

**IN THE SUPREME COURT OF TENNESSEE**

**1. AT NASHVILLE**

**IN RE: AMENDMENTS TO TENNESSEE RULES OF CIVIL PROCEDURE**

**FILED DECEMBER 10, 2003**

**ORDER**

The Court adopts the attached amendments effective July 1, 2004, subject to approval by resolutions of the General Assembly. The rules amended are as follows:

RULE 4 PROCESS

RULE 5 SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

RULE 5A FACSIMILE FILING OF PAPERS

RULE 6 TIME

RULE 8 GENERAL RULES OF PLEADING

RULE 23 CLASS ACTIONS

RULE 30 DEPOSITIONS UPON ORAL EXAMINATION

RULE 32 USE OF DEPOSITIONS IN COURT PROCEEDINGS

RULE 41 DISMISSAL OF ACTIONS

RULE 43 EVIDENCE

RULE 54 JUDGMENTS AND COSTS

RULE 69 EXECUTION ON JUDGMENTS.

FOR THE COURT:

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FRANK F. DROWOTA, III,

CHIEF JUSTICE

TENNESSEE RULES OF CIVIL PROCEDURE

**RULE 4  
PROCESS**

4.01 Summons; Issuance; By Whom Served; Sanction for Delay.– [adding new subparagraph (3)]

....

(3) If a plaintiff or counsel for plaintiff (including third-party plaintiffs) intentionally causes delay of prompt issuance of a summons or prompt service of a summons, filing of the complaint (or third-party complaint) is ineffective.

....

4.04 Service Upon Defendants Within the State.– [amending the current subparagraph (10) to read

as follows, and adding new subparagraph (11):]

(10) Service by mail of a summons and complaint upon a defendant may be made by the plaintiff, the plaintiff's attorney or by any person authorized by statute. After the complaint is filed, the clerk shall, upon request, furnish the original summons, a certified copy thereof and a copy of the filed complaint to the plaintiff, the plaintiff's attorney or other authorized person for service by mail. Such person shall send, postage prepaid, a certified copy of the summons and a copy of the complaint by registered return receipt or certified return receipt mail to the defendant. If the defendant to be served is an individual or entity covered by subparagraph (2), (3), (4), (5), (6), (7), (8), or (9) of this rule, the return receipt mail shall be addressed to an individual specified in the applicable subparagraph. The original summons shall be used for return of service of process pursuant to Rule 4.03(2). Service by mail shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute. If service by mail is unsuccessful, it may be tried again or other methods authorized by these rules or by statute may be used.

(11) When service of a summons, process, or notice is provided for or permitted by registered or certified mail under the laws of Tennessee and the addressee or the addressee's agent refuses to accept delivery and it is so stated in the return receipt of the United States Postal Service, the written return receipt if returned and filed in the action shall be deemed an actual and valid service of the summons, process, or notice. Service by mail is complete upon mailing. For purposes of this paragraph, the United States Postal Service notation that a properly addressed registered or certified letter is "unclaimed," or other similar notation, is sufficient evidence of the defendant's refusal to accept delivery.

#### **Advisory Commission Comment**

New paragraph 4.01(3) would sanction lawyer misconduct such as that in *Stempa v. Walgreen Company*, 70 S.W.3d 39 (Tenn. Ct. App. 2001), where original counsel for plaintiffs "instructed" the clerk not to issue summonses for almost a year, despite the paragraph 4.01(1) instruction that clerks must issue a summons "forthwith."

Rule 4.04(10) is amended to clarify that service by certified or registered return receipt mail must be addressed to an individual specified in the applicable subparagraph of the rule. For example, service by mail upon a domestic corporation must be addressed to one of the individuals specified in Rule 4.04(4).

New Rule 4.04(11) conforms service on Tennessee defendants by "unclaimed" mail to Rule 4.05(5) concerning service on nonresidents.

### TENNESSEE RULES OF CIVIL PROCEDURE

#### RULE 5

#### SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

5.02 Service—How Made.— [Add at the end of present language:]

Items which may be filed by facsimile transmission pursuant to Rule 5A may be served by facsimile

transmission.

### **Advisory Commission Comment**

An additional method of service of pleadings and other papers, by facsimile transmission, is limited by the conditions in Rule 5A on filing by facsimile. For example, such service is limited to those documents which may be filed by facsimile transmission. Also, the sender bears the risk of ineffective transmission.

## TENNESSEE RULES OF CIVIL PROCEDURE

### RULE 5A

#### FACSIMILE FILING OF PAPERS

##### 5A.01 Definitions.—

(1) "Facsimile filing" means the facsimile transmission of an original document which is received in the original document's entirety by the trial court clerk and filed by the clerk.

(2) "Facsimile machine" means a device capable of sending a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union in regular resolution. Any facsimile machine used to send documents to a court must send at an initial transmission speed of no less than 4800 baud and be able to generate a transmission record.

(3) "Facsimile transmission" is the transmission of a document by a system that encodes a document into electrical signals, transmits these electrical signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end.

(4) "Sender" is the person or entity sending the facsimile transmission to the court.

(5) "Transmission record" means the document printed by the sending facsimile machine stating the telephone number of the receiving machine, the number of pages sent, the transmission time and date, and an indication of any errors in transmission.

##### 5A.02 Filing procedures.—

(1) The trial court clerk shall accept papers for filing by facsimile transmission as provided in this rule. The trial court clerk shall maintain a dedicated telephone line for the clerk's facsimile machine.

(2) Any document filed by facsimile transmission shall be accompanied by the uniform cover sheet set forth in the comment to this rule stating: the caption of the case; the trial court docket number; the title of the transmitted document; the number of pages of the facsimile transmission (including the cover sheet); the sender's name, address, voice telephone number, and facsimile telephone number; and the date of the facsimile transmission. The cover sheet shall also contain clear and concise instructions as to the filing of the transmitted document.

(3) The filing of the original document shall not be required after facsimile filing. The sender shall

retain the original document in the sender's possession or control during the pendency of the action and shall produce such document upon request by the court or any party to the action. Upon failure to produce such document, the court may strike the document filed by facsimile transmission.

(4) The following documents shall not be filed in the trial court by facsimile transmission:

(a) Any pleading or similar document for which a filing fee and/or litigation tax must be paid (excluding the facsimile service charge), including, without limitation, a complaint commencing a civil action, an appeal from the general sessions court to the circuit court, and an appeal to a trial court from an inferior tribunal, board or officer;

(b) A summons;

(c) A will or codicil to a will; a bond; or any pleading or document requiring an official seal;

(d) A confidential document that the court previously has ordered to be filed under seal;

(e) A notice of appeal.

(5) No facsimile filing shall exceed ten (10) pages in length, including the cover sheet, unless authorized by the court; absent such authorization, a facsimile transmission exceeding ten (10) pages, including the cover sheet, shall not be filed by the clerk. A facsimile filing may not be split into multiple facsimile transmissions to avoid this page limitation. All documents filed by facsimile transmission shall comply with all applicable rules of court, including, without limitation, rules governing the content and form of pleadings and other papers; the signing of pleadings, motions and other papers; and the service of all papers.

(6) The original document sent by facsimile transmission shall be on letter-sized paper (8 ½ by 11 inches). Originals on larger-sized paper may be reduced prior to facsimile transmission if the reduction to 8½ by 11 inch paper renders a legible and complete copy of the original.

(7) The clerk is not required to notify the sender by return facsimile transmission or voice telephone call that the facsimile document has been received by the clerk or that the facsimile document has not been received in its entirety. This provision shall not relieve the clerk of any notice requirements imposed by law or by the court.

#### 5A.03 Effect of facsimile filing.—

(1) A facsimile transmission received by the clerk after 4:30 p.m. but before midnight, clerk's local time, on a day the clerk's office is open for filing shall be deemed filed as of that business day. A facsimile transmission received after midnight but before 8:00 a.m., clerk's local time, on a business day, or a facsimile transmission received by the clerk on a Saturday, Sunday, legal holiday, or other day on which the clerk's office for filing is closed, shall be deemed filed on the preceding business day. Upon receiving a facsimile transmission in its entirety, the clerk shall note the filing date on the facsimile filing in the same manner as with original pleadings or other documents filed by mail or in person. For purposes of this provision, "received by the clerk" means the date and time the facsimile transmission is received by the clerk as indicated by the date and time printed on the facsimile transmission by the clerk's facsimile machine.

(2) A signature reproduced by facsimile transmission shall be treated as an original signature.

(3) The sender bears the risk of using facsimile transmission to convey a document to a court for filing, including, without limitation, malfunction of facsimile equipment, whether the sender's or the clerk's equipment; electrical power outages; incorrectly dialed telephone numbers; or receipt of a busy signal from the clerk's facsimile telephone number. In the event that a facsimile transmission to the clerk is unsuccessful, the sender may file the document by mail or in person; in such cases, the filing date shall be determined as provided in Rules 5.06 and 6, Tenn. R. Civ. P. However, if a facsimile transmission is not received in its entirety by the clerk because of a transmission error, the sender may move acceptance nunc pro tunc by filing a written motion with the court. The motion shall be accompanied by the sender's transmission record, the original document that was the subject of the attempted transmission, and an affidavit of the sender detailing the facts concerning the attempted transmission. The court, in its discretion, may order filing of the original document nunc pro tunc.

#### 5A.04 Facsimile service charge.—

The sender of the facsimile transmission shall pay to the trial court clerk a service charge for each facsimile filing in the amount of five dollars (\$5.00) plus one dollar (\$1.00) per page of the facsimile filing (including the cover sheet). Payment of the service charge, accompanied by a copy of the facsimile filing cover sheet, shall be received by the trial court clerk not later than ten (10) calendar days after the facsimile filing. The facsimile service charge shall be paid by the sender as provided in this rule and shall not be taxed as court costs, subject to the following exception. If the sender is either a party who has been allowed to proceed on a pauper's oath or an attorney for such a party, timely payment of the facsimile service charge under this rule is suspended, and the charges shall be taxed as court costs.

#### **Advisory Commission Comment**

Rule 5A is adopted to provide for the filing of papers in the trial court by facsimile transmission. Rule 5A.02(4), however, expressly provides that certain documents (listed in that subparagraph) may *not* be filed via facsimile transmission. In addition, the Commission points out that Rule 5A does not authorize the *service* of documents by facsimile transmission. *See* Rule 5A.02(5) (requiring, in pertinent part, compliance with all applicable rules of court governing service of papers). Please refer to Rule 5, Tenn. R. Civ. P., for the provisions in these Rules governing the service of pleadings and other papers after the filing of the original complaint; amended Rule 5.02 permits service by fax if filing by fax is permitted.

Rule 5A.02(1) requires the trial court clerk to maintain a dedicated telephone line for the clerk's facsimile machine. In those jurisdictions in which it is not feasible for each clerk to maintain a dedicated telephone line for facsimile filing, it is the Commission's intent that the respective clerks may jointly maintain a dedicated telephone line for the use of the various clerks. For example, the Circuit Court Clerk and the Clerk & Master in such a jurisdiction may share a dedicated telephone line for facsimile filings in their respective courts.

Image Not Available

**TENNESSEE COURTS**  
**UNIFORM FACSIMILE FILING COVER SHEET**

TO (COURT CLERK): \_\_\_\_\_

WITH (COURT): \_\_\_\_\_

CLERK'S FAX NUMBER: \_\_\_\_\_

CASE NAME: \_\_\_\_\_

DOCKET NUMBER: \_\_\_\_\_

TITLE OF DOCUMENT: \_\_\_\_\_

FROM (SENDER): \_\_\_\_\_

SENDER'S ADDRESS: \_\_\_\_\_

\_\_\_\_\_

SENDER'S VOICE TELEPHONE NUMBER: \_\_\_\_\_

SENDER'S FAX TELEPHONE NUMBER: \_\_\_\_\_

DATE: \_\_\_\_\_ TOTAL PAGES, INCLUDING COVER PAGE: \_\_\_\_\_

FILING INSTRUCTIONS/COMMENTS (attach additional sheet if necessary):

Unless authorized by the Court, a facsimile transmission exceeding ten (10) pages,  
including the cover page, shall not be filed by the clerk.

**TENNESSEE RULES OF CIVIL PROCEDURE**

**RULE 6**  
**TIME**

6.01. Computation.—

[Change the second sentence to read:]

The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the court clerk inaccessible, in which event the period runs until

the end of the next day which is not one of the aforementioned days.

**Advisory Commission Comment**

The second sentence of Rule 6.01 is altered to adopt federal language covering snow days and the like which make a clerk's office "inaccessible" for filing. Earlier language required that the office be "closed."

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 8

GENERAL RULES OF PLEADING

8.04 Effect of Failure to Deny.--

....

(4) [Delete words "nonresidents and."]

**Advisory Commission Comment**

Because of the prevalence of long arm statutes providing personal jurisdiction over nonresidents, the amendment deletes the requirement of a prima facie case when the nonresident defendant fails to deny an allegation in the complaint.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 23

CLASS ACTIONS

23.03 Determination by Order Whether Class Action to Be Maintained—Notice, Judgment—Actions Conducted.—

[replace the current first sentence of subparagraph (1) with the following new first sentence:]

(1) As soon as practicable after the commencement of an action brought as a class action, but never in a hearing without all representative plaintiffs and all defendants having been given an opportunity to be present, the court shall determine by order whether the action is to be so maintained.

**Advisory Commission Comment**

The amendment to Rule 23.03(1) abolishes ex parte class action certifications.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 30

DEPOSITIONS UPON ORAL EXAMINATION

30.06 Disposition

[Add a second paragraph to the present language:]

If a party files a deposition for any purpose, the party filing the deposition shall give notice thereof to all other parties at the time of filing.

**Advisory Commission Comment**

The new second paragraph of Rule 30.06 will require that parties give notice whenever they file a deposition.

TENNESSEE RULES OF CIVIL PROCEDURE  
RULE 32  
USE OF DEPOSITIONS IN COURT PROCEEDINGS

32.01 Use of Depositions.— [replace the current subparagraph (4) with the following new subparagraph (4):]

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the introduction at that time of any other part which ought in fairness to be considered contemporaneously with it.

**Advisory Commission Comment**

Rule 32.01(4) is conformed to the rule of completeness in Evidence Rule 106.

TENNESSEE RULES OF CIVIL PROCEDURE  
RULE 41  
DISMISSAL OF ACTIONS

41.01 Voluntary Dismissal—Effect Thereof.— [add new subparagraph (3)]

....

(3) A voluntary nonsuit to dismiss an action without prejudice must be followed by an order of voluntary dismissal signed by the court and entered by the clerk. The date of entry of the order will govern the running of pertinent time periods.

**Advisory Commission Comment**

New paragraph 41.01(3) mandates a court order after nonsuit. The order entry date would start the saving year running under Tenn. Code Ann. § 28-1-105. In rare cases, the date would trigger times for filing post-trial motions or a notice of appeal. See *Green v. Moore*, 101 S.W.3d 415 (Tenn. 2003).

TENNESSEE RULES OF CIVIL PROCEDURE  
RULE 43  
EVIDENCE

[add new Rule 43.04]



43.04. Matters Considered by Court.—When parties supporting or opposing motions before the court present materials not previously filed with the court, such materials shall be submitted as follows:

(1) All or part of any deposition taken pursuant to Rules 30 or 31 shall be accompanied by an original or photocopy of the certification of the officer taking the deposition.

(2) All or part of any interrogatory answers or objections thereto obtained pursuant to Rule 33 and all or part of any response or objection to a Rule 36 request for admission shall be accompanied by the original signature of the responding party or attorney, or a photocopy thereof.

(3) Any document obtained pursuant to a Rule 34 request for production of documents shall be accompanied by a copy of the request for production and either a copy of the response thereto or a certificate of authenticity from the party or attorney presenting the document to the court.

The submitting party shall also include the title page of the foregoing documents showing the complete caption for the action as required by Rule 10.01. The submission shall include all relevant definitions provided in the original document.

In ruling on any motion, the court shall consider only those documents and other materials that have been filed with the court as provided herein or that have been presented to the court in accordance with Rules 43.01 or 43.02, or matters that have been stipulated by the parties.

#### **Advisory Commission Comment**

New Rule 43.04 limits a trial court's consideration on motion rulings, particularly motion for summary judgment rulings, to certain designated materials. The amendment complements existing Rule 56.04.

### TENNESSEE RULES OF CIVIL PROCEDURE

#### RULE 54

#### JUDGMENTS AND COSTS

54.04(2) Costs. – [replace the current second sentence of subparagraph (2) with the following revised second sentence:]

Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs.

#### **Advisory Commission Comment**

Some experts, including medical doctors, are furnishing reports stipulated by adversaries to be accurate and truthful, thereby avoiding the necessity of a deposition. The amendment to Rule 54.04(2) would allow recovery of related expenses as discretionary costs.

### TENNESSEE RULES OF CIVIL PROCEDURE

#### RULE 69

## EXECUTION ON JUDGMENTS

[replace the current Rule 69 with the following new Rule 69:]

69.01 Scope.—This rule applies to executions and garnishments on legal and equitable interests in personalty, including intangibles, and realty to satisfy judgments in all courts in Tennessee. A Circuit Court judgment will reach equitable interests without a Chancery Court action to enforce the judgment.

69.02 Sequence.—Execution against personalty need not precede execution against realty.

69.03 Discovery.—Discovery in aid of execution may be taken pursuant to Rules 26-37, excluding Rule 35.

69.04 Extension of Time.—Within ten years from entry of a judgment, the judgment creditor whose judgment remains unsatisfied may move the court for an order requiring the judgment debtor to show cause why the judgment should not be extended for an additional ten years. A copy of the order shall be mailed by the judgment creditor to the last known address of the judgment debtor. If sufficient cause is not shown within thirty days of mailing, another order shall be entered extending the judgment for an additional ten years. The same procedure can be repeated within any additional ten-year period until the judgment is satisfied.

69.05 Garnishment.—

(1) Garnishee's Duty Generally.—A writ of garnishment served on a garnishee holding property of the judgment debtor requires the garnishee to answer the writ and make an accounting to the court. Property includes a judgment debtor's realty, personalty, money, wages, corporate stock, choses in action (whether due or not), and court judgments.

(2) Service of Writ of Garnishment.—The sheriff shall serve the garnishee with three copies of the writ of garnishment and one copy of the notice to judgment debtor.

(3) Garnishee's Duty Upon Service.—The garnishee by the next business day after service shall ascertain whether the garnishee holds property of the debtor. If so, the garnishee shall mail one copy of the writ of garnishment with the notice to the last known address of the judgment debtor. Where the garnishee is a financial institution, the balance in the judgment debtor's accounts on the night of the service date is the amount subject to that garnishment writ.

Within ten days of service, the garnishee shall file a written answer with the court accounting for any property of the judgment debtor held by the garnishee.

Within thirty days of service, the garnishee shall file with the court any money or wages (minus statutory exemptions) otherwise payable to the judgment debtor. If the garnishee holds property other than money or wages, a judgment may be entered for that property and a writ of execution may issue against the garnishee.

(4) Failure of Garnishee to Respond.—If the garnishee fails to timely answer or pay money into court, a conditional judgment may be entered against the garnishee and an order served requiring the garnishee to show cause why the judgment should not be made final. If the garnishee does not show

sufficient cause within ten days of service of the order, the conditional judgment shall be made final and a writ of execution may issue against the garnishee for the entire judgment owed to the judgment creditor, plus costs.

#### 69.06 Execution on Personalty.—

(1) Levy.—A levy is effective when the sheriff with a writ of execution exercises control over the judgment debtor's personalty.

(2) Lien of Levy.—A lien of levy in the judgment creditor's favor is effective when the sheriff levies on the judgment debtor's personalty. The first judgment creditor to deliver a writ of execution to the sheriff, as shown by record in the clerk's office, has priority over other judgment creditors as to the property levied upon. A lien of levy remains effective until the property is sold or otherwise released from the sheriff's control.

(3) Sale.—The sheriff shall sell personalty by auction. At least ten days before the sale a notice generally describing the personalty and stating the time, place, and terms shall be published in a newspaper of general circulation at the judgment creditor's expense, taxable as court costs. If the personalty is perishable no notice of sale is required.

Proceeds of the sale shall be applied first to the sheriff's statutory fees and reasonable expenses, then to court costs, then to the judgment creditor, and then any remaining balance to the judgment debtor.

#### 69.07 Execution on Realty.—

(1) Lien Lis Pendens.—A lien lis pendens applies only to realty that is the subject matter of a lawsuit and described in the complaint. To affect the rights of bona fide purchasers and encumbrancers, an abstract must be registered in the register's office of the county where the realty is located. The abstract must identify the court and contain names of parties to the action and a description of the realty and its ownership.

(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 lien.

(3) Levy.—As long as a judgment lien is effective, no levy is necessary; the judgment creditor may move for an order of sale. Otherwise a levy occurs when the sheriff exercises control over the judgment debtor's realty. The first judgment creditor to deliver a writ of execution to the sheriff, as shown by record in the clerk's office, has priority over other judgment creditors as to the realty levied upon.

(4) Sale.—The sheriff shall sell the debtor's interest in realty by auction. At least thirty days before the sale a notice generally describing the realty (including a street address if available) and stating the time, place, and terms shall be published in a newspaper of general circulation at the judgment creditor's expense, taxable as court costs. Publication shall be repeated two times, with each of the

three publications being separated by at least one week. At least twenty days before the sale, the judgment creditor shall mail a copy of the published notice to the judgment debtor and to all persons having an interest of record in the realty.

Proceeds of the sale shall be applied first to the sheriff's statutory fees and reasonable expenses, then to court costs, then to the judgment creditor, and then any remaining balance to the judgment debtor.

Bona fide purchasers for value at the sale shall take free of any defects concerning notice. The sale extinguishes all junior or subordinate liens.

(5) Termination Statement.—Upon satisfaction of the judgment, the judgment debtor may demand that the judgment creditor record in the register's office a termination statement to supersede any lien *lis pendens* or judgment lien of record. If the judgment creditor fails to register a termination statement within ten days after demand, the judgment creditor shall be liable to the judgment debtor for \$100 and for any loss caused to the judgment debtor by failure to register.

#### **Advisory Commission Comment**

The intent is to consolidate procedures established by statute, court precedent, and custom into a single orderly rule. New Rule 69 would not radically change current law.