. It can apply in an action claiming an interest in property or arising in contract.

In all cases in which a party seeking service by publication is represented by an attorney, the affidavit shall be signed by the party's attorney.

(2) Service by Publication--Procedure. When authorized by this rule, service of process may be effected by publication of a notice of the summons issued by the clerk and by mailing the summons and a copy of the complaint to that defendant at the defendant's last known address, if any, by any form of mail with delivery restricted to the addressee or the agent of the addressee. The notice shall be published weekly for two consecutive weeks in a newspaper having

general circulation in the county of the defendant's last known address, shall be directed to the defendant whose identity or whereabouts is unknown, shall advise the defendant to appear in the action within thirty days from the date of the last required publication, shall contain the names of the parties, and shall notify the defendant that in case of the defendant's failure to appear and defend, judgment by default may be entered against that defendant. Service is complete upon the last required publication.

(3) Indigent Plaintiff--Alternative Means. In all actions in which the plaintiff has been granted leave to proceed as an indigent without prepayment of costs, when it appears by the affidavit of a party or the party's attorney that, after diligent inquiry, the whereabouts of a defendant remains unknown, or that the defendant is attempting to evade service as described in subpart (1)(b), service shall be in such manner as the court may order and shall be reasonably calculated, in light of all the circumstances, to provide the defendant with actual notice of the pendency of the action.

(4) Default Judgment. No default judgment shall be taken pursuant to the procedure set forth in subpart (2) unless:

(a) The party seeking the judgment or that party's attorney has filed with the court an affidavit affirmatively setting forth with specificity facts to be considered by the court in making its finding under subpart (b), stating that 30 days have elapsed since the last required publication of the notice and, in any case in which an interested person is known to the party seeking judgment or that party's attorney, that 30 days have elapsed since a letter enclosing a copy of the summons and the complaint was sent to the known interested person at that person's last known address by a form of mail restricting delivery to the addressee or the agent of the addressee; and

(b) The Court finds, based upon evidence adduced before the Court, that service of process by publication, accompanied by the mailing described in subpart (a) hereof, provided the best notice reasonably practicable in light of all the circumstances, including (1) the efforts made by plaintiff to determine the defendant's whereabouts and to provide the defendant with personal service, (2) the interests to be adjudicated, and (3) the probable costs and likelihood of success of further means attempted to locate the defendant.

In any case in which a party is seeking to recover from an insurer on the basis that the person against whom judgment by default is to be entered is an uninsured motorist, the insurer against whom the claim is to be made shall be served with notice of the hearing on the request for the default judgment at least 30 days in advance of the hearing on the request for default judgment.

(5) Further Service. The plaintiff may, at any time before judgment, have a summons served on the defendant, if found in this state, although service by publication or other means may have been previously effected against that defendant.

After service pursuant to this subpart (5), the case shall proceed as in other cases of actual service.

### **Advisory Commission Comment**

The amendment to Rule 4.03 removes the former requirement that a return must be made “within the time during which the person served must respond.”

Rule 4.06, captioned “Service by Publication Upon Defendant Whose Identity or Whereabouts if Unknown or Who is Attempting to Evade Service of Process,” is a new subdivision. It is designed to deal with the increasing problem of defendants who purposefully attempt to evade service of process. Other states have similar provisions. See, e.g., Ala. R. Civ. P. 4.3(c) & (d); Ariz. R. Civ. Pro. 4(1)(e) (formerly Ariz. R. Civ. Pro. 4(e)(3)); Ark. R. Civ. P. 4(f) & (j); Ark. Stat. Ann. §16-58-130; Ky. R. Civ. P. 4.05; Md. Rule 2-121; Neb. Rev. St. §25-517.02; N.C. R. Civ. P. 4(j1).

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 41

DISMISSAL OF ACTIONS

Rule 41.02 Involuntary Dismissal: Effect Thereof

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(2) [Add the following language after the first sentence:]

The court shall reserve ruling until all parties alleging fault against any other party have presented their respective proof-in-chief.

**Advisory Commission Comment**

Adding the sentence in Rule 41.02(2) concerning reservation of a ruling was thought necessary in light of Tennessee's adoption of comparative fault.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 4B

SERVICE UPON SECRETARY OF STATE  
AS AGENT FOR SERVICE OF PROCESS

(1) Whenever the law of this state permits service of any process, notice, or demand, upon a defendant outside the territorial limits of this state, the secretary of state may be served as the agent for that defendant. Service shall be made by delivering to the secretary of state the original and one copy of such process, notice, or demand, duly certified by the clerk of the court in which the suit or action is pending or brought, together with the proper fee. A statement that identifies the grounds for which service on the secretary of state is applicable must be included.

**Advisory Commission Comment**

The amendment to the first sentence of the rule is technical.



TENNESSEE RULES OF CIVIL PROCEDURE

RULE 50

MOTION FOR A DIRECTED VERDICT

Rule 50.01 When Made: Effect

[Add the following language after the first sentence:]

The court shall reserve ruling until all parties alleging fault against any other party have presented their respective proof-in-chief.

**Advisory Commission Comment**

Adding the sentence in Rule 50.01 concerning reservation of a ruling was thought necessary in light of Tennessee's adoption of comparative fault.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 55

DEFAULT

Rule 55.01 Entry

[Change only this one sentence, substituting thirty days for five days:]

All parties against whom a default judgment is sought shall be served with a written notice of the application for judgment at least thirty days before the hearing on the application, regardless of whether the party has made an appearance in the action.

**Advisory Commission Comment**

The former five-day rule has been expanded to thirty days. Consequently, the defendant must be served with written notice of the application at least thirty days before the default hearing.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 67

DEPOSIT IN COURT

[Add] 67.04 Post-Judgment Interest

This rule is inapplicable to post-judgment interest.

**Advisory Commission Comment**

The losing defendant cannot avoid the 10% interest rate under T.C.A. §47-14-222 by depositing the verdict amount into the trial court clerk's office.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 8

GENERAL RULES OF PLEADING

8.03 Affirmative Defenses

[Change “assumption of risk” to:] express assumption of risk

Advisory Commission Comment

*Perez v. McConkey*, 872 S.W.2d 897 (Tenn. 1994), transformed implied assumption of risk from an absolute defense to a criterion position within comparative fault analysis. Contractual express assumption remains as a complete defense to liability.