

Tennessee Judicial Nominating Commission
Application for Nomination to Judicial Office

Rev. 26 November 2012

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INTRODUCTION

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website <http://www.tncourts.gov>). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) **and** electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit fourteen (14) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to debra.hayes@tncourts.gov.

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I am self-employed as a solo practitioner at The Faulk Law Office, 112 East Main Blvd., Church Hill, TN 37642, practicing in Church Hill just over 30 years now. Finally, I also manage a commercial real estate development.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

1980

BPR No. 007078

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee

BPR No. 007078

April 26, 1980

Active

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

The Faulk Law Office

1982-present

My current practice focuses on alcohol-related injury law – both prosecuting and preventing dram shop cases. I handle injury cases of all types, probate estates, prepare advance directive packages, and prepare documents such as deeds, leases and contracts.

Hawkins County Land Company LLC – Manager **2001 - present**
I manage a limited liability company that leases commercial real estate.

Campaign manager, Committee to Elect a Bi-partisan Supreme Court 1982
In 1982 I served the three Republican nominees for the State Supreme Court, Tom Hull, Tom Avery, and John Waters as their statewide campaign manager.

Weintraub DeHart **1979-1982**
Memphis, TN

Associate attorney; law clerk. Practiced labor-management relations law on behalf of employers including but not limited to NLRB litigation, Fair Labor Standards Act litigation, labor contract dispute arbitration; and labor contract negotiations throughout the eastern United States.

Admitted: United States Supreme Court
Sixth Circuit Court of Appeals
All U. S. District Courts of Tennessee

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Bodily Injury & property damage – 50%

Trust & Estates/Probate/Will – 35%

Workers Compensation – 15%

See also answer to No. 5 above and No. 8 below.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters,

regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

After one year of law school full-time, I changed over to the law school night program so I could work as Chancellor Robert Hoffmann's courtroom clerk in Shelby County. I was in court to administer oaths, mark exhibits and assist the Chancellor almost every day of court for two years. As a Deputy Clerk & Master, I watched daily the myriad of cases tried in Chancery Court including injunction proceedings in labor disputes. High profile labor disputes including the municipal strikes that darkened Memphis in the late 1970s were heard by Chancellor Hoffmann. I found these cases most intriguing. That interest was, in part, one of the reasons I received MSU School of Law's Kirby Bowling Labor Law Award.

Leaving the Clerk & Master's office in my last semester of law school, I went to work as a fulltime law clerk and then associate attorney with Weintraub & DeHart, a management labor law firm in Memphis. In two years at that firm I tried arbitrations, unfair labor practice charges before the National Labor Relations Board, Fair Labor Standards Act cases in federal courts, and injunction proceedings in both Chancery Courts around Tennessee and in federal courts. I represented employers in union election campaigns before the National Labor Relations Board. I also negotiated collective bargaining agreements on behalf of employers. I argued in the 6th Circuit Court of Appeals during this employment.

My wife and I started our family in 1980. All the travel with Weintraub & DeHart did not fit with our desires in rearing a family so I returned to my native Hawkins County to start a general practice in September, 1982, taking practically any case that came through the door.

I handled delinquency, dependent/neglect, custody, child support, paternity and practically any conceivable case within the jurisdiction of Juvenile Court primarily in Hawkins and Sullivan County. By 1986, I was asked by Hawkins County Juvenile Court Judge G. Reese Gibson to serve as his Juvenile Court Referee. Over the next three years I heard dozens of juvenile court cases as Referee in Hawkins County and was called upon by other Juvenile Judges to sit as Referee pro tem.

My General Sessions Court practice started in the days before the present-day statewide Public Defender system was established. In Hawkins County, the dozen attorneys who handled criminal cases each had his "day-in-the-barrel" providing a defense to all defendants determined indigent by the Judge. Every twelve weeks, I would represent between ten and thirty defendants on misdemeanor criminal charges and would represent another three to five defendants in preliminary hearings. I tried hundreds of these cases over a four-year period. The Criminal Court Judge normally appointed the attorney who had handled the preliminary hearing to defend those bound over to the Grand Jury. In this same time period, I tried criminal court cases before juries

dozens of times. I tried everything from destruction of public property to murder cases. I was also appointed to defend indigents a few times in federal court criminal matters. Most of my appellate court practice dealt with appeal of criminal convictions.

My General Sessions Court civil experience runs the gamut of cases within its jurisdiction. I've tried collections, forcible ejection & detainer, negligence, breach of contract, possessory hearing, garnishment, writ of detinue, attachment & replevy, trespass and defamation cases. The number of these cases I've tried would be in the hundreds.

In the Circuit and Chancery Courts I have tried most all types of cases in counties across the State. I have had jury trials in Carroll, Davidson, Putnam, Greene, Hancock, Hawkins, Hamblen, Sullivan and Washington Counties. The number of jury cases I've tried, mostly tort cases, is in the dozens. My jury trials include wrongful discharge, product liability and consumer fraud cases.

I did domestic relations work in these courts in multiple counties including divorce, custody, child support, paternity, name change, orders of protection and adoption. These cases number in the dozens. I have tried trespass, nuisance and boundary line disputes. The number of workers compensation cases I have handled is in the dozens.

I have continued an active probate practice over the years handling approximately 300 estates and all the different proceedings that accompanying them. I have tried will contests, declaratory judgments to interpret wills, contested appointment of personal representative, contested claims against estates and contested conservatorships. The number of Last Will & Testaments, Powers of Attorney, Advance Care Plans, Appointments of Health Care Agents and so forth I have prepared is in the hundreds.

My trial practice also included U. S. District Courts including a Labor Management Relations Act case and tort cases with diversity of citizenship. I practiced in the early 1990s in the U. S. Bankruptcy Court handling both consumer and creditor cases. In the last few years I have appeared in Bankruptcy Court to try contested matters incidental to bankruptcy proceedings. The number of bankruptcy cases I handled is in the dozens.

Throughout my 30 plus years of practice in Church Hill, I have done some transactional work. I still do deeds, leases, and contracts. I conducted a few real estate closings in my early years. After the demise of the Butcher banks in 1982 I was hired by the Federal Deposit Insurance Corporation to do title searches and collections work over several northeast Tennessee counties.

In the late 1980s, I served on the Tennessee Human Rights Commission which heard some appeals.

Beginning in 1988 I developed a municipal practice and served as city attorney for two towns. In the process of representing the two, I tried an annexation case and a few condemnation cases. I tried writs of certiorari, mandamus and declaratory judgment cases. I made appearances before administrative agencies such as the Wastewater Financing Board. Transactional work was aplenty when the Town of Mt. Carmel installed a sewer system requiring hundreds of easements and the title work needed to obtain them. For a period of months, I also served as interim City Judge for the Town of Mt. Carmel.

Other administrative agencies before which I have appeared include the Department of Employment Security Board of Review, Department of Labor & Workforce Development

Benefit Review Conference, Board of Pardons & Paroles, Board of Law Examiners, U. S. Department of Justice Drug Enforcement Administration, Medicare Administration and Pre-Hospital Care Regulatory Board.

In 1996 I was hired on my first dram shop case. Since that time a large portion of my practice has involved prosecuting dram shop cases and helping businesses with an alcoholic beverage service avoid over-serving customers or serving underage customers.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

Tennessee Supreme Court Case of first impression – Curde v. Tri-Cities Bank, 826 S. W. 2d 911 (Tenn. 1992) regarding applicability of Electronic Funds Transfer Act, 15 U. S. C. §1693 *et seq.*

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

I was certified as a Rule 31 mediator in 2011 but have not yet served as a mediator.

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

In the early years of my practice in Hawkins County, I was appointed guardian ad litem in a few conservatorship cases and juvenile court cases.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

Not applicable.

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

I applied for the vacancy on The Eastern Section of the Tennessee Court of Appeals, was interviewed by the Judicial Nominating Commission on November 16, 2012, and was submitted as one of the three nominees to Governor Haslam. I applied for the vacancy for Circuit Court, Third Judicial District on March 8th, 2013, was interviewed by the Judicial Nominating Committee on April 11th, 2013, and was submitted as one of three nominees to Governor Haslam. No decision has been announced on the Circuit Court vacancy.

EDUCATION

14. List each college, law school, and other graduate school which you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant. and your reason for leaving each school if no degree was awarded.

J. D.	Memphis State University	1976-1979
Recipient: Kirby Bowling Labor Law Award as outstanding labor law student for 1979		
M. Public Administration	Memphis State University	1975 - 1978
B.S. Business Administration	University of Tennessee at Martin	1971 - 1975
Major: Economics	Minor: Communications	Student Body President 1974-1975
Who's Who in American Colleges & Universities		

PERSONAL INFORMATION

15. State your age and date of birth.

59. Date of Birth: September 10, 1953.

16. How long have you lived continuously in the State of Tennessee?

All my life; 59 years.

17. How long have you lived continuously in the county where you are now living?

30 years 10 months.

18. State the county in which you are registered to vote.

Hawkins County.

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not applicable.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

Not applicable. In 33 years, only four (4) complaints have ever been filed. All were dismissed with no disciplinary action taken.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

Yes. Divorce. Final Decree entered October 25, 2005. Third Judicial District, Hancock County No. C-3120, Final Decree in uncontested irreconcilable differences entered.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

Oak Grove Baptist Church
Holston Valley Sportsman's Club
Kingsport Chamber of Commerce
Hawkins County Chamber of Commerce
East Hawkins County Chamber of Commerce
Jefferson County Chamber of Commerce
Grainger County Chamber of Commerce
National Rifle Association
Hawkins County Republican Party, 1st Vice-Chairman

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- If so, list such organizations and describe the basis of the membership limitation.
 - If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

Kingsport Bar Association – 2002 – present
Hawkins County Bar Association – 1982 – present (former Chairman)
Tennessee Bar Association – 2002 – present
Tennessee Association for Justice – 2002 – present.
Supreme Court Ad Hoc Study Committee on Indigent Defense 2010 – 2012 (Chairman)

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional accomplishments.

Martindale-Hubbell – Rating of “AV” 22 consecutive years
Certified Civil Trial Specialist 1997 – 2012
Super Lawyers of the Mid-South 2007 – present
2012 National Award winner: POPULAR Restore Integrity Award
(www.prweb.com/releases/2012/blprweb9645964.htm)
Who’s Who in American Law 1987-1988
America’s Leading Lawyers 1993
Outstanding Lawyers of America 2002 & 2003

30. List the citations of any legal articles or books you have published.

Published articles:

Faulk, M., 2007, May, “One Too Many”, *Tennessee Bar Journal*, Vol. 43, No. 5, ppg. 12- 15.

Faulk, M., 2006, Spring, “Dangerous Intersections: Parallel Civil & Criminal Prosecutions”, *The Tennessee Trial Lawyer*, ppg. 30, 48.

Faulk, M., 2005-2006, Winter, “Dram Shop Cases”. *The Tennessee Trial Lawyer*, p. 22-23.

I also author a weblog (blog) known as “Tennessee Dramshop Law” (www.dramshop.blogspot.com) .

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

“One Too Many: Dram Shop Cases” – 1 hour CLE presentation – available on-line through TennBarU CLE Center and also presented to local bar associations and to the agents of the Tennessee Alcohol Beverage Commission.

I also taught “Legal Environment for Business”, an undergraduate course, as an adjunct professor for East Tennessee State University.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

State Senator 2008 – 2012 (elected 2008)

County Commissioner 1998 – 2002 (elected 1998)

Tennessee Human Rights Commissioner 1985 – 1991 (vice-Chairman 1989 – 1991)

Town Attorney, Town of Mt. Carmel, Tennessee 1988 – 2001 (appointed)

City Attorney, City of Church Hill, Tennessee 1992 – 2000 (appointed)

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

See attached. Both examples are exclusively my own personal effort.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? *(150 words or less)*

Service to people has taken many forms in my career. In my 32 years of practice I have been a litigator at every level of trial practice. The breadth of my trial practice is comprehensive.

I have been called on many times to sit as a trial judge. My Masters Degree in public administration has served me well as a municipal attorney and in the State Senate. My service on the State & Local Government Committee and the Judiciary Committee helped mold me into the

lawyer I am today.

I feel the body of work I've done over my whole adult life has pointed me toward service as a Judge.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. *(150 words or less)*

My service as a former member of the Board of Directors for Legal Services of Upper East Tennessee, Inc. is a prime indicator of my commitment to pro bono service. Not only did I accept Legal Services referrals on a low-fee basis, I also accepted Legal Service referrals occasionally charging no fee. In addition to those referrals, my practice has included dozens and hundreds of cases where I wrote off, waived or reduced fees to help those who literally could not afford legal services. I've been blessed beyond description by those folks whom I helped in this way. They have been the source of numerous referrals. They've shown their gratitude with cakes and pies, quilts, paintings, and many, many other expressions.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*

The Court of Criminal Appeals – Eastern Section hears a diversity of criminal cases falling within its jurisdiction. The District includes the counties in the Eastern Section of the State. My selection as Judge would allow the Court to continue without interruption in that I've handled hundreds of criminal cases and appeals in this court.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

“Get a Hit: Stay Fit” is a childhood obesity initiative I founded in 2007. It is designed to encourage exercise amongst elementary school children by incentivizing participation in organized summer sports programs. I'd certainly like to continue its promotion.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. *(250 words or less)*

My father didn't finish the 8th grade. My mother was the first of her family to ever finish high school. I am the first of my family to finish college. The Scots-Irish blood that flows through my veins and all they taught me make me what I am today. As an 8th generation Hawkins Countian,

growing up on a farm in eastern Hawkins County, I was taught to work harder because there's always somebody smarter, take personal responsibility because it may really be your fault, know what you believe and why, put back more than you take, dare to stick your neck out, be kind to widows, orphans and dogs, and never forget there is a reason God gave you two ears and only one mouth. They didn't just teach them; both my parents lived these principles.

These principles guide me every day and seem principles worth following as a Judge.

I love to write. In addition to the dramshop law blog I author, I have penned numerous articles for more than a dozen wildlife magazines and web sites. All my published outdoor articles along with anecdotes, photographs, recipes, and more about my love for all things outdoors can be read at Strum Island Journal (www.strumisland.blogspot.com).

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. *(250 words or less)*

As one of the dwindling number of attorneys in the General Assembly who has a trial practice, I felt placing caps on damages in injury cases was overkill and that I should speak up to warn against passing a bad law. I believe the imposition of caps on damages depreciates the value and good work done by jurors. I authored an Op-Ed piece which ran in several of the daily newspapers of the state. (See <http://www.knoxnews.com/news/2011/apr/23/tort-reform-runs-counter-to-conservatism/>).

Now that caps-on-damages is the law, I have no trouble applying the law even though I think capping damages was an unnecessarily burdensome means of tort reform.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. Lt. Governor Ron Ramsey, 3311 Highway 126, Blountville, TN 37617 (423) 323-8700

B. Congressman William Jenkins, 767 McKinney Chapel Road, Rogersville, TN 37857 (423) 272-3878

C. William T. Wray, 102 E. Main Street, Kingsport, TN 37660 (423) 378-0101

D. Heiskell H. Winstead, (retired District Attorney General), [REDACTED], Bulls Gap, TN 37711 [REDACTED]

E. David Darden, [REDACTED] Kingsport, TN 37660 [REDACTED]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Court Criminal Appeals Eastern of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: June 5th, 2013.


Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



TENNESSEE JUDICIAL NOMINATING COMMISSION

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS**

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the state of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Tennessee Judicial Nominating Commission to request and receive any such information and distribute it to the membership of the Judicial Nominating Commission and to the office of the Governor.

Michael A. Faulk
Type or Printed Name

Michael A. Faulk
Signature

June 5th 2013
Date

007078
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

■ New home construction liability ■ Successor liability in Tennessee
■ Corporate veil not pierced in business tort case

Tennessee Bar Journal

MAY 2007



One too many

Sellers, servers must
know 'how much is
too much' to avoid
alcohol-related injuries

Tennessee Bar Journal

MAY 2007

VOL. 43, NO. 5

ARTICLES

- 12 **ONE TOO MANY**
Sellers, servers must know 'how much is too much'
to avoid alcohol-related injuries
By Mike Faulk
- 18 **NEW HOME CONSTRUCTION LIABILITY**
By Jeff Mueller
- 24 **SUCCESSOR LIABILITY IN TENNESSEE**
By George W. Kinney

NEWS & INFORMATION

- 6 Supreme Court increases Client Protection Fund limit
- 6 Panel named to study governor's successor
- 6 UT Legal Clinic to celebrate 60 years
- 6 Youth Court volunteers spend day at Capitol
- 7 St. Mary's of Memphis wins statewide competition
- 7 Court site now searchable
- 8 Actions from the Board of Professional Responsibility

DEPARTMENTS

- 3 **President's Perspective** — Members' efforts help build better citizenry
By Larry Willis
- 5 **Letter/Jest Is for All** — *By Arnie Glick*
- 9 **The Bulletin Board** — News about TBA members
- 29 **Paine on Procedure: Big bucks (back then)**
By Donald F. Paine
- 31 **Day on Torts: Corporate veil not pierced in business tort case**
By John A. Day
- 33 **Book Review** — *Beautiful Cigar Girl* by Daniel Stashower
reviewed by Donald F. Paine
- 34 **But Seriously, Folks! The Lady Vois, Rutgers and Imus:**
A lesson for lawyers
By Bill Habron
- 35 **Classified Advertising**



On the Cover

Advising your clients who serve alcohol — both professionally and in a home environment — requires knowledge of these basics of third-party liability in alcohol-related injuries.

Cover design by
Londry Burtin



One too many

Sellers, servers must know 'how much is too much' to avoid alcohol-related injuries

By Mike Faulk

Thirty-eight percent of all traffic fatalities are alcohol-related.¹ One-half of all boating fatalities have positive blood-alcohol content and alcohol is associated with between 47 percent and 65 percent of all adults drowning.² Up to 40 percent of industrial fatalities and 47 percent of industrial injuries can be linked to alcohol consumption and alcoholism.³

While the statistics are sobering, this is not intended to be a lecture on the evils of alcohol. Two-thirds of the population drink, but 10% of all drinkers (those who drink most heavily) drink half of all alcohol consumed.⁴ This is the group most likely to cause injury to self and others resulting in litigation. This is a review of causes of action recognized and rejected in Tennessee concerning alcohol-related injuries other than those against intoxicated tortfeasors.

A cause of action for negligent sale of alcoholic beverages was recognized by the Tennessee Supreme Court in *Brookins v. The Roundtable Inc.*⁵ But, in 1986, as a harbinger of tort reform to come, the Tennessee General Assembly adopted a statute governing the liability of sellers of alcohol. *Tenn. Code Ann.* §57-10-102⁶ now determines the civil liability of a seller of alcoholic beverages rather than common law concepts of negligence and negligence per se that imposed duties defined under criminal statutes.⁷

The Tennessee General Assembly has declared "consumption" by a tortfeasor of alcoholic beverages is the proximate cause of injuries.⁸ The effect of this declaration, under the principles of comparative fault, provides immunity from both fault and liability for those merely furnishing alcoholic beverages to such alcohol-consuming tortfeasors.⁹

Exceptions to the legislative declaration that consumption, rather than sale, is the proximate cause of injuries caused by intoxicated persons provide a cause of action in two limited circumstances: sales of alcoholic beverages to 1) a person under age 21 or 2) a person already obviously intoxicated.

In the first exception, the seller must know the purchaser is a minor. Sale to one minor who supplies the alcohol to another minor tortfeasor is not covered under the act. The purchasing minor tortfeasor must consume the alcoholic beverage so sold and that consumption must directly cause the personal injury or death.¹⁰

The second exception requires a sale to a person already "obviously intoxicated." While no definition of "obviously intoxicated" has been provided by the legislature and no Tennessee appellate court has provided a precise definition, some direction exists in defining the term for a trier of fact.

"Intoxication" is defined in *Tennessee Pattern Instructions — Civil* as follows:

A person is intoxicated when that person's physical and mental abilities are impaired as a result of drinking an alcoholic beverage. The impairment must be to the extent that the person is unable to act with ordinary or reasonable care, as would a sober person under the same or similar circumstances.¹¹

Under Tennessee law, "intoxication" means "under the influence of an intoxicant." The definition for "under the influence of an intoxicant" in *Tennessee Pattern Instructions — Criminal* is:

The expression "under the influence of an intoxicant" covers not only all well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition which is the result of taking intoxicants or drugs in any form and which deprives one of that clearness of mind and control of oneself which one would otherwise possess. In this situation, it would not be necessary that the person be in such a condition as would make [him] [her] guilty of public drunkenness. The law merely requires that the person be under the influence of an intoxicant or drug. The degree of intoxication must be such that it impairs to any extent the driver's ability to operate a vehicle.¹²

The phrases "obviously intoxicated" and "visibly intoxicated" have been used interchangeably by other courts throughout the country.¹³

(Continued on page 14)

One too many

(Continued from page 13)

In passing the Alcohol Server Responsibility and Training Act of 1995,¹⁴ the legislature gave the Tennessee Alcoholic Beverage Commission authority to promulgate rules to implement that law. Accordingly, the Tennessee ABC determined the primary legislative purpose in passing the Alcohol Server Responsibility and Training Act of 1995 was to prevent intoxication-related deaths, injuries, and other damages through responsible alcohol serving practices and awareness.

The Tennessee Alcoholic Beverage Commission defines “visibly intoxicated” as follows:

An impairment of an individual’s mental or physical faculties as a result of drug and/or alcohol consumption accompanied by a perceptible act, series of acts, or by the appearance of an individual which clearly demonstrates such impairment.¹⁵

No Tennessee appellate court has addressed whether a cause of action exists for inadequate training or a failure to train employees regarding the proper, legal sale of alcoholic beverages. Tennessee criminal statutes proscribe the sale of alcoholic beverages to the visibly intoxicated and those under age.¹⁶

The Alcohol Server Responsibility and Training Act of 1995 requires alcohol merchant employee-servers to have permits to sell alcoholic beverages. To obtain a permit, servers must receive and pass a test on alcohol awareness training. Server training programs must be approved by the Tennessee Alcoholic Beverage Commission. Approved training programs¹⁷ teach recognition of the traditional signs and symptoms of intoxication — the fact issues upon



“No Tennessee appellate court has addressed whether a cause of action exists for inadequate training or a failure to train employees regarding the proper, legal sale of alcoholic beverages.”

which “obvious” or “visible” intoxication depend.

The traditional burden of proof in criminal cases is the most prominent feature in this civil cause of action comprising Tennessee’s dram shop law. Proof of each element of the cause of action “beyond a reasonable doubt” is required including proof of the “obvious” or “visible” intoxication of the purchaser or proof the “seller knew that the purchaser was a minor and sold intoxicating beverages to him or her anyway.”¹⁸

Sellers are shielded from liability in situations where the intoxicated person was not in the seller’s establishment when

the sale of the alcoholic beverages occurred and have no control over who consumes the alcoholic beverage after the product leaves the premises. All relevant circumstances will be considered in answering the question of whether there was a “sale” within the terms and meaning of *Tenn. Code Ann.* §57-10-102. Who paid for the alcoholic beverage is but one of many circumstances to consider in determining whether there was a “sale.”¹⁹ Being reimbursed for purchasing alcoholic beverages for others does not make one a “seller” within the meaning of the act.²⁰

No liability or fault under Tennessee’s dram shop law attaches to a social host²¹ or merchant²² for gratuitously providing alcoholic beverages. In either circumstance, the legislature has declared “... the consumption of any alcoholic beverage or beer rather than the furnishing of any alcoholic beverage or beer is the proximate cause of injuries inflicted upon another by an intoxicated person.”²³

A social host furnishing alcoholic



Faulk

Mike Faulk is an attorney in Church Hill, Tenn., and is a civil trial specialist certified by both the National Board of Trial Advocacy and the Tennessee Commission on Continuing Legal Education and Specialization. Faulk graduated from the Cecil C. Humphreys School of Law at Memphis State University in 1979, when he received the school’s Kirby Bowling Labor Law award as the outstanding labor law student. He has extensive experience in both prosecuting and preventing alcohol-related injury claims. Substantial resources concerning prosecuting, preventing, and defending alcohol-related injury claims may be found at www.faulklaw.com.

beverages is immune from both fault and liability under *Tenn. Code Ann.* §57-10-101.²⁴ However, in limited circumstances such as those found in *Biscan v. Brown*,²⁵ a duty of care to protect underage guests from harm lies separate and apart from furnishing alcohol.²⁶

A social host, who allows a minor to consume alcohol on his premises, even though he did not furnish alcoholic beverages, has an affirmative duty to act because of the "special relationship doctrine."²⁷ Public policy is considered in determining whether a duty exists under the "special purpose doctrine." Such considerations include the legislature's determination that minors are generally prohibited from consuming alcohol,²⁸ the prohibition for persons under the influence of alcohol from driving,²⁹ the care required for minors due to their immaturity and inexperience relative to adults, and the voluntary assumption of supervision, custody and control of a visiting child.

When a host establishes a rule that any minor guest who consumes alcohol in his home is required to spend the night with the intention to prevent minors who had been drinking from leaving the party, the foreseeability of harm to such minors and others is proven by the host's recognition of the need for the rule in the first place and supports a finding of a special relationship.³⁰

A finding of a "special relationship" also requires proof of "means and ability to contro.l"³¹ "An adult host who is 'in charge' of a party held for minors ... certainly has some ability to control the conduct of his guests."³²

Whether or not a person has assumed a duty to act is a question of law. "Because he knowingly permitted and facilitated the consumption of alcohol by minors, an illegal act, Worley had a duty to exercise reasonable care to prevent his guests from harming third persons or from befalling

(Continued on page 16)

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One too many

(Continued from page 15)

harm themselves.”³³ By establishing his “rule” and then failing to enforce his “rule,” Worley assumed a duty of care to all the minor guests attending the party and then breached that duty by failing to ensure intoxicated guests did not leave the party.³⁴

Selling gasoline, not alcohol, to an obviously intoxicated driver and/or assisting an obviously intoxicated driver in pumping gasoline into his vehicle, the Tennessee Supreme Court has held, creates a foreseeable risk to persons on the roadways and grounds a cause of action of negligent entrustment.³⁵

Servers and sellers of alcohol beverages as well as consumers of alcoholic beverages may share responsibility for injuries to innocent third parties in Tennessee. A complicated mix of social responsibility and limitation of liability has evolved through legislation and common law. A careful analysis of facts surrounding the provision and consumption of alcoholic beverages

that precede injury to others in each case is a must in navigating related litigation in Tennessee. ⁴⁷

Notes

1. National Highway Traffic Safety Administration May 27, 1999 press release.

2. United States Department of Transportation, U. S. Coast Guard, Boating Statistics 1994 (Sept. 1995).

3. M. Bernstein & J.J. Mahoney, “Management Perspectives on Alcoholism: The Employer’s Stake in Alcoholism Treatment,” *Occupational Medicine*, vol. 4, no. 2, 1989, pp. 223-232.

4. National Institute on Alcohol Abuse and Alcoholism, Sixth Special Report to U.S. Congress on Alcohol and Health, United States Department of Health and Human Services, 1/87, p. 3.

5. 624 S. W. 2d 547 (Tenn. 1981).

6. “Notwithstanding the provisions of § 57-10-101, no judge or jury may pronounce a judgment awarding damages to or on behalf of any party who has suffered personal

injury or death against any person who has sold any alcoholic beverage or beer, unless such jury of twelve (12) persons has first ascertained beyond a reasonable doubt that the sale by such person of the alcoholic beverage or beer was the proximate cause of the personal injury or death sustained and that such person:

(1) Sold the alcoholic beverage or beer to a person known to be under the age of twenty-one years and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold; or

(2) Sold the alcoholic beverage or beer to an obviously intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold.

7. *Worley v. Weigels*, 919 S. W. 2d 589 (Tenn. 1996), headnote 5.

8. *Tenn. Code Ann.* §57-10-101 (1986).

9. *Biscan v. Brown*, 160 S. W. 3d 462 (Tenn. 2005)

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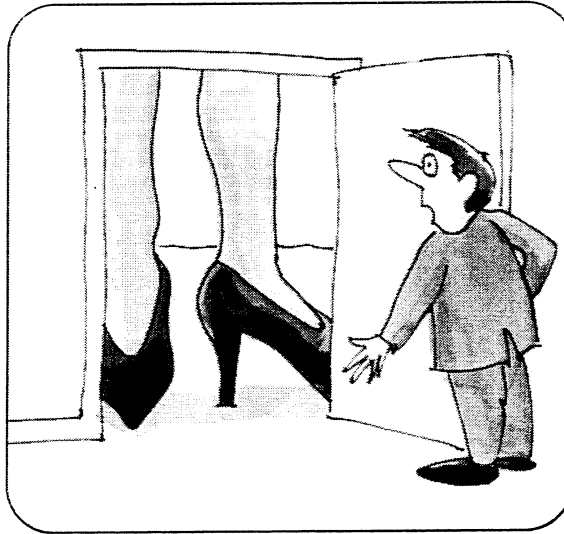
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10. *Worley*, supra.
11. Tenn. Pattern Instructions: Civ. § 4.10 (2005).
12. Tenn. Pattern Instructions: Crim. § 38.01 (2005).
13. 45 *Am. Jur.* 2d "Intoxicating Liquors".
14. *Tenn. Code Ann.* § 57-3-701 et seq. (Acts 1995).
15. *Tenn. Comp.R. & Regs.* Ch. 0100-8-02. DEFINITIONS.(9).
16. *Tenn. Code Ann.* §§57-3-406(d), 57-3-412(a)(1), 57-4-203(b), and 57-3-103(a), (c).
17. TIPS (Training for Intervention Procedures), BARCODE, CARE (Controlling Alcohol Risks Effectively), ServSafe, SPIRITS (Sound Procedures in Reaction and Intervention Techniques of Alcohol Service), TASK (Tennessee Alcohol Server Knowledge), and Top Shelf have been approved.
18. *Worley*, supra, headnote 6.
19. *Temlock v. McGinnis*, (2006 WL 2032501, No. E2005-02646-COA-R3-CV, Tenn. App. May 23, 2006) where the Eastern Section elaborated adding: "To hold otherwise

would mean that a business could adopt a policy that in serving any group of more than one individual, only one person in the group is to be allowed to 'pay' for the alcohol ordered and consumed by all the other members in that party even though those other individuals directly ordered the alcohol from the seller's wait staff, had the alcohol delivered by the seller's wait staff directly to them, and they consumed the alcohol on the seller's premises, and, the seller then would have no potential liability under *Tenn. Code Ann.* §57-10-102 except as to the one person who paid. Such a decision would be contrary to the clear intent and purpose of the legislature ..."

20. *Biscan v. Brown*, 160 S. W. 3d 462 (Tenn. 2005).
21. *Biscan*, supra.
22. *LaRue v. 1817 Lake Inc.*, 966 S. W. 2d 423 (Tenn. App. 1997).
23. *Tenn. Code Ann.* § 57-10-101(Acts 1986).
24. *Tenn. Code Ann.* § 57-10-101(Acts 1986).

25. 160 S. W. 3d 462 (Tenn. 2005).
26. *Biscan*, supra.
27. *Biscan*, supra.
28. See e.g. *Tenn. Code Ann.* §57-4-203(b) (2002) making it illegal for minors to purchase alcohol and for any person to sell or furnish a minor with alcohol and *Tenn. Code Ann.* §57-5-301(e)(1)(2002) making it illegal for minors to possess beer "for any purpose."
29. *Tenn. Code Ann.* §§55-10-401 — 416(2002).
30. *Biscan*, supra
31. See *Lett v. Collins Foods Inc.*, 60 S. W. 3d 95, 100 (Tenn. App. 2001) and *Newton v. Tinsley*, 970 S. W. 2d 490, 493 (Tenn. App. 1997).
32. *Biscan*, supra.
33. *Biscan*, supra.
34. *Biscan*, supra.
35. *West v. East Tennessee Pioneer Oil*, 172 S. W. 3d 545 (Tenn. 2005).



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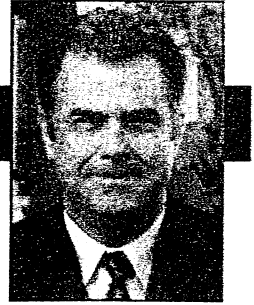
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DANGEROUS INTERSECTIONS

Parallel Civil and Criminal Prosecutions

by Mike Faulk



Representing the injured in a civil action while the tortfeasor is prosecuted by the State for a crime arising out of the same incident presents special dangers for the plaintiff's attorney. Consider this case: your uninsured client was severely injured by an uninsured drunk driver who spent the hours prior to the collision imbibing at the local tavern. The drunk driver is charged with vehicular assault.¹

A dram shop case against the local pub appears to be the only avenue available for significant compensation.² While the drunk driver's toxicology supports a claim that the pub served the patron when he was already obviously intoxicated, you have no eye witness who can confirm the sale of alcoholic beverages to the patron who appeared inebriated at the time of sale. With the drunk driver's cooperation, you could prove the dram shop claim.³

Under no circumstances should you agree to serve as a special prosecutor. *Tenn. Code Ann.* § 8-7-401 in part provides: "A victim of crime or the family members of a victim of crime may employ private legal counsel to act as co-counsel with the district attorney general or the district attorney general's deputies in trying cases, with the extent of participation of such privately employed counsel being at the discretion of the district attorney general." An excellent discussion of the inherent conflicts between the role of government prosecutor and private prosecutor is found in *State v. Eldridge*, 951 S.W. 2d 775, 781 (Tenn. Crim. App. 1997). To serve these dual roles is tantamount to a violation of the criminal defendant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as the Law of the Land provision in *Article I, § 8 of the Tennessee Constitution*.⁴

Most, if not all, criminal prosecutors want the victim's approval of any negoti-

ated plea agreement. Driving while intoxicated is a lesser included offense of vehicular assault and is merely a misdemeanor rather than a felony. A plea to the lesser included offense of driving while intoxicated will surely be considered and likely proposed by defense counsel for the drunk driver.

Can there be a *quid pro quo* for the victim's consent to a negotiated plea agreement? There is inherent advantage for a drunk driver tortfeasor in shifting as much comparative fault to the dram shop as possible especially since a judgment against a drunk driver is non-dischargeable in bankruptcy.⁵ The terms of any such agreement between the drunk driver and the victim will certainly be vetted by the dram shop defense attorney.

Rule of Professional Conduct Rule 4.4(b) provides that a lawyer shall not threaten to present a criminal charge, or to offer or to agree to refrain from filing such a charge, for the purpose of obtaining an advantage in a civil matter. Even after criminal charges have been filed, great care should be exercised by plaintiff's counsel in discussing these matters with the prosecution or the defense.

Surely a requirement that the drunk driver defendant tell the "whole truth" about how much he had to drink, the signs and symptoms of intoxication he exhibited while being served or sold alcoholic beverages, his tendencies and propensities when consuming intoxicants, and like matters should be a reasonable expectation of the victim and his attorney. And his telling the truth as to these matters should further the causes of both justice and public safety. But, just what a victim can and should expect or demand in exchange for the victim's agreement to a reduced sentence for the drunk driver is a gray area within the Rules of Professional Conduct.

If a plea agreement is reached between the State and the drunk driver, it may be central to the successful prose-

cution of the civil case.

Care should be taken by the plaintiff's attorney in the civil case to see that the plea in the criminal case is taken meticulously and properly recorded. In a civil trial, evidence of a felony conviction would be admissible to prove the facts necessary to sustain a judgment.⁶

When the guilty plea is being taken by the criminal court judge, placement of the criminal defendant under oath is a must. A defendant is prohibited from taking a position in future litigation incompatible with a position taken in prior litigation when the prior position was so taken under oath.

"Estoppel by oath" is a form of judicial estoppel within the class of estoppels arising from sworn statements made in the course of judicial proceedings generally in the form of litigation. "The distinctive feature of the Tennessee law of judicial estoppel (or estoppel by oath) is the expressed purpose of the court, on broader grounds of public policy, to uphold the sanctity of an oath. The sworn statement is not merely evidence against the litigant, but (unless explained) precludes him from denying its truth. It is not merely an admission but an absolute bar."⁷

Under the doctrine of "judicial estoppel," where a person states under oath in prior litigation, "either in pleadings or testimony, that a fact is true, she will not be permitted to deny that fact in subsequent litigation."⁸

As followed in a long line of cases in this state, under the doctrine of judicial estoppel, no showing of prejudice is necessary - but in order for the judicial estoppel to apply, the party against whom the estoppel is urged must have made a statement of fact under oath that he or she later seeks to contradict.⁹

CASE SUMMARIES

fended the suit in its name.

Judge Lawrence H. Puckett presided over this Bradley County case. After a day and one-half of testimony the jury returned a verdict of \$450,000. The Court also awarded discretionary costs of \$3,993. When the case returned on defense motion for new trial or remitter, an additional award for post judgment

interest was made to the plaintiff.

Plaintiff's Counsel: James A. H. Bell and William D. Hood, TTLA. The Law Offices of James A. H. Bell, P.C., Knoxville.

Correction: The Verdicts and Settlements section of the Winter 2005-2006 edition carried a summary of Lawrence v. DuPont de Nemours in which the settlement sum of \$3,174,627.43 was incorrectly identified as a jury award.

DANGEROUS INTERSECTIONS ... continued from page 30

Thus it is most important that the judge taking the plea recite the facts (usually found in the affidavit of complaint or the indictment or recited to the court by the prosecutor) to which the criminal defendant is pleading guilty. The defendant's confirmation of those facts and his agreement that those facts constitute the elements of the offense to which he is pleading guilty (especially if the elements of the offense include recklessness) while he is under oath will help insure the proof of those facts in the civil case against both him and the dram shop.

Another key element in securing and keeping the cooperation and truthfulness of the drunk driver may be achieved in bifurcation of the taking of a guilty plea and the sentencing phases of the criminal prosecution. If both the State's attorney and the trial court accepting the plea are willing, a delay in sentencing until after the civil case has been concluded is preferable. But, a

delay in sentencing until the drunk driver has testified under oath in the civil matter may be advisable to insure the defendant testifies consistently and continues to cooperate in both civil and criminal cases.

Taking special care to avoid danger where parallel civil and criminal prosecutions intersect will well serve the interests of justice, your client, yourself. ☐

Tenn. Code Ann. §39-13-106. Vehicular assault; intoxication. (a) A person commits vehicular assault who, as the proximate result of the person's intoxication as set forth in §§5-10-401, recklessly causes serious bodily injury to another person by the operation of a motor vehicle. For the purposes of this section, "intoxication" includes alcohol intoxication as defined by §§5-10-408, drug intoxication, or both.

See Tenn. Code Ann. §40-24-107 for criminal injuries compensation as it relates to driving while intoxicated.

Tenn. Code Ann. §57-10-102. Standard of proof. Notwithstanding the provisions of §57-10-101, no judge or jury may pronounce a judgment awarding damages to or on behalf of any party who has suffered personal injury or death against any person who has

sold any alcoholic beverage or beer, unless such jury of twelve (12) persons has first ascertained beyond a reasonable doubt that the sale by such person of the alcoholic beverage or beer was the proximate cause of the personal injury or death sustained and that such person:

(1) Sold the alcoholic beverage or beer to a person known to be under the age of twenty-one (21) years and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold; or

(2) Sold the alcoholic beverage or beer to an obviously intoxicated person and such person caused the personal injury or death as the direct result of the consumption of the alcoholic beverage or beer so sold.

Eldridge, p.782.

11 U.S.C. §523(a)(9).

Rule, Tennessee Rules of Evidence §803(22)

Tox Corp. of America v. Carr, 52 Tenn. App. 595, 376 S.W.2d 735, 738 (Tenn. App. 1964), citing Sartain v. Dixie Coal & Iron Co., 150 Tenn. 633, 266 S.W.2d 313, 318 (Tenn. 1924).

Cardin v. Campbell, 920 S.W.2d 222, 223-24 (Tenn. App. 1995).

Werne v. Sanderson, 954 S.W.2d 742 (Tenn. App. 1997).

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DRAM SHOP CASES

By Mike Faulk

Your client has been severely injured by a drunk driver who, based on elevated blood alcohol content, pleads guilty to DUI. The drunk driver's liability insurance carrier immediately offers the paltry limit of its minimum coverage policy. You recommend accepting the policy limit without spending any money or time on the case because this approach will give your client the best net results. Rather than suggesting a contingency fee arrangement, you bill the client for the small amount of time you have in the case, feel good about your results, and close your file.

As the pessimist says, "No good deed will go unpunished!" If this scenario applied to you in the past year, you may need to back up or you may have to put your malpractice insurance carrier on notice.

Deposing the drunk driver before setting such a case is a must. At the very least, get a sworn statement from the drunk driver. You may learn, like I did, that the drunk driver had been drinking for several hours at the local tavern where he passed out. But, while maintaining the "party atmosphere" advertised by the bar, the cocktail waitress awoke the drunk driver in waiting to serve him another tequila shooter. His itemized credit card receipt substantiated the 12 shooters he had. The waitress knew him from parties past. She knew he demonstrated all the traditional signs and symptoms of intoxication. But she didn't want to offend him or peeve the boss by cutting him off.

Exceptions to the legislative declaration that consumption, rather than sale, is the proximate cause of injuries caused by intoxicated persons provide a cause of action in two limited circumstances: sales of alcoholic beverages to 1) a person under age twenty-one or 2) a person already obviously intoxicated.

In the first exception, the seller must know the purchaser is a minor. Sale to one minor who supplies the alcohol to another minor tortfeasor is not covered under the act. The purchasing minor tortfeasor must consume the alcoholic beverage so sold and that consumption must directly cause the accident.⁵

The second exception requires a sale to a person already “obviously intoxicated.” Defining the phrase “obviously intoxicated” may directly affect the outcome of a dram shop case. Defendants want to frame these cases so that “obviously intoxicated” means severely drunk with super-elevated blood alcohol concentrations. Plaintiffs will oppose the suggestion that “obviously intoxicated” means “more intoxicated” or “severely intoxicated”. If the State considers a person with a .08 g% blood alcohol concentration “intoxicated”, shouldn’t “obvious” signs and symptoms of that condition meet the requirement of Tenn. Code Anno. §57-10-102?

While no definition of “obviously intoxicated” has been provided by the legislature and no Tennessee appellate court has provided a precise definition, some direction exists in defining the term for a trier of fact. “Intoxication” is defined in Tennessee Pattern Instructions - Civil as follows:

A person is intoxicated when that person’s physical and mental abilities are impaired as a result of drinking an alcoholic beverage. The impairment must be to the extent that the person is unable to act with ordinary or reasonable care, as would a sober person under the same or similar circumstances.⁶

⁵ Worley, supra.

⁶ Tenn. Pattern Instructions: Civ. § 4.10 (2005).

reasonable doubt” is only slightly more complicated than the burden of proof carried by the State in the typical DUI case. The complication concerns proof of the “obvious” or “visible” element.

The Alcohol Server Responsibility and Training Act of 1995 requires alcohol merchant employee-servers to have permits to sell alcoholic beverages. To obtain a permit, servers must receive and pass a test on alcohol awareness training. Server training programs must be approved by Tennessee ABC. Approved training programs¹¹ teach recognition of the traditional signs and symptoms of intoxication. Alcohol servers are subjected to criminal sanctions for improper sales of alcoholic beverages¹². These typical signs and symptoms of intoxication are the cannon fodder for dram shop cases. Tennessee appellate courts have not addressed the relationship between the dram shop law, the server training law, and a cause of action for failure to properly train alcohol servers.

While limited in scope and onerous in application, Tennessee’s dram shop law may provide a means to recovery for those who suffer the misfortune to be injured by a drunk driver who has little or no liability insurance coverage. At the very least, investigation of injuries caused by drunk drivers should include a careful look at potential dram shop liability.

¹¹ TIPS (Training for Intervention Procedures), BARCODE, CARE (Controlling Alcohol Risks Effectively), ServSafe, SPIRITS (Sound Procedures in Reaction and Intervention Techniques of Alcohol Service), TASK (Tennessee Alcohol Server Knowledge), and Top Shelf have been approved.

¹² Tenn. Code Anno. §57-4-203; Tenn. Code Anno. §57-5-301.