Tennessee Judicial Nominating Commission

Application for Nomination to Judicial Office

Rev. 26 November 2012

Name:	Lawrence A. Pivnick		
Office Address: (including county)	University of Memphis Administration Building, Room 154B, Memphis Shelby County, TN 38152		
Office Phone:	901-678-2512	Facsimile:	901-678-4188
Email Address:	lpivnick@memphis.edu		
Home Address: (including county)	[redacted]		
Home Phone:	[redacted]		[redacted]

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.

University of Memphis Faculty Ombudsperson; Post Retirement Contract with University of Memphis; Emeritus Professor of Law.

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

I was licensed to practice law in Tennessee in April 1973. My BPR number is 00008827.

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.

Florida, October 6, 1972. Florida Bar License Number 148597. Active license since 1972.

Tennessee, April 1973. Tennessee B.P.R. Number 00008827. Active since 1973

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).

Never

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).

Associate, Armstrong Allen Braden Goodman McBride and Prewitt, Memphis – July 1972 – August 1974.

During my LL.M studies at NYU from September 1974 to May 1975, I was a substitute teacher in the New York City public schools to help pay education expenses.

Adler, Hackell, and Pivnick, June 1975-August 1976

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.

I maintain an active license to practice law in Tennessee and in Florida, but I am not currently engaged in the "practice of law", beyond law teaching and legal research and writing leading to law publications.

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.

My experience (over my entire time as a licensed attorney) from 1976 to 2013 has been spent primarily in law school teaching (including clinical representation of clients), legal research and analysis, and legal writing.

From 1972 to 1976, I worked in both a large firm and a small firm. My cases included divorces, workers' compensation, probate, personal injury and property damage tort cases (often involving subrogation and uninsured motorist claims), and cases involving juveniles. My cases also involved antitrust, the UCC, and landlord tenant disputes. I also handled a number of city ordinance violations in Municipal Court and misdemeanor cases in General Sessions court, and assisted in defending a second degree murder case.

After I joined the University of Memphis faculty in 1976, I spent 3 summers assisting the Law School's Legal Clinic in supervising third year law students in pro bono cases. From 1990 to 2005, I served as the Law School's Faculty Director of its Legal Clinic, and supervised students in their representation of clients in the General Sessions Civil Litigation, the Elder Law Clinic,

the Juvenile Clinic, and the Domestic Violence Clinic. Up to 80 students per year were trained to represent clients in all of the trial courts of record and in General Sessions, Juvenile, and civil order of protection courts in civil matters including multiple UCC and landlord-tenant cases.

Apart from appearing in court to supervise law students, my primary teaching, research, and writing responsibilities at the University of Memphis Law School included teaching Legal Methods (legal research and writing, including how to write office memorandum, appellate briefs, client letters, and transactional documents).

From 1985 to 2012, I was the Director of the University of Memphis Trial Advocacy Program, a National Institute of Trial Advocacy type simulation program, in which third year law students study rules of procedure, rules of evidence, rules of professional responsibility, and the art and science of advocacy while simulating all of the aspects of a trial from pretrial preparation, pretrial conferences, pre trial motions, all the way through closing arguments and jury instructions. In this program I, along with experienced lawyers and judges, worked in small group simulation sessions with students, after I had lectured and provided demonstrations to the students in all sections.

From 1990 to 2000, I was the Coach of the University of Memphis Mock Trial Teams that won 7 regional titles, and reached the National quarterfinal 4 times, and National semifinals in the National Trial Lawyers Association Mock Trial Competition, ABA Trial Competition, and in the National Tournament of Champions.

My teaching responsibilities included teaching Evidence classes and both a course and seminar focusing on Tennessee Civil Procedure in Tennessee's trail courts and appellate courts. These courses were aided by my continuous research and writing in the field of civil procedure, which always kept me up to date on Tennessee law.

I also was the faculty supervisor advisor to the University of Memphis Law School Extern Program, wherein I coordinated assignment of students and reviewed performance of students externing with state and federal judges, prosecutors, and defenders.

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

In all of the years that I supervised University of Memphis students, I never received a complaint from clients, judges or opposing attorneys about the preparedness, trial execution, or professionalism of my students.

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.

My role as the University of Memphis Faculty Ombudsman from August 2012 to the present (June 2013) has given me many opportunities to informally and impartially mediate disputes and misunderstandings among faculty in cases where no formal complaints or litigation have been initiated. (See Attachment)

I have served as a TUAPA hearing officer in relation to terminations of staff appointments at the University of Memphis..

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.

None.

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

My legal experiences have been covered in my answers to other questions throughout this application.

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.

No previous applications submitted to the Judicial Nominating Commission.

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.

State University of New York at Buffalo, attended 1965-1969. B.A. (cum laude), History major, Education and Economics minors. Phi Beta Kappa.

University of Florida (Gainesville), attended 1970 to 1972, J.D. (cum laude).

New York University, attended September 1974 to May 1975, LL.M. (in Trade Regulations)

PERSONAL INFORMATION

15. State your age and date of birth.

65 years old; born July 27, 1947

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

Resident since May 1972. Attended NYU from September 1974-May 1975; served as visiting professor at the Eotvos Lorand Tudomany Institute Law school (Budapest Hungary) Fall 1988

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

Resident of Shelby County since May 1972 (See Number 16)

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

Shelby County Tennessee

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.

None

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.

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.

Divorce Action in the Chancery Court of Fayette County, TN, styled Louise Levin Pivnick v. Lawrence Allen Pivnick, C.A. 5936, Decree of Absolute Divorce entered February 3, 1981, on no contest and waiver of venue, on property settlement, no children of the marriage.

Automobile Accident Case, Adrian Bean, Gwendolyn Mull, and Sheila Whitlock v. Lawrence Pivnick, Shelby County General Sessions Court Case # 362661, 362654, and 362646. Case filed on September 12, 2006. Voluntary Nonsuit at plaintiffs' cost, July 30, 2007.

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.

University of Memphis Faculty Senate (President and Executive Committee Member); Memphis

Youth Symphony Organization Board of Directors from 1994 to the present, Former President and Treasurer); Memphis Men's Chorus (Board Member); Temple Israel, Memphis; International Ombudsperson Association.

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. **NO**

    a. If so, list such organizations and describe the basis of the membership limitation. NOT APPLICABLE

    b. 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.

Not Applicable

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.

Member, Tennessee Bar Association; Memphis and Shelby County Bar Association; American Bar Association; American Association for Justice; International Ombudsperon Association.

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.

Memphis Area Legal Services Pro Bono Award for 15 years of leadership of the University of Memphis Legal Clinic, Award 2005

University of Memphis Recognition Award for service as President of the University of Memphis Faculty Senate for the 2011-2012 Academic Year.

Awards from the University of Memphis Moot Court Boards for serving for many years as the successful coach of the University of Memphis Mock Trial Teams, including a special award for being the coach of the BALSA Thurgood Marshall Mock Trial teams.

Certificate of Appreciation from the Tennessee Supreme Court for my service to the Supreme Court's Advicory Commission of the Rules of Practice and Procedure from 2004 to 2007.

Selected as University of Memphis Emeritus Professor of Law in 2012

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

See attachment

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.

I have taught the following courses on many occasions within the last 5 years: Tennessee Civil Practice and Procedure; Evidence; Trial Advocacy; Law and Medicine: Medical malpractice law- Substance and Procedure .

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.

I was an unsuccessful candidate for Shelby County Circuit Court, Division 6, in the August 2006 general election.

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

Never.

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.

Pivnick, Circuit Court Practice, Volume 2, Chapter 30. Appeals (Thomson West Pub. Co).

Pivnick, Offering Objectionable Evidence: Does the Adversary's Failure to Object Make the Practice Right?, 46-12 Tennessee Bar Journal 18 (December 2010)

ESSAYS/PERSONAL STATEMENTS

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

With my recent retirement after a 37 year tenure as a full time professor of law at the University of Memphis Law School, I would like to continue contributing my legal knowledge, research, and writing skills to determine, clarify, explain, and apply Tennessee procedural and substantive law. My career at UM in teaching, research, and publications has focused on training students to become learned and ethical "practitioners" of law in office practice, trial litigation, and appellate practice. In addition to teaching Tennessee Civil Procedure, Evidence, and Trial Advocacy course, I have taught Legal Writing, Legal Research, and Legal Methods classes, advanced legal writing seminars, and a Legal Drafting class. I also taught a Legal Writing course in a joint program conducted by both the University of Memphis Law School and the University of Tennessee college of law from 1980 to 1983 to expand diversity in Tennessee's law schools.

My orientation has been that of a "practical skills" professor, rather than a purely theoretical oriented professor. I pledge to provide expeditious, reasoned opinions limited to the issues properly raised by the parties to appeals. I will be dedicated as a judge to provide equal justice and access to the law. I pledge to comply with the Tennessee Code of Judicial Conduct, and to be governed by courtesy and civility towards all persons coming before and working with the Court.

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 creation of the University of Memphis Legal Clinics from 1990 to 2005 stands out as my major contribution to providing equal access to justice. Since the University of Memphis was unable to afford salaries , space, or assigned personnel, I worked with the Memphis Area Legal Services to set up four legal clinics (General Civil Litigation, Elder Law, Juvenile Law, and Domestic Violence) at the offices of MALS. At first, I volunteered my time in addition to my regular assignments to work with our students and MALS attorneys. I applied for and received over the years more than 1/2 million dollars in grant money from the U.S. Department of Education, the Legal Services Corporations, and the U.S. Department of Justice to fund the law school's pro bono clinics.

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)***

I seek a position as Judge on the Tennessee Court of Appeals, Western Section, a position being vacated by Judge Highers. The Court of Appeals has initial appellate jurisdiction over almost all civil cases (unless otherwise provided by statute, e.g., workers' compensation cases) from Tennessee trial courts of record, primarily Circuit and Chancery courts.

On Judge Higher's retirement, the Court of Appeals, Western Section, will continue to have

three other highly learned and competent judges in Judges Farmer, Kirby, and Stafford. My background, knowledge, and skills will complement the work of these judges, particularly in the areas of civil procedure and torts cases, which make up a substantial portion of the Court's cases.

My background as a professor of law and as a law clinician will add a new dimension and perspective to the court, and will allow for closer links between the courts and academia in furthering student experiences and fostering judicial participation in legal education and in the furtherance of the administration of justice. My appointment will also balance the geographic diversity of the Court as I am a resident of Shelby County (Judges Stafford and Farmer are from smaller communities).

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)***

Much of my involvement in community activities, other than as a lawyer, has involved music, and making the wonders of music available to the community as performers or listeners. I have always been motivated by the slogan of the Memphis Youth Symphony Program: "Listen to our Future", and by the appreciation of audiences when I sing in the Memphis Men's Chorale. I am proud that my work with the Youth Symphony Programs has provided training, to more than 200 children between ages 7 to 18 in four different orchestras, annually.

As a member of the appellate court, I would like to continue using my knowledge of the law to educate the general population about the importance of "Rule of Law" and how our legal system is there to protect the rights of everyone. As a Judge of the Court of Appeals, I will regularly participate in programs increasing "Access to Justice" initiatives. I would also welcome opportunities to speak at Tennessee's law schools, bar association meetings, and CLE programs.

In 2008, with an update in 2012, I wrote a manual for bringing and defending General Sessions cases for the use of non attorneys who were likely to be unrepresented by counsel, and for students at law schools clinics and for new attorneys.

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)***

I have been married for 31 years to Eniko Karman Pivnick, M.D., a professor of pediatrics, genetics, and ophthalmology at the University of Tennessee Health Sciences Center. Eniko was born, raised, and educated in Budapest Hungary. My daughter Hajnal Pivnick is a classical violinist, and my daughter Lilla Pivnick is in the Teach for America Program, and is a second grade teacher at Frayser Elementary School in the Achievement School District.

I am the first member of my family to have attended college and law school. I received a public, integrated education from kindergarten through law school. I believe that equal opportunity and hard work, and a respectful attitude towards other people and their ideas, are the key elements to success. I believe in protecting individual rights and providing equal access to justice for all

Tennesseans. I am acutely aware of the need to protect the safety and best interests of the elderly, abused persons, and children.

I believe civility and professionalism are essential guideposts in the practice and administration of justice.

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 a judge on the Tennessee Court of Appeals, I will uphold the U.S. and Tennessee constitutions, statutes and case law, regardless of my personal views on the wisdom of the law. I pledge to follow the doctrine of stare decisis (precedent). If it is my opinion that public policy is not best served by an existing statute or rule of law, I will respectfully explain my reasoning in a clear, rational opinion or consideration by the Supreme Court and the General Assembly. It is not the role of an intermediate appellate court to overrule cases when stare decisis applies.

My attached article, "Offering Objectionable Evidence" (see appendix), addressing whether an attorney should offer evidence that is otherwise clearly inadmissible under the Tennessee Rules of Evidence should be offered in reliance on the chance that an unrepresented or ineffective counsel may not object. This article demonstrates my reasoning process.

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. Richard M. Carter, Martin, Tate, Morrow, and Marston, P.C.,

6410 Poplar Avenue, Suite 1000, Memphis, TN 38119-4839

Telephone – 901-522-9000

E-mail rcarter@martintate.com

B. Donald F. Paine

900 South Gay Street, Suite 2200

Knoxville, TN 37902-1821

865-525-0880

C. Robert C. Banks, Jr.

Cordova TN 30016

Telephone: 901-754-8125

E-mail: rbanks@memphis.edu

D. Judge Christopher Craft, Criminal Court Judge, Div. VIII
Shelby County Criminal Justice Center
201 Poplar Avenue

Memphis, TN 38103

Phone Number 901-222-3209

E. Audra Bares Watt

Senior Products Specialist

Medtronic Spinal and Biologics

Germantown, TN 38138

F. Steve Schwartzberg

Professor of Biology, University of Memphis

Memphis,TN 38152

Office Telephone: 901-678-4470

E-mail sdschwrt@memphis.edu

AFFIRMATION CONCERNING APPLICATION

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

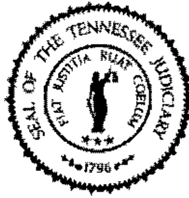
I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the Court of Appeals for the Western Section of Tennessee, and if appointed by the 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 17, 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.

Lawrence A. Pivnick
Type or Printed Name

[signature]
Signature

June 17, 2013
Date

Tennessee Number 8827
BPR #

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

UNIVERSITY OF MEMPHIS FACULTY OMBUDSPERSON

I. ROLE:

The University of Memphis Faculty Ombudsperson is an independent, confidential, impartial (neutral), and informal resource, chosen from the UM faculty, who is available to all members of the University faculty, including all tenured, tenure-track, clinical, research, and one-year instructors, to facilitate dispute resolution through cooperation, consensus, education and mediation.

The Faculty Ombudsperson has been chosen by a 6 person selection committee composed of three members appointed by the Faculty Senate and three members appointed by the President. The Committee's nominee was, subject to the approval of the Faculty Senate and the President.

The Ombudsperson reports to the Faculty Senate, Provost, and President at the end of each academic year but may NOT disclose specific identifying confidential information that does not involve a significant risk of physical harm, without the consent of the faculty member communicating with the Ombudsperson.

The Ombudsperson maintains collaborative relationships with other University offices (e.g., Academic Affairs, Human Resources, Affirmative Action, Student Affairs) in the conduct of her/his functions. .

The major function of the Ombudsperson is to provide confidential and informal assistance to faculty of the institution. Serving as an independent, impartial neutral, the Ombudsperson is neither an advocate, attorney, or officer of formal notice, for any individual nor the University, but rather, serves as an advocate for fairness, equity, and compliance with policies and due process. The Ombudsperson acts as a source of information and referral, aids in answering questions, and assists in the resolution of concerns and critical situations. More specifically, the Ombudsperson engenders awareness and skill development in the areas of conflict resolution, communication, team building and civility.

Ombudsperson's activities assist the faculty to resolve complaints that have not risen to the level of formal grievances, with the goal of promoting alternatives to adversarial processes. The office supplements, but does not replace, the university's existing resources for conflict resolution. Staff and student conflicts should be directed to the Department of Human Resources and the Division of Student Affairs respectively.

II. RESPONSIBILITIES:

A. Dispute Resolution/Consultation and Referral

Provide impartial and confidential consultation to members of the college/university faculty community who are aggrieved or concerned about an Issue

Remain independent, neutral and impartial, and exercise good judgment

Assist inquirers in interpreting college/university policies and procedures, seeking input from appropriate offices when needed

Provide assistance to inquirers by clarifying issues and generating options for resolution

Facilitate the inquirer's assessment of the pros and cons of possible options

If direct action by the ombudsperson may be an appropriate option, obtain the inquirer's agreement and permission

before proceeding

If necessary, and while maintaining confidentiality, conduct appropriate informal fact-finding in order to better understand an issue from all perspectives

Consult with faculty to develop cooperative strategies for complaint resolution

With the inquirer's permission, consult with all parties to clarify and analyze problems, focus discussions, and develop a mutually-satisfactory process for resolution

When appropriate, facilitate group meetings, use shuttle diplomacy, or negotiation skills to facilitate communication among parties in conflict.

When legal and/or disciplinary issues arise, the Ombudsperson refers the case to the appropriate unit of the University.

B. Policy Analysis and Feedback

Serve as a campus resource for officials in formulating or modifying policy and procedures, raising issues that may surface as a result of a gap between the stated goals of the institution and actual practice

Based on anonymous aggregate data, prepare an annual report *to the Faculty Senate* that discusses trends in the reporting of grievances and concerns, identify patterns or problem areas in university/college policies and practices, and recommend revisions and improvements, where appropriate.

Act as a liaison between individuals or groups and the campus administrative structure, serving as a communicator or informal facilitator, as appropriate

Function as a sensor within the campus community to identify problems or trends that affect the faculty.

Provide early warning of new areas of organizational concern, upward feedback, critical analysis of systemic need for improvement, and recommendations of systemic changes

C. Community Outreach and Education

The Ombudsperson is responsible for on-going education and communication about the office's role to all potential inquirers as well as to university leadership

Appendix - Citations to Pivnick Publications

1. Lane v. Daniel,
   Slip Copy, 2013 WL 2325620, Tenn.Ct.App., May 29, 2013 (NO. W2012-01684-COA-R3CV)

   ...Tenn.2012) (citing Hawk v. Chattanooga Orthopaedic Grp., P. C., 45 S.W.3d 24, 28 (Tenn.Ct.App .2000) ; 1 Lawrence A. Pivnick, Tennessee Circuit Court Practice § 11:3, at 857–58 (2011 ed.)). However, this type of motion "tests only the...

2. Spates v. Howell,
   Slip Copy, 2013 WL 2149741, Tenn.Ct.App., May 16, 2013 (NO. W2012-02743-COA-R3CV)

   ...Tenn.2012) (citing Hawk v. Chattanooga Orthopaedic Grp., P. C., 45 S.W.3d 24, 28 (Tenn.Ct.App.2000) ; 1 Lawrence A. Pivnick, Tennes see Circuit Court Practice § 11:3, at 857–58 (2011 ed.)). However, this type of motion "tests only the...

3. Eldrige v. Savage,
   Slip Copy, 2012 WL 6757941, Tenn.Ct.App., December 28, 2012 (NO. M2012-00973-COA-R3CV)

   ...Tenn.2012) (citing Hawk v. Chattanooga Orthopaedic Grp., P. C., 45 S.W.3d 24, 28 (Tenn.Ct.App.2000) ; 1 Lawrence A. Pivnick, Tennessee Circuit Court Practice § 11:3, at 857–58 (2011 ed.)). However, this type of motion "tests only the...

4. Humphries v. Minbiole,
   Slip Copy, 2012 WL 5466085, Tenn.Ct.App., November 08, 2012 (NO. M2011-00008-COA-R3CV)

   ...before and after the trespass, or the reasonable costs of restoring or repairing Humphries' property. 3 See 2 Lawrence A. Pivnick, Tennes see Circuit Court Practice § 31:3 (2011 ed.) (citations omitted) (" 'Irreparable injury,' turns on whether there is a complete...

5. Holley v. Blackett,
   Slip Copy, 2012 WL 4799053, Tenn.Ct.App., October 10, 2012 (NO. W2011-02115-COA-R3CV)

   ...the suit proceeds to judgment for the benefit of the next of kin of the deceased beneficiary. 1 Lawrence A. Pivnick, Tenn. Cir. Ct. Prac. § 5:22 (2011 ed.). The parties here do not dispute that the next of kin...

6. Myers v. AMISUB (SFH), Inc.,
   382 S.W.3d 300, 2012 WL 4712152, Tenn., October 04, 2012 (NO. W2010-00837-SC-R11CV)

   ...1993) "No present controversy exists after the plaintiff takes a nonsuit. The lawsuit is concluded) (citation omitted); 1 Lawrence A. Pivnick, Tennessee Circuit Court Practice § 23.1 (2011 ed.) ("When a voluntary nonsuit has been taken, the action is terminated...

7. Himmelfarb v. Allain,
   380 S.W.3d 35, 2012 WL 3667440, Tenn., August 28, 2012 (NO. M2010-02401-SC-S10CV)

   ...jury trial before the jury retires to deliberate. See Tenn. R. Civ. P 41.01 adv. comm. cmt.; Lawrence A. Pivnick, 1 Tennessee Circuit Court Practice § 23:1 (2011). When a voluntary nonsuit is taken, the rights of the parties ...

   ...by the saving statute. See Tenn. R. Civ. P. 41.01 adv. comm. cmt. (2005), (2006); see also Lawrence A. Pivnick, 1 Tennessee Circuit Court Practice § 23:1. Prior case law also supports our conclusion that a voluntary nonsuit should...

8. Kellon v. Lee,
   Slip Copy, 2012 WL 1825221, Tenn.Ct.App., May 21, 2012 (NO. W2011-00195-COA-R3CV)

   ...granting of a motion for new trial here is conditional and has no immediate effect on the judgment. Lawrence A. Pivnick, Tennes see Circuit Court Practice § 28:6 (2011–12 ed.). As such, the trial court followed proper procedure in granting ...

   ...its interpretation or application of the law to the facts found by the jury, will the jury's verdict be reinstated. Pivnick, Tennes see Circuit Court Practice § 28:6; see also Loeffler v. Kjellgren, 884 S.W.2d 463, 468 (Tenn.Ct.App.1994) (noting ...

   ...ruling on a controlling conclusion of law and has approved the verdict of the jury. Id. at 687; see also Pivnick, Tennes see Circuit Court Practice § 28:6 (only under extraordinary circumstances and in the interests of justice will the jury's...

9. Barone v. Barone,
   Slip Copy, 2012 WL 1116320, Tenn.Ct.App., April 03, 2012 (NO. E2011-01014-COA-R3CV)

   ...this lawsuit to enforce her foreign judgment, and she is not relying upon a judgment lien. See 2 Lawrence A. Pivnick, Tennes see Circuit Court Practice § 29:2 (2011 ed.) ("Tennessee statutes and the Tennessee Rules of Civil Procedure provide for ...

   ...the foreign judgment, seeking a new Tennessee judgment based on the foreign judgment, which is treated as a debt. See Pivnick, § 27:18; 16 William H. Brown, Nancy Fraas MacLean & Lawrence R. Ahern, III, Tenn. Prac., Debtor–Creditor Law & Practice ...

   ...summons is served on the defendant, who has the right to answer and attack the underlying judgment by raising defenses. Pivnick, § 27:18. However, "[t]he scope of the action [is] limited to whether the foreign judgment was properly entered, and...

10. Redwing v. Catholic Bishop for Diocese of Memphis,
    363 S.W.3d 436, 2012 WL 604481, Tenn., February 27, 2012 (NO. W2009-00986-SC-R11CV)

    ...has jurisdiction to adjudicate the claim. See Staats v. McKinnon, 206 S.W.3d 532, 543 (Tenn.Ct.App.2006) ; 1 Lawrence A. Pivnick, Tennes see Circuit Court Practice § 3:2 (2011 ed.) ("Pivnick"). 4 FN4. Federal courts construing Fed.R.Civ.P. 12(b)(2) likewise place the burden of persuasion on the plaintiff when subject ...

    ...grounds for dismissing a complaint. See Hawk v. Chattanooga Orthopaedic Grp., P.C., 45 S.W.3d 24, 28 (Tenn.Ct.App.2000) ; 1 Pivnick § 11:3, at 857–58. B. [21] [22] [23] Statutes of limitations promote fairness and justice. Pero's Steak & Spaghetti...

11. Lovlace v. Copley,
    Not Reported in S.W.3d, 2012 WL 368221, Tenn.Ct.App., February 03, 2012 (NO. M2011-00170-COA-R3CV)

    ...of the court. Sullivan v. Sullivan, 23 Tenn.App. 644, 137 S.W.2d 306, 307 (Tenn.1939) see also Lawrence A. Pivnick, Tennessee Circuit Court Practice § 3:19 (2010 ed.). "Punishment for criminal contempt is both punitive and unconditional in nature ...:

    ...the instance and for the benefit of a party litigant." Sullivan, 137 S.W.2d at 307; see also Lawrence A. Pivnick, Tennessee Circuit Court Practice § 3:19 (2010 ed.). As stated by our Supreme Court, [i]f imprisonment is ordered in...

12. Hamilton v. Hamilton,
    Slip Copy, 2011 WL 5237089, Tenn.Ct.App., October 28, 2011 (NO. M2010-02329-COA-R3CV)

    ...CV, 2011 WL 198516, at *3 (Tenn.Ct.App. Jan.12, 2011) (citing Tenn. R.App. P. 24(c) see also Lawrence A. Pivnick, Tennessee Circuit Court Practice, Vol. 2, § 30.5 (2010)). In the absence of a transcript, it serves to describe...

13. Weaver v. Deverell,
    Slip Copy, 2011 WL 5069418, Tenn.Ct.App., October 26, 2011 (NO. W2011-00563-COA-R3CV)

    ...matter negating the alleged breach or wrong. Thompson v. Bowlin, 765 S.W.2d 743, 744 (Tenn.Ct.App.1987) (quoting Lawrence A. Pivnick, Tennessee Circuit Court Practice § 12–4 (2nd ed.1986)). An affirmative defense must be plead specifically in a responsive...

14. Cantrell v. Tolley,
    Slip Copy, 2011 WL 3556988, Tenn.Ct.App., August 11, 2011 (NO. W2010-02019-COA-R3CV)

    ...appeal in circuit court, dismissal of the appeal is warranted." Nix, 2007 WL 1541331, at *2 . (citing 1 Lawrence A. Pivnick, Tennessee Circuit Court Practice § 3:11 (2007 ed.)); see also C.B. Donaghy & Co. v. McCorkle, 98 S.W. 1050, 1051 ...

    ...the general sessions court." The circuit court's procedure, upon a party's failure to appear, is succinctly outlined in Lawrence A. Pivnick, Tennessee Circuit Court Practice § 33:11 (2010): An appellant's failure to appear and prosecute his appeal in circuit court...

15. In re Shyronne D.H.,
    Slip Copy, 2011 WL 2651097, Tenn.Ct.App., July 07, 2011 (NO. W2011-00328-COA-R3PT)

    ...as the concept of "final completion." Swift v. Campbell, 159 S.W.3d 565, 573 (Tenn.Ct.App.2004) see also Lawrence A. Pivnick, Tennes see Circuit Court Practice § 27:9 n. 22 (2010). In this sense, then, a judgment may be considered "final...

16. Danelz v. Gayden,
    Slip Copy, 2011 WL 2567742, Tenn.Ct.App., June 29, 2011 (NO. W2010-02308-COA-R3JV)

    ...Baker, 2010 WL 174773, at *4; Citizens Real Estate & Loan Co., 633 S.W.2d at 765; see also Lawrence A. Pivnick, Tennes see Circuit Court Practice § 5:1 n. 21 (2011) ("If a party is determined to be indispensable, the action...

17. Crowley v. Thomas,
343 S.W.3d 32, 2011 WL 2420207, Tenn., June 17, 2011 (NO. M2009-01336-SC-R11CV)

...the appeal without the consent and over the objection of Mr. Crowley. Gill , 958 S.W.2d at 351; Lawrence A. Pivnick, Tennessee Circuit Court Practice, § 3:11 (2011 ed.). The dismissal of Ms. Thomas's appeal removed the case from the...

18. Sturgis v. Thompson,
--- S.W.3d ----, 2011 WL 2416066, Tenn.Ct.App., June 13, 2011 (NO. W2010-02024-COA-R3CV)

...affidavit of indigency. Tenn.Code Ann. § 20–12–127 (1994); Tenn.Code Ann. § 27–5–103 (2000); 1 Lawrence A. Pivnick, Tennessee Circuit Court Practice § 3.11 at 261–62 & n. 8 (2007). A de novo appeal to circuit court...

19. Lavoie v. Franklin County Pub. Co., Inc.,
Slip Copy, 2011 WL 1884562, Tenn.Ct.App., May 17, 2011 (NO. M2010-02335-COA-R9CV)

...2d at 763; Olympia, 59 S.W.3d at 134–35; McGee, 574 S.W.2d at 747; see also Lawrence A. Pivnick, Tennes see Circuit Court Practice § 5:5, p. 499–500 (2011). This rule is an exception to the general rule ...

...it[s] binding force from the voluntary acquiescence of the parties, and thus binds only the consenting parties."); Lawrence A. Pivnick, Tennes see Circuit Court Practice § 27:1, p. 358 n. 6 (2011). Thus, Appellees and Mr. Parsley could not affect...

20. Macklin v. Dollar General Corp.,
Slip Copy, 2011 WL 1714307, Tenn.Ct.App., May 04, 2011 (NO. W201001507COAR3CV)

...of persuasion, or (b) negating the movant's claim or defense if the movant has the burden of persuasion." Lawrence A. Pivnick, Tennessee Circuit Court Practice § 27:5, at 394–95 & n. 49 (2011) (collecting cases). There are at least four...

21. Malco Theaters, Inc. v. Roberts,
Slip Copy, 2011 WL 1598884, Tenn.Ct.App., April 26, 2011 (NO. W2010-00464-COA-R3CV)

...of persuasion, or (b) negating the movant's claim or defense if the movant has the burden of persuasion." Lawrence A. Pivnick, Tennes see Circuit Court Practice § 27:5, at 394–95 & n .49 (2011) (collecting cases). There are at least four...

22. Freeman v. CSX Transp., Inc.,
Slip Copy, 2011 WL 1344727, Tenn.Ct.App., April 07, 2011 (NO. M2010-01833-COA-R9CV)

...plaintiff has taken two voluntary dismissals, a third operates as an adjudication upon the merits. FN9. See also Lawrence A. Pivnick, Tennes see Circuit Court Practice, Vol. 1, § 1:9 at n. 15 (2010) ("the statute does not save an action...

23. C.P. ex rel. Powell v. Sheperd,
Slip Copy, 2011 WL 1124003, Tenn.Ct.App., March 24, 2011 (NO. E2010-00726-COA-R3CV)

...273 (Tenn.Ct.App.1992) Collier v. Slayden Bros. Ltd. Partnerhip, 712 S.W.2d 106, 108 (Tenn.Ct.App.1985) see also Lawrence A. Pivnick, Tennessee Circuit Court Practice, Vol 1. § 11:3 (2011). A plaintiff in a legal malpractice action has the burden...

24. McNeary v. Baptist Memorial Hosp.,
360 S.W.3d 429, 2011 WL 863006, Tenn.Ct.App., March 14, 2011 (NO. W2009-01231-COA-R3CV)

...issued when the suit was filed. The question of when an action commences was also discussed in 1 Lawrence A. Pivnick, Tennessee Circuit Court Practice, § 1:21 (2011 ed.): As a general rule, civil actions in circuit court are commenced ...

...the previous process or, if no process is issued, within one year of the filing of the complaint. FN4. Mr. Pivnick incorrectly states that process must be issued within 30 days of the filing of the complaint, or otherwise served within ...

...require that process must be served no later than 90 days after issuance. We have corrected this error in the Pivnick quote. While commencement of an action is not dependent upon whether process is issued, served, or returned, the Rules provide...

25. Reynolds v. Tognetti,
Slip Copy, 2011 WL 761525, Tenn.Ct.App., March 04, 2011 (NO. W201000320COAR3CV)

...this Advisory Commission Comment as "imprecise." Knierim v. Leatherwood, 542 S.W.2d 806, 808 (Tenn.1976) see also Lawrence A. Pivnick, Tennessee Circuit Court Practice, Vol. 1 § 5:2 (2010). A second judge-made doctrine may also serve to bar...

26. Urlaub v. Select Specialty Hospital-Memphis, Inc.,
Slip Copy, 2011 WL 255281, Tenn.Ct.App., January 20, 2011 (NO. W201000732COAR3CV)

...injured party from suing the merely vicariously responsible party, as its liability is purely derivative. Id. (citing 1 Lawrence A. Pivnick, Tennes see Circuit Court Practice § 5:16, at 537 (2010)). Here, Plaintiff argued that the Hospital could be held vicariously...

27. Allen v. Allen,
Slip Copy, 2011 WL 198516, Tenn.Ct.App., January 12, 2011 (NO. W201000920COAR3CV)

...best available means," of what transpired in the lower court proceedings. Tenn. R.App. P. 24(c) see also Lawrence A. Pivnick, Tennes see Circuit Court Practice, Vol. 2, § 30.5 (2010). Necessarily, then, it follows that a statement of the evidence ...

...correct a clerical mistake under Rule 60.01, it is properly considered as a Rule 59 motion. See Lawrence A. Pivnick, Tennessee Circuit Court Practice, Vol. 2, §§ 28.4, 28.8 (2010); Robert Banks, Jr. & June F. Entman, Tennessee Civil...

28. Nicholson v. Lester Hubbard Realtors,
Slip Copy, 2010 WL 4244135, Tenn.Ct.App., October 28, 2010 (NO. W201000658COAR3CV)

...basis of her claimed relief in this cause." FN3. At least one author has reached the same conclusion. See 1 Pivnick, Tenn. Cir. Ct. Prac. § 3:11 (2010 ed.) (explaining that on appeal from general sessions to circuit court, formal...

29. Weaver v. Pardue,
Slip Copy, 2010 WL 4272687, Tenn.Ct.App., October 28, 2010 (NO. M201000124COAR3CV)

...of persuasion, or (b) negating the movant's claim or defense if the movant has the burden of persuasion." Lawrence A. Pivnick, Tennes see Circuit Court Practice § 27:5, at 382-83 & n. 48 (2010) (collecting cases). The Tennessee Supreme Court has...

30. Abshure v. Methodist Healthcare-Memphis Hospitals,
325 S.W.3d 98, 2010 WL 4188221, Tenn., October 20, 2010 (NO. W200801486SCR11CV)

...s] the injured party from suing the merely vicariously responsible party, as his liability [is] purely derivative." 1 Lawrence A. Pivnick, Tennessee Circuit Court Practice § 5:16, at 537 (2010). C. Tennessee's courts have recognized a second limitation on a...

31. Fortune v. Unum Life Ins. Co. of America,
360 S.W.3d 390, 2010 WL 3984705, Tenn.Ct.App., October 12, 2010 (NO. W200901395COAR3CV)

...of persuasion, or (b) negating the movant's claim or defense if the movant has the burden of persuasion." Lawrence A. Pivnick, Tennes see Circuit Court Practice § 27:5, at 382–83 & n.48 (2010) (collecting cases). The Tennessee Supreme Court has...

32. Meeks v. Successor Trustees of Marital Trust,
Slip Copy, 2010 WL 3420546, Tenn.Ct.App., September 01, 2010 (NO. W200902016COAR3CV)

...Campbell, No. M1999-01580-COA-R3-CV, 2001 WL 459106, at *1-3 (Tenn.Ct.App. May 2, 2001) (same); Lawrence A. Pivnick, 2 Tenn. Cir. Ct. Prac. § 30:3 (2010 ed.) ("the filing of a notice of appeal before the entry...

33. Trustmark Nat. Bank v. Deutsche Bank Nat. Trust Co.,
Slip Copy, 2010 WL 3269978, Tenn.Ct.App., August 19, 2010 (NO. W200901658COAR3CV)

...of persuasion, or (b) negating the movant's claim or defense if the movant has the burden of persuasion." Lawrence A. Pivnick, Tennessee Circuit Court Practice § 27:5, at 382-83 & n .48 (2010) (collecting cases). The Tennessee Supreme Court has...

34. Estate of Bell v. Shelby County Health Care Corp.,
318 S.W.3d 823, 2010 WL 2539644, Tenn., June 24, 2010 (NO. W200802213SCS09CV)

...2d 822, 828 (Tenn.1978) Alexander v. Patrick, 656 S.W.2d 376, 377 (Tenn.Ct.App.1983) see also 2 Lawrence A. Pivnick, Tennessee Circuit Court Practice § 30:11, at 790 (2010). Accordingly, these issues should have been raised far earlier than...

35. Memphis Area Teachers Credit Union v. Jones,
Slip Copy, 2010 WL 2349202, Tenn.Ct.App., June 14, 2010 (NO. W200901419COAR3CV)

...appeal in circuit court, dismissal of the appeal is warranted." Nix, 2007 WL 1541331, at *2 . (citing 1 LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 3:11 (2007 ed.)). This Court has considered the issue presented in this appeal, in...

36. State ex rel. Murphy v. Franks,
Slip Copy, 2010 WL 1730024, Tenn.Ct.App., April 30, 2010 (NO. W200902368COAR3JV)

...and authority of the court. Sullivan v. Sullivan, 23 Tenn.App. 644, 137 S.W.2d 306, 307 (Tenn.1939) see also Pivnick, Tenn. Circuit Court Practice § 3:19 (2010 ed). "Punishment for criminal contempt is both punitive and unconditional in nature ...

...meted at the instance and for the benefit of a party litigant." Sullivan, 137 S.W.2d at 307; see also Pivnick, Tenn. Circuit Court Practice § 3:19 (2010 ed). As stated by our Supreme Court, [i]f imprisonment is ordered in...

37. Vintage Health Resources, Inc. v. Guiangan,
309 S.W.3d 448, 2009 WL 2601327, 158 Lab.Cas. P 60,863, Tenn.Ct.App., August 25, 2009 (NO. W200801288COAR3CV)

...breach or wrong." Thompson, Breeding, Dunn, Creswell & Sparks v. Bowlin, 765 S.W.2d 743, 744 (Tenn.Ct.App.1987) (quoting LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 12–4 (2d ed.)). Unconscionability, although not included in the defenses listed in Rule 8...

38. Hermosa Holdings, Inc. v. Mid Tennessee Bone and Joint Clinic, P.C.,
Not Reported in S.W.3d, 2009 WL 711125, Tenn.Ct.App., March 16, 2009 (NO. M200800597COAR3CV)

...common law since Tennessee courts have adopted several ancillary rules. Mills, at 190. The Mills court, quoting from Lawrence A. Pivnick, Tennessee Circuit Court Practice § 6-2 (1999), explained that: First, if venue is proper as to one of several...

39. Indiana State Dist. Council of Laborers v. Brukardt,
Not Reported in S.W.3d, 2009 WL 426237, Tenn.Ct.App., February 19, 2009 (NO. M200702271COAR3CV)

...benefit of all reasonable inferences. Trau-Med of America v. Allstate, 71 S.W.3d 691, 696 (Tenn.2002) See, generally, Pivnick, Tennessee Circuit Court Practice § 11.3 (2008 ed.). Furthermore, matters outside the pleadings generally should not be considered in...

40. Metropolitan Government of Nashville and Davidson County v. Cuozzo,
Not Reported in S.W.3d, 2008 WL 3914890, Tenn.Ct.App., August 25, 2008 (NO. M200701851COAR3CV)

...206 S.W.2d 416, 419 (1947) Braverman v. Roberts Constr. Co., 748 S.W.2d 433, 435 (Tenn.Ct.App.1987) ; Lawrence A. Pivnick, Tennessee Circuit Court Practice, § 3-10, at 115 (3d ed. 1991) ("Pivnick"). Thus, Tenn.Code Ann. § 16-15-729 requires that cases appealed from general sessions court to circuit court be treated...

41. Discover Bank v. McCullough,
Not Reported in S.W.3d, 2008 WL 245976, Tenn.Ct.App., January 29, 2008 (NO. M2006-01272-COA-R3CV)

...affidavit of indigency. Tenn.Code Ann. § 20-12-127 (1994) Tenn.Code Ann. § 27-5-103 (2000) ; 1 Lawrence A. Pivnick, Tennessee Circuit Court Practice § 3.11 at 261-62 & n. 8 (2007). A de novo appeal to circuit court...

42. Ingle v. Head,
Not Reported in S.W.3d, 2007 WL 4530825, Tenn.Ct.App., December 26, 2007 (NO. W200602690COAR3CV)

...1-103 ; Henry R. Gibson, Gibson's Suits in Chancery § 307 (William H. Inman ed., 7th ed.1988); Lawrence A. Pivnick, Tennessee Circuit Court Practice § 29-1 (3d ed.1991)). The writ of execution is simply an order directing the...

43. JPMorgan Chase Bank v. Franklin Nat. Bank,
Not Reported in S.W.3d, 2007 WL 2316450, Tenn.Ct.App., August 13, 2007 (NO. M2005-02088-COA-R3CV)

...harm to a defendant resulting from a voluntary dismissal for vexatious or oppressive reasons. FN13. See generally 2 Lawrence A. Pivnick, Tenn. Cir. Ct. Prac. § 27:11, at 400-06 (2007). With regard to its contention that alleviating harm from...

44. Faught v. E.W. James & Sons, Inc.,
Not Reported in S.W.3d, 2007 WL 1946647, Tenn.Workers Comp.Panel, July 02, 2007 (NO. W200600793WCR3CV)

...some misrepresentation, fraud, overreaching, or similar misconduct on the part of the opposing party in making the stipulations." Lawrence A. Pivnick, Tenn. Circuit Court Practice § 10-6 (3d ed.1991). When these circumstances are present, a prompt motion to withdraw...

45. Nix v. Sutton,
Not Reported in S.W.3d, 2007 WL 1541331, Tenn.Ct.App., May 25, 2007 (NO. M200600960COAR3CV)

...fails to appear and prosecute his appeal in circuit court, dismissal of the appeal is warranted. See 1 Lawrence A. Pivnick, Tennessee Circuit Court Practice § 3:11, at 270 (2007). These statutes were applied in Osborne v. Turner, No. 296...

46. Edgemon v. Edgemon,
Not Reported in S.W.3d, 2007 WL 1227467, Tenn.Ct.App., April 26, 2007 (NO. E2006-00358-COA-R3CV)

...of the exhibit, including proof of authenticity ; and (e) then request that the exhibit be introduced into evidence. Lawrence A. Pivnick, Tennessee Circuit Court Practice § 24-12, at 703-04 (4th ed.1995). We agree that this is the formal...

47. Wicks v. Vanderbilt University,
Not Reported in S.W.3d, 2007 WL 858780, Tenn.Ct.App., March 21, 2007 (NO. M2006-00613-COA-R3CV)

...01A01-9508-CV-00342, 1996 Tenn.App. LEXIS 263, at *8, 1996 WL 221863 (Tenn.Ct.App. May 3, 1996) (citing Lawrence A. Pivnick, Tennessee Circuit Court Practice § 7-2, at 244-45 (3rd. ed.1991)). "The courts of Tennessee have long recognized...

48. Pieny v. United Imports, Inc.,
Not Reported in S.W.3d, 2005 WL 2140853, Tenn.Ct.App., September 06, 2005 (NO. M2004-01695-COA-R3CV)

...206 S.W.2d 416, 419 (1947) Braverman v. Roberts Constr. Co., 748 S.W.2d 433, 435 (Tenn.Ct.App.1987) ; Lawrence A. Pivnick, Tennessee Circuit Court Practice, § 3-10, at 115 (3d ed. 1991) ("Pivnick"). Ware v. Meharry Med. Coll., 898 S.W.2d 181, 185 (Tenn.1995) DEATH AND REVIVER Our analysis of this portion...

49. Lacy v. Cox,
152 S.W.3d 480, 2004 WL 2657217, Tenn., November 22, 2004 (NO. E2003-00709-SC-R11CV)

...2d 293, 294 (Tenn.1976) Stewart v. Univ. of Tenn., 519 S.W.2d 591, 592 (Tenn.1974) see Lawrence A. Pivnick, Tenn. Circuit Court Practice, § 23:1, at 834–35 (2003). In such instance, "The lawyer for the plaintiff is ...

...has been entered move for a new trial or for amendment of the verdict. Tenn. R. Civ. P. 59 see Pivnick, Tenn. Circuit Court Practice, §§ 28:1–4. Alternatively, a plaintiff whose motion for directed verdict at the close of ...

...was not granted may after judgment has been entered move for directed verdict. Tenn. R. Civ. P. 50.02 see Pivnick, Tenn. Circuit Court Practice, § 28:6. Third, a rule affording trial courts the discretion to grant voluntary dismissals during...

50. Kuehne & Nagel, Inc. v. Preston, Skahan & Smith Intern., Inc.,
Not Reported in S.W.3d, 2002 WL 1389615, Tenn.Ct.App., June 27, 2002 (NO. M1998-00983-COA-R3CV)

...have been called both "the usual remedy" and a "predicate" to seeking stiffer penalties for non-production. 1 Laurence A. Pivnick, Tennessee Circuit Court Practice § 18-12 (2002). Motions to compel should be made in the court where the action...

51. State v. Sweat,
Not Reported in S.W.3d, 2001 WL 1134604, Tenn.Crim.App., September 26, 2001 (NO. E2000-02472-CCA-R3CD)

...admission is for limited purposes, this should be stated in the request. Kidd, slip op. at 6 (quoting Lawrence A. Pivnick, Tennessee Circuit Court Practice § 24-12 (4th ed.1995)). In Kidd, the record reflected a casual approach toward the...

52. Thurmon v. Sellers,
62 S.W.3d 145, 2001 WL 256124, Tenn.Ct.App., February 16, 2001 (NO. W200000422COAR3CV)

...a directed verdict, used in jury trials pursuant to Rule 50.01 of the Tennessee Rules of Civil Procedure See Pivnick, Tenn.Cir.Ct.Proc. (2000 ed.) §§ 24–17, –18; Smith v. Inman Realty Co., 846 S.W.2d 819, 821 (Tenn.Ct.App.1992) 1...

53. Rogers v. Estate of Russell,
50 S.W.3d 441, 2001 WL 35838, Tenn.Ct.App., January 16, 2001 (NO. E2000-01054-COA-R3CV)

...both within a reasonable time and within one year after the judgment or order was entered. See also, LAURENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE, § 28–6 (1999 ed.): Relief under clauses (1) and (2) must be made within a...

54. Mills v. Wong,
39 S.W.3d 188, 2000 WL 1346659, Tenn.Ct.App., September 15, 2000 (NO. W199900665COAR9CV)

...101 (b) is mandatory and has been consistently recognized as such. In his book, Tennessee Circuit Court Practice, Professor Lawrence Pivnick notes that Tennessee courts have adopted several ancillary venue rules. He states: FN3. The only issue before this court is ...

...if sued individually. An exception, however, applies as to a defendant having common county residence with the plaintiff. Lawrence A. Pivnick, Tennessee Circuit Court Practice § 6–2 (1999)(emphasis added) (citations omitted). In support of the exception, Professor Pivnick cites Tenn.Code Ann. § 20–4–101 (b). Professor Pivnick also notes that the Tennessee Rules of Civil Procedure specifically defer to Tennessee statutes with respect to venue. See Lawrence A. Pivnick, Tennessee Circuit Court Practice § 6–1 (1999)(citing Tenn.R.Civ.P. 4.01 If this case were simply the Appellees suing...

55. Smith v. Mullikin,
Not Reported in S.W.3d, 2000 WL 351381, Tenn.Ct.App., April 05, 2000 (NO. W199900105COAR3CV)

...206 S.W.2d 416, 419 (1947) Braveman v. Roberts Constr. Co., 748 S.W.2d 433, 435 (Tenn.Ct.App.1987) , Lawrence A. Pivnick, Tennessee Circuit Court Practice, § 3-10, at 115 (3d ed. 1991) ("Pivnick"). The Tennessee Rules of Civil procedure favor using a single proceeding to resolve all the parties' disputes on the merits...

56. Lewis v. Muchmore,
26 S.W.3d 632, 2000 WL 145064, Tenn.Ct.App., February 09, 2000 (NO. W199800794COAR3CV)

...action filed in another Tennessee state court involving the same claim and parties is subject to a motion to dismiss. PIVNICK, TENN.CIRCUIT COURT PRAC. § 3–6 (1999 ed.). This doctrine has prevailed in this jurisdiction for over 100 years. See...

57. Overstreet v. Shoney's, Inc.,
4 S.W.3d 694, 1999 WL 355912, Tenn.Ct.App., June 04, 1999 (NO. 01A01-9612-CV-00566)

...the facts and its application of the law, as charged by the trial court, to the facts. See Lawrence A. Pivnick, Tennes see Circuit Court Practice § 26–3 (1998). It is a unitary finding by the jury on all the issues...

58. Johnson v. Cantrell,
Not Reported in S.W.2d, 1999 WL 5083, Tenn.Ct.App., January 07, 1999 (NO. 01A01-9712-CV-00690)

...facts supporting any theory of relief, even one different from the theory relied upon by the plaintiff. See Lawrence A. Pivnick, Tennessee Circuit Court Practice § 7-2 (1998 ed.) (citations omitted). Recognizing this relaxed rule, we recently held that a...

59. State v. Kidd,
Not Reported in S.W.2d, 1997 WL 789909, Tenn.Crim.App., December 23, 1997 (NO. 03C01-9607-CC-00272)

...into evidence. If the request for admission is for limited purposes, this should be stated in the request. Lawrence A. Pivnick, Tennessee Circuit Court Practice § 24-12, at 703-04 (4th ed.1995). The jury is entitled to review those...

60. Hurdle v. Hurdle,
Not Reported in S.W.2d, 1996 WL 266700, Tenn.Ct.App., May 16, 1996 (NO. 02A01-9502-CH-00025)

...some misrepresentation, fraud, overreaching, or similar misconduct on the part of the opposing party in making the stipulations." Lawrence A. Pivnick, Tenn.Circuit Court Practice § 10-6 (3d ed. 1991). When these circumstances are present, a prompt motion to withdraw from...

61. Prince v. Coffee County, Tennessee,
Not Reported in S.W.2d, 1996 WL 221863, Tenn.Ct.App., May 03, 1996 (NO. 01A01-9508-CV-00342)

...theory of relief, even if the theory is different from that upon which the plaintiff intended to rely. LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 7-2, at 244-45 (3rd ed.1991). Consequently, to permit Plaintiff to amend her...

62. Brooks v. Davis,
Not Reported in S.W.2d, 1996 WL 99794, Tenn.Ct.App., March 08, 1996 (NO. 01-A-01-9509-CV00402)

...the alleged breach or wrong. Thompson, Breeding, Dunn, Creswell & Sparks v. Bowlin, 765 S.W.2d at 744 (quoting Lawrence A. Pivnick, Tennes see Circuit Court Practice § 12-4 (2d ed.1986)). The difference between a general defense which is not required...

63. In re Estate of Tipps,
907 S.W.2d 400, 1995 WL 548648, Tenn., September 18, 1995 (NO. 01S019410PB00129)

...trial court to act upon the report. The Leath court summarily rejected this claim, reasoning as follows: FN1. See Lawrence Pivnick, Tennessee Circuit Court Practice (1986), § 24–25, n. 16 for these cases. 'It is the duty of one seeking...

64. Ware v. Meharry Medical College,
898 S.W.2d 181, 1995 WL 301837, 100 Ed. Law Rep. 804, Tenn., April 24, 1995 (NO. 01S01-9408-CV-00078)

...206 S.W.2d 416, 419 (1947) Braverman v. Roberts Constr. Co., 748 S.W.2d 433, 435 (Tenn.Ct.App.1987) ; Lawrence A. Pivnick, Tennessee Circuit Court Practice, § 3–10, at 115 (3d ed. 1991) ("Pivnick"). C. The transition from the justice of the peace courts to the general sessions courts is relatively straightforward to this ...

...5 the parties are not required to file formal pleadings. Vinson v. Mills, 530 S.W.2d 761, 765 (Tenn.1975) ; Pivnick, supra, § 3–10, at 115. The parties may, however, without the court's direction, file pleadings, engage in discovery, and ...

...339–40, 24 S.W.2d 881, 884 (1930) Moran v. Weinberger, 149 Tenn. 537, 546, 260 S.W. 966, 968 (1924) ; Pivnick, supra, § 3–10, at 114. At the same time, Tenn.Code Ann. § 16–15–729 and its predecessors directed...

65. Keep Fresh Filters, Inc. v. Reguli,
888 S.W.2d 437, 1994 WL 677516, 25 UCC Rep.Serv.2d 599, Tenn.Ct.App., September 02, 1994 (NO. 01-A-01-9302-CH00054)

...103 (1980); Henry R. Gibson, Gibson's Suits in Chancery § 307 (William H. Inman ed., 7th ed. 1988); Lawrence A. Pivnick, Tennessee Circuit Court Practice § 29–1 (3d ed. 1991). It is simply an order directing the sheriff to levy...

66. Ware v. Meharry Medical College,
Not Reported in S.W.2d, 1994 WL 108905, Tenn.Ct.App., March 30, 1994 (NO. 01A01-9304-CV-00149)

...S.W.2d 416, 419 (1947) Braverman v. Roberts Constr. Co., 748 S.W.2d 433, 435 (Tenn. Ct.App.1987) ; Lawrence A. Pivnick, Tennessee Circuit Court Practice, § 3-10, at 115 (3d ed. 1991)("Pivnick"). C. The transition from the justice of the peace courts to the general sessions courts is relatively straightforward to this ...

...5 the parties are not required to file formal pleadings. Vinson v. Mills, 530 S.W.2d 761, 765 (Tenn.1975) ; Pivnick, supra, § 3-10, at 115. The parties may, however, without the court's direction, file pleadings, engage in discovery, and ...

...339-40, 24 S.W.2d 881, 884 (1930) Moran v. Weinberger, 149 Tenn. 537, 546, 260 S.W. 966, 968 (1924) ; Pivnick, supra, § 3-10, at 114. At the same time, Tenn.Code Ann. § 16-15-729 and its predecessors directed...

67. Lam v. Smith,
Not Reported in S.W.2d, 1993 WL 526412, Tenn.Ct.App., December 21, 1993 (NO. 02A01-9303-CV-00065)

...process issued, within 1 year from the filing of the original complaint and summons. (Emphasis added. As stated in L. Pivnick, Tennessee Circuit Court Practice (3d ed.1991); "When the initial pleading is filed the clerk must forthwith issue the original...

68. Five Star Exp., Inc. v. Davis,
866 S.W.2d 944, 1993 WL 504705, Tenn., November 22, 1993 (NO. 01S01-9304-CV-00073)

...also D. Andrew Bryne & Ted C. Raynor, Tennessee Worker's Compensation—Where is the Proper Venue?, 20 Mem.St.U.L.Rev. 189 (1990) ; L. Pivnick, Tennessee Circuit Court Practice § 6–10 (2d ed. 1986). At first blush, this is surprising, because the subject of...

69. Allstate Ins. Co. v. Dixon,
Not Reported in S.W.2d, 1991 WL 79549, Tenn.Ct.App., May 17, 1991 (NO. 01-A-01-9011CH00421)

...App. 539 (1929) State Board of Examiners for Architects and Engineers v. Weinstein, 638 S.W.2d 406,408 (Tenn.1982) See Pivnick, Tennessee Circuit Court Practice § 3–7 (2d ed. 1986); Atchley v. Atchley, 585 S.W.2d 614 (Tenn.Ct.App.1978) Basically...

70. Tandy v. Tandy,
Not Reported in S.W.2d, 1991 WL 3817, Tenn.Ct.App., January 18, 1991 (NO. 52)

...judgment by placing his signature thereon, which is otherwise a representation that the judgment is in proper form. See L. Pivnick, Tenn.Cir.Ct.Prac. § 27-9 at 337 (2nd ed. 1986); see also Sparkle Laundry & Cleaners, Inc. v. Kelton, 595 S.W.2d...

71. Cook v. Board of Educ. of Memphis City Schools,
Not Reported in S.W.2d, 1990 WL 139417, Tenn.Ct.App., September 27, 1990 (NO. 37)

...does not state a cause of action or claim upon which relief can be granted on the grounds pleaded." L. Pivnick, Tennessee Circuit Court Practice (2nd Ed.) § 11-3. The defenses raised by appellees in this case dispute the factual...

72. State v. Pilkey,
776 S.W.2d 943, 1989 WL 105729, Tenn., August 07, 1989 (NO. 150)

...also Lee v. Lee, 719 S.W.2d 295, 296–97 (Tenn.App.1986) Paine, Tennessee Law of Evidence § 183 (1974); Pivnick, Tennessee Circuit Court Practice § 24–14 (2d ed. 1986). Nothing in either the rules of civil or criminal procedure...

73. City of Morristown v. Morgan,
Not Reported in S.W.2d, 1989 WL 48462, Tenn.Ct.App., May 12, 1989 (NO. 129)

...either transfer this case to circuit court or hear it upon the principles of a court of law. See eg. Pivnick, Tenn. Circuit Court Prac. (2nd ed.) § 3-4. Thus, the trial court erred in dismissing the counter-complaint for...

74. Vaughn v. Odom,
Not Reported in S.W.2d, 1988 WL 15711, Tenn.Ct.App., February 25, 1988 (NO. 43)

...would have constituted a waiver by Odom, and chancery court would have had subject matter jurisdiction over this claim. See Pivnick, Tenn. Circuit Court Prac. (2nd Ed.) § 3. 0 #2 2059...

75. Thompson, Breeding, Dunn, Creswell & Sparks v. Bowlin,
765 S.W.2d 743, 1987 WL 49642, Tenn.Ct.App., November 12, 1987 (NO. 4)

...action, but avoids liability because of a legally sufficient excuse, justification, or other matter negating the alleged breach or wrong." Pivnick, Tenn. Circuit Court Prac. (2nd Ed.), § 12–4. A party relying upon matter that constitutes such an avoidance or...

76. Edlund v. Dodge Country, Inc.,
Not Reported in S.W.2d, 1987 WL 17872, Tenn.Ct.App., October 05, 1987 (NO. 52)

...are 'special damages' which 'are those that are natural but not the necessary result of an alleged breach or wrong.' Pivnick, Tenn. Circuit Court Prac. (2d Ed.) § 7-18 at 141. Normally, special damages must be 'stated specifically' in written...

77. Bonds v. Chandler,
Not Reported in S.W.2d, 1986 WL 15860, Tenn.Ct.App., June 10, 1986 (NO. 10)

...04(10). The function of the process, upon service, is to notify the defendant that he is being sued. L. Pivnick, Tennessee Circuit Court Practice, 2d Ed. § 9.1, p. 145 (1986). While it would have been the preferred practice...

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Books and Periodicals

1. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 3:1 (2013 ed.)**
   Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 3. Separate Maintenance § 3:1. In general

   ...is statutory. The effect of a decree for separate maintenance is the same as the decree for legal separation. See Pivnick, Tennessee Circuit Court Practice, Chapters 3, 4, and 6 for a discussion of jurisdiction and venue and Pivnick, Tennessee Circuit Court Practice, Chapters 17 and 27 for a discussion of orders and judgments. [FN a0] Garrett is an emeritus professor of law at ...

2. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 6:1 (2013 ed.)**
   Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 6. Grounds for Divorce § 6:1. In general

   ...evidence.[FN 17] The trial judge may award the divorce to either party or to both of the parties.[FN 18] See Pivnick, Tennessee Circuit Court Practice, Chapters 18, 19, 20, and 24 for a discussion of evidence. [FN a0] Garrett is an emeritus professor of law at ...

3. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 7:1 (2013 ed.)**
   Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 7. Defenses to Divorce § 7:1. In general

   ...grounds for divorce occurred after the separation of the parties is not a defense to a divorce action.[FN 11] See Pivnick, Tennessee Circuit Court Practice, Chapter 12 for a discussion of defenses; Pivnick, Tennessee Circuit Court Practice, Chapter 24 for a discussion of the Soldiers' and Sailors' Civil Relief Act (now called the Servicemembers Civil Relief Act of 2003); and Pivnick, Tennessee Circuit Court Practice, Chapter 27 for a discussion of res judicata and estoppel. [FN a0] Garrett is an emeritus professor of law at the ...

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4. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 8:1 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 8. Jurisdiction and Venue § 8:1. In general

...parties must be a domiciliary of Tennessee.[FN 6] Retention of jurisdiction for support orders and custody is statutory.[FN 7] See Pivnick, Tennessee Circuit Court Practice Chapters 3, 4, and6, for a discussion of jurisdiction and venue. [FN a0] Garrett is an emeritus professor of law at ...

5. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 9:1 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 9. Pleading and Procedure in Divorce Cases § 9:1. In general

...oath is required before service of the complaint. Costs may be adjudged in the exercise of judicial discretion.[FN 11] See Pivnick, Tennessee Circuit Court Practice, Chapter 7 for a discussion of pleading and procedure. [FN a0] Garrett is an emeritus professor of law at the University ...

6. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 9:13 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 9. Pleading and Procedure in Divorce Cases § 9:13. Servicemembers Civil Relief Act

...7:11 , Servicemembers Civil Relief Act, § 30:9 , Military affidavit, § 30:10 , Waiver of Servicemembers Civil Relief Act; Pivnick, Tennessee Circuit Court Practice § 24:4 Tenn. Op. Atty. Gen. No. 87-115, 1 TFLL 11-9, 12 TAM 34-43, indicates that ...

7. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 10:1 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 10. Alimony Pendente Lite, Attorney Fees, Temporary Custody, and Child Support § 10:1. In general

...If the parties reconcile and the case is dismissed, counsel must bring an independent action to recover attorney fees. See Pivnick, Tennessee Circuit Court Practice, Chapter 27 for a discussion of attorney fees.[FN 9] [FN a0] Garrett is an emeritus professor of law at the University ...

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8. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 11:1 (2013 ed.)**
   . Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 11. Equitable Relief § 11:1. In general

   ...a writ of ne exeat attaching the defendant's person and requiring him to give bond to be released.[FN 5] See Pivnick, Tennessee Circuit Court Practice, Chapter 31 for a discussion of injunctions and temporary restraining orders. [FN a0] Garrett is an emeritus professor of law at ...

9. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 12:1 (2013 ed.)**
   Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 12. Trial, Verdict, and Judgment § 12:1. In general

   ...failure to properly enter the decree on the minutes may be corrected by a nunc pro tunc decree.[FN 17] See Pivnick, Tennessee Circuit Court Practice, Chapter 16 for a discussion of amendments to pleadings; Pivnick, Tennessee Circuit Court Practice, Chapter 22 for a discussion of separate trials; Pivnick, Tennessee Circuit Court Practice, Chapter 24 for a discussion of trials; Pivnick, Tennessee Circuit Court Practice, Chapter 25 for a discussion of juries; Pivnick, Tennessee Circuit Court Practice, Chapter 26 for a discussion of verdicts; and Pivnick, Tennessee Circuit Court Practice, Chapter 27 for a discussion of judgments. [FN a0] Garrett is an emeritus professor of law at the University of Memphis ...

10. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 16:1 (2013 ed.)**
    Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 16. Enforcement of Alimony, Child Support, and Property Division § 16:1. In general

    ...Law, Part I, Overview and Criminal Contempt"FN 26] and "Contempt Petitions in Domestic Law, Part 2, Civil Contempt."FN 27] See Pivnick, Tennessee Circuit Court Practice, Chapter 27, for a discussion of attorney fees and enforcement of foreign judgments; Pivnick, Tennessee Circuit Court Practice, Chapter 29, for a discussion of enforcement of judgments; and Pivnick, Tennessee Circuit Court Practice, Chapter 31, for a discussion of injunctions. [FN a0] Garrett is an emeritus professor of law at the University of Memphis ...

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11. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 17:1 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 17. Correction of Errors in Trial Courts and Collateral Attack on Judgments § 17:1. In general

...generally the defenses which are available against an equitable action to enjoin the enforcement of a judgment in law. See Pivnick, Tennessee Circuit Court Practice, Chapter 27 for a discussion of setting aside default judgments and Pivnick, Tennessee Circuit Court Practice, Chapter 28 for a discussion of post-trial motions. [FN a0] Garrett is an emeritus professor of law at the University ...

12. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 18:1 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 18. Appellate Court Proceedings § 18:1. In general

...support matters which are subject to modification upon changed circumstances, the trial court retains jurisdiction during appellate review.[FN 19] See Pivnick, Tennessee Circuit Court Practice, Chapter 30, for a discussion of appeals from Circuit Court. [FN a0] Garrett is an emeritus professor of law at the University of Memphis Cecil C. Humphreys School of Law ...

13. **19 Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 21:1 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 21. Judgments of Sister States and Foreign Nations § 21:1. In general

...and the circumstances have not changed, the decree of that state is res judicata as between the parties.[FN 12] See Pivnick, Tennessee Circuit Court Practice, Chapter 27, for a discussion of enforcement of foreign judgments. [FN a0] Garrett is an emeritus professor of law at the ...

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14. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:1 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 30. Forms[FN*] § 30:1. Complaint for divorce

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15. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:2 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 30. Forms[FN*] § 30:2. Complaint for divorce—Irreconcilable differences

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16. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:3 (2013 ed.)**
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19. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:6 (2013 ed.)**
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20. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:7 (2013 ed.)**
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21. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:8 (2013 ed.)**
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23. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:10 (2013 ed.)**
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26. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:13 (2013 ed.)**
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28. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:15 (2013 ed.)**
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33. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:20 (2013 ed.)**
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34. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:21 (2013 ed.)**
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35. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:22 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 30. Forms[FN*] § 30:22. Default judgment—Publication after "Not To Be Found"

...University of Alabama; his J.D. in 1961 from Cumberland University; and his LL.M. in 1962 from Yale University. COMMENT: See Pivnick, Tennessee Circuit Court Practice for a discussion of pleading and procedure. Westlaw. © 2013 Thomson Reuters. No Claim to Orig. U.S. Govt. Works. TNPRAC-DIV ...

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36. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:23 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 30. Forms[FN*] § 30:23. Default judgment—Constructive service by posting

...University of Alabama; his J.D. in 1961 from Cumberland University; and his LL.M. in 1962 from Yale University. COMMENT: See Pivnick, Tennessee Circuit Court Practice for a discussion of pleading and procedure. Westlaw. © 2013 Thomson Reuters. No Claim to Orig. U.S. Govt. Works. TNPRAC-DIV ...

37. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:24 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 30. Forms[FN*] § 30:24. Default judgment—Constructive service by posting after "Not To Be Found" return

...University of Alabama; his J.D. in 1961 from Cumberland University; and his LL.M. in 1962 from Yale University. COMMENT: See Pivnick, Tennessee Circuit Court Practice for a discussion of pleading and procedure. Westlaw. © 2013 Thomson Reuters. No Claim to Orig. U.S. Govt. Works. TNPRAC-DIV ...

38. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:25 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 30. Forms[FN*] § 30:25. Motion for default judgment and to set case for hearing

...University of Alabama; his J.D. in 1961 from Cumberland University; and his LL.M. in 1962 from Yale University. COMMENT: See Pivnick, Tennessee Circuit Court Practice for a discussion of pleading and procedure. Westlaw. © 2013 Thomson Reuters. No Claim to Orig. U.S. Govt. Works. TNPRAC-DIV ...

171. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:158 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 30. Forms[FN*] § 30:158. Tenn. R. App. P. 7 assets and liabilities schedule

...University of Alabama; his J.D. in 1961 from Cumberland University; and his LL.M. in 1962 from Yale University. COMMENT: See Pivnick, Tennessee Circuit Court Practice for a discussion of pleading and procedure. Westlaw. © 2013 Thomson Reuters. No Claim to Orig. U.S. Govt. Works. TNPRAC-DIV ...

172. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:159 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 30. Forms[FN*] § 30:159. Uncontested divorce

...University of Alabama; his J.D. in 1961 from Cumberland University; and his LL.M. in 1962 from Yale University. COMMENT: See Pivnick, Tennessee Circuit Court Practice for a discussion of pleading and procedure. Westlaw. © 2013 Thomson Reuters. No Claim to Orig. U.S. Govt. Works. TNPRAC-DIV ...

173. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:160 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 30. Forms[FN*] § 30:160. Affidavit of assets and liabilities

...University of Alabama; his J.D. in 1961 from Cumberland University; and his LL.M. in 1962 from Yale University. COMMENT: See Pivnick, Tennessee Circuit Court Practice for a discussion of pleading and procedure. Westlaw. © 2013 Thomson Reuters. No Claim to Orig. U.S. Govt. Works. TNPRAC-DIV ...

174. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody § 30:161 (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 30. Forms[FN*] § 30:161. General order concerning parenting plan

...University of Alabama; his J.D. in 1961 from Cumberland University; and his LL.M. in 1962 from Yale University. COMMENT: See Pivnick, Tennessee Circuit Court Practice for a discussion of pleading and procedure. Westlaw. © 2013 Thomson Reuters. No Claim to Orig. U.S. Govt. Works. TNPRAC-DIV ...

175. **19A Tenn. Prac. Tenn. Divorce, Alimony & Child Custody Ch. 30 Correlation Table (2013 ed.)**
Tennessee Practice, Tennessee Divorce, Alimony & Child Custody Database updated April 2013 W. Walton Garrett[FNa0] Chapter 30. Forms[FN*] Correlation Table

...University of Alabama; his J.D. in 1961 from Cumberland University; and his LL.M. in 1962 from Yale University. COMMENT: See Pivnick, Tennessee Circuit Court Practice for a discussion of pleading and procedure. Westlaw. © 2013 Thomson Reuters. No Claim to Orig. U.S. Govt. Works. TNPRAC-DIV ...

176. **20 Tenn. Workers' Comp. Prac. & Proc. § 20:4**
Tennessee Workers' Compensation Practice and Procedure with Forms Database updated October 2012 Thomas A. Reynolds Chapter 20. Practice and Procedure § 20:4. Contested cases

...should be determined exclusively by the workers' compensation law. For a helpful discussion of venue for workers' compensation actions, see Pivnick, Tennessee Circuit Court Practice, § 6:12 ; see also Byrne and Raynor, "Tennessee Workers' Compensation-Where Is the Proper Venue," 20 Mem. St. U ...

177. **21 Tenn. Prac. Contract Law and Practice § 7:14 (2012)**
Tennessee Practice Series Contract Law and Practice Database updated September 2012 Steven W. Feldman Chapter 7. Public Policy Part I. Text § 7:14. Effect of illegality—Procedural aspects

...rules for pleading illegality). [FN 6] Tenn. Dep't of Human Services v. Vaughn, 595 S.W.2d 62 (Tenn. 1980) [FN 7] See Pivnick, Tennessee Circuit Court Practice § 1:1 (2006 ed.) (stating principle). [FN 8] See Reaves Lumber Co. v. Cain-Hurley Lumber Co., 152 Tenn. 339 ...

178. **27 Tenn. Prac. Const. Law § 15:6 (2012 ed.)**
Tennessee Practice Series, Construction Law Handbook Database updated November 2012 Joseph T. Getz and Michael I. Less Chapter 15. Litigation § 15:6. Filing suit—Personal jurisdiction

...topic, see Chapter 3 of the Teply and Whitten treatise cited within this note and volume 1 of Lawrence A. Pivnick's Tennessee Circuit Court Practice §§ 4:1 to 4:9 (2006). [FN 2] But see Rentenbach Constructors Inc. v. American Way Applicators of South Carolina ...

...12.02 12.08 [FN 8] See, e.g., Landers v. Jones, 872 S.W.2d 674, 676 (Tenn. 1994) 1 Lawrence A. Pivnick, Tennessee Circuit Court Practice § 4:2 (2006) Under prior law, an objection to personal jurisdiction was waived whenever a party failed to specially ...

...674, 676 (Tenn. 1994) [FN 9] See Dalton Trailer Service, Inc. v. Ardis, 792 S.W.2d 934 (Tenn. Ct. App. 1990) Pivnick, Tennessee Circuit Court Practice § 4:2 [FN 10] See Tenn. R. Civ. P. 12.08 See also § 15:12 [FN 11] See Dalton Trailer ...

179. **27 Tenn. Prac. Const. Law § 15:7 (2012 ed.)**
Tennessee Practice Series, Construction Law Handbook Database updated November 2012 Joseph T. Getz and Michael I. Less Chapter 15. Litigation § 15:7. Filing suit—Subject matter jurisdiction

...The Tennessee Constitution also limits the Supreme Court's jurisdiction to appellate review. Tenn. Const. Art. IV, § 2 See also Pivnick Tennessee Circuit Court Practice § 3.1 [FN 6] See T.C.A. § 16-15-401 (including a list of powers once held by the justices ...

180. **27 Tenn. Prac. Const. Law § 15:10 (2012 ed.)**
Tennessee Practice Series, Construction Law Handbook Database updated November 2012 Joseph T. Getz and Michael I. Less Chapter 15. Litigation § 15:10. Basic rules for pleading

...01 [FN 2] Tenn. R. Civ. P. 7.01 [FN 3] Tenn. R. Civ. P. 8.01 [FN 4] See 1 Lawrence A. Pivnick, Tennessee Circuit Court Practice, § 7:2 [FN 5] Erickson v. Pardus, 551 U.S. 89, 90, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 ...

...implied by the Rule's language. [FN 11] See, e.g., Swallows v. Western Elec. Co., Inc., 543 S.W.2d 581 (Tenn. 1976) Pivnick, Tennessee Circuit Court Practice § 7.2 Also note that Rule 8.03, which deals with affirmative defenses, requires that a pleader "set forth ...

181. **27 Tenn. Prac. Const. Law § 15:12 (2012 ed.)**
Tennessee Practice Series, Construction Law Handbook Database updated November 2012 Joseph T. Getz and Michael I. Less Chapter 15. Litigation § 15:12. Third-party pleadings

...any party may move to have the third-party suit severed or heard at a separate trial.[FN 8] [FN 1] See Pivnick, Tennessee Circuit Court Practice, §§ 14:0 to 14:8 [FN 2] Tenn. R. Civ. P. 14.01 [FN 3] Tenn. R. Civ. P. 14.01 ...

182. **27 Tenn. Prac. Const. Law § 15:13 (2012 ed.)**
Tennessee Practice Series, Construction Law Handbook Database updated November 2012 Joseph T. Getz and Michael I. Less Chapter 15. Litigation § 15:13. Motions under Tennessee Rules Civil Procedure

...v. Browning, 20 S.W.3d 645, 652 (Tenn. Ct. App. 1999) [FN 3] Tenn. R. Civ. P. 7.02 [FN 4] See Pivnick, Tennessee Circuit Court Practice § 10:1 [FN 5] Tenn. R. Civ. P. 12.02 [FN 6] See Wright & Miller Federal Practice and Procedure: Civil 3d ...

...Hannan v. Alltel Publishing Co., 270 S.W.3d 1 (Tenn. 2008) [FN 22] Tenn. R. Civ. P. 56.01 See also Pivnick, Tennessee Circuit Court Practice, § 1:21 (describing what is meant by "commencement of the action"). [FN 23] Tenn. R. Civ. P. 56.02 [FN 24] ...

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183. **27 Tenn. Prac. Const. Law § 16:22 (2012 ed.)**
Tennessee Practice Series, Construction Law Handbook Database updated November 2012 Joseph T. Getz and Michael I. Less Chapter 16. Damages and Remedies § 16:22. Collection—Execution

...to execute on the judgment during appeal.[FN 6] For further discussion of stays of execution in Tennessee, see Lawrence A. Pivnick's Tennessee Circuit Court Practice. The common law and Title 26 of the T.C.A. each contribute to the jurisprudence surrounding execution. With that said, however ...

...2d 599 (Tenn. Ct. App. 1994) A writ of execution is also known as a writ of fieri facias. See Pivnick, Tennessee Circuit Court Practice, § 29:1 [FN 2] Hyder v. Butler, 103 Tenn. 289, 52 S.W. 876 (1899) [FN 3] Tenn. R. Civ. P. 62 ...

184. **27 Tenn. Prac. Const. Law § 16:26 (2012 ed.)**
Tennessee Practice Series, Construction Law Handbook Database updated November 2012 Joseph T. Getz and Michael I. Less Chapter 16. Damages and Remedies § 16:26. Collection—Costs

...11] The costs generated by experts preparing for depositions and trial are not recoverable.[FN 12] [FN 1] See 2 Lawrence A. Pivnick, Tennessee Circuit Court Practice, § 27.10 (2007) [FN 2] T.C.A. § 20-12-101 [FN 3] T.C.A. § 20-12-102 [FN 4] T.C.A. § 20 ...

185. **Tn. Criminal Trial Practice § 19:14 (2012-2013 ed.)**
Tennessee Criminal Trial Practice Database updated November 2012 W. Mark Ward By W. Mark Ward Part V. Trial Chapter 19. Preliminary Matters and General Requirements § 19:14. Conduct of attorneys[FN1]

...attitude toward the judge, opposing counsel, witnesses, jurors, and others in the courtroom."FN 6] [FN 1] This section was adapted from Pivnick, Tennessee Circuit Court Practice § 24 27 See also Pivnick, Tennessee Circuit Court Practice § 24 27 [FN 2] State v. Hardison, 705 S.W.2d 684, 686 (Tenn. Crim. App. 1985) [FN 3] Tenn. Sup. Ct ...

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186. **Tn. Criminal Trial Practice § 20:2 (2012-2013 ed.)**
Tennessee Criminal Trial Practice Database updated November 2012 W. Mark Ward By W. Mark Ward Part V. Trial Chapter 20. The Jury § 20:2. Juror qualifications, excuses and postponements

...2009 ed.) (TNPRAC-CRP) Texts and Periodicals — All Law Reviews, Texts and Bar Journals (TP-ALL) Treatises and Practice Aids Pivnick, Tennessee Circuit Court Practice § 25:4 (2009 ed.) Raybin, Tennessee Practice Series Criminal Practice and Procedure § 25:24 (2008-2009 ed.) To ...

187. **Tn. Criminal Trial Practice § 20:5 (2012-2013 ed.)**
Tennessee Criminal Trial Practice Database updated November 2012 W. Mark Ward By W. Mark Ward Part V. Trial Chapter 20. The Jury § 20:5. Voir dire—Generally

...should be cognizant of contamination of the entire panel and move for a mistrial or other corrective measures. See also Pivnick, Tennessee Circuit Court Practice § 25 6 [FN 1] Smith v. State, 205 Tenn. 502, 327 S.W.2d 308 (1959) ("A voir dire examination is ...

188. **Tn. Criminal Trial Practice § 20:6 (2012-2013 ed.)**
Tennessee Criminal Trial Practice Database updated November 2012 W. Mark Ward By W. Mark Ward Part V. Trial Chapter 20. The Jury § 20:6. Challenges for cause—Generally

...and not whether the denial of the challenge for cause to the peremptorily excused juror was proper.[FN 32] See also Pivnick, Tennessee Circuit Court Practice § 25 7 [FN 1] T.C.A. § 22-3-102 [FN 2] T.C.A. § 22-1-104 [FN 3] T.C.A. § 22-3 ...

189. **Tn. Criminal Trial Practice § 22:10 (2012-2013 ed.)**
Tennessee Criminal Trial Practice Database updated November 2012 W. Mark Ward By W. Mark Ward Part V. Trial Chapter 22. Presenting the State's Case § 22:10. Witnesses—Generally

...trial judge's action more probably than not affected the verdict or resulted in prejudice to the judicial system.[FN 37] See Pivnick, Tennessee Circuit Court Practice § 24 10 See also Tennessee Practice Series, Tennessee Pattern Jury Instructions—Criminal Nos. 42.04, 42.04(a) and ...

190. **Tn. Criminal Trial Practice § 22:33 (2012-2013 ed.)**
Tennessee Criminal Trial Practice Database updated November 2012 W. Mark Ward By W. Mark Ward Part V. Trial Chapter 22. Presenting the State's Case § 22:33. Objections to evidence

...Texts and Bar Journals (TP-ALL) Treatises and Practice Aids Hunter, Federal Trial Handbook: Criminal § 39:1 (4th ed.) Pivnick, Tennessee Circuit Court Practice § 24:15 (2009 ed.) The Tennessee Rules of Evidence and prior case law recognize two ways to object to ...

...purposes of appellate review.[FN 11] Proffer of excluded evidence is discussed in § 22:34 , Offers of proof. See also Pivnick, Tennessee Circuit Court Practice § 24 14 [FN 1] Tenn. R. Evid. 103(a)(1) State v. Pilkey, 776 S.W.2d 943, 952–53 (Tenn ...

191. **Tn. Criminal Trial Practice § 22:34 (2012-2013 ed.)**
Tennessee Criminal Trial Practice Database updated November 2012 W. Mark Ward By W. Mark Ward Part V. Trial Chapter 22. Presenting the State's Case § 22:34. Offers of proof

...determine if error was committed in excluding the evidence and also makes it available for post-trial motions. See also Pivnick, Tennessee Circuit Court Practice § 24 16 [FN 1] Tenn. R. Evid. 103(a)(2) [FN 2] Tenn. R. Evid. 103(a), (b) [FN 3] State v ...

192. **Tn. Criminal Trial Practice § 30:6 (2012-2013 ed.)**
Tennessee Criminal Trial Practice Database updated November 2012 W. Mark Ward By W. Mark Ward Part VII. Post-Trial Proceedings Chapter 30. Post-Judgment Motions § 30:6. Motion to correct clerical mistake

...Texts and Treatises (TEXTS) Texts and Periodicals — All Law Reviews, Texts and Bar Journals (TP-ALL) Treatises and Practice Aids Pivnick, Tennessee Circuit Court Practice § 28:7 (2009 ed.) A motion to correct a mere clerical mistake may be made at any time by ...

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193. **1 Tenn. Cir. Ct. Prac. § 3:7 (2012 ed.)**
Tennessee Circuit Court Practice Database updated December 2012 Lawrence A. Pivnick Chapter 3. Subject Matter Jurisdiction § 3:7. Circuit court—Original concurrent civil jurisdiction

...action filed in another Tennessee state court involving the same claim and parties is subject to a motion to dismiss. Pivnick, Tennessee Circuit Court Practice § 3 6 (2) Prior suit pending doctrine, however, did not require the dismissal of an FED action filed by ...

194. **1 Tenn. Cir. Ct. Prac. § 12:4 (2012 ed.)**
Tennessee Circuit Court Practice Database updated December 2012 Lawrence A. Pivnick Chapter 12. Answers and Replies § 12:4. Affirmative defenses

...wrong." Thompson, Breeding, Dunn, Creswell & Sparks v. Bowlin, 765 S.W.2d 743, 744 (Tenn. Ct. App. 1987) (quoting LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 12-4 (2d ed.)). Poole v. Union Planters Bank, N.A., 337 S.W.3d 771 (Tenn. Ct. App. 2010) appeal ...

195. **2 Tenn. Cir. Ct. Prac. § 28:1 (2012 ed.)**
Tennessee Circuit Court Practice Database updated December 2012 Lawrence A. Pivnick Chapter 28. Post-Trial Motions § 28:1. Motion for new trial

...for new trial grounds have been governed by case law. A helpful list can be found in Professor Larry A. Pivnick's treatise, Tennessee Circuit Court Practice § 28:1 (Thomson West). [FN 11] See, e.g., State v. McGhee, 746 S.W.2d 460, 463 n.1 (Tenn. 1988 ...

196. **47-MAR Tenn. B.J. 34**
Tennessee Bar Journal March, 2011 IMPEACHING JURY VERDICTS Donald F. Paine [FNa1]

...for naught. On appeal the original verdicts were reinstated. For collections of appellate opinions see Ward on Tennessee Criminal Trial Practice at §27:7, Pivnick on Tennessee Circuit Court Practice at §26:9, and Tennessee Law of Evidence at §6.06. [FNa1] . DONALD F. PAINE is a past president of...

West 2013 No Claim to Orig. U.S. Govt. Works

197. **46-NOV Tenn. B.J. 30**
Tennessee Bar Journal November, 2010 FEDERAL CIVIL PROCEDURE AMENDMENTS Donald F. Paine [FNa1]

...Rule of Civil Procedure 8.03 has 20. In either jurisdiction, however, an unlisted affirmative defense can be asserted. Professor Pivnick in Tennessee Circuit Court Practice (2010) cites Thomasson v. Thomasson, 755 S.W.2d 799 (Tenn. 1988) (statutory defenses to allegations of adultery or cruel and...

198. **77 Tenn. L. Rev. 305**
Tennessee Law Review Winter, 2010 TRICK OR TREAT? SUMMARY JUDGMENT IN TENNESSEE AFTER HANNAN V. ALLTEL PUBLISHING CO. Judy M. Cornett [FNa1]

...706620, at *3 (Tenn. Ct. App. Dec. 19, 1994) (bare assertion of lack of evidence is insufficient). [FN18] . Lawrence A. Pivnick, Tennessee Circuit Court Practice § 27:5, at 362 (2010); see Allstate Ins. Co. v. Hartford Accident & Indem. Co., 483 S.W.2d 719, 719...

199. **46-JAN Tenn. B.J. 29**
Tennessee Bar Journal January, 2010 GENERAL SESSIONS COURT PRACTICE IN TENNESSEE: BRINGING AND DEFENDING CIVIL LAWSUITS BY LAWRENCE A. PIVNICK SELF-PUBLISHED | $90 | 237 PAGES | 2009 Donald F. Paine

...book for judges, lawyers, and pro se litigants in General Sessions civil trials. You are (or should be) familiar with Pivnick on Tennessee Circuit Court Practice , an indispensable treatise I reviewed in the June 2004 issue of this Journal Larry exhibits the same blend of scholarship...

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200. **40 U. Mem. L. Rev. 485**
University of Memphis Law Review Winter 2009 DISCOVERY—THOMAS v. OLDFIELD: PROTECTING THE NECESSARY BOUNDARIES OF DISCOVERY WHILE RECOGNIZING THE REALITIES OF MODERN LITIGATION Jason G. McCuistion [FNa1]

...02767-COA-R9-CV, 2007 WL 3306759, at *4-*5 (Tenn. Ct. App. Nov. 7, 2007) [FN80] . 1 LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 18.3 n.44 (2009). In 1994, the Commission on Alternative Dispute Resolution also recommended to the Tennessee Supreme...

201. **39 U. Mem. L. Rev. 85**
University of Memphis Law Review Fall, 2008 ERRORS, OMISSIONS, AND THE TENNESSEE PLAN Brian T. Fitzpatrick [FNa1]

...n.5 (Tenn. 2000) (emphasis added and noting that "[u]npublished intermediate court opinions have persuasive force" [FN89] . 2 LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 30:20 (2008 ed.). [FN90] . See Fitzpatrick, supra note 1, at 489 n.143. [FN91] . See id. [FN92] . See...

202. **59 Mercer L. Rev. 553**
Mercer Law Review Winter 2008 COPYRIGHT INFRINGEMENT LITIGATION AND THE EXERCISE OF PERSONAL JURISDICTION WITHIN DUE PROCESS LIMITS: JUDICIAL APPLICATION OF PURPOSEFUL AVAILMENT, PURPOSEFUL DIRECTION, OR PURPOSEFUL EFFECTS REQUIREMENTS TO FINDING THAT A PLAINTIFF HAS ESTABLISHED A DEFENDANT'S MINIMUM CONTACTS WITHIN THE FORUM STATE Daniel E. Wanat [FNa1]

...Ins. Cos., 4 F.3d 452, 455 (6th Cir. 1993) Tennessee's long-arm statute's application is examined in Lawrence A. Pivnick, Tennessee Circuit Court Practice §§ 4:3-4:5 (Thompson West 2007). [FN88] Bridgeport Music, 327 F.3d at 477 [FN89] Id. at 478...

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203. **40-JUN Tenn. B.J. 34**
Tennessee Bar Journal June, 2004 TENNESSEE CIRCUIT COURT PRACTICE BY LAWRENCE A. PIVNICK • THOMSON WEST • $239 • 1,509 PAGES + TABLES AND INDEX • 2003 Donald F. Paine [FNa1]

...40-JUN Tenn. B.J. 34 2004 WL 1329963 TENNESSEE BAR JOURNAL Tennessee Bar Journal June, 2004 Department Book Review TENNESSEE CIRCUIT COURT PRACTICE BY LAWRENCE A. PIVNICK • THOMSON WEST • $239 • 1,509 PAGES + TABLES AND INDEX • 2003 Donald F. Paine [FNa1] Copyright © 2004 by Tennessee Bar Association; Donald...

204. **69 Tenn. L. Rev. 175**
Tennessee Law Review Fall, 2001 THE LEGACY OF BYRD V. HALL: GOSSIPING ABOUT SUMMARY JUDGMENT IN TENNESSEE Judy M. Cornett [FNa1]

...219. [FN104] . Commentary on Byrd includes Banks & Entman, supra note 87, § 9-4(m) , at 705-09; Lawrence A. Pivnick, Tennessee Circuit Court Practice § 27.5, at 858-59, 867-68 n.38 (4th ed. 1995); Entman, supra note 6, at 218; James...

205. **67 Tenn. L. Rev. 653**
Tennessee Law Review Spring, 2000 PREJUDICE, CONFUSION, AND THE BIFURCATED CIVIL JURY TRIAL: LESSONS FROM TENNESSEE Steven S. Gensler [FNa1]

...all the issues in a case, whether those issues are presented in a unitary or bifurcated format. See LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 22-3 n.7 (1999). [FN20] Ennix , 703 S.W.2d at 139 [FN21] Id. (emphasis added). The court erected...

206. **30 Cumb. L. Rev. 493**
Cumberland Law Review 1999-2000 A REVIEW OF DAVID J. LANGUM & HOWARD P. WALTHALL, FROM MAVERICK TO MAINSTREAM: CUMBERLAND SCHOOL OF LAW, 1847-1997 Lewis Laska [FNaaa1]

...Publishing Co. 1980). The second, written by a University of Memphis law professor, seems to have gained primacy. Lawrence A. Pivnick, Tennessee Circuit Court Practice (Harrison Publishers, 1999). [FN8] . Sendator John Bell, An Address Before the Law Department of Cumberland University, at Lebanon, 44 (October...

207. **35-AUG Tenn. B.J. 25**
Tennessee Bar Journal August, 1999 BOOK REVIEW: TENNESSEE CIVIL PROCEDURE Donald F. Paine [FNa1]

...a partner with Paine, Tarwater, Bickers, and Tillman in Knoxville and a regular columnist of the Journal [FN1] . Lawrence A. Pivnick, Tennessee Circuit Court Practice (Harrison Company; 1998 Edition; Norcross, Georgia; 800-241-3561). [FN2] . See Tenn. Code Ann. §24-2-106 and Hinkle v...

208. **35-JUL Tenn. B.J. 20**
Tennessee Bar Journal July, 1999 PAINE ON PROCEDURE FEDERAL JUDGES AS 13TH JURORS Donald F. Paine [FNa1]

...and Procedure: Civil §2806 , collects the widely divergent precedents. [FN2] Wright, Law of Federal Courts (5th ed. 1994) 678 [FN3] . Pivnick, Tennessee Circuit Court Practice (1998) 1040...

209. **23 Mem. St. U. L. Rev. 105**
Memphis State University Law Review Fall, 1992 THE NONPARTY TORTFEASOR June F. Entman [FNa1]

...147, 156-58 (Kan.1988) [FN50] . See supra note 44. [FN51] Restatement (Second) of Judgments § 17 (1982) ; Lawrence A. Pivnick, Tennessee Circuit Court Practice § 27-13 (2d ed. 1986). [FN52] Hime v. Sullivan, 221 S.W.2d 893, 896 (Tenn.1949) Restatement (Second) of...

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210. **59 Tenn.L.Rev. 325**
Tennessee Law Review Winter, 1992 TENNESSEE'S LONG-AWAITED ADOPTION OF PROMISSORY FRAUD: STEED REALTY v. OVEISI R. Alston Hamilton

...affirms the result but not necessarily the reasoning of the intermediate appellate court. See Request for Comments, supra; Lawrence A. Pivnick & James C. Schaeffer, TENNESSEE CIRCUIT COURT PRACTICE § 30-12 (3d ed. 1991) [hereinafter Pivnick]; Adams v. State, 547 S.W.2d 553, 556 (Tenn. 1977) Clingan v. Vulcan Life Ins. Co., 694 S.W.2d 327...

211. **57 Tenn. L. Rev. 199**
Tennessee Law Review Winter, 1990 MOVING TO COMPARATIVE NEGLIGENCE IN AN ERA OF TORT REFORM: DECISIONS FOR TENNESSEE Carol A. Mutter [FNa1]

...be set aside only if there is no material evidence to support the verdict. TENN.R.APP.P. 13(d) See generally L. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE (2d ed. 1986), § 30-7 (scope and standard of review of both jury and nonjury cases). [FN98] Howard v ...

...13(d), TENN.R.APP.P . for nonjury trials); COINER, TENNESSEE LAW OF DAMAGES § 1.6 (1988 ed.), at 16-18; L. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE, §§ 28-2, 28-2.1, at 126-28 (2d ed. 1986 & Supp.1988). [FN108] . See supra notes 35-36...

212. **55 Tenn. L. Rev. 405**
Tennessee Law Review Spring, 1988 THE EXCLUSIVENESS OF AN EMPLOYEE'S WORKERS' COMPENSATION REMEDY AGAINST HIS EMPLOYER Joseph H. King, Jr. [FNa]

...employer sought to have the court consider were 'not capable of ready demonstration.' Id. at 355. [FN575] See generally L. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE §§ 7-7, 27-13, 27-14 (2d ed. 1986). The defense of judicial estoppel may also arise in these...

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Offering Objectionable Evidence — Does an Adversary's Failure to Object Make the Practice Right?

By Lawrence A. Pivnick

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In Trial Advocacy classes in American law schools, students are taught that in preparation for trial, the proponents of evidence should determine whether or not the evidence they plan to offer at trial is probably admissible under state statutes, rules of court, and rules of ethics. Further, students are taught that clearly inadmissible evidence should not be offered at trial, and that an attorney, who has a good faith, reasonable belief that evidence may only "possibly" be admissible, should address the question of admissibility to the trial judge at a pretrial conference, by motion in limine before trial, or at a jury-out hearing during trial, before a witness testifies on direct or cross. Most leading legal commentators on trial advocacy have opined that the intentional violation of rules of evidence is ethically improper.[1] The American College of Trial Lawyers has concurred by stating: "A lawyer should not attempt to get before the jury evidence which is improper. In all cases in which a lawyer has any doubt about the propriety of any disclosures to the jury, a request should be made for leave to approach the bench and obtain a ruling out of the jury's hearing, either by propounding the question and obtaining a ruling or by making an offer of proof."[2]

But not so, say a substantial number of attorneys and judges, and a few academics who opine that ethical rules and principles are subordinate to rules of evidence and that rules of evidence are merely adversarial tools that may be used by lawyers as they see fit to best present their cases.[3] Thus, many trial

attorneys and trial and appellate courts, in furtherance of the American "adversarial system of justice," have endorsed, as a "rule of evidence," the "raise or waive rule" under which evidentiary rules excluding inadmissible irrelevant and hearsay evidence do not become applicable until a timely and specific objection is raised by adversary counsel and sustained by the trial judge.[4] In reliance on this rule, attorneys for plaintiffs in personal injury cases where the plaintiff resides in a distant state have successfully offered into evidence, because of the absence of an objection, unsworn written statements of the plaintiff or its witnesses, affidavits of the plaintiff or its witnesses, and letters from experts, all of which are generally inadmissible as hearsay,[5] in the absence of a hearsay exception.[6] Attorneys for plaintiffs have also offered as evidence in support of their case in chief interrogatories that have been signed by the plaintiff, not the opposing party, even though this practice is contrary to the Tennessee Rules of Civil Procedure.[7] While actions on sworn account are authorized in contract actions under the *Tenn. Code Ann.*,[8] some plaintiffs' attorneys offer "sworn statements of account" in tort actions that assert factual allegations of fault of the defendant and state that the defendant owes the plaintiff specified damages on account. These practices are most egregious when used in cases that involve parties that are not represented by counsel.

This article addresses the scope of "the rule" that inadmissible evidence becomes admissible when a timely specific objection has not been raised by an adversary party (the "raise or waive rule"). The author contends that evidentiary, procedural, practical and ethical limitations, which have been developed in furtherance of the administration of justice, caution against an attorney's reliance on admitting evidence through the "raise or waive" rule, and suggests that an attorney is required or should voluntarily self-police his or her conduct and refrain from offering evidence that he or she does not reasonably believe is admissible absent the use of "the rule," particularly when the adversary party is not represented by counsel.

Overview of the Rules of Evidence

The purposes of the Tennessee Rules of Evidence, and counterpart federal and state rules of evidence, include the securing of fairness in administration, elimination of unjustifiable expense, and delay, and promotion of the growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined.[9] Most importantly, the rules provide that: "The court shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel."[10] The rules further provide that all relevant evidence is admissible, except as otherwise provided by rules of exclusion contained within the Constitution, legislative acts, or rules of evidence and other rules prescribed by the supreme court pursuant to statutory authority,[11] and that "[e]vidence which is not relevant is not admissible."[12] Similarly, hearsay is not admissible except as provided by these rules of evidence or otherwise by law.[13] While many courts have applied a "raise or waive" rule, as discussed in Part III, infra, there is no express provision in the Tennessee Rules of Evidence that provides that absent a timely specific objection, evidence is automatically admissible.

"[E]videntiary, procedural, practical and ethical limitations ... caution against an attorney's reliance on admitting evidence through the 'raise or waive' rule, and suggest that an attorney is required or should voluntarily self-police his or her conduct and refrain from offering evidence that he or she does not reasonably believe is admissible."

The 'Rule' that Inadmissible Evidence Becomes Admissible When a Timely, Specific Objection Is not Raised

The American legal system is often referred to as an "adversary system," wherein "partisan attorneys representing the opposing parties exercise primary control over the course of pretrial discovery and evidentiary presentation."[14] The adversary system presupposes that when every party to an action is represented by efficient, competent, diligent, and zealous counsel, the interests of the parties will be best served, and that judicial intervention in the process regarding the admissibility of evidence, particularly in jury trials, should be minimal.

The Tennessee Supreme Court in *State v. Smith*,[15] has held that a trial court generally has no duty to exclude evidence or to provide a limiting instruction when a case is tried to a jury, in the absence of a timely objection, and a party may consent to the admissibility of evidence that is otherwise prohibited by the Tennessee Rules of Evidence, so long as the proceedings are not rendered so fundamentally unfair as to violate due process of law. In that case, the Supreme Court noted that this same principle is reflected today in Tenn. R. Evid. 103(1), which requires that a timely objection be made to preserve an error, and in Tenn. R. App. P. 36(a), which requires that a party take any action reasonably available so as to prevent an error or to mitigate its harm. In another Tennessee stat

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se, *State v. Robertson*,[16] the court stated ıt when a party does not object to the missibility of the evidence, the idence becomes admissible notwith- nding any other Rule of Evidence to : contrary, and the jury may consider : evidence for its "natural probative ects as if it were in law admissible." her state and federal courts generally : in agreement that in truly adversarial ses where all parties are represented by mpetent counsel, the practice of ering probably irrelevant and/or inad- ssible evidence — even though such dence is subject to exclusion upon jection — is proper.[17] An important tual predicate to application of the ise or waive" rule in excluding dence absent an objection is whether : nonobjecting party has in fact aived" the objection by its silence. ιere a party is represented by an ɔrney, a principal/agent relationship sts and an agent, if authorized, may ive the principal's rights. Further, a l court may interpret and treat an ɔrney's failure to object as an implied ver, provided the attorney is in a ition and has sufficient knowledge t its inaction may be treated as an entional voluntary waiver of its prin- al's rights.[18] A "waiver" is generally ined as an intentional, voluntary nquishment of a known right."[19] nessee courts have held that, in order a party to waive a legal right, there st be a clear, unequivocal, and decisive act of the party showing such a purpose.[20] Further, the law will not presume a waiver, and the party claiming the waiver has the burden of proving it by a preponderance of the evidence.[21] Waiver may be proved by "express declaration; or by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by a course of acts and conduct, or by so neglecting and failing to act, as to induce a belief that it was the party's intention and purpose to waive.[22] Inaction in the absence of knowledge and intent should not bear the consequences of a waiver of rights as may be justified when a party has counsel.

"It is not only the trial court's right but its duty to see that only proper and relevant evidence [is] admitted.

The "raise or waive" rule is also inapplicable where a trial judge, in his or her discretion to control the propriety, scope, manner, order and presentation of evidence at trial, chooses to exclude evidence as irrelevant or otherwise improper for admission at trial.[23] Some courts have even gone so far as to state: "It is not only the trial court's right but its duty to see that only proper and relevant evidence [is] admitted."[24] Further, a trial court has a duty to limit and control attorney misconduct,[25] a rational limitation on the wide latitude generally given by the trial court to counsel.[26]

In *Mercer v. Vanderbilt University Inc.*,[27] the Tennessee Supreme Court recognized that a trial judge's decision to admit or exclude evidence will be overturned on appeal only when there is an abuse of discretion, i.e., "Only when [the trial] court applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." Further, in *State v. Saylor*,[28] the Supreme Court held that trial courts in their determinations of whether to admit or exclude evidence are generally accorded a wide range of latitude and will only be overruled on appeal when there is a showing of abuse of discretion.

The Tennessee Rules of Evidence both expressly and implicitly recognize a trial judge's duty to exclude inadmissible evidence on her own initiative. Of primary importance, Rule 611 provides that: "The [trial] court shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel."[29] Rule 611 is bolstered by other rules requiring that the Tennessee Rules of Evidence "shall be construed to secure the just, speedy, and inexpensive determination of proceedings,"[30] and that "evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."[31] The Tennessee Rules of Evidence also expressly provide that a trial court "shall determine" preliminary questions, other than relevance conditioned on fact,[32] concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence;[33]

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615-385-9911 • jdkitch@edge.net
References available upon request.

and a trial judge may exclude expert evidence, upon a finding of unreliability in its role as "gatekeeper."[34] In addition, the Tennessee Rules of Evidence limit the applicability of the "raise or waive rule" when the impropriety of a question and/or answer offered as evidence is "apparent";[35] and when the admission of evidence involves "plain error,"[36] in either a criminal[37] or a civil case,[38] which clearly and obviously affects a substantial right of an appellant and the error has seriously affected the fairness, integrity or public reputation of judicial proceedings.[39]

The "raise or waive rule" is also inapplicable where a proponent has engaged in conduct in violation of a court order[40] or has engaged in conduct in violation of court rules of procedure, which are intended to further the just, speedy and inexpensive determination of every action.[41] Further, the rules require attorneys, in making factual and legal presentations to a trial court to certify to the best of their knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that the evidence offered is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and that allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.[42] Other court rules require that attorneys act in good faith.[43]

It has also become the de facto practice of many trial judges not to apply the "raise or waive" rule in nonjury bench trials. This practice is based on a recognition by the judge that he or she is legally trained, and, unlike lay jurors, can hear, yet disregard or give little weight to, "inadmissible evidence" that is not relevant, reliable, or right.[44] In non-jury tried cases, the proponent who relies on such low-grade evidence to prove its substantive case, may subject itself to an order of involuntary dismissal at the end of its case in chief in a non-jury case.[45] In such cases, the judge is doing the proponent a service by holding that its evidence is inadmissible despite the silence of adversary counsel.

The Model Rules of Professional Conduct and Offering Inadmissible Evidence

The focus of the Model Rules of Professional Conduct on the furtherance of the administration of justice suggests that an attorney may not offer inadmissible evidence at trial, in reliance on the "raise or waive" rule. Alternatively, the Tennessee Model Rules of Professional Conduct, in furtherance of the administration of justice, encourage attorneys to voluntarily self-police their conduct and not offer inadmissible evidence.

In addition to proscribing attorneys from knowingly offering fraudulent,[46] false,[47] or perjured testimony,[48] and from knowingly disobeying an obligation under the rules of a tribunal,[49] the Model Rules of Professional Conduct proscribe an attorney from offering inadmissible evidence at trial by providing that a lawyer shall not, in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence.[50] The rules further provide that it is professional misconduct for a lawyer to "violate or attempt to violate the Rules of Professional Conduct"[51] or "engage in conduct that is prejudicial to the administration of justice."[52] Prior to the adoption of the Tennessee Rules of Professional Conduct, the Tennessee Code of Professional Responsibility specifically provided: "In appearing in his professional capacity before a tribunal, a lawyer shall not : (1) state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be admissible evidence ...[53] (7) intentionally or habitually violate any established rule of procedure or of evidence."[54] It has also been held that an attorney's attempt to offer inadmissible evidence and then withdrawing it if there is an objection

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falls within the prohibition against alluding to anything the attorney knows is irrelevant or not supported by admissible line evidence.[55]

Rule 1.1 of the Model Rules of Professional Conduct provides that a lawyer's duty of competent representation to a client requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation,[56] and Rule 1.3 provides that a lawyer shall act with reasonable diligence in representing a client.[57] These rules, when read in conjunction with Rule 3.4(c)(1), logically lead to the conclusion that a trial lawyer, in advance of presenting evidence at trial, has a duty to reasonably assure himself that evidence he offers is relevant and at least arguably admissible, and that breaching this duty is unethical.[58] As attorneys may not "knowingly disobey an obligation under the rules of a tribunal"[59] and the rules of a tribunal logically include its rules of evidence, the offering of inadmissible evidence would appear to be in knowing disobedience of court rules and, therefore improper.

Some commentators argue, however, :hat intentional evidentiary violations ıre invited by the duty of zealous advo- :acy.[60] For example, it has been argued hat "[i]n the absence of broader ethical ›rinciples, lawyers are drawn to the ›osition that anything that might ncrease their chances of winning that is ıot expressly prohibited, is permitted — ven required."[61] Another commentator has noted that attorney misconduct has "become a staple in American prosecutions" and "shows no sign of abating or being checked by institutional or other sanctions."[62] In contrast, one commentator has stated that although attorneys face great temptation to cross the limits of acceptable behavior in order to win a case at the expense of their ethical responsibilities, a claim that such improper behavior is merely "zealous advocacy" will not justify it."[63] Another leading commentator on trial advocacy has stated that the overreaching ethics of evidence bears upon the duty of zealous advocacy, and that under moral principles guiding members of an honorable profession, attorneys are prevented from presenting inadmissible evidence.[64]

In 2010, both the Tennessee Supreme Court and U.S. Supreme Court addressed professional responsibility in trial practice. The Tennessee Supreme Court has stated: "One truth is that lawyers are not mercenaries but rather are professional advocates and counselors. While we may have different views of the practice of law, we subscribe to Chief Justice Cardozo's view that '[m]embership in the bar is a privilege burdened with conditions. [An attorney is] received into that ancient fellowship for something more than private gain. [He or she] becomes an officer of the court, and like the court itself, an instrument or agency to advance the ends of justice."[65] The U.S. Supreme Court concurs, stating: "An attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and the standards of professional conduct."[66]

Even if one were to accept the proposition that the use of the "raise or waive rule" is not an evidentiary violation, or if it were a violation, that it was invited by the duty of zealous advocacy, an argument can be made that attorneys, in meeting their duty to further the "interests in the administration of justice" should self-police and voluntarily refrain from offering evidence that is only admissible because of the "raise or waive rule," in cases involving unrepresented parties.

It is axiomatic in the United States that all persons are entitled to equal access to justice, as guaranteed by the Tennessee Constitution,[67] and are entitled to fair and equal treatment by the courts.[68] Ideally, all persons not only will have the right to walk into the courthouse but will also have representation by competent and effective counsel, so that the American adversarial system of justice, under limited control by fair and impartial judges, will expeditiously and fairly result in truth and justice. In civil cases where indigent parties are unrepresented, not by choice but due to inadequate finances and inability to procure counsel through diligent reasonable means, while their adversaries are represented by licensed attorneys, courts usually announce that they "must not excuse unrepresented litigants from complying with the same substantive and procedural rules that represented parties are expected to observe," although several Tennessee cases, to a limited extent, have accommodated unrepresented parties by applying less stringent standards to pleadings filed by unrepresented parties than are applied to pleadings prepared by an attorney[69] and have provided unrepresented parties with extensions of time to respond to motions and discovery.[70] Absent the adoption by

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Tennessee courts of a special evidentiary rule applicable to cases involving self-represented litigants, as in Massachussettes[71] and has been suggested by several commentators,[72] the author suggests that in the furtherance of "the interest in the fair administration of justice," attorneys voluntarily forego the use of the "raise or waive rule" in cases involving unrepresented parties.

Conclusion

In truly adversarial proceedings where all parties are represented by competent counsel, it is unlikely that an objection to unfairly prejudicial inadmissible evidence will not be raised unless waiver is intended. There is a real danger, however, that unfairly prejudicial, otherwise inadmissible evidence may be offered by a represented party and admitted against an unrepresented party, who is not aware of its right to object, under the "raise or waive rule." While a trial judge has discretion to exclude inadmissible evidence absent an objection, the author suggests that the better trial practice, in the furtherance of the administration of justice, is for an attorney to voluntarily self-police his or her conduct and refrain from offering evidence that he or she does not reasonably believe is admissible absent the use of "the raise or waive rule," particularly in cases where the adversary party is not represented by counsel. In summary, "two wrongs should not make it right."

LAWRENCE A. PIVNICK is a professor of law at the University of Memphis Law School, where he teaches trial advocacy, Tennessee civil practice and procedure, and evidence courses. He received his law degree from the University of Florida and LL.M. from New York University. He has been a member of the Tennessee bar since 1973. He is the author *Tennessee Circuit Court Practice* (updated yearly since 1980) and *General Sessions Practice in Tennessee: Bringing and Defending Civil Lawsuits* (2009).

Notes

1. See J. Alexander Tanford, *The Trial Process: Law, Tactics and Ethics*, fourth edition (LexisNexis 2009), pages 213-14; Robert E. Keeton, *Trial Tactics and Methods*, second edition, Little Brown and Company (1973), page 58; Steven Lubet, *Modern Trial Advocacy: Analysis and Practice*, Law School Edition (3d ed. NITA 2010), pages 70 and 209-210; Jeans, *Trial Advocacy*, second edition (West 1993), section 2:14, pages 29-31).

2. Am. College of Trial Lawyers, Annotated Code of Trial Conduct 18(g) (Oct. 2005).

3. Daniel D. Blinka, "Ethics, Evidence, and Modern Adversary Trial," *Georgetown Journal of Legal Ethics* 1,11 (Winter, 2006). See also, A. Darby Dickerson, The Law and Ethics of Civil Dispositions, 57 *Md. L. Rev.* 273, 298–99 (1998) (arguing that failure to comply with procedural rules could constitute an ethics violation).

4. Daniel D. Blinka, "Ethical Firewalls, Limited Admissibility, and Rule 703," 76 *Fordham L. Rev.* 1229, 1238–39 (2007).

5. Tenn. R. Evid. 802, 802.

6. Tenn. R. Evid. 803, 804.

7. See Tenn. R. Civ. P. 33.01. "Any party may serve upon any other party written interrogatories ... ."

8. *Tenn. Code Ann.* Section 24-5-107.

9. Tenn. R. Evid. 101.

10. Tenn. R. Evid. 611(a).

11. Tenn. R. Evid. 402.

12. Tenn. R. Evid. 402.

13. Tenn. R. Evid. 802.

14. Carlson, Imwinkelreid, Konka, and Strachan, *Evidence: Teaching Materials for an Age of Science and Statutes*, 4th ed. (Michie 1997, p. 2).

15. *State v. Smith*, 24 S.W.3d 274 (Tenn. 2000).

16. *State v. Robertson*, 130 S.W.3d 842 (Tenn. Crim. App. 2003).

17. *State v. York*, 211 N.W.2d 314, 317-8 (Iowa 1973) quoting *McCormick on Evidence*, (second ed.) section 54 : "(A) failure to make a sufficient objection to evidence which is incompetent waives any ground of complaint as to the admission of the evidence." See *United States v. Stavroff*, 149 F.3d 478, 482 (6th Cir. 1998). "The trial judge should not assume that every failure to object is the result of a failure to recognize the possible objection that might be made." See also, *Moxley v. State*, 109A2d 370 (Md. 1954); *People v. Viray*,36 Cal.Rptr.3d 693 (Cal. App.6thDist. 2005).

18. *Freeman Management Corp. v. Shurgard Storage Centers Inc.*, 2007 WL 1556604 (M.D.Tenn. 2007) citing *Dallas Glass of Hendersonville Inc. v. Bituminous Fire & Marine Ins. Co.*, 544 S.W .2d 351, 354 (Tenn.1976); *Baird v. Fidelity-Phenix Fire Ins. Co.*, 162 S.W.2d 384, 389 (Tenn.1942).

19. *Id.* citing *Ky. Nat'l Ins. Co. v. Gardner*, 6 S.W.3d 493, 498-99 (Tenn.Ct.App.1999).

20. *Id.*

21. *Id.*

22. *Freeman Management Corp. v. Shurgard Storage Centers Inc.*, 2007 WL 1556604 (M.D.Tenn. 2007) citing *Koontz v. Fleming*, 65 S.W.2d 821, 825 (Tenn. Ct. App.1933);

23. *State v. Harris*, 839 S.W.2d 54, 72 (Tenn.1992); see also *State v. Hutchinson*, 898 S.W.2d 161, 172 (Tenn.1994).

24. *Weaver v. United States*, 374 F.2d 878, 882 (5th Cir. 1967).

25. *Reetz v. Kinsman Marine Transit Co.*, 330 N.W.3d 638 (Mich. 1982).

26. *Sparks v. State*, 563 S.W.2d 564, 569-70 (Tenn. Crim. App. 1978).

27. *Mercer v. Vanderbilt University Inc.*, 134 S.W.3d121, 131 (Tenn. 2004). See also, *People v. Jackson*, 250 Ill.App.3d 192, 620 N.E.2d 1239 (1993); *Commonwealth v. Haley*, 363 Mass. 513, 518 (1973).

28. *State v. Saylor*, 117 S.W.3d 239, 247 (Tenn. 2003).

29. Tenn. R. Evid. 611(a).

30. Tenn. R. Evid. 102..

31. Tenn. R. Evid. 403.

32. Tenn. R. Evid. 104(b).

33. Tenn. R. Evid. 104(a).

34. Tenn. R. Evid. 702 and 703. See 38. *McDaniel v. CSX Transportation Inc.*, 955 S.W.2d 257 (Tenn. 1997); *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 589 (1993)..

35. Tenn. R. Evid. 103(a)(1).

36. Tenn. R. Evid. 103(d) and Fed. R. Evid. 103(d). See *State v. Ubaldi*, 462 A.2d 1001, 1009 (Conn. 1983); *People v. Rodriguez*, 136 P.2d 626, 629 (Cal.App. 2 Dist. 1943). In contrast, see *Marshall v. United States* 409 F.2d 925, 927 (9th Cir. 1969); *State v. Wolery*, 46 Ohio St. 2d 316, 327 (Ohio 1976).

37. See *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993);. *State v. Rodriguez*, 254 S.W.3d 361 (Tenn. 2008), discussing Tenn. R.Crim. P. 52(a) and Tenn. R.App. P. 36(b).

38. See e.g., *Dixon v. Crete Medical Center*, 498 F.3d 837, 849-50 (8th Cir 2007) (a medical malpractice action) and *Wiser v. Wayne Farms*, 411 F.3d 923, 927 (8th Cir.2005).

39. See *Turner v. State*, 72 Tenn. 206 (1879). See also, *State v. Ubaldi*, 462 A.2d 1001, 1009 (Conn. 1983).

40. *Price v. State*, 137 P. 736 (Okla. 1914); *Onstad v. Wright*, 54 S.W.3d 799, 807-8 (Tex. App. Texarkana 2001) *U.S. v. Baresh*, 790 F.2d 392, 402 (5th Cir. 1986). See *State Farm and Casualty Company v. Rodriguez*, 88 S.W.3d 313 (Tex. App. San Antonio 2002); *Bruce v. State*, 375 N.E.2d 1042, 1066 (Ind. 1978); *People v. McManus*, 4 Cal.Rptr. 642, 651 (Cal.App.1960) citing *Weaver v. United States*, 374 F.2d 878, 882 (5th Cir. 1967); *Kamali v. Hawaiian Elec. Co.*, 504 P.2d 861, 863 (Haw. 1972); *Vachon v. Pugliese*, 931 P.2d 371, 380–81 (Alaska 1996); *United States v. Clarke*, 390 F. Supp. 2d 131, 136 (D. Conn. 2005); *Heye Farms v. Nebraska*, 251 Neb. 639, 558 N.W.2d 306, 326 (1997). See McCormick, *Law of Evidence*, Section 55 (5th ed. 1999): "The judge should exercise his discretionary power to intervene only when the evidence is irrelevant, unreliable, misleading, or prejudicial, as well as inadmissible."

41. Tenn. R. Civ. P. 1.

42. Tenn. R. Civ. P. 11.02.

43. Tenn. R. Civ. P. 37 and 56.08. See also, Tenn. R. Civ. P. 17.03.

44. *Kesterson v. Varner* 172 S.W.2d 556, 565-6 (Tenn. Ct. App. 2005); *Vachon v. Pugliese*, 931 P.2d 371, 380–81 (Alaska 1996). See also, *State v. Spurlock*, 874 S.W.2d 602, 617 (Tenn. Crim. App. 1993).

45. Tenn. R. Civ. P. 41.02(2).

46. Tenn. Model Rules of Prof'l Conduct R. 3.3(d), 8.4 (c).

47. Tenn. Model Rules of Prof'l Conduct R.3.3(b), (c), (d), 3.4(b).

48. Tenn. Model Rules of Prof'l Conduct R.

49. Tenn. Model Rules of Prof'l Conduct R. 3.4.

50. Tenn. Model Rules of Prof'l Conduct R. 3.4. See William H. Fortune et al., *Modern Litigation and Professional Responsibility Handbook: The Limits of Zealous Advocacy*, 379–81 (1996) (noting that an attorney may not allude to inadmissible evidence by deliberately asking an improper question or commenting on the court's ruling).

51. Tenn. Model Rules of Prof'l Conduct R. 8.4(a).

52. Tenn. Model Rules of Prof'l Conduct R 8.4(d). See *Cherry Creek Nat. Bank v. Fidelity & Casualty Co. of New York*, 202 N.Y.S. 611, 614 (N.Y.A.D. 4 Dept.1924).

53. See Tenn. Model Code of Prof'l Conduct, DR 7-106(c)(1); Restatement (Third) of Law Governing Law. §107 (2000). See also *U.S. v. Collier* 68 *Fed. Appx.* 676, 678 (6th Cir. 2003); *U.S. v. Martinez-Medina* 279 F.3d 105, 118 -119 (1st Cir. 2002).

54. ABA Model Code of Professional Responsibility, EC 7-25; DR-106(C)(7). See also A. Darby Dickerson, "The Law and Ethics of Civil Dispositions," 57 *Md. L. Rev.* 273, 298–99 (1998).

55. See *In re McDonald*, 609 N.W.2d 418, 426 (N.D. 2000) (stating that withdrawing improper evidence after a challenge does not cure an ethical violation).

56. Tenn. Model Rules of Prof'l Conduct R. 1.1.

57. Tenn. Model Rules of Prof'l Conduct R. 1.3.

58. See Tenn. Model Rules of Prof'l Conduct R. 3.1 cmt. (1983); Tenn. Model Rules of Prof'l Conduct R. 8.4(c); Tenn. Model Rules of Prof'l Conduct R. 3.3(c); Restatement (Third) of the Law § 107 (2000).

59. Tenn. Model Rules of Prof'l Conduct R.3.4(c).

60. Daniel D. Blinka, "Ethical Firewalls, Limited Admissibility, and Rule 703," 76 *Fordham L. Rev.* 1229, 1238–39 (2007).

61. Tenn. Model Code of Professional Responsibility, Canon 7: "A Lawyer Should Represent a Client Zealously within the Bounds of the Law." See Monroe H. Freedman, *Understanding Lawyers' Ethics* (1990) (discussing the concept of zealous advocacy).

62. J. Alexander Tanford, "The Ethics of Evidence," 25 *Am. J. Trial Advoc.* 487, 491 (2002).

63. Bennett L. Gershman, *Prosecutorial Misconduct* §11:1, at 11–3 (2d ed. 2001).

64. J. Alexander Tanford, "The Ethics of Evidence," 25 *Am. J. Trial Advoc.* 487, 554–555 (2002).

65. *Flowers v. Board of Professional Responsibility*, 314 S.W.3d 882, 897 (Tenn. 2010).

66. *Jerman v. Carlisle*, 130 S.Ct. 1605, 16 (2010).

67. Tenn. Const. Art. 1, Section 17.

68. U.S. Const. Amendment 14.

69. *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003); *Marceaux v. Thompso* 212 S.W.3d 262, 267 (Tenn. Ct. App. 2006

70. *Hessmer v. Miranda*, 138 S.W.3d 241 (Tenn. Ct. App. 2003).

71. *Commonwealth v. Sapoznik*, 28 Mass. App. Ct. 236 (1990), citing *Faretta v. Califor* 422 U.S. 806, 834-835 n.46 (1975). *Interna tional Fidelity Ins. Co. v. Wilson*, 387 Mass. 8 847 (1983); *Commonwealth v. Barnes*, 399 M 385 , 392 (1987).

72. Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented L gants* (American Judicature Society) . See als G. Andrew Bringham and Thomas B. Norris Jr., *A Tennessee General Sessions Handbook*, 7 (2009).

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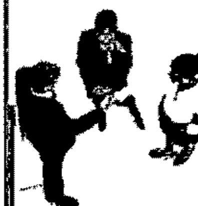

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Tennessee Handbook Series

TENNESSEE CIRCUIT COURT PRACTICE

Volume 2

by Lawrence A. Pivnick

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PREFACE

Tennessee Circuit Court Practice (2012–2013 Edition) contains references to pertinent Tennessee procedural developments in Tennessee appellate court decisions reported through October 1, 2012, with citations extending through 373 S.W.3d Reporter, and all Tennessee Supreme Court decisions decided before October 1, 2012. This text also contains references to all Tennessee statutory developments through the end of the 2012 Tennessee legislative session. All amendments to the Tennessee Rules of Civil Procedure, the Tennessee Rules of Evidence, and the Tennessee Rules of Appellate Procedure adopted by the Tennessee Supreme Court and approved by joint resolution of the Tennessee House and Senate through October 1, 2012 are also discussed.

The gender exclusive terms in this work should be construed to include the masculine and the feminine.

Lawrence A. Pivnick
Professor of Law
University of Memphis
School of Law
November 1, 2012

Chapter 30

Appeals from Circuit Court

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§ 30:1 History

The Tennessee Rules of Appellate Procedure were adopted in 1979 and became effective on July 1, 1979.[1] The Tennessee Rules of Appellate Procedure, as amended,[2] govern the procedure for all appeals

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[Section 30:1]

[1]Tenn. R. App. P. 49. The legislature approved the Rules in 1979 H. J. R. 162.

[2]Effective July 1, 2012, the following Rules in the Tennessee Rules of Appellate Procedure were amended by 2012 Tenn. S. Ct. Order 6, and were subsequently approved by the General Assembly: Tenn. R. App. P. 3 (Appeal as of Right; Method of Initiation); 5 (Appeal as of right; Service of Notice of Appeal); 9 (Interlocutory Appeal by Permission from the Trial Court); 10 (Extraordinary Appeal y Permission on Original Application to the Appellate Court); 11 (Appeal by Permission from Appellate

from the circuit courts to the courts of appeal or to the Supreme Court in civil and criminal cases.[3] The Rules of Appellate Procedure have greatly simplified Tennessee's appellate procedure and the terminology applicable thereto. The Rules purport to gather in one package all of the statutes and appellate court rules which had previously governed appellate procedure,[4] and the legislature in 1981 passed a repealer statute to amend and supersede numerous prior statutes and rules governing appeals.[5] Further, Tennessee statutes provide that the Rules of Appellate Procedure govern all prior conflicting procedural, as distinguished from substantive, statutes.[6] The Rules of Appellate Procedure, however, may be supplemented by prior statutes that are consistent with the Rules of Appellate Procedure and may be superseded by subsequently enacted conflicting general statutes.[7] The

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Court to the Supreme Court; 22 (Motions); 24 (Content and Preparation of the Record); and 30 (Form of Briefs and Other Papers). Advisory Commission Comments [2012] further provide that effective July 1, 2012, the Supreme Court adopted Tenn. Sup. Ct. R. 10B, governing motions and appeals seeking disqualification or recusal of a judge.

[3]Tenn. R. App. P. 1. Tenn. S. Ct. R. 1, adopted on January 28, 1981, provides that the Tennessee Rules of Appellate Procedure govern all appeals before the Supreme Court and that all Supreme Court Rules in conflict with, or modified by, the Tennessee Rules of Appellate Procedure are superseded and modified to the extent of any conflict.

State v. Osborne, 712 S.W.2d 488, 491 (Tenn. Crim. App. 1986): "We point out that proceedings of general session courts are not governed by the Rules of Appellate Procedure. *See* Tenn. R. App. P. 1."

[4]Tenn. R. App. P. 1, Advisory Commission Comments.

Overnite Transp. Co. v. Teamsters Local Union No. 480, 172 S.W.3d 507, 510 n.2 (Tenn. 2005): "A principal purpose of the Rules of Appellate Procedure is to bring together in one place a simplified, coherent, and modern body of law. Advisory Commission Comments to Tenn. R. App. P. 1. These rules are intended to replace the appellate procedure that was governed by scattered provisions of the Tennessee Code and the rules and decisions of the appellate courts. Id."

Johnson v. Hardin, 926 S.W.2d 236, 238 (Tenn. 1996), citing Tenn. R. App. P. 1, Adv. Comm'n Comment: "Prior to July 1, 1979, practice and procedure in Tennessee appellate courts were governed by scattered statutory provisions and by the rules and decisions of the appellate courts."

[5]See 1981 Tenn. Pub. Acts 449, effective July 1, 1981 (this Act specifically repealed numerous prior statutes, amended other statutes, and concluded with an omnibus provision repealing and nullifying all acts or parts of acts in conflict with the Tennessee Rules of Appellate Procedure, pursuant to T.C.A. § 16-3-406). This Act is further summarized in § 30:1, History, n. 25 of the first edition of this text.

See also 1986 Tenn. Pub. Acts 538, repealing T.C.A. § 20-9-102, which addressed bill of exception transcripts.

[6]T.C.A. § 16-3-403, T.C.A. § 16-3-406. See, e.g., Bush v. Bradshaw, 615 S.W.2d 157 (Tenn. 1981), citing Tenn. R. App. P. 1 and T.C.A. § 16-3-406. See also Haynes v. McKenzie Memorial Hosp., 667 S.W.2d 497, 498 (Tenn. Ct. App. 1984).

[7]One example is 1983 Tenn. Pub. Acts 417, as codified at T.C.A. § 27-1-123. This statute, enacted after the adoption of the Rules of Appellate Procedure, provides that the filing of a notice of appeal document within 30 days of entry of judgment is not jurisdictional in criminal cases and may be waived; this was in direct conflict with Tenn. R. App. P. 4(a). Note: After the enactment of T.C.A. § 27-1-123, Tenn. R. App. P. 4(a) was amended in 1984 to conform to its terms.

Compare Jefferson v. Pneumo Services Corp., 699 S.W.2d 181, 184 n.5 (Tenn. Ct. App. 1985): "The limitation of the 1983 amendment to criminal appeals is a persuasive indication that the General Assembly intended that the filing of the notice of appeal remain jurisdictional in civil cases."

Rules of Appellate Procedure may also be supplemented by Appellate Court Rules designed to govern certain practices of the respective appellate courts.[8] The Rules do not purport to affect the subject matter jurisdiction of Tennessee's appellate courts.[9]

The Rules of Appellate Procedure purport to provide a single set of Rules that are coherent and simple.[10] The Rules are to be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits.[11] The Rules also provide a certain degree of flexibility, so that meritorious appeals are not dismissed because of the failure to meet technicalities, by stating that most of the Rules may be suspended for "good cause."[12] The Rules, however, do not permit the extension of mandatory time requirements for filing a no-

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[8]See, e.g., the Tennessee Court of Appeals Rules, as amended March 5, 2001 and effective on April 2, 2001. Tenn. Ct. App. R. 1 provides: "(a) The procedures of this Court are governed by Tennessee Code Annotated and by the Tennessee Rules of Appellate Procedure. These court rules are designed only to govern certain aspects of practice of this Court and supersede all previous rules of this Court. (b) For good cause, including the interest of expediting a decision upon any matter, this Court, or the panel assigned to hear a particular case, may suspend the requirements or provisions of any of these rules in a particular case on motion of a party, or on its own motion, and may order proceedings in accordance with its discretion."

[9]Tenn. R. App. P. 1, Advisory Commission Comments. See T.C.A. § 16-4-108 for jurisdiction in general.

[10]Tenn. R. App. P. 1, Advisory Commission Comments. See also H.D. Edgemon Contracting Co., Inc. v. King, 803 S.W.2d 220, 221 (Tenn. 1991); State v. Green, 689 S.W.2d 189, 190 (Tenn. Crim. App. 1984): "The purpose behind the adoption of the various procedural rules was to simplify proceedings in the courts of this state and to abolish so far as possible the use of common law procedures which were cumbersome, outdated, and unnecessary."

Johnson v. Hardin, 926 S.W.2d 236, 238 (Tenn. 1996), citing Tenn. R. App. P. 1, Adv. Comm'n Comment: "A principal purpose of the new Tennessee Rules of Appellate Procedure was to replace the often complex and technical rules with a 'simplified, coherent, and modern body of law.'"

[11]Tenn. R. App. P. 1. See Huskey v. Crisp, 865 S.W.2d 451, 455 (Tenn. 1993), citing Tenn. R. App. P. 1; Bradshaw v. Daniel, 854 S.W.2d 865, 868 (Tenn. 1993), citing Tenn. R. App. P. 1, Advisory Commission Comments ("[t]he general policy of the Tennessee Rules of Appellate Procedure is to 'disregard technicality in form in order that a just, speedy, and inexpensive determination of every appellate proceeding on its merits may be obtained'"); Munke v. Munke, 882 S.W.2d 803, 805 (Tenn. Ct. App. 1994) (appellate court treated trial judge's grant of Tenn. R. Civ. P. 54.02 final judgment as the equivalent of a trial judge's grant of permission to appeal under Tenn. R. App. P. 9); H.D. Edgemon Contracting Co., Inc. v. King, 803 S.W.2d 220, 221 (Tenn. 1991); Davis v. Sadler, 612 S.W.2d 160 (Tenn. 1981); Gassaway v. Patty, 604 S.W.2d 60 (Tenn. Ct. App. 1980); Wallace v. Wallace, 733 S.W.2d 102, 106 (Tenn. Ct. App. 1987); Johnson v. Hardin, 926 S.W.2d 236, 238 (Tenn. 1996), citing Tenn. R. App. P. 1.

State v. Henning, 975 S.W.2d 290 (Tenn. 1998): "The Tennessee Rules of Appellate Procedure are to 'be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits.' Rule 1, Tenn. R. App. P. To that end, the appellate courts of this State are authorized to 'grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires. . . .' Rule 36(a), Tenn. R. App. P."

[12]Tenn. R. App. P. 2.

See generally Johnson v. Hardin, 926 S.W.2d 236, 238-39 (Tenn. 1996): "[O]nce a timely notice of appeal is filed, the rules should not erect unjustified technical barriers which prevent consideration of the merits of the appeal. The rules of appellate procedure provide courts with wide discretion and substantial flexibility. Huskey v. Crisp, 865 S.W.2d 451, 455 (Tenn. 1993). An appellate court, '[f]or good cause, includ-

tice of appeal prescribed in Rule 4, an application for permission to

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ing the interest of expediting decision upon any matter, . . . may suspend the requirements or provisions of [the] rules in a particular case. . . .' Tenn. R. App. P. 2. . . . The rules may be suspended upon motion of a party, or upon the motion of the court, in its own discretion. Id. Moreover, an appellate court may grant the parties any 'relief on the law and facts to which [a] party is entitled or the proceeding otherwise requires' unless the relief would contravene the 'province of the trier of fact.' Tenn. R. App. P. 36(a). Thus, the overall intent of the rules is to allow cases to be resolved on their merits."

See H.D. Edgemon Contracting Co., Inc. v. King, 803 S.W.2d 220, 221 (Tenn. 1991). Tenn. R. App. P. 2 authorizes suspension of most time requirements under the Rules of Appellate Procedure where "good cause" has been shown, but the Court held that "good cause" is not satisfied by mere "good faith" and absence of prejudice to the adversary party. The Court granted a motion to dismiss an appeal under Tenn. R. App. P. 26(b) as appellant failed to file a statement of the evidence with the appellate court clerk within 90 days of the filing of a notice of appeal, as required by Tenn. R. App. P. 24(c), and failed to file its appellate brief with the clerk within 30 days after the date on which the record was filed with the clerk, as required by Tenn. R. App. P. 29(a). The Court noted that no request for extension of time had been made within the time initially allowed by the rules for filing transcripts and briefs and added that timely requests for extension are granted more generously.

See also Bayberry Associates v. Jones, 783 S.W.2d 553, 559, Fed. Sec. L. Rep. (CCH) P 95326 (Tenn. 1990) (Tenn. R. App. P. 2 authorizes suspension of all but Tenn. R. App. P. 4, 11 and 12; therefore, there is no bar to suspension of Rule 3(a), provided there is good reason for suspension and there is a record affirmatively showing the Court of Appeal's intent to suspend Rule 3(a)); G. F. Plunk Const. Co., Inc. v. Barrett Properties, Inc., 640 S.W.2d 215 (Tenn. 1982) (under Tenn. R. App. P. 2, the appellate courts have authority to suspend the Rules and waive the failure to serve notice of the filing of appeal upon opposing counsel and/or the clerk of the appellate court, as required by Tenn. R. App. P. 5, where (1) the appellant has timely filed a notice of appeal with the clerk of the trial court, in full compliance with Tenn. R. App. P. 4, and (2) good cause is shown for the failure to comply with the time requirements of the Rules); Bush v. Bradshaw, 615 S.W.2d 157, 158 (Tenn. 1981); Davis v. Sadler, 612 S.W.2d 160 (Tenn. 1981).

Parker v. Lambert, 206 S.W.3d 1, 4 (Tenn. Ct. App. 2006). Tennessee Rules of Appellate Procedure, Rule 2, allows an appellate court to suspend Tenn. R. App. P. 3(a), and to hear an appeal even though a final judgment has not been entered. In so holding, the Court stated that the issues which have already been adjudicated by the Chancery Court are unlikely to be pretermitted by future events, and rather than delaying the inevitable need to address these issues, judicial economy is best served by addressing the issues on their merits in this appeal. Accordingly, the Court held that good cause existed to suspend the application of Rule 3(a) pursuant to Rule 2.

See Paehler v. Union Planters Nat. Bank, 971 S.W.2d 393, 396–97 (Tenn. Ct. App. 1997). While pro se appellant's brief did not comply with Tenn. R. App. P. 6 and 27 in that it did not contain specific references to pages in the record and did not contain the sections required by the rules, so that its appeal was subject to dismissal, the Court chose to entertain the appeal. (1) While pro se litigants are not excused from complying with applicable substantive and procedural law, and must follow the same substantive and procedural law as the represented party, pro se parties are entitled to fair and equal treatment. (2) The Tennessee Rules of Appellate Procedure should be construed to afford all parties a hearing on the merits, Tenn. R. App. P. 1, and an appellate court has the discretion to suspend or relax some of the rules for good cause.

In Turner v. Aldor Co. of Nashville, Inc., 827 S.W.2d 318 (Tenn. Ct. App. 1991), as the appellant's Rule 9 Application for Interlocutory Appeal and the appellee's responses thereto set out the parties' respective positions and provided all the information necessary to decide the issues presented, the Court of Appeals proceeded to the merits without further briefing or oral arguments. At n. 1, the Court stated: "In accordance with Tenn. R. App. P. 2, we suspend the application of Tenn. R. App. P. 9(e), 24–36, 29. We also find that oral argument is unnecessary pursuant to Tenn. R. App. P. 35(c)." See also Davis Kidd Booksellers, Inc. v. Day-Impex, Ltd., 832 S.W.2d 572,

appeal prescribed in Rule 11, or a petition to review prescribed in Rule 12.[13]

Tenn. R. App. P. 2 was amended effective July 1, 2003, to provide that Tenn. R. App. P. 2 suspension of the rules for good cause shall not permit the extension of time for filing "an application for permission to appeal to the Supreme Court from the denial of an application for interlocutory appeal by an intermediate appellate court prescribed in Rule 9(c), an application for permission to appeal to the Supreme Court from an intermediate appellate court's denial of an extraordinary appeal prescribed in Rule 10(b)." A new Advisory Commission Comment states: "The rule was amended to clarify that the filing deadlines to the Supreme Court under Rule 9(c) and 10 are jurisdictional, like those in Rules 4, 11 and 12."

As the Rules of Appellate Procedure are patterned largely upon the Federal Rules of Appellate Procedure and, in part, upon prior Tennessee statutes and rules, the cases developed under the federal rules and prior Tennessee law should be consulted in construing the Rules

574 n.1, Prod. Liab. Rep. (CCH) P 13235 (Tenn. Ct. App. 1992); Jessee's Estate v. White, 633 S.W.2d 767, 768 n.1 (Tenn. Ct. App. 1982); Gregory v. McCulley, 912 S.W.2d 175, n.1 (Tenn. Ct. App. 1995).

[13]Tenn. R. App. P. 2, 4, 11, 12. See § 30:3, Perfecting appeal as of right.

See Tenn. R. App. P. 21(a), "Computation of Time." The second sentence of subsection (a) was amended, effective July 1, 2004, to provide: "In computing the last day of the period for the filing of a paper in court, if the last day of the period is a day on which weather or other conditions have made the office of the court clerk inaccessible, the period runs until the end of the next day which is not one of the aforementioned days." An Advisory to the amended Rule provides: "The second sentence of Rule 21(a) 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."

See Johnson v. Hardin, 926 S.W.2d 236, 238 n.4 (Tenn. 1996); Bayberry Associates v. Jones, 783 S.W.2d 553, 559, Fed. Sec. L. Rep. (CCH) P 95326 (Tenn. 1990); Brumlow v. Brumlow, 729 S.W.2d 103, 105 (Tenn. Ct. App. 1986); Jefferson v. Pneumo Services Corp., 699 S.W.2d 181, 184 (Tenn. Ct. App. 1985).

McCracken v. Brentwood United Methodist Church, 958 S.W.2d 792, 795 (Tenn. Ct. App. 1997). (1) The filing requirements for notices of appeal in civil cases are mandatory and jurisdictional. (2) While neither a trial court nor an appellate court may waive or expand the time for filing a notice of appeal, a trial court may grant an appellant relief from an untimely notice of appeal in unusual or compelling circumstances, generally by vacating and re-entering the final judgment.

Edmundson v. Pratt, 945 S.W.2d 754 (Tenn. Ct. App. 1996). Following entry of judgment on August 6, 1996, appellant filed a notice of appeal on September 6, 1996, the thirty-first day following the entry of the judgment. The Court of Appeals held that the notice of appeal was not timely filed. (1) Tenn. R. App. P. 4(a) provides that the notice of appeal "shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from." (2) Tenn. R. App. P. 21(a) provides that "the date of the act, event, or default after which the designated period of time begins to run shall not be included." (3) Tenn. R. App. P. 2 specifically provides that an appellate court "shall not permit the extension of time for filing a notice of appeal prescribed in Rule 4." (4) Since the notice of appeal was not filed within 30 days of the entry of the judgment, the Court of Appeals did not have jurisdiction to hear this appeal. (5) Litigants who proceed pro se are entitled to fair and equal treatment; but "they must follow the same procedural and substantive law as the represented party." 945 S.W.2d at 755, quoting Irvin v. City of Clarksville, 767 S.W.2d 649 (Tenn. Ct. App. 1988).

of Appellate Procedure.[14]

Tenn. Sup. Ct. R. 36, adopted on March 14, 2002 and effective on July 1, 2003, has established a standards, including paper size, for papers filed in all state courts. See § 7:1, Definitions and scope. Rule 36(e) notes that prior to July 1, 2003, pleadings, motions, and other papers presented for filing with the clerk or intended for the use of the court may be filed either on letter size (8 1/2 x 11 inches) or legal size (8 1/2 x 14 inches) paper.

2004 Tenn. S.R. 121 and 2004 Tenn. H.R. 243 ratified and approved Supreme Court amendments to Tenn. R. App. P. 8A governing Appeals as of Right in Termination of Parental Rights Cases, effective July 1, 2004.

The Tennessee Supreme Court on July 21, 2006 entered an Order adopting Tenn. Sup. Ct. R. 46, which establishes, effective August 1, 2006, a Pilot Project for permissive E-Filing of specified documents in the appellate courts.

§ 30:2 Types of appeals

The Tennessee Rules of Appellate Procedure recognize two types of appeals from circuit court civil proceedings: (a) appeals as of right,[1] discussed in § 30:3, Perfecting appeal as of right; and (b) appeals by permission,[2] discussed in § 30:9, Appeals by permission from interlocutory order, and § 30:10, Extraordinary appeals by permission. Every "final judgment" entered by a circuit court from which an appeal lies to the Supreme Court or to the courts of appeal is appealable as of right.[3] Generally, a final judgment is one that adjudicates the merits

[14]See, e.g., Jefferson v. Pneumo Services Corp., 699 S.W.2d 181, 185 (Tenn. Ct. App. 1985); State v. Gawlas, 614 S.W.2d 74 (Tenn. Crim. App. 1980).

[Section 30:2]

[1]Tenn. R. App. P. 3.

[2]Tenn. R. App. P. 9 and 10. See Fox v. Fox, 657 S.W.2d 747, 749 n.2 (Tenn. 1983).

[3]Tenn. R. App. P. 3(a).

In re Estate of Henderson, 121 S.W.3d 643 (Tenn. 2003). A probate court's rejection of all purported wills submitted for probate and the entering of an order finding that the decedent died intestate is a final, conclusive in rem (subject matter) judgment against all claiming under the wills not only in the courts in which they are propounded, but all others in which the question. Such judgment constitutes a final order under Tenn. R. Civ. P. 58 and is subject to appeal as of right under Tenn. R. App. P. 3., even though the trial court did not certify its order as a final judgment under Tenn. R. Civ. P. 54.02.

Davis v. Davis, 224 S.W.3d 165, 167–8 (Tenn. Ct. App. 2006). (1) A final judgment "fully and completely defines the parties' rights with regard to the issue, leaving nothing else for the trial court to do." (2) An appeal as of right is available to any party following the entry of a final judgment by a trial court, pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure.

Hoalcraft v. Smithson, 19 S.W.3d 822, 827–28 (Tenn. Ct. App. 1999). In the present case, the Court held that the trial court's judgment of divorce which granted mother custody was a final judgment, even though the trial judge placed the case on a review docket for the following year, as the trial court had disposed of all issues before the court at the time the judgment was entered; thus, the judgment was not subject to the rule that a trial court may alter its order at any time prior to the entry of final judgment.

of all the claims for relief of all the parties involved in an action.[4] Unless an appeal from an interlocutory order is provided by the Rules or by statute, appellate courts have jurisdiction over final judgments only.[5]

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[4]Tenn. R. App. P. 3; Tenn. R. Civ. P. 54.02; Stidham v. Fickle Heirs, 643 S.W.2d 324 (Tenn. 1982); Ruckart v. Schubert, 223 Tenn. 215, 443 S.W.2d 466 (1969); Baker v. Seal, 694 S.W.2d 948, 950 (Tenn. Ct. App. 1984).

Discover Bank v. Morgan, 363 S.W.3d 479, 488 n.17 (Tenn. 2012). With respect to Tenn. R. Civ. P. 54.02 and 59, "final judgment" refers to a trial court's decision adjudicating all the claims, rights, and liabilities of all the parties. See Tenn. R. App. P. 3(a). Under Tenn. R. Civ. P. 60, however, "final judgment" refers both to a decision adjudicating all the claims, rights, and liabilities of all the parties *and* to the fact that more than 30 days have passed since the final judgment was entered.

In re Estate of Schorn, 359 S.W.3d 192, 195 (Tenn. Ct. App. 2011), appeal denied, (July 15, 2011). (1) A final judgment is "one that resolves all the issues in the case," "leaving nothing else for the trial court to do." (2) Tenn. R. App. P. 3(a) defines an appeal as of right from a final judgment as follows: "In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right."

Irwin v. Tennessee Dept. of Correction, 244 S.W.3d 832, 834 (Tenn. Ct. App. 2007). Rule 3(a) of the Tennessee Rules of Appellate Procedure states that "every final judgment entered by a trial court from which an appeal lies to the . . . Court of Appeals is appealable as of right." Tenn. R. App. P. 3(a) (2005).

Brandy Hills Estates, LLC v. Reeves, 237 S.W.3d 307, 318 (Tenn. Ct. App. 2006). A final order fully and completely defines the parties' rights with regard to the issue, leaving nothing else for the trial court to do. Until a judgment is final, the rulings of the trial court are subject to modification.

New Life Corp. of America v. Thomas Nelson, Inc., 932 S.W.2d 921, 923–24 (Tenn. Ct. App. 1996). While plaintiff has no right to appeal when a trial court has entered an interlocutory order granting a defendant a summary judgment on certain counts of plaintiff's complaint, but denying defendant's motion as to the remaining counts, the plaintiff can create a right to appeal the interlocutory order by voluntarily dismissing its remaining claims. A party is entitled to an appeal as of right once the trial court has entered a final order that resolves all the claims between all the parties.

Dunlap v. Dunlap, 996 S.W.2d 803, 808 (Tenn. Ct. App. 1998). In this divorce action, the Court held that the trial court's order, which had distributed the parties' property, was not a final order, which the defendant was required to appeal as of right within 30 days of its entry, as issues regarding the defendant's motion to order the sale of the marital home and the defendant's motion for the trial court to recuse itself were unresolved.

Gaskill v. Gaskill, 936 S.W.2d 626, 629–30 (Tenn. Ct. App. 1996). Court of Appeals held that a trial court's order, entered following a bench trial, which had declared the parties divorced and had awarded custody of the parties' four-year-old daughter to the mother, but which did not contain a determination regarding visitation, a disputed issue and an integral part of the custody decision, was not a final order, and did not become a final order by the trial court's mailing to the parties a letter on October 24, 1995, containing its decision with regard to the father's visitation rights. The judgment became final only when an order embodying this decision was entered on January 4, 1996. At n. 4, the Court stated: "Parties are entitled to an appeal as of right from final judgments. Tenn. R. App. P. 3(a). A final judgment is one that resolves all the claims between all the parties. Aetna Cas. & Sur. Co. v. Miller, 491 S.W.2d 85, 86 (Tenn. 1973); Mengle Box Co. v. Lauderdale County, 144 Tenn. 266, 276, 230 S.W. 963, 965–66 (1921)."

[5]Bayberry Associates v. Jones, 783 S.W.2d 553, 558, Fed. Sec. L. Rep. (CCH) P 95326 (Tenn. 1990), citing Aetna Cas. & Sur. Co. v. Miller, 491 S.W.2d 85 (Tenn. 1973).

See also, In re Estate of Schorn, 359 S.W.3d 192, 195 (Tenn. Ct. App. 2011), appeal denied, (July 15, 2011). In the present case, the Court held an order dealing

Tennessee Rules of Appellate Procedure Rule 6. "Security for Costs on Appeal" was amended in 2008 by inserting the following new three sentences to paragraph (a) between the present fourth and fifth sentences: "In order to ensure that a surety is sufficient, the appellate court clerk may require the surety to provide proof that the surety has sufficient assets in the State of Tennessee to pay the costs of the appeal. If the appellate court clerk determines that the surety is not sufficient, the appellate court clerk may reject the bond for costs. The surety may appeal the decision of the appellate court clerk to the appellate court by filing a motion to approve the bond for costs within 10 days of the decision of the appellate court clerk."

Rule 54.02,[6] adopted by the Tennessee legislature during the same week that the Tennessee Rules of Appellate Procedure were adopted, specifically authorizes a trial judge to expressly direct entry of a final judgment as to fewer than all of the parties or all of the claims involved in an action.[7] In doing so, it is not necessary or proper that the trial judge certify controlling questions of law nor that he state

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with an interim accounting does not adjudicate all the claims, and all the rights and liabilities of all parties to the action, and is not a final judgment for purposes of determining whether an appellate court has jurisdiction.

See Cantrell v. Estate of Cantrell, 19 S.W.3d 842 (Tenn. Ct. App. 1999). In affirming the chancery court's judgment denying an intestate widow's claim to a year's support, an award of exempt property, and an elective share of the intestate's estate, the Court of Appeals held that the chancellor's order was final and was subject to appeal of right under Tenn. R. App. P. 3(a), even though the chancellor had appointed a guardian ad litem and directed him to file appropriate pleadings for the child of the widow and intestate. The widow's demands are like any other claims against the estate, and therefore fall within the provisions of T.C.A. § 30-2-315(b), under which claimants may appeal immediately where their claims are denied, without awaiting the disposition of all the other claims.

[6]Tenn. R. Civ. P. 54.02. The provisions of Tenn. R. Civ. P. 54.02 are identical to the provisions of T.C.A. § 27-3-105 ¶ 4 which controlled before the adoption of the Rules of Appellate Procedure. T.C.A. § 27-3-105 was repealed by 1981 Tenn. Pub. Acts 449, § 1(10).

[7]Tenn. R. Civ. P. 54.02; Nichols v. Springfield Production Credit Ass'n, 737 S.W.2d 277 (Tenn. 1987); Fox v. Fox, 657 S.W.2d 747, 749 (Tenn. 1983); Stidham v. Fickle Heirs, 643 S.W.2d 324 (Tenn. 1982); Coldwell Banker-Hoffman Burke v. KRA Holdings, 42 S.W.3d 868, 872–73 (Tenn. Ct. App. 2000); Humphries v. West End Terrace, Inc., 795 S.W.2d 128, 134 (Tenn. Ct. App. 1990); J. M. Humphries Const. Co. v. City of Memphis, 623 S.W.2d 276 (Tenn. Ct. App. 1981).

See also, Discover Bank v. Morgan, 363 S.W.3d 479, 488 n.18 (Tenn. 2012); In re Estate of Schorn, 359 S.W.3d 192, 195 (Tenn. Ct. App. 2011), appeal denied, (July 15, 2011).

GuestHouse Intern., LLC v. Shoney's North America Corp., 330 S.W.3d 166, 208 (Tenn. Ct. App. 2010), appeal denied, (Sept. 23, 2010). Where an appeal has been taken upon a trial court's entry of a final judgment prior to the determination of all claims, any claims that were not made final and appealable under Tenn. R. Civ. P. 54.02, are not reviewable on appeal. Nevertheless, holdings regarding the parties on the appealed issues clearly change the landscape of the litigation and will necessitate reconsideration of some of the rulings below on the counterclaims that were previously made.

Baptist Memorial Hosp. v. Argo Const. Corp., 308 S.W.3d 337, 340, 69 U.C.C. Rep. Serv. 2d 410 (Tenn. Ct. App. 2009), appeal denied, (Feb. 22, 2010). The presence of counterclaims does not render Rule 54.02 certification inappropriate; rather, their significance for Rule 54(b) purposes turns on their interrelationship with the claims on which certification is sought. The factual analysis depends not on whether there are any facts in common between the adjudicated and the unadjudicated claim, but rather on whether the factual issues at the heart of the claims are sufficiently distinct.

that an immediate appeal may materially advance an ultimate determination of the litigation.[8] The court must, however, expressly direct the entry of final judgment, and must expressly determine that there is no just reason for delay,[9] preferably including specific findings of fact to that effect.[10] An appeal from such final judgment is pursued as

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Consider Bayberry Associates v. Jones, 783 S.W.2d 553, 557–59, Fed. Sec. L. Rep. (CCH) P 95326 (Tenn. 1990) (an order denying class certification but not the putative class representative's individual claim is not a proper basis for directed entry of a Rule 54.02 final judgment as such order has not adjudicated the entire claim of any party; at n. 2 on p. 557, the Court discussed other reported and unreported cases where entry of a Rule 54.02 judgment was held to be improper).

See also Town of Collierville v. Norfolk Southern Railway Co., 1 S.W.3d 68 (Tenn. Ct. App. 1998). (1) Trial court erred in entering a Rule 54.02 final judgment so as to allow appeal of right of an order of possession in eminent domain action which did not address the question of damages. A trial court's order is not reviewable under Rule 54.02, despite the trial court's certification to that effect, where the order does not dispose of an entire claim or party. (2) Notwithstanding, the Court, citing the suspension language in Tenn. R. App. P. 2, held that it would review the trial court's interlocutory order under Tenn. R. App. P. 9 as an interlocutory appeal by permission.

Consider Munke v. Munke, 882 S.W.2d 803, 805 (Tenn. Ct. App. 1994). A trial court's order denying a non party's motion to quash a subpoena duces tecum may not be made a final judgment under Tenn. R. Civ. P. 54.02, which allows entry of final judgment upon disposition of "one or more but fewer than all of the claims or parties." As Rule 54.02 applies only to parties, the parties, rather than the nonparty, should have sought review under Tenn. R. App. P. 9 or 10 governing interlocutory appeals by permission.

[8]Consider Waddell v. Davis, 571 S.W.2d 844 (Tenn. Ct. App. 1978) (interpreting T.C.A. § 27-3-105, ¶ 4 which was identical to Tenn. R. Civ. P. 54.02).

[9]Tenn. R. Civ. P. 54.02; Loyd v. State Farm Mut. Auto. Ins. Co., 521 S.W.2d 556 (Tenn. 1975), citing Frame v. Marlin Firearms Co., Inc., 514 S.W.2d 728 (Tenn. 1974) (interpreting T.C.A. § 27-3-105 ¶ 4, which was identical to Tenn. R. Civ. P. 54.02). Note that T.C.A. § 27-3-105 was repealed by 1981 Tenn. Pub. Acts 449, § 1(10).

See also Bayberry Associates v. Jones, 783 S.W.2d 553, 557, Fed. Sec. L. Rep. (CCH) P 95326 (Tenn. 1990); Fagg v. Hutch Mfg. Co., 755 S.W.2d 446, 447 (Tenn. 1988); Fox v. Fox, 657 S.W.2d 747, 749 (Tenn. 1983); Stidham v. Fickle Heirs, 643 S.W.2d 324 (Tenn. 1982); Coldwell Banker-Hoffman Burke v. KRA Holdings, 42 S.W.3d 868, 872–73 (Tenn. Ct. App. 2000).

In re Estate of Schorn, 359 S.W.3d 192, 195 (Tenn. Ct. App. 2011), appeal denied, (July 15, 2011). Tenn. R. Civ. P. 54.02 requires, as a prerequisite to an appeal as of right of an interlocutory order, the certification by the trial judge that the judge has directed the entry of a final judgment as to one or more but fewer than all of the issues of the parties, and that the court has made an express determination that there is no just reason for delay.

Davis v. Davis, 224 S.W.3d 165, 168 (Tenn. Ct. App. 2006). When more than one claim for relief is present in an action, a court "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties *only* upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Tenn. R. Civ. P. 54.02 s.

[10]Harris v. Chern, 33 S.W.3d 741, 745 n.3 (Tenn. 2000).

Huntington Nat. Bank v. Hooker, 840 S.W.2d 916, 920–23 (Tenn. Ct. App. 1991), interpreting Tenn. R. Civ. P. 54.02(1), previously held that there is no requirement in Tennessee that the trial judge state the underlying reasons for its certification, as it is implicit in the entry of a Rule 54.02 final judgment that there has been a finding of the trial court supporting its conclusion that "there is no just reason for delay." The Court, however, encouraged trial judges, in their discretion, to explain the rationale for entry of Rule 54.02 final judgments to aid subsequent appellate review; and noted that under Tenn. R. App. P. 3(a) and 13(d), final judgments entered pursuant to Rule 54.02 are subject to de novo appellate review upon the record to determine whether the exercise of appellate jurisdiction is proper, i.e., whether the

an appeal as of right.[11] Proceeding to trial on issues other than those pending appeal of a final judgment entered pursuant to Rule 54.02 is subject to the sound discretion of the trial judge absent clear prejudicial error under the circumstances, and is not contrary to the purpose of Rule 54.02.[12]

While Rule 54.02 authorizes trial courts to certify interlocutory orders as final, the Supreme Court has stated that piecemeal appellate review is not favored, that trial courts are not encouraged to certify interlocutory orders as final, and that such orders should not be entered routinely nor as a courtesy to counsel.[13]

The entry by a circuit court of an interlocutory order, as distinguished from a Rule 54.02 "final judgment," that adjudicates fewer than all of the claims,[14] fewer than all the elements of a single claim,[15] or the rights and liabilities of fewer than all of the parties[16] in an ac-

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facts warranted the trial judge's findings that there was no just reason for delay.

[11]1981 Tenn. S. J. R. 36, adopted May 6, 1981, approved Supreme Court amendments to Tenn. R. App. P. 3(a), sentence 2, specifically providing that Tenn. R. Civ. P. 54.02 final judgments are appealable as of right. See Nance by Nance v. Westside Hosp., 750 S.W.2d 740, 742 (Tenn. 1988).

McCracken v. Brentwood United Methodist Church, 958 S.W.2d 792, 794 n.4 (Tenn. Ct. App. 1997). A request for an interlocutory appeal is unnecessary where a trial court had designated an order as final in accordance with Tenn. R. Civ. P. 54.02. In such cases, appellants are entitled to an appeal as of right from the order.

Coldwell Banker-Hoffman Burke v. KRA Holdings, 42 S.W.3d 868, 872–73 (Tenn. Ct. App. 2000). (1) Upon entry of a final judgment pursuant to Rule 54.02, notice of appeal as of right must be filed within 30 days thereafter. (2) An appellate court is prohibited from extending the time allowed for taking an appeal as of right. Tenn. R. App. P. 2 and Edmundson v. Pratt, 945 S.W.2d 754 (Tenn. Ct. App. 1996). (3) An appellate court has no jurisdiction to hear the appeal where the notice of appeal is not timely filed.

[12]Trinity Industries, Inc. v. McKinnon Bridge Co., Inc., 77 S.W.3d 159, 175, 46 U.C.C. Rep. Serv. 2d 119 (Tenn. Ct. App. 2001) citing Turtle Creek Apartments v. Polk, 958 S.W.2d 789 (Tenn. Ct. App. 1997).

[13]Harris v. Chern, 33 S.W.3d 741, 745 n.3 (Tenn. 2000).

[14]Fox v. Fox, 657 S.W.2d 747, 749 (Tenn. 1983); Frayser Assembly Christian School v. Putnam, 552 S.W.2d 746 (Tenn. 1977); Woods v. Fields, 798 S.W.2d 239, 241 (Tenn. Ct. App. 1990); Majors v. Smith, 776 S.W.2d 538 (Tenn. Ct. App. 1989), citing Tenn. R. App. P. 3(a) (trial court's failure to address issues raised in amended complaint and answer thereto renders trial court's judgment not final and subject to revision at any time before entry of final judgment; therefore, appeal is premature and should be dismissed).

Consider State v. Gallaher, 730 S.W.2d 622, 623 (Tenn. 1987) (since a trial judge's granting of a defendant's trial motion to strike from an indictment an allegation of a prior DUI conviction was an interlocutory order, not a final judgment, Tenn. R. App. P. 3 appeal was properly dismissed; the Court, however, held that in the exercise of its supervisory authority, the state's purported Rule 3 appeal would be treated as a Rule 10 application).

[15]Hall v. Hall, 772 S.W.2d 432, 436 (Tenn. Ct. App. 1989), citing Tenn. R. App. P. 3(a), State v. Green, 689 S.W.2d 189 (Tenn. Crim. App. 1984), C.J.S., Contempt page 301 § 114, and 4 Am. Jur. 2d, Appeal and Error § 170 (a judgment of contempt is not a final judgment, subject to appeal as of right, until punishment is fixed).

[16]See, e.g., Highland Const. Co. v. K.I.T. Coal Co., 557 S.W.2d 67 (Tenn. 1977); Saunders v. Metropolitan Government of Nashville and Davidson County, 214 Tenn. 703, 383 S.W.2d 28 (1964); Masters by Masters v. Rishton, 863 S.W.2d 702, 704–05 (Tenn. Ct. App. 1992).

Consider Warren v. Haggard, 803 S.W.2d 703 (Tenn. Ct. App. 1990).

tion is not appealable as of right.[17] It has been held that a case is not appealable as of right when a party has filed a post-trial renewed motion for directed verdict and a motion for new trial, and the trial court has granted the renewed motion for directed verdict but has not addressed the alternative motion for new trial;[18] when a suggestion of additur has been made;[19] and when a motion to set attorney's fees has been filed after a verdict or a trial judge's oral pronouncement in a nonjury case but before the entry of final judgment.[20] However, appeals by permission may be taken (a) upon application and in the discretion of both the trial and appellate courts,[21] as discussed in § 30:9, Appeals by permission from interlocutory order, or (b) in "extraordinary cases" upon application and in the discretion of the appellate court alone,[22] as discussed in § 30:10, Extraordinary appeals by permission.

Where a trial court has expressly directed entry of a final judgment pursuant to Rule 54.02 but the prerequisites for such entry have not been met, the appellate court may treat the trial court's judgment as the equivalent of a grant of permission to appeal under Tenn. R. App. P. 9.[23] It has also been held that an appellate court may treat an improperly filed Rule 3 appeal as a Rule 10 extraordinary appeal.[24]

Final decisions of the courts of appeal in civil actions may be "appealed by permission" to the Supreme Court,[25] as discussed in § 30:12, Appeals from appellate court to Supreme Court. Further, interlocutory actions of the courts of appeal may be "appealed by permission" under Tenn. R. App. P. 9 and 10, discussed in § 30:10, Extraordinary appeals by permission.

Appeals in the nature of writ of error (appeals in error), simple ap-

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[17]Tenn. R. App. P. 3(a). See Hoalcraft v. Smithson, 19 S.W.3d 822, 827–28 (Tenn. Ct. App. 1999).

Davis v. Davis, 224 S.W.3d 165, 167–8 (Tenn. Ct. App. 2006). Except in limited circumstances, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.

[18]Hutchinson v. ARO Corp., 653 S.W.2d 738 (Tenn. Ct. App. 1983), citing Tenn. R. App. P. 4(b) and Holmes v. Wilson, 551 S.W.2d 682 (Tenn. 1977).

[19]Consider Evans v. Wilson, 776 S.W.2d 939, 942 (Tenn. 1989), on reh'g in part, 1989 WL 135293 (Tenn. 1989), citing Tenn. R. App. P. 4(b) and its Advisory Commission Comments (notice of appeal is inappropriate where motion for new trial has resulted in a provisional "order suggesting additur and denying motion for new trial in all other respects"; the latter order is not a final order from which appeal as of right lies until the defendant accepts the additur and a further order is entered reflecting that action and denying the new trial).

[20]Deas v. Deas, 774 S.W.2d 167, 169 (Tenn. 1989) (a trial judge's order is not final if a motion to set attorney's fees is filed between the judge's oral announcement at trial and the entry of a written decree).

[21]Tenn. R. App. P. 9.

[22]Tenn. R. App. P. 10.

[23]Munke v. Munke, 882 S.W.2d 803, 805 (Tenn. Ct. App. 1994) (appellate court treated trial judge's grant of Tenn. R. Civ. P. 54.02 final judgment as the equivalent of a trial judge's grant of permission to appeal under Tenn. R. App. P. 9).

[24]State v. Norris, 47 S.W.3d 457, 463 (Tenn. Crim. App. 2000).

[25]Tenn. R. App. P. 11.

peals, and writs of error have been abolished by the Rules of Appellate Procedure.[26]

§ 30:3 Perfecting appeal as of right

An appeal as of right from a circuit court judgment in a civil matter does not require permission of either the trial court or the appropriate appellate court.[1] It is taken by (a) filing a notice of appeal with the clerk of the trial court within 30 days after the entry of the judgment appealed from,[2] unless a Rule 50.02 motion for judgment in accordance with a motion for directed verdict, a Rule 52.02 motion to amend

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[26]Tenn. R. App. P. 3(d). See also Haynes v. McKenzie Memorial Hosp., 667 S.W.2d 497, 498 (Tenn. Ct. App. 1984).

[Section 30:3]

[1]Tenn. R. App. P. 3(d).

Cooper v. Tabb, 347 S.W.3d 207 n.7 (Tenn. Ct. App. 2010), appeal denied, (May 25, 2011). A litigant has a right to appeal a final judgment. See Tenn. R. App. P. 3. In the absence of a final, appealable judgment, a litigant may appeal an interlocutory order by obtaining permission to appeal from both the trial court and the appellate court, provided certain criteria are met. See Tenn. R. App. P. 9; see also Tenn. R, App. P. 10 (no permission from trial court required under this rule).

[2](a) Applicable Rules of Appellate Procedure

Tenn. R. App. P. 3(e), 4(a), 4(b). See Tenn. R. App. P. 2 ("good cause" does not permit an extension of time for filing the notice of appeal).

Tenn. R. App. P. 4(a) was amended in 1984 to provide that in all *criminal* cases, the "notice of appeal" document is not jurisdictional and the filing of such document may be waived in the interest of justice. This amendment conforms with 1983 Tenn. Pub. Acts 417, codified at T.C.A. § 27-1-123.

An Advisory Commission Comment to Tenn. R. App. P. 4, approved in 2000, states: "A notice of appeal filed by a pro se litigant incarcerated in a correctional facility is governed by the prisoner-filing provision in Rule 20(a)." Tenn. R. App. P. 20(a), as amended in 2000, effective July 1, 2000, cross-references a new Tenn. R. App. P. 20(g), titled "Filing by Pro Se Litigant Incarcerated in Correctional Facility," which provides: "If papers required or permitted to be filed pursuant to the rules of appellate procedure are prepared by or on behalf of a pro se litigant incarcerated in a correctional facility and are not received by the clerk of the court until after the time fixed for filing, filing shall be timely if the papers were delivered to the appropriate individual at the correctional facility within the time fixed for filing. This provision shall also apply to service of paper by such litigants pursuant to the rules of appellate procedure. 'Correctional facility' shall include a prison, jail, county workhouse or similar institution in which the pro se litigant is incarcerated. Should timeliness of filing or service become an issue, the burden is on the pro se litigant to establish compliance with this provision." [Ed. note — These amendments "codify" the holding in Goodwin v. Hendersonville Police Dept., 5 S.W.3d 633, 634 (Tenn. 1999).]

The Tennessee Supreme Court in 1988 reported to the General Assembly for approval by joint resolution an Advisory Committee Comment to Tenn. R. App. P. 2 that the final clause in Rule 2 "prohibiting extensions in no way affects computation of time under Tenn. R. App. P. 2. For example, if the thirtieth day to file a notice of appeal falls on a holiday, the notice could be filed on the next business day."

Tennessee Rules of Appellate Procedure, Rule 21(a) Computation of Time, was amended in 2011 to provide: "In computing any period of time prescribed or allowed by these rules, the date of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday as defined in T.C.A. § 15-1-101, or, when the act to be done is the filing of a paper in court, a day on which the office of the court clerk is closed or 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. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays,

Sundays and legal holidays shall be excluded from the computation."

A 2011 Advisory Commission Comment states: Rule 21(a) is amended to define "legal holiday" by reference to statute. The status of a day as a legal holiday is statutory; thus, for the purpose of filing papers in court, it does not depend on whether the clerk's office is open for business. For example, state offices might be open on Columbus Day, pursuant to the governor's authority under T.C.A. § 4-4-105(a)(3) to substitute the day after Thanksgiving for the Columbus Day holiday; in such circumstances, however, Columbus Day is still a "legal holiday" for purposes of computing time periods under the rule. As of the date of this Comment, T.C.A. § 15-1-101 reads as follows: "**Legal Holidays.** January 1; the third Monday in January, "Martin Luther King, Jr. Day"; the third Monday in February, known as "Washington Day"; the last Monday in May, known as "Memorial" or "Decoration Day"; July 4; the first Monday in September, known as "Labor Day"; the second Monday in October, known as "Columbus Day"; November 11, known as "Veterans' Day"; the fourth Thursday in November, known as "Thanksgiving Day"; December 25; and Good Friday; and when any one (1) of these days falls on Sunday, then the following Monday shall be substituted; and when any of these days falls on Saturday, then the preceding Friday shall be substituted; also, all days appointed by the governor or by the president of the United States as days of fasting or thanksgiving, and all days set apart by law for holding county, state, or national elections, throughout this state, are made legal holidays, and the period from 12:00 noon to 12:00 midnight of each Saturday which is not a holiday is made a half-holiday, on which holidays and half-holidays all public offices of this state may be closed and business of every character, at the option of the parties in interest of the same, may be suspended. Rule 21(a) also is amended to add a reference to days on which the "office of the court clerk is closed."

(b) Applicable Rules of Civil Procedure

Tenn. R. Civ. P. 58, which governs the requirements for entry of final judgment, was amended in 1997 to change the second sentence to read: "When requested by counsel or pro se parties, the clerk shall mail or deliver a copy of the entered judgment to all parties or counsel within five days after entry; notwithstanding any rule of civil or appellate procedure to the contrary, time periods for post-trial motions or a notice of appeal shall not begin to run until the date of such requested mailing or delivery." The amendment to Tenn. R. Civ. P. 58 was approved by 1997 S. R. 24 and H. R. 47, with an effective date of July 1, 1997.

Tenn. R. Civ. P. 6.02, "Enlargement of Time," as amended in 2001, provides: "This subsection [allowing extension of time] shall not apply to the time provided in Tennessee Rule of Appellate Procedure 4(a) for filing a notice of appeal, nor to the time provided in Tennessee Rule of Appellate Procedure 24(b) & (c) for filing a transcript or statement of evidence." A 2001 Advisory Commission Comment states: "This technical amendment to Rule 6.02 deletes references to repealed statutes and substitutes references to the Rules of Appellate Procedure."

(c) Case Law — Generally

See Third Nat. Bank in Nashville v. Knobler, 789 S.W.2d 254, 255 (Tenn. 1990) (where notice of appeal under Tenn. R. App. P. 3(e) or a motion specified in Tenn. R. App. P. 4(b) is not filed within 30 days of the entry of final judgment, review of a trial court's decision is foreclosed in the appellate court). In accord, McGaugh v. Galbreath, 996 S.W.2d 186, 189–90 (Tenn. Ct. App. 1998); Jones v. Jones, 784 S.W.2d 349, 351 n.1 (Tenn. Ct. App. 1989); Brumlow v. Brumlow, 729 S.W.2d 103, 105 (Tenn. Ct. App. 1986).

Green v. Moore, 101 S.W.3d 415, 416 (Tenn. 2003). The 30-day notice of appeal time period, articulated in Tenn. R. App. P. 4(a), commenced on the date that the trial court entered an order confirming that all claims between all the parties had been adjudicated, rather than when the appellees filed a Tenn. R. Civ. P. 41.01 notice of voluntary dismissal of its counterclaim filed against appellant/plaintiff, the final claim between all parties in this action. Thus, an appeal filed within 30 days of the trial court's order confirming that all claims between all parties in this action had been adjudicated but more than 30 days after the filing of the notice of voluntary nonsuit, was timely and proper.

In re Estate of Rinehart, 363 S.W.3d 186, 189 (Tenn. Ct. App. 2011), appeal denied, (Mar. 7, 2012). (1) If no appeal is filed within the 30 day time-frame, an ap-

or make additional findings of fact, a Rule 59.07 motion for new trial,

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pellate court has no jurisdiction to review the order. The 30-day time limit for filing a notice of appeal is mandatory. (2) Because the order granting the conservatorship was entered more than 30 days prior to the filing of this appeal, the order is final and the appellate Court has no jurisdiction to review it.

Born Again Church & Christian Outreach Ministries, Inc. v. Myler Church Bldg. Systems of the Midsouth, Inc., 266 S.W.3d 421, 424–5 (Tenn. Ct. App. 2007) (1) Under Tenn. R. App. P. 4(a) of the Tennessee Rules of Appellate Procedure, a notice of appeal shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from. (2) As a general rule, a trial court's judgment becomes final 30 days after its entry unless a timely notice of appeal or a specified post-trial motion is filed. (3) The advisory committee comments to Rule 4 state, "Nothing in this rule or any other rule permits the time for filing notice of appeal to be extended beyond the specified 30 days, although in appropriate circumstances an otherwise untimely appeal may be taken by first securing relief under Tennessee Rule of Civil Procedure 60.02." (4) Where an appellant has timely filed only a Rule 60.02 motion for relief from the final judgment, without more, a trial court would have subject matter jurisdiction to consider the motion. (5). If a party wishes to seek relief from a judgment during the time an appeal is pending, he has the option of applying to the appellate court for an order of remand. Absent an application for remand, the trial court's attempt to enter further orders addressing a party's Rule 60.02 motion is a nullity.

Briley v. Chapman, 182 S.W.3d 884 (Tenn. Ct. App. 2005) citing Tenn. R. App. P. 3(a) and Tenn. R. App. P. 21(b). A notice of appeal must be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from. An appellate court is not authorized to extend the time for filing a notice of appeal, and cannot enlarge the time for filing a notice of appeal prescribed in Tenn. R. App. P. 4. In civil cases, the failure to timely file a notice of appeal deprives the appellate court of jurisdiction to hear the appeal. If the notice of appeal is not timely filed, the appellate court is required to dismiss the appeal.

Hutcheson v. Barth, 178 S.W.3d 731 (Tenn. Ct. App. 2005). Plaintiff failed to timely file her notice of appeal so as to give the Court of Appeals jurisdiction to hear this case as the notice of appeal was entered on April 19, 2004, more than 30 days after the trial court entered an order granting the Defendant's motion for summary judgment which adjudicated all the claims of the parties on January 15, 2004, thereby making the case ripe for appeal. The date to appeal this final judgment was not extended by defendant's filing on February 25, 2004 of a motion for contempt alleging non-performance of the final order by the Plaintiff, nor by the March 19, 2004 entry of an agreed order awarding the Defendant pre-judgment interest, which she had not sought in her counter-complaint or in any subsequent pleadings.

Begley Lumber Co., Inc. v. Trammell, 15 S.W.3d 455 (Tenn. Ct. App. 1999). (1) Appeal of right was dismissed because appellant's notice of appeal, which was filed with the clerk of the trial court on February 5, 1999 from a final judgment entered on January 5, 1999, was not timely filed within 30 days after the date of entry of the judgment appealed from, as required by Tenn. R. App. P. 4(a). (2) The "suspension for good cause" provision of Tenn. R. App. P. 2 and "extension of time" provision of Tenn. R. App. P. 21(b) are inapplicable to time for filing a notice of appeal. (3) Although Tenn. R. Civ. P. 58 provides that a trial court, upon request of counsel (as in the present case), shall mail or deliver a copy of an entered judgment to all parties or counsel within five days after entry and that "time periods for post-trial motions or a notice of appeal shall not begin to run until the date of such requested mailing or deliver," the Court held that this provision did not extend the 30-day period from entry of judgment because the Certificate of Service from the trial court clerk showed that it had mailed a copy of the entered order to the appellant the day before the judgment was filed. (4) The Court held that the language in Tenn. R. Civ. P. 6.05, which provides that "whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon such party and the notice or paper is served upon such party by mail, three days shall be added to the prescribed time," only extends the time period when a party is required to do some act after service of a notice or some other paper. The Rule does not apply, as in the present case, if the act (the filing of a notice of appeal)

or a Rule 59.04 motion to alter or amend judgment has previously

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is predicated on some other event, like the entry of a final judgment or order.

Dewees v. Sweeney, 947 S.W.2d 861 (Tenn. Ct. App. 1996). (1) Plaintiff waived its right of appeal by failing to file a notice of appeal, as is required by Tenn. R. App. P. 4(a), within 30 days of the trial court's grant of defendant's motion for partial summary judgment, and directed entry of the judgment as a final order, pursuant to Tenn. R. App. P. 54.02. (2) Plaintiff's filing of a "Motion for Interlocutory Appeal" within 30 days of the judgment did not suffice as timely notice. While recognizing that Tenn. R. App. P. 3(f) provides that an appeal shall not be dismissed for informality of form or title of the notice of appeal, the Court held that the appellant did not file an informal Notice of Appeal but an actual correctly drawn motion that would have been valid under other circumstances. (3) The 30-day time limit for filing a notice of appeal from a final judgment may be defeated by the trial court where it is authorized to grant relief from its own judgments or orders under Tenn. R. Civ. P. 60.01 (clerical mistakes in judgments, orders or other parts of the record, and errors therein that arise from oversight or omissions), or under Rule 60.02 (for the reasons of "mistake, inadvertence, surprise or excusable neglect . . ."), but the appellate court held that Rule 60 relief was not available in the present case because the appellant did not file a motion for Rule 60 relief, and the trial court did not act on its own initiative to grant such a motion.

First Nat. Bank of Polk County v. Goss, 912 S.W.2d 147, 148 (Tenn. Ct. App. 1995). (1) Tenn. R. App. P. 3 requires that a notice of appeal must be filed with and received by the clerk of the trial court within 30 days after the date of the entry of the judgment appealed from. (2) The time limit set out in Rule 4 is jurisdictional in a civil case. (3) An appellate court has no discretion to expand the time limit set out in Rule 4. See Tenn. R. App. P. 2. (4) The Advisory Commission Comments to Rule 4 do state that "[n]othing in this rule or any other rule permits the time for filing notice of appeal to be extended beyond the specified 30 days, although in appropriate circumstances an otherwise untimely appeal may be taken by first securing relief under Tennessee Rule of Civil Procedure 60.02." (5) Relief under Rule 60.02, relating to timeliness of an appeal, is available only under the most extraordinary, unusual, rare, compelling, and propitious circumstances. (6) Parties seeking relief pursuant to Tenn. R. Civ. P. 60.02 have the burden of demonstrating that they are entitled to relief. Requests for relief pursuant to this rule are addressed to the discretion of the trial court. (7) The movant-appellant failed to carry its heavy burden. The mailing of a notice of appeal to the office of the clerk and master within two days of the deadline for filing is not excusable neglect as that term is used in Rule 60. Under such circumstances, prudence would dictate at least a call to the office of the clerk and master to insure receipt before the time to appeal had elapsed. Then, if the clerk and master had erroneously advised appellant that it had been received, the spirit and intent of the rules and the cases addressing their interpretations and applications would more likely support relief.

Consider Jefferson v. Pneumo Services Corp., 699 S.W.2d 181 (Tenn. Ct. App. 1985). While recognizing the statement in the Advisory Committee Comments to Tenn. R. App. P. 4(a) that, in appropriate circumstances, an otherwise untimely appeal may be taken by first securing relief under Tenn. R. Civ. P. 60.02, the Court held that such relief should be granted only in the most extraordinary circumstances. Such circumstances do not include where a lawyer has failed to file a timely notice of appeal because he was too busy with his other clients' work, particularly where the case was tried on the merits, the movant and his attorney had timely notice of the entry of the trial court's order, illness of counsel was not shown, and the attorney, based upon his prior appellate experience, knew that the filing of the notice of appeal was required within 30 days of the entry of judgment.

McKinney v. Widner, 746 S.W.2d 699, 700 (Tenn. Ct. App. 1987). Thirty days runs from entry of final judgment, not from filing of a memorandum opinion.

(d) Case Law — Untimely Filing

Arfken & Associates, P.A. v. Simpson Bridge Co., Inc., 85 S.W.3d 789, 791 (Tenn. Ct. App. 2002). Failure to file notice of appeal within 30 days of entry of initial final judgment, as required by Tenn. R. App. P. 3(a) warranted dismissal even though appellant filed notice of appeal within 30 days of the entry of a later dated final judgment, where the later dated final judgment was identical in terms to the earlier dated

final judgment. (1) An appeals court is not authorized to extend the time for filing a notice of appeal. Tenn. R. App. P. 2. (2) In civil cases, the failure to timely file a notice of appeal deprives the appellate court jurisdiction to hear the appeal. (3) If the notice of appeal is not timely filed, the appellate court is required to dismiss the appeal.

Dunlap v. Dunlap, 996 S.W.2d 803, 808 (Tenn. Ct. App. 1998). Defendant's notice of appeal was not untimely where the trial court's final judgment was entered on May 1, 1997 and the notice of appeal was filed on June 2, 1997. The date that judgment was entered, May 1, is not included in computing the 30-day period; and as the thirtieth day fell on Saturday, May 31, 1997, the defendant had until Monday, June 2, 1997, within which to file her notice of appeal. (1) In computing the 30-day time period, the appellate court does not include the date on which the judgment was entered. See Tenn. R. App. P. 21(a). (2) Under Rule 21(a), if the last day of the 30-day time period falls on a Saturday, a Sunday, a legal holiday, or a day when the clerk's office is closed, then this day is not included in the 30-day time period. In that event, "the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or a day when the clerk's office for filing is closed."

American Steinwinter Investor Group v. American Steinwinter, Inc., 964 S.W.2d 569, 571 (Tenn. Ct. App. 1997). In this action, a notice of appeal was untimely filed on June 28, 1996, more than 30 days after entry of final judgment on May 28, 1996. (1) The 30-day rule for notices of appeal is mandatory and jurisdictional and may not be waived. Tenn. R. App. P. 2; Jefferson v. Pneumo Services Corp., 699 S.W.2d 181 (Tenn. Ct. App. 1985); John Barb, Inc. v. Underwriters at Lloyds of London, 653 S.W.2d 422 (Tenn. Ct. App. 1983). (2) June 27, 1996, occurred on a Thursday, so that the extension of time provision in Tenn. R. App. P. 4 when the last day to perform an act occurs on a Saturday or Sunday was inapplicable.

Edmundson v. Pratt, 945 S.W.2d 754 (Tenn. Ct. App. 1996). Following entry of judgment on August 6, 1996, appellant filed a notice of appeal on September 6, 1996, the thirty-first day following the entry of the judgment. The Court of Appeals held that the notice of appeal was not timely filed. (1) Tenn. R. App. P. 4 provides that the notice of appeal "shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from." (2) Tenn. R. App. P. 21(a) provides that "the date of the act, event, or default after which the designated period of time begins to run shall not be included." (3) Tenn. R. App. P. 2 specifically provides that an appellate court "shall not permit the extension of time for filing a notice of appeal prescribed in Rule 4." (4) Litigants who proceed pro se must follow the same procedural and substantive law as the represented party.

(e) Filing by Fax

Cruse v. City of Columbia, 922 S.W.2d 492, 493 (Tenn. 1996). In this action, plaintiff's counsel, who practiced primarily in a neighboring judicial district in which a pilot program allowing facsimile transmissions was in effect, filed a notice of appeal by facsimile transmission with a trial court in a district where the pilot program was inapplicable. The Supreme Court announced an apparent one-time rule that the facsimile transmission in the present case was effective under Tenn. R. App. P. 3. (1) In so holding, the Court reasoned that nothing in Tenn. R. App. P. 3 or 4 or 4, setting forth the method for filing an appeal as of right with the trial court, specifically prohibits facsimile filings; that the language in Tenn. R. App. P. 1 provides that the Rules of Appellate Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits"; that the plaintiff had substantially complied with Rules 3 and 4in that the notice of appeal that was sent by facsimile was received and filed by the trial court within the time allowed by the rules; that the opposing party was given appropriate notice; and that neither the court nor the opposing party suffered any prejudice as a result of the facsimile filing. (2) Notwithstanding its holding, the Court stated that the decision in the present case does not sanction the use of facsimile filing in future cases and that counsel should not rely on facsimile transmissions for the filing of documents in the future.

Tenn. R. App. P. 20A, as amended in 2002, with an effective date of July 1, 2002, provides that the appellate court clerk shall accept for filing certain documents, designated in Rule 20A(b)(1), that have been submitted to the clerk by facsimile transmission. Rule 20A(b)(5) adds that an appellate court, in its discretion, may also direct the appellate court clerk to accept any document for filing by facsimile trans-

been filed within that 30-day period.[3] In cases where one or more of

mission if the court finds that extraordinary circumstances necessitate facsimile filing. Rule 20A(b) sets forth detailed mechanics for filing by facsimile transmission; and Rule 20A(c)(1) provides, in part, that "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;" Rule 20A(c)(2) provides that a signature reproduced by facsimile transmission shall be treated as an original signature; and Rule 20A(c)(3) provides that 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. Rule 20A(d) provides for the assessment and payment of service charges that the sender of the facsimile transmission shall pay to the appellate court clerk, but notes that these charges shall not be taxed as court costs. The trial court clerk shall not be liable for a facsimile service charge for filing any document that may be filed by the trial court clerk pursuant to this rule.

(f) Probate

In re Estate of Ridley, 270 S.W.3d 37 (Tenn. 2008). A probate court's order construing a will is a final judgment, even though the probate court continues to exercise jurisdction over the further administration of the estate. Accordingly, a beneficiary that wants to appeal the probate court's order construing a will must file its appeal within 30 days of the trial court's order construing the will or if an authorized motion is filed within 30 days of the order and is denied, the beneficiary must file an appeal regarding the construction order within 30 days of entry of the order on the motion. The beneficiary may not delay its appeal until the final probate order closing the estate. According to the latter rule, the beneficiary's notice of appeal in the present case filed within 30 days of the order closing the estate, but some 17 months after the final judgment construing the will was entered and post trial motions to alter or amend pursuant to Tenn. R. Civ. P. 59.04, were denied, was not timely

(g) Arbitration

Philpot v. Tennessee Health Management, Inc., 279 S.W.3d 573, 578 (Tenn. Ct. App. 2007). Although Tenn. R. App. P. 3(a) provides that an appeal as of right must originate from a trial court's final judgment, an appeal as of right may be taken under the Tennessee Uniform Arbitration Act from an order denying an application to compel arbitration. T.C.A. § 29-5-319. See also, T.R. Mills Contractors, Inc. v. WRH Enterprises, LLC, 93 S.W.3d 861, 864–65 (Tenn. Ct. App. 2002).

[3]Tenn. R. Civ. P. 59.01, as amended in 1984 and 1993, and Tenn. R. App. P. 4(b), as amended in 1995, provide that a motion for a new trial under Tenn. R. Civ. P. 59.02, a motion to alter or to amend a judgment under Tenn. R. Civ. P. 59.04, a motion for amended or additional findings under Tenn. R. Civ. P. 52.02, and a post-trial motion for directed verdict under Tenn. R. Civ. P. 50.02, are the only motions that extend the time for taking steps in the regular appellate process. Motions to reconsider any of these motions are not authorized and will not operate to extend the time for appellate proceedings.

In 2011, Tennessee Rules of Appellate Procedure, Rule 4(b) was amended to corrects an erroneous cross-reference, changing "59.02" to "59.07." in reference to motions for new trials.

On January 28, 1993, the Tennessee Supreme Court, pursuant to T.C.A. §§ 16-3-402 et seq., ordered an amendment to Tenn. R. Civ. P. 59.01, deleting reference to "motions for discretionary costs," thereby removing this motion from the motions which extend the time for taking steps in the regular appellate process. Similarly, Tenn. R. App. P. 4(b) was amended in 1995 to delete its provision that the filing of a Rule 54.04(2) motion to assess discretionary costs tolls the time for filing notice of appeal until entry of an order granting or denying the motion. This amendment was intended to conform Appellate Rule 4 to the amended Tenn. R. Civ. P. 59.

Discover Bank v. Morgan, 363 S.W.3d 479, 488 (Tenn. 2012). Tennessee Rule of

these motions has been filed, the notice of appeal is required within

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Civil Procedure 59 expressly authorizes four categories of motions: "(1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; or (4) under Rule 59.04 to alter or amend the judgment." Tenn. R. Civ. P. 59.01. Furthermore, the specified motions are the only means "for extending the time for taking steps in the regular appellate process." Discover Bank v. Morgan, 363 S.W.3d 479; see also Tenn. R. App. P. 4(b).

Ball v. McDowell, 288 S.W.3d 833 (Tenn. 2009). If timely filed, certain post-trial motions, such as Defendants' motion to alter or amend, will toll commencement of the thirty-day period for filing a notice of appeal until the trial court enters an order granting or denying the motion. Tenn. R. App. P. 4(b). If, however, a post-trial motion is not timely, the trial court lacks jurisdiction to rule on the motion.

Holladay v. Speed, 208 S.W.3d 408, 413–14 (Tenn. Ct. App. 2005). In the present case, the appellant filed a "motion to reconsider findings of fact and conclusions of law" under Tennessee Rule of Civil Procedure 52.02 in the trial court on April 27, 2005, at 4:28, after having filed a notice of appeal to the Court of Appeals at 4:05. The Court held that Tenn. R. App. P. Rule 4 as it existed in April 2005, provided that jurisdiction of the appellate court attached with the filing of a notice of appeal and, once an appeal had been filed, the trial court effectively lost its authority to act in the case without leave of the appellate court. Under Rule 4 of the Rules of Appellate Procedure as it existed in April 2005, after a notice of appeal had been filed, a party seeking relief from a judgment pursuant to Rule 59, which includes a motion to amend or make additional findings of fact under Rule 52.02, arguably was required to seek an order of remand from the appellate court. The Tennessee Rules of Appellate Procedure, however, were amended effective July 1, 2005, to include Rule 4(e), which provides: "The trial court retains jurisdiction over the case pending the court's ruling on any timely filed motion specified in [Rule 4] subparagraph (b) or (c). A notice of appeal filed prior to the trial court's ruling on a timely specified motion shall be deemed to be premature and shall be treated as filed after the entry of the order disposing of the motion and on the day thereof. If an appellant named in a premature notice of appeal decides to terminate the appeal as a result of the trial court's disposition of a motion listed in subparagraph (b) or (c) of this rule, the appellant shall file in the appellate court a motion to dismiss the appeal pursuant to Rule 15."

Albert v. Frye, 145 S.W.3d 526 (Tenn. 2004), distinguishing Gassaway v. Patty, 604 S.W.2d 60 (Tenn. App. 1980). Within 30 days of trial court's dismissal of complaint against Defendant 1 and its award of judgment against Defendant 2, Plaintiffs filed a Tenn. R. Civ. P. 59.04 motion to alter or amend the judgment which had dismissed Defendant 1 from the case. The trial court granted Plaintiffs' motion by order dated January 21, 2003, awarding a judgment to Plaintiffs against Defendant 1. On January 21, 2003, the day the judgment was entered against him, Defendant 1 filed a Tenn. R. Civ. P. 59.04 motion to alter or amend the court's judgment. The trial court denied Defendant 1's motion on March 13, 2003. On April 7, 2003, Defendant 1 filed a notice of appeal. On May 13, 2003, Plaintiffs filed a motion to dismiss for failure to file a timely notice of appeal, defendant 1 did not file a response, and on May 29, 2003, the Court of Appeals dismissed defendant 1's appeal as untimely, holding that the time to appeal had begun to run on January 21, 2003 and was not tolled by Defendant 1's Rule 59.04 motion. On June 27, 2003, Defendant 1 filed a petition to reconsider, which the Court of Appeals dismissed as untimely. On application for permission to appeal, the Supreme Court held that Tenn. R. App. P. 4(b), the 30-day time limit for filing a notice of appeal under Tenn. R. App. P. 4(a) was tolled until the trial court issued its decision on the defendant's post-trial motion to alter or amend. Because the trial court denied defendant 1's motion to alter or amend on March 13, 2003 and defendant 1 filed its notice of appeal on April 7, 2003, within the 30-day time limit, his appeal was timely.

Binkley v. Medling, 117 S.W.3d 252, 255 (Tenn. 2003). The 30-day jurisdictional time limit for filing an appeal in a civil case following entry of judgment under Tenn. R. App. P. 4 is tolled by the timely filing of a post-trial motion to alter or amend, until an order granting or denying the motion is entered. Tenn. R. App. P. 4(b).

Anthony v. Kelly Foods, Inc., 704 S.W.2d 305, 307 n.1 (Tenn. 1986): "Motions

30 days of the disposition of the motion;[4] further, if a bankruptcy

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to reconsider are not authorized and do not operate to extend the time for appellate proceedings; T. R. C. P. 59.01, effective August 20, 1984." In accord, Gassaway v. Patty, 604 S.W.2d 60 (Tenn. Ct. App. 1980).

See, however, Tennessee Farmers Mut. Ins. Co. v. Farmer, 970 S.W.2d 453 (Tenn. 1998). (1) Court of Appeals erred in its holding that appeal was untimely because notice of appeal was filed more than 30 days after entry of the trial court's original judgment, as defendant had filed a "motion to reconsider" within 30 days of entry of the original judgment, and this motion. (2) Although a "motion to reconsider" is not one of the motions designated in Tenn. R. Civ. P. 59.01 which extend the appellate process when filed within 30 days of the trial court's original judgment, the defendant's motion was in substance a Rule 59.04 motion to alter or amend the judgment, which allowed the trial court to retain jurisdiction of the cause and which tolled commencement of the time for filing a notice of appeal until entry of an order granting or denying the motion. In so holding, the Court reasoned that requiring courts to consider the substance of a post-trial motion, rather than its form, is consistent with Tenn. R. Civ. P. 8.05, which explicitly states that "[n]o technical forms of pleading or motions are required." Moreover, allowing the form of a motion to control its substance could result in the dismissal of many appeals and would, in turn, defeat the mandate of Tenn. R. App. P. 1, which instructs that the rules of appellate procedure are to be "construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits." (3) Notwithstanding its holding, the Supreme Court stated that attorneys filing post-trial motions should avoid confusion by utilizing the titles referenced in Tenn. R. App. P. 4 and Tenn. R. Civ. P. 59.01.

Consider Griswold v. Income Properties, II, 880 S.W.2d 672, 677–78 (Tenn. Ct. App. 1993), citing Tenn. R. Civ. P. 54.02 and Tenn. R. App. P. 3(a). The pendency of a motion for permission to file a third party complaint, which was filed by a defendant after entry of judgment disposing of all the claims and rights of all the parties to the suit, did not disturb the entry of final judgment, nor did it delay the 30-day period for filing notice of appeal. A motion to file a third party complaint is not one of the motions listed in Tenn. R. App. P. 4(b) which extends the time for filing a notice of appeal.

See Spann v. Abraham, 36 S.W.3d 452, 460–61 (Tenn. Ct. App. 1999). Trial court did not err in determining that it did not have jurisdiction to consider appellant's Tenn. R. Civ. P. 59.04 motion, filed within 30 days of entry of final judgment but one day after appellant had filed her notice of appeal and appeal bond. Appellant's notice of appeal was not premature as the trial court's final judgment had disposed of all matters before the court, and there were no post-trial motions that had been filed at the time that the notice of appeal had been filed. Thus, the filing of her notice of appeal and appeal bond had the legal effect of terminating the trial court's authority to act on her later filed Rule 59.04 motion without leave of the appellate courts, as the filing of the notice of appeal and appeal bond vested jurisdiction over the case with the court of appeals.

[4]Tenn. R. Civ. P. 59.01, as amended in 1984 and 1993, and Tenn. R. App. P. 4(b), as amended in 1995.

Tenn. R. App. P. 4 was amended in 2005 by adding a new Tenn. R. App. P. 4(e) which provides: "(e) Effect of Specified Timely Motions on Trial Court's Jurisdiction. The trial court retains jurisdiction over the case pending the court's ruling on any timely filed motion specified in subparagraph (b) or (c) of this rule. A notice of appeal filed prior to the trial court's ruling on a timely specified motion shall be deemed to be premature and shall be treated as filed after the entry of the order disposing of the motion and on the day thereof. If an appellant named in a premature notice of appeal decides to terminate the appeal as a result of the trial court's disposition of a motion listed in subparagraph (b) or (c) of this rule, the appellant shall file in the appellate court a motion to dismiss the appeal pursuant to Rule 15."

A 2005 Advisory Commission Comment to Tenn. R. App. P. 4 states: "If a post-trial motion specified in Rule 4 is timely filed after the filing of a notice of appeal and after the trial court clerk's service of the notice of appeal on the clerk of the appellate court pursuant to Rule 5(a), the trial court clerk must notify the clerk of the appellate court of the filing of the motion; in addition, the trial court clerk must promptly notify

automatic stay prevents filing a notice of appeal, the appellant has 30 days after the lifting of the stay in which to file the notice;[5] (b) filing a cost bond contemporaneously with the notice of appeal;[6] (c) serving a copy of the notice of appeal, which must state the date on which notice of appeal was filed, on counsel of record for each party, or on a party himself who has no counsel, no later than seven days after the filing of the notice of appeal;[7] and (d) by filing proof of service with the

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the clerk of the appellate court of the entry of the trial court's order disposing of the motion."

See Third Nat. Bank in Nashville v. Knobler, 789 S.W.2d 254, 255 (Tenn. 1990); Griswold v. Income Properties, II, 880 S.W.2d 672 (Tenn. Ct. App. 1993); Brumlow v. Brumlow, 729 S.W.2d 103, 105 (Tenn. Ct. App. 1986).

See Tennessee Farmers Mut. Ins. Co. v. Farmer, 970 S.W.2d 453 (Tenn. 1998). Tenn. R. Civ. P. 59.01 specifically provides that motions to reconsider previously decided post-trial motions are "not authorized and will not operate to extend the time for appellate proceedings."

Caveat: See Flynn v. Shoney's, Inc., 850 S.W.2d 458, 461; 71 Fair Empl. Prac. Cas. (BNA) 1801 (Tenn. Ct. App. 1992), citing Tenn. R. Civ. P. 59.02. Defendant filed motion for judgment notwithstanding the verdict within 30 days of entry of an adverse judgment, but not a motion for new trial. After judgment notwithstanding verdict was denied, the plaintiff filed a motion for a new trial within 30 days of the order denying the motion for judgment notwithstanding the verdict, but more than 30 days after entry of the judgment. The appellate court denied relief because the motion must be filed within 30 days after entry of judgment.

[5]1999 Advisory Commission Comment to Tenn. R. App. P. 4, citing 11 U.S.C.A. § 108(c).

[6]Tenn. R. App. P. 6.

On January 24, 1992, the Tennessee Supreme Court, pursuant to T.C.A. §§ 16-3-402 et seq., ordered an amendment to Tenn. R. App. P. 6, to raise the required appeals cost bond from $500 to $1,000. This amendment was approved by 1992 S. R. 61 and H. R. 160 with an effective date of July 1, 1992.

Security Bank & Trust Co. of Ponca City, Okl. v. Fabricating, Inc., 673 S.W.2d 860, 866 (Tenn. 1983). Tenn. R. App. P. 6 requires that a bond for costs on appeal be filed, but the right to appeal is not conditioned upon the filing of a bond for a stay of execution. See, however, Bush v. Bradshaw, 615 S.W.2d 157 (Tenn. 1981) (filing bond for costs on appeal is not mandatory unless a motion is filed by the appellee or the court orders the posting of a bond).

Cooper v. Insurance Co. of North America, 884 S.W.2d 446, 448 (Tenn. 1994). While the State's Second Injury Fund in workers' compensation cases may be assessed with costs, no bond is required in an appeal on behalf of the State, its agencies, or its officers.

Tenn. R. App. P. 6(a) as amended in 2002, provides that if a trial court shall notify an appellate court clerk of a party's failure to file a bond with the notice of appeal, the appellate court may issue a show cause order as to why the appeal should not be dismissed for failure to file a bond.

First American Trust Co. v. Franklin-Murray Development Co., L.P., 59 S.W.3d 135, 141 n.7 (Tenn. Ct. App. 2001). Perfecting an appeal consists of filing a timely notice of appeal and either an appeal bond or affidavit of indigency. Blue Cross-Blue Shield of Tennessee v. Eddins, 516 S.W.2d 76, 77 (Tenn. 1974) (holding that an appeal is perfected when the appeal bond is filed).

[7]Tenn. R. App. P. 5(a).

G. F. Plunk Const. Co., Inc. v. Barrett Properties, Inc., 640 S.W.2d 215 (Tenn. 1982), has held that appellate courts have authority to suspend the Rules of Appellate Procedure and waive the failure to serve notice of the filing of an appeal upon opposing counsel as required by Tenn. R. App. P. 5, where (1) the appellant has timely filed a notice of appeal with the clerk of the trial court in full compliance with Tenn. R. App. P. 4 *and* (2) good cause is shown why timely service was not effected. The express language of Tenn. R. App. P. 2 prevails over the conflicting language of Tenn.

trial court clerk, in the manner set forth in Tenn. R. App. P. 20(e), within seven days after service.[8] The Tennessee Rules of Appellate Procedure, as amended in 1998, however, provide: "Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal."[9]

Tenn. R. App. P. 5(c) was amended in 2012 by adding the following as a new second paragraph: "If more than one party files a notice of appeal in an action appealed to the Court of Appeals pursuant to Tenn. R. App. P. 3, the first party filing a notice of appeal shall be deemed to be the appellant, unless otherwise directed by the court."[10]

Tenn. R. App. P. 16(a) was revised in 2005 to read: "(a) Joint Appeals. If two or more persons are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may proceed on appeal jointly. If two or more persons file separate notices of appeal from one judgment or order, the case shall be docketed in the appellate court as a single appeal." A 2005 Advisory Commission Comment notes that Tenn. R. App. P. 16(a) is amended to harmonize this rule with the 2004 amendment to Tenn. R. App. P. 3(f) (regarding content of notice of appeal). Under paragraph (a) parties either may file a joint notice of appeal in compliance with Tenn. R. App. P. 3(f) or they may file separate notices of appeal. In either situation, when parties are seeking to appeal from a single judgment or order, the case will be docketed as a single appeal.

R. App. P. 3(e), which provides that "failure of an appellant to take any step other than the timely filing and serving of a notice of appeal does not effect the validity of an appeal." As to the "good cause" requirement for suspension, the Court stated at p. 218: "A showing of good cause requires more than a mere good faith belief that a routine office chore has been timely performed. The service of a copy of the notice of appeal filed in the trial court, on counsel of record and the clerk of the appellate court may be classified as a routine office chore. Thus we are compelled to the conclusion that the mere good faith intention and belief that notices were sent at the appropriate time does not provide good cause under Rule 21(b) for permitting an act to be done after the expiration of the time prescribed in the rules."

See also Price v. Mercury Supply Co., Inc., 682 S.W.2d 924, 928–29 n.4 (Tenn. Ct. App. 1984) (failure to serve notice of appeal on adversary's counsel does not bar appeal where there has been substantial compliance with Tenn. R. App. P. 5(a) and the Court, pursuant to Tenn. R. App. P. 2, suspends the requirements of Rule 5(a)).

Consider Gray v. Boyle Inv. Co., 803 S.W.2d 678, 685 (Tenn. Ct. App. 1990) (failure to serve notice of appeal on adversary party, as required by Tenn. R. App. P. 5, is not jurisdictional and may be waived).

[8]Tenn. R. App. P. 5(a).

[9]Tenn. R. App. P. 3(e) (1998).

In 1998, the Tennessee Supreme Court ordered an amendment to Tenn. R. App. P. 3(e), which deleted "and service" from the fourth sentence. The Advisory Commission Comment to the amendment states: "Because the trial clerk rather than the appellant's lawyer is now responsible for serving the appellate clerk with a copy of the notice of appeal, the words 'and service' were deleted from subsection (e)." The amendment to Tenn. R. App. P. 3(e) was approved by 1998 S. R. 80 and H. R. 152, with an effective date of July 1, 1998.

[10]An Advisory Commission Comment [2012] to Tenn. R. App. P. 5(c) states: "The purpose of the amendment is to clarify the application of other rules of appellate procedure, e.g., Tenn. R. App. P. 6 (governing bond for costs on appeal in civil actions), Tenn. R. App. P. 24 (governing the content and preparation of the record on appeal), and Tenn. R. App. P. 29 (governing the filing and service of briefs)."

Tenn. R. App. P. 16(b) was revised in 2005 to read: "(b) Consolidated Appeals. When separate appeals involving a common question of law or common facts are pending before the appellate court, the appeals may be consolidated by order of the appellate court on its own motion or on motion of a party." A 2005 Advisory Commission Comment notes that Tenn. R. App. P. 16(b) is amended to clarify that appeals from separate cases may be consolidated on the court's own motion or on motion of a party, when the separate cases involve a common question of law or a common set of facts.

A 1999 Advisory Commission Comment to Tenn. R. App. P. 3 states: "It is the policy of the appellate court clerk's office in cases involving cross appeals to consider the appellant to be the party who first files a notice of appeal; in the event that the notices are filed on the same day, the plaintiff in the proceeding below is considered to be the appellant unless the parties otherwise agree or the court otherwise directs."

Tenn. R. App. P. 5(a) was amended in 1997 to delete the requirement for perfecting an appeal as of right, that the appellant must serve a copy of its notice of appeal on the clerk of the appellate court designated in the notice not later than seven days after the filing of the notice.[11] Tenn. R. App. P. 5, as amended in 1997, now provides that the trial court clerk shall promptly serve all filed notices of ap-

[11]Donnelly v. Walter, 959 S.W.2d 166, 167 (Tenn. Ct. App. 1997). Appellant's failure to serve a copy of her notice of appeal on the appellate court clerk in accordance with Tenn. R. App. P. 5(a) did not warrant a dismissal of its appeal. Cobb v. Beier, 944 S.W.2d 343 (Tenn. 1997), held that all cases presently on appeal in which the clerk of the appellate court was not timely served a copy of the notice of appeal should not be dismissed for failure to comply with Tenn. R. App. P. 5(a). The Court opined that to dismiss an appeal for this reason alone would be to elevate form over substance, thereby impeding the search for justice.

Dunlap v. Dunlap, 996 S.W.2d 803, 808–10 (Tenn. Ct. App. 1998). At the time the plaintiff filed her notice of appeal on June 2, 1997, Tenn. R. App. P. 5(a) required service of a copy of a notice of appeal on the appellate court clerk designated in the notice not later than seven days after filing the notice of appeal. Plaintiff, however, did not serve a copy of the notice of appeal on the appellate court clerk until 28 days later, June 30, 1997. Notwithstanding plaintiff's late filing of the notice with the appellate court clerk, the Court denied defendant's motion to dismiss the appeal. (1) The Court first cited Cobb v. Beier, 944 S.W.2d 343 (Tenn. 1997), which had noted that the requirement of service on the clerk of the appellate court under Tenn. R. App. P. 5 had been in a state of flux since 1979, and had been amended in 1997 to place upon the trial court clerk, rather than the appellant or appellant's counsel, the responsibility of serving a copy of the notice of appeal upon the clerk of the appellate court. Cobb further declined to dismiss an appeal based on the appellant's failure to timely serve a copy of the notice of appeal on the appellate court clerk, as there was no prejudice to the appellee or to the appellate process resulting from appellant's failure to serve a copy of the notice of appeal upon the clerk of the appellate court. (2) The Court further cited Johnson v. Hardin, 926 S.W.2d 236, 238 (Tenn. 1996), which held that the general policy of the rules, as suggested by the Advisory Commission and interpreted by the courts, emphasizes reaching a just result and disregarding technicality in form, and that a court's construction and application of the rules should further that intent and should enhance, not impede, the search for justice. (3) The Court recognized that Cobb had specifically applied its holding to "this case, and all cases presently on appeal in which the clerk of the appellate court was not timely served a copy of the notice of appeal," and that the present appeal was not pending when the Supreme Court decided Cobb. Notwithstanding the fact that the present appeal was filed after the Supreme Court decided Cobb and before the Supreme Court's amendment to Rule 5(a) became effective on July 1, 1997, the Court concluded that the rationale of Cobb

peal on the clerk of the appellate court designated in the notice of appeal.[12] Tenn. R. App. P. 5(a) was further amended in 2007 to provide: "With the notice of appeal, the trial court clerk shall also serve on the clerk of the appellate court either an appeal bond or an affidavit of indigency or a notice of the appellant's failure to file either an appeal bond or affidavit."[13] Tenn. R. App. P. 5(c), as amended in 2002, provides: "The clerk of the appellate court shall enter the appeal on the docket immediately upon receipt of the copy of the notice of appeal served upon the clerk of the appellate court by the trial court clerk or, in appeals other than appeals as of right pursuant to Rule 3, upon receipt of the application or petition initiating the appeal. The clerk of the appellate court shall immediately serve notice on all parties of the docketing of the appeal. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if such title does not contain the name of the appellant, the party's name, identified as appellant, shall be added to the title. With the service of the notice of docketing of the appeal, the clerk of the appellate court shall send to the appellant, and the appellant shall fully complete and return to the clerk, a docketing statement in the form prescribed by the clerk. In 1996, the Tennessee Supreme Court ordered an amendment to Tenn. R. App. P. 3(e) which provides: "The trial court clerk shall send the trial judge a copy of all notices of appeal."[14] The Advisory Commission Comment following this amendment states that the amendment "ensures that trial judges will know what decisions have been appealed."

A "notice of appeal" need only specify (a) the party or parties taking the appeal, by naming each one in the caption or body of the notice (but an attorney representing more than one party may describe those

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applied equally well to the present case, and declined to dismiss defendant's appeal based solely on her failure to timely serve a copy of the notice of appeal on the clerk of the appellate court.

[12]Tenn. R. App. P. 5(a) was amended by Order of the Tennessee Supreme Court and was approved by 1997 S. R. 4 and H. R. 7, with an effective date of July 1, 1997. The Advisory Commission Comment to the 1997 Amendment states: "In order to assist the appellate court system in tracking all cases post-trial, the amendment shifts the duty of serving copies of notices of appeal on appellate clerks from counsel to trial clerks. Service of a copy on the appellate court clerk is not jurisdictional."

Prior to the 1997 amendment to Tenn. R. App. P. 5(a), Cobb v. Beier, 944 S.W.2d 343 (Tenn. 1997), held that the Court of Appeals had erred in dismissing an appeal based on appellant's failure to serve the appellate court clerk with a copy of its notice of appeal, notwithstanding the requirements of Tenn. R. App. P. 5(a). In so holding, the Court, at p. 345, stated: "The filing of the notice of appeal with the clerk of the appellate court is administrative, not jurisdictional, for it serves no substantive purpose in the appellate process." Further, there was "no prejudice to the appellee or the appellate process resulting from appellant's failure to serve a copy of the notice of appeal upon the clerk of the appellate court."

[13]Tenn. R. App. P. 5(a), paragraph 2, sentence 2, effective July 1, 2007. A 2007 Advisory Commission Comment states: "The amended language requires the trial court clerk to promptly serve either the appeal bond or affidavit of indigency with the notice of appeal upon the appellate court clerk. This amendment will ensure that appellants timely file their appeal bond with the notice of appeal. Failure to do so will result in the trial court clerk notifying the appellate court clerk that no appeal bond has been filed so that action can be taken to dismiss the appeal under Rule 6(a) prior to the filing of the record."

[14]The amendment to Tenn. R. App. P. 3(e) was approved by H. R. 178 on April 18, 1996, and S. R. 34 on April 24, 1996, with an effective date of July 1, 1996.

parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X," (b) the judgment from which relief is sought, and (c) the name of the court to which the appeal is taken.[15] Informality of form or title of the notice of appeal is

[15]Tenn. R. App. P. 3(f).

2005 Advisory Commission Comment to Tenn. R. App. P. 3(f) notes: "Subdivision (f) specifies the content of the notice of appeal. The purpose of the notice of appeal is simply to declare in a formal way an intention to appeal. As long as this purpose is met, it is irrelevant that the paper filed is deficient in some other respect. Similarly, the notice of appeal plays no part in defining the scope of appellate review. Scope of review is treated in Rule 13. This subdivision read in conjunction with Rule 13(a) permits any question of law to be brought up for review [except as otherwise provided in Rule 3(e)] as long as any party formally declares an intention to appeal in a timely fashion."

2005 Advisory Commission Comment to Tenn. R. App. P. 3(e) notes: "Under Rule 16, two or more persons may proceed on appeal jointly. Thus it is entirely proper for parties to file a joint notice of appeal; however, a joint notice of appeal must comply with subparagraph (f) of this rule."

Tenn R. App. P. 8(a)(2), effective July 1, 2004, which governs appeals in cases involving the termination of parental rights, provides: "In addition to meeting the requirements of Rule 3(f) ("Content of the Notice of Appeal"), a notice of appeal in a termination of parental rights proceeding shall indicate that the appeal involves a termination of parental rights case."

Tenn. R. App. P. 13(d) governs the scope of review on appeal and provides that "any question of law may be brought up for review and relief by any party."

In Christenberry Trucking & Farm, Inc. v. F & M Marketing Services, Inc., 329 S.W.3d 452, 457–8 (Tenn. Ct. App. 2010), appeal denied, (Oct. 21, 2010). Appellee filed a Tenn. R. Civ. P. 11 jurisdictional challenge to appellant's notice of appeal because it was signed by an attorney, other than appellant's trial attorney, who had not previously entered an appearance or filed anything making him attorney of record. The Court of Appeals denied the challenge, holding that while Tenn. R. Civ. P. 11 requires that every pleading "be signed by at least one attorney of record, it was clear that the notice of appeal filed in this case fulfilled the purposes behind requiring a party to file a notice of appeal, 'to declare in a formal way an intention to appeal.'" Tennessee Rules of Appellate Procedure, Rule 3 (Advisory Commission Comment Subdivision (f)). Tennessee Rules of Appellate Procedure, Rule 3(f) provides that an appeal should not be dismissed for informality of form or title of notice of appeal. Accordingly, even if the missing signature of trial counsel were to be construed as a defect, such defect was no more than an informal defect that was cured by the later added signature. Rule 11.01 specifically contemplates situations where an omission of the signature is corrected promptly after being called to the attention of the attorney or party. Alternatively, the Court found no defect in appellant's notice of appeal, stating that there are many means of making an "appearance" and the Tennessee Rules of Civil Procedure do not define an appearance. As there is no requirement in the rules of a formal record entry; an appearance can be implied from "some act done with the intention of appearing and submitting to the court's jurisdiction." The filing of the notice of appeal by appellant attorney, who was licensed in Tennessee, on behalf of appellant made him an attorney of record. The notice of appeal, therefore, was signed by "one attorney of record."

In re NHC--Nashville Fire Litigation, 293 S.W.3d 547, 556-7, 37 Media L. Rep. (BNA) 1363 (Tenn. Ct. App. 2008). Although appellant's notice of appeal following entry of final judgment did not specify that the appellant was also appealing the trial court's interlocutory non-final order related to the protection of discovery from public access, review of the interlocutory order was not beyond the scope of the appeal. While Rule 3(f) mandates that the notice of appeal designate the judgment being appealed, the advisory comment to Rule 3(f) states: "This subdivision specifies the content of the notice of appeal. The purpose of the notice of appeal is simply to declare in a formal way an intention to appeal. As long as this purpose is met, it is irrelevant that the paper filed is deficient in some other respect. Similarly, the notice of appeal plays no part in defining the scope of appellate review. Scope of review is

treated in [T.R.A.P.] 13. This subdivision read in conjunction with rule 13(a) permits any question of law to be brought up for review [except as otherwise provided in rule 3(e)] as long as any party formally declares an intention to appeal in a timely fashion."

Cox v. Tennessee Farmers Mut. Ins. Co., 297 S.W.3d 237, 243 (Tenn. Ct. App. 2009). Tenn. R. App. P. 13(a) rejects use of the notice of appeal as a review-limiting device. The principal utility of the notice of appeal under the Tenn. R. App. P. is simply to indicate a party's intention to take an appeal, and neither the issues presented for review nor the arguments in support of those issues are set forth in the notice of appeal. The Court added that there is no good reason for Tennessee courts to follow the practices in federal courts that the issues raised on appeal are limited to questions affecting the portion of the judgment specified in the notice of appeal, and that an appellee may only raise on appeal issues set forth in the appellee's own notice of appeal. In Cox, the Court of Appeals held that it had jurisdiction to review and consider an earlier grant of a partial summary judgment even though plaintiffs' notice of appeal stated that the appeal was of a late entered final judgment. Appellant's failure to list the trial court's partial summary judgment in its notice of appeal once a final judgment was later entered by the trial judge did not preclude appellate review of that ruling.

Elliot v. Life of the South Ins. Co., 296 S.W.3d 64, 68 (Tenn. Ct. App. 2008). Although plaintiff appealed from an order denying her motion to alter or vacate a previously entered order of summary judgment, appellate review is not limited to only that order as it is well settled that the notice of appeal is not a review limiting device, and an appellate court may consider any question presented, including the grant of summary judgment.

Cruse v. City of Columbia, 922 S.W.2d 492, 493 (Tenn. 1996): "The filing and content requirements of a notice of appeal fulfill two purposes. First, the notice of appeal, filed with the trial court clerk and served on opposing counsel, advises the court and opposing counsel that an appeal has been taken. Secondly, designation of the judgment appealed from and the court appealed to clearly describes the matter on appeal."

Hall v. Hall, 772 S.W.2d 432, 435–36 (Tenn. Ct. App. 1989), citing Tenn. R. App. P. 3(f). Appeal is limited to those orders clearly and specifically designated.

Arnett v. Domino's Pizza I, L.L.C., 124 S.W.3d 529, 533 (Tenn. Ct. App. 2003). In the present case, the notice of appeal filed in the appellate court named as appellants "Cedric Arnett, et al." The Court held that the listing of one or more named parties followed by the phrase "et al" on the notice of appeal was insufficient to satisfy the Tenn. R. App. P. 3(f) as the Rule provides that a notice of appeal "shall specify the party or parties taking the appeal". Accordingly, the Court held that its appellate jurisdiction was limited to the appeal of Cedric Arnett. In so holding, the Court distinguished Fed. R. App. P. 3(c) which was amended following the ruling in Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S. Ct. 2405, 101 L. Ed. 2d 285, 47 Fair Empl. Prac. Cas. (BNA) 116, 46 Empl. Prac. Dec. (CCH) P 38066, 11 Fed. R. Serv. 3d 6 (1988), which had held that the use of the phrase "et al" was insufficient to provide notice of appeal in accordance with the Fed. R. App. P. 3(c) as it then existed. In contrast to the amended federal rule, Tenn. R. App. P. remains identical to the pre-amended federal rule, and Tennessee continues to follow the decision in Torres, notwithstanding Congress' amendment to the federal rules, which effectively overruled the holding of Torres in federal court actions.

After the decision in Arnett, Tenn. R. App. P. 3(f), which governs the content of a notice of appeal, was amended, effective July 1, 2004, by replacing the first sentence of subparagraph (f), which had provided that a notice of appeal "shall specify the party or parties taking the appeal, shall designate the judgment from which relief is sought, and shall name the court to which to which the appeal is taken," with the following: "The notice of appeal shall specify the party or parties taking the appeal by naming each one in the caption or body of the notice (but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X"), shall designate the judgment from which relief is sought, and shall name the court to which the appeal is taken. An Advisory Commission Comment to the Amendment states: "The language of paragraph (f) in parentheses, taken from Fed. R. App. P. 3(c),

not fatal.[16] The Rules of Appellate Procedure contain an official notice

provides a lawyer representing appellants with options other than listing each appellant by name. The lawyer should consult with clients to make sure each wants to appeal, thereby avoiding problems with court costs."

Toms v. Toms, 209 S.W.3d 76, 79 (Tenn. Ct. App. 2005). Where notice of appeal was signed by various parties but only one appellate brief was filed and that brief stated it was filed in the name of only one appellant by the attorney for the appellants, the Court of Appeals held tat for purpose of this appeal, it shall consider each of the parties listed on the notice of appeal as appellants.

Consider Becker v. Montgomery, 532 U.S. 757, 121 S. Ct. 1801, 149 L. Ed. 2d 983, 49 Fed. R. Serv. 3d 357 (2001). The requirement in the Federal Rules that a notice of appeal be signed derives from Fed. R. Civ. P. 11(a), and so does the remedy for a signature's omission on the notice originally filed. When a party files a timely notice of appeal which properly specifies the party or parties taking the appeal, in district court, the failure to "sign" the notice, as by a name handwritten or a mark handplaced (in the present case the appellant typed his name), as required by the Fed. R. Civ. P. 11 and Fed. R. App. P. 3 and 4, does not require the court of appeals to dismiss the appeal. Imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court, and the appellant, upon having the omission of a signature brought to his attention, promptly corrects the omission by signing the paper on file or by submitting a duplicate that contains the signature.

[16]Tenn. R. App. P. 3(f), second sentence. See Boyd v. Hicks, 774 S.W.2d 622, 625 (Tenn. Ct. App. 1989).

See, Christenberry Trucking & Farm, Inc. v. F & M Marketing Services, Inc., 329 S.W.3d 452, 457–8 (Tenn. Ct. App. 2010), appeal denied, (Oct. 21, 2010), discussed supra.

Cox v. Tennessee Farmers Mut. Ins. Co., 297 S.W.3d 237, 242 (Tenn. Ct. App. 2009). The Advisory Committee Comments to Rule 3(f) that states: "This subdivision specifies the content of the notice of appeal. The purpose of the notice of appeal is simply to declare in a formal way an intention to appeal. As long as this purpose is met, it is irrelevant that the paper filed is deficient in some other respect."

Fayne v. Vincent, 301 S.W.3d 162, 167 n.2 (Tenn. 2009). The appellate court in the present case granted a party's motion to correct the spelling of her first name from "Gwinn" to "Gwen" in the style of the case.

See Bank of America, N.A. v. Darocha, 241 S.W.3d 510 (Tenn. Ct. App. 2007). Plaintiff bank filed a complaint upon sworn account to collect a past due balance owed by defendant "Michael J. Darocha" on a credit card account. Mr. Darocha filed no responsive pleading on his own behalf to the bank's complaint, although a motion to dismiss the complaint was filed in the action on behalf of "MICHAEL J. DAROCHA™" by Michael J. Darocha© Auth. Rep." The trial court's entered judgment against Michael J. Darocha, and included findings that Mr. Darocha had a security interest in an entity designated "MICHAEL J. DAROCHA." Thereafter, a notice of appeal was filed on behalf of "MICHAEL J. DAROCHA©™." But the Court of Appeals dismissed the appeal, holding that "MICHAEL J. DAROCHA©™" had no right to appeal because there was an absence of any evidence that "MICHAEL J. DAROCHA©™" was a party below and was adversely affected by the trial court's judgment. Accordingly, one has no right to appeal a judgment by which one is not adversely affected, this appeal was not properly before this Court, and the appeal is without merit.

Dunlap v. Dunlap, 996 S.W.2d 803, 810 (Tenn. Ct. App. 1998). While noting that the defendant's first notice of appeal failed to identify the order or orders being appealed and that Tenn. R. App. P. 3(f) specifically requires that a party's notice of appeal designate the judgment from which relief is sought, the Court nevertheless concluded that the defendant's failure to comply with Rule 3(f) did not preclude the appellate court from reviewing the issues of law or fact involved in this case which were raised by the defendant in her appellate brief. (1) In so holding, the Court noted the general rule that a party to an appeal may present any question of law for appellate court review, and cited Rule 13(a), governing scope of review of appellate courts which provides that, except as otherwise provided in Rule 3(e) (addressing waiver of certain issues in jury trials), any question of law may be brought up for review and

form in Appendix A.[17]

Upon an appellant's filing of a notice of appeal and the docketing of the case, the appellee acquires the right to present to the appellate court any question of law that she sees fit without the need of filing a separate notice of appeal.[18] Further, upon an appellant's dismissal of its appeal, Tennessee Rules of Appellate Procedure, Rule 15, in conjunction with Tennessee Rules of Appellate Procedure, Rule 13(a), gives any remaining parties the right to prosecute an appeal to completion.[19]

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relief by any party. (2) Unlike in federal practice, Rule 13(a) rejects use of the notice of appeal as a review-limiting device. More particularly, the notice of appeal does not limit the questions an appellant may urge on review to those affecting the portion of the judgment specified in the notice of appeal. Further, an appellant's notice of appeal does not limit the issues an appellee may raise on appeal in the absence of the appellee's own notice of appeal. (3) In examining the relationship between Rule 13(a) and Rule 3(f), the Court further cited previous unreported opinions that had held that a party's failure to comply with Rule 3(f) does not limit the issues which that party may raise on appeal as the purpose of the notice of appeal is simply to declare in a formal way an intention to appeal. As long as this purpose is met, it is irrelevant that the paper filed is deficient in some other respect. (4) The Court observed that, while it would have been prudent for the defendant to identify the appropriate judgments in her notice of appeal, this oversight had not prejudiced the plaintiff in any way and had not otherwise hampered review of this appeal.

[17]2005 Advisory Commission Comment to Tenn. R. App. P. 3(e) notes: "The form and content of the notice of appeal are set out in official form 1, and Rule 48 specifically provides that the use of this form is sufficient under these rules."

[18]Harrell v. Harrell, 321 S.W.3d 508, 512 (Tenn. Ct. App. 2010), appeal denied, (Aug. 25, 2010).

An Advisory Commission Comment [2012] to Tenn. R. App. P. 5(c) states that "once one party files a notice of appeal, other parties are not required to file a separate notice of appeal in order to raise any issue(s) in the appeal. Tenn. R. App. P. 13(a), Advisory Commission Comment (stating, '[t]he result of eliminating any requirement that an appellee file the appellee's own notice of appeal is that once any party files a notice of appeal the appellate court may consider the case as a whole'). As a practical matter, however, it is not uncommon for more than one party to file a notice of appeal."

Forbess v. Forbess, 370 S.W.3d 347, 357–8 (Tenn. Ct. App. 2011), appeal denied, (Apr. 12, 2012). An appellee waived certain issues on appeal by failing to include those issues in its statement of the issues on appeal, as required by Tenn. R. App. P. 24, to the extent that the presentation by the appellant is deemed unsatisfactory, and if the appellee is requesting relief from the judgment. In that case, the brief of the appellee shall contain the issues and arguments involved in his request for relief as well as the answer to the brief of appellant. The Court held that Tenn. R. App. P. 13(b) states that "[r]eview generally will extend to only those issues presented for review," and the Advisory committee comments to Rule 13(b) states that: "Only the absence of subject-matter jurisdiction, whether at the trial or appellate level, must be considered by the appellate court regardless of whether it is presented for review." "However, the appellate court has discretion to decide whether it will consider a matter not raised by the parties. It is intended that this discretion be sparingly exercised."

[19]Harrell v. Harrell, 321 S.W.3d 508, 512 (Tenn. Ct. App. 2010), appeal denied, (Aug. 25, 2010).

An Advisory Commission Comment [2012] to Tenn. R. App. P. 5(c) states that "a second (or later) party filing a notice of appeal may file a reply brief pursuant to Tenn. R. App. P. 27(c); that rule permits an appellee who is seeking relief from the judgment to file a brief in reply to the response of the appellant to the issues presented by appellee's request for relief." The Advisory Commission Comment [2012] adds: "Tenn. R. App. P. 13(a) provides that 'any question of law may be brought up for review and relief by any party' and that '[c]ross-appeals, separate appeals, and

If a notice of appeal has been filed after the timely filing of a Rule 50.02 motion for judgment in accordance with a motion for directed verdict, a Rule 52.02 motion to amend or make additional findings of fact, a Rule 59.02 motion for new trial, or a Rule 59.04 motion to alter or amend judgment or their disposition,[20] the notice of appeal remains effective subsequent to the entry of the order disposing of the motions without the necessity of filing a new notice of appeal.[21] In such cases, the prematurely filed notice of appeal is treated as taken after the entry of the judgment from which the appeal is taken.[22] Similarly, the filing of a notice of appeal before the entry of final judgment, where

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separate applications for permission to appeal are not required.' Tenn. R. App. P. 13(a) goes on to provide that '[d]ismissal of the original appeal shall not preclude issues raised by another party from being considered by an appellate court.' *See also* Tenn. R. App. P. 6(c) (providing that a party wanting to litigate appellate issues despite dismissal of the original appellant's appeal shall file a cost bond, with surety, to replace the cost bond filed by the original appellant); Tenn. R. App. P. 15(a) (providing for the voluntary dismissal of an appeal by stipulation or on motion, but also stating, '[a]ny party wanting to litigate appellate issues despite dismissal of the original appeal must provide notice of such intent in a response to the motion to dismiss).'"

Compare Crowley v. Thomas, 343 S.W.3d 32 (Tenn. 2011). The plaintiff obtained a judgment against the defendant in the general sessions court. The defendant, but not the plaintiff, appealed to the circuit court. In the circuit court, the plaintiff amended his complaint to add an additional plaintiff and an additional cause of action and to seek additional damages. Shortly before trial, the defendant filed a notice dismissing her appeal. The circuit court dismissed the appeal and affirmed the judgment of the general sessions court pursuant to T.C.A. § 27-5-107 (2000). On plaintiff's appeal, the Court of Appeals, affirmed, and on further grant of permission to appeal, the Supreme Court affirmed the judgment of the lower courts, holding that the circuit court properly dismissed the defendant's appeal and affirmed the general sessions judgment. To preserve the plaintiff's original cause of action after such dismissal, the plaintiff itself must have perfected an appeal to the circuit court as prescribed by T.C.A. § 27-5-108 (2000).

[20]Tenn. R. App. P. 4(b).

[21]By a 1984 amendment to the Tennessee Rules of Appellate Procedure, the following language was deleted from Tenn. R. App. P. 4(b): "A notice of appeal filed before the filing or the disposition of any of the above motions shall have no effect. The party making the motion after a notice of appeal is filed shall move in the trial court for an order dismissing the appeal. . . . A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above." Tenn. R. App. P. 4(d) was also amended and provides that "[a] prematurely filed notice of appeal shall be treated as filed after the entry of the judgment for which the appeal is taken and on the day thereof."

Alison Group, Inc. v. Ericson, 181 S.W.3d 670, 673 n.5 (Tenn. Ct. App. 2005). Although the notice of appeal in the present case was filed before the trial court's order on a previously filed motion to reconsider, which the trial court treated as a motion for a new trial, and before a previously filed motion for discretionary costs and attorney's fees was determined, the Court noted that under Tenn. R. App. P. 4(b), a prematurely filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof.

McCullough v. Johnson City Emergency Physicians, P.C., 106 S.W.3d 36, 41-2 (Tenn. Ct. App. 2002). Plaintiff timely appealed summary judgment entered in favor of defendant medical group where an order was entered under Tenn. R. Civ. P. 54.02 on July 17, 2001; plaintiffs filed a motion to reconsider the grant of summary judgment on July 31, 2001, which in substance was a motion to alter or amend under Tenn. R. Civ. P. 59.04; plaintiffs' notice of appeal was filed in November, 2001; and the trial court on December 17, 2001, entered an order denying the Plaintiffs' motion to reconsider.

[22]See Tenn. R. App. P. 4(d) as amended in 1984. See also n. 16.

there have been no post-trial motions, will be treated as if it had been filed after the final judgment was entered.[23] In contrast, if a notice of appeal is filed with the trial court clerk within 30 days of the entry of final judgment but prior to the filing of a Rule 50.02 motion for judgment in accordance with a motion for directed verdict, a Rule 52.02 motion to amend or make additional findings of fact, a Rule 59.02 motion for new trial, or a Rule 59.04 motion to alter or amend judgment or their disposition, the filing of the notice of appeal has the legal effect of terminating the trial court's authority to act on a later filed motion, even one filed within 30 days of the entry of final judgment, without leave of the appellate courts, as the filing of the notice of ap-

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[23]Tenn. R. App. P. 4(d), as amended in 1984, provides: "A prematurely filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the date thereof."

In re Conservatorship of Ackerman, 280 S.W.3d 206, 209–10 (Tenn. Ct. App. 2008). Appellant, acting pro se filed an appeal before the final order was signed, and subsequently moved the Court of Appeals to suspend the requirement of Tenn. R. App. P. 3, arguing that she would have delayed the filing of her notice of appeal until after the final order if she had been aware of Tenn. R. App. P. 3(a). The Court held that Rule 3(a) must be read in conjunction with Tenn. R. App. P. 4(d), which provides that "[a] prematurely filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof."

Hawkins v. Hawkins, 883 S.W.2d 622, 624–25 (Tenn. Ct. App. 1994). A Rule 59.04 motion to alter or amend filed *before* the entry of judgment complies with Rule 59.04's command that such motions be filed "within thirty (30) days after the entry of the judgment." Therefore, the filing of such motion stays finality of the judgment under Tenn. R. App. P. 4(b), for the purpose of extending the time for filing a notice of appeal, under Tenn. R. App. P. 4(a), until 30 days from the entry of the order granting or denying the motion.

Gaskill v. Gaskill, 936 S.W.2d 626, 629–30 (Tenn. Ct. App. 1996). Court of Appeals held that a trial court's order, entered following a bench trial, which had declared the parties divorced and had awarded custody of the parties' four-year-old daughter to the mother, but which did not contain a determination regarding visitation, a disputed issue and an integral part of the custody decision, was not a final order, and did not become a final order by the trial court's mailing to the parties a letter on October 24, 1995, containing its decision with regard to the father's visitation rights. The judgment became final only when an order embodying this decision was entered on January 4, 1996. Nevertheless, the Court held that the filing of appellant's appeal within 30 days of the trial court's interlocutory order dated October 13, 1995, and before the entry of the January 4, 1996, final judgment, while premature, was timely in accordance with Tenn. R. App. P. 4(d).

In FirsTier Mortg. Co. v. Investors Mortg. Ins. Co., 498 U.S. 269, 111 S. Ct. 648, 112 L. Ed. 2d 743, 18 Fed. R. Serv. 3d 385 (1991), interpreting Fed. R. App. P. 4(a)(2), the Court allowed relation forward of a notice of appeal filed after a trial judge's statement from the bench of his legal conclusions about a case but before entry of final judgment, to the date of entry of judgment. "Under Rule 4(a)(2), a premature notice of appeal does not ripen until judgment is entered. Once judgment is entered, the Rule treats premature notice of appeal 'as filed after such entry.'" The Court added: "This is not to say that Rule 4(a)(2) permits a notice of appeal from a clearly interlocutory decision — such as a discovery ruling or sanction order under Rule 11 of the Federal Rules of Civil Procedure — to serve as a notice of appeal from the final judgment. A belief that such a decision is a final judgment would *not* be reasonable. In our view, Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment. In these instances, a litigant's confusion is understandable, and permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise. Little would be accomplished by prohibiting the Court of Appeals from reaching the merits of such an appeal."

peal vests jurisdiction over the case with the court of appeals.[24] Similarly, where an appellant has timely filed a notice of appeal contemporaneously with the filing of a Rule 60.02 motion for relief from judgment, the trial court no longer retains jurisdiction to address the Rule 60.02 motion. Once the notice of appeal is filed, the jurisdiction of the appellate court attaches, and, correlatively, the trial court loses its jurisdiction.[25]

While the Rules provide generally that an appellant in a civil action must file a bond for the costs on appeal with the trial court when it files its notice of appeal, the appellant is not required to file a bond or full bond for costs if the appellant is exempted by statute, the Rules of Appellate Procedure, or the Rules of Civil Procedure, or has filed a bond for stay that includes security for the payment of costs on appeal.[26] The Supreme Court has held that the filing of a "bond for costs on appeal" is not a mandatory requirement unless a motion is filed by the appellee or the court orders the posting of a bond.[27] The trial court clerk shall notify the appellate court clerk of a party's failure to file a bond with the notice of appeal, and the appellate court may issue a show cause order as to why the appeal should not be dismissed for failure to file a bond.[28] If a bond is not filed pursuant to court order, this failure is then grounds for dismissal of the appeal.[29]

Tenn. R. App. P. 6(c), as amended with an effective date of July 1, 2002, provides: "(c) Any party wanting to litigate appellate issues de-

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[24]See Spann v. Abraham, 36 S.W.3d 452, 460–61 (Tenn. Ct. App. 1999), discussed at n. 3.

[25]Born Again Church & Christian Outreach Ministries, Inc. v. Myler Church Bldg. Systems of the Midsouth, Inc., 266 S.W.3d 421, 425 (Tenn. Ct. App. 2007) citing Spence v. Allstate Ins. Co., 883 S.W.2d 586, 595 (Tenn. 1994). The Court noted, however, that the filing of a notice of appeal does not prevent the trial court from ruling on ancillary matters relating to the enforcement or collection of its judgment. as distinguished from filing a motion for relief from judgment.

[26]Tenn. R. App. P. 6; see Tenn. R. Civ. P. 62 and 65A. Tenn. R. App. P. 6(a).

Tenn. R. App. P. 6(b), as amended with an effective date of July 1, 2002, provides: "(b) Unless an appellant is exempted by statute or has filed an affidavit of indigency and been permitted to proceed on appeal as a poor person, the appellant shall pay to the clerk of the appellate court all applicable litigation taxes upon receipt of the notice of docketing of the appeal pursuant to Rule 5(c). If the appellant fails to pay the litigation tax, the appellate court may issue an order requiring the appellant to show cause why the appeal should not be dismissed for failure to pay the litigation tax." A 2002 Advisory Commission Comment to this amendment states that Rule 6(b) governs the procedure for payment of all litigation taxes applicable to the appeal.

[27]Tenn. R. App. P. 6; Bush v. Bradshaw, 615 S.W.2d 157, 158 (Tenn. 1981).

Tenn. Ct. App. R. 7 was amended in 1988 to provide: "Except in cases where a bond for costs on appeal is not already on file, all documents filed with the Clerk of this Court must be accompanied by a bond to secure the costs to be incurred in this Court unless proper proof of indigency, satisfactory to the Clerk, is submitted in lieu of such bond. The Clerk is empowered to hold any necessary evidentiary hearings to determine the sufficiency of such bond or proof of indigency."

See Tenn. R. App. P. 6(b) as amended in 2002, with an effective date of July 1, 2002.

[28]Tenn. R. App. P. 6, as amended by Order of the Supreme Court on January 28, 2000, and approved by 2000 S. R. and H. R., effective July 1, 2000. Tenn. R. App. P. 6(a).

[29]Tenn. R. App. P. 3(e), last sentence. See Bush v. Bradshaw, 615 S.W.2d 157, 158 (Tenn. 1981).

spite dismissal of the original appellant's appeal shall file with the appellate court clerk a cost bond with sufficient surety to replace the cost bond filed by the original appellant. Filing of the replacement cost bond shall relieve the original appellant and surety of further obligations under the original cost bond." A 2002 Advisory Commission Comment to Rule 6(c) states that new subparagraph (c) conforms to a similar provision in Appellate Rule 15(a).

The Rules of Appellate Procedure specifically address appeal bonds when the appellant is a "poor person."[30] The Rules provide that if a person was determined poor in the trial court, he will automatically be considered the same on appeal.[31] One who has not been treated as a poor person during trial and who seeks to proceed as a poor person on appeal must seek leave in the trial court.[32] If the trial court grants leave, the appellant may proceed as a poor person without application to the appellate court.[33] If, however, the trial court denies leave in an order which states the reasons for the denial and which is served on the appellant by the trial court clerk, a motion rather than an appeal to proceed as a poor person must be filed in the appellate court within 30 days after the service of the notice of the trial court's denial.[34] The motion must be accompanied by the papers filed in the trial court seeking leave and a copy of the statement of reasons given by the trial court for its actions.[35] The appellate court then rules upon the motion.[36]

Prior to a 2006 amendment, Tenn. R. App. P. 18 authorized trial courts to determine whether a party should be permitted to proceed on appeal as a poor person, but the Rule did not expressly authorize an appellate court to do so. In some cases, however, the issue of a party's financial condition does not arise until after the notice of appeal is filed. To address this problem, Tenn. R. App. P 18 was amended

[30]The Rules do not define the term "poor person," but a poor person is generally defined as one without sufficient means to employ counsel or pay for costs of litigation. See Hewell v. Cherry, 25 Tenn. App. 420, 158 S.W.2d 370 (1941) and T.C.A. §§ 20-12-127 et seq. for pauper's oaths.

[31]Tenn. R. App. P. 18(a).

By Order dated January 26, 1990, the Supreme Court amended the first sentence of Rule 18(b) to read: "Except as provided in (a), a party to an action in the trial court who desires to proceed as a poor person on appeal shall seek leave so as to proceed in the trial court." The Advisory Commission Comment to the amendment stated: "The exception in subdivision (b) referring to subdivision (a) is to make it clear that a person already proceeding as a pauper through the trial need not obtain additional leave to proceed under the pauper's oath on appeal." This amendment was approved by the Tennessee General Assembly by 1990 H. R. 100 and S. R. 34, with an effective date of July 9, 1990.

[32]Tenn. R. App. P. 18(b), as amended in 1990.

Massachusetts Mut. Life Ins. Co. v. Henry, 638 S.W.2d 410, 411 (Tenn. Ct. App. 1982), recognized that under Tenn. R. App. P. 18(b), a party who desires to proceed as a poor person on appeal must obtain approval to so proceed in the trial court; but noncompliance may not be the basis for a dismissal of the appeal when the appellee failed to object in the trial court and objected only after briefs were filed in the appellate court.

[33]Tenn. R. App. P. 18(b).

[34]Tenn. R. App. P. 18(c). See Massachusetts Mut. Life Ins. Co. v. Henry, 638 S.W.2d 410, 411 (Tenn. Ct. App. 1982).

[35]Tenn. R. App. P. 18(c).

[36]Tenn. R. App. P. 18(c).

in 2006 to give the appellate courts the authority to determine whether an appealing party should be permitted to proceed on appeal as a poor person, as an alternative to the appellate court's remanding the matter to the trial court for a hearing on the issue, if necessary. Tenn. R. App. P. 18(d), as adopted in 2006,[37] provides: "If a party to an action on appeal is unable to bear the expenses of the appeal due to poverty, but that party has not sought leave from the trial court to proceed on appeal as a poor person, or that party becomes indigent during the appeal, the party may seek leave from the appellate court to proceed on appeal as a poor person. A motion for leave to proceed on appeal as a poor person filed in the appellate court shall be accompanied by a Uniform Affidavit of Indigency as set forth in Supreme Court Rule 13 (criminal cases) or by a Uniform Civil Affidavit of Indigency as set forth in Supreme Court Rule 29 (civil cases). If leave to proceed as a poor person is denied by an intermediate appellate court, the appellate court shall state in writing the reasons for the denial." Tenn. R. App. P. 18(e), as adopted in 2006, further provides: "If leave to proceed as a poor person is denied by an intermediate appellate court, or an intermediate appellate court finds that the party is not entitled so to proceed, the clerk of the appellate courts shall forthwith serve notice of such action. A motion for leave to proceed as a poor person may thereafter be filed in the Supreme Court within 15 days after service of notice of the action of the intermediate appellate court. The motion shall be accompanied by copies of any papers filed in the trial and appellate courts seeking leave to proceed as a poor person and by a copy of the statement of reasons given by the trial and intermediate appellate courts for their actions."

In 1998, the Tennessee Supreme Court ordered an amendment to Tenn. R. App. P. 6, "Security for Costs on Appeal," deleting the second sentence which had provided: "The bonds shall be in the sum or value of $1,000 unless the trial court fixes a different amount." (An Advisory Commission Comment to Rule 6, which was adopted in 2000, states: "A $1,000 cash bond is considered sufficient in the absence of specific direction by the court as to some other amount.") The 1998 amendment further revised the fourth sentence to read: "After a bond for costs on appeal is filed, an appellee may raise on motion for determination by the trial court objections to the form of the bond or the sufficiency of the surety."

Service of any papers may be accomplished either personally or by authorized methods of mail.[38] In computing any time period, the day of the event, such as the final judgment or the filing of papers, is not

[37]Tenn. R. App. P. 18 regarding "Appeals by Poor Persons" has been amended by Tenn. S.R. 99, passed February 27, 2006 and Tenn. H.R. 201, passed March 13, 2006, with an effective date of July 1, 2006. A 2006 Advisory Commission Comment notes that the term "poor person" as used in the Rule is intended to refer to persons who are indigent for purposes of Rule 13 (appointment, qualifications and compensation of counsel for indigent defendants), or Rule 29 (uniform civil affidavit of indigency), Tenn. S. Ct. R., or any other provision of law."

[38]Tenn. R. App. P. 20.

On January 31, 1991, the Tennessee Supreme Court ordered an amendment to Tenn. R. App. P. 20(a), allowing the filing of papers with the appellate court clerk by certified return receipt mail in addition to registered return receipt mail. This amendment was approved by 1991 H. R. 7 and S. R. 13, effective July 1, 1991.

included. The time period expires upon the end of a stated period, unless that final day falls upon a Saturday, Sunday, a legal holiday, or a day when the clerk's office is closed. In the latter event, the period runs until the end of the next day which is not one of these days. For periods of less than seven days, intermediate Saturdays, Sundays, and legal holidays are not included in the computation.[39] Since the time periods for filing service of notice of appeal and proof of service are seven days, they do not meet the "less than seven days" exclusion of intermediate Saturdays, Sundays, and legal holidays.

Upon completing the above steps, an appeal as of right is perfected. Upon perfection, jurisdiction is transferred to the appropriate appellate court.[40] There is no requirement for a motion in arrest of judgment, a prayer for an appeal, or entry of an order permitting appeal.[41] Motions for new trials are no longer prerequisites to appeal a jury action but the following issues, not included in a motion for new trial in a jury case, may not be the basis for an appeal: errors in admission or exclusion of evidence; jury instructions granted or refused; misconduct of jurors, parties or counsel, or other actions committed or occurring during the trial of the case; or other grounds upon which a new trial is sought.[42]

After an appeal has been filed, the appeal may be dismissed by fil-

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Prior to 2002, Tenn. R. App. P. 20(a) provided that papers required or permitted to be filed in the appellate court had to be received by the appellate court clerk or mailed to the office of the clerk by certified return receipt mail or registered return receipt mail within the time fixed for filing. By a 2002 amendment, filing will also be timely if placed with a commercial delivery service, having computer tracking capacity, within the time for filing. Further, official drop boxes for filing of papers shall be located at the Supreme Court Buildings in Knoxville, Nashville, and Jackson and shall be maintained by agents of the Clerk of the Appellate Courts. These boxes shall be opened at the beginning of each business day. Papers found therein will be deemed filed on the last business day preceding opening of the box.

[39]Tenn. R. App. P. 21(a).

[40]Steele v. Wolfe Sales Co., Inc., 663 S.W.2d 799, 802 (Tenn. Ct. App. 1983); Dunlap v. Dunlap, 996 S.W.2d 803, 810 (Tenn. Ct. App. 1998).

State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn. 1996). (1) The jurisdiction of the Court of Criminal Appeals attaches upon the filing of the notice of appeal, at which time the trial court loses jurisdiction. (2) Once the trial court loses jurisdiction, it generally has no power to amend its judgment. (3) Pursuant to Tenn. R. Crim. P. 36, however, the trial court retains limited power to correct clerical mistakes in judgments and other errors in the record arising from oversight or omission. (4) In the case at bar, the Court held that Tenn. R. Crim. P. 36 was inapplicable.

First American Trust Co. v. Franklin-Murray Development Co., L.P., 59 S.W.3d 135, 141 (Tenn. Ct. App. 2001). (1) Once a party perfects an appeal from a trial court's final judgment, the trial court effectively loses its authority to act in the case without leave of the appellate court. Perfecting an appeal vests jurisdiction over the case in the appropriate appellate court. (2) An appellate court retains jurisdiction over a case until its mandate returns the case to the trial court. Issuance of a mandate by an appellate court reinvests the trial court with jurisdiction over a case.

Harrell v. Harrell, 321 S.W.3d 508, 512 (Tenn. Ct. App. 2010), appeal denied, (Aug. 25, 2010). With certain exceptions, trial courts lose jurisdiction to consider motions made after the notice of appeal has been filed.

[41]Tenn. R. App. P. 3(e).

[42]Tenn. R. App. P. 3(e). See § 28:1, Motion for new trial.

A 2000 Advisory Commission Comment to Tenn. R. App. P. 3 provides that the language in Rule 3(e), third sentence that "in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evi-

dence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived," does not bar an appellee who failed to move for a new trial from raising issues on appeal under Tenn. R. App. P. 13(a). The latter Rule provides: "Except as otherwise provided in Rule 3(e), any question of law may be brought up for review and relief by any party. Cross-appeals, separate appeals, and separate applications for permission to appeal are not required." The 2000 Advisory Commission Comment adds: "Raising such issues has been the practice since adoption of the Appellate Rules, and it is the conclusion reached by Prof. John Sobieski — Reporter at the time — in 46 Tenn. L. Rev. at 732–4 (1979)."

Tenn. R. App. P. 8A(a)(1), effective July 1, 2004, which governs appeals in cases involving the termination of parental rights, provides; "It shall not be necessary for a party to file a motion to alter or amend the judgment or a motion for new trial in order to obtain appellate review of the judgment of the trial court.

See Alexander v. Armentrout, 24 S.W.3d 267, 272 (Tenn. 2000), citing Tenn. R. App. P. 3(e) and 36(a). Appellant may not rely on the defense of equitable estoppel as grounds for reversal of a judgment entered on a jury verdict where the defense was not raised in the trial court by the pleadings, in opening and closing arguments to the jury, or during any other portion of the trial. Further, no jury instruction were requested on equitable estoppel and the jury heard no law with regard to the affirmative defense.

State v. Hatcher, 310 S.W.3d 788, 807 (Tenn. 2010). Notwithstanding the waiver provision in Tenn. R. App. P. 3(e), the Supreme Court has held that when "necessary to do substantial justice," an appellate court has the authority to "consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." Tenn. R. App. P. 36(b). Such discretionary consideration of waived issues is referred to as "plain error" review.

Waters v. Coker, 229 S.W.3d 682 (Tenn. 2007). (1) Typically, an issue not brought to the trial court's attention in the motion for new trial cannot be raised on appeal unless it amounts to "plain error" seriously affecting the fairness, integrity, or public reputation of judicial proceedings. (2) The reason for requiring a motion for new trial is to allow the trial court to rectify any errors that might have been made at trial and to avoid "appeal by ambush." The comments to Rule 3 make reference to Rule 36(a) for the proposition that "relief need not be granted to a party who fails to take whatever action is reasonably available to prevent or nullify the harmful effect of an error." The Advisory Commission Comments to Rule 36(a) provide that "[t]he last sentence of this rule is a statement of the accepted principle that a party is not entitled to relief if the party invited error, waived an error, or failed to take whatever steps were reasonably available to cure an error."

Hampton v. Braddy, 270 S.W.3d 61, 66 (Tenn. Ct. App. 2007). The issue of whether a trial court had erred in entering an in personam judgment against defendant rather than an equitable lien on realty, was not raised in defendant's motion for new trial and, thus, was waived. Tenn. R. App. P. 3(e)

Flynn v. Shoney's, Inc., 850 S.W.2d 458, 461, 71 Fair Empl. Prac. Cas. (BNA) 1801 (Tenn. Ct. App. 1992). A motion for new trial is not a prerequisite to appeal a legal issue arising in a jury trial, as it is decided by the judge, not tried by the jury. See also Massachusetts Bonding Co. v. McLemore, 4 Tenn. Civ. App. 633, 4 Higgins 633 (1914).

Cortez v. Alutech, Inc., 941 S.W.2d 891, 894–95 (Tenn. Ct. App. 1996). Where a defendant's motions for directed verdict made at the close of the plaintiff's case and again at the close of all proof are denied and the defendant files a renewed motion for directed verdict pursuant to Tenn. R. Civ. P. 50.02 after the jury returns an adverse verdict, but this motion is also denied, the defendant's failure to join a motion for new trial with a Rule 50.02 motion does not preclude appellate review of the propriety of the trial court's denial of the motions for directed verdict. The Tennessee Rules of Civil Procedure permit, but do not require, the filing of a joined motion, and Tenn. R. App. P. 3(e) establishes that the failure to file a post-trial motion for a new trial,

ing in the appellate court a stipulation for dismissal signed by all parties or on motion and notice by appellant.[43] A copy of the dismissal

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except as provided in Rule 3(e), is not a prerequisite to appeal.

State v. Robinson, 239 S.W.3d 211, 224-5 (Tenn. Crim. App. 2006). Typically, the failure to include an issue in a motion for new trial waives the issue on appeal. Tenn. R. App. P. 3(e). However, an appellate court may analyze any error under the plain error doctrine under Tennessee Rule of Criminal Procedure 52(b) which provides that an appellate court may address an error which has affected the substantial rights of an accused at any time, even though not raised in the motion for a new trial where necessary to do substantial justice." *See also* Tenn. R. Evid. 103(d). An appellate court, however, may only consider an issue as plain error when all of the following five factors are met: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice. Furthermore, the "plain error" must be of such a great magnitude that it probably changed the outcome of the trial.

See State v. Electroplating, Inc., 990 S.W.2d 211, 220 (Tenn. Crim. App. 1998). A defendant in a criminal case tried to a jury is not required by Tenn. R. App. P. 3(e) to raise the sufficiency of the evidence either in a motion for judgment of acquittal or in a motion for new trial in order to preserve the issue for appellate review.

Woods v. Herman Walldorf & Co., Inc., 26 S.W.3d 868, 875 (Tenn. Ct. App. 1999). While appellant's failure to raise a Batson objection to a peremptory strike in a motion for new trial, as required by Tenn. R. App. P. 3(e), would justify an appellate court to treat the issue as having been waived, the Court, citing Tenn. R. App. P. 2, held that the issue was of sufficient importance to the administration of justice that it should be addressed.

Wright v. Quillen, 83 S.W.3d 768, 772 (Tenn. Ct. App. 2002). The failure to move for a new trial pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure does not preclude appeal to review an issue not predicated upon trial errors. In the present case, appellant did not challenge a jury's findings of fact, but rather the application of the law to those findings. The Court held that a new trial would have served no purpose but to extend already complex and time consuming litigation. "Thus to the extent that a motion for a new trial would have been required by the rule, we suspend the requirement pursuant to the provisions of Rule 3 itself, and Rule 2 governing suspension of the rules."

Story v. Lanier, 166 S.W.3d 167, 183 (Tenn. Ct. App. 2004). In a case tried without a jury, Tenn. R. App. P. 3(e) does not prevent an appellate court to consider an issue that has not been raised in a motion for new trial.

[43]Dunlap v. Dunlap, 996 S.W.2d 803, 810 (Tenn. Ct. App. 1998). (1) A trial court may not dismiss an appeal. An appellate court's jurisdiction attaches upon the filing of the notice of appeal, and only the appropriate appellate court has the authority to entertain and dispose of a motion to dismiss an appeal. (2) This rule applies whether the motion to dismiss is based upon an alleged defect in the notice of appeal, the appellant's failure to timely file a transcript or statement of evidence, or the appellant's failure to timely file his brief.

Tenn. R. App. P. 15(c) Voluntary Dismissal, was amended effective July 1, 2003, setting forth the procedure for dismissing an appeal that is subject to the trial court's approval. The Rule titled "Dismissal Contingent on Settlement Agreement" states: "If the parties agree to settle a case on appeal and the settlement agreement is subject to the approval of the trial court, the parties shall file a motion in the appellate court asking the court to remand the case to the trial court for the limited purpose of considering the proposed settlement. If the trial court approves the settlement upon remand, the parties jointly shall file in the appellate court a motion to dismiss the appeal; the motion shall provide for the assessment of costs on appeal and shall be accompanied by a copy of the settlement agreement and the trial court's order approving that settlement. If the trial court disapproves the settlement, the appellant shall file a notice in the appellate court stating that the trial court disapproved the settlement, in which case the appeal shall proceed under these rules. A motion to dismiss the appeal based upon the trial court's approval of a settlement or

optional to the appellant and may be posted at or after the time of the notice of appeal is filed.[7]

In cases where a money judgment has been rendered, a bond for stay generally must secure payment for the judgment in full, interest, damages for delay, and costs on appeal.[8] If a money judgment is payable in periodic installments, the bond may be fixed in any manner sufficient to the court.[9]

T.C.A. § 27-1-124, as amended by 2011 Tenn. Pub. Acts, Ch. 510, titled the Tennessee Civil Justice Act of 2011 effective on October 1, 2011, and applicable to all liability actions for injuries, deaths and losses covered by the Act which accrue on or after October 1, 2011, provides: "(a) If a plaintiff in a civil action obtains a judgment under any legal theory, the amount of the appeal bond necessary to stay execution during the course of all appeals or discretionary reviews of that judgment by any appellate court shall not exceed the lesser of (1) twenty-five million dollars or (2) one hundred and twenty-five percent (125%) of the judgment amount. (b) For purposes of determining the amount of the required bond, the court shall not include punitive or

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[7]See Security Bank & Trust Co. of Ponca City, Okl. v. Fabricating, Inc., 673 S.W.2d 860, 866 (Tenn. 1983).

Bazner v. American States Ins. Co., 820 S.W.2d 742, 746 (Tenn. 1991). A cash supersedeas bond was required by the trial court upon motion of the successful plaintiff in a workers' compensation action. The Supreme Court held that absent a finding of facts or a statement of a trial judge's reasons for requiring a cash supersedeas appeal bond as a condition precedent to perfecting its appeal and absent appellant's filing of a transcript of the hearing on the motion to require it to file such bond, appellant cannot raise the issue on appeal.

Consider Catlett v. Indemnity Ins. Co. of North America, 914 S.W.2d 76 (Tenn. 1995). Trial court should have granted employer's motion to compel repayment of workers' compensation death benefit funds paid to its employee's surviving spouse pending appeal of liability. The employer's motion was filed after the Supreme Court on appeal had held that the employer was not liable for payments and the payments were made "pending the outcome of appeal" so as to avoid accrual of interest and were not intended as a full unconditional satisfaction of judgment. The Court so held notwithstanding its finding that the employer had, and should have, exercised other options, including obtaining a stay of execution under Rule 62 or depositing the money with the trial court under Rule 67.03.

[8]Tenn. R. Civ. P. 62.05.

Mills v. Hancock, 995 S.W.2d 110 (Tenn. Ct. App. 1998). Surety was held liable upon an appeal bond, given for appeal to the Tennessee Court of Appeals from a judgment in the Circuit Court of Davidson County, for attorney's fees awarded to the appellee's attorney for defendant's frivolous appeal as the surety had bound itself to pay damages and costs awarded for wrongfully prosecuting the appeal. The Court held that under the plain and clear language contained within the four corners of this appeal bond, the parties intended that the attorney's fees at issue here were damages awarded for the wrongful prosecution of this appeal. In so holding, the Court distinguished cases holding that where the language in a bond is ambiguous or unclear, a court may look to the statute mandating the bond to determine the parties' intent as to the bond's coverage. The Court further held that the bond, as interpreted, did not conflict with Tenn. R. App. P. 6. It merely provided that, in addition to covering the costs as required by Rule 6, defendants and their surety were responsible for satisfying any damages awarded for the wrongful prosecution of the appeal. Tennessee courts have acknowledged that an obligor and his surety may assume a greater obligation than that required by the statute.

Consider Holmes v. U.S. Fidelity & Guar. Co., 844 S.W.2d 632 (Tenn. Ct. App. 1992).

[9]Tenn. R. Civ. P. 62.05.

from the cost bond, discussed in § 30:3, Perfecting appeal as of right, which may be one portion of the bond for stay.[6] The bond for stay is

Clark v. Shoaf, 302 S.W.3d 849 (Tenn. Ct. App. 2008). In the present case, plaintiffs chose not to seek execution of their judgment after the judgment was appealed even though they could have done since Tenn. R. Civ. P. 62 provides that an appeal does not automatically stay the enforcement of judgment, and appellants had not filed a surety bond for stay during appeal. The Court of Appeals held that the plaintiff was not required to seek execution of its judgment while appeal was pending even though there was no bond filed and no order staying execution during appeal.

Holmes v. U.S. Fidelity & Guar. Co., 844 S.W.2d 632, 634 (Tenn. Ct. App. 1992). "Although appeal bonds once were governed by statute in Tennessee (see T.C.A. § 27-6-109), T. C. R. P. 62 now governs the filing of bonds in order to obtain a stay of execution of the trial court's judgment. In that regard, T. C. R. P. 62.05 requires a party appealing from a money judgment to file a bond which 'shall be conditioned to secure the payment of the judgment in full, interest, damages for delay, and costs on appeal.' While the rule plainly requires that the bond secure the trial court's judgment plus interest, damages caused by any delay, and costs on appeal, the rule is silent as to any new judgment awarded by the trial court upon remand from the Court of Appeals." At 636, the Court, citing Neeley v. Bankers Trust Co. of Texas, 848 F.2d 658 (5th Cir. 1988), stated: "[T]o the extent that the trial court's judgment is affirmed on appeal, the surety remains obligated for that amount. In addition, where the court of appeals modifies the award, the surety remains obligated for the modified amount. Where part of an award has been reversed and remanded to the trial court for the issue to be retried, however, the surety is not obligated on an entirely new judgment of the trial court." Under these rules, the Court held that the defendant's surety was not liable for a new judgment for attorney's fees awarded by the trial court upon remand.

Consider Evans Lumber Co. v. Sanders, 10 T. A. M. 47-14 (Tenn. App. E. S. 1985): "Tenn. R. App. P. 62 does not empower judges to stay enforcement of judgment when no appeal is pending."

First American Trust Co. v. Franklin-Murray Development Co., L.P., 59 S.W.3d 135, 141 n.8 (Tenn. Ct. App. 2001). (1) Perfecting an appeal does not prevent the trial court from acting with regard to ancillary matters relating to the enforcement or collection of its judgment. For example, Tenn. R. Civ. P. 69 permits judgment creditors to engage in post-judgment discovery using the same discovery methods that are used in pre-trial discovery. If a judgment debtor declines to respond to a request for post judgment discovery, a trial court could, on proper application, enter an order under Tenn. R. Civ. P. 37 to compel a response. (2) In the present case, defendant/appellant filed a notice of appeal and appeal bond to perfect its appeal, but it did not seek a stay pending appeal. Appellee thereupon decided to execute on its judgment while the appeal was pending, and returned to the trial court requesting a distringas writ under T.C.A. § 26-1-105 and the appointment of a receiver for defendant/appellant, alleging that defendant/appellant was disposing of its assets in order to avoid satisfying the trial court's judgment. The Court of Appeals, at 137-8, noted that executing on a judgment while an appeal is pending can prove risky, and held that a trial court lacks jurisdiction to hear a post-judgment receivership proceeding while a case is pending on appeal.

[4]Tenn. R. Civ. P. 62.05. See Holmes v. U.S. Fidelity & Guar. Co., 844 S.W.2d 632, 634 (Tenn. Ct. App. 1992), discussed at n. 3.

[5]Tenn. R. Civ. P. 65A.

[6]Tenn. R. App. P. 6.

Tennessee Rules of Appellate Procedure Rule 6. "Security for Costs on Appeal" was amended in 2008 by inserting the following new three sentences to paragraph (a) between the present fourth and fifth sentences: "In order to ensure that a surety is sufficient, the appellate court clerk may require the surety to provide proof that the surety has sufficient assets in the State of Tennessee to pay the costs of the appeal. If the appellate court clerk determines that the surety is not sufficient, the appellate court clerk may reject the bond for costs. The surety may appeal the decision of the appellate court clerk to the appellate court by filing a motion to approve the bond for costs within 10 days of the decision of the appellate court clerk."

shall be filed by the clerk of the appellate court with the clerk of the trial court. If the record has not been filed with the clerk of the appellate court, the clerk of the trial court shall file a copy of the appeal bond with the clerk of the appellate court.[44]

§ 30:4 Stays of execution; Bonds

While execution is generally automatically stayed for 30 days after entry of a judgment[1] and while certain timely filed post-trial motions are pending,[2] further stays of execution pending an appeal generally require the giving of a bond with security as approved by the trial court.[3] The amount[4] and the form[5] of the bond with security are prescribed by the Rules. The bond for stay should be distinguished

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a notice of the trial court's disapproval shall be filed within 30 days of the trial court's order."

[44]Tenn. R. App. P. 15(a), as amended in 1998, effective July 1, 1998. The Advisory Commission Comments state: "New Rule 15(a) requires voluntary dismissals to be filed at the appellate level. The change was made because cases are docketed on appeal once the trial clerk sends a copy of the notice of appeal to the appellate clerk." This amendment was approved by 1998 S. R. 80 and H. R. 152, with an effective date of July 1, 1998.

Tenn. R. App. P. 15(a) was amended in 2002 to provide: "Any party wanting to litigate appellate issues despite dismissal of the original appeal must provide notice of such intent in a response to the motion to dismiss."

[Section 30:4]

[1]Tenn. R. Civ. P. 62.01; Underwood v. Liberty Mut. Ins. Co., 782 S.W.2d 175, 177 (Tenn. 1989) (absent a request for a formal stay, a judgment becomes enforceable 30 days after entry of judgment).

Tenn. R. Civ. P. 58, which governs the requirements for entry of final judgment, is discussed in § 27:9, Entry and perfection.

[2]Tenn. R. Civ. P. 62.02, as amended in 2000. Execution or any proceedings to enforce a judgment are stayed pending and for 30 days after entry of the following orders made upon timely motion: (1) the granting or denying a motion under Rule 50.02 for judgment in accordance with a motion for directed verdict; (2) granting or denying a motion under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59.04 to alter or amend judgment; and (4) denying a motion under Rule 59.02 for a new trial.

Tenn. R. Civ. P. 62.02(4) was amended in 2011 so as to provide that the execution of or any proceedings to enforce a judgment shall be stayed pending and for 30 days after an order made upon timely motion "denying a motion under Rule 59.07 for a new trial." 2011 Advisory Commission Comment states: "The amendment of Rule 62.02 corrects an erroneous cross-reference, changing '59.02 to 59.07.'"

[3]Tenn. R. Civ. P. 62.05, 65A.

See Tenn. R. Civ. P. 62.06, as amended in 1986 (discussing stay of proceedings to enforce a judgment when an appeal is taken by the state, a county, a municipal corporation, or an officer or agency acting on behalf of the governmental entity).

See Underwood v. Liberty Mut. Ins. Co., 782 S.W.2d 175, 177 (Tenn. 1989) (the taking of an appeal generally does not, in and of itself, bring about a stay of execution; judgments may continue to be enforced pending an appeal unless a stay is ordered by the trial court); Security Bank & Trust Co. of Ponca City, Okl. v. Fabricating, Inc., 673 S.W.2d 860 (Tenn. 1983) ("[t]he right to appeal is not conditioned upon the filing of a bond for stay; but, if the appellant desires the protection of a stay, then the bond for a stay must be filed").

In re Estate of Rinehart, 363 S.W.3d 186, 189 (Tenn. Ct. App. 2011), appeal denied, (Mar. 7, 2012). "A court order is to be given full effect, regardless of whether it was entered in error, unless and until a party obtains dissolution of the order through operation of the judicial system of review."

exemplary damages in the judgment amount. (c) Notwithstanding subsections (a) and (b) if a party proves by a preponderance of the evidence that an appellant is dissipating assets outside the ordinary course of business to avid payment of a judgment, a court may enter orders that are necessary to protect the appellee and establish the bond amount, which may include any punitive or exemplary damages. (d) If the appellant establishes by clear and convincing evidence at a post judgment hearing that the cost of the bond and the obligation resulting from the surety's payment of the bond in an amount authorized by this section will render the appellant insolvent, the court shall establish a security in an amount, and other terms and conditions it deems proper, that would allow the appeal of the judgment to proceed, without resulting in the appellant's insolvency. This subsection (d) should be narrowly construed. (e) If this section is found to be in conflict with any rules prescribed by the supreme court, this section shall apply notwithstanding the provisions of § 16-3-406."

Tenn. R. Civ. P. 62.05 was amended effective July 1, 2003: "62.05. Bond for Stay. - * * * * (3)If the amount of a judgment is fully bonded as provided in subsection (1), the court upon motion may order the judgment creditor to remove any judgment lien from the register's office." An Advisory Commission Comment states: "Rule 62.05(3) is a procedure needed to prevent abuse when a judgment creditor unnecessarily files a judgment lien despite the judgment being fully bonded. Some trial judges have heretofore been sympathetic with a judgment debtor's plight but found no vehicle for relief."

Unless otherwise provided by statute or by court order specifically stating the court's reasons, an appellant who has proceeded as a poor person in the trial court may similarly proceed with his appeal as a poor person without posting a bond for stay.[10] Further, a bond for stay is not necessary where an appellant, who has not proceeded to trial as a poor person, upon motion filed in the trial court, presents evidence, usually an itemized and verified statement of his financial condition, showing that he cannot afford to post a bond for stay.[11] The Rules also recognize that the trial court may allow a stay of execution upon security for less than the full amount of the generally required security upon motion and presentation of evidence, showing that he cannot afford to post a full bond for a stay.[12] By a 1984 amendment, the Tennessee Rules of Civil Procedure further allow a trial judge to set a bond for stay in an amount less than the full judgment even though the appellant is not a poor person provided evidence of good cause, including insurance coverage or positive financial conditions to meet the judgment, is shown.[13] If the motion for reduced bond or stay is

[10]Tenn. R. Civ. P. 62.05, sentence 3, referring to Tenn. R. App. P. 18(a).

[11]Tenn. R. Civ. P. 62.05, sentence 3, referring to Tenn. R. App. P. 18(b). See State v. Copeland, 647 S.W.2d 241, 242 (Tenn. Crim. App. 1983), which recognizes that where a trial court, pursuant to Tenn. R. Civ. P. 62, stays a judgment without bond pending appeal, the judgment creditor, pursuant to Tenn. R. App. P. 7, may appeal the trial judge's action.

[12]Tenn. R. Civ. P. 62.05, sentence 4.

[13]Tenn. R. Civ. P. 62.05, sentences 4, 5, and 6 provide that upon motion submitted to the trial court and for good cause shown, the bond for stay may be set in an

denied, the court must state in writing the reasons for the denial.[14]

When the trial court denies a stay of execution without any security or upon partial security in an order which states its reasons and which is served upon the appellant by the trial clerk, the appellant may file a motion with the appellate court to proceed without any or full security.[15] This motion must be filed within 30 days after service of the notice of the trial court's order and must be accompanied by the papers filed in the trial court seeking leave and a copy of the trial court's reason for its actions.[16]

Notwithstanding the prior discussion, the Tennessee Rules of Civil Procedure provide that in exceptional cases trial courts have the power to stay proceedings on any terms or conditions that it deems proper.[17] Appellate courts have similar authority.[18]

Stays regarding Tenn. R. App. P. 9(a) "appeals by permission" are governed by Tenn. R. Civ. P. 62.09, under which the trial judge may stay enforcement of its own judgment upon terms as to bond or otherwise as it deems proper. If the court, upon written motion, refuses to grant a stay of an interlocutory order but has permitted an interlocutory appeal, appellate review of this denial may be had by filing a motion for review in the appropriate appellate court having jurisdiction.[19] If the trial court not only refuses to stay an interlocutory order but further refuses to allow a Rule 9 appeal by permission, a Rule 10 "extraordinary appeal by permission" may be applied for and, if granted, may be accompanied by a stay order.[20]

Tenn. R. App. P. Rule 7(a), as amended in 2006,[21] governs "Stays of Injunction Pending Appeal."

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amount less than that ordinarily set. In ruling on such a motion, the trial court may consider all appropriate factors including, but not limited to, the appealing party's financial condition and the amount of his insurance coverage, if any. If the motion is granted, the party may obtain a stay by giving such security as the court deems proper.

[14]Tenn. R. Civ. P. 62.05, sentence 7.

[15]Tenn. R. App. P. 18(c). See also Tenn. R. Civ. P. 62.08.

[16]Tenn. R. App. P. 18(c). See also Tenn. R. Civ. P. 62.05 and 62.08.

[17]Tenn. R. Civ. P. 62.07. See also Tenn. R. Civ. P. 62.03.

See Young v. Young, 971 S.W.2d 386, 393 (Tenn. Ct. App. 1997). Trial court did not err in entering an order denying a wife's motion to dismiss or to stay husband's post-judgment petition to modify child support and alimony pending the appeal of final judgment. Tenn. R. Civ. P. 62.03 expressly gives the trial court the discretion to suspend or grant whatever relief is deemed appropriate during the pendency of an appeal in an action for alimony or child support.

[18]Tenn. R. Civ. P. 62.08; Tenn. R. App. P. 7.

Consider Kelton v. Snell, 689 S.W.2d 186 (Tenn. Ct. App. 1985).

[19]Tenn. R. App. P. 7.

[20]Tenn. R. App. P. 7 and 10(a), last sentence; Tenn. R. Civ. P. 62.08.

Consider State v. West, 728 S.W.2d 32, 33 (Tenn. Crim. App. 1986).

[21]Tenn. R. App. P. 7(a) was amended, effective July 1, 2006, by adding the following as a new third paragraph: "A party may appeal a Court of Appeals' decision on a motion for review by filing a motion for review in the Supreme Court within 15 days of filing of the Court of Appeals' order. The motion shall be accompanied by a copy of the trial court's order, the motion filed in the Court of Appeals, the order of the Court of Appeals, and all other documents (including transcripts) filed in the Court of Appeals on the issue of stay or injunction pending appeal. Review shall be had without briefs after reasonable notice to the other parties, who shall be served with a copy of

The original of all motions for a stay or injunction pending appeal under Tenn. R. App. P. 7 shall be accompanied by one copy.[22]

Tenn. R. App. P. 8A, effective July 1, 2004, imposes special requirements governing the appeal of any termination of parental rights proceeding. In particular, Tenn. R. App. P. 8A(b) imposes a special provision regarding a stay of injunction pending appeal of such a proceeding.

§ 30:5 Record on appeal—Elements and preparation

An appellate court is bound by the contents of the trial court record in determining whether an issue has been raised below, and the court must base its decisions on matters within the record.[1] An appellant or any party seeking review of issues before an appellate court must prepare a record which conveys a fair and complete account of what transpired in the trial court with respect to the issues which form the basis of the appeal.[2] Where an appellate record is incomplete, the ap-

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the motion. The other parties may file an answer within 10 days of the filing of the motion in the Supreme Court. No oral argument shall be permitted except when ordered on the court's own motion. Review shall be completed promptly." A 2006 Advisory Commission Comment states: "A third paragraph is added to Rule 7(a) to provide a procedure for Supreme Court review of a Court of Appeals denial of a Rule 7 application."

[22]Tenn. Ct. App. R. 8(c), as amended March 5, 2001, effective April 2, 2001.

[Section 30:5]

[1]State v. Bobadilla, 181 S.W.3d 641, 643 (Tenn. 2005). What is in the record sets the boundaries for what the appellate courts may review, and thus only evidence contained therein can be considered. See also, State v. Smotherman, 201 S.W.3d 657 (Tenn. 2006).

In re Adoption of E.N.R., 42 S.W.3d 26, 30 (Tenn. 2001).

State Dept. of Children's Services v. Owens, 129 S.W.3d 50, 56 (Tenn. 2004). When reviewing a case on appeal, an appellate court relies upon the record which sets forth the facts established as evidence in the trial court. Tenn. R. App. P. 13(c) (2003). An appellate court, as a court of appeals and errors, is limited in authority to the adjudication of issues that are "presented and decided" in the trial courts, and a record thereof preserved as prescribed by statutes and rules of court.

Tanner v. Whiteco, L.P., 337 S.W.3d 792 (Tenn. Ct. App. 2010), appeal denied, (Nov. 18, 2010). An appellate court's review is limited to the appellate record and it is incumbent upon the appellant to provide a record that is adequate for a meaningful review. Tennessee Rules of Appellate Procedure, Rule 24(b)

[2]In re Adoption of E.N.R., 42 S.W.3d 26, 30 (Tenn. 2001).

State v. Smotherman, 201 S.W.3d 657 (Tenn. 2006). The purpose of the record on appeal is to "convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(a).

Strine v. Walton, 323 S.W.3d 480, 490 (Tenn. Ct. App. 2010), appeal denied, (Aug. 25, 2010). An appellate court may not conclude that the Trial Court committed error when ruling on an issue if there is nothing in the record establishing that the issue actually was raised below. It is well-settled that an issue not raised in the trial court cannot be raised for the first time on appeal.

Chiozza v. Chiozza, 315 S.W.3d 482, 488 (Tenn. Ct. App. 2009), appeal denied, (May 20, 2010); Marra v. Bank of New York, 310 S.W.3d 329, 335 (Tenn. Ct. App. 2009), appeal denied, (Feb. 22, 2010); Jones v. LeMoyne-Owen College, 308 S.W.3d 894, 902, 256 Ed. Law Rep. 981 (Tenn. Ct. App. 2009), appeal denied, (Mar. 1, 2010). It is the duty of the appellant to prepare an adequate record in order to allow meaningful review on appeal. Tenn. R.App. P. 24(b); Tip's Package Store, Inc. v. Commercial Ins. Managers, Inc., 86 S.W.3d 543, 562 (Tenn. Ct. App. 2001); Hamrick's,

pellate court is precluded from considering the issues raised.[3]

The contents of the record on appeal are governed by the Tennessee Rules of Appellate Procedure.[4] The record on appeal must include: (a) copies, certified by the circuit court clerk, of all pleadings, motions, and other papers filed in its office, except subpoenas or summons for witnesses or for defendants who have made appearances, papers relating to discovery including depositions, interrogatories, and answers

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Inc. v. Roy, 115 S.W.3d 468, 478 (Tenn. Ct. App. 2002); State v. Mickens, 123 S.W.3d 355, 387 (Tenn. Crim. App. 2003).

State v. Robinson, 73 S.W.3d 136, 154 (Tenn. Crim. App. 2001). It is the duty of the appellant to prepare a record that conveys a fair, accurate, and complete account of what transpired in the trial court with respect to the issues that form the basis of the appeal. Tenn. R. App. P. 24(b).

[3]In re Adoption of E.N.R., 42 S.W.3d 26, 30 (Tenn. 2001); In re Adoption of D.P.M., 90 S.W.3d 263, 267 (Tenn. Ct. App. 2002).

Williams v. Williams, 286 S.W.3d 290, 295 (Tenn. Ct. App. 2008). The party raising an issue on appeal is obligated to give the appellate court a record that is sufficient for an appropriate review of the issue raised. Tenn. R. App. P. 24.

State v. Mitchell, 339 S.W.3d 629 (Tenn. 2011), republished at, 343 S.W.3d 381 (Tenn. 2011), cert. denied, 132 S. Ct. 244, 181 L. Ed. 2d 139 (2011) and withdrawn from bound volume. Because the instructions the trial court made to the jury were not made a part of the record, this Court must presume that they were proper.

Holland v. City of Memphis, 125 S.W.3d 425, 429 (Tenn. Ct. App. 2003). In the present case, appellant failed to include its response to a motion for summary judgment and the transcript of the hearing on the motion for summary judgment with the appellate court on its appeal of the trial court's order granting summary judgment. Accordingly, the Court of Appeals held that without appellant's response or a transcript of the hearing before it, it was unable to determine upon what basis appellant opposed the motion for summary judgment, what issues she asserted as material and in dispute, or to what evidence she pointed to demonstrate dispute. Accordingly, the Court held that the appeal must fail.

State v. Robinson, 73 S.W.3d 136, 154 (Tenn. Crim. App. 2001). Generally, an appellate court is precluded from addressing an issue on appeal when the record fails to include relevant documents.

State v. Crenshaw, 64 S.W.3d 374, 386-87 (Tenn. Crim. App. 2001). Because the defendant failed to include the transcript of the jury selection, the Court held that it was unable to review whether the jurors were exposed to the publicity or were biased against the defendant. Thus, in the absence of a complete record, an appellate court must presume that the trial court correctly denied the motion for a change of venue.

Davis v. The Tennessean, 83 S.W.3d 125, 127, 29 Media L. Rep. (BNA) 2468 (Tenn. Ct. App. 2001). Even if an issue had been raised with the trial court, appellant has the primary burden to see that a proper record is prepared on appeal and filed in this court. In the present case, an issue regarding a document could not be considered on appeal where the document was not made a part of the appellate record.

[4]Tenn. R. App. P. 24(a), as amended by Order of the Supreme Court on January 28, 2000 and approved by the General Assembly, effective July 1, 2000.

The 2005 Advisory Comment to Tenn. R. App. P. 24 notes: "This rule seeks to provide a method of preparation of the record that is both inexpensive and simple, and to provide that the record conveys an accurate account of what transpired in the trial court."

See also Tenn. Ct. App. R. 3, "Record on Appeal," as amended March 5, 2001, effective April 2, 2001, which provides: "(a) The record on appeal shall be referred to as the record, which may be abbreviated 'R.' It shall be composed of volumes of not more than 150 pages each. All references to the record shall be by volume and page number. (b) The record shall be captioned as in the trial court, except that the caption shall specify the position occupied by each party in the trial court and on appeal. For example, John Smith, plaintiff-appellant."

thereto, reports of physical and mental examinations, requests to admit, all notices, motions, or orders relating thereto, and jury selection lists; trial briefs; and minutes of opening and closing of court.[5] These excepted items may be included in the record if a party so designates in writing;[6] (b) the original of any exhibits filed in the trial court.[7] Papers related to discovery, if offered as evidence for any purpose, must be clearly identified and are treated as exhibits.[8]

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[5]Tenn. R. App. P. 24(a), as amended by Order of the Supreme Court on January 28, 2000, and approved by the General Assembly, effective July 1, 2000.

State v. Bobadilla, 181 S.W.3d 641, 643 (Tenn. 2005). Tenn. R. App. P. 24(a)(1) provides that the record on appeal shall include copies, certified by the clerk of the trial court, of all papers filed in the trial court except as otherwise provided in Rule 24.

[6]Tenn. R. App. P. 24(a); Hunt v. Shaw, 946 S.W.2d 306, 310 (Tenn. Ct. App. 1996) (it is the appellants' responsibility pursuant to Tenn. R. App. P. 24 to include in the record, by certification of the trial court clerk, any summonses and other relevant papers bearing on their appellate issue).

State v. Housler, 167 S.W.3d 294 (Tenn. 2005). The trial court's authority to add to or subtract from the record is not unlimited. Tenn. R. App. P. 24(g) provides that nothing in this rule shall be construed as empowering the parties or any court to add or subtract from the record except insofar as may be necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal.

[7]See Tenn. R. App. P. 25(a), as amended in 2005. Boyd v. Hicks, 774 S.W.2d 622, 629 (Tenn. Ct. App. 1989) (complaint as to the exclusion of "illustrative" exhibits was not considered on appeal because brief did not identify the exhibits by letter or number and the exhibits were not found in the record).

State v. Bobadilla, 181 S.W.3d 641, 643 (Tenn. 2005). Tenn. R. App. P. 24(a)(2) provides that the record on appeal shall include the original of any exhibits filed in the trial court.

Levine v. March, 266 S.W.3d 426, 439 (Tenn. Ct. App. 2007). A party may not base an appeal upon a trial court's admission into evidence of a videotape at trial where neither the videotape nor a transcript of the videotape has been included in this record. Parties have the responsibility to see to it that the record contains the evidence necessary to support their arguments on appeal. Where the record is incomplete and does not contain a transcript of the relevant portion of the proceedings or the portions of the record upon which the party relies, an appellate court cannot consider the issue. Tenn. R. App. P. 24(b).

Tarpley v. Hornyak, 174 S.W.3d 736 (Tenn. Ct. App. 2004). Photographs should not be included in an appellate record even though accompanied with a "Certificate of Appellate Record" indicating that the exhibit was either "authenticated by trial judge or as provided by T.R.A.P. Rule 24(f)," where there was nothing in the record to indicate that a witness was ever questioned about them and, consequently, no identification of the photographs or description of what they depict.

State v. Jefferson, 938 S.W.2d 1, 15 (Tenn. Crim. App. 1996): "Customarily, large or oversized exhibits are not transmitted to the appellate court. These exhibits are retained by the clerk of the trial court. If the appellate court wishes to examine one or all of these exhibits, it may do so by ordering the clerk to transmit the exhibits to the clerk of the appellate court."

[8]Tenn. R. App. P. 24(a) as amended by Order of the Supreme Court on January 28, 2000, and approved by the General Assembly, effective July 1, 2000, provides, in part, that "if a party wishes to include any papers specifically excluded in this subdivision, the party shall, within 15 days after filing the notice of appeal, file with the clerk of the trial court and serve on the appellee a description of the parts of the record the appellant intends to include on appeal, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal." The 2000 amendment to Rule 24(a) further provides: "If a party wishes to include any papers specifically excluded in this subdivision, but fails to timely designate such items, the

Discovery depositions[9] or written interrogatories,[10] however, that are filed with the clerk, but which have not been identified, authenticated, nor read to the court and copied into the transcript cannot be considered by the appellate court for any reason; (c) the transcript or statement of the evidence and proceedings, which must clearly indicate and identify any exhibits offered in evidence and whether they were received or rejected.[11] Inclusion of the exhibits in the

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trial court clerk may supplement the record as provided for in subdivision (e) without modifying the previously prepared record."

Church v. Perales, 39 S.W.3d 149, 160 (Tenn. Ct. App. 2000). (1) The absence of appellant's deposition from the appellate record should have been discovered by appellant's attorney because the appellate record had been on file with the appellate court and available to the parties for six months prior to oral argument, and the attorney actually had the record in her possession for two weeks prior to oral argument, when the issue of the absence of the records was raised. (2) Once the fact that appellant's deposition was not included in the record was brought to her attention, appellant's attorney could have supplemented the record pursuant to Tenn. R. App. P. 24(e). She did not do so, and as a result, the record contained no testimony by appellant on a dispositive issue raised on appeal. Accordingly, the Court held that it cannot take judicial knowledge of appellant's testimony in her deposition, even if parts of it were cited in the briefs, because it was outside the record. (3) In accordance with Tenn. R. App. P. 36(a), appellant must bear the consequences of the absence of her deposition from the record.

Simpson v. Simpson, 716 S.W.2d 27, 29, 67 A.L.R.4th 261 (Tenn. 1986), citing Tenn. R. App. P. 24(a). When a deposition has not been included in the record certified and filed in the appellate court, the appellate court may correct the record by ordering the clerk of the trial court to certify and file the deposition with the appellate court's clerk.

[9]Benton v. Anderson, 571 S.W.2d 145 (Tenn. 1978). See Allstate Ins. Co. v. Young, 639 S.W.2d 916, 918–19 (Tenn. 1982), citing Nold v. Selmer Bank & Trust Co., 558 S.W.2d 442, 445 (Tenn. Ct. App. 1977) and Tenn. R. App. P. 13(c) (depositions filed with the clerk but not entered into evidence during a trial may not be considered on appeal); Nelms v. Tennessee Farmers Mut. Ins. Co., 613 S.W.2d 481 (Tenn. Ct. App. 1978) (only those parts of the deposition actually read to the jury may be made an exhibit for inclusion in the record to be considered by the appellate court for review).

Consider Lundy v. Lundy, 719 S.W.2d 154, 156 (Tenn. Ct. App. 1986): "[T]he proper manner of preserving depositions for consideration on appeal is to copy them into the transcript or authenticate them as exhibits to a transcript filed within 90 days after notice of appeal. Tenn. R. App. P. Rule 24."

In re Estate of Oakley, 936 S.W.2d 259, 260 (Tenn. Ct. App. 1996). In affirming a trial court's directed verdict for the proponents of a will, the Court of Appeals stated: "We are still troubled by the precedent we are setting in this case of allowing an appellant to challenge a directed verdict on the basis of a deposition that appears in the record without a complete transcript of the evidence. We cannot know whether the evidence in the deposition was properly before the jury. But the Supreme Court's remand directs this court to reconsider the propriety of the directed verdict in light of the evidence in the deposition."

[10]Gold Kist, Inc. v. Pillow, 582 S.W.2d 77, 26 U.C.C. Rep. Serv. 1078 (Tenn. Ct. App. 1979).

Consider Wright v. United Services Auto. Ass'n, 789 S.W.2d 911, 915 n.3 (Tenn. Ct. App. 1990), citing Tenn. R. App. P. 24(a) (interrogatories are not part of the record on appeal without a specific designation by one of the parties that they be included; the appellate court, however, considered interrogatories not so designated and included in the appellate record where the adversary party did not deny the existence of the document).

[11]Tenn. R. App. P. 24(a)(3).

Bishop v. Bishop, 939 S.W.2d 109, 110 (Tenn. Ct. App. 1996). In divorce action,

transcript when filed with the clerk satisfies requirement (b);[12] (d) any requests for instructions submitted to the trial judge for consideration, whether expressly acted upon or not;[13] and (e) other matters if

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the appellate court affirmed the trial court's factual findings regarding the division of marital property, notwithstanding appellant's claim that the findings were contrary to balance sheets and tax returns found in the record and marked as exhibits, with the date and time for filing noted by the clerk and master, where appellant made no effort to file a transcript of the evidence showing that the documents were authenticated by the trial judge. The Court held that absent the filing of a transcript, the automatic authentication provided in Rule 24(f) does not apply and the documents could not be considered. The Court added that even if the documents in the record could be considered, in the absence of a transcript, the partial evidentiary record did not exclude the possibility that other evidence tilted the balance in favor of the chancellor's findings.

State v. Cooper, 736 S.W.2d 125, 131 (Tenn. Crim. App. 1987). Exhibits contained in a technical record may be considered by an appellate court only if they have been introduced and received into evidence, have been authenticated by the trial court, and have been included in the transcript of the evidence transmitted to the appellate court.

State v. Bennett, 798 S.W.2d 783, 789 (Tenn. Crim. App. 1990), citing Tenn. R. App. P. 24(b) and (f). "[S]tatements of fact made in pleadings, briefs and oral argument may not be considered by this Court in lieu of a transcript of an evidentiary hearing. . . . Before an exhibit or an attachment to a pleading may be considered by this Court, it must have been (a) received into evidence, (b) marked by the trial judge, clerk or court reporter as having been received into evidence as an exhibit, and (c) included in the transcript transmitted to this Court. . . . When the record is incomplete, and does not contain the proceedings and documents relevant to an issue, this Court is precluded from considering the issue."

[12]Tenn. R. App. P. 24(a)(3).

Consider Lundy v. Lundy, 719 S.W.2d 154, 156 (Tenn. Ct. App. 1986); Oram v. People's and Union Bank, 1986 WL 927 (Tenn. Ct. App. 1986), considering alternative procedures under Tenn. R. App. P. 24(a) and (f).

Consider State v. Bennett, 798 S.W.2d 783, 789 (Tenn. Crim. App. 1990), discussed at n. 11.

[13]Tenn. R. App. P. 24(a)(4), sentence 1, part (4), as amended in 1988.

1988 Advisory Commission Comments to Tenn. R. App. P. 24 states: "The amendment requires only submission to the judge of written requests for a jury charge under Tenn. R. Civ. P. 51 or Tenn. R. Crim. P. 30; the judge's failure to expressly deny a request does not affect inclusion of the request in the record. The traditional judicial method of writing the action, date, and signature on the document itself continues to be a desirable but not essential procedure under the amendment. The important element is that the judge be made aware of the request and be given an opportunity to charge it or decline. If the requested instruction is submitted at a pretrial proceeding or simply filed with the clerk before trial, the better practice would be to specifically direct the judge's attention to the document, but that practice is not mandatory. Again, the only criterion is that the request be "submitted to the trial judge for consideration."

Trial briefs are superfluous in view of appellate briefs, and they should not be sent to the appellate court absent unusual circumstances."

Emery v. Southern Ry. Co., 866 S.W.2d 557, 564 (Tenn. Ct. App. 1993), citing Tenn. R. Civ. P. 51 (omission of jury instruction may not be the basis of appeal where the record does not show that the person alleging the error has pointed out the omission to the trial judge during trial by appropriate request for instructions).

State v. Bonam, 7 S.W.3d 87, 88–89 (Tenn. Crim. App. 1999). A transcription of the jury charge as actually read to the jury, as distinguished from a request that certain instructions be read to the jury, is generally necessary to facilitate full appellate review of jury instruction issues. When a party has requested special jury instructions be given by the court to the jury, the record should reflect whether the request has been granted or denied.

designated by the parties and properly includable in the record.[14] The record on appeal does not include statements contained in trial briefs of counsel.[15]

When a record or exhibit is lost, whether innocently or otherwise, the Tennessee Code provides that the missing parts of the record may be supplied, upon application and court order, by the best evidence that the nature of the case will admit.[16] This evidence may be by affidavit of the court clerk, the attorneys, or any other person who is best

[14]Tenn. R. App. P. 24(a)(5).

2005 Advisory Commission Comments to Tenn. R. App. P. 24(g) states: "Under subdivision (a) the parties are empowered to designate any matter to be included in the record on appeal even though it is not automatically includable under the provisions of that subdivision. This subdivision makes clear, however, that the ability to designate additional parts to be included in the record extends only insofar as it is necessary to convey a fair, accurate and complete account of what transpired in the trial court. The ability to designate additional parts under subdivision (a) does not permit a party to augment the record by evidence entered ex parte."

[15]Tenn. R. App. P. 24(a), second sentence, subpart (4), as amended in 1988, provides that trial briefs should not be included in the trial record, unless a party otherwise designates.

Jennings v. Sewell-Allen Piggly Wiggly, 173 S.W.3d 710, 712 (Tenn. 2005). (1) The inclusion of legal memoranda in the trial record does not necessarily result in their inclusion in the appellate record. (2) Tennessee Rule of Appellate Procedure 24(a) ordinarily excludes from the appellate record trial briefs filed in the trial court. The Advisory Commission Comments to Tenn. R. App. P. 24(a) explains that trial briefs are superfluous in view of appellate briefs and should only be included in the appellate record under unusual circumstances. (3) A party may, however, add such excluded items to the appellate record by filing a written designation of the items. Tenn. R. App. P. 24(a). (4) If a party initially fails to designate such items to be included, the record may be supplemented. Tenn. R. App. P. 24(a), (e). Appending or attaching both parties' memoranda of law to an appellate brief, however, does not serve to supplement the record on appeal.

In re M.L.D., 182 S.W.3d 890, 895 n.1 (Tenn. Ct. App. 2005). Petitioners attached a document purporting to be a statement of the evidence to their appellate brief to the Court. The Court noted that a document attached to a brief is not a part of the official record before an appellate court.

Ralph v. Pipkin, 183 S.W.3d 362, 367 n.1 (Tenn. Ct. App. 2005). Under Tenn. R. App. P. 24(a), trial briefs and memoranda of law are not part of the record on appeal.

B & G Const., Inc. v. Polk, 37 S.W.3d 462, 464 (Tenn. Ct. App. 2000). The Court of Appeals, citing Tenn. R. App. P. 24(g), elected not to consider a large volume of various materials appended to appellant's brief, as the materials were neither filed with, nor considered by the trial court, and they did not serve to convey a fair, accurate, and complete account of what transpired in the trial court with respect to the issues on appeal.

Jackson v. Aldridge, 6 S.W.3d 501, 502 n.1 (Tenn. Ct. App. 1999). While the appellant had appended a transcript of the hearing in the trial court and a copy of the summons to his brief, the Court of Appeals held that these filings were not part of the appellate record and could not be considered. See Tenn. R. App. P. 13(c). See also Hunt v. Shaw, 946 S.W.2d 306, 309 (Tenn. Ct. App. 1996).

See McDonald v. Onoh, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989) (facts set forth in the parties' briefs are not part of the appellate record and cannot be considered); Matter of Estate of Lee-Cuozzo, 931 S.W.2d 230, 232 (Tenn. Ct. App. 1996) (a letter to the trial judge which was attached to appellant's brief but which was not properly certified as part of the evidence heard by the trial judge cannot be considered by the appellate court).

[16]T.C.A. § 24-8-109, discussed in Goins v. University of Tennessee Memorial Research Center and Hosp. at Knoxville, 821 S.W.2d 942, 945, 72 Ed. Law Rep. 456 (Tenn. Ct. App. 1991) (under a T.C.A. § 24-8-109 order, the parties may offer sum-

acquainted with the facts or nature of the missing record.[17] If the evidence is the best that the nature of the case permits and it is sufficiently clear, cogent, and definite, it will be accepted with the force and effect of the original.[18]

In cases where trial court proceedings have been recorded, the Rules of Appellate Procedure require the appellant to prepare a transcript containing a substantially verbatim recital of the evidence or proceedings or an abridgement containing such parts of the evidence or proceedings as are necessary to convey a fair, accurate, and complete account of what transpired with respect to the issues that are the basis of appeal.[19] Where an abridgment is intended, counsel, within 15 days of the filing of the notice of appeal, should file with the clerk of

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maries of videotapes, photographs, and other exhibits by sworn affidavit).

[17]Goins v. University of Tennessee Memorial Research Center and Hosp. at Knoxville, 821 S.W.2d 942, 945, 72 Ed. Law Rep. 456 (Tenn. Ct. App. 1991), citing Inman, Gibson's Suits in Chancery, § 396 (7th ed. 1988).

[18]Goins v. University of Tennessee Memorial Research Center and Hosp. at Knoxville, 821 S.W.2d 942, 945, 72 Ed. Law Rep. 456 (Tenn. Ct. App. 1991), citing Inman, Gibson's Suits in Chancery, § 396 (7th ed. 1988).

[19]Tenn. R. App. P. 24(a) ¶ 2, and 24(b).

The 2005 Advisory Comment to Tenn. R. App. P. 24(a) states: "In some situations it may not be desirable to prepare a full record as defined in the first paragraph of this subdivision. The third paragraph of this subdivision gives the parties the opportunity to designate which matters are to be included in the record on appeal. All matters designated by the parties are included by the clerk in the record on appeal."

2005 Advisory Commission Comments to Tenn. R. App. P. 24(b) states that a party may prepare a verbatim transcript of the proceedings on less than a full record, and that "each party has the option to designate and have included whatever portions of the transcript the party deems relevant and appropriate for the appellate court to consider. The designation of the parts of the record to be included on appeal may be filed and served with the designation of the parts of the transcript to be included in the record."

Consider Tenn. S. Ct. R. 3 and Tenn. Ct. App. R. 4 and 6(c), as amended in 2001, regarding abridgement of the record. Tenn. Ct. App. R. 4, as amended, effective April 2, 2001, governs "Abridgement of the Transcript of Evidence, Including Depositions." This Rule is identical to previous Tenn. Ct. App. R. 14, with the addition of the following: "(e) Nothing in this rule shall be construed to authorize any alteration of the original trial transcript, which shall be and remain a part of the record on appeal." Tenn. Ct. App. R. 6 "Briefs," as amended March 5, 2001, effective April 2, 2001, provides: "(c) Where less than the full record is sufficient to convey a fair, accurate and complete account of the issues on appeal (as set out in Tenn. R. App. P. 24) and counsel for one of the parties desires to file a complete transcript of the proceeding in this Court, counsel may do so. However, this Court may require *that party* or counsel to bear the expense of the unnecessary part of the transcript and to furnish an appendix as provided in Tenn. R. App. P. 28." (Emphasis added.)

Caveat: In recognition of the 1986 amendment to Tenn. R. Civ. P. 30.02(4)(B), which allows for videotaped depositions without a stenographic record, an Advisory Commission Comment to Tenn. R. App. P. 24 provides: "Because the appellate courts generally do not review lengthy videotapes, however, an appellant must make certain that relevant portions of any videotape deposition introduced in evidence be presented to the appellate tribunal in written form. Usually the court reporter at trial should take down the testimony while the videotape is being played in the courtroom."

State v. Banks, 271 S.W.3d 90, 169–70 (Tenn. 2008). (Appendix -Tenn. Crim. App. Opinion). It is the burden of the Appellant to prepare a full and complete record for appellate review. See Tenn. R. App. P. 24(b).

State v. Bobadilla, 181 S.W.3d 641, 643 (Tenn. 2005). The duty to prepare a record which conveys a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of the appeal rests on the appellant. Tenn.

R. App. P. 24(b).

State v. Ballard, 855 S.W.2d 557, 560–61 (Tenn. 1993), citing Tenn. R. App. P. 24(b): "When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal. . . . Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. . . . Absent the necessary relevant material in the record an appellate court cannot consider the merits of an issue."

Marra v. Bank of New York, 310 S.W.3d 329, 335 (Tenn. Ct. App. 2009), appeal denied, (Feb. 22, 2010). (1) The Tennessee Rules of Appellate Procedure require an appellant to file a transcript of the trial court proceedings under review. (2) Neither allegations contained in pleadings, recitations of the facts contained in a brief, nor arguments of counsel qualify as evidence for purposes of a statement of the evidence.

Outdoor Management, LLC v. Thomas, 249 S.W.3d 368, 377-8 (Tenn. Ct. App. 2007). On appeal of a trial court's finding of contempt, the burden is upon the appellant to show that the evidence preponderates against the judgment of the trial court. The burden is likewise on the appellant to provide the Court with a transcript of the evidence or a statement of the evidence from which this Court can determine if the evidence does preponderate for or against the findings of the trial court.

Wilson County School System v. Clifton, 41 S.W.3d 645, 660, 153 Ed. Law Rep. 433 (Tenn. Ct. App. 2000). Pursuant to Tenn. R. App. P. 24(b), the appellant bears the burden of preparing "a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." In the absence of the attorney's affidavits or any other evidence, an appellate court is unable to conclude that the trial court abused its discretion in awarding attorney's fees in the full amount requested.

The Realty Shop, Inc. v. RR Westminster Holding, Inc., 7 S.W.3d 581, 607 (Tenn. Ct. App. 1999) (opinion denying petition for rehearing). (1) The Tennessee Rules of Appellate Procedure require the parties, not the appellate court, to assure that the record on appeal contains a "fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal." (2) Tenn. R. App. P. 24(a) places the responsibility for the contents of the record, as an initial matter, with the appellant. However, the appellee must also designate additional parts of the trial court record to be included in the record on appeal if it determines that other parts of the record are necessary. (3) The parties' decisions concerning the completeness of the record on appeal are driven by the issues that are raised on appeal in the parties' arguments as well as in their statement of issues in their briefs, provided the parties have fair notice of the issues and are not unfairly prevented from briefing or arguing their factual and legal positions. (4) Where the parties to an appeal have made tactical decisions to pursue an appeal with less than a complete record, the parties cannot wait to reverse their field on the question of the adequacy of the record until after they receive an opinion that is not to their liking. Thus, in the present case, the Court of Appeals declined to find that the incompleteness of the record required remand to the trial court for further proceedings.

Word v. Word, 937 S.W.2d 931, 933 (Tenn. Ct. App. 1996) (emphasis by the court): "A party raising issues on appeal is responsible for furnishing the appellate court with a record that will enable that court to reach the issues raised. In many, but not all, cases, a *complete* record must include a transcript or statement of the evidence or proceedings."

Beef N' Bird of America, Inc. for Use and Benefit of Galbreath v. Continental Cas. Co., 803 S.W.2d 234 (Tenn. Ct. App. 1990). "Supreme Court Rule 3 requires counsel for the parties to abridge the record to exclude unnecessary parts, Rules 6(c) and 14 of the Rules of this Court [Court of Appeals] provide for abridged records, Tenn. R. App. P. Rule 24(a) and (b) provide for abbreviated records, and Tenn. R. App. P. Rule 24(c) recognizes that an informal incomplete statement of the evidence may be acceptable if it is sufficient for consideration of the 'bases of the appeal.'" The Court held that a single page "statement of the evidence" was adequate for review of the single issue raised by plaintiff on appeal. The Court further held that plaintiff's preparation of a full record of all of the evidence in response to defendant's objection

the trial court[20] with service on his adversary[21] a designation of portions of the proceedings that the appellant wants transcribed and a statement of the issues he intends to present on appeal.[22] Thereupon, the appellee, if he deems a transcript of other parts of the record to be necessary, within 15 days after service of the appellant's designation, may serve on the trial court clerk and on the appellant a designation

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to the accuracy of the plaintiff's original statement of the evidence was not justified as it was not necessary for consideration of the issue on appeal; therefore, plaintiff was responsible for the extra expense of producing the full record.

Consider also McDonald v. Onoh, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989) (Tenn. R. App. P. 24 places the responsibility for the preparation of the transcript or statement of evidence squarely on the shoulders of the parties; the appellant has the primary burden to see that a proper record is prepared on appeal and filed in the appellate court).

State v. Rhoden, 739 S.W.2d 6, 14–15 (Tenn. Crim. App. 1987). Applicant has a duty to prepare the trial transcript, and if he is unable to do so, he has the burden to show (1) his inability, (2) that the inability was brought about by matters outside his control, and (3) his diligent efforts to supply the record.

See State v. Matthews, 805 S.W.2d 776, 783 (Tenn. Crim. App. 1990) ("[w]hen counsel certifies that the transcript contains the 'entire proceedings,' but the transcript, as here, does not contain an essential portion of proceedings, an appellate court could construe such a statement as an intent to abridge the record").

See Johnson v. Hardin, 926 S.W.2d 236, 239-40 (Tenn. 1996) discussing Tenn. R. App. P. 26(b) (dismissal of appeals for failure to file a transcript); 24(e) (supplementing the record). The Court held that Tenn. R. App. P. 26(b) grants the appellate court the discretion to rectify error rather than dismissing the appeal by providing: "In lieu of granting the motion [to dismiss] or at any time on its own motion, the appellate court may order filing of the transcript or statement." Further, Tenn. R. App. P. 24(e) allows the modification or supplementation of the record with any matter the trial court deems properly includable.

Autry v. Autry, 83 S.W.3d 785, 788 (Tenn. Ct. App. 2002). In an action seeking an order of protection based on allegations of domestic abuse, the Court noted that it was presented with a less than satisfactory substantially verbatim transcript of the evidence heard by the trial court, which was transcribed by a professional court reporter and notary public, to the best of her ability, from a tape recording of the proceedings. At ten places in the fifteen page transcript appears the word "inaudible". This transcript was certified by the court reporter and filed with the clerk of the court. On the face of the transcript was a certification by the clerk that no objections to the transcript had been filed as of the date of certification. The Court added that as the appellee was without counsel on appeal the effort to perfect the record of testimony under Tenn. R. App. P. 24(b) was probably done as well as the appellant could do.

State v. Skelton, 77 S.W.3d 791, 797 (Tenn. Crim. App. 2001). The facts presented in a verbatim transcript of the trial court proceedings control the minute entry filed by the court in the event there is a conflict between the two documents. The transcript controls the questions presented on appeal.

[20]Tenn. R. App. P. 24(a) ¶ 2, and 24(b), sentence 2; State v. Matthews, 805 S.W.2d 776, 784 n.33 (Tenn. Crim. App. 1990), citing Tenn. R. App. P. 24(b).

[21]Tenn. R. App. P. 24(a) ¶ 2, and 24(b), sentence 2.

See Rogers v. Russell, 733 S.W.2d 79, 89 (Tenn. Ct. App. 1986); Johnson v. Hardin, 926 S.W.2d 236, 239-40 (Tenn. 1996), discussed at n. 19.

[22]Johnson v. Hardin, 926 S.W.2d 236, 239 (Tenn. 1996), citing Tenn. R. App. P. 24(b) (if a full transcript is not required, an appellant must "file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript the appellant intends to include in the record, accompanied by a short and plain declaration of the issues . . .").

See Roberts v. Roberts, 767 S.W.2d 646, 647–48 (Tenn. Ct. App. 1988) (15-day time period for filing declaration of issues to be presented on appeal was suspended under Tenn. R. App. P. 2 where appellant's attorney was retained after notice of appeal was filed by former counsel).

of additional parts to be included in the transcript.[23]

The filing of transcripts similar to the narrative bill of exceptions is authorized by the Tennessee Rules of Appellate Procedure, but only where no stenographic record or transcript of the evidence or proceedings is available to the appellant or where there is leave of court granted under Tenn. R. App. P. 2.[24] Where a transcript is available of

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[23]Tenn. R. App. P. 24(b); Johnson v. Hardin, 926 S.W.2d 236, 239-40 (Tenn. 1996); Rogers v. Russell, 733 S.W.2d 79, 88 (Tenn. Ct. App. 1986).

State v. Peak, 823 S.W.2d 228, 230 (Tenn. Crim. App. 1991), citing Tenn. R. App. P. 24(b). Where a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence is available, and appellant designates less than the entire transcript as the appellate record, and appellee designates additional parts for inclusion, the appellant shall have the additional parts prepared at its own expense or apply to the court for an order requiring appellee to do so.

Consider Jackson v. Aldridge, 6 S.W.3d 501, 502 n.1 (Tenn. Ct. App. 1999). Appellate court would have been better served had counsel for appellee, upon learning that appellant was undertaking to represent himself, taken timely steps to assure that the appellate record, in the words of Tenn. R. App. P. 24(a), contained a "fair, accurate and complete account of what transpired with respect to those issues that are the bases of the appeal."

Svacha v. Waldens Creek Saddle Club, 60 S.W.3d 851 (Tenn. Ct. App. 2001). A party who has sought and obtained summary judgment is responsible for ensuring that all proof considered by the trial court in arriving at its determination to grant summary judgment is on file and in the record in the event that appellate review is sought, even though the Tenn. R. App. P. 24(a) places the primary burden on appellant to prepare a proper record for appeal. In the present case, the Court of Appeals reversed the trial court's grant of summary judgment for defendant, where the record did not contain a transcript of plaintiff's oral testimony, relied on by the trial court in granting summary judgment to defendant/ appellee, and defendant had ample time to have appellant's testimony transcribed and filed with the trial court. Tenn. R. App. P. 24(a).

[24]Tenn. R. App. P. 24(c); Kawatra v. Gardiner, 765 S.W.2d 771, 775, 29 Wage & Hour Cas. (BNA) 533, 110 Lab. Cas. (CCH) P 35126 (Tenn. Ct. App. 1988); Chilton Air Cooled Engines, Inc. v. First Citizens Bank of Hohenwald, 726 S.W.2d 526, 527 (Tenn. Ct. App. 1986).

2005 Advisory Commission Comments to Tenn. R. App. P. 24(b) states that Rule 24(b) "does not require that a stenographic report be made of all the evidence or proceedings. If a stenographic or other substantially verbatim record is not available, subdivision (c) establishes a procedure for generating a narrative record.

Bellamy v. Cracker Barrel Old Country Store, Inc., 302 S.W.3d 278, 280-2 (Tenn. 2009). The rules allow for a statement of the evidence or proceedings to be used in cases where a verbatim transcript does not exist. However, because the statements in such cases are partly generated from the parties' own recollections, Rule 24(c) anticipates that the appellant will file a statement, that the appellee may file objections to the statement, and that any differences regarding the statement shall be settled as set forth in Rule 24(e). Moreover, Rule 24(e) expressly and mandatorily requires that the differences "shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court" Rule 24 (c) and (e) require the Trial Judge to rule upon objections and to approve a single statement of the evidence. In so doing, he should require counsel to consolidate into one instrument all of the uncontested portions of their respective statements, together with the Court's version of any contested matter.

Marra v. Bank of New York, 310 S.W.3d 329, 335 (Tenn. Ct. App. 2009), appeal denied, (Feb. 22, 2010). Where no transcript is available, Rule 24(c) directs the appellant to prepare a statement of the evidence:

> In order to be a useful substitute for a trial transcript, the statement must "convey a fair, accurate, and complete account of what transpired [in the trial court] with respect to those issues that are the bases of appeal." Tenn. R.App. P. 24(c).

2005 Advisory Commission Comments to Tenn. R. App. P. 24(c) states that

part but not all of the evidence introduced at trial, the trial judge may

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subdivision (c) "is available only in those situations in which a stenographic report or other substantially verbatim recital or transcript of the evidence is unavailable. It permits the preparation of a narrative record of the evidence or proceedings."

Williams v. Williams, 286 S.W.3d 290, 295 (Tenn. Ct. App. 2008) Because there was no transcript of the trial in this divorce case, the appellate court relied on the Statement of the Evidence approved by the trial court, and upon the technical record.

C & W Asset Acquisition, LLC v. Oggs, 230 S.W.3d 671, 673 n.1, 2 (Tenn. Ct. App. 2007). (1) Tenn. R.App. P. 24(c) provides in pertinent part that "if no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection." (2) In the present case, plaintiff/appellant filed a timely notice of appeal and a Tenn. R. App. P. 24(c) statement of the evidence. The statement of the evidence was served on defendant but he did not file any objections. The statement of the evidence was not approved by the trial court, but the Court of Appeals deemed the statement of the evidence approved pursuant to Tenn R. App. P. 24(f).

Beef N' Bird of America, Inc. for Use and Benefit of Galbreath v. Continental Cas. Co., 803 S.W.2d 234 (Tenn. Ct. App. 1990). Tenn. R. App. P. 24(c) authorizes an appellant to prepare a statement of the evidence of proceedings from the best available means, including his recollection, where no stenographic report, substantially verbatim recital, or transcript of the evidence or proceedings is available. "Of course, if no record, stenographic or otherwise, was made of the proceedings, a verbatim transcript is unavailable. If such a record was made, then it may or may not be available according to the circumstances. If made by a court employee as in criminal cases, then the record is presumed to be available absent unusual circumstances. In civil cases, this Court notes judicially the practice of parties to engage and pay a stenographer a 'per diem' to attend and record the evidence and proceedings. If only one party engages and pays the stenographer, it appears that the verbatim record of evidence and proceedings would be available to that party by contract. If more than one party jointly engage and pay the stenographer, it would appear that the verbatim record would be available to any one of the participating parties by contract. Inability of a participating party to pay for the transcript might make it unavailable to him. A party who does not join in the engagement and payment of a stenographer has no contract right to require the stenographer to transcribe the record which is therefore unavailable to him unless and until made available to him on terms satisfactory to the stenographer and the party or parties who engaged the stenographer. . . . Accordingly, if an appellant conceives that a verbatim transcript is unavailable to him, he may initially perform his duty by filing a narrative statement of the evidence and proceedings within 90 days after notice of appeal. If the appellee files timely objection and shows that a verbatim record is available to appellant, the Trial Court may require the production and substitution of a verbatim record instead of the informal narrative. . . . In ruling upon availability the Trial Judge may properly consider the financial ability of appellant to pay for the transcription of a verbatim record, the willingness of the stenographer and those who paid him to make the transcription available, and any other relevant circumstance."

Stokes v. Arnold, 27 S.W.3d 516, 522 (Tenn. Ct. App. 2000). (1) The appellate rules do not require that a party who has assumed the burden of providing a reporter at trial make available that reporter's work for a party who did not join in providing the reporter. In re Estate of Nichols, 856 S.W.2d 397 (Tenn. 1993). (2) A party who does not join in the engagement and payment of a stenographer has no contract right to require the stenographer to transcribe the record which is therefore unavailable unless and until made available to him on terms satisfactory to the stenographer and the party or parties who engaged the stenographer. Beef N' Bird of America, Inc. for Use and Benefit of Galbreath v. Continental Cas. Co., 803 S.W.2d 234, 240 (Tenn. Ct. App. 1990). (3) Where several but not all of the parties to litigation have agreed to share the costs of a court reporter, either of the parties who agreed to share the expense may make a copy of the court reporter's transcript available to others and may consent to allowing others to contract with the court reporter for a copy of the transcript or to furnish her a copy, if it chose to do so.

See also Parker v. Parker, 986 S.W.2d 557, 561–62 (Tenn. 1999). In this child

permit the supplementing of the trial transcript with a narrative statement of the nontranscribed evidence.[25] Tenn. S. Ct. R. 26, adopted by Order dated May 5, 1993, addresses the circumstances under which videotapes prepared in courts of record, which are authorized to use videotape equipment to record, may be used on appeal.

If a party plans to file no transcript or statement of the evidence or

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custody action, the trial judge erred in excluding from a "statement of the evidence from recollection of the parties," that was offered pursuant to Tenn. R. App. P. 24(c), a statement it made during the cross-examination of a witness which allegedly showed racial bias, but it did not err in excluding parenthetical information added to the statement of evidence to place the judge's statement in context, as such information would not have appeared on the page of a written transcript or other verbatim record. In so holding, the Court cited Tenn. R. App. P. 24(g), which provides that "[n]othing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal."

Consider Steve Frost Agency v. Spurlock, 859 S.W.2d 337, 338 (Tenn. Ct. App. 1993) (a stipulation of the parties as a substitute for a transcript or statement of the evidence must be timely filed with the trial clerk and either actually or constructively approved by the trial judge before it may be considered on appeal).

Word v. Word, 937 S.W.2d 931, 933 (Tenn. Ct. App. 1996), citing Tenn. R. App. P. 24(c): "If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection."

State v. Alvarado, 961 S.W.2d 136, 154 (Tenn. Crim. App. 1996). Trial court did not err, in violation of the equal protection clauses under federal and state law, U.S. Const. Amend. XIV and Tenn. Const. Art. XI, § 8, by denying indigent defendant's motion for a trial transcript to be used in preparation for his motion for a new trial, where defense counsel took notes throughout the proceedings. Absent a showing of need and prejudice, a defendant is not entitled to a trial transcript, at the expense of the state, for use in preparing for a motion for new trial.

Consider M.L.B. v. S.L.J., 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996). Under due process and equal protection principles, the right to appeal an order terminating parental rights may not be conditioned on prepayment of record preparation fees when the appellant is indigent. Just as a state may not deny an indigent's access to an appeal of a criminal offense, it may not deny appellate review of the sufficiency of evidence supporting parental termination because of appellant's poverty and inability to obtain a transcript.

Consider Wagner v. Fleming, 139 S.W.3d 295, 300 n.2 (Tenn. Ct. App. 2004). The trial was held without a court reporter present; however, the parties agreed, with the trial court's approval, that the court clerk would record the trial with a cassette recorder. Due to technical or human error, a portion of the trial was not recorded. The recorded portion of the trial was later transcribed. The transcript was supplemented by a statement of the evidence with respect to the missing testimony.

[25]Moody v. Ryan, 1990 WL 19675 (Tenn. Ct. App. 1990).

See Buss-Flinn v. Flinn, 121 S.W.3d 383, 386 (Tenn. Ct. App. 2003). In the present divorce action, Father did not have a court reporter present when issues of child custody and support were decided in the trial court, but he did tape record most of the trial and had these tapes transcribed for appeal. The Court held that as various portions of the recordings were unintelligible and some of the testimony was not recorded at all for one reason or another, the transcript was not a substantially verbatim recording of the proceedings as set forth in Tenn. R. App. P. 24(b). However, as the Father submitted the transcript as a "Statement of the Evidence" under Tenn. R. App. P. 24(c) and Mother made no objections to the transcript, such as it was, the Court accepted the transcript as a Statement of the Evidence, even though an incomplete one, and discussed only that testimony which pertains to the issues on appeal.

proceedings, he must file a statement to this effect with the trial court within 15 days after the filing of the notice of appeal.[26] Appellee may then order that a transcript of the evidence or portions thereof be transcribed, if desired.[27]

The failure to file a transcript does not prevent an appeal where the error alleged is apparent from the record, including the court's judgment containing findings of fact;[28] but it has been held that absent a transcript, it is presumed that the trial proceedings were proper[29] and

[26]Tenn. R. App. P. 24(d).

Marra v. Bank of New York, 310 S.W.3d 329, 335 (Tenn. Ct. App. 2009), appeal denied, (Feb. 22, 2010). If an appellant intends to file neither a transcript nor a statement of the evidence, the appellant is required to file with the clerk of the trial court and serve upon the appellee a notice that no transcript or statement is to be filed. Tenn. R.App. P. 24(d).

See Roberts v. Roberts, 767 S.W.2d 646, 647–48 (Tenn. Ct. App. 1988) (15-day time period suspended under Tenn. R. App. P. 2 where appellant's attorney was retained after notice of appeal was filed by former counsel); Johnson v. Hardin, 926 S.W.2d 236, 239-40 (Tenn. 1996), discussed at n. 19.

[27]Johnson v. Hardin, 926 S.W.2d 236 (Tenn. 1996), citing Tenn. R. App. P. 24(d).

[28]J. C. Bradford & Co. v. Martin Const. Co., 576 S.W.2d 586 (Tenn. 1979); Bazner v. American States Ins. Co., 820 S.W.2d 742, 746 (Tenn. 1991) (absent a transcript or statement of the evidence, the Court relied upon a stipulation that had been entered by the parties).

State v. Byington, 284 S.W.3d 220, 225 (Tenn. 2009). A transcript showing that a trial court had disposed of a motion for new trial was held to be properly corroborated by a minute entry, even though the record on appeal had not been supplemented with the order disposing of the motion for new trial in the trial court.

Scholz v. S.B. Intern., Inc., 40 S.W.3d 78, 80 n.1 (Tenn. Ct. App. 2000). Absent a transcript or statement of the evidence, the appellate court had no alternative than to rely on the technical record, i.e., the factual allegations in the plaintiff's complaint that were admitted in the defendant's answer, to provide the factual framework for appeal.

Sherrod v. Wix, 849 S.W.2d 780, 784 (Tenn. Ct. App. 1992). Even absent a transcript, appellate court affirmed trial court's judgment regarding custody and visitation, as these matters are customarily left to the trial court's discretion, and the trial court order containing detailed findings of fact and conclusions of law left no basis for second guessing its decision.

Stevens v. Raymond, 773 S.W.2d 935, 936 (Tenn. Ct. App. 1989). Although there was no transcript or statement of evidence, the appellate court considered findings of fact in the trial judge's memorandum in lieu of a record of the evidence.

Lyon v. Lyon, 765 S.W.2d 759, 760 (Tenn. Ct. App. 1988). Absent transcript, appellate review is limited to the technical record.

See however, Carpenter v. Klepper, 205 S.W.3d 474, 491 (Tenn. Ct. App. 2006). Review of a trial court's award of discretionary costs is not precluded by the failure to provide a transcript of the hearing where no witnesses or evidence has been offered at the hearing. In that case, the appellate court reviews the matter without the presumption that the evidence presented during the hearing supported the trial court's decision.

[29]State v. Ballard, 855 S.W.2d 557, 560–61 (Tenn. 1993); Bazner v. American States Ins. Co., 820 S.W.2d 742, 746 (Tenn. 1991); State v. Melson, 638 S.W.2d 342, 359 (Tenn. 1982) (the propriety of a trial court's disposition of a motion may not be reversed on appeal unless a transcript of the motion hearing and other material exhibits are included in the record presented to the appellate court for review).

State v. Thornton, 10 S.W.3d 229, 238 (Tenn. Crim. App. 1999). In the absence of the tape or a transcript of the proceedings, an appellate court must presume that the trial court's refusing to uphold a challenge to the jury venire was correct.

See also, Levine v. March, 266 S.W.3d 426, 445 (Tenn. Ct. App. 2007)

that judgment is supported by the evidence.[30] Where an appellate rec-

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Vaccarella v. Vaccarella, 49 S.W.3d 307, 315 (Tenn. Ct. App. 2001). As no transcript of this divorce proceeding was made and there was no offer of proof filed with the court, the determination of the trial court was presumed to be correct.

Jackson v. Aldridge, 6 S.W.3d 501, 502 n.1 (Tenn. Ct. App. 1999). Appellate court held that it was unable to determine the propriety of service of process because (a) the appeal was before the Court of Appeals on the technical record alone because neither appellant nor the lawyer who represented him in the trial court took the steps required by Tenn. R. App. P. 24(b) or (c) to prepare and file either a transcript or a statement of the evidence; and (b) the technical record did not contain a copy of the process which appellant alleged was not properly served on him because the trial court clerk omitted it pursuant to Tenn. R. App. P. 24(a) when neither party requested that it be included in the record.

State v. Griffis, 964 S.W.2d 577, 592–93 (Tenn. Crim. App. 1997). (1) When a party seeks appellate review of an issue, the party has a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issue presented for review. (2) When the record is incomplete and does not contain a transcript of the proceedings relevant to the issue presented for review, the appellate court is precluded from considering the issue. Instead, the appellate court must conclusively presume the ruling of the trial court was correct.

State v. Hopper, 695 S.W.2d 530, 537 (Tenn. Crim. App. 1985) (failure to prepare a transcript showing voir dire proceedings and evidence heard on motions precludes appellate review of alleged errors during these proceedings); State v. Plummer, 658 S.W.2d 141, 143 (Tenn. Crim. App. 1983) (objection to jury voir dire and arguments of counsel which are not made a part of the record cannot be considered on appeal as a basis for reversal).

Pankow v. Mitchell, 737 S.W.2d 293 (Tenn. Ct. App. 1987). Absent record of pretrial conference by transcript or order embodying actions taken at the conference, trial court's pretrial order excluding evidence is not reversible on appeal.

McDonald v. Onoh, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989) (alleged error in excluding proffered evidence is not subject to appellate review where the evidence is not part of the record); State v. Pendergrass, 795 S.W.2d 150, 156 (Tenn. Crim. App. 1989) (alleged trial court error in excluding evidence cannot be considered on appeal where a proffer of the excluded evidence does not appear in the transcript of the proceedings).

Overton v. Davis, 739 S.W.2d 2 (Tenn. Ct. App. 1987) (without transcript, jury instructions are presumed to be accurate and complete); Harper v. Watkins, 670 S.W.2d 611, 613 (Tenn. Ct. App. 1983) (trial judge's instructions to the jury were presumed correct when the instructions were not included in the record on appeal). See also Norman v. Prather, 971 S.W.2d 398, 401 (Tenn. Ct. App. 1997) (where a charge to the jury is not included in the record, the presumption is that the trial court charged the jury fully and correctly).

State v. Aucoin, 756 S.W.2d 705, 716 (Tenn. Crim. App. 1988) (absent a transcript of a hearing on a new trial motion, an appeal cannot be based on events occurring at the hearing); State v. Brock, 678 S.W.2d 486, 489 (Tenn. Crim. App. 1984) (an appellate court will not review a trial court's denial of a new trial motion based upon newly discovered evidence where the affidavits in support of the motion are not in the record on appeal).

Shelter Ins. Companies v. Hann, 921 S.W.2d 194 (Tenn. Ct. App. 1995). Appellant argued that the trial court erred in setting aside its previous judgment because the appellee had offered no justifiable reason for relief under Rule 60.02 and because the motion, filed nine months after entry of judgment, was not filed within a reasonable time. The Court of Appeals held that it could not review the propriety of the trial judge's adjudication, as the appellant failed to present the appellate court with a record of the facts and circumstances presented to the trial court.

[30]See, e.g., Fayne v. Vincent, 301 S.W.3d 162, 169-70 (Tenn. 2009); Tanner v. Whiteco, L.P., 337 S.W.3d 792 (Tenn. Ct. App. 2010), appeal denied, (Nov. 18, 2010); Byars v. Young, 327 S.W.3d 42, 48 (Tenn. Ct. App. 2010), appeal denied, (Nov. 10, 2010); Chiozza v. Chiozza, 315 S.W.3d 482, 491 (Tenn. Ct. App. 2009), appeal denied, (May 20, 2010); Williams v. Williams, 286 S.W.3d 290, 295 (Tenn. Ct. App. 2008);

ord (transcript or otherwise) is inadequate to allow appellate review, the appellate court is justified in dismissing the appeal or in directing the furnishing of a more adequate record.[31] It has also been held that an appeal may be deemed frivolous where an appellate court's ability

Outdoor Management, LLC v. Thomas, 249 S.W.3d 368, 378 (Tenn. Ct. App. 2007); Bank of America, N.A. v. Darocha, 241 S.W.3d 510, 512 (Tenn. Ct. App. 2007); Reinhardt v. Neal, 241 S.W.3d 472, 474 (Tenn. Ct. App. 2007); Brooks v. United Uniform Co., 682 S.W.2d 913 (Tenn. 1984); Rhea v. Marko Const. Co., 652 S.W.2d 332, 333 (Tenn. 1983); Reagor v. Dyer County, 651 S.W.2d 700, 701 (Tenn. 1983); Orlando Residence, Ltd. v. Nashville Lodging Co., 213 S.W.3d 855, 865 (Tenn. Ct. App. 2006); Toms v. Toms, 209 S.W.3d 76 (Tenn. Ct. App. 2005); In re M.L.D., 182 S.W.3d 890, 894-5 (Tenn. Ct. App. 2005); Fossett v. Gray, 173 S.W.3d 742, 751 (Tenn. Ct. App. 2004); Tarpley v. Hornyak, 174 S.W.3d 736 (Tenn. Ct. App. 2004); Glassell v. Glassell, 152 S.W.3d 5, 8 n.1 (Tenn. Ct. App. 2004); Manufacturers Consolidation Service, Inc. v. Rodell, 42 S.W.3d 846, 865 (Tenn. Ct. App. 2000).

Tallent v. Cates, 45 S.W.3d 556, 562 (Tenn. Ct. App. 2000). While Tenn. R. App. P. 24(d) provides a procedure when no transcript or statement of the evidence at trial has been filed as required by Tenn. R. App. P. 24(a), an appellate court must presume, in the absence of a transcript or statement of the evidence, that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings.

Taylor v. Allstate Ins. Co., 158 S.W.3d 929 (Tenn. Ct. App. 2004). Pro se plaintiff's appeal from Circuit Court's dismissal of his appeal from general sessions court was dismissed because the plaintiff's "statement of evidence" did not include any information about the witnesses' testimony or any other evidence submitted at trial. An appellate court's authority to review a trial court's decision is limited to those issues for which an adequate legal record has been preserved, and it is the parties, not the court, who bear the burden of ensuring that the record on appeal contains a fair, accurate, and complete account of what transpired in the trial court. Without a complete record or sufficient statement of the evidence from which to determine whether the trial court acted appropriately, an appellate court must assume the sufficiency of the evidence to support the judgment.

Sherrod v. Wix, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). In a nonjury case, absent a transcript or statement of the evidence prepared in accordance with Tenn. R. App. P. 24(c), an appellate court cannot conduct a Tenn. R. App. P. 13(d) de novo review and, therefore, must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings.

King v. King, 986 S.W.2d 216, 220 (Tenn. Ct. App. 1998). In the absence of a transcript or a statement of the evidence reflecting the testimony at a hearing, an appellate court must conclusively presume that every fact admissible under the pleadings was found or should have been found favorably to the appellee.

McDonald v. Onoh, 772 S.W.2d 913 (Tenn. Ct. App. 1989). Failure to file transcript or statement of the evidence in an appeal from a judgment entered on a jury verdict prevents the appellate court from determining if there is material evidence to support the jury's verdict; in such cases, the appellate court must presume that every fact admissible under the pleadings was found or should have been found in the appellee's favor.

Rogers v. Russell, 733 S.W.2d 79, 89 (Tenn. Ct. App. 1986). A full transcript was necessary to resolve appellant's assignments of error regarding the trial court's denial of a directed verdict and judgment notwithstanding the verdict.

Hoover v. Metropolitan Bd. of Housing Appeals of Metropolitan Government of Nashville and Davidson County, 936 S.W.2d 950, 953 (Tenn. Ct. App. 1996). On appeal from trial court's denial of relief on petition for certiorari to review an administrative order, appellant's complaint that the trial judge erroneously weighed the evidence was dismissed, as appellant provided no transcript or narrative statement of the evidence wherein any evidence might be found supporting appellant's complaint.

State ex rel. Wrzesniewski v. Miller, 77 S.W.3d 195, 197 (Tenn. Ct. App. 2001) citing King v. King, 986 S.W.2d 216, 220 (Tenn. Ct. App. 1998).

[31]Tenn. R. App. P. 24, and 26(b), and 36(a), sentence 2. See Harrington v. Harrington, 759 S.W.2d 664, 666 (Tenn. 1988), citing Tenn. R. App. P. 24(g).

to address the issues raised is undermined by the appellant's failure to provide an adequate record.[32]

T.C.A. §§ 40-14-301 et seq., which provides that a criminal defendant has the right to a transcript of trial proceedings, is inapplicable in civil cases. A party to a civil action has no right to be furnished a transcript of the evidence at trial unless he establishes a statutory or constitutional right thereto.[33] Absent such right, a civil litigant who

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Tenn. R. App. P. 26(b), first sentence, was amended by Order of the Supreme Court in 1997 to provide: "If the appellant shall fail to file the transcript or statement within the time specified in Rule 24(b) or (c), *or if the appellant shall fail to follow the procedure in Rule 24(d) when no transcript or statement is to be filed,* any appellee may file a motion in the appellate court to dismiss the appeal." Tenn. R. App. P. 26(b), as amended, was approved by 1997 S. R. 4 and H. R. 7, with an effective date of July 1, 1997.

Johnson v. Hardin, 926 S.W.2d 236, 239-40 (Tenn. 1996). Although appellant's attorney failed to comply with Tenn. R. App. P. 24(b), the Court of Appeals erred in its holding that the appeal should be dismissed, rather than permitting a late transcript designation. (1) A late designation would have satisfied the purposes of Rule 24(b), as defendants would have had an opportunity to designate additional portions of the transcript, and the appellate court would have had before it a full and fair record on which to resolve the issue. (2) Tenn. R. App. P. 26(b) grants the appellate court the discretion to rectify error rather than to dismiss the appeal by providing: "In lieu of granting the motion [to dismiss] or at any time on its own motion, the appellate court may order filing of the transcript or statement." (3) Tenn. R. App. P. 24(e) allows the modification or supplementation of the record with any matter the trial court deems properly includable. (4) Tenn. R. App. P. 24(c) empowers the trial judge to correct and modify the record and provides that the trial judge's determination is conclusive. (5) A trial judge's order supplementing a record is sufficient to place the matter before the appellate court. (6) Absent extraordinary circumstances, an appellate court may not ignore matters that the trial judge has ordered included. (7) In the present case, the trial judge certified and approved the portion of the transcript provided by plaintiffs and ordered the supplementation of the record.

Justice v. Sovran Bank, 918 S.W.2d 428, 429 (Tenn. Ct. App. 1995). (1) While a party is entitled to relief from a judgment if the party is deprived of effective appellate review without fault on his part, appellants bear a heavy burden in seeking a new trial on the ground of absence of a transcript of the evidence: The burden is upon them to show their inability to prepare a transcript, the reason for the inability, and that the inability was brought about by matters outside their control. (2) In the present case, the record before the Court of Appeals was devoid of any attempt to prepare a narrative transcript in accordance with Tenn. R. App. P. 24. (3) Appellate courts will not presume that a transcript cannot be prepared simply because of the passage of time. (4) The conclusions of the appellant in her brief were not sufficient to demonstrate that a narrative transcript could not be made.

[32]Williams v. Williams, 286 S.W.3d 290, 295 (Tenn. Ct. App. 2008).

[33]Lyon v. Lyon, 765 S.W.2d 759, 762 (Tenn. Ct. App. 1988).

State, Dept. of Human Services v. Harris, 1992 WL 259288 (Tenn. Ct. App. 1992). (1) The trial court's failure, in an action to terminate parental rights, to order the state to furnish the defendant with a verbatim transcript of the trial court proceedings so that it could properly prepare an appeal was not constitutional error in violation of due process. (2) A trial court does not have the statutory authority to order the state to pay for the cost of preparing a transcript as part of the preparation for a parent's appeal from a termination of parental rights. (3) In response to defendant's assertion that the *trial court,* pursuant to Tenn. R. App. P. 40(a), has the discretion to tax the expense of preparing a transcript on the state as costs, the appellate court noted: "Rule 40(a) T. R. A. P. is an appellate rule, not a trial court rule. It provides that at the time the appellate court renders its judgment, it has the discretion to tax costs to one party or the other. One of the items of recoverable costs on appeal is the cost of a transcript, previously prepared but possibly not paid for. Rule 40(a) does not apply, in our opinion, to the specific taxing of cost for the preparation

cannot afford a transcript should be allowed to utilize the "narrative bill of exceptions device."[34] In contrast, a party who can afford a transcript may not file a narrative bill merely to avoid the burdensome expense of a verbatim transcript.[35]

The transcript, whether it includes the entire evidence or part thereof, must be prepared, certified by the appellant, his counsel, or the court reporter as an accurate account of the proceedings,[36] and filed with the clerk of the circuit court within 60 days after the filing of the notice of appeal in appeals to the Tennessee Court of Appeals or, if the appeal is direct, to the Tennessee Supreme Court and within 90 days after filing the notice of appeal in appeals to the Court of Criminal Appeals.[37] If the transcript cannot be filed timely, it is the duty of the appellant, prior to the expiration of the 60-day period, to

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of the transcript at the time the appellate process begins and when no appellate judgment has been rendered. But even if we are in error in this regard . . ., there is no violation of due process without there first being a showing that a statement of the evidence would be insufficient to produce a record adequate for the appellate court to fully and fairly adjudicate the issue."

[34]Consider Beef N' Bird of America, Inc. for Use and Benefit of Galbreath v. Continental Cas. Co., 803 S.W.2d 234 (Tenn. Ct. App. 1990), discussed at n. 24; State, Dept. of Human Services v. Harris, 1992 WL 259288 (Tenn. Ct. App. 1992), discussed at n. 32.

[35]Bynum v. Duncan, 1989 WL 128291 (Tenn. Ct. App. 1989): "Rule 24(b) provides that if a verbatim recital of the evidence is available, the 'appellant shall have prepared a transcript of such part of the evidence as is necessary to convey a fair, accurate, and complete account of what transpired.' In light of this direction, a statement of the evidence cannot be utilized when transcript is available. Appellant wished to avoid the burdensome expense of a verbatim transcript when a counsel-prepared statement would suffice, a position with which we are sympathetic, but Rule 24 does not address this feature."

[36]Tenn. R. App. P. 24(b), sentence 5; Johnson v. Hardin, 926 S.W.2d 236, 239-40 (Tenn. 1996).

State v. Matthews, 805 S.W.2d 776, 783–84 (Tenn. Crim. App. 1990), notes that counsel is not required to execute a certificate attesting to the accuracy and content of the transcript. Tenn. R. App. P. 24(b) requires that the transcript be certified by one of the following: the reporter, the appellant, or his counsel; and where a transcript is certified by the court reporter, counsel's certification is mere surplusage and, in fact, "is fraught with peril."

[37]Tenn. R. App. P. 24(b).

Tenn. R. App. P. 24(b), was amended in 2010, to provide different time periods for filing the transcript of evidence. In civil proceedings it is 60 days after filing the notice of appeal. In criminal proceedings it is 90 days. The 60-day period in Rule 24 (c) for a statement of the evidence remains unchanged."

In 2007, the Tennessee Supreme Court ordered and the General Assembly approved, amendments to Tenn. R. App. P. Rule 24(b) and (c) and Rule 25(a) that "90 days" be changed to "60 days." This amendment has an effective date of July 1, 2007. A 2007 Advisory Commission Comment states "A transcript or statement of the evidence must be filed with the trial court clerk within 60 days after the filing of the notice of appeal unless extended by the court. The period was formerly 90 days."

Tenn. R. Civ. P. 6.02, "Enlargement of Time," as amended in 2001, provides: "This subsection [allowing extension of time] shall not apply to the time provided in Tennessee Rule of Appellate Procedure . . . 24(b) & (c) for filing a transcript or statement of evidence." A 2001 Advisory Commission Comment states: "This technical amendment to Rule 6.02 deletes references to repealed statutes and substitutes references to the Rules of Appellate Procedure."

See H.D. Edgemon Contracting Co., Inc. v. King, 803 S.W.2d 220, 221 (Tenn. 1991). Tenn. R. App. P. 2 authorizes suspension of most time requirements under the Rules of Appellate Procedure where "good cause" has been shown, but the Court held

move the appellate court for the entry of an order permitting the appellant to file a delayed transcript.[38] This motion should be granted when a late filing is justified by a showing of "good cause" and not merely a showing of a good faith effort to timely file the transcript and an absence of prejudice to the other parties.[39] Absent an appellate court order allowing the filing of a delayed transcript, the appellate court may dismiss the appellant's appeal or may elect to proceed on the technical record alone.[40]

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that "good cause" is not satisfied by mere "good faith" and absence of prejudice to the adversary party. The Court granted a motion to dismiss an appeal under Tenn. R. App. P. 26(b) as appellant failed to file a statement of the evidence with the appellate court clerk within 90 days of the filing of a notice of appeal, as required by Tenn. R. App. P. 24(c). The Court noted that no request for extension of time had been made within the time initially allowed by the Rules for filing transcripts and briefs, and added that timely requests for extension are granted more generously.

H. D. Edgemon specifically limited Davis v. Sadler, 612 S.W.2d 160 (Tenn. 1981), which relied on Tenn. R. App. P. 1, 2, 24(b), and 26(b) in holding that an appellate court should allow the late filing of a transcript in all cases where there has been a good faith attempt on the part of the appellant to file the transcript within the 90-day time period set forth in Rule 24(b) and the appellee is not prejudiced by the delay in filing.

Beef N' Bird of America, Inc. for Use and Benefit of Galbreath v. Continental Cas. Co., 803 S.W.2d 234, 240 (Tenn. Ct. App. 1990): "Although not expressly stated in T. R. A. P., it is inherent and inferred from other express provisions that the requirement for filing within ninety days is satisfied by timely filing of a proposed transcript or statement of the evidence and proceedings, and that after such timely filing, objections, rulings thereon, and amendments and substitutions under orders of the Trial Court may properly occur after the expiration of the prescribed ninety day period. Accordingly, if an appellant conceives that a verbatim transcript is unavailable to him, he may initially perform his duty by filing a narrative statement of the evidence and proceedings within ninety days after notice of appeal."

See also Word v. Word, 937 S.W.2d 931, 933 (Tenn. Ct. App. 1996); McDonald v. Onoh, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989); State v. Blevins, 736 S.W.2d 120, 122 (Tenn. Crim. App. 1987).

[38]H.D. Edgemon Contracting Co., Inc. v. King, 803 S.W.2d 220, 221 (Tenn. 1991), discussed at n. 36; State v. Blevins, 736 S.W.2d 120, 122 (Tenn. Crim. App. 1987).

Word v. Word, 937 S.W.2d 931, 933 (Tenn. Ct. App. 1996). Trial court did not err in its refusal to order a court reporter to file the transcript of all relevant proceedings where the evidence did not preponderate against the trial court's factual findings that the appellant had not ordered the necessary transcript within 90 days of the filing of the notice of appeal, as required by Tenn. R. App. P. 24(b), and that the appellant had not timely sought an extension of time within which to file the transcript. See Tenn. R. App. P. 13(d).

In re Estate of Oakley, 936 S.W.2d 259, 260 (Tenn. Ct. App. 1996). Appellate court did not err in denying motion to file a transcript of the evidence and in requiring an appeal to proceed on the technical record alone, as appellants failed to file a transcript in a timely manner and failed to persuade the Court that the failure was justified. The Court at n. 1 further noted that the appellants had filed a notice of their intent to proceed on the technical record alone which is "an indication that the appellants had no evidentiary basis on which to challenge the trial court's action."

[39]Tenn. R. App. P. 2. See H.D. Edgemon Contracting Co., Inc. v. King, 803 S.W.2d 220, 221 (Tenn. 1991).

[40]Tenn. R. App. P. 26(b).

Tenn. R. App. P. 26(b), first sentence, was amended in 1997 to provide: "If the appellant shall fail to file the transcript or statement within the time specified in Rule 24(b) or (c), *or if the appellant shall fail to follow the procedure in Rule 24(d) when no transcript or statement is to be filed,* any appellee may file a motion in the appellate court to dismiss the appeal." Tenn. R. App. P. 26(b), as amended, was ap-

When the transcript is filed with the trial court, the appellant must simultaneously serve notice of the filing on the appellee and must thereafter file proof of service with the circuit court clerk.[41] If the appellee contests the correctness of the transcript as filed, he must submit his objections with the trial court within 15 days after he has received notice of the filing.[42] Similarly, an objection that an appellant's filing of a narrative transcript is improper because a verbatim record is available must be filed by an appellee within 15 days after he has received notice of the filing of the narrative transcript.[43]

By Order dated January 18, 1996, the Tennessee Supreme Court adopted an amendment to Tenn. R. App. P. 24(f), which adds: "The trial court clerk shall send the trial judge transcripts of evidence and statements of evidence." The Advisory Commission Comment following this amendment states that the amendment "ensures that trial judges will have a record in chambers to approve." The amendment to Rule 24(f) was approved by H. R. 178 on April 18, 1996, and S. R. 34 on April 24, 1996, with an effective date of July 1, 1996.

If any objections to the transcript are timely filed, the trial judge[44] must rule on the objections and decide the proper transcript for

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proved by 1997 S. R. 4 and H. R. 7, with an effective date of July 1, 1997.

See H.D. Edgemon Contracting Co., Inc. v. King, 803 S.W.2d 220, 221 (Tenn. 1991), discussed at n. 36; State v. Blevins, 736 S.W.2d 120, 122 (Tenn. Crim. App. 1987).

In re Estate of Oakley, 936 S.W.2d 259, 260 (Tenn. Ct. App. 1996). Appellate court was proper in denying a motion to file a transcript of the evidence and in requiring an appeal to proceed on the technical record alone, as appellant failed to file a transcript in a timely manner and failed to persuade the Court that the failure was justified. The Court at n. 1 further noted that the appellants had filed a notice of their intent to proceed on the technical record alone, which is "an indication that the appellants had no evidentiary basis on which to challenge the trial court's action."

[41]Tenn. R. App. P. 24(b), sentences 6 and 7.

Consider Wallace v. Wallace, 733 S.W.2d 102, 105 (Tenn. Ct. App. 1987) (failure to file "proof of service" of transcript with trial court clerk and with opposing counsel as required by Tenn. R. App. P. 24(d) does not mandate dismissal where proof shows that notice had in fact been timely received); Zeitlin v. Zeitlin, 544 S.W.2d 103, 106 (Tenn. Ct. App. 1976) (neither due process nor prior statutes similar to the Rules of Appellate Procedure are offended if the adversary has actual notice).

[42]Tenn. R. App. P. 24(b), sentence 8.

See Beef N' Bird of America, Inc. for Use and Benefit of Galbreath v. Continental Cas. Co., 803 S.W.2d 234 (Tenn. Ct. App. 1990); Rogers v. Russell, 733 S.W.2d 79, 88 (Tenn. Ct. App. 1986); Chilton Air Cooled Engines, Inc. v. First Citizens Bank of Hohenwald, 726 S.W.2d 526, 527 (Tenn. Ct. App. 1986) (party's filing objection to narrative statement of the evidence more than 15 days after the filing is untimely and ineffective); Artrip v. Crilley, 688 S.W.2d 451, 453 (Tenn. Ct. App. 1985) (objections not raised are waived).

State v. Aucoin, 756 S.W.2d 705, 716 (Tenn. Crim. App. 1988), citing Tenn. R. App. P. 24(b). Upon reading a transcript and discovering an omission, this fact should be brought to the court's attention and a correction sought; absent contemporaneous objection, any objection to the omission is waived.

[43]Beef N' Bird of America, Inc. for Use and Benefit of Galbreath v. Continental Cas. Co., 803 S.W.2d 234 (Tenn. Ct. App. 1990).

[44]Tenn. R. App. P. 24(b), ¶ 1, last sentence; 24(e); and 24(f). See State v. Branam, 855 S.W.2d 563, 571–72 (Tenn. 1993); Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993); Hall v. Hall, 772 S.W.2d 432, 435 (Tenn. Ct. App. 1989) (statement of evidence signed by the trial judge and entered on the minutes superseded statements of the evidence filed by the parties; the latter statement should not be considered on ap-

purposes of appeal.[45] In resolving any conflict regarding the proper content of the transcript, the trial judge may rely on his memory or on any memoranda he has prepared.[46] Alternatively, he can hold an evidentiary hearing to establish what evidence was presented during the trial.[47] Generally, the circuit judge must approve the transcript and must authenticate exhibits within 30 days of the filing of the transcript.[48] By a 1988 amendment to Tenn. R. App. P. 24(f), a trial judge's authentication of a deposition authenticates all of the exhibits to the deposition. Approval by the trial judge of a transcript may be by a separate signed order as the Rules no longer require that the judge affix his signature on the transcript itself.[49]

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peal); Wallace v. Wallace, 733 S.W.2d 102, 105 (Tenn. Ct. App. 1987); Artrip v. Crilley, 688 S.W.2d 451, 453 (Tenn. Ct. App. 1985).

Marra v. Bank of New York, 310 S.W.3d 329, 335 (Tenn. Ct. App. 2009), appeal denied, (Feb. 22, 2010). If a statement of the evidence is filed with the trial court, the trial judge is to approve the statement of the evidence after objections have been considered and adjudicated. In the present case, the only document that satisfied any portion of the requirements of Rule 24(c) was the Appellants' amended Statement of the Evidence, which was filed in the trial court but was not signed by either the trial judge or counsel for the Appellees. However, as there was no indication in the record that the Appellees had filed an objection to this document or that the trial court approved or rejected this document as an accurate statement of the evidence, the Court deemed the amended Statement of the Evidence to have been approved, pursuant to Rule 24(f), because 30 days after the time for objections had expired.

[45]Tenn. R. App. P. 24(b), ¶ 1, last sentence; 24(e); and 24(f). See State v. Branam, 855 S.W.2d 563, 571–72 (Tenn. 1993); Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993).

In re Estate of Trigg, 368 S.W.3d 483, n.1 (Tenn. 2012). Where the parties cannot agree on matters that were properly part of the record of the proceedings in the circuit court, the circuit court must settle these disputes as required by Tenn. R. App. P. 24(e).

Parker v. Parker, 986 S.W.2d 557, 561 (Tenn. 1999), quoting Tenn. R. App. P. 24(e): "[D]ifferences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court. Absent extraordinary circumstances, the determination of the trial court is conclusive."

Consider Beef N' Bird of America, Inc. for Use and Benefit of Galbreath v. Continental Cas. Co., 803 S.W.2d 234 (Tenn. Ct. App. 1990), citing Anderson v. Sharp, 195 Tenn. 274, 259 S.W.2d 521 (1953), Rose v. Third Nat. Bank, 27 Tenn. App. 553, 183 S.W.2d 1 (1944) and Tenn. R. App. P. 24(e): "The parties may differ on the issue of whether a verbatim record is available, and this difference should be settled by the Trial Court."

[46]Parker v. Parker, 986 S.W.2d 557, 561 (Tenn. 1999); Hall v. Hall, 772 S.W.2d 432, 435 (Tenn. Ct. App. 1989).

[47]See Parker v. Parker, 986 S.W.2d 557, 561 (Tenn. 1999). Resources for preparing an accurate statement of evidence and resolving any disputes include: (a) the memory of the trial judge, (b) memoranda of the trial judge, and (c) an evidentiary hearing to establish what evidence was presented during the trial. An evidentiary hearing is seldom used, but, if used, and the evidence at such hearing is preserved on appeal, the appellate court might find some support therein for revision of the evidentiary record.

See also Hall v. Hall, 772 S.W.2d 432, 435 (Tenn. Ct. App. 1989).

[48]Tenn. R. App. P. 24(f). See Artrip v. Crilley, 688 S.W.2d 451, 453 (Tenn. Ct. App. 1985) (a trial judge's approval of the transcript certifies that the record is true, fair, and, for appellate purposes, complete).

[49]Artrip v. Crilley, 688 S.W.2d 451, 453 (Tenn. Ct. App. 1985); Oram v. People's and Union Bank, 1986 WL 927 (Tenn. Ct. App. 1986) (trial judge should note his ap-

A trial judge's determination of the accuracy of a transcript or statement of evidence is conclusive, absent extraordinary circumstances.[50] The alternative holding in one case states that a trial judge's determination is a finding of fact entitled to a presumption of correctness unless the evidence at the hearing on the subject preponderates otherwise.[51]

If the trial judge, within the requisite time, fails to approve the transcript or to authenticate the exhibits, the transcript and the exhibits are deemed to have been approved and will be so considered by the appellate court[52] except where the approval did not occur because of the death or inability to act of the circuit court judge.[53] In the latter case, a successor or replacement judge of the circuit court, in certain circumstances, may perform the duties of the trial judge.[54]

Generally, within 45 days of the filing of the transcript or within 45

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proval on each exhibit or on a paper attached to each exhibit).

[50]Tenn. R. App. P. 24(e), sentence 3.

See Parker v. Parker, 986 S.W.2d 557, 561 (Tenn. 1999), citing Tenn. R. App. P. 24(e); Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993); Hall v. Hall, 772 S.W.2d 432, 435 (Tenn. Ct. App. 1989).

[51]Hall v. Hall, 772 S.W.2d 432, 435 (Tenn. Ct. App. 1989), citing Tenn. R. App. P. 13(d).

[52]Tenn. R. App. P. 24(f), sentence 2.

Bellamy v. Cracker Barrel Old Country Store, Inc., 302 S.W.3d 278, 282 (Tenn. 2009), quoting 2 Arthur Crownover, Jr., Gibson's Suits in Chancery § 1210(9), at 573 (5th ed.1956): "One of the sacred rights of every litigant is to have a true record of everything done by a Court or a Judge thereof during the course of a litigation; and a Judge is as much violating his oath and his duty who fails or refuses to sign a bill of exceptions in which the truth of the case is fairly stated, as he would be in refusing to grant an injunction, or attachment, or a final decree to a party clearly entitled thereto. If a trial court's failure to perform its obligation to settle differences in conflicting statements of the evidence frustrates a party's right to have its case reviewed by the appellate courts, the party may be entitled to a new trial as long as the trial court's failure to act was not the fault of the party." In the present case, rather than remanding to the Chancery Court, the Court of Appeals tried to reconcile the differences by searching for common ground in the statements submitted by the parties. "Although perhaps understandable, the Court of Appeals' approach failed to comply with the mandates of Rule 24. As expressly stated in Rule 24(e), the trial court is to settle any disputes about the record "regardless of whether the record has been transmitted to the appellate court."

Marra v. Bank of New York, 310 S.W.3d 329, 335 (Tenn. Ct. App. 2009), appeal denied, (Feb. 22, 2010). If no objections are filed within the time limit, and the trial court does not rule on the statement of the evidence within 30 days after the expiration of the time to file objections, then the statement of the evidence "shall be deemed to have been approved and shall be so considered by the appellate court. . ." Tenn. R. App. P. 24(f).

State v. Yeomans, 10 S.W.3d 293, 295 n.1 (Tenn. Crim. App. 1999). (1) In the present case, appellant's counsel, pursuant to Tenn. R. App. P. 24(c), filed a statement of the evidence as there was no verbatim transcript of the proceedings available, notice of filing was sent to the appellee, and appellee filed no objections. Although the trial judge did not approve the statement, it was deemed approved when the trial judge took no action within 30 days after expiration of the period for filing objections. Tenn. R. App. P. 24(f). (2) When an appellant's counsel has filed a statement of the evidence with a trial court's clerk, the trial court clerk's responsibility is to send such statements to the trial judge.

[53]Tenn. R. App. P. 24(f), sentence 2. See State v. Cash, 867 S.W.2d 741, 743 n.1 (Tenn. Crim. App. 1993); State v. Peak, 823 S.W.2d 228, 230 (Tenn. Crim. App. 1991).

[54]Tenn. R. App. P. 24(f).

days after the filing of the appellant's notice that no transcript will be filed, the circuit court clerk must assemble, number, and complete the record on appeal.[55] The trial court clerk, however, within the 45-day period or within an earlier granted extension, may apply to the appellate court and the appellate court may grant an extension to a date not more than 60 days after the date of the filing of the transcript.[56] On completion of the record, the circuit court clerk must transmit the record to the clerk of the appellate court.[57] Documents of unusual bulk or weight or physical exhibits other than documents, however, need not be transmitted unless the clerk is otherwise directed by a party or the clerk of the appellate court.[58] To give the parties an opportunity to make a request, the clerk must notify the parties when any documents or physical exhibits are not being transmitted.[59]

Tenn. R. App. P. 25(a) was amended effective July 1, 2003, adding a new second sentence which covers situations where lawyers take no action concerning the transcript of evidence after notice of appeal is filed. The proposed amendment provides: "Unless the time has been extended by order, if the appellant fails to file within 90 days from the filing of the notice of appeal either the transcript or statement of evidence prepared pursuant to Rule 24(b) or Rule 24(c) or the notice under Rule 24(d) that no transcript or statement is to be filed, the clerk of the trial court shall provide written notice within 10 days to the clerk of the appellate court of the appellant's failure to comply with Rule 24(b) or Rule 24(c) or Rule 24(d), with a copy provided to counsel and pro se parties."

Where exhibits or depositions that were admitted at trial inadvertently have been omitted from the appellate record, have not been authenticated, and/or have not been timely transmitted to the Court of Appeals, these exhibits may subsequently be included in the record, authenticated, and transmitted to the Court of Appeals for consider-

[55]Tenn. R. App. P. 25(a). See State v. Watts, 670 S.W.2d 246, 248 (Tenn. Crim. App. 1984): "Upon the filing of the transcript, the clerk of the trial court completes the entire record on appeal. Rule 25(a), Tenn. R. App. P."

Consider McGill v. Hendrix, 913 S.W.2d 184, 185 (Tenn. Ct. App. 1995): "The four volume, 368 page record is unusual and inconvenient for two reasons. (1) It contains no master index. The separate indexes in each of the four volumes must be searched to find a given document. (2) Documents are arranged in the volumes in reverse chronological order, i.e. the earliest document is last in volume three and the latest is first in volume one. In future appeals, the Trial Clerk is advised to obtain assistance from another Court Clerk who is familiar with preparation of appellate records."

[56]Tenn. R. App. P. 25(d).

2005 Advisory Commission Comments to Tenn. R. App. P. 25. COMPLETION AND TRANSMISSION OF THE RECORD states: "If unable to complete the record within 45 days, the clerk, not one of the parties, must request an extension from the appellate court to which the appeal has been taken. Under Rule 40(g), the clerk forfeits the clerk's entire cost of preparing and transmitting the record, or such portion thereof as appropriate, if the clerk fails to complete the record on appeal within the time specified in this rule. When the record is complete for purposes of appeal, the clerk of the trial court transmits the record to the clerk of the appellate court."

[57]Tenn. R. App. P. 25(b). See State v. Watts, 670 S.W.2d 246, 248 (Tenn. Crim. App. 1984).

[58]Tenn. R. App. P. 25(b).

[59]Tenn. R. App. P. 25(b).

ation on appeal.[60] Similarly, when an attorney discovers, after the filing of a transcript with the appellate court, that the transcript does not include opening statements or closing arguments, a supplemental record may be prepared.[61] A motion to prepare a supplemental appellate record should be filed in the first instance in the trial court and approved by the trial court.[62] If approved by the trial court, the

[60]Tenn. R. App. P. 24(e).

2005 Advisory Commission Comments to Tenn. R. App. P. 24(e) states that this subdivision (e) "sets forth the procedure to be followed if it is necessary to correct or modify the record. Omissions, improper inclusions, and misstatements may be remedied at any time, either pursuant to stipulation of the parties or on the motion of a party or the motion of the trial or appellate court. If it is necessary to inform the appellate court of facts that have arisen after judgment in the trial court, resort should be made not to this subdivision but to Rule 14 of these rules."

State v. Byington, 284 S.W.3d 220, 223 (Tenn. 2009). An appellate court pursuant to either Rule 24 of the Tennessee Rules of Appellate Procedure or Tennessee Code Annotated section 27-3-128, should have ordered supplementation of the record to include an order disposing of the defendant's motion for new trial. Tenn. R. App. P. 24(e) sets forth the procedure for the correction or modification of an incomplete record

State v. Rogers, 188 S.W.3d 593, 610-1 (Tenn. 2006). (1) The procedure for correction or modification of the appellate record is set forth in Tenn. R. App. P. 24(e). (2) The authority to supplement the record is limited by Tenn. R. App. P. 24(g), which states that nothing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal. (3) State v. Housler, 167 S.W.3d 294 (Tenn. 2005) has held that an appellate record may be supplemented with any matter that was appropriately considered by the trial court, even though it has not been properly introduced in evidence. Such matter is properly includable in the appellate record and may be added to the record under Rule 24(g) when such matter is "necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal." (4) In the present case, however, the Court held that records that had been sent under seal to the trial court in the course of pre-trial discovery, but which were not before the court for its consideration, even though filed in the trial court, were not properly a part of the trial court's record, see Tenn. R. App. P. 24(a). (5) If a matter is not "properly includable," then it cannot be added to the appellate record, regardless of whether the trial court determines under Rule 24(g) that such matter is "necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal."

State v. Bobadilla, 181 S.W.3d 641, 643-4 (Tenn. 2005), citing State v. Housler, 167 S.W.3d 294, 298 (Tenn. 2005), held that any matter appropriately considered by the trial court is properly includable in the appellate record and may be added to the record under Rule 24(g) when such matter is "necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to issues that are the bases of appeal."

Johnson v. Hardin, 926 S.W.2d 236, 239-40 (Tenn. 1996); Wallace v. Wallace, 733 S.W.2d 102, 105–106 (Tenn. Ct. App. 1987), citing Tenn. R. App. P. 24(e) (a trial court may direct that a supplemental record be filed in the appellate court containing matters, including the transcript and exhibits, which were "properly includable" in the record on appeal); State v. Taylor, 763 S.W.2d 756, 757 (Tenn. Crim. App. 1988) (search warrant in technical record and considered by the trial judge may be included in a supplemental record).

[61]McDowell v. Ratcliff, 1991 WL 50205 (Tenn. Ct. App. 1991), rehearing denied May 17, 1991 (the Court of Appeals remanded the case to the trial court under T.C.A. § 27-3-128 for further development of the record); State v. Matthews, 805 S.W.2d 776, 784 n.34 (Tenn. Crim. App. 1990), citing Tenn. R. App. P. 24(e).

[62]Tenn. R. App. P. 24(e); Johnson v. Hardin, 926 S.W.2d 236, 239-40 (Tenn.

supplemental record may then be transmitted to the appellate court.[63] A supplemental record, however, will be returned to the trial court if it contains matters (a) not established by the evidence in the trial court,[64] (b) not the subject of judicial notice,[65] and (c) not post-judgment facts generally capable of ready demonstration and affecting the positions of the parties or the subject matter of the action.[66]

If an appellant fails to file a transcript or statement within 90 days after the filing of the notice of appeal where required by the Rules of Appellate Procedure,[67] or if an appellant fails to follow the procedure in Rule 24(d) when no transcript or statement is to be filed,[68] an appellee may file with the appellate court clerk a motion to dismiss the appeal supported by the trial court clerk's certificate showing the date and substance of the appealed judgment and the date on which notice of appeal was filed.[69] Where such motion has been filed, the appellant

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1996); Akins v. Tedder, 1988 WL 109150 (Tenn. Ct. App. 1988).

Mann v. Alpha Tau Omega Fraternity, 2012 WL 2553534, n.11 (Tenn. 2012). The mere attachment of a document to a party's brief does not render it part of the record on appeal. Tenn. R. App. P. 24(a).

[63]Steve Frost Agency v. Spurlock, 859 S.W.2d 337, 339 (Tenn. Ct. App. 1993). After all briefs were filed, the appellant moved the Court of Appeals to supplement the trial court's record with a statement of the evidence which did not appear to have been timely filed with the trial clerk or approved by the trial judge, and this motion was opposed by appellee. The motion to supplement was denied because it had not been timely filed with the trial clerk or approved by the trial judge. Under Tenn. R. App. P. 24, supplements to the record ordinarily must be ordered by the trial judge and accepted upon motion to, and upon order of, the Court of Appeals.

Akins v. Tedder, 1988 WL 109150 (Tenn. Ct. App. 1988), cites Tenn. R. App. P. 24(e).

[64]Tenn. R. App. P. 13(c), 24(g).

Akins v. Tedder, 1988 WL 109150 (Tenn. Ct. App. 1988), cites Tenn. R. App. P. 13(c).

State v. Branam, 855 S.W.2d 563, 571–72 (Tenn. 1993). Tenn. R. App. P. 24(g) does not permit an appellant court to consider evidence which has not been introduced at trial or certified as part of the record by the trial court.

[65]Akins v. Tedder, 1988 WL 109150 (Tenn. Ct. App. 1988), citing Tenn. R. App. P. 13(c).

[66]Akins v. Tedder, 1988 WL 109150 (Tenn. Ct. App. 1988), citing Tenn. R. App. P. 14.

State v. Branam, 855 S.W.2d 563, 571–72 (Tenn. 1993). Tenn. R. App. P. 14 authorizes an appellate court to consider post-judgment facts on appeal where the facts (a) were unconstitutionally withheld from the defendant-appellant in a criminal prosecution, (b) were unavailable to the appellant at the time of trial, and (c) were learned by appellant during prosecution of other cases involving other defendants. In the latter case, the appellate court may remand the action, where necessary, to gather additional evidence for resolution of an issue which was not previously available to the defendant.

[67]Tenn. R. App. P. 24(b).

[68]Tenn. R. App. P. 26(b), first sentence, was amended in 1997 to provide: "If the appellant shall fail to file the transcript or statement within the time specified in Rule 24(b) or (c), *or if the appellant shall fail to follow the procedure in Rule 24(d) when no transcript or statement is to be filed,* any appellee may file a motion in the appellate court to dismiss the appeal." Tenn. R. App. P. 26(b), as amended, was approved by 1997 S. R. 4 and H. R. 7, with an effective date of July 1, 1997.

[69]Tenn. R. App. P. 26(b).

2005 Advisory Commission Comments to Tenn. R. App. P. 26. FILING OF THE

has 14 days after the service of the motion to respond.[70] Absent such motion, the appeal is not subject to dismissal and a transcript filed late may be considered on appeal if good cause for the late filing is shown.[71] Even if a motion to dismiss is filed, the appellate court may allow the filing of a late transcript on its own initiative or in lieu of granting the motion where the appellant shows "good cause" why the transcript has not been timely filed.[72]

Tenn. R. App. P. 15(a) was amended in 2002 to provide: "Any party wanting to litigate appellate issues despite dismissal of the original appeal must provide notice of such intent in a response to the motion to dismiss."

By Order dated January 18, 1996, the Tennessee Supreme Court adopted an amendment to Tenn. R. App. P. 15(a) to provide that when a voluntary dismissal of an appeal has been filed with the trial court, "[a] copy of the dismissal shall be filed by the clerk of the trial court with the clerk of the appellate court." The Advisory Commission Comment following this amendment states that the amendment "lets the appellate tribunal know that a case where notice of appeal was served will not be arriving." The amendment to Rule 15(a) was approved by H. R. 178 on April 18, 1996, and S. R. 34 on April 24, 1996, with an effective date of July 1, 1996.

Tenn. R. App. P. 15(c) Voluntary Dismissal was amended effective July 1, 2003, setting forth the procedure for dismissing an appeal that is subject to the trial court's approval. The Proposed Rule titled "Dismissal Contingent on Settlement Agreement" states: "If the parties agree to settle a case on appeal and the settlement agreement is subject to the approval of the trial court, the parties shall file a motion in the appellate court asking the court to remand the case to the trial court for the limited purpose of considering the proposed settlement. If the trial court approves the settlement upon remand, the parties jointly shall file in the appellate court a motion to dismiss the appeal; the motion shall provide for the assessment of costs on appeal and shall be accompanied by a copy of the settlement agreement and the trial court's order approving that settlement. If the trial court disapproves the settlement, the appellant shall file a notice in the appellate court stating that the trial court disapproved the settlement, in which case the appeal shall proceed under these rules. A motion to

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RECORD states: "Subdivision (b). The failure of a party to file the transcript or statement within the time specified in Rule 24 may result in dismissal of the appeal upon motion. The motion should be in the form set forth in Rule 22 of these rules. Nothing in this rule permits the dismissal of an appeal due to the errors or omissions of the clerk of the trial court."

State v. Peak, 823 S.W.2d 228 (Tenn. Crim. App. 1991), citing Tenn. R. App. P. 3(e) and 4(a) (the jurisdiction of the Court of Criminal Appeals attached upon the filing of a notice of appeal; a Tenn. R. App. P. 26(b) motion to dismiss an appeal for failure to timely file a transcript within the prescribed time set forth in Tenn. R. App. P. 24(b) or (c) must be filed in the appellate court, not the trial court); Johnson v. Hardin, 926 S.W.2d 236, 239-40 (Tenn. 1996), discussed at nn. 19 and 32.

[70]Tenn. R. App. P. 26(b).

[71]Cooper v. Alcohol Com'n of City of Memphis, 745 S.W.2d 278, 281 (Tenn. 1988), citing Tenn. R. App. P. 26(b) and 21(b).

[72]H.D. Edgemon Contracting Co., Inc. v. King, 803 S.W.2d 220, 221 (Tenn. 1991); Johnson v. Hardin, 926 S.W.2d 236, 239-40 (Tenn. 1996), discussed at nn. 19 and 32.

dismiss the appeal based upon the trial court's approval of a settlement or a notice of the trial court's disapproval shall be filed within 30 days of the trial court's order."

Tenn. Ct. App. R. 5, as amended March 5, 2001, effective April 2, 2001, governs preservation of records.

Tenn. R. App. P. 8A, effective July 1, 2004, imposes special requirements governing the appeal of any termination of parental rights proceeding. In particular, Tenn. R. App. P. 8A(c) and Tenn. R. App. P. 8A(d) imposes special provision regarding the content and preparation of the record in such an appeal, and Tenn. R. App. P. 8A(e) and Tenn. R. App. P. 8A(f) impose special provision regarding the completion and transmission of the record in such an appeal. See § 30:21 Appeals as of right—Termination of parental rights cases.

Tenn. R. App. P. 24(h) was revised in 2005 to provide: "Nothing in Tenn. R. App P. 24 shall be construed as prohibiting any party from preparing and filing with the clerk of the trial court a transcript or statement of the evidence or proceedings at any time prior to entry of an appealable judgment or order. Upon filing, the party preparing the transcript or statement shall simultaneously serve notice of the filing on all other parties, accompanied by a short and plain declaration of the issues the party may present on appeal. Proof of service shall be filed with the clerk of the trial court with the filing of the transcript or statement. Any differences regarding the transcript or statement shall be settled as set forth in subdivision (e) of this rule."

§ 30:6 Procedure after record is filed with appellate court

When the appellate court clerk receives the record from the circuit court clerk, it files the record and immediately serves notice on all of the parties of the date on which the record was filed.[1] The appellant then has 30 days after the date on which the record was filed with the

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[Section 30:6]

[1]Tenn. R. App. P. 26(a). By a 1984 amendment, Tenn. R. App. P. 5(c) provides that the clerk of the appellate court shall enter the appeal on the docket immediately upon receipt of the record on appeal and shall immediately serve notice on all parties upon receipt of the record and docketing of the appeal.

Tenn. R. App. P. 25(c), titled "Duty of Clerk to Make Record Available to Prepare Appellate Papers," as amended in 1999, and 2005, reads as follows: "An attorney may request the clerk of the appellate court to transmit the record for the purpose of preparing appellate papers. The clerk shall comply with the request by making the record available at the clerk's office or by sending the record to the attorney at the attorney's expense. Upon receiving the record, the attorney is responsible for its safekeeping and shall return the record to the clerk of the appellate court not later than the day upon which the party's brief is to be filed. The attorney shall return the record to the clerk in its entirety and in an organized manner, with all volumes of the record intact and with all exhibits accounted for. In the event the returned record is either incomplete or in disarray, the appellate court in its discretion may require the attorney to pay the cost of reconstructing the record and/or may suspend the attorney's privilege to check out records in the future. The clerk shall keep a written account of requests for and return of the record. Pro se litigants shall be allowed to remove the record from the appellate clerk's office only upon order of the appellate court. However, pro se litigants may inspect the record at the appellate clerk's office pursuant to Supreme Court Rule 34."

See State v. Watts, 670 S.W.2d 246, 248 (Tenn. Crim. App. 1984). Upon the filing of a transcript with the appellate court clerk, the transcript is within the power of

appellate court clerk, not from the date that he received notice that the record was filed, within which to file and serve its appellate brief.[2] Filing of the brief with the appellate court clerk requires actual receipt by the clerk or a mailing to the clerk in a manner provided by the Rules, within the 30-day period for filing.[3] The appellee then has 30 days after the date he receives service of the appellant's brief to serve and file his brief.[4] Reply briefs must be served and filed within 14 days after service of the preceding brief.[5] If separate briefs are filed on

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the appellate court and not the parties or their counsel. The transcript may not be removed by the parties except with leave of court or as provided by Tenn. R. App. P. 25(c) which allows "checking out" of the transcript by a party "for the purpose of preparing appellate papers."

[2]Tenn. R. App. P. 29(a).

Tenn. Ct. App. R. 6, "Briefs," as amended March 5, 2001, effective April 2, 2001, provides: "(d) Extensions of time in excess of those provided for in Tenn. R. App. P. 29(a) will not be liberally granted by this Court. Any request for such extension shall be in the form of a written motion setting forth the reasons for the extension sought. Such motion shall be filed or presented to a member of this Court within the time initially allowed by Tenn. R. App. P. 29(a) for the doing of the act for which an extension is sought."

See Orlando Residence, Ltd. v. Nashville Lodging Co., 213 S.W.3d 855, 861 (Tenn. Ct. App. 2006). One party who has appealed a trial court's judgment lacks standing to raise issues on its appeal on behalf of other co-parties who have not appealed. In the present case, the Court of Appeals held that where three parties filed notices of appeal in a matter, but only one party filed a brief and presented arguments, it was proper to enter an order dismissing the other two appellants as parties to the appeal.

See In re N.T.B., 205 S.W.3d 499, 505 (Tenn. Ct. App. 2006). On appeal of trial court's findings of severe child abuse pursuant to T.C.A. § 37-1-102(b)(21)(A) and that this abuse occurred while the child was in the care of the child's parents, mother and father filed separate appeals but mother was allowed to adopt by reference the issues and argument contained in Father's appellate brief pursuant to Tenn. R. App. P. 27(j).

[3]Tenn. R. App. P. 20(a) defines filing with the appellate court clerk as actual receipt by the clerk or a mailing to the clerk by certified return receipt mail or registered return receipt mail.

Tenn. R. App. P. 20(a) was amended in 1991 to allow the filing of papers with the appellate court clerk by certified return receipt mail. This amendment was in response to cases like Joseph Larkey/Memphis Associates v. Borod & Huggins, 1990 WL 59395 (Tenn. Ct. App. 1990) (order denying petition to rehear), which held that Tenn. R. App. P. 20(a) must be strictly adhered to, and that a document mailed by certified mail is not the same and does not qualify as being mailed by "registered return receipt mail."

Prior to 2002, Tenn. R. App. P. 20(a) provided that papers required or permitted to be filed in the appellate court had to be received by the appellate court clerk or mailed to the office of the clerk by certified return receipt mail or registered return receipt mail within the time fixed for filing. By a 2002 amendment, filing will also be timely if placed with a commercial delivery service, having computer tracking capacity, within the time for filing. Further, official drop boxes for filing of papers shall be located at the Supreme Court Buildings in Knoxville, Nashville, and Jackson and shall be maintained by agents of the Clerk of the Appellate Courts. These boxes shall be opened at the beginning of each business day. Papers found therein will be deemed filed on the last business day preceding opening of the box.

[4]Tenn. R. App. P. 29(a). MacDonald v. Smith, 1990 WL 3345 (Tenn. Ct. App. 1990), admonished counsel for plaintiff-appellee for not giving notice to the appellate court of its intent not to make an appearance, file a brief, or appear for oral argument.

[5]Tenn. R. App. P. 29(a).

Regions Financial Corp. v. Marsh USA, Inc., 310 S.W.3d 382 (Tenn. Ct. App.

behalf of multiple appellants or appellees, the time for filing and serving responsive briefs does not run until the briefs on behalf of all appellants and appellees have been served.[6] If an appellant fails to timely file a brief, any appellee may file a motion in the appellate court to dismiss the appeal.[7]

2009). It. is not the office of a reply brief to raise issues on appeal.

Owens v. Owens, 241 S.W.3d 478, 499 (Tenn. Ct. App. 2007). On petition to rehear, appellant suggested that the Court of Appeals had failed to address her request for attorney's fees on appeal. The Court held that appellant had not requested attorney's fees in her original appellant's brief, and it was not until she filed her reply brief that appellant mentioned that she would like to be awarded attorney's fees incurred on appeal. Accordingly, the Court denied attorney's fees to appellant noting that a reply brief is a response to the arguments of the appellee, and it is not a vehicle for raising new issues. Tenn. R. App. P. 27(c). Further, under Tenn. R. App. P. 27(a)(4), it is incumbent on an appellant, when drafting its brief, to raise the issues for review, and to state "the precise relief sought." Because an award of attorney's fees generated in pursuing the appeal is a form of relief, the rule requires it to be stated, and failure to do so waives the issue.

Caruthers v. State, 814 S.W.2d 64, 69 (Tenn. Crim. App. 1991): "A reply brief is limited in scope to a rebuttal of the argument advanced in the appellee's brief. An appellant cannot abandon an argument advanced in his brief and advance a new argument to support an issue in the reply brief. Such a practice would be fundamentally unfair as the appellee may not respond to a reply brief."

Killingsworth v. Ted Russell Ford, Inc., 104 S.W.3d 530, 533 (Tenn. Ct. App. 2002). An appellant may file a brief in reply to the brief of the appellee. If the appellee also is requesting relief from the judgment, the appellee may file a brief in reply to the response of the appellant to the issues presented by appellee's request for relief. As to issues initially raised in an appellee's reply and rebuttal brief, neither Tenn. R. App. P. 27(c) nor any other rule of court allows appellant to file a second reply brief, and any second reply brief that is filed should be stricken from the record.

[6]Tenn. R. App. P 29(a).

See Tenn. Ct. App. R. 6, "Briefs," discussed at n. 2, regarding extension of time for filing briefs.

[7]Tenn. R. App. P. 29(c), as amended in 1980.

Tenn. R. App. P. 29(e), as amended by Order of the Supreme Court in 1997, discusses the consequence of the failure to file a brief. Tenn. R. App. P. 29(e), as amended, was approved by 1997 S. R. 4 and H. R. 7, with an effective date of July 1, 1997.

2005 Advisory Commission Comments Tenn. R. App. P. 29. FILING AND SERVICE OF BRIEFS states: "Under subdivision (c) an appellee may move for dismissal of an appeal if the appellant does not timely file a brief. Similarly, an appellant may move to have a case determined on the appellant's brief alone if the appellee fails timely to file a brief. In addition, under Rule 35(a) of these rules a party who has not filed a brief may not argue orally."

Orlando Residence, Ltd. v. Nashville Lodging Co., 213 S.W.3d 855, 861–863 (Tenn. Ct. App. 2006). (1) Where several parties have all filed notices of appeal in a matter, but only one party has filed a brief and presented arguments, the Court of Appeals entered orders dismissing the other two appellants as parties to this appeal. (2) One party who has appealed a trial court's judgment lacked standing to raise issues on its appeal on behalf of defendants who did not appeal.

Willis v. Tennessee Dept. of Correction, 113 S.W.3d 706, 709 n.3 (Tenn. 2003). When several co-parties file a notice of appeal, but only one has filed a brief with the Court of Appeals, the appeal of the party who has not filed an appellate brief may properly be dismissed in accordance with Tennessee Rule of Appellate Procedure 29(c).

See H.D. Edgemon Contracting Co., Inc. v. King, 803 S.W.2d 220, 221 (Tenn. 1991). The Court granted a motion to dismiss an appeal under Tenn. R. App. P. 26(b) as appellant failed to file a statement of the evidence with the appellate court clerk within 90 days of the filing of a notice of appeal, as required by Tenn. R. App. P.

The content[8] and proper technical form[9] of a brief are governed gen-

24(c), and failed to file its appellate brief with the clerk within 30 days after the date on which the record was filed with the clerk, as required by Tenn. R. App. P. 29(a). The Court noted that no request for extension of time had been made within the time initially allowed by the Rules for filing transcripts and briefs, and added that timely requests for extension are granted more generously.

Coldwell Banker-Hoffman Burke v. KRA Holdings, 42 S.W.3d 868, 873 (Tenn. Ct. App. 2000). An appeal is subject to dismissal upon motion of an appellee where appellants have not timely filed a brief (Tenn. R. App. P. 29(c)).

Chiozza v. Chiozza, 315 S.W.3d 482, 488 (Tenn. Ct. App. 2009), appeal denied, (May 20, 2010). Even when a brief is woefully inadequate, there are times when an appellate court, in the discretion afforded it under Tenn. R. App. P. 2, may waive the briefing requirements to adjudicate the issues on their merits. This is especially true in cases involving domestic relations where the interests of children are involved.

[8]See Tenn. R. App. P. 27, 28.

The Tenn. R. App. P., Rule 27 regarding the Content of Briefs, , was amended in 2010, effective July 1, 2010, TRAP Rule 27(a)(7) and (b) were amended to to read as follows: "(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated: * * * (7) An argument, which may be preceded by a summary of argument, setting forth: (A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on; and (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues); Rule 27(b) is amended to add a cross-reference to amended Rule 27(a)(7)(B).

2005 Advisory Commission Comments to Tenn. R. App. P. 27. CONTENT OF BRIEFS states: "Briefs will be oriented toward a statement of the issues presented in a case and the arguments in support thereof. Subdivision (g) envisions that the clerk of the trial court will have numbered the pages of the record consecutively from start to finish as provided in Rule 25(a) of these rules. The page limitations on arguments in briefs are based on the expectation that most arguments need not extend beyond the 50 pages authorized under subdivision (I). It should be noted that the limitation relates to the argument. The full brief may exceed the 50-page limitation."

2005 Advisory Commission Comments to Tenn. R. App. P. 28. OPTIONAL APPENDIX TO THE BRIEFS states: "Perhaps the most notable feature of this rule is the fact that preparation of an appendix is not required but is an option afforded the parties if they care to take advantage of this rule. Each party is free to reproduce as an appendix to that party's brief those portions of the record that party deems essential for the judges to read. If an appendix is prepared, it is important to keep in mind that the full record always remains available to the court for reference and examination. It should also be noted that under Rule 40(c) the cost of preparing an appendix is not a recoverable cost on appeal."

State v. Cross, 362 S.W.3d 512 (Tenn. 2012). The Tennessee Rules of Appellate Procedure require more than bare assertions without citations to authority. Tenn. R. App. P. 27(a)(7) requires that briefs contain arguments with regard to each issue presented that include citations to the authorities relied on. It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.

State v. Sexton, 368 S.W.3d 371 (Tenn. 2012), opinion corrected and superseded, 2012 WL 4800459 (Tenn. 2012). Rule 27(a)(7)(A) of the Tennessee Rules of Appellate Procedure requires "citations to the authorities and appropriate references to the record." Otherwise, the issue may be considered waived. Moreover, constitutional objections to the admission of evidence may be waived by the failure to cite appropriate authority.

Flowers v. Board of Professional Responsibility, 314 S.W.3d 882, n.35 (Tenn. 2010). "Judges are not like pigs, hunting for truffles buried in" the record. Albrechtsen v. Board of Regents of University of Wisconsin System, 309 F.3d 433, 436, 170 Ed.

erally by the Tennessee Rules of Appellate Procedure. The Rules of the Court of Appeals[10] and the Rules of the Supreme Court, including

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Law Rep. 520, 90 Fair Empl. Prac. Cas. (BNA) 193, 83 Empl. Prac. Dec. (CCH) P 41275 (7th Cir. 2002) (quoting U.S. v. Dunkel, 927 F.2d 955, 956, 91-1 U.S. Tax Cas. (CCH) P 50216, 67 A.F.T.R.2d 91-637 (7th Cir. 1991)). Parties are required to provide citation and support identifying where in the record evidence can be found. Tenn. R. App. P. 27."

Threadgill v. Board of Professional Responsibility of Supreme Court, 299 S.W.3d 792, 812 (Tenn. 2009) (overruled by, Lockett v. Board of Professional Responsibility, 2012 WL 2550586 (Tenn. 2012)). Bare allegations made in appellate briefs are not sufficient for an appellate court to consider.

Edwards v. City of Memphis, 342 S.W.3d 12, 18 (Tenn. Ct. App. 2010), appeal denied, (Apr. 13, 2011). Tennessee Rules of Appellate Procedure, Rule 27(a)(7) provides that the brief of the appellant shall contain under appropriate headings an "argument, which may be preceded by a summary of argument, setting forth: (A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on; and (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)."

[9]See Tenn. R. App. P. 30, 29; Duchow v. Whalen, 872 S.W.2d 692 (Tenn. Ct. App. 1993), discussed at n. 8.

[10]See, e.g., Tenn. Ct. App. R. 6, Tenn. Ct. App. R. 7, Tenn. Ct. App. R. 9, Tenn. Ct. App. R. 12.

Tenn. Ct. App. R. 6, "Briefs," as amended March 5, 2001, effective April 2, 2001, provides in part: "(a) Written argument in regard to each issue on appeal shall contain: (1) A statement by the appellant of the alleged erroneous action of the trial court which raises the issue and a statement by the appellee of any action of the trial court which is relied upon to correct the alleged error, with citation to the record where the erroneous or corrective action is recorded; (2) A statement showing how such alleged error was seasonably called to the attention of the trial judge with citation to that part of the record where appellant's challenge of the alleged error is recorded; (3) A statement reciting wherein appellant was prejudiced by such alleged error, with citations to the record showing where the resultant prejudice is recorded; and (4) A statement of each determinative fact relied upon with citation to the record where evidence of each such fact may be found. (b) No complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded."

Tenn. Ct. App. R. 9, "Disrespect of Courts," as amended March 5, 2001, effective April 2, 2001, provides: "Any brief or written argument containing language showing disrespect or contempt for any court of Tennessee will be stricken from the files, and this Court will take such further action relative thereto as it may deem proper."

Tenn. Ct. App. R. 12, "Citation of Unpublished Opinions," was amended March 5, 2001, effective April 2, 2001.

An Advisory Comment to Tenn. R. App. P. 27, which was added in 1994, states: "In addition to this rule, internal rules of the intermediate appellate courts state that no trial error will be considered on appeal if briefs do not cite pages of the trial record where the alleged error occurred. The advocate is directed to Rule 6 of the Court of Appeals and Rule 10 of the Court of Criminal Appeals."

Forbess v. Forbess, 370 S.W.3d 347, 354 (Tenn. Ct. App. 2011), appeal denied, (Apr. 12, 2012). Tennessee Rules of the Appellate Court Rule 7 requires that, in all cases where a party takes issue with the classification and division of marital property, the party must include in its brief a chart displaying the property values proposed by both parties, the value assigned by the trial court, and the party to whom the trial court awarded the property. Tenn. Ct. App. R. 7. Rule 7 also requires that "[e]ach entry in the table must include a citation to the record where each

the Model Rules of Professional Conduct should also be consulted. A reply brief may not raise an argument that was not raised in an appellee's original brief.[11]

If a party to an appeal desires an oral argument, he must request it by stating at the bottom of the cover page of his brief that an oral argument is requested.[12] If one party to an appeal requests an oral argument, it is not necessary for the other parties to so request.[13] If no party requests an oral argument, the appellate court may nevertheless require an argument.[14] If a party who has requested an oral argument fails to appear for the argument, an adverse decision does not thereby result, but the court will hear the arguments of the other parties and it may assess reasonable costs incurred by the appearing party, including reasonable attorney's fees.[15]

2005 Advisory Commission Comments to Tenn. R. App. P. 35 states: "The rule allows 30 minutes for each side to argue a case on appeal. As the Advisory Committee note to Federal Rule of Appellate Procedure 35 points out, "[t]he term 'side' is used to indicate that the time allowed by the rule is afforded to opposing interests rather than to individual parties. Thus if multiple appellants or appellees have a common interest, they constitute only a single side. If counsel for multiple parties who constitute a single side feel that additional time is necessary, they may request it." It is in the spirit of this rule that the appellate court grant additional time if there is a reasonable basis for

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party's evidence regarding the classification or valuation of the property or debt can be found." Where an appellant fails to comply with this rule, that appellant waives all such issues relating to the rule's requirements.

[11]Denver Area Meat Cutters and Employers Pension Plan v. Clayton, 209 S.W.3d 584, 594 (Tenn. Ct. App. 2006). (1) A reply brief may not raise an argument that was not raised in an appellee's original brief. Tenn. R. App. P. 27 provides that a reply brief allows the appellant to "reply to the brief of the appellee." (2) A reply brief is limited in scope to a rebuttal of the argument advanced in the appellee's brief. (3) An appellant cannot abandon an argument advanced in his brief and advance a new argument to support an issue in the reply brief. Such a practice would be fundamentally unfair as the appellee may not respond to a reply brief.

[12]Tenn. R. App. P. 35(a).

2005 Advisory Commission Comments to Tenn. R. App. P. 35. CONDUCT OF ORAL ARGUMENT states: "Under subdivision (a) a party to an appeal desiring oral argument must request argument. If a party inadvertently fails to request oral argument, the appellate court may relieve the party of this omission."

Consider Hindman v. State, 672 S.W.2d 223, 224 (Tenn. Crim. App. 1984): "The absence of oral argument on appeal gives no basis for a finding of incompetency of counsel."

[13]Tenn. R. App. P. 35(a).

[14]Tenn. R. App. P. 35(h).

State v. Dellinger, 79 S.W.3d 458, 464 n.1 (Tenn. 2002): "Prior to the setting of oral argument, the Court shall review the record and briefs and consider all errors assigned. The Court may enter an order designating those issues it wishes addressed at oral argument...." Tenn. R. Sup. Ct. 12.2.

[15]Tenn. R. App. P. 35(g).

2005 Advisory Commission Comments to Tenn. R. App. P. 35. CONDUCT OF ORAL ARGUMENT states: "Subdivision (g) of this rule also provides that a party who appears for oral argument shall be heard even if the opponent does not appear. Sanctions are provided for failure of a party to appear when that party has requested oral argument. In the discretion of the appellate court, such a sanction may include the reasonable attorney's fees of the party who did appear."

the requested additional time."

The Rules of Appellate Procedure provide that the parties to an appeal must file a sufficient number of copies of their briefs with the appellate court clerk so as to provide the clerk and each judge with one copy.[16] The Rules, as amended in 1992, further specifically require the filing of "the original and six copies" of an application for appeal by permission from the Court of Appeals to the Supreme Court,[17] and the Rules of the Court of Appeals require the filing of an original and four copies.[18] Also, one copy must be served on each party[19] with proof of service given to the appellate court.[20]

Tenn. R. App. P. 8A, effective July 1, 2004, imposes special requirements governing the appeal of any termination of parental rights proceeding. In particular, Rule 8A(g) imposes a special provision regarding the filing of briefs in such an appeal. See § 30:21 - Appeals as of Right - Termination of Parental Rights Cases, supra.

Tenn. R. App. P. Rule 31 "Brief and Oral Argument of an Amicus Curiae" has been amended effective July 1, 2007, by adding new subsection (d) "Costs of Amicus Curiae Filing" which provides: "The Court in its dis cretion may assess the costs of filing the motion for leave to file an amicus brief and all related filings against the amicus curiae, to be paid to the Appellate Court Clerk at the time of entry of the order granting or denying the motion."

Tenn. R. App. P. 30. Form of Briefs and Other Papers was amended in 2012 to provide that if a brief is not printed, copies of a brief should be on paper 8½ by 11 inches, double spaced, except for quoted matter, which may be single spaced, "with the text (1) when typewriter generated not smaller than standard elite type or (2) when computer generated not smaller than times new roman 12 point font and, in either event, not to exceed 6½ by 9½ inches on the page. Papers should be numbered on the bottom and fastened on the left."

§ 30:7 Scope and standard of review

Appellate review of circuit court cases is available as to questions of law, questions of fact, and mixed questions of law and fact.[1] Generally, appellate court review is confined to the trial court's record,

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[16]Tenn. R. App. P. 29(b).

Tenn. Ct. App. R. 8(b), as amended March 5, 2001, effective April 2, 2001, provides that the original of all briefs filed with the clerk of this Court shall be accompanied by four copies.

[17]Tenn. R. App. P. 11(c) was amended in 1992 by Order of the Supreme Court dated January 24, 1992, and was approved by 1992 S. R. 61 and H. R. 160, with an effective date of July 1, 1992.

[18]Tenn. Ct. App. R. 7(a).

[19]Tenn. R. App. P. 29(b).

[20]Tenn. R. App. P. 20(e).

[Section 30:7]

[1]Tenn. R. App. P. 13(a) (questions of law); 13(d) (questions of fact).

2005 Advisory Commission Comments to Tenn. R. App. P. 13(a) SCOPE OF REVIEW states: "Subdivision (a). This subdivision treats that aspect of scope of review that involves the questions of law that may be urged on appeal. There are three features of this subdivision that are particularly noteworthy. First, this subdivision provides only that any question of law may be brought up for review and relief

including transcripts of evidence heard and preserved in the trial court,[2] as discussed in § 30:6, Procedure after record is filed with ap-

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[except as otherwise provided in Rule 3(e)], not that the appellate court must decide every question or that it must grant the requested relief. The propriety of granting relief is governed by Rule 36, which provides that relief need not be granted to a party who was responsible for an error or failed to take whatever action was reasonably available to prevent or nullify the harmful effect of error. Second, this subdivision rejects use of the notice of appeal as a review- limiting device. In federal practice the notice of appeal has limited review in two principal ways. Some courts have limited the questions an appellant may urge on review to those affecting the portion of the judgment specified in the notice of appeal. However, since the principal utility of the notice of appeal is simply to indicate a party's intention to take an appeal, this limitation seems undesirable. The federal courts have also limited the issues an appellee may raise on appeal in the absence of the appellee's own notice of appeal. Here again, since neither the issues presented for review nor the arguments in support of those issues are set forth in the notice of appeal, there seems to be no good reason for so limiting the questions an appellee may urge on review. The result of eliminating any requirement that an appellee file the appellee's own notice of appeal is that once any party files a notice of appeal the appellate court may consider the case as a whole. Finally, this subdivision applies not only to appeals from final judgments of the trial court, but also to interlocutory appeals and final decisions of the intermediate appellate courts that are reviewed by the Supreme Court. A separate application for permission to appeal is not necessary to bring up a question of law upon an interlocutory appeal or upon Supreme Court review of the final decision of an intermediate appellate court. As previously noted, the fact that a question of law may be brought up for review does not mean the appellate court must decide the question or grant the requested relief. Ordinarily, therefore, the Supreme Court will refuse to consider an issue not presented to the intermediate appellate court because, as stated in Rule 36, the party raising the issue has failed to take action reasonably available to nullify the error presented by the issue. However, if the issue were presented but not dealt with by the intermediate appellate court, the Supreme Court may decide the issue and grant appropriate relief. Thus the scope of review is as plenary in cases in which the Supreme Court reviews the final decision of an intermediate appellate court as it is when the Supreme Court reviews directly the final decision of a trial court. Full access to the issues and record is also available upon an interlocutory appeal."

Dooley v. Everett, 805 S.W.2d 380, 384 (Tenn. Ct. App. 1990): "Whether there is a duty owed by one person to another is a question of law to be decided by the court, but once a duty is established, the scope of the duty or the standard of care is a question of fact to be decided by the trier of fact."

Kelley v. Johnson, 796 S.W.2d 155, 157–58 (Tenn. Ct. App. 1990). The determination of negligence claims involve mixed questions of law and fact. The existence and scope of the defendant's duty is a question of law; whether the defendant breached its duty and whether the breach proximately caused injury are questions of fact unless the facts and the inferences drawn from the facts permit reasonable persons to reach only one conclusion, in which case they are questions of law. "Accordingly, reviewing negligence cases tried before a judge without a jury requires a two-step analysis. Tenn. R. App. P. 13(d) requires us to presume that the trial court's finding of fact are correct unless the evidence preponderates against them. However, the same presumption does not exist with regard to the trial court's legal determination or when the trial court's conclusions are based on uncontroverted facts."

[2]Tenn. R. App. P. 13(c).

Marra v. Bank of New York, 310 S.W.3d 329, 334 (Tenn. Ct. App. 2009), appeal denied, (Feb. 22, 2010). As the Court of Appeals has appellate jurisdiction only, its review power is limited to those factual and legal issues for which an adequate legal record has been preserved."

Childress v. Union Realty Co., Ltd., 97 S.W.3d 573, 576 (Tenn. Ct. App. 2002). An alleged policy of insurance that was not admitted into evidence in the trial court may not be considered by an appellate court.

Shelter Ins. Companies v. Hann, 921 S.W.2d 194, 199 (Tenn. Ct. App. 1995). The Court of Appeals criticized an attorney for attaching to its appellate brief a letter

pellate court. The Rules of Appellate Procedure, however, provide that the appellate courts may take judicial notice of additional facts existing at the time of the trial[3] and may consider limited post-judgment facts.[4] An appellate court may consider a supplemental record (submit-

from a trial judge that its judgment in a previous action was not intended to be an adjudication on the merits as to issues in the present action where the letter was not a part of the trial court record in the present action. The Court stated: "It is inconceivable that an attorney admitted to practice in the Courts of this State would expect an appellate court to accord any cognizance to any fact not evidenced by the record certified to this Court by the Trial Court."

[3]Tenn. R. App. P. 13(c); Delbridge v. State, 742 S.W.2d 266, 267 (Tenn. 1987) (appellate court may take judicial notice of the court records in an earlier proceeding of the same case and the action of the courts therein).

B & B Enterprises of Wilson County, LLC v. City of Lebanon, 318 S.W.3d 839, n.1 (Tenn. 2010). An appellate court may take judicial notice of facts that have been gleaned from prior proceedings in the present case and related cases to provide a clearer understanding of the context in which this case arose.

Threadgill v. Board of Professional Responsibility of Supreme Court, 299 S.W.3d 792, 812-3 (Tenn. 2009) (overruled on other grounds by, Lockett v. Board of Professional Responsibility, 2012 WL 2550586 (Tenn. 2012)). A reference in a Reply Brief to "the public records of this Court," without stating what specific records he references or necessary information anticipated by Tenn. R. Evid. 201, is not a request to an appellate court to take judicial notice of any facts. necessary information anticipated by Tenn. R. Evid. 201. Accordingly, the Court declines to guess what information was being referenced.

[4]Tenn. R. App. P. 14. An appellate court on its own motion or on motion of a party may, in its discretion, consider facts concerning an action that occurred after judgment. "While neither controlling nor fully measuring the court's discretion, consideration generally will extend only to those facts, capable of ready demonstration, affecting the positions of the parties or the subject matter of the action such as mootness, bankruptcy, divorce, death, other judgments or proceedings, relief from the judgment requested or granted in the trial court, and other similar matters. Nothing in this rule should be construed as a substitute for or limitation on relief from judgment available under the Tennessee Rules of Civil Procedure or the Post-Conviction Act."

Baugh v. Novak, 340 S.W.3d 372 (Tenn. 2011). In the present case, the Supreme Court, upon learning after granting permission to appeal that a bankruptcy petition had been filed, directed the parties to address the effect of the automatic stay provisions of 11 U.S.C.A. 362(a) on its ability to decide this appeal. Based upon post-judgment facts presented under Tennessee Rules of Appellate Procedure, Rule 14 regarding certain papers filed in the bankruptcy proceeding, as well as papers filed in the Circuit Court, the Court decided that it was appropriate to consider as post-judgment facts (1) that on July 22, 2010, the Baughs filed a voluntary Chapter 11 bankruptcy petition in the United States District Court for the Middle District of Tennessee and (2) that on May 10, 2011, the bankruptcy court entered an order granting relief from the automatic stay to enable the Court of Appeals to decide this case.

Larsen-Ball v. Ball, 301 S.W.3d 228, 237 n.5 (Tenn. 2010). A motion to consider post-judgment facts pursuant to Tenn. R. App. P. 14, permits consideration of post-judgment facts that are "unrelated to the merits," "not genuinely disputed," and "necessary to keep the record up to date." Tenn. R. App. P. 14, advisory comm'n cmt.

Threadgill v. Board of Professional Responsibility of Supreme Court, 299 S.W.3d 792, 812 (Tenn. 2009) (overruled on other grounds by, Lockett v. Board of Professional Responsibility, 2012 WL 2550586 (Tenn. 2012)). A prerequisite for an appellate court to consider any post-judgment facts under Tenn. R. App. P. 14(b) is the filing of a motion asking this Court to consider them.

Lovin v. State, 286 S.W.3d 275 (Tenn. 2009). After affirmation on appeal of defendant's conviction of felony murder in the perpetration of aggravated child abuse and sentence of life imprisonment, defendant filed a petition for post conviction relief,

ted to and approved by the trial court after the original record was

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alleging inefficiency of counsel. Defendant attached four pieces of correspondence between him and his attorney to his pro se application for permission to appeal. After the Supreme Court granted his application for permission to appeal, defendant filed a Tenn. R. App. P. 14 motion requesting that the Court consider these pieces of correspondence as post-judgment facts, and filed an affidavit stating that the facts contained in his motion to consider post-judgment facts were true. The Supreme Court held that defendant's motion to consider the post-judgment correspondence between him and his attorney should be granted. (1) Tenn. R. App. P. 14, by its own terms, generally extends "only to those facts, capable of ready demonstration, affecting the positions of the parties or the subject matter of the action." (2). Typically, these facts include facts relating to "mootness, bankruptcy, divorce, death, other judgments or proceedings, relief from the judgment requested or granted in the trial court, and other similar matters." Tenn. R. App. P. 14(a). (3) Appellate courts should generally consider only those facts established at trial, and thus Tenn. R. App. P. 14 is not intended to permit the parties to retry a case on appeal. Tenn. R. App. P. 14 advisory comm'n cmt. (4) However, Tenn. R. App. P. 14 permits appellate courts, in their discretion, to consider facts "unrelated to the merits and not genuinely disputed" that "are necessary to keep the record up to date." Tenn. R. App. P. 14 advisory comm'n cmt. (5) In the past, the Supreme Court has used Tenn. R. App. P. 14 to consider facts that were undisputed and readily ascertainable or facts that were undisputed and which rendered a judgment moot. On the other hand, both the Supreme Court and the Court of Appeals have declined to invoke Tenn. R. App. P. 14 with regard to (a) facts that are irrelevant, (b) facts that are disputed, or (3) facts that took place before the trial court's judgment was entered.

State v. Rodgers, 235 S.W.3d 92 (Tenn. 2007). The appropriate avenue for the determination of post-judgment facts is contained in Rule 14 of the Tennessee Rules of Appellate Procedure: "If a motion to consider post-judgment facts is granted *or the appellate court acts on its own motion,* the court, by appropriate order, shall direct that the facts be presented in such manner and pursuant to such reasonable notice and opportunity to be heard as it deems fair." Tenn. R.App. P. 14(c).

Edwards v. Hallsdale-Powell Utility Dist. Knox County, Tenn., 115 S.W.3d 461, 464 n.3 (Tenn. 2003). Motion to consider post-judgment facts was not well taken. Rule 14(a) of the Tennessee Rules of Appellate Procedure allows appellate courts to consider facts that have not been established at trial when they are necessary to keep the record current. However, such facts must be unrelated to the merits and not genuinely disputed.

See Duncan v. Duncan, 672 S.W.2d 765, 767 (Tenn. 1984); Office of Disciplinary Counsel v. McKinney, 668 S.W.2d 293, 297 (Tenn. 1984); State v. Doe, 588 S.W.2d 549, 551 n.1 (Tenn. 1979) ("[t]he purpose of a rule 14 motion is to bring before the court material facts that arise after judgment, not to vary or augment a trial stipulation with facts extant at its entry").

In re Askew, 993 S.W.2d 1 (Tenn. 1999). In an Order Denying Rehearing dated May 21, 1999, the Supreme Court declined to stay its Order directing the return of a minor child to its mother even though petitioner alleged the existence of post-judgment facts, contained in police reports made by the mother, alleging that she had been the victim of assault at the hands of various individuals, including the child's natural father. (1) While the alleged post-judgment facts raised serious issues relevant to the central issue in the case, consideration of these allegations would require the Court to conduct a hearing and hear evidence. Such is not the function of the Supreme Court. The Court's jurisdiction is appellate only, and it would be improper for the Court to function as a fact-finding court. T.C.A. § 16-3-201(a). Rather, the proper place for the determination of factual matters is the trial court. (2) Moreover, the factual assertions presented by petitioner were not proper for consideration under the Rules of Appellate Procedure. Facts related to issues central to the determination of the merits of a controversy are not appropriate for consideration as post-judgment facts under Tenn. R. App. P. 14(a). Duncan v. Duncan, 672 S.W.2d 765 (Tenn. 1984).

State v. Branam, 855 S.W.2d 563, 571–72 (Tenn. 1993). Tenn. R. App. P. 14 authorized an appellate court to consider post-judgment facts on appeal where (a) the facts were unconstitutionally withheld from the defendant-appellant in a criminal prosecution, (b) were unavailable to the appellant at the time of trial, and (c) were

learned by appellant during prosecution of other cases involving other defendants. In the latter case, the appellate court may remand the action, where necessary, to gather additional evidence for resolution of an issue which was not previously available to the defendant.

See State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 195 n.8 (Tenn. 2000). Supreme Court declined to consider proposed intervenor's Tenn. R. App. P. 14 motion for the Supreme Court to consider a laches argument made by the State in a case pending in another action filed in federal court as the motion did not request the Court to consider a post-judgment fact, but merely a legal position taken by the State in another case.

Anderton v. Anderton, 988 S.W.2d 675, 684 (Tenn. Ct. App. 1998). In this divorce action, husband filed a Tenn. R. App. P. 39 petition for rehearing and a Tenn. R. App. P. 14 motion to consider post-judgment facts with regard to his actual pre-divorce decree gross income in 1996 and 1997. Based on these motions and accompanying copies of husband's 1996 and 1997 W-2 Wage and Tax Statements showing his actual net monthly income in 1996 and 1997, the Court reduced the amount of husband's monthly spousal support payments.

Rose v. H.C.A. Health Services of Tennessee, Inc., 947 S.W.2d 144, 146 n.1 (Tenn. Ct. App. 1996). Appellate court denied plaintiff's motion to consider post-judgment facts under Tenn. R. App. P. 14(a) in this medical malpractice case because the existence of the post-judgment facts (affidavits of experts) related directly to the merits of the case, and the facts did not occur after the judgment, despite appellant's counsel's not having discovered the facts earlier.

State ex rel. Adventist Health Care System/Sunbelt Health Care Corp. v. Nashville Memorial Hosp., Inc., 914 S.W.2d 903, 907 (Tenn. Ct. App. 1995). In quo warranto action, plaintiff sought to enjoin the sale of a hospital. After dismissal of the complaint and pending appeal, the sale was consummated and defendant filed a Tenn. R. App. P. 14(a) motion for the Court of Appeals to consider the post-judgment facts that the transaction had been consummated and the sale completed, and to dismiss the appeal as moot. The appellate court granted defendant's motion to consider post-judgment facts and dismissed the appeal as moot.

Book-Mart of Florida, Inc. v. National Book Warehouse, Inc., 917 S.W.2d 691, 693 (Tenn. Ct. App. 1995). The Court of Appeals overruled a motion to consider post judgment facts, i.e., the filing of two new lawsuits between the parties in the instant action on appeal. While Tenn. R. App. P. 14 allows an appellate court to exercise discretion to consider facts occurring after judgment which are unrelated to the merits or not genuinely disputed, the Court of Appeals, citing State ex rel. SCA Chemical Waste Services, Inc. v. Konigsberg, 636 S.W.2d 430, 432 (Tenn. 1982), held that it was inappropriate to consider factual allegations made in subsequent litigation between the parties that was pending in a trial court, where the appellant's allegations had not been tested in the trial court and were disputed by the appellee. "[T]hese allegations are not capable of 'ready demonstration' as required by Rule 14 and have not been 'established at trial,' as recommended by the Advisory Commission. Moreover, the facts are outside the scope of Rule 14 consideration because the allegations go to the merits of the case. See Town of Dandridge v. Patterson, 827 S.W.2d 797 (Tenn. Ct. App. 1991)."

In Wilder v. Wilder, 863 S.W.2d 707, 711 (Tenn. Ct. App. 1992), husband was required to supplement the appellate record in divorce action with information regarding fees he received as an attorney in an action pending while the divorce action was at trial, but not received until after the trial court's judgment in the divorce action, where the wife had a claim to a share of the fees as marital property.

State v. Williams, 52 S.W.3d 109, 121–22 (Tenn. Crim. App. 2001). (1) Tenn. R. App. P. 14 allows the appellate court to consider post-judgment facts when the court is in need of extraneous evidence respecting some situation or fact to enable it to determine, not the propriety of the conduct of the trial court, but the nature of the judgment to be directed. E.g., an appellate court could hear a Rule 14 motion to consider whether a defendant's post-conviction accident is relevant to the nature of the judgment that should be entered on appeal, rather than remanding the case for further proceedings to determine the type of appropriate sentencing based on additional facts determined by the trial court. An appellate court, pursuant to Rule 14,

prepared and transmitted to the appellate court) which contains matters that were properly includable but omitted from the originally submitted record.[5]

Appellate review is generally limited to issues presented for review in the parties' briefs.[6] It is the brief and not the notice of appeal that

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may order a limited remand for the purpose of having the trial court hear new evidence regarding the accident; the trial court thereby would be assisting the court's appellate jurisdiction. (2) Where relevant post-judgment facts arise while a Rule 11 application for permission to appeal is under consideration by the supreme court and the supreme court accepts the defendant's appeal, the state may request consideration under Rule 14 of post-judgment facts by the supreme court. Alternatively, once the supreme court has denied permission to appeal, the state may file with the court of appeals a request that its mandate be stayed or that the mandate be recalled. See Tenn. R. App. P. 42(d) (power to stay a mandate includes power to recall a mandate). As grounds, the state could cite to the defendant's accident as appropriate for Rule 14 consideration of post-judgment facts.

Hall v. Bookout, 87 S.W.3d 80, 87 (Tenn. Ct. App. 2002). Tenn. R. App. P. 14 allows an appellate court, in the exercise of its discretion, to consider certain post-judgment facts, i.e., facts occurring after judgment. The appropriate types of post-judgment facts to be considered by this Court upon a Rule 14 motion are those facts "capable of ready demonstration, affecting the positions of the parties or the subject matter...." Moreover, the Advisory Commission Comments for Rule 14 provide that post-judgment facts which may be considered by an appellate court are "facts, unrelated to the merits and not genuinely disputed [and] are necessary to keep the record up to date...."

[5]Tenn. R. App. P. 24(e).

2005 Advisory Commission Comments to Tenn. R. App. P. 24(e) states that this subdivision (e) "sets forth the procedure to be followed if it is necessary to correct or modify the record. Omissions, improper inclusions, and misstatements may be remedied at any time, either pursuant to stipulation of the parties or on the motion of a party or the motion of the trial or appellate court. If it is necessary to inform the appellate court of facts that have arisen after judgment in the trial court, resort should be made not to this subdivision but to Rule 14 of these rules."

Bradshaw v. Daniel, 854 S.W.2d 865 (Tenn. 1993). Following trial court's granting of plaintiff's motion for a new trial, defendant moved for summary judgment based upon the pleadings, affidavits of experts, and the "entire record of this cause." Plaintiff filed no written response, but did *orally* argue that he relied on the entire record in the original trial in opposing defendant's motion. The trial court, relying on the defendant's trial testimony in the original trial, *denied* defendant's motion for summary judgment, but the Court of Appeals refused to consider this testimony because it was not transcribed at the time of the trial court's hearing on the motion for summary judgment. The Supreme Court reversed the Court of Appeals, holding that absent extraordinary circumstances (not found here), an appellate court does not have the authority to refuse to consider matters that were determined by the trial judge to be appropriately includible in the record on appeal. By allowing testimony to be included in the record on appeal, the trial judge agreed that he considered the defendant's testimony when he denied summary judgment.

Steve Frost Agency v. Spurlock, 859 S.W.2d 337, 338 (Tenn. Ct. App. 1993). Where no transcript or statement of the evidence has been properly filed with the appellate court and the appellate court has denied an appellant's motion to supplement the record with a statement of the evidence because it had not been timely filed with the trial clerk or approved by the trial judge, the appellate court considers the appeal on the technical record only. Under Tenn. R. App. P. 24, supplements to the record ordinarily must be ordered by the trial judge and accepted upon motion to, and upon order of, the Court of Appeals.

[6]Tenn. R. App. P. 27(a). See Cantrell v. Carrier Corp., 193 S.W.3d 467, 471 (Tenn. 2006); Newsweek, Inc. v. Celauro, 789 S.W.2d 247, 250, 18 Media L. Rep. (BNA) 1134 (Tenn. 1990) (issues ruled on by the trial court but neither presented nor argued on appeal are pretermitted); Commissioner of Dept. of Transp. v. Hall, 635

S.W.2d 110, 112 (Tenn. 1982) ("[w]e are limited to consideration of those issues that are *actually* before the Court and are not authorized to give advisory opinions" (court's emphasis)); Runnells v. Rogers, 596 S.W.2d 87, 91 (Tenn. 1980).

Champion v. CLC of Dyersburg, LLC, 359 S.W.3d 161, 163 (Tenn. Ct. App. 2011), appeal denied, (July 15, 2011). An issue not raised in an appellant's statement of the issues may be considered waived.

Forbess v. Forbess, 370 S.W.3d 347, 357–358 (Tenn. Ct. App. 2011), appeal denied, (Apr. 12, 2012). An appellee waived certain issues on appeal by failing to include those issues in its statement of the issues on appeal, as required by Tenn. R. App. P. 24.

Banks v. Elks Club Pride of Tennessee 1102, 301 S.W.3d 214, 227 n.16 (Tenn. 2010). An appellant has waived the issue regarding his entitlement to attorney's fees by failing to brief and argue the issue. Tenn. R. App. P. 27(a)(7).

State v. Banks, 271 S.W.3d 90, 121–3 (Tenn. 2008). Litigants are not free simply to reserve issues until their case reaches the Supreme Court as the general rule is that when a defendant fails to present an issue on appeal to the Court of Criminal Appeals, that issue is not properly before the Supreme Court and is waived. Nonetheless, the Supreme Court, in the present case determined that the interests of justice prompted it to address an issue first raised in the Supreme Court to determine whether the trial court had committed plain error.

Gleaves v. Checker Cab Transit Corp., Inc., 15 S.W.3d 799, 801 n.3 (Tenn. 2000). The Supreme Court declined to address an issue that was not addressed by either party at oral argument or in the briefs submitted to the Court.

King v. State, 989 S.W.2d 319, 334 (Tenn. 1999). There is no constitutional requirement for an attorney to raise every issue on appeal. Rather, as a general rule, the determination of which issues to present on appeal is a matter which addresses itself to the professional judgment and sound discretion of appellate counsel. Counsel is given considerable leeway to decide which issues will serve the appellant best on appeal, and an appellate court should not second guess those decisions.

See however, State v. Cawood, 134 S.W.3d 159, 164 (Tenn. 2004). An appellate court may consider issues of subject matter jurisdiction even though neither party raised the jurisdictional issue in the lower courts.

Frye v. St. Thomas Health Services, 227 S.W.3d 595, 614 (Tenn. Ct. App. 2007). Tenn. R. App. P. Rule 13(b). A party waives an issue on appeal when it fails to raise the issue in its initial appellate brief. A party may not raise an issue for the first time in its reply brief.

See also, Irwin v. Tennessee Dept. of Correction, 244 S.W.3d 832, 834 (Tenn. Ct. App. 2007). An appellate court may *sua sponte* review the record to determine if there is proper appellate jurisdiction. Tenn. R. App. P. 3(a)); *see also* Tenn. R. App. P. 13(b) (2005).

Heatherly v. Merrimack Mut. Fire Ins. Co., 43 S.W.3d 911, 914 (Tenn. Ct. App. 2000). (1) The scope of the issues that can be raised in an appeal as of right under Tenn. R. App. P. 3 generally differs from the scope of issues that may be raised on Rule 9 and 10 interlocutory appeals. On appeals as of right, both the appellant and the appellee, subject to the limitations in Rules 3(e) and 13(b), have broad latitude with regard to the issues they can raise on a direct appeal as of right. In contrast, on interlocutory appeals under Rule 9, the only issues that can be raised are those certified in the trial court's order granting permission to seek an interlocutory appeal, and in the appellate court's order granting the interlocutory appeal. For Rule 10 extraordinary appeals, the issues are limited to those specified in the appellate court's order granting the extraordinary appeal. (2) Where, however, an appellate court's order granting an extraordinary appeal, as in the present case, has not specifically delineated the issues that would be addressed on appeal and appellee has not objected to issues, other than those upon which appeal was requested, which appellant included in its brief, and in fact filed a responding brief on these issues, it was appropriate for the appellate court to address these additional issues.

Walsh v. BA, Inc., 37 S.W.3d 911, 917 (Tenn. Ct. App. 2000). An issue raised during trial but not argued on appeal is abandoned.

Smith v. Harriman Utility Bd., 26 S.W.3d 879, 885 (Tenn. Ct. App. 2000). An appellant's failure on appeal to raise an issue addressed by the trial court waives the

delineates the scope of appeal.[7] An appellee may raise issues of appeal in his brief even though he has not filed his own notice of appeal.[8] If

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issue.

Sunburst Bank v. Patterson, 971 S.W.2d 1, 6 n.3 (Tenn. Ct. App. 1997), citing Tenn. R. App. P. 13(b). An issue not included in the recitation of issues in an appellate brief is not properly before the appellate court.

See also Morris v. Snodgrass, 886 S.W.2d 761, 762–63 (Tenn. Ct. App. 1994) (an issue on appeal (here, the constitutionality of a statute) which is not addressed in an appellant's written argument is waived); Leeson v. Chernau, 734 S.W.2d 634, 637 (Tenn. Ct. App. 1987) ("Tenn. R. App. P. does not contemplate that an appellant may submit one blanket issue as to the correction of the judgment and thereby open the door to argument upon various issues which might affect the correctness of the judgment").

Cookeville Gynecology & Obstetrics, P.C. v. Southeastern Data Systems, Inc., 884 S.W.2d 458, 463 (Tenn. Ct. App. 1994). On petition to rehear, the Court held that attorney's fees, even though provided for by statute or contract, were not recoverable where the prevailing party had not presented the issue of its entitlement to attorney's fees as an issue in its brief or at oral argument although it did request attorney's fees in the conclusion of its brief. Under Tenn. R. App. P. 13(b), review extends only to those issues presented for review.

State v. Farner, 66 S.W.3d 188, 206 (Tenn. 2001). In order to prevent needless litigation and to promote judicial economy, an appellate court may exercise its discretion and address issues not raised by the parties which will likely arise at a retrial. See Tenn. R. App. P. 13(b). See State v. Mixon, 983 S.W.2d 661, 673 (Tenn. 1999).

[7]See 2005 Advisory Commission Comments to Tenn. R. App. P. 13(a), at n. 1, supra.

Davis v. Shelby County Sheriff's Dept., 278 S.W.3d 256, 262, 28 I.E.R. Cas. (BNA) 1783 (Tenn. 2009).

Cantrell v. Carrier Corp., 193 S.W.3d 467, 471 (Tenn. 2006).

[8]Tenn. R. App. P. 13(a). See Cantrell v. Carrier Corp., 193 S.W.3d 467, 471 (Tenn. 2006); State v. Russell, 800 S.W.2d 169, 170–72 (Tenn. 1990), citing Tenn. R. App. P. 3, 13(a), 27(b), and 27(c); Underwood v. Liberty Mut. Ins. Co., 782 S.W.2d 175, 177 (Tenn. 1989), citing Tenn. R. App. P. 13; Gray v. Boyle Inv. Co., 803 S.W.2d 678, 685 (Tenn. Ct. App. 1990), citing Tenn. R. App. P. 13 and its advisory committee comments. See also, Harrell v. Harrell, 321 S.W.3d 508, 512 (Tenn. Ct. App. 2010), appeal denied, (Aug. 25, 2010).

Lance v. York, 359 S.W.3d 197, 206 (Tenn. Ct. App. 2011), appeal denied, (Oct. 18, 2011). An appellate court has wide latitude to discern the exact nature of the issues raised. To that end, the Court may adopt an Appellant's statement of the issues verbatim, or may modify the stated issues. The Court may adopt an Appellee's statement of the issues, or it may draft its own statement of the issues.

Henderson v. Mabry, 838 S.W.2d 537, 541 (Tenn. Ct. App. 1992): "Cross-appeals, separate bills, and separate applications for appeal are not required. T. R. A. P. Rule 13(a). It is the intention of this rule that only one notice of appeal be filed and that the right of cross-appeal shall exist without notice of cross-appeal. Edwards v. Hunt, 635 S.W.2d 696 (Tenn. Ct. App. 1982). The issue of child support is sufficiently presented to this Court by appellee's statement of issues."

Jahn v. Jahn, 932 S.W.2d 939, 941 n.1 (Tenn. Ct. App. 1996), citing Tenn. R. App. P. 13(a). Once a case is properly appealed by one party, the other party or parties are at liberty to raise issues even though they have not filed their own notices of appeal.

In 2002, Tenn. R. App. P. 13(a) was amended to provide: Except as otherwise provided in Rule 3(e), any question of law may be brought up for review and relief by any party. Cross-appeals, separate appeals, and separate applications for permission to appeal are not required. Dismissal of the original appeal shall not preclude issues raised by another party from being considered by an appellate court. A 2002 Advisory Commission Comment to Rule 13(a) states: "As pointed out in amended Rule 15(a), a party wishing to preserve appellate issues after dismissal of the original appeal should so indicate in response to the motion to dismiss."

the appellant, who has filed a notice of appeal, dismisses his appeal after the appellee has filed a brief containing a cross-appeal, the appellant's dismissal does not affect the cross-appeal unless (1) there is a stipulation of the parties, or (2) there is a motion and notice of dismissal without objection.[9] An appellate court, in its discretion, may also consider issues not raised in the briefs of the parties where necessary to prevent needless litigation, injury to public interests, and prejudice to the judicial process.[10] An appellate court is bound to fol-

[9]See Edwards v. Hunt, 635 S.W.2d 696, 698 (Tenn. Ct. App. 1982), citing Tenn. R. App. P. 15.

Cantrell v. Carrier Corp., 193 S.W.3d 467, 471 (Tenn. 2006).

Tenn. R. App. P. 15(a) was amended in 2002 to provide: "Any party wanting to litigate appellate issues despite dismissal of the original appeal must provide notice of such intent in a response to the motion to dismiss."

[10]Tenn. R. App. P. 13(b).

2005 Advisory Commission Comments to Tenn. R. App. P. 13(b) states: "This subdivision deals with the very difficult question of when an appellate court should consider an issue not raised by the parties. Generally speaking, control over the issues should reside in the parties, not in the court. Accordingly, this subdivision provides that review will typically extend only to the issues set forth in the briefs. Only the absence of subject-matter jurisdiction, whether at the trial or appellate level, must be considered by the appellate court regardless of whether it is presented for review. Cases appealed to the wrong appellate court must be transferred pursuant to Rule 17 of these rules. In all the other situations described in this subdivision, the appellate court has discretion to decide whether it will consider a matter not raised by the parties. It is intended that this discretion be sparingly exercised."

See State v. Bledsoe, 226 S.W.3d 349 (Tenn. 2007); Osborne v. Mountain Life Ins. Co., 130 S.W.3d 769, 774 n.6 (Tenn. 2004); Williams v. Tecumseh Products Co., 978 S.W.2d 932, 936–37 (Tenn. 1998); Spence v. Allstate Ins. Co., 883 S.W.2d 586, 595 (Tenn. 1994); Nance by Nance v. Westside Hosp., 750 S.W.2d 740, 744 (Tenn. 1988); Panzer v. King, 743 S.W.2d 612, 616 (Tenn. 1988) (abrogated by, Lacy v. Cox, 152 S.W.3d 480 (Tenn. 2004)); Blasingame v. American Materials, Inc., 654 S.W.2d 659, 667, 36 U.C.C. Rep. Serv. 1709 (Tenn. 1983); Tennessee Dept. of Human Services v. Vaughn, 595 S.W.2d 62 (Tenn. 1980); State ex rel. Polin v. Hill, 547 S.W.2d 916 (Tenn. 1977).

Momon v. State, 18 S.W.3d 152, 157 (Tenn. 1999), on reh'g, (Mar. 30, 2000), citing Tenn. R. Crim. P. 52(b) and Tenn. R. App. P. 13(b). While the Supreme Court will not ordinarily consider issues that are not raised by the parties, in exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings. In the present case, the Court held that it was plain and obvious that the appellant was denied an opportunity to testify in his own behalf, and the Court therefore elected to address the issue to protect the appellant's fundamental constitutional right to testify guaranteed by article I, section 9 of the Tennessee Constitution and the Fifth and Fourteenth Amendments of the United States Constitution and to prevent manifest injustice. See also State v. Chalmers, 28 S.W.3d 913 (Tenn. 2000). Pursuant to Tenn. R. Civ. P. 52(b), "plain error" is a proper consideration for an appellate court whether or not the error was properly assigned or raised by the parties.

Baugh v. Novak, 340 S.W.3d 372 (Tenn. 2011). As a general matter, the issues addressed by the appellate courts should be limited to those which have been fully briefed and argued in the appellate courts. However, Tennessee Rules of Appellate Procedure, Rule 13(b) recognizes that an appellate court in appropriate circumstances, may raise an issue sua sponte.

Lance v. York, 359 S.W.3d 197, 206 (Tenn. Ct. App. 2011), appeal denied, (Oct. 18, 2011). An appellate court has wide latitude to discern the exact nature of the issues raised. To that end, the Court may adopt an Appellant's statement of the issues verbatim, or may modify the stated issues. The Court may adopt an Appellee's state-

low applicable rules of substantive law even though the appellant has not objected at trial and/or has failed to raise the issue on appeal.[11] An appellate court will also dismiss an appeal as moot when a case loses its controversial character.[12]

In resolving issues properly raised on appeal, the appellate court must grant the relief to which the parties are entitled, limited by proper deference to findings within the province of the trier of fact,[13] as discussed below. A party, however, as a general rule, is not entitled to relief when he is responsible for an error;[14] when he has failed to take reasonable available action, including but not limited to the fil-

ment of the issues, or it may draft its own statement of the issues.

[11]Nance by Nance v. Westside Hosp., 750 S.W.2d 740, 744 (Tenn. 1988) (where an issue has been presented for review, "[i]t is incumbent upon the courts to apply the controlling law, whether or not cited or relied upon by either party"); State v. Goins, 705 S.W.2d 648, 650 (Tenn. 1986) (an appellate court may correct constitutional errors, even those raised for the first time on appeal, where necessary to prevent manifest injustice).

Haynes v. Rutherford County, 359 S.W.3d 585, 588 (Tenn. Ct. App. 2011), appeal denied, (Sept. 21, 2011). It is incumbent upon the courts to apply the controlling law, whether or not cited or relied upon by either party.

Consider U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 113 S. Ct. 2173, 2177–79, 124 L. Ed. 2d 402 (1993).

[12]Hudson v. Hudson, 328 S.W.3d 863 (Tenn. 2010).

[13]Tenn. R. App. P. 36(a); Huskey v. Crisp, 865 S.W.2d 451, 455 (Tenn. 1993), citing Tenn. R. App. P. 36(a) (appellate courts have the power to grant any "relief on the law or facts to which a party is entitled or the proceeding otherwise requires" as long as the relief does not contravene the province of the trier of fact).

See also, In re Estate of Trigg, 368 S.W.3d 483 (Tenn. 2012). Tenn. R. App. P. 36(a) vests in the appellate courts the authority to grant relief on the law and the facts to which the parties are entitled or the proceedings otherwise require, as long as the relief does not contravene the province of the trier of fact. Haynes v. Rutherford County, 359 S.W.3d 585, 588 (Tenn. Ct. App. 2011), appeal denied, (Sept. 21, 2011).

See GRW Enterprises, Inc. v. Davis, 797 S.W.2d 606, 614 n.5 (Tenn. Ct. App. 1990); McClain v. Kimbrough Const. Co., Inc., 806 S.W.2d 194, 201 (Tenn. Ct. App. 1990), discussed at n. 10.

[14]Tenn. R. App. P. 36(a). See State v. Garland, 617 S.W.2d 176, 186 (Tenn. Crim. App. 1981), citing Tenn. R. App. P. 36(a), which held that "a party cannot take advantage of errors which he himself committed or invited, or induced the trial court to commit, or which were the natural consequence of his own neglect or misconduct." In accord, Dunlap v. Dunlap, 996 S.W.2d 803, 817 (Tenn. Ct. App. 1998); State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993).

See State v. Hester, 324 S.W.3d 1, 56 (Tenn. 2010), cert. denied, 131 S. Ct. 2096, 179 L. Ed. 2d 896 (2011); Waters v. Coker, 229 S.W.3d 682 (Tenn. 2007); Palanki ex rel. Palanki v. Vanderbilt University, 215 S.W.3d 380, 392 (Tenn. Ct. App. 2006); Ottinger v. Stooksbury, 206 S.W.3d 73, 78 (Tenn. Ct. App. 2006).

O'Connell v. Metropolitan Government of Nashville & Davidson County, 99 S.W.3d 94, 97 (Tenn. Ct. App. 2002). Rule 36 of the Rules of Appellate Procedure describes the nature of the relief appeals courts are authorized to grant as follows: "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error."

See Betty v. Metropolitan Government of Nashville and Davidson County, 835 S.W.2d 1, 9 (Tenn. Ct. App. 1992) (overruled on other grounds by, Edwards v. Hallsdale-Powell Utility Dist. Knox County, Tenn., 115 S.W.3d 461 (Tenn. 2003)), citing Tenn. R. App. P. 36(a), (b). Trial judge's inclusion of a charge that correctly stated the law but which had no basis in fact does not mandate a new trial and was not reversible error on appeal where appellant itself requested the instruction and the instruction more likely than not did not prejudice the appellant's case. Here, the

ing of new trial motions in jury cases, to bring an alleged error to the trial court's attention so as to prevent the harmful effects of the error;[15] when he raises a contention on appeal that is inconsistent with

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verdict was supportable under other proper theories.

See City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S. Ct. 1624, 1636, 143 L. Ed. 2d 882, 48 Env't. Rep. Cas. (BNA) 1513, 29 Envtl. L. Rep. 21133 (1999). A party that has proposed the essence of the instructions given to the jury cannot contend on appeal that the instructions did not provide an accurate statement of the law.

[15](a) Rules

State v. Schmeiderer, 319 S.W.3d 607 (Tenn. 2010). APPENDIX- (Excerpts from the Decision of the Court of Criminal Appeals). According to Tennessee Rule of Appellate Procedure 36(a), relief is not available to a party "who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of the error."

Fayne v. Vincent, 301 S.W.3d 162, 171 (Tenn. 2009). The rule that issues not raised in the trial court cannot be raised for the first time on appeal was held to be inapplicable in the present case. The Court noted that the jurisprudential restriction against permitting parties to raise issues on appeal that were not first raised in the trial court is premised on the doctrine of waiver; that the party asserting waiver of an issue on appeal has the burden of proof; that Tenn. R. App. P. 1 requires that an appellate court's jurisprudential rules should be interpreted and applied in a way that enables appeals to be considered on their merits; and that the party invoking waiver has the burden of demonstrating that the issue sought to be precluded was, in fact, not raised in the trial court.

See Tenn. R. App. P. 36(a), 3(e) (in jury cases, no issue presented on appeal may be predicated upon trial errors unless the same have been specifically stated in a new trial motion; otherwise such issues are treated as waived).

A 2000 Advisory Commission Comment to Tenn. R. App. P. 3 provides that the language in Rule 3(e), third sentence, that "in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived," does not bar an appellee who failed to move for a new trial from raising issues on appeal under Tenn. R. App. P. 13(a). The latter Rule provides: "Except as otherwise provided in Rule 3(e), any question of law may be brought up for review and relief by any party. Cross-appeals, separate appeals, and separate applications for permission to appeal are not required." The 2000 Advisory Commission Comment adds: "Raising such issues has been the practice since adoption of the Appellate Rules, and it is the conclusion reached by Prof. John Sobieski — Reporter at the time — in 46 Tenn. L. Rev. at 732–4 (1979)."

(b) Cases — Generally

State v. Hester, 324 S.W.3d 1, 56 (Tenn. 2010), cert. denied, 131 S. Ct. 2096, 179 L. Ed. 2d 896 (2011) (Appendix Excerpts from the Decision of the Court of Criminal Appeals) citing Tennessee Rules of Appellate Procedure, Rule 36; State v. Griffis, 964 S.W.2d 577, 599 (Tenn. Crim. App. 1997): "If a party fails to request a curative instruction, or, if dissatisfied with the instruction given does not request a more complete instruction, the party effectively waives the issue for appellate purposes." See also, State v. Ramos, 331 S.W.3d 408, 414, 417–418 (Tenn. Crim. App. 2010), appeal denied, (Aug. 26, 2010).

State v. Banks, 271 S.W.3d 90, 170 (Tenn. 2008). (Appendix -Tenn. Crim. App. Opinion). Tennessee law is well-established that a party who invites or waives error, or who fails to take reasonable steps to cure an error, is not entitled to relief on appeal. See Tenn. R. App. P. 36(a). Moreover, if waived, an appellate court this court will not consider the issue on appeal unless it is clear from the record that plain error was committed.

State v. Hannah, 259 S.W.3d 716, 721 (Tenn. 2008). Where the State did not

advance its argument before either the trial court or the Court of Criminal Appeals, it is waived.

Alexander v. Armentrout, 24 S.W.3d 267 (Tenn. 2000), citing Tenn. R. App. P. 3(e) and 36(a). Appellant may not rely on the defense of equitable estoppel as grounds for reversal of a judgment entered on a jury verdict where the defense was not raised in the trial court by the pleadings, in opening and closing arguments to the jury, or during any other portion of the trial. Further, no jury instructions were requested on equitable estoppel and the jury heard no law with regard to the affirmative defense. Because the defense of equitable estoppel was never raised during the trial court proceedings, the issue was waived and the Court of Appeals should not have considered the defense.

State v. Hall, 8 S.W.3d 593, 596 n.1 (Tenn. 1999). In prosecution for first degree murder, prosecutor's use of mannequin for demonstrative purposes to show the size and shape of victim's multiple wounds was not objected to at trial, nor was it listed as error in either defendant's motion for new trial or in defendant's appeal to the intermediate appellate court. Defendant's failure to raise the issue in previous proceedings constituted waiver.

Haynes v. Rutherford County, 359 S.W.3d 585, 588 (Tenn. Ct. App. 2011), appeal denied, (Sept. 21, 2011). In general, questions not raised in the trial court will not be entertained on appeal.

Freeman v. CSX Transp., Inc., 359 S.W.3d 171, 176 (Tenn. Ct. App. 2010), appeal denied, (Apr. 14, 2011). A party who fails to bring an issue to the attention of the trial court will generally not be permitted to raise the issue for the first time on appeal. Subject matter jurisdiction, however, is an exception to the general rule and "the issue of subject-matter jurisdiction can be raised in any court at any time." Thus, the issue of subject matter jurisdiction need not be raised in the trial court to be considered on appeal.

McPeek v. Lockhart, 174 S.W.3d 751, 757 (Tenn. Ct. App. 2005). A party who invites or waives error, or who fails to take reasonable steps to cure an error, is not entitled to relief on appeal. Failure to object to evidence in a timely and specific fashion precludes taking issue on appeal with the admission of the evidence.

Williams v. State, 139 S.W.3d 308, 313 (Tenn. Ct. App. 2004). Questions not raised in the trial court will not be entertained on appeal and this rule applies to an attempt to make a constitutional attack upon the validity of a statute for the first time on appeal unless the statute involved is so obviously unconstitutional on its face as to obviate the necessity for any discussion.

Childress v. Union Realty Co., Ltd., 97 S.W.3d 573, 576 (Tenn. Ct. App. 2002). An error regarding admissibility of evidence that has not been raised in a trial court in a motion for a new trial is not subject to review on appeal. Tenn. R. App. P. 3(e).

Brown v. Chesor, 6 S.W.3d 479, 482 (Tenn. Ct. App. 1999). A plaintiff in a personal injury comparative fault action may not assign as error on appeal that the trial judge permitted the jury to assess fault against a person who was not identified by name in the defendant's Answer to the Complaint where this issue had not been raised by the plaintiff in a motion for new trial. Pursuant to Tenn. R. App. P. 3(e), plaintiffs waived this issue by failing to include it in their motion for new trial.

(c) Pleadings

Stewart Title Guar. Co. v. F.D.I.C., 936 S.W.2d 266, 270–71 (Tenn. Ct. App. 1996). Where the record discloses that an issue raised on appeal was neither affirmatively pled nor argued or ruled upon by the trial judge, although the issue was addressed by the judge, the issue was waived upon appeal. In accord, State Dept. of Human Services v. Defriece, 937 S.W.2d 954, 959–60 (Tenn. Ct. App. 1996).

Clawson v. Burrow, 250 S.W.3d 59, 64 (Tenn. Ct. App. 2007). Although employer pled "estoppel" in its Answer, it did not pursue this theory in its "Motion for Summary Judgment Based on the Tennessee Workers' Compensation Act," in its Brief in Support of Summary Judgment, or in its Supplemental Motion and Argument in Support of Motion for Summary Judgment. Thus, as the doctrines of judicial or equitable estoppel were never brought to the attention of the trial court, consideration of these issues on appeal is inappropriate.

(d) Discovery

Commissioner of Dept. of Transp. v. Hall, 635 S.W.2d 110, 112 (Tenn. 1982). A party cannot object to discovery on appeal where he has not attempted discovery prior to trial.

Barnhill v. Barnhill, 826 S.W.2d 443, 458 (Tenn. Ct. App. 1991). Failure to request recusal or to object at trial to fact that trial judge deciding child custody and property rights in a divorce action was not a lawyer, results in waiver of issues; therefore, issues cannot be raised for the first time on appeal.

(e) Jury Selection

State v. Strouth, 620 S.W.2d 467, 471 (Tenn. 1981), citing Tenn. R. App. P. 3(e). Error directed to voir dire ordinarily is waived and is not subject to appeal when not raised in a motion for new trial, but the court, in its discretion, may review the error if it is of sufficient gravity.

State v. Hugueley, 185 S.W.3d 356, 369, 376 (Tenn. 2006). (1) Defendant waived his equal protection claim that the state had improperly used peremptory challenges against jurors on the basis of their race or gender because Defendant failed to object to the State's challenges in a timely fashion at trial prior to appeal. (2) Defendant also waived his argument that a juror should have been removed for cause where Defendant did not raise this issue in his motion for new trial. Nevertheless, because the present case was a capital case, and because this issue involves Defendant's fundamental constitutional rights to a fair and impartial jury, the Court addressed the propriety of the denial of the challenge on the merits.

(f) Evidence — Offer, Objections, Offer of Proof

Levine v. March, 266 S.W.3d 426, 440 (Tenn. Ct. App. 2007). (1) The contemporary objection rule is an elementary principle of trial practice. Parties who desire to object to the admission of evidence must make their objection in a timely manner and must state the specific basis for their objection. (2) Parties cannot obtain relief on appeal from an alleged error they could have prevented. Tenn. R. App. P. 36(a). Therefore, failing to make an appropriate and timely objection to the admission of evidence in the trial court prevents a litigant from challenging the admission of the evidence on appeal.

Tire Shredders, Inc. v. ERM-North Central, Inc., 15 S.W.3d 849, 864 (Tenn. Ct. App. 1999). In order to challenge on appeal a trial court's admission of evidence, there must appear in the record a timely and specific objection to the evidence or motion to strike the evidence.

See Tenn. R. Evid. 103(a)(1).

Brandy Hills Estates, LLC v. Reeves, 237 S.W.3d 307, 318 (Tenn. Ct. App. 2006). It is well settled in Tennessee that appeals from jury trials must be preceded by a motion for new trial when the error alleged is based on the admission or exclusion of evidence or on jury instructions granted or refused. Tenn. R. App. P. 3(e). Failure to do so is deemed a waiver of the issue.

Owens v. Owens, 241 S.W.3d 478, 497 n.18 (Tenn. Ct. App. 2007). Appellant cannot complain on appeal that the trial judge erred in failing to allow her counsel to read the appellee's deposition into the record where appellant did not make a timely objection to the trial court's stance on the matter or make an offer of proof thereon. Tenn. R. Evid. 103(a)(2).

Dossett v. City of Kingsport, 258 S.W.3d 139, 144 (Tenn. Ct. App. 2007). Appellate courts will not consider issues relating to the exclusion of evidence when this tender of proof has not been made.

Burnette v. Pickel, 858 S.W.2d 319, 322 (Tenn. Ct. App. 1993): "Generally, to put a trial court in error, it must be shown that the aggrieved party objected and that the court ruled on the objection, or if the court did not rule on the objection, the aggrieved party must have insisted on a ruling and show that the court then failed or refused to make a ruling on such insistence, or that the ruling was made erroneously. Shelton v. Martin, 180 Tenn. 454, 176 S.W.2d 247 (1943). A party will not be allowed to put an objection in his pocket to save for a later time. A party must, when the error occurs, object or the perceived error is waived in most instances."

State v. Bigbee, 885 S.W.2d 797, 804, 805 (Tenn. 1994) (in the absence of an objection or motion at trial challenging evidence on the same grounds on which the evidence is challenged on appeal, the issue may not be considered on appeal); Benson

v. Tennessee Valley Elec. Co-op., 868 S.W.2d 630, 641, Prod. Liab. Rep. (CCH) P 13622 (Tenn. Ct. App. 1993) (appellant may not assert on appeal a basis why a trial court erred in admitting evidence at trial where the basis was not asserted in the trial court).

Tenpenny v. Batesville Casket Co., Inc., 781 S.W.2d 841, 846 (Tenn. 1989) (evidence admitted over improper objection which would have been excluded if another correct objection had been raised may not be challenged on appeal; failure to raise proper objection at trial waives the objection); Ammons v. Bonilla, 886 S.W.2d 239, 244 (Tenn. Ct. App. 1994) (an issue regarding the exclusion of evidence at trial may not be raised on appeal where it has not been stated in a motion for new trial).

See State v. Campbell, 904 S.W.2d 608, 613 (Tenn. Crim. App. 1995) (a party who withdraws an objection to an offer of evidence waives the issue; therefore, it cannot be the basis for a motion for new trial or for appellate review).

(g) Jury Instructions

Brandy Hills Estates, LLC v. Reeves, 237 S.W.3d 307, 318 (Tenn. Ct. App. 2006). It is well settled in Tennessee that appeals from jury trials must be preceded by a motion for new trial when the error alleged is based on the admission or exclusion of evidence or on jury instructions granted or refused. Tenn. R. App. P. 3(e). Failure to do so is deemed a waiver of the issue.

Johnson v. Lawrence, 720 S.W.2d 50, 59, 77 A.L.R.4th 251 (Tenn. Ct. App. 1986). Failure to object to jury charge prior to instructing the jury was waived.

Johnson v. Attkisson, 722 S.W.2d 390, 394 (Tenn. Ct. App. 1986). Trial judge's failure to give a special instruction is not a proper subject on appeal where the appellant failed to make a seasonable special request in the trial court.

Emery v. Southern Ry. Co., 866 S.W.2d 557, 564 (Tenn. Ct. App. 1993), citing Tenn. R. Civ. P. 51. Omission of jury instruction may not be the basis of appeal where the record does not show that the person alleging the error has pointed out the omission to the trial judge during trial by appropriate request for instructions.

State v. Faulkner, 154 S.W.3d 48 (Tenn. 2005). An assignment of error regarding an erroneous or inaccurate jury charge is waived where appellant did not raise the issue in a motion for a new trial. See Tenn. R. App. P. 3(e).

Emerson v. Oak Ridge Research, Inc., 187 S.W.3d 364, 372, 96 Fair Empl. Prac. Cas. (BNA) 1845 (Tenn. Ct. App. 2005). A party who acquiesces to the format of the jury verdict form at trial can not complain on appeal about an alleged error which they took no steps to correct in the trial court. Tenn. R.App. P. 36.

(h) Interlocutory Appeal

Scott v. Pulley, 705 S.W.2d 666, 672 (Tenn. Ct. App. 1985). Absent highly unusual circumstances, a party may not base an appeal on the denial by the trial court of a Rule 9 permission to appeal where the party has not sought Rule 10 extraordinary permission to appeal.

(i) Failure to Notify Attorney General of Constitutional Challenge

In re Adoption of E.N.R., 42 S.W.3d 26 (Tenn. 2001). Appellant's failure to properly inform the Attorney General of a constitutional challenge to a Tennessee statute, as required by statute (T.C.A. § 29-14-107(b)) and court rules (Tenn. R. Civ. P. 24.04 and Tenn. R. App. P. 32), further supports waiver of the constitutional challenge on appeal.

(j) Exceptions

Boyer v. Heimermann, 238 S.W.3d 249, 261 (Tenn. Ct. App. 2007). Tenn. R. App. P. 13(b) empowers an appellate court to exercise its discretion to consider issues not raised by the parties, even in a civil case.

See, Coffman v. Poole Truck Line, Inc., 811 S.W.2d 908, 911 (Tenn. Ct. App. 1991) (an attorney's violation of D. R. 7-104(A)(1) resulting in prejudice to an adversary may be the basis of a new trial motion and appeal of an adverse verdict even though the movant was aware of the misconduct for up to one year but moved to disqualify the attorney only eight days before trial; applying waiver "would lend judicial absolution to attorney misconduct"); State v. Parton, 817 S.W.2d 28 (Tenn. Crim. App. 1991) (trial judge's allowing an entire jury trial in a felony action to be conducted on one day, with two short recesses and one break for dinner, from early afternoon to 11:45 p.m., and then submitting the case to the jury, which deliberated

his contentions at trial;[16] when he raised an issue for the first time on appeal;[17] or when it cannot be said that the error more probably than

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and reported its verdict at 2:15 a.m., violated the defendant's due process rights and required reversal even though no formal objection was raised by the lawyers or jurors; late night sessions may be appropriate when unusual circumstances require, but conflicts in use of courtrooms is not sufficient).

[16]State v. Harris, 839 S.W.2d 54, 65 (Tenn. 1992), reh'g denied and opinion modified, (Sept. 8, 1992) (a defendant should not be allowed to rely upon one ground at trial and then assert different grounds in subsequent proceedings on appeal); Civil Service Merit Bd. of City of Knoxville v. Burson, 816 S.W.2d 725 (Tenn. 1991) (failure to allege denial of equal protection in plaintiff's complaint and the failure to argue the issue before the trial court results in waiver of the issue on appeal).

Smith v. U.S. Pipe & Foundry Co., 14 S.W.3d 739, 744 n.4 (Tenn. 2000). When a party has submitted proposed findings of fact and conclusions of law to the trial court, the party is barred from presenting a contrary argument on appeal.

State v. Leach, 148 S.W.3d 42, 55 (Tenn. 2004). As a general rule, a party may not litigate an issue on one ground, abandon that ground post-trial, and assert a new basis or ground on appeal.

See also Johnston v. Houston, 170 S.W.3d 573, 577 (Tenn. Ct. App. 2004); Richardson v. Miller, 44 S.W.3d 1, 30 (Tenn. Ct. App. 2000); Smith v. Harford Mut. Ins. Co., 751 S.W.2d 140, 143 (Tenn. Ct. App. 1987); State v. Brewer, 932 S.W.2d 1, 9 (Tenn. Crim. App. 1996); State v. Korsakov, 34 S.W.3d 534, 545 (Tenn. Crim. App. 2000); State v. Dooley, 29 S.W.3d 542, 549 (Tenn. Crim. App. 2000); State v. McPherson, 882 S.W.2d 365, 373 (Tenn. Crim. App. 1994).

Compare Murvin v. Cofer, 968 S.W.2d 304 (Tenn. Ct. App. 1997). Defendant's denial of the applicability of the Consumer Protection Act in its answer sufficiently preserved the issue for appeal even though the defendant during trial argued that it was not liable under the Act even if it were applicable.

[17]See, e.g., Brown v. Roland, 357 S.W.3d 614, n.6 (Tenn. 2012); Kiser v. Wolfe, 353 S.W.3d 741, 747 (Tenn. 2011); State v. West, 844 S.W.2d 144, 150 (Tenn. 1992); Barnes v. Barnes, 193 S.W.3d 495, 501 (Tenn. 2006); In re F.R.R., III, 193 S.W.3d 528, 531 (Tenn. 2006); Kelley v. Middle Tennessee Emergency Physicians, P.C., 133 S.W.3d 587, 598 (Tenn. 2004); State v. Middlebrooks, 840 S.W.2d 317, 334 (Tenn. 1992); State v. Harris, 839 S.W.2d 54, 65 (Tenn. 1992), reh'g denied and opinion modified, (Sept. 8, 1992); See also, McNeary v. Baptist Memorial Hosp., 360 S.W.3d 429, 445 (Tenn. Ct. App. 2011), appeal denied, (Aug. 25, 2011); Van Grouw v. Malone, 358 S.W.3d 232, 236 (Tenn. Ct. App. 2010), appeal denied, (Feb. 16, 2011); State v. Hannah, 259 S.W.3d 716, 721 (Tenn. 2008); Wood v. Lowery, 238 S.W.3d 747, 763 (Tenn. Ct. App. 2007). An appellate court cannot review issues which have not been presented and ruled upon in the trial court; Crossley Const. Corp. v. National Fire Ins. Co. of Hartford, 237 S.W.3d 652, 656 (Tenn. Ct. App. 2007). Except for some limited exceptions not applicable in the present case, an appellate court will not consider issues, let alone claims, raised for the first time on appeal. Todd v. Jackson, 213 S.W.3d 277, 282 (Tenn. Ct. App. 2006); Alexander v. Jackson Radiology Associates, P.A., 156 S.W.3d 11, 14 (Tenn. Ct. App. 2004); Mitts v. Mitts, 39 S.W.3d 142, 146 (Tenn. Ct. App. 2000); Tamco Supply v. Pollard, 37 S.W.3d 905, 909 (Tenn. Ct. App. 2000); In re Valle, 31 S.W.3d 566, 571 (Tenn. Ct. App. 2000); Davis v. Tennessee Dept. of Employment Sec., 23 S.W.3d 304, 310 (Tenn. Ct. App. 1999); Chadwell v. Knox County, 980 S.W.2d 378, 384 (Tenn. Ct. App. 1998); Tomlin by Cockerham v. Warren, 958 S.W.2d 354, 356 (Tenn. Ct. App. 1997); Dement v. Kitts, 777 S.W.2d 33, 35–36 (Tenn. Ct. App. 1989) (a statutory provision that is not obviously unconstitutional on its face may not have its constitutionality raised for the first time on appeal).

Baugh v. Novak, 340 S.W.3d 372 (Tenn. 2011). As a general matter, the issues addressed by the appellate courts should be limited to those that have been raised and litigated in the lower courts, and which have been fully briefed and argued in the appellate courts. However, Tennessee Rules of Appellate Procedure, Rule 13(b) recognizes that exceptions can be made in appropriate circumstances, and a challenge to the validity of a contract based on public policy grounds is one such exception and is an issue that trial and appellate courts may raise sua sponte. The Court added that in those cases where a court itself raised an issue, the better practice is for the court

not affected the judgment *or* resulted in prejudice to the judicial process.[18] Prior to the adoption of the appellate rules, this last cate-

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to give the parties notice and a reasonable opportunity to address the issue before the court decides it.

Powell v. Community Health Systems, Inc., 312 S.W.3d 496 (Tenn. 2010). (1) It is axiomatic that parties will not be permitted to raise issues on appeal that they did not first raise in the trial court. (2) Parties invoking this waiver principle have the burden of demonstrating that the issue sought to be precluded was, in fact, not raised in the trial court. (3) Determining whether parties have waived their right to raise an issue on appeal should not exalt form over substance. (4) Appellate courts must carefully review the record to determine whether a party is actually raising an issue for the first time on appeal. (5) The fact that the party phrased the question or issue in the trial court in a different way than it does on appeal does not amount to a waiver of the issue. (6) When dealing with a statutory, as opposed to a common-law, privilege, an appellate court must not take the matter of waiver of this privilege lightly because weakening this privilege could undermine the confidentiality that the privilege is intended to protect.

Fayne v. Vincent, 301 S.W.3d 162, 171 (Tenn. 2009). The rule that issues not raised in the trial court cannot be raised for the first time on appeal was held to be inapplicable in the present case. The Court noted that the jurisprudential restriction against permitting parties to raise issues on appeal that were not first raised in the trial court is premised on the doctrine of waiver; that the party asserting waiver of an issue on appeal has the burden of proof; that Tenn. R. App. P. 1 requires that an appellate court's jurisprudential rules should be interpreted and applied in a way that enables appeals to be considered on their merits; and that the party invoking waiver has the burden of demonstrating that the issue sought to be precluded was, in fact, not raised in the trial court.

[18]Tenn. R. App. P. 36(b).

Effective July 1, 2009, Tenn. R. App. P. 36(b), as amended in 2009, provides: "(b) Effect of Error. A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process. When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." 2009 Advisory Commission Comment notes that a second sentence has been added to Rule 36(b) incorporating the plain error doctrine. The initial sentence states the harmless error doctrine. The Comment further refers to Tenn. R. App. P. 13(b) on consideration of issues not presented for review. Another 2009 Advisory Commission Comment to the Tennessee Rules of Appellate Procedure Rule 13 states: "See amended Rule 36(b), Tenn. R. App. P. on the plain error doctrine."

See State v. Sexton, 368 S.W.3d 371, n.25 (Tenn. 2012), opinion corrected and superseded, 2012 WL 4800459 (Tenn. 2012). Pursuant to Tenn. R. App. P. 36(b), a final judgment shall not be set aside unless, considering the whole record, an error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process. See also, In re Melanie T., 352 S.W.3d 687, 696 (Tenn. Ct. App. 2011), appeal denied, (Aug. 24, 2011).

See State v. Hester, 324 S.W.3d 1, 76–77 (Tenn. 2010), cert. denied, 131 S. Ct. 2096, 179 L. Ed. 2d 896 (2011). (1) The cumulative error doctrine is a judicial recognition that there may be multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial. (2) Claims under the cumulative error doctrine are sui generis. A reviewing tribunal must consider each such claim against the background of the case as a whole, paying particular weight to factors such as the nature and number of the errors committed; their interrelationship, if any, and combined effect; how the trial court dealt with the errors as they arose (including the efficacy-or lack of efficacy-of any remedial efforts); and the strength of the State's case. The length of the trial may also be important; a handful of miscues, in combination, may often pack a greater punch in a short trial than in a much longer trial.

gory was governed by the more limited statutory "harmless error" rule, under which relief was not required unless an error affected the result.[19] Post-rules cases have held that appellate courts may affirm trial court judgments that are correct in result, even though rendered upon different, incomplete or erroneous grounds.[20]

In *State v. Gomez*,[21] the Tennessee Supreme Court summarized the

[19]T.C.A. § 27-1-116, T.C.A. § 27-1-117 (both repealed by 1981 Tenn. Pub. Acts 449 as being in conflict with the Tenn. R. App. P.).

[20]Continental Cas. Co. v. Smith, 720 S.W.2d 48, 50 (Tenn. 1986), citing Hopkins v. Hopkins, 572 S.W.2d 639, 641 (Tenn. 1978). See also In re Estate of Trigg, 368 S.W.3d 483, n.62 (Tenn. 2012); Wilson v. State, 367 S.W.3d 229, n.5 (Tenn. 2012); Allstate Ins. Co. v. Tarrant, 363 S.W.3d 508, 522 n.11 (Tenn. 2012); State v. Hester, 324 S.W.3d 1, 21 n.9 (Tenn. 2010), cert. denied, 131 S. Ct. 2096, 179 L. Ed. 2d 896 (2011); Ussery v. City of Columbia, 316 S.W.3d 570, 586 (Tenn. Ct. App. 2009), appeal denied, (Mar. 15, 2010); Summer v. Summer, 296 S.W.3d 57, 64 (Tenn. Ct. App. 2008); Wood v. Metropolitan Nashville & Davidson County Government, 196 S.W.3d 152, 160 n.6 (Tenn. Ct. App. 2005); Arrow Electronics v. Adecco Employment Services, Inc., 195 S.W.3d 646, 656 (Tenn. Ct. App. 2005); Emerson v. Oak Ridge Research, Inc., 187 S.W.3d 364, 377, 96 Fair Empl. Prac. Cas. (BNA) 1845 (Tenn. Ct. App. 2005); McEwen v. Tennessee Dept. of Safety, 173 S.W.3d 815, 818 n.1 (Tenn. Ct. App. 2005); City of Brentwood v. Metropolitan Bd. of Zoning Appeals, 149 S.W.3d 49, 60 n.18 (Tenn. Ct. App. 2004); Denton v. Denton, 33 S.W.3d 229, 232 (Tenn. Ct. App. 2000); Basily v. Rain, Inc., 29 S.W.3d 879, 884 n.3 (Tenn. Ct. App. 2000); Brown v. Brown, 29 S.W.3d 491, 495 (Tenn. Ct. App. 2000); Hutcherson v. Criner, 11 S.W.3d 126, 136 (Tenn. Ct. App. 1999); Allen v. National Bank of Newport, 839 S.W.2d 763, 765 (Tenn. Ct. App. 1992); Clark v. Metropolitan Government of Nashville and Davidson County, 827 S.W.2d 312, 317 (Tenn. Ct. App. 1991); Harper v. City of Milan, 825 S.W.2d 92 (Tenn. Ct. App. 1991); In re Ellis, 822 S.W.2d 602 (Tenn. Ct. App. 1991).

See also, Bacardi v. Tennessee Bd. of Registration in Podiatry, 124 S.W.3d 553, 562 (Tenn. Ct. App. 2003); Stigall v. Lyle, 119 S.W.3d 701, 704 (Tenn. Ct. App. 2003); Olympia Child Development Center, Inc. v. City of Maryville, 59 S.W.3d 128, 135 (Tenn. Ct. App. 2001); First American Trust Co. v. Franklin-Murray Development Co., L.P., 59 S.W.3d 135, 142 n.10 (Tenn. Ct. App. 2001); Dickey v. McCord, 63 S.W.3d 714, 722 (Tenn. Ct. App. 2001); Hill v. Lamberth, 73 S.W.3d 131, 136, 164 Ed. Law Rep. 963 (Tenn. Ct. App. 2001).

Patton v. Estate of Upchurch, 242 S.W.3d 781, 792 (Tenn. Ct. App. 2007). Although the Circuit Court's reasoning was incorrect, an appellate court may affirm a judgment that was correct in result, although based on erroneous reasoning.

Lewis v. NewsChannel 5 Network, L.P., 238 S.W.3d 270, 302 n.31, 35 Media L. Rep. (BNA) 1897 (Tenn. Ct. App. 2007). The Court of Appeals may affirm a judgment on different grounds than those relied on by the trial court when the trial court reached the correct result.

[21]State v. Gomez, 163 S.W.3d 632 (Tenn. 2005) (rejected by, State v. Natale, 184 N.J. 458, 878 A.2d 724 (2005)) and cert. granted, judgment vacated, 549 U.S. 1190, 127 S. Ct. 1209, 167 L. Ed. 2d 36 (2007). Admission of testimony about a co-defendant's oral statement violated the defendants' Sixth Amendment right to confrontation because the defendants had no prior opportunity to cross-examine the co-defendant. See Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177, 63 Fed. R. Evid. Serv. 1077 (2004). Nevertheless, the Court concluded one defendant was not entitled to relief on this claim because (a) he failed to preserve the issue for review, (b) the standard of review was therefore plain error, governed by Tenn. R. Crim. P. 52(b) and Tenn. R. App. P. 36(b); and (c) the defendant failed to meet its burden of persuasion, under the plain error rule, which requires proof that (a) there had been a clear, conspicuous, or obvious error, apparent in the trial record and involving a clear and unequivocal rule that has been breached, (b) the error has affected the substantial rights of an accused, (c) the error more probably than not affected the judgment to the prejudice of the accused, or would result in prejudice to the judicial process, and correction of the error is necessary to do substantial justice.

As to a second defendant, who had preserved the issue, the Court held that (a)

standards applicable to the harmful/harmless error dichotomy in criminal case. First, in criminal cases where the issue involves procedural constitutional error in the trial process, such as a violation of the confrontation clause, and the issue has been properly preserved for appellate review, appellate review is plenary and requires a determination if the error was harmful or harmless, as only harmful error warrants reversal. In such cases, the state had the burden of persuasion beyond a reasonable doubt to prove that the trial court's

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plenary appellate review applied, to the trial court's "trial process" error in admitting evidence in violation of the confrontation clause, (b) only harmful error warrants reversal on procedural constitutional errors in the trial process; (c) the state had the burden of persuasion beyond a reasonable doubt to prove that the trial court's procedural constitutional error was harmless; and (d) defendant was not entitled to relief because the state proved that the procedural constitutional error, under the circumstances of the present case, was harmless beyond a reasonable doubt.

State v. Brown, 311 S.W.3d 422 (Tenn. 2010). (1) Trial court's failure to instruct the jury as to the lesser-included offenses of second degree murder, reckless homicide, and criminally negligent homicide, was a non-structural constitutional error, which requires the State to prove that the error was harmless beyond a reasonable doubt in order to avoid reversal. (2) Whether a nonstructural constitutional error is harmless is not determined by the existence of sufficient evidence to affirm a conviction or by the belief that the jury rendered the correct verdict. Rather, the proper test is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (3) In assessing whether an error did not affect the trial's outcome beyond a reasonable doubt, an appellate court must "conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury. When the evidence clearly was sufficient to support a conviction for second degree murder, reckless homicide, or criminally negligent homicide, and the jury was not given an opportunity to reach a decision on these offenses, a court cannot say that the failure to instruct on the lesser-included offenses was harmless beyond a reasonable doubt.

Ward v. State, 315 S.W.3d 461, 476 (Tenn. 2010). Where a trial court has committed constitutional error by failing to ensure that the defendant is aware of a direct consequence of his or her guilty plea, a judgment of conviction must be set aside unless the State proves that the error was harmless beyond a reasonable doubt.

State v. Ferrell, 277 S.W.3d 372, 380 (Tenn. 2009). The error in this case cannot be classified as harmless. See Tenn. R. App. P. 36(b). State v. Rodriguez, 254 S.W.3d 361, 373–74 (Tenn. 2008) has held that Tennessee's harmless error doctrine, reflected in Tenn. R. App. P. 36(b), rests on a foundation that recognizes that a person accused of a crime is entitled to an essentially fair trial *and* that a person convicted of a crime as a result of an essentially fair trial is not entitled to have his or her conviction reversed based on errors that, more probably than not, did *not* affect the verdict or judgment. When the appellate courts conduct a harmless error analysis using Tenn. R. App. P. 36(b), they must be careful to avoid becoming a second jury by conflating the harmlessness inquiry with their own assessment of the defendant's guilt. The analysis is more than simply a calculation of whether sufficient evidence exists to support the conviction. It requires a careful examination of the entire record to determine whether the *non-constitutional* error involving a substantial right "more probably than not affected the judgment or would result in prejudice to the judicial process."

State v. Gann, 251 S.W.3d 446, 462 (Tenn. Crim. App. 2007). Prosecutor's remarks, although completely improper, had no effect on the verdict. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). Under the circumstances that the defendant was acquitted of felony murder and especially aggravated robbery, thereby suggesting that the jury was able to carefully consider the charges against the defendant and render its verdict based upon the evidence presented., and the trial court's instruction to the jury that the arguments of counsel are not evidence, and the jury is presumed to follow the instructions of the trial court, the Court held that the prosecutors misconduct during closing arguments was not harmful, and did not require reversal of conviction and remand for a new trial.

constitutional error was harmless.[22] Second, issues that have been properly preserved for review and which involve a substantive "structural" constitutional error, e.g., cases involving a defective reasonable doubt instruction; denial of public trial; racial discrimination in selection of grand jury; denial of self-representation at trial; complete denial of the assistance of counsel; or a biased trial judge, defy harmless error analysis and are therefore entitled to automatic reversal.[23] Third, appellate court "plain error review" applies in criminal cases where defendant has failed to preserve an issue for review. These cases are governed by Tenn. R. Crim. P. 52(b) and Tenn. R. App. P. 36(b), which require proof that (a) there had been a clear, conspicuous, or obvious error, apparent in the trial record and involving a clear and unequivocal rule that has been breached, (b) the error has affected the substantial rights of an accused, (c) the error more probably than not affected the judgment to the prejudice of the accused, or would result in prejudice to the judicial process, and correction of the error is necessary to do substantial justice.[24] Fourth, on an appeal regarding an issue not involving either a structural or a procedural constitutional error that was properly raised in the trial court, an appellate court applies a harmless error, i.e., the court had to determine whether the trial court's error "more probably than not affected the judgment."[25]

By a 2001 amendment to the Rules of Appellate Procedure, a defaulted defendant cannot raise on appeal the defense of failure to state a claim upon which relief can be granted or the defense of fail-

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[22]State v. Nagele, 353 S.W.3d 112 (Tenn. 2011) involved a trial court's procedural, non-structural error in not informing a defendant of a direct consequence of his or her guilty plea; therefore, the judgment of conviction must be set aside unless the State proves that the error was harmless beyond a reasonable doubt.

State v. Parker, 350 S.W.3d 883 (Tenn. 2011). Trial court's error which violated Defendant's constitutional rights under the federal and state confrontation clauses is not structural error mandating reversal. Rather, a nonstructural constitutional error does not require reversal if the State proves beyond a reasonable doubt that the error did not affect the verdict at trial.

[23]State v. Hester, 324 S.W.3d 1, 29–30 (Tenn. 2010), cert. denied, 131 S. Ct. 2096, 179 L. Ed. 2d 896 (2011). An error in denying the exercise of the right to self-representation is a structural constitutional error not amenable to harmless error review and requires automatic reversal when it occurs.

[24]State v. Hester, 324 S.W.3d 1, 56 (Tenn. 2010), cert. denied, 131 S. Ct. 2096, 179 L. Ed. 2d 896 (2011), which involved an issue not objected to at trial. The Court therefore conducted a "plain error" analysis. (1) Tennessee's appellate courts may take up an issue that has been waived if the issue constitutes a "plain error" that affects the substantial rights of a party and consideration of the issue is necessary to do substantial justice. (2) Plain error review is discretionary. (3) When asserting plain error, the defendant bears the burden of persuading the appellate court that the trial court committed plain error and that the error was of sufficient magnitude that it probably changed the outcome of the trial. (4) Under plain error review, relief will only be granted when five prerequisites are met: (a) the record clearly establishes what occurred in the trial court, (b) a clear and unequivocal rule of law was breached, (c) a substantial right of the accused was adversely affected, (d) the accused did not waive the issue for tactical reasons, and (e) consideration of the error is necessary to do substantial justice.

[25]State v. Garrett, 331 S.W.3d 392 (Tenn. 2011).

ure to join a party under Rule 19 of the Rules of Civil Procedure.[26]

An appellate court's review of a trial court's conclusions of law in a jury or non jury trial is de novo, on the trial court's record, and is not accompanied by a presumption of correctness.[27] In contrast, an appellate court's review of a trial court's findings of fact in a non jury action

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[26]Tenn. R. App. P. 13(f), as amended by the Supreme Court on January 23, 2001, and approved by the Tennessee General Assembly by 2001 H. R. 5 and S. B. 6, with an effective date of July 1, 2001. A 2001 Advisory Commission Comment states: "New Rule 13(f) overrules decisions such as Nickas v. Capadalis, 954 S.W.2d 735 (Tenn. Ct. App. 1997). That opinion relied on the pre-Rules precedent of Edington v. Michigan Mut. Life Ins. Co., 134 Tenn. 188, 183 S.W. 728 (1915). When the Rules of Civil Procedure took effect on January 1, 1971, however, Edington was no longer controlling because the holding conflicted with Tenn. R. Civ. P. 12.08 concerning waiver of defenses not raised by motion to dismiss or answer. See T.C.A. § 16-3-406: 'After such rules shall have become effective, all laws in conflict therewith shall be of no further force or effect.' "

Wills & Wills, L.P. v. Gill, 54 S.W.3d 283, 285 (Tenn. Ct. App. 2001). The interpretation of a written agreement is a matter of law and not of fact. Therefore, appellate review is de novo on the record with no presumption of the correctness of the trial court's conclusions of law.

[27](a) General Rule

The presumption of correctness of a trial court's findings under Tenn. R. App. P. 13(d) is not applicable to a trial court's conclusions of law. See Ready Mix, USA, LLC v. Jefferson County, 2012 WL 3757025 (Tenn. 2012); Rogers v. Louisville Land Co., 367 S.W.3d 196 (Tenn. 2012); Brown v. Roland, 357 S.W.3d 614 (Tenn. 2012); Lind v. Beaman Dodge, Inc., 356 S.W.3d 889, 895 (Tenn. 2011); Hughes v. Metropolitan Government of Nashville and Davidson County, 340 S.W.3d 352 (Tenn. 2011); Sanford v. Waugh & Co., Inc., 328 S.W.3d 836 (Tenn. 2010); Estate of Bell v. Shelby County Health Care Corp., 318 S.W.3d 823 (Tenn. 2010); Owens v. National Health Corp., 263 S.W.3d 876, 882 (Tenn. 2007); Brown v. Erachem Comilog, Inc., 231 S.W.3d 918 (Tenn. 2007); Lichtenwalter v. Lichtenwalter, 229 S.W.3d 690, 692 (Tenn. 2007); State v. McGouey, 229 S.W.3d 668, 672 (Tenn. 2007); Building Materials Corp. v. Britt, 211 S.W.3d 706 (Tenn. 2007); Alsip v. Johnson City Medical Center, 197 S.W.3d 722 (Tenn. 2006); Barnett v. Earthworks Unlimited, Inc., 197 S.W.3d 716 (Tenn. 2006) (overruled by, Building Materials Corp. v. Britt, 211 S.W.3d 706 (Tenn. 2007)); State v. Livingston, 197 S.W.3d 710 (Tenn. 2006); State v. Thompson, 197 S.W.3d 685 (Tenn. 2006); Blair v. Brownson, 197 S.W.3d 681 (Tenn. 2006); Whaley v. Perkins, 197 S.W.3d 665 (Tenn. 2006); Taylor v. Fezell, 158 S.W.3d 352 (Tenn. 2005); Honsa v. Tombigbee Transport Corp., 141 S.W.3d 540, 542 (Tenn. 2004); Gonzalez v. State Dept. of Children's Services, 136 S.W.3d 613 (Tenn. 2004); State v. Blye, 130 S.W.3d 776 (Tenn. 2004); Alford v. Alford, 120 S.W.3d 810, 812 (Tenn. 2003); Burlew v. Burlew, 40 S.W.3d 465, 470 (Tenn. 2001); Rice v. Sabir, 979 S.W.2d 305, 308 (Tenn. 1998); Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998); State v. Bridges, 963 S.W.2d 487, 490 (Tenn. 1997); Brown v. Erachem Comilog, Inc., 231 S.W.3d 918 (Tenn. 2007); Overstreet v. TRW Commercial Steering Div., 256 S.W.3d 626 (Tenn. 2008); Owens v. National Health Corp., 263 S.W.3d 876 (Tenn. 2007); Moore v. Moore, 254 S.W.3d 357, 359 (Tenn. 2007); Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827 (Tenn. 2008).

See Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993) (when there is no conflict in the evidence as to any material fact, the question on appeal is one of law, and the scope of appellate review is de novo, with no presumption of correctness accompanying the trial judge's conclusions of law). In accord, In re Estate of Vincent, 98 S.W.3d 146, 148 (Tenn. 2003); Hawks v. City of Westmoreland, 960 S.W.2d 10, 15 (Tenn. 1997); McCormick v. Snappy Car Rentals, Inc., 806 S.W.2d 527, 529 (Tenn. 1991); State v. Kelly, 603 S.W.2d 726, 729 (Tenn. 1980); Pierce v. Tharp, 224 Tenn. 328, 457 S.W.2d 529 (1970).

Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 628 (Tenn. 1999). Questions involving the application of the law to the facts are questions of law which an appellate court reviews de novo with no presumption of correctness given the lower courts' judgments. See also State v. Norris, 47 S.W.3d 457, 463 (Tenn. Crim. App. 2000), citing State v. Crutcher, 989 S.W.2d 295, 299 (Tenn. 1999).

The Realty Shop, Inc. v. RR Westminster Holding, Inc., 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999). Appellate courts review a trial court's finding of fact as a legal matter in one circumstance. When a finding of fact is based on undisputed evidence that can reasonably support only one conclusion, the appellate court reviews that finding on appeal without Tenn. R. App. P. 13(d)'s presumption of correctness.

See also, Kendrick v. Shoemake, 90 S.W.3d 566 (Tenn. 2002); Reece v. Findlay Industries, Inc., 83 S.W.3d 713, 716 (Tenn. 2002); The Bank/First Citizens Bank v. Citizens and Associates, 82 S.W.3d 259, 262, 48 U.C.C. Rep. Serv. 2d 26 (Tenn. 2002); Langschmidt v. Langschmidt, 81 S.W.3d 741, 744-5 (Tenn. 2002); Gray v. Gray, 78 S.W.3d 881, 883 (Tenn. 2002); Trau-Med of America, Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 696-7, R.I.C.O. Bus. Disp. Guide (CCH) P 10287 (Tenn. 2002); Weston v. State, 60 S.W.3d 57, 59 (Tenn. 2001).

(b) Legality, Formation, and Interpretation of a Contract

ICG Link, Inc. v. Steen, 363 S.W.3d 533, 543 (Tenn. Ct. App. 2011). Questions of contract formation and interpretation are questions of law. See also, Ray Bell Const. Co., Inc. v. State, Tennessee Dept. of Transp., 356 S.W.3d 384, 386 (Tenn. 2011); 84 Lumber Co. v. Smith, 356 S.W.3d 380, 382 (Tenn. 2011); Federal Ins. Co. v. Winters, 354 S.W.3d 287, 291 (Tenn. 2011); Mitchell v. Kindred Healthcare Operating, Inc., 349 S.W.3d 492, 499 (Tenn. Ct. App. 2008). Whether a particular contract is unconscionable is a question of law.

Clark v. Sputniks, LLC, 368 S.W.3d 431 (Tenn. 2012). The question of the extent of insurance coverage is a question of law involving the interpretation of contractual language, which is reviewed de novo with no presumption of correctness.

Garrison v. Bickford, 2012 WL 3590444 (Tenn. 2012). Questions regarding the extent of insurance coverage present issues of law involving the interpretation of contractual language, and the standard of appellate review is de novo with no presumption of correctness afforded to the conclusions reached by the courts below.

Baugh v. Novak, 340 S.W.3d 372 (Tenn. 2011). The determination of whether a contract is unenforceable on public policy grounds is a question of law. An appellate court reviews rulings on questions of law de novo with no presumption of correctness.

Maggart v. Almany Realtors, Inc., 259 S.W.3d 700 (Tenn. 2008). Where a contractual provision may be susceptible to more than one reasonable interpretation, rendering the terms of the contract ambiguous, the Court, as a matter of law, must interpret the terms de novo, and is not bound to affirm the trial court's interpretation. Further, the appellate court is not bound by the trial court's determination of the unambiguous terms. Ambiguity, however, does not arise in a contract merely because the parties may differ as to interpretations of certain of its provisions. A contract is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one. The court will not use a strained construction of the language to find an ambiguity where none exists.

Barnes v. Barnes, 193 S.W.3d 495, 498 (Tenn. 2006). A marital dissolution agreement is a contract and thus is generally subject to the rules governing construction of contracts. Because the interpretation of a contract is a matter of law, appellate review is de novo on the record with no presumption of correctness in the trial court's conclusions of law.

(c) Will Construction

First Tennessee Bank, N.A. v. Woodward, 362 S.W.3d 86, 89 (Tenn. Ct. App. 2011), appeal denied, (Feb. 16, 2012). When an appellate court is called upon to construe a will, and there is no dispute in the evidence as to any material fact, then the question on appeal is one of law. Accordingly, appellate review is de novo with no presumption of correctness accompanying the lower courts' conclusions of law.

In re Estate of Eden, 99 S.W.3d 82, 93 (Tenn. Ct. App. 1995). Since construing a will involves questions of law, appellate review will be de novo on the record without any presumption of correctness.

Estate of Burchfiel v. First United Methodist Church of Sevierville, 933 S.W.2d 481, 483 (Tenn. Ct. App. 1996): "The construction of the will is a question of law for the court. Presley v. Hanks, 782 S.W.2d 482, 487 (Tenn. Ct. App. 1989). The standard of review for the appellate court is de novo with no presumption of correctness. T. R. A. P. 13(d)." See also Briggs v. Estate of Briggs, 950 S.W.2d 710, 712 (Tenn. Ct. App. 1997).

See also, Estate of Pegram v. Pegram, 189 S.W.3d 227 (Tenn. Ct. App. 2005); McBride v. Sumrow, 181 S.W.3d 666, 669 (Tenn. Ct. App. 2005).

Compare In re Estate of Warren, 3 S.W.3d 493, 496 (Tenn. Ct. App. 1999). Trial judge's finding in will contest tried without a jury that testator, rather than another person, had revoked a will provision by markings on the will is presumed to be correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d).

(d) Constitutionality of Statute

State v. White, 362 S.W.3d 559, 565 (Tenn. 2012). Issues of constitutional interpretation are questions of law, which an appellate court reviews de novo with no presumption of correctness.

Waters v. Farr, 291 S.W.3d 873 (Tenn. 2009). (1) Issues of constitutional interpretation are questions of law, which an appellate court reviews de novo without any presumption of correctness given to the legal conclusions of the courts below. (2) It is well-settled in Tennessee that "courts do not decide constitutional questions unless resolution is absolutely necessary to determining the issues in the case and adjudicating the rights of the parties." (3) The Supreme Court is charged to uphold the constitutionality of a statute wherever possible. (4) In evaluating the constitutionality of a statute, an appellate court begins with the presumption that an act of the General Assembly is constitutional. (5) The presumption of constitutionality applies with even greater force when a party brings a facial challenge to the validity of a statute. In such an instance, the challenger must establish that no set of circumstances exists under which the statute, as written, would be valid.

State v. Davis, 266 S.W.3d 896, 901 (Tenn. 2008). The Supreme Court reviews issues of constitutional law de novo with no presumption of correctness attaching to the legal conclusions reached by the courts below)

State v. Burns, 205 S.W.3d 412 (Tenn. 2006). The resolution of this appeal involves an issue of constitutional interpretation, which is a question of law. Therefore, the standard of review is de novo without any presumption of correctness given to the legal conclusions of the courts below.

(e) Construction of Statutes and Rules

See, e.g., Ganzevoort v. Russell, 949 S.W.2d 293 (Tenn. 1997). The construction of a statute and the application of the law to undisputed facts are questions of law; in such cases, the scope of review for questions of law is de novo upon the record of the trial court with no presumption of correctness.

Sallee v. Barrett, 2005 WL 1981821 (Tenn. 2005), opinion corrected and superseded, 171 S.W.3d 822 (Tenn. 2005). The construction of statutes and application of the law to the facts of a case are questions of law. Accordingly, the standard of appellate review is de novo without any presumption of correctness given to the lower courts' conclusions of law.

Jordan v. Baptist Three Rivers Hosp., 984 S.W.2d 593, 600 (Tenn. 1999). Issues of statutory construction are questions of law which are to be reviewed de novo without a presumption of correctness. An appellate court's role in statutory interpretation is to ascertain and to effectuate the legislature's intent. Generally, legislative intent shall be derived from the plain and ordinary meaning of the statutory language when a statute's language is unambiguous. When a statute's language is ambiguous and the parties legitimately derive different interpretations, we must look to the entire statutory scheme to ascertain the legislative intent.

See also, Garrison v. Bickford, 2012 WL 3590444 (Tenn. 2012); Mann v. Alpha Tau Omega Fraternity, 2012 WL 2553534 (Tenn. 2012); In re Estate of Trigg, 368 S.W.3d 483 (Tenn. 2012); Waddle v. Elrod, 367 S.W.3d 217 (Tenn. 2012) (construction of the statute of frauds); State v. White, 362 S.W.3d 559, 565–6 (Tenn. 2012) (construction of Tennessee's kidnaping statutes); Mills v. Fulmarque, Inc., 360 S.W.3d 362, 366 (Tenn. 2012); State v. McNack, 356 S.W.3d 906, 908 (Tenn. 2011); Kiser v. Wolfe, 353 S.W.3d 741, 745 (Tenn. 2011); Rich v. Tennessee Bd. of Medical Examiners, 350 S.W.3d 919, 926 (Tenn. 2011).

State v. Johnson, 342 S.W.3d 468 (Tenn. 2011). Issues regarding the construction and interpretation of rules of court, including the Rules of Criminal Procedure, involve questions of law. The Supreme Court reviews the lower courts' construction of the rules of court de novo with no presumption of correctness, using essentially the same rules of construction that courts employ to construe statutes.

is de novo, upon the trial court's record, accompanied by a presump-

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State v. Hatcher, 310 S.W.3d 788, 799 (Tenn. 2010). An appellate court reviews de novo issues involving the interpretation of Tennessee's rules of criminal procedure.

Board Of Professional Responsibility v. Love, 256 S.W.3d 644 (Tenn. 2008) citing Doe v. Board of Professional Responsibility of Supreme Court of Tennessee, 104 S.W.3d 465, 469 (Tenn. 2003), held that the Supreme Court's rules should be interpreted in the same manner as statutes. Thus, it is prudent for Supreme Court to apply the traditional rules of statutory construction to the Supreme Court's procedural rules that are promulgated by the joint actions of the Supreme Court and the General Assembly.

Green v. Moore, 101 S.W.3d 415, 418 (Tenn. 2003). Interpretation of the Tenn. R. App. P. Rule 4(a) is a pure question of law, for which the standard of review is de novo with no presumption of correctness given to the Court of Appeals. Issues of statutory construction and interpretation are questions of law; thus our review is de novo without any presumption of correctness.

City of Harriman v. Roane County Election Com'n, 354 S.W.3d 685, 688–689 (Tenn. 2011) (construction of a statute and its application to the facts of a case are questions of law, which an appellate court reviews de novo with no courts presumption of correctness).

Holder v. Westgate Resorts Ltd., 356 S.W.3d 373, 379 (Tenn. 2011) (construction of the rules of evidence); Lind v. Beaman Dodge, Inc., 356 S.W.3d 889, 895 (Tenn. 2011) (the application of the Tennessee Rules of Civil Procedure).

(f) Summary Judgments

Giggers v. Memphis Housing Authority, 277 S.W.3d 359, 363 (Tenn. 2009). The scope of review of a grant of summary judgment involves a question of law. Therefore, no presumption of correctness attaches to the judgment, and the task of the appellate court is to review the record to determine whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied.

Estate of Bell v. Shelby County Health Care Corp., 318 S.W.3d 823 (Tenn. 2010); Stanfill v. Mountain, 301 S.W.3d 179, 184-5 (Tenn. 2009).

State v. Hannah, 259 S.W.3d 716, 721 (Tenn. 2008). An appellate court reviews questions of statutory construction under a de novo standard with no presumption of correctness afforded to the trial court's conclusions.

Maggart v. Almany Realtors, Inc., 259 S.W.3d 700 (Tenn. 2008). Because the review of a trial court's grant of summary judgment is a question of law, the standard of review is de novo, according no presumption of correctness to the trial court's determination.

Amos v. Metropolitan Government Of Nashville And Davidson County, 259 S.W.3d 705, 156 Lab. Cas. (CCH) P 60655 (Tenn. 2008). The appellate in reviewing whether a motion for summary judgment should be granted must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in favor of the non-moving party.

Tennessee Farmers Life Reassurance Co. v. Rose, 239 S.W.3d 743 (Tenn. 2007). A trial court's grant of summary judgment is purely a question of law. Accordingly, appellate review is de novo, and no presumption of correctness attaches to the lower courts' judgments.

Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ., 244 S.W.3d 302, 309, 229 Ed. Law Rep. 958, 183 L.R.R.M. (BNA) 2552 (Tenn. 2007). Initially, a trial court's grant of a motion for summary judgment presents a question of law that an appellate court reviews de novo without a presumption of correctness.

Overnite Transp. Co. v. Teamsters Local Union No. 480, 172 S.W.3d 507, 511 (Tenn. 2005). A trial court's grant of a motion for summary judgment presents a question of law, which an appellate court reviews de novo without a presumption that the trial court's conclusions are correct.

Teter v. Republic Parking System, Inc., 181 S.W.3d 330, 337, 37 Employee Benefits Cas. (BNA) 1245, 23 I.E.R. Cas. (BNA) 1478 (Tenn. 2005). Because the determination of whether summary judgment was proper involves a question of law only, the standard of appellate review is de novo with no presumption of correctness attached to the trial court's conclusions.

Tennessee Farmers Life Reassurance Co. v. Rose, 239 S.W.3d 743 (Tenn. 2007).

tion of the correctness of the findings unless the preponderance of the

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A trial court's grant of summary judgment is purely a question of law. Accordingly, appellate court review is de novo, and no presumption of correctness attaches to the lower courts' judgments.

Rose v. H.C.A. Health Services of Tennessee, Inc., 947 S.W.2d 144, 147 (Tenn. Ct. App. 1996). Where only questions of law are involved, there is no presumption of correctness regarding a trial court's grant of summary judgment and appellate review is de novo. See also, Campora v. Ford, 124 S.W.3d 624, 626 (Tenn. Ct. App. 2003)

(g) Subject Matter Jurisdiction and Venue

Peck v. Tanner, 181 S.W.3d 262, 265 (Tenn. 2005). An issue concerning the scope of appellate jurisdiction is a question of law; as a result, appellate review is de novo without a presumption of correctness.

Lanius v. Nashville Elec. Service, 181 S.W.3d 661 (Tenn. 2005). As with all questions of law, appellate review of a Tenn. R. Civ. P. 12 motion to dismiss for improper venue is conducted under a pure de novo standard, according no deference to the conclusions of law made by the lower courts.

State v. Cawood, 134 S.W.3d 159, 163 (Tenn. 2004). A determination of whether subject matter jurisdiction exists is a question of law; therefore, the appellate standard of review is de novo without a presumption of correctness.

Grace Thru Faith v. Caldwell, 944 S.W.2d 607, 608, Unempl. Ins. Rep. (CCH) P 15580B (Tenn. Ct. App. 1996), citing Tenn. R. App. P. 13(d). The issue of whether a trial court had subject matter jurisdiction is a question of law; therefore, appellate review is de novo upon the record without a presumption of correctness.

LeTellier v. LeTellier, 40 S.W.3d 490, 493, 90 A.L.R.5th 707 (Tenn. 2001). Whether the juvenile court had jurisdiction is a question of law over which review is de novo with no presumption of correctness. See, e.g., Northland Ins. Co. v. State, 33 S.W.3d 727, 729 (Tenn. 2000).

Southwest Williamson County Community Ass'n v. Saltsman, 66 S.W.3d 872, 877 (Tenn. Ct. App. 2001). Whether a court has subject matter jurisdiction is a question of law; therefore, appellate review is de novo with no presumption of correctness as to the trial court's conclusion as to this matter.

See also, Blair v. Tennessee Bd. of Probation and Parole, 246 S.W.3d 38, 40 (Tenn. Ct. App. 2007); Bernard v. Metropolitan Government of Nashville and Davidson County, 237 S.W.3d 658, 662 (Tenn. Ct. App. 2007); Tennessee Environmental Council v. Water Quality Control Bd., 250 S.W.3d 44, 54 (Tenn. Ct. App. 2007); In re E.J.M., 259 S.W.3d 124, 135 (Tenn. Ct. App. 2007).

(h) Duty in Negligence Actions

Coln v. City of Savannah, 966 S.W.2d 34, 44 (Tenn. 1998). A trial court's determination whether a duty exists in a negligence action is a question of law, which is subject to de novo review on appeal with no presumption of correctness. The question of breach of the standard of reasonable care, however, is a factual question, which is reviewed de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.

See also Burroughs v. Magee, 118 S.W.3d 323 (Tenn. 2003).

(i) Evidentiary Rulings at Trial

Russell v. Crutchfield, 988 S.W.2d 168, 170 (Tenn. Ct. App. 1998), citing City of Tullahoma v. Bedford County, 938 S.W.2d 408 (Tenn. 1997). Since an evidentiary ruling by the trial court is a question of law, the standard of review is de novo with no presumption of correctness.

State v. James, 81 S.W.3d 751, 760 (Tenn. 2002). Rulings on the admissibility of evidence are largely within the sound discretion of the trial court, and on appellate review, a trial court's ruling to admit or exclude evidence will not be disturbed unless it appears that such a ruling amounts to an abuse of that discretion. An appellate court should find an abuse of discretion when it appears that the trial court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.

Heath v. Memphis Radiological Professional Corp., 79 S.W.3d 550, 558-9 (Tenn. Ct. App. 2001). The admissibility of evidence is a matter which rests within the sound discretion of the trial court, and an appellate court will not reverse the trial court's decision on the admissibility of evidence absent clear abuse.

State v. Caldwell, 80 S.W.3d 31, 39-40 (Tenn. Crim. App. 2002). The admission of evidence lies within the sound discretion of the trial court, and an appellate court reviews this issue under an abuse of discretion standard.

(j) Motions to Suppress

State v. England, 19 S.W.3d 762, 766 (Tenn. 2000). In reviewing a trial court's granting of a motion to suppress, an appellate court's findings of fact regarding questions of fact involving credibility of witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence will be upheld unless the preponderance of the evidence preponderates against these findings, but the trial court's application of the law to its findings of fact is a question of law which the appellate court reviews de novo.

See also, State v. Richards, 286 S.W.3d 873, 877 (Tenn. 2009); State v. Dailey, 273 S.W.3d 94 (Tenn. 2009).

(k) Mixed Questions of Law and Fact

Nelson v. Wal-Mart Stores, Inc., 8 S.W.3d 625, 628 (Tenn. 1999). Questions involving the application of the law to the facts are questions of law which an appellate court reviews de novo with no presumption of correctness given the lower courts' judgments. See also Starr v. Hill, 353 S.W.3d 478, 481 (Tenn. 2011); Lance v. York, 359 S.W.3d 197, 201 (Tenn. Ct. App. 2011), appeal denied, (Oct. 18, 2011); Knox County ex rel. Environmental Termite & Pest Control, Inc. v. Arrow Exterminators, Inc., 350 S.W.3d 511 (Tenn. 2011); State v. Hester, 324 S.W.3d 1, 29–30 (Tenn. 2010), cert. denied, 131 S. Ct. 2096, 179 L. Ed. 2d 896 (2011); Foust v. Metcalf, 338 S.W.3d 457, 462 (Tenn. Ct. App. 2010); State v. McGouey, 229 S.W.3d 668, 672 (Tenn. 2007); State v. Maclin, 183 S.W.3d 335, 343 (Tenn. 2006); Sallee v. Barrett, 171 S.W.3d 822, 825 (Tenn. 2005); State v. Benham, 113 S.W.3d 702, 704 (Tenn. 2003); Kyle v. Williams, 98 S.W.3d 661, 663-64 (Tenn. 2003); State v. Wilson, 92 S.W.3d 391, 394 (Tenn. 2002); King v. Pope, 91 S.W.3d 314, 318, Blue Sky L. Rep. (CCH) P 74501 (Tenn. 2002); State v. Ross, 49 S.W.3d 833, 839 (Tenn. 2001); State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001); State v. Smiley, 38 S.W.3d 521, 524 (Tenn. 2001); State v. Norris, 47 S.W.3d 457, 468 (Tenn. Crim. App. 2000), citing State v. Crutcher, 989 S.W.2d 295, 299 (Tenn. 1999).

Sepulveda v. State, 90 S.W.3d 633, 637 (Tenn. 2002). Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. When reviewing the application of law to factual findings, appellate review is de novo, and the trial court's conclusions of law are given no presumption of correctness.

Langschmidt v. Langschmidt, 81 S.W.3d 741, 745 (Tenn. 2002). Mixed questions of law and fact are reviewed de novo with no presumption of correctness, "but... this Court has great latitude to determine whether findings as to mixed questions of fact and law made by the trial court are sustained by probative evidence on appeal."

State v. Moore, 77 S.W.3d 132, 134 (Tenn. 2002). Issues involving a mixed question of law and fact are subject to de novo review with no presumption of correctness. State v. Smiley, 38 S.W.3d 521 (Tenn. 2001); State v. Rush, 50 S.W.3d 424 (Tenn. 2001), as amended, (July 25, 2001). The propriety of charging a lesser-included offense is such an issue; hence, our review of this case is de novo. Id.; see also State v. Burns, 6 S.W.3d 453 (Tenn. 1999).

Cooper v. Creative Learning Child Care Center, Inc., 240 S.W.3d 230, 233 (Tenn. Ct. App. 2007). A trial court's resolution of issues of law or issues involving the application of law to undisputed facts are not entitled to Tenn. R. App. P. 13(d)'s presumption of correctness on appeal. Rather, the appellate courts review these issues de novo and reach their own independent conclusions regarding them.

In re Estate of Ladd, 247 S.W.3d 628, 641 (Tenn. Ct. App. 2007). The rule that concurrent "findings of fact" by the Special Master and Chancellor are conclusive on appeal does not apply to matters that are considered mixed questions of fact and law. E.g., issues concerning the amount of compensation to be paid executors and attorneys constitute mixed questions of fact and law and, therefore, they are not subject to the material evidence standard of review.

(l) Stipulations

Home Federal Bank, FSB, of Middlesboro, Kentucky v. First Nat. Bank of LaFollette, Tennessee, 110 S.W.3d 433, 440 (Tenn. Ct. App. 2002). An appellate court is not bound by a stipulation of the parties pertaining to questions of law. In the pres-

evidence is otherwise or there is an error of law.[28] Under this stan-

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ent case, the appellate court acknowledged that it was ignoring the parties' stipulation that the totality of the statutory scheme under discussion was not applicable to the facts of the instant case.

Harrell v. Harrell, 321 S.W.3d 508, 512 (Tenn. Ct. App. 2010), appeal denied, (Aug. 25, 2010). When a case is on appeal on stipulated facts and exhibits, and there is no dispute in the evidence as to any material fact, then the question on appeal is one of law. Accordingly, appellate review is de novo with no presumption of correctness accompanying the lower courts' conclusions of law.

(m) Jury Instructions

Nye v. Bayer Cropscience, Inc., 347 S.W.3d 686 (Tenn. 2011). Whether a jury instruction is erroneous is a question of law and is therefore subject to de novo review with no presumption of correctness.

Stanfield v. Neblett, 339 S.W.3d 22, 40 (Tenn. Ct. App. 2010), appeal denied, (Jan. 13, 2011). The determination of whether jury instructions were proper is a question of law and therefore, the appellate standard of review is de novo with no presumption of correctness.

Ginn v. American Heritage Life Ins. Co., 173 S.W.3d 433, 441 (Tenn. Ct. App. 2004). The issue of whether a jury instruction was proper is a question of law and is reviewed de novo without a presumption of correctness.

(n) Default Judgments

Orten v. Orten, 185 S.W.3d 825, 829 (Tenn. Ct. App. 2005). With respect to legal issues involving a trial court's grant of a default judgment, appellate review is conducted under a pure de novo standard of review, according no deference to the conclusions of law made by the lower courts.

(o) Interpretations of Orders and Judgments

Konvalinka v. Chattanooga-Hamilton County Hosp. Authority, 249 S.W.3d 346, n.19 (Tenn. 2008). Tennessee's courts have long recognized that orders and judgments should be construed like other written instruments, and that the interpretation of written instruments involves questions of law that are reviewed de novo without a presumption of correctness. Accordingly, the Court of Appeals has observed that the proper interpretation of a judgment is a question of law.

Ball v. McDowell, 288 S.W.3d 833 (Tenn. 2009). The determination of which of two judgments entered in an action constituted the final judgment is a question of law which is reviewed de novo with no presumption of correctness.

(p) Class action

Wicker v. Commissioner, 342 S.W.3d 35 (Tenn. Ct. App. 2010), appeal denied, (Nov. 15, 2010). Whether the trial court used a correct legal standard in making that decision is a question of law reviewed de novo. Any conclusions of law by a trial court that affect its decision on certification are reviewed de novo.

(q) Subject Matter jurisdiction

State v. L.W., 350 S.W.3d 911 (Tenn. 2011). A determination of jurisdiction is a question of law, which is we reviewed de novo with no presumption of correctness. See also, Schutte v. Johnson, 337 S.W.3d 767, 769 (Tenn. Ct. App. 2010), appeal denied, (Sept. 23, 2010); State ex rel. Com'r of Dept. of Transp. v. Thomas, 336 S.W.3d 588, 601 (Tenn. Ct. App. 2010), appeal denied, (Nov. 18, 2010).

(r) Verdict

Stanfield v. Neblett, 339 S.W.3d 22, 40 (Tenn. Ct. App. 2010), appeal denied, (Jan. 13, 2011). An appellate court reviews a trial court's de novo as a question of law.

(s) Interpretation of written documents

Adkins v. Bluegrass Estates, Inc., 360 S.W.3d 404 (Tenn. Ct. App. 2011), appeal denied, (Dec. 14, 2011). Interpretation of written documents is generally a matter of law for the court that is reviewed de novo with no presumption of correctness; but, it can become an issue for the trier of fact if the document is ambiguous and parol evidence is needed to determine the meaning of the document.

[28]Tenn. R. App. P. 13(d). T.C.A. § 27-3-103, which prescribed the general standard of review in nonjury cases prior to the adoption of the Rules of Appellate Procedure, was repealed by 1981 Tenn. Pub. Acts 449, § 1.

dard, the appellant has the burden to show that the evidence preponderates against the trial court's findings.[29] In the event the evidence is found by the appellate court to be in equipoise as to the facts, the presumption as to the correctness of the findings of the trial court prevails.[30] On appellate review of a trial court's findings of fact in a

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See, e.g., Rogers v. Louisville Land Co., 367 S.W.3d 196 (Tenn. 2012); Allstate Ins. Co. v. Tarrant, 363 S.W.3d 508, 514 (Tenn. 2012); Knox County ex rel. Environmental Termite & Pest Control, Inc. v. Arrow Exterminators, Inc., 350 S.W.3d 511 (Tenn. 2011); Hughes v. Metropolitan Government of Nashville and Davidson County, 340 S.W.3d 352 (Tenn. 2011); Smith County Regional Planning Com'n v. Hiwassee Village Mobile Home Park, LLC, 304 S.W.3d 302, 309 (Tenn. 2010); In re Angela E., 303 S.W.3d 240, 246 (Tenn. 2010); Fayne v. Vincent, 301 S.W.3d 162, 169 (Tenn. 2009); Blackburn v. Blackburn, 270 S.W.3d 42, 47 (Tenn. 2008); Naifeh v. Valley Forge Life Ins. Co., 204 S.W.3d 758, 770 (Tenn. 2006); Broadbent v. Broadbent, 211 S.W.3d 216, 219 (Tenn. 2006); State v. Thompson, 197 S.W.3d 685 (Tenn. 2006); Blair v. Brownson, 197 S.W.3d 681 (Tenn. 2006); In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006); Barnes v. Barnes, 193 S.W.3d 495, 498 (Tenn. 2006); Gonzalez v. State Dept. of Children's Services, 136 S.W.3d 613 (Tenn. 2004); Alford v. Alford, 120 S.W.3d 810, 812 (Tenn. 2003). Scoggins v. Scoggins, 136 S.W.3d 211, 214 (Tenn. Ct. App. 2003); Hawks v. City of Westmoreland, 960 S.W.2d 10, 15 (Tenn. 1997); Walton v. Young, 950 S.W.2d 956, 959 (Tenn. 1997); Campbell v. Florida Steel Corp., 919 S.W.2d 26, 35, 70 Fair Empl. Prac. Cas. (BNA) 509, 67 Empl. Prac. Dec. (CCH) P 43999 (Tenn. 1996); Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993); Hearthstone, Inc. v. Hardy Moyers, 809 S.W.2d 888, 890 (Tenn. 1991); Vantage Technology, LLC v. Cross, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999).

Cross v. City of Memphis, 20 S.W.3d 642, 643 (Tenn. 2000), clarifying Coln v. City of Savannah, 966 S.W.2d 34 (Tenn. 1998). In reviewing a trial court's findings of fact regarding allocation of fault in a nonjury trial, an appellate court must apply the de novo standard of review contained in Tenn. R. App. P. 13(d). The clearly erroneous language of Wright v. City of Knoxville, 898 S.W.2d 177 (Tenn. 1995), regarding appellate review of allocation of fault, is limited to jury cases. See also Wilson v. Pickens, 196 S.W.3d 138, 143-4 (Tenn. Ct. App. 2005); Varner v. Perryman, 969 S.W.2d 410, 411 (Tenn. Ct. App. 1997).

There is no presumption, however, as to the correctness of the trial court's conclusions of law.

[29]Tenn. R. App. P. 13(d); Newman v. Bartee, 787 S.W.2d 929, 931 (Tenn. Ct. App. 1990); First American Bank of Nashville, N.A. v. Woods, 781 S.W.2d 588, 590 (Tenn. Ct. App. 1989); Town of Bruceton v. Arnold, 818 S.W.2d 347, 349 (Tenn. Ct. App. 1991); Galbreath v. Harris, 811 S.W.2d 88, 91 (Tenn. Ct. App. 1990).

Pamperin v. Streamline Mfg., Inc., 276 S.W.3d 428, 436 (Tenn. Ct. App. 2008). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. See also, Marla H. v. Knox County, 361 S.W.3d 518, 527, 278 Ed. Law Rep. 1145 (Tenn. Ct. App. 2011), appeal denied, (Oct. 18, 2011); 4215 Harding Road Homeowners Ass'n. v. Harris, 354 S.W.3d 296, 305 (Tenn. Ct. App. 2011), appeal denied, (Aug. 25, 2011) and reconsideration of denial of appeal denied, (Sept. 8, 2011).

Levy v. Franks, 159 S.W.3d 66, 80 (Tenn. Ct. App. 2004). (1) The weight, faith, and credit granted to a witness's testimony in a non-jury case lies first with the trial court, which has the opportunity to observe the witness's manner and demeanor while testifying. (2) Because the trial court is in a far better position than this Court to determine those issues, the credibility accorded at trial will be given great weight on appeal.

Sherrod v. Wix, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992). In nonjury case, absent a transcript or statement of the evidence prepared in accordance with Tenn. R. App. P. 24(c), an appellate court cannot conduct a Tenn. R. App. P. 13(d) de novo review and, therefore, must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings.

[30]Tipton v. Smith, 593 S.W.2d 298 (Tenn. Ct. App. 1979). See also Armstrong v. Pilot Life Ins. Co., 656 S.W.2d 18, 32 (Tenn. Ct. App. 1983).

civil case governed by the "clear and convincing evidence" burden of proof, the appellate court initially reviews the trial court's specific findings of fact in accordance with Tenn. R. App. P. 13(d). Accordingly, the trial court's findings of fact will be presumed to be correct unless the evidence preponderates otherwise. Then the court will determine whether the facts, as found by the trial court, clearly and convincingly establish a grounds for termination and the best interests of the child.[31]

If the appellate court determines that the evidence preponderates against the trial court's findings, it must enter such decree as the law and evidence warrant,[32] where it is practicable to do so.[33]

Halliburton v. Town of Halls, 295 S.W.3d 636 (Tenn. Ct. App. 2008). In a bench tried case, if the trial court fails to make findings of fact, appellate review of these facts is de novo with no presumption of correctness.

[31]In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006). In reviewing a termination of parental rights, an appellate court's duty is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

In re T.M.G., 283 S.W.3d 318, 326–7 (Tenn. Ct. App. 2008). In an action to terminate parental rights, an appellate court must review findings of fact made by the trial court de novo upon the record "accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). To terminate parental rights, the trial court must then determine by *clear and convincing evidence* not only the existence of at least one of the statutory grounds for termination but also that termination is in the child's best interest. In re Valentine, 79 S.W.3d 539, 546 (Tenn. 2002) (citing T.C.A. § 36-1-113(c)). Upon reviewing a termination of parental rights, an appellate court's duty is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

State Dept. of Children's Services v. M.P., 173 S.W.3d 794, 802 (Tenn. Ct. App. 2005). In cases where the clear and convincing burden of proof standard is applicable, Tenn. R. App. P. 13(d)'s customary standard of review has been adapted. First, the appellate court must review the trial court's specific findings of fact de novo in accordance with Tenn. R. App. P. 13(d). Thus, each of the trial court's specific factual findings will be presumed to be correct unless the evidence preponderates otherwise. Second, the appellate court must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for terminating the biological parent's parental rights.

Ray v. Ray, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001).

Estate of Acuff v. O'Linger, 56 S.W.3d 527, 537 (Tenn. Ct. App. 2001). On appeal of a Chancery Court finding in a non jury case that fraud (forgery of signatures on deeds) had been proven by clear, cogent, and convincing evidence, appellate review is de novo and the appellate court must determine whether or not the plaintiffs have proved their case by clear, cogent and convincing evidence. The determinative question under this standard of review is whether or not the plaintiffs have carried the burden to establish that it is "highly probable" that the deeds were forgeries.

In re S.M., 149 S.W.3d 632, 640 (Tenn. Ct. App. 2004). (1) In reviewing the propriety of a trial court's termination of parental rights under T.C.A. § 36-1-113(c)'s clear and convincing evidence standard, an appellate court must adapt Tenn. R. App. P. 13(d)'s customary standard of review for cases of this sort. First we must review the trial court's specific findings of fact de novo in accordance with Tenn. R. App. P. 13(d). Thus, each of the trial court's specific factual findings will be presumed to be correct unless the evidence preponderates otherwise. Second, the Court must determine whether the facts, either as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for terminating the biological parent's parental rights.

[32]Tenn. R. App. P. 36(a) and 13(d).

In Wright v. City of Knoxville, 898 S.W.2d 177, 181 (Tenn. 1995), a case arising

Appellate review of a trial court's application of law to the facts of a particular case and its findings involving mixed questions of law and fact is de novo, with no presumption of correctness.[34]

Formerly, appeals in child custody cases were reviewed on a strictly de novo basis[35] and appeals from workers' compensation cases were

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from a nonjury trial and the Court of Appeals' reversal of the trial court's judgment, the Supreme Court, citing T.C.A. § 27-3-103 and Tenn. R. App. P. 13(d), found upon de novo review that the preponderance of the evidence was contrary to the trial court's and Court of Appeals' allocations of the percentages of fault of the parties under comparative fault analysis. The Supreme Court thereupon modified the trial court's allocation of fault and remanded for execution.

See Hamblen County Educ. Ass'n v. Hamblen County Bd. of Educ., 892 S.W.2d 428, 431, 97 Ed. Law Rep. 958 (Tenn. Ct. App. 1994), citing Tenn. R. App. P. 13(d) (an appeal in a nonjury case requires de novo review, i.e., re-examination of the whole matter of law and fact, and the Court of Appeals is required to render the judgment warranted by the law and the evidence).

Glover v. Hardeman County, 713 S.W.2d 73, 77 (Tenn. Ct. App. 1985). Where an appellate court determines that the evidence preponderates against the damages award given to a plaintiff by a trial judge sitting without a jury, the appellate court can modify the judgment of the trial judge and enter an order increasing the amount of damages.

[33]American Bldgs. Co. v. White, 640 S.W.2d 569, 576 (Tenn. Ct. App. 1982).

First Tennessee Bank Nat. Ass'n v. Hurd Lock & Mfg. Co., a Subsidiary of Avis Indus. Corp., 816 S.W.2d 38, 40 (Tenn. Ct. App. 1991), citing Tenn. R. App. P. 36(a) and T.C.A. § 27-3-125, and distinguishing T.C.A. § 27-3-128. Appellate court may remand on issue of damages following reversal of the trial court's judgment where damages to be assessed are uncertain; and the trial court, upon remand, may reopen proof. The trial court, on remand, is not limited to proof offered at the initial trial.

McClain v. Kimbrough Const. Co., Inc., 806 S.W.2d 194, 201 (Tenn. Ct. App. 1990), is discussed at n. 10.

[34]Larsen-Ball v. Ball, 301 S.W.3d 228, 232 (Tenn. 2010). The construction of a statute and its application to the facts of a case are questions of law, which an appellate court reviews de novo with no presumption of correctness afforded to the lower court's conclusions.

State v. Holmes, 302 S.W.3d 831, 837 (Tenn. 2010). An appellate court reviews mixed questions of law and fact se novo, accompanied by a presumption that the trial court's findings of fact are correct.

See also, Starr v. Hill, 353 S.W.3d 478, 481–482 (Tenn. 2011); Knox County ex rel. Environmental Termite & Pest Control, Inc. v. Arrow Exterminators, Inc., 350 S.W.3d 511 (Tenn. 2011); State v. Hester, 324 S.W.3d 1, 29–30 (Tenn. 2010), cert. denied, 131 S. Ct. 2096, 179 L. Ed. 2d 896 (2011); Foust v. Metcalf, 338 S.W.3d 457, 462 (Tenn. Ct. App. 2010); Crowley v. Thomas, 343 S.W.3d 32 (Tenn. 2011). The application of a statute or the Tennessee Rules of Civil Procedure to the facts of a case is a question of law, which an appellate court reviews de novo.

Cummings Inc. v. Dorgan, 320 S.W.3d 316, 333, 29 I.E.R. Cas. (BNA) 1708 (Tenn. Ct. App. 2009), appeal denied, (June 18, 2010). When a contract is ambiguous and it is necessary to consider extrinsic evidence to properly interpret the contract, the issue becomes a mixed question of law and fact. Therefore, while the underlying facts are reviewed under a de novo standard with a presumption of correctness, the legal conclusion arising from those facts is reviewed de novo, without such a presumption.

See Lance v. York, 359 S.W.3d 197, 201 (Tenn. Ct. App. 2011), appeal denied, (Oct. 18, 2011). While mixed questions of law and fact are reviewed *de novo* with no presumption of correctness, the appellate courts have great latitude to determine whether findings as to mixed questions of fact and law made by the trial court are sustained by probative evidence on appeal.

[35]See Riddick v. Riddick, 497 S.W.2d 740, 742 (Tenn. Ct. App. 1973), citing Smith v. Smith, 188 Tenn. 430, 220 S.W.2d 627 (1949).

determined under the "material evidence" standard.[36] The present general rule, however, is that nonjury child custody, visitation, and support judgments are to be reviewed under the same standards that govern other appeals of nonjury actions, i.e., de novo review upon the trial court's record, accompanied by a presumption of correctness, unless the evidence preponderates otherwise.[37] In 1985, the Tennessee

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[36]See T.C.A. § 50-6-225(e) prior to its amendment by 1985 Tenn. Pub. Acts 393, § 14.

[37](a) General Rule

Hass v. Knighton, 676 S.W.2d 554 (Tenn. 1984), specifically overruling Smith v. Smith, 188 Tenn. 430, 220 S.W.2d 627 (1949), and citing Tenn. R. App. P. 13(d). See also Kilgore v. NHC Healthcare, 134 S.W.3d 153, 156 (Tenn. 2004); Nichols v. Nichols, 792 S.W.2d 713 (Tenn. 1990) (holding modified by, Taylor v. Taylor, 849 S.W.2d 319 (Tenn. 1993)) and (overruled by, Aaby v. Strange, 924 S.W.2d 623 (Tenn. 1996)); Seessel v. Seessel, 748 S.W.2d 422 (Tenn. 1988) (holding modified by, Taylor v. Taylor, 849 S.W.2d 319 (Tenn. 1993)) and (overruled by, Aaby v. Strange, 924 S.W.2d 623 (Tenn. 1996)); Suttles v. Suttles, 748 S.W.2d 427, 429 (Tenn. 1988).

K.B.J. v. T.J., 359 S.W.3d 608, 613 (Tenn. Ct. App. 2011), appeal denied, (Dec. 14, 2011). The trial court's factual findings in a divorce case where the judge is sitting without a jury are reviewed *de novo* with a presumption that they are correct unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d). See also, Lofton v. Lofton, 345 S.W.3d 913, 917 (Tenn. Ct. App. 2008). Where a divorce case was tried by the trial judge sitting without a jury, appellate court review is *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, an appellate court must affirm, absent error of law. See Tenn. R. App. P. 13(d).

Cornelius v. State, Dept. of Children's Services, 314 S.W.3d 902, 906-7 (Tenn. Ct. App. 2009). While the Court of Appeals, pursuant to Tenn. R.App. P. 13(d), reviews a trial court's specific findings of fact in support of its conclusions concerning the ultimate issues, de novo with a presumption of correctness, the Court reviews a trial court's conclusions on the ultimate issues of law as to whether there is clear and convincing evidence that a parent has engaged in severe child abuse and that a child is dependent and neglected, de novo with no presumption of correctness.

Massey v. Casals, 315 S.W.3d 788, 793-4 (Tenn. Ct. App. 2009), appeal denied, (May 12, 2010). In a child support modification case, the trial court's findings of fact are reviewed de novo with a presumption of correctness. On appeal, considerable deference is given to the trial court's determinations of the credibility and weight to be given to witness testimony because the trial court had the opportunity to observe the witnesses' demeanor and hear the in-court testimony."

(b) Child Custody and Visitation

K.B.J. v. T.J., 359 S.W.3d 608, 613 (Tenn. Ct. App. 2011), appeal denied, (Dec. 14, 2011). Because the details of custody and visitation with children are peculiarly within the broad discretion of the trial judge, an appellate court reviews issues of primary custody and parenting time for abuse of discretion.

Marlow v. Parkinson, 236 S.W.3d 744 (Tenn. Ct. App. 2007). An appellate court reviews custody and visitation decisions, including parenting plans and proposals for later amendment, *de novo* with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. Moreover, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. This is because of the broad discretion given trial courts in matters of child custody, visitation and related issues. Appellate courts also general defer to trial court findings as to custody and visitation because these decisions often hinge on subtle factors, such as the parents' demeanor and credibility during the proceedings. Accordingly, Courts of Appeal generally hold that trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case, and it is not the role of the appellate courts to "tweak" parenting plans in the hopes of achieving a more reasonable result than the trial court." This is particularly true when no error is evident from the record. Thus, a trial court's decision regarding custody or visitation will be set aside only when it falls outside the

spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.

In re J.C.D., 254 S.W.3d 432, 439 (Tenn. Ct. App. 2007). In a non-jury case involving termination of parental rights, when a trial court has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded to either as to the trial court's factual findings. The trial court's specific findings of fact are first reviewed and are presumed to be correct unless the evidence preponderates *against* them. The appellate court then determines whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the grounds for terminating the biological parent's parental rights. The trial court's conclusions of law are reviewed *de novo* and are accorded no presumption of correctness.

Earls v. Earls, 42 S.W.3d 877, 885–86 (Tenn. Ct. App. 2000). Appellate review of child custody and visitation determinations is de novo on the record with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise.

Adelsperger v. Adelsperger, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997). Since child custody and visitation decisions often hinge on the parties' credibility, appellate courts are reluctant to second guess trial judges who have observed the witnesses and assessed their credibility. Appellate courts will not disturb custody decisions unless they are based on a material error of law or the evidence preponderates against them.

Bowers v. Bowers, 956 S.W.2d 496, 498 (Tenn. Ct. App. 1997): "Where it is demonstrated that an *existing* joint custody arrangement is not in the best interest of the child, it is appropriate for the Court to alter the custody arrangement established in the original decree. Dalton v. Dalton, 858 S.W.2d 324, 326 (Tenn. Ct. App. 1993)." In the present case, the Court held that the evidence did not preponderate against the trial court's modifying a joint custody order so as to give the father sole custody of the child.

(c) Child Support

Wilson v. Wilson, 43 S.W.3d 495, 496 (Tenn. Ct. App. 2000). Appellate review of a child support order is de novo on the record. The trial court's findings of fact are presumed correct "unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). No presumption of correctness attaches to the trial court's conclusions of law. See Carvell v. Bottoms, 900 S.W.2d 23, 26 (Tenn. 1995).

Berryhill v. Rhodes, 21 S.W.3d 188, 190 (Tenn. 2000). Appellate court review of an award of child support pursuant to Child Support Guidelines is a de novo review of the record with a presumption that the decision of the trial court with respect to the facts is correct unless the evidence preponderates against such factual determinations.

Brooks v. Brooks, 992 S.W.2d 403, 404–405 (Tenn. 1999). (1) In an action seeking modification of child support obligations previously set in a divorce order, the appellate courts generally must review the record of the trial court de novo with the presumption that the decision of the trial court with respect to the facts is correct unless the evidence preponderates against such factual determinations. Farrar v. Farrar, 553 S.W.2d 741, 743 (Tenn. 1977). (2) In this case, however, the trial court made no findings of fact despite the appellant's motion for specific findings of fact and conclusions of law pursuant to Tenn. R. Civ. P. 52.01. The trial court did issue written conclusions of law in response to the motion, but not findings of fact. Both the memorandum and order of the trial court simply concluded, without explanation, that wife was not entitled to an increase in support, that husband shall pay the total private school expense of the parties' minor child, and that each party pay his or her own attorney's fees. Accordingly, there was nothing found as a fact which the appellate court may presume correct. Therefore, under these circumstances, the appellate court must conduct its own independent review of the record to determine where the preponderance of the evidence lies.

(d) Adoption

In re Adoption of M.J.S., 44 S.W.3d 41, 55–56 (Tenn. Ct. App. 2000). Appellate review of the trial court's final decree of adoption is governed by Tenn. R. App. P. 13(d). Under Rule 13(d), an appellate court, in conducting a de novo review of the record, is to presume that the trial court's factual findings are correct, unless the evi-

legislature provided that a trial court's findings of fact in workers' compensation cases, as a general rule, are to be reviewed de novo upon the trial court's record accompanied by a presumption of correctness, unless the evidence preponderates otherwise.[38]

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dence in the record preponderates otherwise.

(e) "Abuse of Discretion" Standard

Eldridge v. Eldridge, 42 S.W.3d 82 (Tenn. 2001). (1) A trial court's child visitation order will not ordinarily be reversed absent some abuse of discretion. (2) In the present case, the Court held that the intermediate "appellate court" erred in failing to give proper deference to the trial court's discretionary ruling ordering unrestricted overnight visitation of child with mother without restrictions prohibiting the presence of the mother's lesbian partner during the overnight visitation. The Court held that the record showed no justification for the Court of Appeals' actions in reversing the trial court's exercise of its discretion, and the Court of Appeals had failed to develop any justification in its opinion.

K.B.J. v. T.J., 359 S.W.3d 608, 615–6 (Tenn. Ct. App. 2011), appeal denied, (Dec. 14, 2011). While the details of child custody and visitation arrangements are generally left to the discretion of the trial court, it is the appellate court's job to review for an abuse of discretion to see that the trial court's order is made with due regard for controlling law and based on the facts proven in the case.

(f) Dependent and neglected

In re Melanie T., 352 S.W.3d 687, 695 (Tenn. Ct. App. 2011), appeal denied, (Aug. 24, 2011). (1) The ultimate issues of whether a child is dependent and neglected and whether a parent, guardian or person has engaged in severe child abuse must be established by clear and convincing evidence. T.C.A. § 37-1-129(c). (2) Whether the ultimate issues of dependency and neglect or severe child abuse have been established by clear and convincing evidence is a question of law, which an appellate court reviews de novo with no presumption of correctness. (3) To the extent the trial court made findings of fact in support of the ultimate issues, the appellate court reviews the factual findings pursuant to Tenn. R. App. P. 13(d): de novo with a presumption of correctness, unless the evidence preponderates otherwise.

(g) Divorce—Alimony

Forbess v. Forbess, 370 S.W.3d 347, 354 (Tenn. Ct. App. 2011), appeal denied, (Apr. 12, 2012). The division of marital property, including its classification and valuation are findings of fact. A trial court's decisions regarding classification, valuation and division of property are reviewed *de novo* with a presumption of correctness unless the evidence preponderates otherwise. A trial court's decisions regarding alimony, however, are reviewed under an abuse of discretion standard

Jekot v. Jekot, 362 S.W.3d 76 (Tenn. Ct. App. 2011), appeal denied, (Mar. 7, 2012). (1) When reviewing a discretionary decision by the trial court, such as an alimony determination, the appellate court should presume that the decision is correct and should review the evidence in the light most favorable to the decision. (2) Appellate courts are generally disinclined to second-guess a trial judge's spousal support decision, absent an abuse of discretion. (3) The role of an appellate court in reviewing an award of spousal support is to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable.

[38](a) General Workers' Compensation Statute

See T.C.A. § 50-6-225(e), as amended by 1985 Tenn. Pub. Acts 393, § 14. In workers' compensation cases, "review of findings of fact by the trial court shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise."

1992 Tenn. Pub. Acts 952 amended T.C.A. § 50-6-225(e) to provide that the Supreme Court may refer workers' compensation cases to a panel known as the "Special Workers' Compensation Appeals Panel," consisting of three judges designated by the Chief Justice, at least two of whom shall be members of the Supreme Court or retired judges. The Act has not altered the standard of review to be used by the Special Workers' Compensation Appeals Panel or by the full Supreme Court if further review is sought.

(b) Workers' Compensation Cases — Generally

Several special rules apply to de novo review in appeals of nonjury

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Cleek v. Wal-Mart Stores, Inc., 19 S.W.3d 770, 773–74 (Tenn. 2000). (1) The extent of vocational disability in a workers' compensation action is a question of fact to be determined from all of the evidence, including lay and expert testimony. (2) Supreme Court review of a trial court's findings in a workers' compensation case is de novo upon the record, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2). Under this standard of review, the Court is required to weigh in more depth factual findings and conclusions of trial judges in workers' compensation cases than under the former material evidence standard of review, where the Court was required to accept the findings of fact of trial courts if those findings are supported by any material evidence. (3) Under the present standard of review, the appellate court in workers' compensation cases is obliged to review the record on its own to determine where the preponderance of the evidence lies. (4) Although deference still must be given to the trial judge when issues of credibility and weight of oral testimony are involved, an appellate court makes its own independent assessment of the medical proof when the medical testimony is presented by deposition.

See also, Davis v. Shelby County Sheriff's Dept., 278 S.W.3d 256, 262, 28 I.E.R. Cas. (BNA) 1783 (Tenn. 2009); Lindsey v. Trinity Communications, Inc., 275 S.W.3d 411, 419 (Tenn. 2009); Cloyd v. Hartco Flooring Co., 274 S.W.3d 638 (Tenn. 2008); Trosper v. Armstrong Wood Products, Inc., 273 S.W.3d 598, 603–4 (Tenn. 2008); Wilhelm v. Krogers, 235 S.W.3d 122 (Tenn. 2007); Interstate Mechanical Contractors, Inc. v. McIntosh, 229 S.W.3d 674, 678–9 (Tenn. 2007); Davidson v. Lewis Bros. Bakery, 227 S.W.3d 17, 19 (Tenn. 2007); Bryant v. Baptist Health System Home Care of East Tennessee, 213 S.W.3d 743, 750 (Tenn. 2006); Eads v. GuideOne Mut. Ins. Co., 197 S.W.3d 737 (Tenn. 2006); Barnett v. Earthworks Unlimited, Inc., 197 S.W.3d 716 (Tenn. 2006) (overruled by, Building Materials Corp. v. Britt, 211 S.W.3d 706 (Tenn. 2007)); Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 532 (Tenn. 2006); Glisson v. Mohon Intern., Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006); Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006); Banks v. United Parcel Service, Inc., 170 S.W.3d 556, 560 (Tenn. 2005); Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Gray v. Cullom Machine, Tool & Die, Inc., 152 S.W.3d 439, 442 (Tenn. 2004); Hickman v. Continental Baking Co., 143 S.W.3d 72, 75 (Tenn. 2004); Galloway v. Liberty Mut. Ins. Co., 137 S.W.3d 568, 570 (Tenn. 2004); Bohanan v. City of Knoxville, 136 S.W.3d 621, 624 (Tenn. 2004); Phillips v. A&H Const. Co., Inc., 134 S.W.3d 145, 149 (Tenn. 2004); Guess v. Sharp Mfg. Co. of America, a Div. of Sharp Electronics Corp., 114 S.W.3d 480 (Tenn. 2003); Martin v. Lear Corp., 90 S.W.3d 626, 629 (Tenn. 2002); Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 732 (Tenn. 2002); Mannery v. Wal-Mart Distribution Center, 69 S.W.3d 193, 196 (Tenn. 2002); Whirlpool Corp. v. Nakhoneinh, 69 S.W.3d 164, 167 (Tenn. 2002); State v. Walls, 62 S.W.3d 119, 121 (Tenn. 2001).

Woodlawn Memorial Park, Inc. v. Keith, 70 S.W.3d 691, 695 (Tenn. 2002). Any issue as to whether an employee's injury arose out of his or her employment, or whether it arose from factors not associated with that employment, is a question of fact. See Mayes v. U.S. Fidelity and Guar. Co., 672 S.W.2d 773, 774 (Tenn. 1984). Accordingly, our standard of review is de novo upon the record, accompanied by a presumption that the factual findings of the trial court are correct, unless the preponderance of the evidence is otherwise. See T.C.A. § 50-6-225(e)(2) (1999).

Gooden v. Coors Technical Ceramic Co., 236 S.W.3d 151 (Tenn. 2007). Whether an injury occurred in the course of employment is generally a question of fact that we review "de novo upon the record of the trial court, with a presumption of correctness given to the trial court's findings of fact, unless the evidence preponderates against it." T.C.A. § 50-6-225(e)(2) (Supp. 2006). However, when there is no material fact in dispute, the question on appeal is one of law and the appropriate review is de novo with no presumption of correctness.

(c) Workers' Compensation Cases Where the Judge Has Seen and Heard Witnesses — Questions of Fact

Davis v. Shelby County Sheriff's Dept., 278 S.W.3d 256, 262, 28 I.E.R. Cas. (BNA) 1783 (Tenn. 2009); Lindsey v. Trinity Communications, Inc., 275 S.W.3d 411, 420–1 (Tenn. 2009); Trosper v. Armstrong Wood Products, Inc., 273 S.W.3d 598, 604 (Tenn. 2008); Anderson v. Westfield Group, 259 S.W.3d 690 (Tenn. 2008); Tryon v.

Saturn Corp., 254 S.W.3d 321 (Tenn. 2008); Crew v. First Source Furniture Group, 259 S.W.3d 656 (Tenn. 2008); Hill v. Eagle Bend Mfg., Inc., 942 S.W.2d 483, 487 (Tenn. 1997). When a trial court in a workers' compensation action has seen and heard witnesses, especially where issues of credibility and weight of oral testimony are involved, considerable deference must be accorded the trial court's factual findings. In accord, Wilhelm v. Krogers, 235 S.W.3d 122 (Tenn. 2007); Interstate Mechanical Contractors, Inc. v. McIntosh, 229 S.W.3d 674, 678-9 (Tenn. 2007); Bryant v. Baptist Health System Home Care of East Tennessee, 213 S.W.3d 743, 750 (Tenn. 2006); Banks v. United Parcel Service, Inc., 170 S.W.3d 556, 560 (Tenn. 2005); Long v. Mid-Tennessee Ford Truck Sales, Inc., 160 S.W.3d 504, 509 (Tenn. 2005), as modified on denial of reh'g, (Apr. 18, 2005); Gray v. Cullom Machine, Tool & Die, Inc., 152 S.W.3d 439, 442 (Tenn. 2004); Clark v. Nashville Machine Elevator Co. Inc., 129 S.W.3d 42, 46 (Tenn. 2004); Moore v. Town of Collierville, 124 S.W.3d 93, 97 (Tenn. 2004); Guess v. Sharp Mfg. Co. of America, a Div. of Sharp Electronics Corp., 114 S.W.3d 480 (Tenn. 2003); Humphrey v. David Witherspoon, Inc., 734 S.W.2d 315, 315–16 (Tenn. 1987); Jones v. Hartford Acc. & Indem. Co., 811 S.W.2d 516, 521 (Tenn. 1991). See also McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999); Long v. Tri-Con Industries, Ltd., 996 S.W.2d 173, 177 (Tenn. 1999). In accord, Woodlawn Memorial Park, Inc. v. Keith, 70 S.W.3d 691, 695 (Tenn. 2002).

C & W Asset Acquisition, LLC v. Oggs, 230 S.W.3d 671, 676 (Tenn. Ct. App. 2007). (1) It is well-settled that a trial court's assessment of witness credibility is entitled to great weight on appeal because the trial court saw and heard the witness testify. The weight, faith and credit to be given to a witness' testimony lies with the trial judge in a non-jury case because the trial judge had an opportunity to observe the manner and demeanor of the witness. (2) An appellate court does "not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary."

Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 732 (Tenn. 2002). When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must extend considerable deference to the trial court's factual findings.

Lang v. Nissan North America, Inc., 170 S.W.3d 564 (Tenn. 2005). Although an appellate court must extend considerable deference to the trial court's factual findings where the trial court has seen and heard witnesses and issues of the credibility or weight of oral testimony are involved, the Supreme Court in workers' compensation cases ultimately conducts an independent review to determine where the preponderance of the evidence lies, see T.C.A. § 50-6-225(e)(2).

(d) Workers' Compensation Cases Heard by Trial Judge on Depositions or Documentary Evidence — Questions of Fact

Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 271 (Tenn. 2009). When the record in a workers' compensation case contains expert medical testimony presented by deposition, the reviewing court may draw its own conclusions with respect to the weight and credibility afforded that documentary evidence.

Crew v. First Source Furniture Group, 259 S.W.3d 656 (Tenn. 2008). In Tennessee workers' compensation cases, if medical testimony is presented by deposition, this Court may make an "independent assessment of the medical proof to determine where the preponderance of the evidence lies."

Lang v. Nissan North America, Inc., 170 S.W.3d 564 (Tenn. 2005). No deference to the trial court is warranted in reviewing documentary proof, such as expert medical testimony presented by deposition, because the appellate court stands in as good a position as the trial court.

Clifton v. Komatsu America Mfg. Corp., 38 S.W.3d 550, 553 (Tenn. 2001). On appeal of a workers' compensation judgment, the appellate court is free to draw its own conclusions concerning the credibility of testimony presented by deposition.

McIlvain v. Russell Stover Candies, Inc., 996 S.W.2d 179, 183 (Tenn. 1999). Where the issues in a workers' compensation action involve expert medical testimony, and all the medical proof is contained in the record by deposition, the Supreme Court may draw its own conclusions about the weight and credibility of that testimony, since it is in the same position as the trial judge. See also Cunningham v. Shelton Sec. Service, Inc., 46 S.W.3d 131, 135 (Tenn. 2001).

Thomas v. Aetna Life & Cas. Co., 812 S.W.2d 278, 283 (Tenn. 1991), held that in a workers' compensation action where medical causation and permanency of injury generally must be established by expert medical testimony, the trial court, in its discretion, may conclude that opinions of certain experts should be accepted over the opinions of other experts. When it does so after seeing and hearing the expert's testimony in person, appellate courts must accord considerable deference to the trial court's findings involving credibility and the weight of the evidence. Where, however, all of the expert testimony is taken by deposition, so that impressions of weight and impressions are drawn from their contents, the "considerable deference" standard is inapplicable and the appellate court, on de novo review, must weigh the deposition evidence in conjunction with lay testimony.

Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 61 (Tenn. 2001). The Supreme Court may draw its own conclusions about the weight and credibility of expert testimony when the medical proof is presented by deposition since the Court is in the same position as the trial judge to evaluate such testimony.

Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 732 (Tenn. 2002). When medical proof is presented by deposition, the reviewing court may draw its own conclusions about the weight and credibility of the expert testimony since it is in the same position as the trial judge for evaluating such evidence.

See also, Wilhelm v. Krogers, 235 S.W.3d 122 (Tenn. 2007); Bryant v. Baptist Health System Home Care of East Tennessee, 213 S.W.3d 743, 750 (Tenn. 2006); Glisson v. Mohon Intern., Inc./Campbell Ray, 185 S.W.3d 348, 353 (Tenn. 2006); Barron v. State, Dept. of Human Services, 184 S.W.3d 219, 221 (Tenn. 2006); Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006); Banks v. United Parcel Service, Inc., 170 S.W.3d 556, 560 (Tenn. 2005); Clark v. Nashville Machine Elevator Co. Inc., 129 S.W.3d 42, 46 (Tenn. 2004).

(e) Workers' Compensation Cases Decided on Questions of Law

Nichols v. Jack Cooper Transport Co., Inc., 318 S.W.3d 354 (Tenn. 2010). In a workers' compensation action, the Supreme Court reviews questions of law de novo with no presumption of correctness.

McCall v. National Health Corp., 100 S.W.3d 209, 211 (Tenn. 2003). Issues of statutory interpretation of the Workers' Compensation Act are reviewed de novo with no presumption of correctness afforded to the trial court. See also, Orrick v. Bestway Trucking, Inc., 184 S.W.3d 211, 216 (Tenn. 2006); Hubble v. Dyer Nursing Home, 188 S.W.3d 525, 532 (Tenn. 2006); Rhodes v. Capital City Ins. Co., 154 S.W.3d 43, 46 (Tenn. 2004); Galloway v. Liberty Mut. Ins. Co., 137 S.W.3d 568, 570 (Tenn. 2004); Valencia v. Freeland and Lemm Const. Co., 108 S.W.3d 239, 241 (Tenn. 2003).

Crew v. First Source Furniture Group, 259 S.W.3d 656 (Tenn. 2008); Parks v. Tennessee Mun. League Risk Management Pool, 974 S.W.2d 677, 678–79 (Tenn. 1998), citing Presley v. Bennett, 860 S.W.2d 857, 858 (Tenn. 1993). Where a question of law is presented in a workers' compensation case, appellate review is de novo without a presumption of correctness. See also Wilhelm v. Krogers, 235 S.W.3d 122 (Tenn. 2007); Interstate Mechanical Contractors, Inc. v. McIntosh, 229 S.W.3d 674, 678–9 (Tenn. 2007); Davidson v. Lewis Bros. Bakery, 227 S.W.3d 17, 19 (Tenn. 2007); Gray v. Cullom Machine, Tool & Die, Inc., 152 S.W.3d 439, 442 (Tenn. 2004); Jefferies v. McKee Foods Corp., 145 S.W.3d 551, 554 (Tenn. 2004); Scales v. City of Oak Ridge, 53 S.W.3d 649, 652 (Tenn. 2001); Ferrell v. Cigna Property & Cas. Ins. Co., 33 S.W.3d 731, 734 (Tenn. 2000); Tucker v. Foamex, L.P., 31 S.W.3d 241, 242 (Tenn. 2000); McCoy v. T.T.C., Illinois Inc., 14 S.W.3d 734, 735 (Tenn. 2000); Smith v. U.S. Pipe & Foundry Co., 14 S.W.3d 739, 742 (Tenn. 2000); Spencer v. Towson Moving and Storage, Inc., 922 S.W.2d 508, 509 (Tenn. 1996).

Ivey v. Trans Global Gas & Oil, 3 S.W.3d 441, 445–46, 84 A.L.R.5th 761 (Tenn. 1999). When a workers' compensation action involves questions of law pertaining to the construction of the workers' compensation statutes and the application of the law to the facts, appellate review in that regard is de novo without a presumption of correctness.

Clevinger v. Burlington Motor Carriers, Inc., 925 S.W.2d 518, 520 (Tenn. 1996), not designated for publication: "[A] workers' compensation case appealed from a summary judgment order is not controlled by the de novo standard of review; rather, the Supreme Court reviews the record without attaching any presumption of correctness

to the trial court's judgment." In accord, McCann v. Hatchett, 19 S.W.3d 218, 219 (Tenn. 2000).

(f) Workers' Compensation Cases Decided on Summary Judgment

Warrick v. Cheatham County Highway Dept., 60 S.W.3d 815, 817 (Tenn. 2001). (1) When summary judgment has been granted in a workers' compensation case, the standard of review is governed by Tenn. R. Civ. P. 56. Downen v. Allstate Ins. Co., 811 S.W.2d 523, 524 (Tenn. 1991). (2) Under Rule 56, a court must "review the record without a presumption of correctness to determine whether the absence of genuine and material factual issues entitle the movant to judgment as a matter of law." Finister v. Humboldt General Hosp., Inc., 970 S.W.2d 435, 437-38 (Tenn. 1998).

Wait v. Travelers Indem. Co. of Illinois, 240 S.W.3d 220, 224 (Tenn. 2007). (1) When a motion for summary judgment has been filed in a worker's compensation, an appellate court must review the evidence in a light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. The standard of review is de novo with no presumption of correctness attached to the trial court's conclusions. (2) In the present case, the plaintiff's counsel, at oral argument before the Supreme Court, conceded that the facts are not in dispute, but maintained that "nuances" from the undisputed facts are in dispute. The Court held that the record on appeal did not reflect that the plaintiff's counsel relied upon these allegedly disputed "nuances" at the hearing before the Chancellor. Additionally, a review of the record convinced the Court that there were no disputes of material facts or "nuances" that precluded the entry of summary judgment.

(g) Workers' Compensation Cases — Causation

Crew v. First Source Furniture Group, 259 S.W.3d 656 (Tenn. 2008). Causation cannot be based upon speculative or conjectural proof, but absolute medical certainty is not required. Reasonable doubt must be resolved in favor of the employee, and if an employee presents medical evidence showing that the employment could or might have been the cause of his or her injury when lay testimony reasonably suggests causation, an award of benefits is appropriate.

Ferrell v. Cigna Property & Cas. Ins. Co., 33 S.W.3d 731, 734 (Tenn. 2000). The burden of proof on the issue of causation, as with every essential element of a claim, lies with the employee.

GAF Bldg. Materials v. George, 47 S.W.3d 430, 432–33 (Tenn. 2001), citing Long v. Tri-Con Industries, Ltd., 996 S.W.2d 173, 177 (Tenn. 1999) and Tindall v. Waring Park Ass'n, 725 S.W.2d 935 (Tenn. 1987). In a workers' compensation case, a trial judge may properly predicate an award on medical testimony to the effect that a given incident "could be" the cause of a claimant's injury, when, from other evidence, it may reasonably be inferred that the incident was in fact the cause of the injury. Where equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may be drawn under Tennessee case law.

Rumsey v. County of Humphreys, 2000 WL 157473 (Tenn. Workers' Comp. Panel 2000). Although causation cannot be based upon speculative or conjectural proof, absolute medical certainty is not required, and any reasonable doubt as to whether an injury "arose out of the employment" is to be resolved in favor of the employee.

Bohanan v. City of Knoxville, 136 S.W.3d 621 (Tenn. 2004). Claimant, a retired city police officer, filed suit seeking workers' compensation benefits, alleging that his job duties caused him to develop hypertension resulting in permanent partial disability. The employee relied on the statutory presumption in T.C.A. § 7-51-201(a)(1), that a law enforcement officer's health impairment caused by hypertension is due to an accidental injury suffered in the course of employment and is therefore compensable, and conceded that if the employer rebutted the presumption by competent medical evidence, there was insufficient evidence establishing a causal relationship between his hypertension and his employment. On appeal, the Supreme Court concluded that the City of Knoxville had rebutted the statutory presumption of causation, and reversed the judgment of the trial court which had allowed compensation. The Court held: (1) To rebut the presumption of causation under T.C.A. § 7-51-201(a)(1), there must be affirmative evidence that there is not a substantial causal connection between the work of the employee so situated and the occurrence upon which the claim for benefits is based. (2) Once the presumption has

cases. First, appellate courts generally give "great weight" and defer to the trial court's determination of the credibility of witnesses, unless there is real, clear, concrete and convincing evidence compelling a contrary conclusion.[39] Second, where a trial judge in a nonjury case has failed to make any findings of fact and/or conclusions of law or to

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been overcome, it disappears, and the employee must then prove causation by a preponderance of the evidence as in any other workers' compensation case.

Glisson v. Mohon Intern., Inc./Campbell Ray, 185 S.W.3d 348, 354 (Tenn. 2006). (1) In resolving the question whether an injury has arisen out of employment in a workers compensation action, causation must be established through medical evidence except in the most obvious cases. (2) Although causation cannot be based upon speculative or conjectural proof, absolute medical certainty is not required, and reasonable doubt must be resolved in favor of the employee. (3) Benefits may be properly awarded to an employee who presents medical evidence showing that the employment could or might have been the cause of his or her injury when lay testimony reasonably suggests causation. (4) In the present case, the medical evidence consisted entirely of the employee's medical records, without any depositions of medical experts or a C-32 medical report. (5) Puruant to T.C.A. § 50-6-235(c)(1)-(2), any party may introduce direct testimony from a treating or examining physician through a written medical report on a form, commonly referred to as a C-32 form, established by the commissioner of labor and workforce development, and these reports shall be admissible at any stage of a workers' compensation claim in lieu of a deposition upon oral examination, including as evidence at trial. (6) The Court noted that proceeding on the medical records alone is a risky and uncertain approach to litigating a workers' compensation case, that relying on medical records may actually be more costly than if the parties had taken medical testimony, and that an appeal probably would have been unnecessary had medical testimony been taken or had a C-32 form been introduced into evidence. (7) In the present case, however, the Court concluded that lay testimony in conjunction with the medical evidence in plaintiff's medical records, was sufficient to establish a causal relationship between the employee's work activities and her back injury.

(h) Trial court adoption of master's findings

Frazier v. Bridgestone/Firestone, Inc., 67 S.W.3d 782, 785 (Tenn. Workers' Comp. Panel 2001). Where a trial court adopts the findings of a special master in a workers compensation case, as the trial court did in the present case, appellate review is de novo without any presumption of correctness.

(i) Trial court's failure to make findings of fact

Hickman v. Continental Baking Co., 143 S.W.3d 72, 75 (Tenn. 2004). When a trial court in a worker's compensation action has failed to make findings of fact explaining how it arrived at a vocational disability award, there is nothing upon which a presumption of correctness can attach, and the standard of appellate review is de novo with no presumption of correctness as to the trial court's determination of vocational disability, and the court must review the record to determine the preponderance of the evidence.

Barron v. State, Dept. of Human Services, 184 S.W.3d 219, 222 n.1 (Tenn. 2006). To prevent additional proceedings and undue delay in a workers compensation action, a trial court should make appropriate findings of fact and alternative findings necessary for appellate review.

[39](a) General Rule

Morrison v. Allen, 338 S.W.3d 417 (Tenn. 2011). When credibility and weight to be given testimony are involved, considerable deference must be afforded to the trial court when the trial judge had the opportunity to observe the witness' demeanor and to hear in-court testimony. Because trial courts are able to observe the witnesses, assess their demeanor, and evaluate other indicators of credibility, an assessment of credibility will not be overturned on appeal absent clear and convincing evidence to the contrary. See also, Allstate Ins. Co. v. Tarrant, 363 S.W.3d 508 (Tenn. 2012); 4215 Harding Road Homeowners Ass'n. v. Harris, 354 S.W.3d 296, 305 (Tenn. Ct. App. 2011), appeal denied, (Aug. 25, 2011) and reconsideration of denial of appeal denied, (Sept. 8, 2011); In re Melanie T., 352 S.W.3d 687, 702 (Tenn. Ct. App. 2011), appeal denied, (Aug. 24, 2011); Lofton v. Lofton, 345 S.W.3d 913, 917 (Tenn. Ct. App.

2008); Hughes v. Metropolitan Government of Nashville and Davidson County, 340 S.W.3d 352 (Tenn. 2011); James v. James, 344 S.W.3d 915, 919 (Tenn. Ct. App. 2010), appeal denied, (Mar. 9, 2011); Andrews v. Andrews, 344 S.W.3d 321 (Tenn. Ct. App. 2010), appeal denied, (Mar. 9, 2011).

Snodgrass v. Snodgrass, 295 S.W.3d 240 (Tenn. 2009). In a divorce action, an appellate court gives great weight to a trial court's decisions regarding the division of marital assets, and will not disturb the trial court's ruling unless the distribution lacks proper evidentiary support, misapplies statutory requirements or procedures, or results in some error of law. As to a trial court's findings of fact, an appellate court reviews the record de novo with a presumption of correctness, and must honor those findings unless there is evidence which preponderates to the contrary. An appellate court, however, accords no presumption of correctness to the trial court's conclusions of law.

Randolph v. Randolph, 937 S.W.2d 815, 819 (Tenn. 1996). As the trial judge in a nonjury case is in a better position to weigh and evaluate the credibility of the witnesses who testify orally, appellate courts give great weight to the trial judge's findings on issues involving credibility of witnesses on de novo appellate review. See also Walton v. Young, 950 S.W.2d 956, 959-60 (Tenn. 1997).

Reeves v. Olsen, 691 S.W.2d 527, 531 (Tenn. 1985): "Even though our review is de novo upon the record, the opinion of the chancellor on fact questions is entitled to great weight on appeal, where he saw the witnesses face to face." See also Clarendon v. Baptist Memorial Hosp., 796 S.W.2d 685, 689 (Tenn. 1990); Tenn-Tex Properties v. Brownell-Electro, Inc., 778 S.W.2d 423, 425 (Tenn. 1989).

(b) Cases Involving Documentary Proof and Depositions

Board of Professional Responsibility v. Curry, 266 S.W.3d 379, n.20 (Tenn. 2008). When evidence is presented though a deposition, the appellate courts are just as able to judge the witness's credibility as the trial court.

Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783–84, 141 Ed. Law Rep. 933 (Tenn. 1999). (1) Where a chancellor has permitted, and personally observes witnesses as they testify, thereby allowing the chancellor to assess their demeanor and evaluate their credibility, the chancellor is in the most favorable position to resolve factual disputes hinging on credibility determinations. Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. (2) In contrast, when a chancellor's findings are based upon documentary proof, such as depositions or other forms of testimony presented to the trial court in a "cold" record, appellate courts may make an independent assessment of the credibility of the documentary proof it reviews, without affording deference to the trial court's findings. This rule is premised on the fact that appellate courts are in just as good a position as the trial court to judge the credibility of witnesses who provided the proof. (3) Where a chancellor has heard live testimony from the witnesses offered by only one party and the other party, who had an opportunity to provide live testimony, has chosen to rely on the administrative record being reviewed, the appellate court must afford strict deference only to the chancellor's credibility assessments of the witnesses it actually observed, absent clear and convincing evidence to the contrary, and not to its credibility findings based upon to the administrative record it considered. The appellate court may make its own independent review of the latter issues.

Bohanan v. City of Knoxville, 136 S.W.3d 621 (Tenn. 2004). Where the issues involve expert medical testimony and all the medical proof is contained in the record by deposition, then an appellate court may draw its own conclusions about the weight and credibility of that testimony, since it is in the same position as the trial judge.

Parish v. Kemp, 308 S.W.3d 884 (Tenn. Ct. App. 2008). Where the trial court has assessed documentary evidence, an appellate court will generally draw its own conclusions regarding credibility without deferring to the trial court's judgment. In the unique circumstances here, however, where the same judge who issued the opinion upon remand conducted the earlier jury trial which is the subject of the appellate record; this Court reversed this case on its first appeal only because of an erroneous jury instruction, and the parties stipulated that the proof on remand was precisely what the trial judge heard during the first trial. Although the trial court reviewed transcripts and depositions upon remand, it heard the witnesses testify during the

give any explanation as to the rationale behind its judgment,[40] there is nothing in the record upon which the presumption of correctness can attach; accordingly, appellate review is by de novo review of the record without any presumption of correctness.[41] Alternatively, the

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parties' first trial and has first-hand impressions regarding weight and credibility. Because the trial judge was, therefore, in the best position to evaluate witness credibility, we will not reevaluate his credibility assessments absent clear and convincing evidence.

Estate of Fetterman ex rel. Fetterman v. King, 206 S.W.3d 436, 445 (Tenn. Ct. App. 2006). In a non jury case, no presumption regarding credibility attaches when the testimony is admitted via deposition. In that case, an appellate court may draw its own conclusions about the weight and credibility to be given to expert testimony when all of the medical proof is by deposition.

See Reed v. Alamo Rent-A-Car, Inc., 4 S.W.3d 677, 683, 15 I.E.R. Cas. (BNA) 273, 138 Lab. Cas. (CCH) P 58663 (Tenn. Ct. App. 1999). While recognizing that the trial court is in the best position to judge the credibility of the witnesses and that, when the court resolves a conflict in testimony in favor of a party, such a determination is "binding on the appellate court unless from other real evidence the appellate court is compelled to conclude to the contrary," the Court held that an appellate court is not bound by a trial judge's findings when the evidence is not disputed. See also, Mid-Century Ins. Co. v. Williams, 174 S.W.3d 230 (Tenn. Ct. App. 2005).

(c) Videotaped Trial Proceedings

See Mitchell v. Archibald, 971 S.W.2d 25, 29–30 (Tenn. Ct. App. 1998). The principle of appellate review that trial courts are best situated to determine the credibility of the witnesses and to resolve factual disputes hinging on credibility determinations applies in nonjury cases where trial proceedings have been videotaped, pursuant to Tenn. S. Ct. R. 26, unless there is concrete, clear, and convincing evidence to the contrary. At n. 7, the Court stated: "Our decision not to expand the appellate court's existing role in weighing and determining witness credibility does not mean that videotape records cannot be used either to point out other errors in the trial proceedings, see Deemer v. Finger, 817 S.W.2d 435, 436–37 (Ky. 1990), or to provide concrete, clear, and convincing evidence that a trial court's conclusions regarding a witness's credibility were erroneous."

[40]Goodman v. Memphis Park Com'n, 851 S.W.2d 165, 166 (Tenn. Ct. App. 1992).

[41]Goodman v. Memphis Park Com'n, 851 S.W.2d 165, 166 (Tenn. Ct. App. 1992), citing Kelly v. Kelly, 679 S.W.2d 458 (Tenn. Ct. App. 1984) (where a trial judge in a nonjury case makes no findings of fact, there is nothing in the appellate record upon which the presumption of correctness contained in Tenn. R. App. P. 13(d) can attach; accordingly, the appellate court will review the record de novo, without a presumption of correctness). See also, Rogers v. Louisville Land Co., 367 S.W.3d 196 (Tenn. 2012); 4215 Harding Road Homeowners Ass'n. v. Harris, 354 S.W.3d 296, 305 (Tenn. Ct. App. 2011), appeal denied, (Aug. 25, 2011) and reconsideration of denial of appeal denied, (Sept. 8, 2011); Marla H. v. Knox County, 361 S.W.3d 518, 527, 278 Ed. Law Rep. 1145 (Tenn. Ct. App. 2011), appeal denied, (Oct. 18, 2011); Mid-South Industries, Inc. v. Martin Mach. & Tool, Inc., 342 S.W.3d 19, 25 (Tenn. Ct. App. 2010), appeal denied, (Oct. 12, 2010); Foust v. Metcalf, 338 S.W.3d 457, 462 (Tenn. Ct. App. 2010); Forrest Const. Co., LLC v. Laughlin, 337 S.W.3d 211, 220 (Tenn. Ct. App. 2009), appeal denied, (June 18, 2010); Holt v. Wilmoth, 336 S.W.3d 234, 240 n.11 (Tenn. Ct. App. 2010), appeal denied, (Nov. 17, 2010); McKenzie Banking Co. v. Couch, 332 S.W.3d 349, 350 (Tenn. Ct. App. 2010), appeal denied, (Sept. 23, 2010); Nashville Ford Tractor, Inc. v. Great American Ins. Co., 194 S.W.3d 415, 424 (Tenn. Ct. App. 2005); Boles v. National Development Co., Inc., 175 S.W.3d 226, 232 (Tenn. Ct. App. 2005); Hardcastle v. Harris, 170 S.W.3d 67, 79, Blue Sky L. Rep. (CCH) P 74515 (Tenn. Ct. App. 2004); Kesterson v. Varner, 172 S.W.3d 556, 566 (Tenn. Ct. App. 2005); Eldridge v. Eldridge, 137 S.W.3d 1, 17 (Tenn. Ct. App. 2002); Davis v. Davis, 138 S.W.3d 886, 888 (Tenn. Ct. App. 2003).

Mann v. Mann, 299 S.W.3d 69, 71 (Tenn. Ct. App. 2009). Where the trial court in a non jury case does not make findings of fact, there is no presumption of correctness, an appellate court must conduct our own independent review of the record to

appellate court may remand the case to the trial court written and specific findings of fact.[42]

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determine where the preponderance of the evidence lies.

Adkins v. Bluegrass Estates, Inc., 360 S.W.3d 404, 415 (Tenn. Ct. App. 2011), appeal denied, (Dec. 14, 2011). (1) A trial judge in a non jury case has met its responsibility to make findings of fact and conclusions of law as required in Tenn. R. Civ. P. 52.01 where its findings as a whole cover all relevant facts necessary to a determination of the case. (2) Even if a trial judge in a non jury case has failed to meet its responsibility to make findings of fact and conclusions of law as required in Tenn. R. Civ. P. 52.01, its refusal to make requested findings is not reversible error where the record furnishes the party challenging the judgment with all the information needed to challenge the judgment. Tenn. R. App. P. 36(b).

Spann v. American Exp. Travel Related Services Co., Inc., 224 S.W.3d 698, 706–7 (Tenn. Ct. App. 2006). If a trial court in a bench trial has not made a specific finding of fact on a particular matter, an appellate court will review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness.

Elliott v. Elliott, 149 S.W.3d 77, 83 (Tenn. Ct. App. 2004). If the trial judge in a bench trial has not made a specific finding of fact on a particular matter, the appellate court will review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness.

Fields v. State, 40 S.W.3d 450, n.5 (Tenn. 2001). (1) While appellate courts generally do not review the facts in the record under a purely de novo standard without according any deference to the trial court, a purely de novo standard of review is applicable to determine where the preponderance of the evidence lies when the trial judge had failed to make specific findings of fact. (2) Outside of this context, appellate courts may review a trial court's factual findings according to a purely de novo standard only in very limited circumstances. E.g., it has been held that findings of fact at a suppression hearing are reviewed under a purely de novo standard when the only evidence considered by the trial court was that of a videotape; and findings of fact in workers' compensation cases may be reviewed under a purely de novo standard when all of the medical proof was taken by deposition or was documentary, so that all impressions of weight and credibility must be drawn from the contents thereof, and not from the appearance of witnesses on oral testimony at trial.

Crabtree v. Crabtree, 16 S.W.3d 356, 360 (Tenn. 2000). When a trial judge in a divorce action has stated that it has considered the entire record prior to its ruling, but the judge has not recited its findings of fact with regard to the factors set forth at T.C.A. § 36-5-101(d)(1)(A)-(L), there are no findings of fact that an appellate court may presume to be correct. In that case, the appellate court must conduct its own independent review of the record to determine where the preponderance of the evidence lies. See also Burlew v. Burlew, 40 S.W.3d 465, 470 (Tenn. 2001).

State v. Walton, 958 S.W.2d 724, 728 (Tenn. 1997). Trial court's sentencing decisions are reviewed de novo without a presumption of correctness where the trial court has not placed in the record the findings of fact relied upon for its decisions.

See also, Kendrick v. Shoemake, 90 S.W.3d 566 (Tenn. 2002); In re Valentine, 79 S.W.3d 539, 546 (Tenn. 2002); Mayes v. LeMonte, 122 S.W.3d 142, 145 (Tenn. Ct. App. 2003); Devorak v. Patterson, 907 S.W.2d 815, 818 (Tenn. Ct. App. 1995).

See however, Richards v. Liberty Mut. Ins. Co., 70 S.W.3d 729, 732 (Tenn. 2002). In this workers compensation action, the Court held that because there is no requirement that a trial court make express findings of fact regarding a witness's credibility, the absence of such findings does not alter the applicable standard of review. Indeed, the trial court's findings with respect to credibility and the weight of the evidence, as in the present case, generally may be inferred from the manner in which the trial court resolves conflicts in the testimony and decides the case. See Tobitt v. Bridgestone/Firestone, Inc., 59 S.W.3d 57, 62 (Tenn. 2001).

[42]Nelson v. Nelson, 66 S.W.3d 896 (Tenn. Ct. App. 2001). Trial court's awarding custody to father without making specific findings of fact regarding wife's allegations of abuse by husband required vacation of trial court's custody order and remand to the trial Court to make a written finding of all evidence and specific findings of fact regarding Wife's allegations of abuse by Husband, particularly the allegations of

Where a trial court sitting without a jury and the Court of Appeals concur in their respective findings of fact which are supported by material evidence, these findings are conclusive on the Supreme Court.[43] However, the Supreme Court is not bound by (a) concurrently found inferences not justifiably drawn from the facts;[44] (b) concurrent findings where the trial court has failed to make specific findings of fact;[45] nor (c) concurrent findings as to questions of law or mixed questions of law and fact.[46] Also, the Supreme Court is not bound by the concur-

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abuse occurring in the presence of the Children.

[43]T.C.A. § 27-1-113. See Junot v. Estate of Gilliam, 759 S.W.2d 654, 657 (Tenn. 1988); Burleson v. McCrary, 753 S.W.2d 349 (Tenn. 1988); Quality Care Nursing Services, Inc. v. Coleman, 728 S.W.2d 1, 3 (Tenn. 1987). Justice Drowota, dissenting in Kennedy v. City of Spring City, 780 S.W.2d 164, 166–67 (Tenn. 1989) (overruled by, Haynes v. Hamilton County, 883 S.W.2d 606 (Tenn. 1994)), reviewed the "concurrent finding" rule and took exception to the majority opinion's failure to explain why the concurrent findings of the trial court and the Court of Appeals were not binding on the Supreme Court when there was material "evidence to support" the concurrent findings.

Cary v. Cary, 937 S.W.2d 777, 782 (Tenn. 1996). The Supreme Court noted that "the lower courts made concurrent findings of fact, by which we are bound, that the agreement was entered into freely and knowledgeably, without duress, or undue influence. T.C.A. § 27-1-113 (1980 Repl.)."

[44]T.C.A. § 27-1-113 (the general rule only applies "if there be any evidence to support" the concurrent findings of the trial and appellate court); Conaway v. New York Life Ins. Co., 171 Tenn. 290, 102 S.W.2d 66 (1937); Brown v. Timmons, 110 Tenn. 148, 72 S.W. 958 (1903).

Consider Higgins v. Oil, Chemical and Atomic Workers Intern. Union, Local No. 3-677, 811 S.W.2d 875, 878–79, 122 Lab. Cas. (CCH) P 56999 (Tenn. 1991). Trial court's and intermediate appellate court's concurrent findings of breach of contract were reversed where the Supreme Court concluded that the proof unequivocally showed that an enforceable contract never came into existence.

[45]John P. Saad & Sons, Inc. v. Nashville Thermal Transfer Corp., 715 S.W.2d 41, 45 (Tenn. 1986); Arnold v. Hayslett, 655 S.W.2d 941, 944, 13 Ed. Law Rep. 566 (Tenn. 1983) (abrogated on other grounds by, McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992)); Uhlhorn v. Keltner, 637 S.W.2d 844, 851 (Tenn. 1982); Continental Bankers Life Ins. Co. of the South v. Bank of Alamo, 578 S.W.2d 625, 26 U.C.C. Rep. Serv. 1170 (Tenn. 1979); City of Columbia v. C.F.W. Const. Co., 557 S.W.2d 734 (Tenn. 1977).

Keyt v. Keyt, 244 S.W.3d 321, 332 n.14 (Tenn. 2007). The rule that an appellate court is bound by the "concurrent" factual findings of the trial court and the Court of Appeals as to the extent and value of the marital estate was not applicable in the present case because the concurrent finding statute applies only when the Court of Appeals has filed written findings of fact pursuant to that section, and none appear in this case.

[46]Reeves v. Granite State Ins. Co., 36 S.W.3d 58, 60 (Tenn. 2001) (where the only issue for appellate review is purely a question of law, appellate review is de novo with no presumption of correctness given the judgments of either the trial court or the Court of Appeals).

Tibbals Flooring Co. v. Huddleston, 891 S.W.2d 196, 198 (Tenn. 1994), citing Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993). When there is no conflict in the evidence as to any material fact, the question on appeal is one of law, and the Supreme Court's review of a Court of Appeals opinion is de novo with no presumption of correctness accompanying the conclusions of law of the Court of Appeals.

Aaron v. Aaron, 909 S.W.2d 408, 410 (Tenn. 1995). In cases tried without a jury, the rule that concurrent findings of fact are binding on the reviewing court if supported by any material evidence does not apply to questions of law or mixed questions of law and fact. Thus, mixed questions of law and fact are subject to review

rent finding rule where the courts below have completely overlooked material undisputed facts.[47] In these situations, the Supreme Court must make its own findings of fact upon a de novo review of the record with a presumption that the circuit court's judgment was correct unless the evidence preponderates against it;[48] and it must reach its own conclusions of law.[49]

If the trial judge in a nonjury case and the Court of Appeals differ in their findings of fact, general de novo review standards are applied by the Supreme Court.[50] Further, if the Court of Appeals has pretermitted an issue decided by the trial court, general de novo review standards are applicable in the Supreme Court.[51]

With certain exceptions, findings of fact by a jury in circuit court actions where the jury's verdict has been approved by the trial judge may be set aside only if there is no material evidence to support the verdict.[52] In reviewing a judgment based upon a jury verdict, an appellate court is not at liberty to weigh the evidence or to decide where

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without a presumption of correctness, and the reviewing court has great latitude to determine whether findings as to mixed questions of fact and law made by the trial court are sustained by probative evidence on appeal.

[47]Thomasson v. Thomasson, 755 S.W.2d 779, 786 (Tenn. 1988).

[48]Faught v. Estate of Faught, 730 S.W.2d 323, 324 n.1 (Tenn. 1987); John P. Saad & Sons, Inc. v. Nashville Thermal Transfer Corp., 715 S.W.2d 41, 45 (Tenn. 1986); Arnold v. Hayslett, 655 S.W.2d 941, 13 Ed. Law Rep. 566 (Tenn. 1983) (abrogated on other grounds by, McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992)); Uhlhorn v. Keltner, 637 S.W.2d 844, 851 (Tenn. 1982); City of Mason v. Banks, 581 S.W.2d 621 (Tenn. 1979); City of Columbia v. C.F.W. Const. Co., 557 S.W.2d 734 (Tenn. 1977). See also Staples v. CBL & Associates, Inc., 15 S.W.3d 83, 88 (Tenn. 2000).

[49]Maryville Lumber Co. v. Robinson, 216 Tenn. 184, 391 S.W.2d 624 (1965). See also Arnold v. Hayslett, 655 S.W.2d 941, 13 Ed. Law Rep. 566 (Tenn. 1983) (abrogated on other grounds by, McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992)).

[50]T.C.A. § 27-1-113.

Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 142, 82 Ed. Law Rep. 991 (Tenn. 1993), citing Tenn. R. App. P. 13(d) and T.C.A. § 27-1-113. Where there has been no concurrence by the trial court and the Court of Appeals, the Supreme Court conducts a de novo review of the record, accompanied by a presumption of correctness of the trial court's findings unless the preponderance of the evidence is otherwise.

In Wright v. City of Knoxville, 898 S.W.2d 177, 181 (Tenn. 1995), a case arising from a nonjury trial and the Court of Appeals' reversal of the trial court's judgment, the Supreme Court, citing T.C.A. § 27-3-103 and Tenn. R. App. P. 13(d), found, upon de novo review, that the preponderance of the evidence was contrary to the trial court's and Court of Appeals' allocations of the percentages of fault of the parties under comparative fault analysis. The Supreme Court thereupon modified the trial court's allocation of fault and remanded for execution.

[51]Dyersburg Mach. Works, Inc. v. Rentenbach Engineering Co., 650 S.W.2d 378, 381 (Tenn. 1983), citing Tenn. R. App. P. 13(d) and 36.

[52]Tenn. R. App. P. 13(d), second sentence; Crabtree Masonry Co., Inc. v. C & R Const., Inc., 575 S.W.2d 4 (Tenn. 1978); D. M. Rose & Co. v. Snyder, 185 Tenn. 499, 206 S.W.2d 897 (1947). See also Watson v. Payne, 359 S.W.3d 166, 168 (Tenn. Ct. App. 2011), appeal denied, (July 15, 2011); Advanced Photographic Solutions, LLC v. National Studios, Inc., 352 S.W.3d 431, 442 (Tenn. Ct. App. 2011), appeal denied, (July 13, 2011); Cooper v. Tabb, 347 S.W.3d 207, 217 (Tenn. Ct. App. 2010), appeal denied, (May 25, 2011); Usher v. Charles Blalock & Sons, Inc., 339 S.W.3d 45 (Tenn. Ct. App. 2010), appeal denied, (Feb. 17, 2011); Clemons v. Cowan, 324 S.W.3d 528 (Tenn. Ct. App. 2010), appeal denied, (Aug. 25, 2010); Goff v. Elmo Greer & Sons Const. Co., Inc., 297 S.W.3d 175, 70 Env't. Rep. Cas. (BNA) 2137 (Tenn. 2009), cert.

the preponderance lies.[53] In determining whether there is material evidence to support the verdict, the appellate court is required to take the strongest legitimate view of all the evidence in favor of the verdict, to assume the truth of all that tends to support it, allowing all reasonable inferences to sustain the verdict, and to discard all to the contrary.[54] Having thus examined the record, if there be any material

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denied, 130 S. Ct. 1910, 176 L. Ed. 2d 367, 71 Env't. Rep. Cas. (BNA) 1704 (2010); Creech v. Addington, 281 S.W.3d 363, 372 (Tenn. 2009); Whaley v. Perkins, 197 S.W.3d 665 (Tenn. 2006); Parish v. Kemp, 179 S.W.3d 524, 531 (Tenn. Ct. App. 2005). Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." Tenn. R. App. P. 13(d) (2004); McPeek v. Lockhart, 174 S.W.3d 751, 754 (Tenn. Ct. App. 2005); Forrester v. Stockstill, 869 S.W.2d 328, 329–30, 9 I.E.R. Cas. (BNA) 184 (Tenn. 1994), citing Tenn. R. App. P. 13(d) and Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 898, 7 I.E.R. Cas. (BNA) 650, 123 Lab. Cas. (CCH) P 57150 (Tenn. 1992).

Barnes v. Goodyear Tire and Rubber Co., 48 S.W.3d 698, 704–705, 10 A.D. Cas. (BNA) 1088 (Tenn. 2000) (abrogated by, Gossett v. Tractor Supply Co., Inc., 320 S.W.3d 777, 31 I.E.R. Cas. (BNA) 437 (Tenn. 2010)), citing Crabtree Masonry Co., Inc. v. C & R Const., Inc., 575 S.W.2d 4, 5 (Tenn. 1978). (1) The standard of appellate review when reviewing a jury verdict approved by a trial court is whether there is any material evidence to support the verdict. Tenn. R. App. P. 13(d). (2) When addressing whether there is material evidence to support a verdict, an appellate court shall: (a) take the strongest legitimate view of all the evidence in favor of the verdict; (b) assume the truth of all evidence that supports the verdict; (c) allow all reasonable inferences to sustain the verdict; and (d) discard all countervailing evidence. (3) Appellate courts shall neither re-weigh the evidence, nor decide where the preponderance of the evidence lies. (4) If the record contains any material evidence to support the verdict, the jury's findings must be affirmed; if it were otherwise, the parties would be deprived of their constitutional right to trial by jury.

Davidson v. Lindsey, 104 S.W.3d 483, 493 (Tenn. 2003). Jury's apportionment of fault, approved by the trial court, was not reversible upon appeal as it was not clearly erroneous and was supported by material evidence. See Tenn. R. App. P. 13(d); Cross v. City of Memphis, 20 S.W.3d 642, 644-45 (Tenn. 2000).

[53]Barnes v. Goodyear Tire and Rubber Co., 48 S.W.3d 698, 704-5, 10 A.D. Cas. (BNA) 1088 (Tenn. 2000) (abrogated by, Gossett v. Tractor Supply Co., Inc., 320 S.W.3d 777, 31 I.E.R. Cas. (BNA) 437 (Tenn. 2010)).

See also, Watson v. Payne, 359 S.W.3d 166, 168 (Tenn. Ct. App. 2011), appeal denied, (July 15, 2011); Advanced Photographic Solutions, LLC v. National Studios, Inc., 352 S.W.3d 431, 442 (Tenn. Ct. App. 2011), appeal denied, (July 13, 2011); Usher v. Charles Blalock & Sons, Inc., 339 S.W.3d 45 (Tenn. Ct. App. 2010), appeal denied, (Feb. 17, 2011); Clemons v. Cowan, 324 S.W.3d 528 (Tenn. Ct. App. 2010), appeal denied, (Aug. 25, 2010); Creech v. Addington, 281 S.W.3d 363, 372 (Tenn. 2009); Whaley v. Perkins, 197 S.W.3d 665 (Tenn. 2006); White v. Premier Medical Group, 254 S.W.3d 411, 417 (Tenn. Ct. App. 2007); VanBebber v. Roach, 252 S.W.3d 279, 283 (Tenn. Ct. App. 2007); Alley v. McLain's Inc. Lumber and Const., 182 S.W.3d 312, 316 (Tenn. Ct. App. 2005); McPeek v. Lockhart, 174 S.W.3d 751, 754-5 (Tenn. Ct. App. 2005); Ginn v. American Heritage Life Ins. Co., 173 S.W.3d 433, 440 (Tenn. Ct. App. 2004); Braswell v. Lowe's Home Centers, Inc., 173 S.W.3d 41, 42-3 (Tenn. Ct. App. 2005); Anderson v. American Limestone Co., Inc., 168 S.W.3d 757, 760-2 (Tenn. Ct. App. 2004); Bronson v. Umphries, 138 S.W.3d 844, 850 (Tenn. Ct. App. 2003); Patterson-Khoury v. Wilson World Hotel-Cherry Road, Inc., 139 S.W.3d 281, 286 (Tenn. Ct. App. 2003).

[54]Marshall v. Cintas Corp., Inc., 255 S.W.3d 60, 71 (Tenn. Ct. App. 2007); Bronson v. Umphries, 138 S.W.3d 844, 850 (Tenn. Ct. App. 2003).

See also, Creech v. Addington, 281 S.W.3d 363, 372 (Tenn. 2009); State v. Hanson, 279 S.W.3d 265, 282 (Tenn. 2009); Whaley v. Perkins, 197 S.W.3d 665 (Tenn. 2006); Watson v. Payne, 359 S.W.3d 166, 168 (Tenn. Ct. App. 2011), appeal denied, (July 15, 2011); Advanced Photographic Solutions, LLC v. National Studios, Inc., 352 S.W.3d 431, 442 (Tenn. Ct. App. 2011), appeal denied, (July 13, 2011); Alley v.

evidence to support the verdict, it must be affirmed; if it were otherwise, the parties would be deprived of their constitutional right to trial by jury.[55] The material evidence contemplated by this Rule must be credible.[56] Under this rule, the courts frequently state that an assignment of error that a jury verdict is contrary to the weight and preponderance of the evidence is improper.[57] Similarly, an assignment of error that "the trial judge acting as the thirteenth juror" should have set aside the jury's verdict is improper.[58] This rule, however,

McLain's Inc. Lumber and Const., 182 S.W.3d 312, 316 (Tenn. Ct. App. 2005); McPeek v. Lockhart, 174 S.W.3d 751, 754-5 (Tenn. Ct. App. 2005); Ginn v. American Heritage Life Ins. Co., 173 S.W.3d 433, 440 (Tenn. Ct. App. 2004); Anderson v. American Limestone Co., Inc., 168 S.W.3d 757, 760 (Tenn. Ct. App. 2004).

[55]Bronson v. Umphries, 138 S.W.3d 844, 850 (Tenn. Ct. App. 2003).

See also, Advanced Photographic Solutions, LLC v. National Studios, Inc., 352 S.W.3d 431, 442 (Tenn. Ct. App. 2011), appeal denied, (July 13, 2011); Usher v. Charles Blalock & Sons, Inc., 339 S.W.3d 45 (Tenn. Ct. App. 2010), appeal denied, (Feb. 17, 2011); Whaley v. Perkins, 197 S.W.3d 665 (Tenn. 2006); Alley v. McLain's Inc. Lumber and Const., 182 S.W.3d 312, 316 (Tenn. Ct. App. 2005); McPeek v. Lockhart, 174 S.W.3d 751, 754-5 (Tenn. Ct. App. 2005); Anderson v. American Limestone Co., Inc., 168 S.W.3d 757, 762 (Tenn. Ct. App. 2004).

Braswell v. Lowe's Home Centers, Inc., 173 S.W.3d 41, 42-3 (Tenn. Ct. App. 2005). Challenging a jury's allocation of fault is the legal equivalent of a "Hail Mary" pass. The comparison and allocation of fault is for the jury, and an appellate court will not second-guess a jury's allocation of fault if it is supported by any material evidence.

[56]Lowe v. Preferred Truck Leasing, Inc., 528 S.W.2d 38 (Tenn. Ct. App. 1975). See also Nelms v. Tennessee Farmers Mut. Ins. Co., 613 S.W.2d 481, 483 (Tenn. Ct. App. 1978).

Alexander v. Armentrout, 24 S.W.3d 267 (Tenn. 2000). An issue of witness credibility falls within the province of the jury.

[57]See, e.g., Goodale v. Langenberg, 243 S.W.3d 575, 581 (Tenn. Ct. App. 2007); Shelby County v. Barden, 527 S.W.2d 124, 131 (Tenn. 1975); Bradley v. Triangle Amoco, Inc., 859 S.W.2d 333, 335 (Tenn. Ct. App. 1993).

See England v. Burns Stone Co., Inc., 874 S.W.2d 32, 38 (Tenn. Ct. App. 1993) (assignment of error that jury verdict, approved by the trial judge, is against the evidence or contrary to the law and the evidence is not proper for consideration by the Court of Appeals).

Loeffler v. Kjellgren, 884 S.W.2d 463, 469, 73 Fair Empl. Prac. Cas. (BNA) 1325 (Tenn. Ct. App. 1994). On appeal from a jury verdict affirmed by the trial judge, the court does not weigh the evidence. An assignment of error that the evidence clearly preponderates against the jury's verdict and that the trial judge, therefore, as thirteenth juror should have granted a new trial is improper.

Harper v. Churn, 83 S.W.3d 142, 144 (Tenn. Ct. App. 2001). On an appeal from a jury verdict, and appellate court does not determine the credibility of witnesses or weigh the evidence.

[58]Grissom v. Metropolitan Government of Nashville, Davidson County, 817 S.W.2d 679, 683–84 (Tenn. Ct. App. 1991). The trial judge did not err when, in its role as thirteenth juror, it refused to order a new trial on the grounds that the jury's verdict was contrary to the weight of the evidence. "Appellate courts do not have the same ability to reconcile conflicting testimony or to evaluate credibility (as do trial judges) because they do not have the opportunity to observe the witnesses while they are testifying. . . . Accordingly, we do not reweigh the evidence and we do not reevaluate the witnesses' credibility on appeal from a jury verdict. . . . Instead we give the jury verdict great weight . . . and we will not set a verdict aside unless there is no material evidence to support it. Tenn. R. App. P. 13(b); Electric Power Bd. of Chattanooga v. St. Joseph Valley Structural Steel Corp., 691 S.W.2d 522, 526, Prod. Liab. Rep. (CCH) P 10609 (Tenn. 1985); Cary v. Arrowsmith, 777 S.W.2d 8, 23 (Tenn. Ct. App. 1989)."

does not bind the appellate courts to follow the law as interpreted by the trial court or the trial court's application of the law to undisputed facts.[59] The Rules in this paragraph apply in breach of contract cases tried by a jury as well as in tort actions.[60] These Rules also apply in jury trials in chancery court where authorized by statute.[61]

The propriety of a trial court's granting a directed verdict presents a question of law, concerning whether the evidence is sufficient to create an issue of fact for the jury to decide.[62] An appellate court may sustain a circuit court judge's grant of a directed verdict only if, upon taking the evidence in the light most favorable to the appellant, indulging all reasonable inferences in his favor, and disregarding any countervailing evidence, there is no material evidence in the record that would support a verdict for the appellant under any theory that he has advanced.[63] An appellate court may sustain a directed verdict on some of a party's theories while reversing the trial court's order on

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See Ridings v. Norfolk Southern Ry. Co., 894 S.W.2d 281 (Tenn. Ct. App. 1994), which comprehensively discusses the thirteenth juror rule in civil cases.

Davidson v. Lindsey, 104 S.W.3d 483 (Tenn. 2003). (1) Where, in a motion for new trial, the judge simply approves the jury's verdict without further comment, the appellate court presumes that the trial judge adequately performed his function as thirteenth juror.

[59]Federated Mut. Implement & Hardware Co. v. Shoemaker, 211 Tenn. 523, 366 S.W.2d 129 (1963); McCormick v. Snappy Car Rentals, Inc., 806 S.W.2d 527, 529 (Tenn. 1991); Creech v. Addington, 281 S.W.3d 363, 372 (Tenn. 2009).

Brown v. Wal-Mart Discount Cities, 12 S.W.3d 785, 787 (Tenn. 2000). Appellate review on a question of law is de novo with no presumption of correctness.

[60]Lane v. John Deere Co., 767 S.W.2d 138, 142, 8 U.C.C. Rep. Serv. 2d 609, 85 A.L.R.4th 273 (Tenn. 1989); Crabtree Masonry Co., Inc. v. C & R Const., Inc., 575 S.W.2d 4, 5 (Tenn. 1978).

See also, Ginn v. American Heritage Life Ins. Co., 173 S.W.3d 433, 440 (Tenn. Ct. App. 2004).

[61]Bynum v. Hollowell, 656 S.W.2d 400, 402 (Tenn. Ct. App. 1983), citing T.C.A. § 21-1-103 and Hurt v. Earnhart, 539 S.W.2d 133 (Tenn. Ct. App. 1976). But see, Estate of Acuff v. O'Linger, 56 S.W.3d 527, 537 n.1 (Tenn. Ct. App. 2001) citing State ex rel. Webster v. Daugherty, 530 S.W.2d 81 (Tenn. Ct. App. 1975) and McDade v. McDade, 45 Tenn. App. 487, 325 S.W.2d 575 (1958). Where a trial judge has sua sponte impaneled an advisory jury to provide advisory answers to special interrogatories, the trial judge is free to accept or reject the advisory jury's conclusions, and the case is reviewed on appeal as a non-jury case.

[62]Spann v. Abraham, 36 S.W.3d 452, 462 (Tenn. Ct. App. 1999), citing Norman v. Southern Ry. Co., 119 Tenn. 401, 422, 104 S.W. 1088, 1093–94 (1907) and Underwood v. Waterslides of Mid-America, Inc., 823 S.W.2d 171, 176 (Tenn. Ct. App. 1991) (abrogated by, Chapman v. Bearfield, 207 S.W.3d 736 (Tenn. 2006)).

See also, Stanfield v. Neblett, 339 S.W.3d 22, 29 (Tenn. Ct. App. 2010), appeal denied, (Jan. 13, 2011). A trial court's decision to grant a motion for directed verdict involves a question of law; Johnson v. Richardson, 337 S.W.3d 816 (Tenn. Ct. App. 2010), appeal denied, (Feb. 16, 2011). A trial court's decision to grant a motion for directed verdict involves a question of law.

Piana v. Old Town of Jackson, 316 S.W.3d 622, 626 (Tenn. Ct. App. 2009). On appeal of a trial court's grant of a directed verdict, an appellate court applies the same standard used by the trial court when ruling on the motion initially. The appellate court does not weigh the evidence or evaluate the credibility of witnesses. Rather, the Court considers all of the evidence, taking the strongest legitimate view of it in the non-moving party's favor. The court should grant the motion, only if, after assessing the evidence according to the foregoing standards, it determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence.

[63]Conatser v. Clarksville Coca-Cola Bottling Co., 920 S.W.2d 646, 647 (Tenn.

other theories, thereby warranting remand.[64]

An appeal from the denial of a directed verdict involves a question of law concerning whether the evidence is sufficient to create an issue for the jury to decide.[65] The reviewing court does not weigh the evidence, or evaluate the credibility of the witnesses.[66] Instead, it reviews the evidence taking the strongest legitimate view of the evidence in

1995); Williams v. Brown, 860 S.W.2d 854, 857 (Tenn. 1993); Benton v. Snyder, 825 S.W.2d 409, 413 (Tenn. 1992); Goode v. Tamko Asphalt Products, Inc., 783 S.W.2d 184, Prod. Liab. Rep. (CCH) P 12318, 3 A.L.R.5th 1132 (Tenn. 1989); Haga v. Blanc & West Lumber Co., Inc., 666 S.W.2d 61, 65 (Tenn. 1984); Sauls v. Evans, 635 S.W.2d 377, 379 (Tenn. 1982); Cecil v. Hardin, 575 S.W.2d 268 (Tenn. 1978).

See also, Stanfield v. Neblett, 339 S.W.3d 22, 29 (Tenn. Ct. App. 2010), appeal denied, (Jan. 13, 2011); Usher v. Charles Blalock & Sons, Inc., 339 S.W.3d 45, 57 (Tenn. Ct. App. 2010), appeal denied, (Feb. 17, 2011).

Brown v. Crown Equipment Corp., 181 S.W.3d 268, 281-2 (Tenn. 2005). (1) An appellate court may affirm a directed verdict only if it determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence. (2) Trial court's entry of directed verdict for defendant manufacturer in the present products liability action was reversed on appeal as the Court, upon viewing plaintiff's experts testimony in a light most favorable to the plaintiffs as the nonmoving parties, concluded that reasonable minds could disagree with the trial court's conclusion that the plaintiffs failed to present proof of a defect.

Biscan v. Brown, 160 S.W.3d 462, 470 (Tenn. 2005). (1) An appellate court will affirm a directed verdict only if, after assessing the evidence, it determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence. i.e. that the evidence in the case is susceptible to but one conclusion. (2) In reviewing the propriety of a directed verdict, an appellate court must take the strongest legitimate view of the evidence favoring the opponent of the motion, and must accept all reasonable inferences in favor of the nonmoving party.

Bronson v. Umphries, 138 S.W.3d 844, 862 (Tenn. Ct. App. 2003). When deciding a motion for directed verdict, the reviewing court on appeal must look to all the evidence, take the strongest legitimate view of the evidence in favor of the opponent of the motion, and allow all reasonable inferences in favor of that party. The court must discard all countervailing evidence, and if there is then any dispute as to any material fact, or any doubt as to the conclusions to be drawn from the whole evidence, the motion must be denied.

Fye v. Kennedy, 991 S.W.2d 754, 760 (Tenn. Ct. App. 1998). On petition for rehearing, the Court held that an appellate court's determination of the propriety of the trial court's grant of a directed verdict is not based upon a weighing of all the evidence in this case. While an appellate court is required to consider all the evidence, it is not permitted to weigh that evidence to determine where the preponderance of the evidence lies. In evaluating a grant of a directed verdict, an appellate court is required to discard all countervailing evidence, i.e., all evidence contrary to the evidence favorable to the nonmovant. On petition to rehear, the Court added that pursuant to directed verdict analysis, a reasonable inference supportive of a nonmovant's claim, even absent supporting direct evidence, "trumps" "countervailing" testimony offered by the movant. A reasonable inference is all that is required to support a jury's finding of this factual matter.

Spann v. Abraham, 36 S.W.3d 452, 462 (Tenn. Ct. App. 1999). In conducting appellate review of the grant or denial of a directed verdict, the appellate court does not weigh the evidence, or evaluate the credibility of the witnesses.

[64]See Hill v. City of Chattanooga, 533 S.W.2d 311 (Tenn. Ct. App. 1975). See also State ex rel. Lockert v. Crowell, 631 S.W.2d 702, 710 (Tenn. 1982); Stokes v. Leung, 651 S.W.2d 704 (Tenn. Ct. App. 1982).

[65]Ingram v. Earthman, 993 S.W.2d 611, 626, 40 U.C.C. Rep. Serv. 2d 500 (Tenn. Ct. App. 1998).

[66]Ellis v. Pauline S. Sprouse Residuary Trust, 304 S.W.3d 333, 337 (Tenn. Ct. App. 2009); PacTech, Inc. v. Auto-Owners Ins. Co., 292 S.W.3d 1, 5 (Tenn. Ct. App. 2008); Newcomb v. Kohler Co., 222 S.W.3d 368, 390 (Tenn. Ct. App. 2006); Johnson v.

favor of the appellant, indulges all reasonable inferences in his favor, and disregards any evidence to the contrary.[67] If there is a dispute as to any material determinative evidence or any doubt as to the conclusions to be drawn from the whole evidence, a trial court's denial of a directed verdict should be affirmed.[68] A directed verdict is appropriate

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Tennessee Farmers Mut. Ins. Co., 205 S.W.3d 365 (Tenn. 2006); Ginn v. American Heritage Life Ins. Co., 173 S.W.3d 433, 441 (Tenn. Ct. App. 2004); Ingram v. Earthman, 993 S.W.2d 611, 626, 40 U.C.C. Rep. Serv. 2d 500 (Tenn. Ct. App. 1998); Richardson v. Miller, 44 S.W.3d 1, 30 (Tenn. Ct. App. 2000); Stooksbury v. American Nat. Property and Cas. Co., 126 S.W.3d 505, 516 (Tenn. Ct. App. 2003).

Anderson v. Mason, 141 S.W.3d 634, 639 (Tenn. Ct. App. 2003). Once it is determined that substantial material evidence supports the verdict of a jury and the verdict has been approved by the trial court, the appellate inquiry on the propriety of denying a directed verdict comes to an end. It does not matter that there is substantial material evidence of even greater weight from which the appellate court might believe that the evidence preponderates against the verdict. Tenn. R. App. P. 13(d) provides, in part: "Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict."

[67]Johnson v. Tennessee Farmers Mut. Ins. Co., 205 S.W.3d 365 (Tenn. 2006); Ginn v. American Heritage Life Ins. Co., 173 S.W.3d 433, 441 (Tenn. Ct. App. 2004); Ricketts v. Robinson, 169 S.W.3d 642, 645 (Tenn. Ct. App. 2004); Goode v. Tamko Asphalt Products, Inc., 783 S.W.2d 184, 187, Prod. Liab. Rep. (CCH) P 12318, 3 A.L.R.5th 1132 (Tenn. 1989), citing Crosslin v. Alsup, 594 S.W.2d 379, 380 (Tenn. 1980).

Sasser v. Averitt Exp., Inc., 839 S.W.2d 422, 428 (Tenn. Ct. App. 1992): "When we [appellate court] are requested to review the denial of a motion for a directed verdict, we view the evidence in the light most favorable to the motion's opponent and grant the motion only when the evidence can reasonably support but one conclusion." Here, the motion for directed verdict was properly denied, as the evidence did not support only the movant's version of the case.

See Ellis v. Pauline S. Sprouse Residuary Trust, 304 S.W.3d 333, 337 (Tenn. Ct. App. 2009); Anderson v. Mason, 141 S.W.3d 634, 636-7 (Tenn. Ct. App. 2003); Stooksbury v. American Nat. Property and Cas. Co., 126 S.W.3d 505, 516 (Tenn. Ct. App. 2003); Richardson v. Miller, 44 S.W.3d 1, 30 (Tenn. Ct. App. 2000); Addaman v. Lanford, 46 S.W.3d 199, 203 (Tenn. Ct. App. 2000); Ingram v. Earthman, 993 S.W.2d 611, 626, 40 U.C.C. Rep. Serv. 2d 500 (Tenn. Ct. App. 1998); United Brake Systems, Inc. v. American Environmental Protection, Inc., 963 S.W.2d 749, 754 (Tenn. Ct. App. 1997); Bland v. Allstate Ins. Co., 944 S.W.2d 372, 374 (Tenn. Ct. App. 1996); Seats v. Lowry, 930 S.W.2d 558, 559 (Tenn. Ct. App. 1996); Beske v. Opryland USA, Inc., 923 S.W.2d 544, 545 (Tenn. Ct. App. 1996); Hurley v. Tennessee Farmers Mut. Ins. Co., 922 S.W.2d 887, 891 (Tenn. Ct. App. 1995).

Eaton v. McLain, 891 S.W.2d 587, 590 (Tenn. 1994). The Supreme Court's adoption of comparative fault in McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992), does not change the previously established standards governing a trial judge's assessment of the evidence, nor does it change the previously established standard governing the trial court's ultimate decision of whether to grant or deny a motion for directed verdict. The question in negligence actions after McIntyre is whether reasonable minds could differ on the question: "Assuming that both plaintiff and defendant have been found guilty of negligent conduct that proximately caused the injuries, was the fault attributable to plaintiff equal to or greater than the fault attributable to the defendant?"

Miller v. Choo Choo Partners, L.P., 73 S.W.3d 897, 901 (Tenn. Ct. App. 2001).

[68]Goode v. Tamko Asphalt Products, Inc., 783 S.W.2d 184, 187, Prod. Liab. Rep. (CCH) P 12318, 3 A.L.R.5th 1132 (Tenn. 1989), citing Crosslin v. Alsup, 594 S.W.2d 379, 380 (Tenn. 1980).

See Ricketts v. Robinson, 169 S.W.3d 642, 645 (Tenn. Ct. App. 2004); Stooksbury v. American Nat. Property and Cas. Co., 126 S.W.3d 505, 516 (Tenn. Ct. App. 2003); Ingram v. Earthman, 993 S.W.2d 611, 627, 40 U.C.C. Rep. Serv. 2d 500 (Tenn. Ct. App. 1998); United Brake Systems, Inc. v. American Environmental Protection,

only when the evidence, viewed reasonably, supports only one conclusion.[69]

Appellate review of the grant or denial of a Rule 50.02 renewed motion for entry of judgment in accordance with a previous timely filed motion for a directed verdict is governed by the same rules relating to review of directed verdicts.[70]

Inc., 963 S.W.2d 749, 754 (Tenn. Ct. App. 1997); Remco Equipment Sales, Inc. v. Manz, 952 S.W.2d 437, 439, 35 U.C.C. Rep. Serv. 2d 51 (Tenn. Ct. App. 1997); Bland v. Allstate Ins. Co., 944 S.W.2d 372, 374 (Tenn. Ct. App. 1996); Beske v. Opryland USA, Inc., 923 S.W.2d 544, 545 (Tenn. Ct. App. 1996); Hurley v. Tennessee Farmers Mut. Ins. Co., 922 S.W.2d 887, 891 (Tenn. Ct. App. 1995); Seats v. Lowry, 930 S.W.2d 558, 559 (Tenn. Ct. App. 1996) (trial judge did not err in entering judgment for plaintiff on jury's verdict in this medical malpractice action).

Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C., 813 S.W.2d 400, 403 (Tenn. 1991), citing Tenn. R. App. P. 13(d) and Hohenberg Bros. Co. v. Missouri Pac. R. Co., 586 S.W.2d 117, 119 (Tenn. Ct. App. 1979). On appeal to the Supreme Court of a Court of Appeals decision that the trial court erred in not sustaining defendant's motion for directed verdict, the Supreme Court must review the record to ascertain if material evidence is present to support the jury's verdict.

Ginn v. American Heritage Life Ins. Co., 173 S.W.3d 433, 441 (Tenn. Ct. App. 2004). The term "substantial and material evidence" has been defined as "such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." Substantial and material evidence has also has described as requiring something less than a preponderance of the evidence but more than a scintilla or glimmer.

[69]Anderson v. Mason, 141 S.W.3d 634, 636-7 (Tenn. Ct. App. 2003); Stooksbury v. American Nat. Property and Cas. Co., 126 S.W.3d 505, 516 (Tenn. Ct. App. 2003); Orlando Residence, Ltd. v. Nashville Lodging Co., 104 S.W.3d 848 (Tenn. Ct. App. 2002); United Brake Systems, Inc. v. American Environmental Protection, Inc., 963 S.W.2d 749, 754 (Tenn. Ct. App. 1997); Remco Equipment Sales, Inc. v. Manz, 952 S.W.2d 437, 439, 35 U.C.C. Rep. Serv. 2d 51 (Tenn. Ct. App. 1997); Addaman v. Lanford, 46 S.W.3d 199, 203 (Tenn. Ct. App. 2000); Ingram v. Earthman, 993 S.W.2d 611, 627, 40 U.C.C. Rep. Serv. 2d 500 (Tenn. Ct. App. 1998).

Miller v. Choo Choo Partners, L.P., 73 S.W.3d 897, 901 (Tenn. Ct. App. 2001). A directed verdict is appropriate only when the evidence is susceptible to but one conclusion.

[70]Holmes v. Wilson, 551 S.W.2d 682, 685 (Tenn. 1977).

Mercer v. Vanderbilt University, Inc., 134 S.W.3d 121, 130-1 (Tenn. 2004). In ruling on a Tenn. R. Civ. P. 50.02 motion, the standard applied by both the trial court and the appellate court is the same as that applied to a motion for directed verdict made during trial. The trial court and appellate court are required to take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion when there is any doubt as to the conclusions to be drawn from the evidence. A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion.

Alexander v. Armentrout, 24 S.W.3d 267 (Tenn. 2000). (1) The standard for review of a trial court's denial of a motion for a directed verdict following entry of judgment on a jury verdict (a special verdict in the present case) is as follows: A directed verdict is appropriate only when the evidence is susceptible to but one conclusion. In making this determination, an appellate court must take the strongest legitimate view of the evidence favoring the opponent of the motion, all reasonable inferences in favor of the opponent of the motion must be allowed, and all evidence contrary to the opponent's position must be disregarded. The grant of directed verdict is proper only if the appellate court determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence. (2) Tenn. R. App. P. 13(d) provides that findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict.

Usher v. Charles Blalock & Sons, Inc., 339 S.W.3d 45, 66 (Tenn. Ct. App.

In reviewing a trial court's grant of a Rule 41.02(2) motion for invol-

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2010), appeal denied, (Feb. 17, 2011). (1) When an appellate court has reversed a trial court's grant of a directed verdict and the trial court has also conditionally granted a new trial as 13th juror, the general rule is that, absent extraordinary circumstances, the case will be remanded for new trial. (2) Exceptional circumstances do not exist any time a trial court sets aside a jury verdict based on an error of law.

In re Estate of Blackburn, 253 S.W.3d 603, 612-1 (Tenn. Ct. App. 2007). The trial court did not err in denying defendant's motion for a judgment notwithstanding the verdict and in approving the verdict and entering a judgment on the verdict, as material evidence supported the jury's verdict. (1) In ruling on the trial court's denial of a motion for a j.n.o.v., an appellate court must take the strongest legitimate view of the evidence in favor of the non-moving party and disregard countervailing evidence. A motion for a j.n.o.v. is justified only if "reasonable minds could not differ as to the conclusion to be drawn from the evidence." (2) Appellate review of the trial court's approval of a jury verdict is based on a "material evidence" standard. Under this standard, appellate courts may only review the record to determine whether it contains material evidence to support the jury's verdict. As with the standard for reviewing the denial of a motion for a j.n.o.v., an appellate court must (a) take the strongest legitimate view of all the evidence in favor of the verdict; (b) assume the truth of all evidence that supports the verdict; (c) allow all reasonable inferences to sustain the verdict; and (d) discard all countervailing evidence. (3) The "material evidence" inquiry actually resolves both issues, because if there is material evidence to support the jury's findings, then, of necessity, granting a directed verdict [or j.n.o.v.] for the losing party would have been improper because the evidence permitted reasonable minds to reach a conclusion different from that asserted by the losing party.

Potter v. Ford Motor Co., 213 S.W.3d 264 (Tenn. Ct. App. 2006). While traveling on a rain-slick road at a moderate rate of speed, plaintiff driver lost control of her 1997 Ford Escort which spun around and crashed into a tree. Her seat back collapsed into the rear seat and her spinal cord was severed. Driver was rendered a paraplegic. She and her husband sued manufacturer Ford Motor Company for the enhanced injuries driver received as a result of the collapse of her seat back. The jury found Ford to be 70% at fault, driver to be 30% at fault, and determined driver's compensatory damages to be ten million dollars. Following jury verdict, the Circuit Court entered judgment for driver in the amount of seven million dollars and denied defendant's motion for judgment notwithstanding the verdict. On manufacturer's appeal, the Court of Appeals affirmed, holding theat there was material evidence that supported the jury finding that seat back was defective; that the jury instruction's failure to charge the intervening cause doctrine was not error as the doctrine did not apply in cases where the alleged intervening cause is the negligent conduct of the plaintiff; and that the defendant owed a duty to the plaintiff as the nature of plaintiff's accident was foreseeable. Therefore, the trial court did not err in refusing to grant Ford judgment notwithstanding the verdict.

Myers v. Pickering Firm, Inc., 959 S.W.2d 152, 158 (Tenn. Ct. App. 1997). The duty of a trial or appellate judge in dealing with a judgment notwithstanding a verdict, i.e., a post-trial motion for the entry of judgment in accordance with a motion for a directed verdict made during the trial, is to take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be drawn from the whole evidence. A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion.

Martin v. Washmaster Auto Center, U.S.A., 946 S.W.2d 314, 317 (Tenn. Ct. App. 1996). Trial judge erred in not entering judgment notwithstanding the verdict for defendant in slip and fall action, as there was no material evidence supporting the verdict for the plaintiff. The Court of Appeals so held after looking at all the evidence, construing it most favorably in favor of the plaintiff, taking the plaintiff's evidence which supports his theory as true, discarding all countervailing evidence, and indulging in all reasonable inferences to uphold the verdict. The Court further noted that a directed verdict is appropriate when the evidence supports only one conclusion; that a case should go to the jury, even if the facts are undisputed, if reasonable persons could draw conflicting inferences from the facts; that a jury is permitted to reasonably

untary dismissal based upon the insufficiency of the facts at the close of the plaintiff's proof in a nonjury trial, appellate court review is de novo upon the trial court's record, accompanied by a presumption of correctness of the trial court's findings unless the preponderance of the evidence is contrary.[71]

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infer facts from circumstantial evidence, and these inferred facts may be the basis of further inferences of the ultimate fact at issue; that an inference is reasonable and legitimate only when the evidence makes the existence of the fact to be inferred more probable than the nonexistence of the fact; and that a jury is not permitted to engage in conjecture, speculation, or guesswork as to which of two equally probable inferences is applicable.

Bills v. Lindsay, 909 S.W.2d 434, 438–40 (Tenn. Ct. App. 1993). In an action contesting a will admitted to probate, the trial court denied the will proponents' motion for directed verdict, the case was submitted to the jury, and a verdict was entered in favor of the contestant. The Court of Appeals held: (1) The proponents were entitled to a directed verdict on motion made at the close of the contestant's proof and renewed at the close of all the proof, as there was no material evidence, which is necessary to submit an issue to the jury, that the testator lacked testamentary capacity or was under undue influence at the time his will was executed. (2) The right to have an issue submitted to a jury in a will contest rests upon substantial or material evidence at the time the will was made and not upon a "scintilla" or "glimmer" of evidence.

Mairose v. Federal Exp. Corp., 86 S.W.3d 502, 511-12 (Tenn. Ct. App. 2001). A motion for a judgment notwithstanding the verdict and a motion for new trial are subject to separate and distinct standards of review. In ruling on a motion for judgment notwithstanding the verdict, the trial court and the appellate courts may not weigh the evidence or determine the preponderance of the evidence, which is the proper inquiry when ruling on a motion for new trial. Furthermore, the trial judge does not assume the role of thirteenth juror when ruling on a motion for a judgment notwithstanding the verdict.

[71]Landry v. Dood, 936 S.W.2d 635, 637 (Tenn. Ct. App. 1996); Bradford v. City of Clarksville, 885 S.W.2d 78, 81–82 (Tenn. Ct. App. 1994), citing Tenn. R. App. P. 13(d).

Building Materials Corp. v. Britt, 211 S.W.3d 706 (Tenn. 2007). (1) The standard of review of a trial court's decision to grant a Rule 41.02 involuntary dismissal is governed by Rule 13(d) of the Tennessee Rules of Appellate Procedure. (2) As the involuntary dismissal in this case was based on the statute of limitations defense, a question of law, appellate review was de novo without a presumption of correctness.

See Cunningham v. Shelton Sec. Service, Inc., 46 S.W.3d 131, 135 n.1 (Tenn. 2001). The standard of appellate review of a trial court's Rule 41.02(2) order of involuntary dismissal of a plaintiff's workers' compensation action tried without a jury, at the end of the plaintiff's presentation of its proof, is not the same as that for a Rule 50 directed verdict in a case tried to a jury, i.e., that there is no material evidence to support a verdict for the plaintiff.

Boyer v. Heimermann, 238 S.W.3d 249, 254-5 (Tenn. Ct. App. 2007). (1) The appropriate appellate standard of review of a trial court's decision to grant a Rule 41.02 involuntary dismissal is governed by Tenn. R. App. P. Rule 13(d) because the trial court has used the same reasoning to dispose of the motion that it would have used to make a final decision at the close of all the evidence. Thus, an appellate court must review the record on appeal de novo with a presumption that the trial court's factual findings are correct, and will affirm the trial court's decision unless the evidence preponderates against the trial court's factual determinations or unless the trial court has committed an error of law affecting the outcome of the case. (2) On appeal of a trial court's grant of Rule 41.02 involuntary dismissal, an appellate court will also give great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses. See also, Via v. Oehlert, 347 S.W.3d 224, 228–9 (Tenn. Ct. App. 2010), appeal denied, (Apr. 12, 2011).

Burton v. Warren Farmers Co-op., 129 S.W.3d 513, 521-2 (Tenn. Ct. App. 2002). When a trial court has dismissed a plaintiff's action at the conclusion of

In ruling on the propriety of a trial court's grant of a summary judgment, an appellate court must consider the matter in the same manner as a motion for directed verdict;[72] i.e., it must view the pleadings, stipulations, depositions, affidavits, testimony, and other evidence in the record in the light most favorable to the nonmoving party, draw all reasonable inferences in his favor, and discard all countervailing evidence.[73] If, after doing so, a genuine dispute of ma-

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plaintiff's proof in a non jury in response to a Tenn. R. Civ. P. 41.02(2) motion, the appellate court reviews the record on appeal de novo with a presumption that the trial court's findings are correct. The Court will affirm the trial court's decision unless the evidence preponderates against the trial court's factual determinations or the trial court has committed an error of law affecting the outcome of the case. In its deliberations, the appellate court gives great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses.

See Adelsperger v. Adelsperger, 970 S.W.2d 482, 484 (Tenn. Ct. App. 1997). A party may not assert as error on appeal that a trial court erred by failing to grant her Tenn. R. Civ. P. 41.02(2) motion for involuntary dismissal at the close of the other party's proof, where the moving party elected to present her proof rather than to rest on her motion. Following the denial of a Rule 41.02(2) motion, the moving party may stand on its motion and bring an appeal or present its evidence; it cannot do both. By proceeding with her proof, the moving party waived her opportunity to take issue with the trial court's denial of her Rule 41.02(2) motion.

See however, Orlando Residence, Ltd. v. Nashville Lodging Co., 213 S.W.3d 855, 864 (Tenn. Ct. App. 2006). When a trial court exercises its discretion in imposing the sanction of involuntary dismissal, this exercise of its discretion will not be disturbed by this Court in the absence of an affirmative showing that the trial court abused its discretion.

[72]Whitehead v. Dycho Co., Inc., 775 S.W.2d 593, 598, Prod. Liab. Rep. (CCH) P 12215 (Tenn. 1989); Hardesty v. Service Merchandise Co., Inc., 953 S.W.2d 678, 684 (Tenn. Ct. App. 1997); Jones v. Exxon Corp., 940 S.W.2d 69, 71 (Tenn. Ct. App. 1996); Burgess v. Harley, 934 S.W.2d 58, 62 (Tenn. Ct. App. 1996); Suddath v. Parks, 914 S.W.2d 910, 912 (Tenn. Ct. App. 1995); Wadlington v. Miles, Inc., 922 S.W.2d 520, 522, Prod. Liab. Rep. (CCH) P 14431 (Tenn. Ct. App. 1995).

[73]Federal Ins. Co. v. Winters, 354 S.W.3d 287, 291 (Tenn. 2011); Shipley v. Williams, 350 S.W.3d 527 (Tenn. 2011); CAO Holdings, Inc. v. Trost, 333 S.W.3d 73, 82 (Tenn. 2010); B & B Enterprises of Wilson County, LLC v. City of Lebanon, 318 S.W.3d 839 (Tenn. 2010); Cox v. M.A. Primary and Urgent Care Clinic, 313 S.W.3d 240 (Tenn. 2010); Mullins v. State, 320 S.W.3d 273 (Tenn. 2010); Downs ex rel. Downs v. Bush, 263 S.W.3d 812 (Tenn. 2008); Chattanooga-Hamilton County Hosp. Authority v. Bradley County, 249 S.W.3d 361, 365 (Tenn. 2008); Shadrick v. Coker, 963 S.W.2d 726, 731 (Tenn. 1998). See also Cumulus Broadcasting, Inc. v. Shim, 226 S.W.3d 366, 373–4 (Tenn. 2007); Bennett v. Trevecca Nazarene University, 216 S.W.3d 293, 299, 217 Ed. Law Rep. 977 (Tenn. 2007); Frye v. St. Thomas Health Services, 227 S.W.3d 595, 602 (Tenn. Ct. App. 2007); Teter v. Republic Parking System, Inc., 181 S.W.3d 330, 337, 37 Employee Benefits Cas. (BNA) 1245, 23 I.E.R. Cas. (BNA) 1478 (Tenn. 2005); Draper v. Westerfield, 181 S.W.3d 283, 288 (Tenn. 2005); West v. East Tennessee Pioneer Oil Co., 172 S.W.3d 545, 550 (Tenn. 2005); Parrish v. Marquis, 172 S.W.3d 526, 529-30 (Tenn. 2005) (overruled by, Himmelfarb v. Allain, 2012 WL 3667440 (Tenn. 2012)); Freeman Industries, LLC v. Eastman Chemical Co., 172 S.W.3d 512, 517, 2005-2 Trade Cas. (CCH) ¶ 74914 (Tenn. 2005); Griffis v. Davidson County Metropolitan Government, 164 S.W.3d 267, 284, 199 Ed. Law Rep. 509 (Tenn. 2005); Christenberry v. Tipton, 160 S.W.3d 487, 494 (Tenn. 2005); Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville, 154 S.W.3d 22, 41 (Tenn. 2005); XI Properties, Inc. v. RaceTrac Petroleum, Inc., 151 S.W.3d 443, 446 (Tenn. 2004); Kelley v. Middle Tennessee Emergency Physicians, P.C., 133 S.W.3d 587, 591 (Tenn. 2004); Shelburne v. Frontier Health, 126 S.W.3d 838, 841 (Tenn. 2003); Health Cost Controls, Inc. v. Gifford, 108 S.W.3d 227, 237 (Tenn. 2003); Stovall v. Clarke, 113 S.W.3d 715, 721 (Tenn. 2003); Penley v. Honda Motor Co., Ltd., 31

terial fact is found to exist, or if there is doubt as to whether or not such genuine issue remains for trial, the appellate court must reverse the trial court's grant of summary judgment.[74] If the appellate court's review of the record reveals no genuine dispute of material fact, i.e., if

S.W.3d 181, 183, Prod. Liab. Rep. (CCH) P 15890 (Tenn. 2000); Bowden v. Memphis Bd. of Educ., 29 S.W.3d 462, 464, 148 Ed. Law Rep. 513, 142 Lab. Cas. (CCH) P 59120 (Tenn. 2000); Canipe v. Memphis City Schools Bd. of Educ., 27 S.W.3d 919, 921, 147 Ed. Law Rep. 1115 (Tenn. 2000); Norton v. McCaskill, 12 S.W.3d 789, 792 (Tenn. 2000); Seavers v. Methodist Medical Center of Oak Ridge, 9 S.W.3d 86, 91 (Tenn. 1999); Guiliano v. Cleo, Inc., 995 S.W.2d 88, 94, 16 I.E.R. Cas. (BNA) 1015, 139 Lab. Cas. (CCH) P 58713 (Tenn. 1999); Anderson v. Save-A-Lot, Ltd., 989 S.W.2d 277, 279, 75 Empl. Prac. Dec. (CCH) P 45968 (Tenn. 1999); Eyring v. Fort Sanders Parkwest Medical Center, 991 S.W.2d 230, 236 (Tenn. 1999); Warren v. Estate of Kirk, 954 S.W.2d 722, 723 (Tenn. 1997); Fruge v. Doe, 952 S.W.2d 408, 410 (Tenn. 1997).

In re Estate of Davis, 308 S.W.3d 832, 837 (Tenn. 2010). At the summary judgment phase, "it is not the role of a trial or appellate court to weigh the evidence or substitute its judgment for that of the trier of fact." See also, Sherrill v. Souder, 325 S.W.3d 584 (Tenn. 2010).

Johnson v. LeBonheur Children's Medical Center, 74 S.W.3d 338, 342 (Tenn. 2002); Guy v. Mutual of Omaha Ins. Co., 79 S.W.3d 528, 534, 18 I.E.R. Cas. (BNA) 1459 (Tenn. 2002).

Pero's Steak and Spaghetti House v. Lee, 90 S.W.3d 614, 620 (Tenn. 2002). In reviewing the record to determine if a trial court has correctly granted summary judgment to a defendant, appellate courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor.

[74]Whitehead v. Dycho Co., Inc., 775 S.W.2d 593, 598, Prod. Liab. Rep. (CCH) P 12215 (Tenn. 1989), citing Jones v. Home Indem. Ins. Co., 651 S.W.2d 213 (Tenn. 1983). See also Starr v. Hill, 353 S.W.3d 478, 481–2 (Tenn. 2011); Fruge v. Doe, 952 S.W.2d 408, 410 (Tenn. 1997); Melton v. BNSF Ry. Co., 322 S.W.3d 174, 189 (Tenn. Ct. App. 2010), appeal denied, (Aug. 25, 2010); Hibdon v. Grabowski, 195 S.W.3d 48 (Tenn. Ct. App. 2005); Decatur County Bank v. Duck, 969 S.W.2d 393, 396 (Tenn. Ct. App. 1997); Rose v. H.C.A. Health Services of Tennessee, Inc., 947 S.W.2d 144, 146–47 (Tenn. Ct. App. 1996); Stone v. Hinds, 541 S.W.2d 598, 600 (Tenn. Ct. App. 1976); and Tenn. R. Civ. P. 56.

McCall v. Wilder, 913 S.W.2d 150, 152–53 (Tenn. 1995). The Court applied the general rule and held that the trial court's grant of summary judgment for defendant was improper.

Champion v. CLC of Dyersburg, LLC, 359 S.W.3d 161 (Tenn. Ct. App. 2011), appeal denied, (July 15, 2011). A disputed fact that must be decided to resolve a substantive claim or defense is material, and it presents a genuine issue if it reasonably could be resolved in favor of either one party or the other.

Urtuzuastegui v. Kirkland, 366 S.W.3d 128 (Tenn. Ct. App. 2011), appeal denied, (Aug. 24, 2011). If an appellate court in reviewing a motion for summary judgment finds a disputed fact, it must determine whether the fact is material to the claim or defense upon which summary judgment is predicated and whether the disputed fact creates a genuine issue for trial.

Roberts v. Blount Memorial Hosp., 963 S.W.2d 744 (Tenn. Ct. App. 1997) (abrogated by, Limbaugh v. Coffee Medical Center, 59 S.W.3d 73 (Tenn. 2001)). Appellate court sustained summary judgment in favor of defendant hospital as to claims of one plaintiff alleging vicarious liability of the hospital for alleged sexual abuse of that plaintiff by a nurse, sustained summary judgment as to another plaintiff's claim against the hospital on vicarious liability ground, but reversed summary judgment entered for defendant as to the latter plaintiff's claims alleging direct independent negligence of the hospital, e.g., in failing to adequately investigate the nurse's background before his employment.

Burgess v. Harley, 934 S.W.2d 58, 62 (Tenn. Ct. App. 1996). The appellate court should not affirm a summary judgment if any doubt or uncertainty exists with regard to the facts or the conclusions to be drawn from the facts.

both the facts and inferences to be drawn from the facts permit a reasonable person to reach only one conclusion, *and* there is no error of law, i.e., the trial judge has properly applied the governing substantive law, the trial court's grant of summary judgment must be affirmed.[75]

In reviewing the propriety of the trial court's grant of summary judgment to a defendant where plaintiff's burden of proof is clear and convincing evidence, the appellate court must determine, upon taking the evidence in the light most favorable to plaintiff, that reasonable minds must agree that plaintiff has not proven its prima facie elements by clear and convincing evidence, in order to affirm the sum-

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Winter v. Smith, 914 S.W.2d 527, 535 (Tenn. Ct. App. 1995). Like other decisions granting Tenn. R. Civ. P. 56 motions, interlocutory summary judgments are reviewed de novo. (1) An interlocutory summary adjudication will be upheld if there are no material factual disputes involving the relevant facts and if the moving party is entitled to a judgment as a matter of law. (2) Appellate review of the facts is limited to the record before the trial court when it heard the motion. (3) Where, as in the present case, a trial court reconsiders an earlier interlocutory summary judgment, the appellate court should consider not only matters of record as of the date that the interlocutory order was entered, but also matters of record as of the date of the entry of final judgment to determine whether there were material factual disputes and whether the interlocutory summary judgment was proper.

[75]Sherrill v. Souder, 325 S.W.3d 584 (Tenn. 2010); Chattanooga-Hamilton County Hosp. Authority v. Bradley County, 249 S.W.3d 361, 365 (Tenn. 2008); Cowden v. Sovran Bank/Central South, 816 S.W.2d 741, 744 (Tenn. 1991). See also Blair v. West Town Mall, 130 S.W.3d 761, 763-4 (Tenn. 2004); Norton v. McCaskill, 12 S.W.3d 789, 792 (Tenn. 2000); Guiliano v. Cleo, Inc., 995 S.W.2d 88, 94, 16 I.E.R. Cas. (BNA) 1015, 139 Lab. Cas. (CCH) P 58713 (Tenn. 1999); Warren v. Estate of Kirk, 954 S.W.2d 722, 723 (Tenn. 1997); McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891, 894 (Tenn. 1996) (rejected by, Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968, 135 Ed. Law Rep. 1043 (Ind. 1999)); Anderson v. Save-A-Lot, Ltd., 989 S.W.2d 277, 279, 75 Empl. Prac. Dec. (CCH) P 45968 (Tenn. 1999); Bradley v. McLeod, 984 S.W.2d 929, 934 (Tenn. Ct. App. 1998).

Mann v. Alpha Tau Omega Fraternity, 2012 WL 2553534 (Tenn. 2012). Where the parties do not dispute any material fact, the issue presented on a motion for summary judgment is purely a question of law, which an appellate court reviews de novo with no presumption of correctness.

Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt University, 174 S.W.3d 98, 120, 203 Ed. Law Rep. 396 (Tenn. Ct. App. 2005). The Court reversed the summary judgment entered in favor of appellee defendant not because the record revealed disputed issues of material fact but rather because appellee defendant had failed to demonstrate that it was entitled to a judgment as a matter of law.

Angus v. City of Jackson, 968 S.W.2d 804, 807 (Tenn. Ct. App. 1997), citing Carvell v. Bottoms, 900 S.W.2d 23, 26 (Tenn. 1995) (summary judgment is only appropriate when the facts and the legal conclusions drawn from the facts reasonably permit only one conclusion); Gardner v. Insura Property & Cas. Ins. Co., 956 S.W.2d 1, 3 (Tenn. Ct. App. 1997) (summary judgment is appropriate when the inferences which may be drawn from uncontroverted facts are so certain that all reasonable persons must agree on them).

Donnelly v. Walter, 959 S.W.2d 166, 168 (Tenn. Ct. App. 1997). Trial court's denial of relief from summary judgment was not an abuse of discretion as appellant failed to support its motion for relief with any evidence making out a disputed material fact regarding the merits of the lawsuit. In the absence of some indication that the appellant had a response to the appellee's properly supported motions, there is absolutely no reason to set aside a summary judgment.

Pero's Steak and Spaghetti House v. Lee, 90 S.W.3d 614, 620 (Tenn. 2002); Guy v. Mutual of Omaha Ins. Co., 79 S.W.3d 528, 534, 18 I.E.R. Cas. (BNA) 1459 (Tenn. 2002).

mary judgment.[76]

In reviewing a trial court's grant of a summary judgment, the absence of disputed facts is not presumed, and the appellate court makes a de novo determination of whether a genuine issue of material fact exists.[77] As to this determination, it has been held that a party's statement in support of his own motion for summary judgment (which

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[76]Hibdon v. Grabowski, 195 S.W.3d 48, 63 (Tenn. Ct. App. 2005).

Lewis v. NewsChannel 5 Network, L.P., 238 S.W.3d 270, 282, 35 Media L. Rep. (BNA) 1897 (Tenn. Ct. App. 2007). When reviewing a grant of summary judgment to a defendant in a libel case, the appellate court must "determine, not whether there is material evidence in the record supporting the plaintiff (non movant), but whether or not the record discloses clear and convincing evidence upon which a trier of fact could find actual malice."

[77]Blocker v. Regional Medical Center At Memphis, 722 S.W.2d 660 (Tenn. 1987). See also Giggers v. Memphis Housing Authority, 363 S.W.3d 500, 504 (Tenn. 2012), cert. denied, 2012 WL 2809309 (U.S. 2012); Federal Ins. Co. v. Winters, 354 S.W.3d 287, 291 (Tenn. 2011); *King* v. Betts, 354 S.W.3d 691, 711, 33 I.E.R. Cas. (BNA) 30 (Tenn. 2011); Starr v. Hill, 353 S.W.3d 478, 481 (Tenn. 2011); Shipley v. Williams, 350 S.W.3d 527 (Tenn. 2011); Edwards v. City of Memphis, 342 S.W.3d 12, 16 (Tenn. Ct. App. 2010), appeal denied, (Apr. 13, 2011); Coleman v. St. Thomas Hosp., 334 S.W.3d 199, 31 I.E.R. Cas. (BNA) 73 (Tenn. Ct. App. 2010), appeal denied, (Nov. 15, 2010); Estate of French v. Stratford House, 333 S.W.3d 546 (Tenn. 2011); CAO Holdings, Inc. v. Trost, 333 S.W.3d 73, 82 (Tenn. 2010); Blue Bell Creameries, LP v. Roberts, 333 S.W.3d 59, 74 A.L.R.6th 613 (Tenn. 2011), cert. denied, 131 S. Ct. 3068, 180 L. Ed. 2d 889 (2011); Abshure v. Methodist Healthcare-Memphis Hospitals, 325 S.W.3d 98, 103 (Tenn. 2010); Shelby County Health Care Corp. v. Nationwide Mut. Ins. Co., 325 S.W.3d 88, 92 (Tenn. 2010); Sherrill v. Souder, 325 S.W.3d 584 (Tenn. 2010); Hall v. Haynes, 319 S.W.3d 564 (Tenn. 2010); B & B Enterprises of Wilson County, LLC v. City of Lebanon, 318 S.W.3d 839 (Tenn. 2010); Cox v. M.A. Primary and Urgent Care Clinic, 313 S.W.3d 240 (Tenn. 2010); Autry v. Hooker, 304 S.W.3d 356, 361, 254 Ed. Law Rep. 1044 (Tenn. Ct. App. 2009); Bailey v. Blount County Bd. of Educ., 303 S.W.3d 216, 226, 254 Ed. Law Rep. 420, 30 I.E.R. Cas. (BNA) 421 (Tenn. 2010); UT Medical Group, Inc. v. Vogt, 235 S.W.3d 110, 26 I.E.R. Cas. (BNA) 1177 (Tenn. 2007); Cumulus Broadcasting, Inc. v. Shim, 226 S.W.3d 366, 373 (Tenn. 2007); Chambers v. Semmer, 197 S.W.3d 730 (Tenn. 2006); Bailey v. County of Shelby, 188 S.W.3d 539, 542-3 (Tenn. 2006); Draper v. Westerfield, 181 S.W.3d 283, 288 (Tenn. 2005); Freeman Industries, LLC v. Eastman Chemical Co., 172 S.W.3d 512, 517, 2005-2 Trade Cas. (CCH) ¶ 74914 (Tenn. 2005); Griffis v. Davidson County Metropolitan Government, 164 S.W.3d 267, 283-4, 199 Ed. Law Rep. 509 (Tenn. 2005); Staubach Retail Services-Southeast, LLC v. H.G. Hill Realty Co., 160 S.W.3d 521, 524 (Tenn. 2005); Christenberry v. Tipton, 160 S.W.3d 487, 491 (Tenn. 2005); Butterworth v. Butterworth, 154 S.W.3d 79, 81 (Tenn. 2005); Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville, 154 S.W.3d 22, 41 (Tenn. 2005); Eadie v. Complete Co., Inc., 142 S.W.3d 288 (Tenn. 2004); Honsa v. Tombigbee Transport Corp., 141 S.W.3d 540, 542 (Tenn. 2004); Kelley v. Middle Tennessee Emergency Physicians, P.C., 133 S.W.3d 587, 591 (Tenn. 2004); City of Cookeville ex rel. Cookeville Regional Med. Ctr. v. Humphrey, 126 S.W.3d 897, 901 (Tenn. 2004); Prodigy Services Corp., Inc. v. Johnson, 125 S.W.3d 413, 415-6 (Tenn. Ct. App. 2003); McNabb v. Highways, Inc., 98 S.W.3d 649, 652 (Tenn. 2003); Miller v. Willbanks, 8 S.W.3d 607, 609 (Tenn. 1999); Guiliano v. Cleo, Inc., 995 S.W.2d 88, 94, 16 I.E.R. Cas. (BNA) 1015, 139 Lab. Cas. (CCH) P 58713 (Tenn. 1999); Holt v. Holt, 995 S.W.2d 68, 71 (Tenn. 1999), order clarified, (June 7, 1999); Eyring v. Fort Sanders Parkwest Medical Center, 991 S.W.2d 230, 236 (Tenn. 1999); Shadrick v. Coker, 963 S.W.2d 726, 731 (Tenn. 1998); Warren v. Estate of Kirk, 954 S.W.2d 722, 723 (Tenn. 1997).

Shelburne v. Frontier Health, 126 S.W.3d 838, 841 (Tenn. 2003). (1) A ruling on a motion for summary judgment involves only questions of law and not disputed issues of fact. (2) The standard for reviewing a grant of summary judgment is de novo with no presumption of correctness as to the trial court's findings.

Griffin v. Shelter Mut. Ins. Co., 18 S.W.3d 195, 197 (Tenn. 2000). On appellate review of a trial court's grant of a summary judgment to defendant, inquiry involves

motion was denied by the trial court) that there are no genuine material disputed issues of fact does not estop the party, on appeal of the trial court's granting of summary judgment to his adversary, from contending that there are genuine material disputed issues of fact.[78] In its de novo review, an appellate court may consider only matters that are included in the appellate record, matters of judicial notice, and matters authorized by Tenn. R. App. P. 14.[79]

Apart from the question of whether a genuine issue of disputed fact exists, an appellate court, in reviewing a trial court's grant of a summary judgment, is not bound by the trial court's finding of law or its application of the law to the facts,[80] even if the facts are undisputed, nor by the trial court's determination of the applicable governing

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purely a question of law; therefore, the appellate court reviews the record without a presumption of correctness to determine whether the absence of genuine and material factual issues entitle the movant to judgment as a matter of law. See also Staples v. CBL & Associates, Inc., 15 S.W.3d 83, 88 (Tenn. 2000).

Norton v. McCaskill, 12 S.W.3d 789, 792 (Tenn. 2000). Appellate review of a trial court's order on a motion for summary judgment involves purely a question of law, and no presumption of correctness attaches to the lower court's judgment. The appellate court's task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56.03 have been met, i.e., (a) whether there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and (b) whether the moving party is entitled to a judgment as a matter of law on the undisputed facts. See also, Honsa v. Tombigbee Transport Corp., 141 S.W.3d 540 (Tenn. 2004).

Pratt v. Smart Corp., 968 S.W.2d 868, 871 (Tenn. Ct. App. 1997). Where a trial court has not given a detailed explanation for its grant of summary judgment, merely stating that a statute doesn't allow recovery for plaintiff, an appellate court will review the record de novo without a presumption of correctness, rather than attempting to discern the reasons for the trial court's decision.

Winter v. Smith, 914 S.W.2d 527, 535 (Tenn. Ct. App. 1995), addresses the standard of appellate review of interlocutory summary judgments.

See also, Godfrey v. Ruiz, 90 S.W.3d 692, 695 (Tenn. 2002); Pero's Steak and Spaghetti House v. Lee, 90 S.W.3d 614, 620 (Tenn. 2002); Guy v. Mutual of Omaha Ins. Co., 79 S.W.3d 528, 534, 18 I.E.R. Cas. (BNA) 1459 (Tenn. 2002); Planters Gin Co. v. Federal Compress & Warehouse Co., Inc., 78 S.W.3d 885, 889 (Tenn. 2002); State v. Walls, 62 S.W.3d 119, 121 (Tenn. 2001).

[78]Franklin Distributing Co., Inc. v. Crush Intern. (U.S.A.), Inc., 726 S.W.2d 926, 929 (Tenn. Ct. App. 1986).

[79]Langley v. Metropolitan Government of Nashville and Davidson County, 1988 WL 123001 (Tenn. Ct. App. 1988). As Tennessee does not provide for the recording and preservation of the proceedings of all its civil courts of record, and as a general practice proceedings concerning summary judgment motions are not recorded or transcribed for use on appeal, it is advisable for counsel to obtain his own court reporter; to file a written notice of objection to the evidence offered at a summary judgment hearing; or to request the trial court to include objections and rulings on objections in the order disposing of the motion for summary judgment.

Rose v. H.C.A. Health Services of Tennessee, Inc., 947 S.W.2d 144, 146 n.1 (Tenn. Ct. App. 1996), citing Tenn. R. App. P. 14(a). On appeal of summary judgment entered for defendant in a medical malpractice action, the appellate court denied appellant's motion to consider post-judgment facts (the discovery of an expert witness from a contiguous state after the trial court's issuance of a final judgment) on the basis that the existence of this witness related directly to the merits of the case, that it was the subject of dispute between the parties, and that it was not a fact that occurred after the judgment, despite counsel not having discovered the witness earlier.

[80]Executone of Memphis, Inc. v. Garner, 650 S.W.2d 734, 736 (Tenn. 1983). See also King v. Betts, 354 S.W.3d 691, 711, 33 I.E.R. Cas. (BNA) 30 (Tenn. 2011); Starr v. Hill, 353 S.W.3d 478, 481 (Tenn. 2011); Carvell v. Bottoms, 900 S.W.2d 23 (Tenn.

law.[81] Rather, these questions are reviewed de novo, with no presumption of correctness.[82] Where an appellate court determines that a summary judgment was granted because of an error of law, the case should be remanded to the trial court for a determination whether there is a

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1995); Cowden v. Sovran Bank/Central South, 816 S.W.2d 741, 744 (Tenn. 1991); Gonzales v. Alman Const. Co., 857 S.W.2d 42, 44–45, 1993 O.S.H. Dec. (CCH) P 30011 (Tenn. Ct. App. 1993).

First Inv. Co. v. Allstate Ins. Co., 917 S.W.2d 229, 231 (Tenn. Ct. App. 1994). In reviewing a trial court's grant of a summary judgment when the parties have agreed on material facts, the trial court's judgment on a question of law is not entitled to a presumption of correctness.

[81]Green v. Johnson, 249 S.W.3d 313, 317 (Tenn. 2008); Tennessee Farmers Life Reassurance Co. v. Rose, 239 S.W.3d 743, 747 (Tenn. 2007); Fruge v. Doe, 952 S.W.2d 408, 410 (Tenn. 1997); Hunter v. Brown, 955 S.W.2d 49, 50–51 (Tenn. 1997); Koella v. McHargue, 976 S.W.2d 658, 660 (Tenn. Ct. App. 1998); Rose v. H.C.A. Health Services of Tennessee, Inc., 947 S.W.2d 144, 147 (Tenn. Ct. App. 1996).

Memphis Housing Authority v. Thompson, 38 S.W.3d 504, 507 (Tenn. 2001). Summary judgment reversed because the trial court had applied an inappropriate legal standard. The case was remanded to the trial court for reconsideration of the motion for summary judgment based upon the appropriate legal standard.

[82]Fain v. O'Connell, 909 S.W.2d 790, 792 (Tenn. 1995), citing Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 91 (Tenn. 1993). On appellate court review of trial court's denial of summary judgment, where the issue is a question of law, the scope of review is de novo with no presumption of correctness.

BellSouth Advertising and Pub. Co. v. Johnson, 100 S.W.3d 202 (Tenn. 2003). The standard of appellate review of a trial court's award of summary judgment is de novo with no presumption of correctness, the trial court's decisions being purely a question of law.

Worley v. Weigels, Inc., 919 S.W.2d 589, 592 (Tenn. 1996), citing Tenn. R. App. P. 13(d). (1) Construction of a statute and application of the law to the facts are questions of law. (2) Where the issues presented on a motion for summary judgment are questions of law, the scope of review is de novo with no presumption of correctness.

See also Himmelfarb v. Allain, 2012 WL 3667440 (Tenn. 2012); Perkins v. Metropolitan Government of Nashville, 115 Fair Empl. Prac. Cas. (BNA) 1437, 2012 WL 3594236 (Tenn. 2012); Green v. Johnson, 249 S.W.3d 313, 317 (Tenn. 2008); Tennessee Farmers Life Reassurance Co. v. Rose, 239 S.W.3d 743, 747 (Tenn. 2007); Memphis Housing Authority v. Thompson, 38 S.W.3d 504, 507 (Tenn. 2001); Canipe v. Memphis City Schools Bd. of Educ., 27 S.W.3d 919, 921, 147 Ed. Law Rep. 1115 (Tenn. 2000); Bowden v. Memphis Bd. of Educ., 29 S.W.3d 462, 464, 148 Ed. Law Rep. 513, 142 Lab. Cas. (CCH) P 59120 (Tenn. 2000); Penley v. Honda Motor Co., Ltd., 31 S.W.3d 181, 183, Prod. Liab. Rep. (CCH) P 15890 (Tenn. 2000); Luther v. Compton, 5 S.W.3d 635, 638 (Tenn. 1999); Sullivan v. Baptist Memorial Hosp., 995 S.W.2d 569, 571, 15 I.E.R. Cas. (BNA) 1426 (Tenn. 1999); Anderson v. Save-A-Lot, Ltd., 989 S.W.2d 277, 279, 75 Empl. Prac. Dec. (CCH) P 45968 (Tenn. 1999); Finister v. Humboldt General Hosp., Inc., 970 S.W.2d 435, 437-38 (Tenn. 1998); Hunter v. Brown, 955 S.W.2d 49, 50–51 (Tenn. 1997); Robinson v. Omer, 952 S.W.2d 423, 426 (Tenn. 1997); Bain v. Wells, 936 S.W.2d 618, 622 (Tenn. 1997); McClung v. Delta Square Ltd. Partnership, 937 S.W.2d 891, 894 (Tenn. 1996) (rejected by, Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968, 135 Ed. Law Rep. 1043 (Ind. 1999)); Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993) (holding modified by, Hannan v. Alltel Publishing Co., 270 S.W.3d 1 (Tenn. 2008)).

Fruge v. Doe, 952 S.W.2d 408, 410 (Tenn. 1997). The issue whether an uninsured motorist insurance carrier is entitled to summary judgment is a question of law, and there is no presumption in favor of the trial court's decision.

NSA DBA Benefit Plan, Inc. v. Connecticut General Life Ins. Co., 968 S.W.2d 791, 795–96 (Tenn. Ct. App. 1997). The existence of an ambiguity in a written insurance contract and its resolution are questions of law for the judge to determine; therefore, appellate review is de novo on the record with no presumption of correctness of the trial court's conclusions of law.

genuine issue of fact under the proper applicable law; the appellate court itself should not make factual determinations on an incomplete record.[83]

In reviewing a trial court's denial of a motion for summary judgment, no presumption of correctness attaches to the trial court's findings, and the appellate court must review the record de novo to determine whether there are any genuine issues with regard to the material facts relevant to the claim or defense contained in the motion and, if not, whether the moving party is entitled to a judgment as a matter of law on the undisputed facts.[84] Where a trial court's denial of a motion for summary judgment is predicated upon the existence of a genuine issue of fact, the denial of the motion is not generally reviewable on appeal where there has been a judgment subsequently rendered on the merits.[85] See § 27:5, Summary judgment generally. Therefore, it may be advisable for the movant to seek an interlocutory appeal before a trial on the merits is held.[86]

A trial court's grant of a Rule 12.02(6) motion to dismiss for failure

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[83]Taylor v. Linville, 656 S.W.2d 368, 370 (Tenn. 1983).

[84]Bain v. Wells, 936 S.W.2d 618, 622 (Tenn. 1997). In this action, trial court denied summary judgment for defendant hospital and Court of Appeals affirmed, but Supreme Court held that summary judgment for defendant was proper. The Supreme Court noted that in determining whether a genuine issue of material fact exists, courts must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. Applying this standard, the Court held (a) that the defendant had met its burden of proving the prerequisites for summary judgment set forth in Tenn. R. Civ. P. 56.03 that there were no genuine issues with regard to the material facts relevant to the claim or defense contained in the motion, and the moving party was entitled to a judgment as a matter of law on the undisputed facts, and (b) that the plaintiff (nonmoving party) failed to meet the burden, which had shifted to it, to offer countervailing factual evidence to establish the existence of a material factual dispute requiring resolution by the trier of fact. Therefore, summary judgment for the defendant was proper.

Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 307 (Tenn. 2008): Appellate review of a denial of summary judgment is de novo with no presumption of correctness as to the trial court's findings. In determining whether a motion for summary judgment should be granted, the evidence must be viewed "in the light most favorable to the nonmoving party," and all reasonable inferences must be drawn in the nonmoving party's favor.

Johnson v. LeBonheur Children's Medical Center, 74 S.W.3d 338, 342 (Tenn. 2002).

[85]In re Estate of Blackburn, 253 S.W.3d 603, 611 (Tenn. Ct. App. 2007); Wagner v. Fleming, 139 S.W.3d 295, 304 (Tenn. Ct. App. 2004); Mullins v. Precision Rubber Products Corp., 671 S.W.2d 496, 498 (Tenn. Ct. App. 1984); Tate v. Monroe County, 578 S.W.2d 642 (Tenn. Ct. App. 1978); Klosterman Development Corp. v. Outlaw Aircraft Sales, Inc., 102 S.W.3d 621, 635 (Tenn. Ct. App. 2002).

See Bradford v. City of Clarksville, 885 S.W.2d 78, 80 (Tenn. Ct. App. 1994).

See, however, Ferguson v. Tomerlin, 656 S.W.2d 378 (Tenn. Ct. App. 1983) (the appellate court held that a summary judgment was proper even though the trial court denied the summary judgment motion and the case proceeded on to trial).

Childress v. Union Realty Co., Ltd., 97 S.W.3d 573, 576 (Tenn. Ct. App. 2002): Although a trial court's denial of a motion for summary judgment based on finding of genuine issues of material fact can not be reviewed by an appellate court when there has been a subsequent judgment following a trial on the merits, Hobson v. First State Bank, 777 S.W.2d 24, 32, 10 U.C.C. Rep. Serv. 2d 160 (Tenn. Ct. App. 1989), the denial of the motion for summary judgment predicated not on an issue of material fact, but on the interpretation of the lease agreement, may be considered on appeal.

[86]Tenn. R. App. P. 9 and 10. See, e.g., Windsor v. Tennessean, 654 S.W.2d 680

to state a claim upon which relief can be granted involves a question of law, and appellate review thereof is de novo with no presumption of correctness.[87] In reviewing the grant of a Rule 12.02(6) motion, the appellate court liberally construes the facts set forth in the complaint[88] and assumes all well-pleaded, material factual allegations in the com-

688, 46 A.L.R.4th 311 (Tenn. Ct. App. 1983); Brown v. J.C. Penney Life Ins. Co., 861 S.W.2d 834, 836 (Tenn. Ct. App. 1992) (trial court's denial of summary judgment was reversed on interlocutory appeal); Batchelor v. Heiskell, Donelson, Bearman, Adams, Williams & Kirsch, 828 S.W.2d 388 (Tenn. Ct. App. 1991) (denial of summary judgment was reversed on interlocutory appeal where the Court found that "the facts in this case are essentially uncontroverted").

[87]Conley v. State, 141 S.W.3d 591 (Tenn. 2004); Stein v. Davidson Hotel Co., 945 S.W.2d 714, 716, 12 I.E.R. Cas. (BNA) 1636 (Tenn. 1997), citing Tenn. R. App. P. 13(d). On appeal of a trial court's grant of a defendant's motion to dismiss, the appellate court takes all allegations of fact in the plaintiff's complaint as true and reviews the lower court's legal conclusions de novo with no presumption of correctness. See also SNPCO, Inc. v. City of Jefferson City, 363 S.W.3d 467, 472 (Tenn. 2012); Lind v. Beaman Dodge, Inc., 356 S.W.3d 889 (Tenn. 2011); Redwing v. Catholic Bishop for Diocese of Memphis, 363 S.W.3d 436, 456 (Tenn. 2012); Harman v. University of Tennessee, 353 S.W.3d 734, 736–7, 274 Ed. Law Rep. 1098, 32 I.E.R. Cas. (BNA) 1495 (Tenn. 2011); Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 32 I.E.R. Cas. (BNA) 1124 (Tenn. 2011); Leggett v. Duke Energy Corp., 308 S.W.3d 843, 2010-1 Trade Cas. (CCH) ¶ 77000 (Tenn. 2010); Highwoods Properties, Inc. v. City of Memphis, 297 S.W.3d 695 (Tenn. 2009); Tigg v. Pirelli Tire Corp., 232 S.W.3d 28, 31–2, 182 L.R.R.M. (BNA) 2658, 154 Lab. Cas. (CCH) P 10892 (Tenn. 2007); Lanier v. Rains, 229 S.W.3d 656, 660 (Tenn. 2007); Kincaid v. SouthTrust Bank, 221 S.W.3d 32, 37 (Tenn. Ct. App. 2006); Jones v. Professional Motorcycle Escort Service, L.L.C., 193 S.W.3d 564, 567 (Tenn. 2006); Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 311 (Tenn. 2005); Freeman Industries, LLC v. Eastman Chemical Co., 172 S.W.3d 512, 516-7, 2005-2 Trade Cas. (CCH) ¶ 74914 (Tenn. 2005); Conley v. State, 141 S.W.3d 591 (Tenn. 2004); Leach v. Taylor, 124 S.W.3d 87, 90 (Tenn. 2004); Gunter v. Laboratory Corp. of America, 121 S.W.3d 636, 639 (Tenn. 2003); Utley v. Tennessee Dept. of Correction, 118 S.W.3d 705, 712 (Tenn. Ct. App. 2003); White v. Revco Discount Drug Centers, Inc., 33 S.W.3d 713, 718 (Tenn. 2000); Doe v. Sundquist, 2 S.W.3d 919, 922 (Tenn. 1999); Premium Finance Corp. of America v. Crump Ins. Services of Memphis, Inc., 978 S.W.2d 91, 92–93 (Tenn. 1998).

Weber v. Moses, 938 S.W.2d 387, 389, 72 Fair Empl. Prac. Cas. (BNA) 1584, 12 I.E.R. Cas. (BNA) 758, 70 Empl. Prac. Dec. (CCH) P 44604, 133 Lab. Cas. (CCH) P 58197 (Tenn. 1996), citing Tenn. R. App. P. 13(d); Owens v. Truckstops of America, 915 S.W.2d 420, 424, Prod. Liab. Rep. (CCH) P 14493 (Tenn. 1996); and Cook By and Through Uithoven v. Spinnaker's of Rivergate, Inc., 878 S.W.2d 934, 938 (Tenn. 1994). Appellate court review of a trial court's grant of a motion to dismiss for failure of plaintiff to timely file its action within the statute of limitations is a question of law. Consequently, the appellate court must take all allegations of fact in the plaintiff's complaint as true, and must review the lower court's legal conclusions de novo with no presumption of correctness.

Winchester v. Little, 996 S.W.2d 818, 822 (Tenn. Ct. App. 1998). As the allegations of fact are taken as true on a Rule 12.02(6) motion, the issues raised on motion to dismiss are questions of law and the scope of review is de novo with no presumption of correctness. Tenn. R. App. P. 13(d).

See also, Lourcey v. Estate of Scarlett, 146 S.W.3d 48, 51 (Tenn. 2004); Crews v. Buckman Laboratories Intern., Inc., 78 S.W.3d 852, 857, 18 I.E.R. Cas. (BNA) 1246 (Tenn. 2002); Faulks v. Crowder, 99 S.W.3d 116, 121 (Tenn. Ct. App. 2002); Mitchell v. Campbell, 88 S.W.3d 561, 565 (Tenn. Ct. App. 2002); Davis v. The Tennessean, 83 S.W.3d 125, 127-8, 29 Media L. Rep. (BNA) 2468 (Tenn. Ct. App. 2001); Sutton v. Barnes, 78 S.W.3d 908, 917 (Tenn. Ct. App. 2002); Pendleton v. Mills, 73 S.W.3d 115, 120-1 (Tenn. Ct. App. 2001).

[88]Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc., 876 S.W.2d 818, 820 (Tenn. 1994). In reviewing a trial court's finding that plaintiff's complaint was legally insufficient because of its failure to state a claim, an appellate court construes the

plaint are true.[89] Further inferences drawn from the facts set forth in the complaint are required to be taken as true.[90] The appellate court will reverse the dismissal and remand if the facts that have been pled

complaint liberally in favor of the plaintiff.

Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, 311 S.W.3d 913, 917 (Tenn. Ct. App. 2009), appeal denied, (Apr. 23, 2010). In reviewing a motion to dismiss, an appellate court must liberally construe the complaint, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.

See also SNPCO, Inc. v. City of Jefferson City, 363 S.W.3d 467, 472 (Tenn. 2012); Tigg v. Pirelli Tire Corp., 232 S.W.3d 28, 31–2, 182 L.R.R.M. (BNA) 2658, 154 Lab. Cas. (CCH) P 10892 (Tenn. 2007); Gunter v. Laboratory Corp. of America, 121 S.W.3d 636, 639 (Tenn. 2003); White v. Revco Discount Drug Centers, Inc., 33 S.W.3d 713, 718 (Tenn. 2000); Lane v. Becker, 334 S.W.3d 756 (Tenn. Ct. App. 2010), appeal denied, (Nov. 29, 2010); Faulks v. Crowder, 99 S.W.3d 116, 121 (Tenn. Ct. App. 2002); Lyons v. Farmers Ins. Exchange, 26 S.W.3d 888, 890 (Tenn. Ct. App. 2000); Baldwin v. Pirelli Armstrong Tire Corp., 3 S.W.3d 1, 2–3, 160 L.R.R.M. (BNA) 2541, 137 Lab. Cas. (CCH) P 10409 (Tenn. Ct. App. 1999), citing Huckeby v. Spangler, 521 S.W.2d 568 (Tenn. 1975); National Gas Distributors v. Sevier County Utility Dist., 7 S.W.3d 41, 43 (Tenn. Ct. App. 1999).

See also, Trau-Med of America, Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 696, R.I.C.O. Bus. Disp. Guide (CCH) P 10287 (Tenn. 2002); Sutton v. Barnes, 78 S.W.3d 908, 917 (Tenn. Ct. App. 2002).

[89]Quality Auto Parts Co., Inc. v. Bluff City Buick Co., Inc., 876 S.W.2d 818, 820 (Tenn. 1994). In reviewing a trial court's finding that plaintiff's complaint was legally insufficient because of its failure to state a claim, an appellate court takes as true all well-pleaded, material factual allegations.

See also SNPCO, Inc. v. City of Jefferson City, 363 S.W.3d 467, 472 (Tenn. 2012); Highwoods Properties, Inc. v. City of Memphis, 297 S.W.3d 695 (Tenn. 2009); Tigg v. Pirelli Tire Corp., 232 S.W.3d 28, 31–2, 182 L.R.R.M. (BNA) 2658, 154 Lab. Cas. (CCH) P 10892 (Tenn. 2007); Lanier v. Rains, 229 S.W.3d 656, 660 (Tenn. 2007); Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 311 (Tenn. 2005); Freeman Industries, LLC v. Eastman Chemical Co., 172 S.W.3d 512, 516-7, 2005-2 Trade Cas. (CCH) ¶ 74914 (Tenn. 2005); Leach v. Taylor, 124 S.W.3d 87, 92-3 (Tenn. 2004); Willis v. Tennessee Dept. of Correction, 113 S.W.3d 706, 710 (Tenn. 2003); White v. Revco Discount Drug Centers, Inc., 33 S.W.3d 713, 718 (Tenn. 2000).

In re Estate of Rinehart, 363 S.W.3d 186, 188 (Tenn. Ct. App. 2011), appeal denied, (Mar. 7, 2012); Collier v. Greenbrier Developers, LLC, 358 S.W.3d 195, 204 (Tenn. Ct. App. 2009); Lane v. Becker, 334 S.W.3d 756, 761 (Tenn. Ct. App. 2010), appeal denied, (Nov. 29, 2010); Davidson v. Bredesen, 330 S.W.3d 876, 882 (Tenn. Ct. App. 2009), appeal denied, (June 18, 2010).

Givens v. Mullikin ex rel. Estate of McElwaney, 75 S.W.3d 383, 403 (Tenn. 2002). In deciding whether the grant of a motion to dismiss is proper, an appellate court does not look to the perceived strength of the plaintiff's proof. Rather, an appellate court should look only to the allegations contained in the plaintiff's complaint.

[90]Utley v. Tennessee Dept. of Correction, 118 S.W.3d 705, 712 (Tenn. Ct. App. 2003); Pendleton v. Mills, 73 S.W.3d 115, 120 (Tenn. Ct. App. 2001). Courts reviewing a complaint being tested by a Tenn. R. Civ. P. 12.02(6) motion must construe the complaint liberally in favor of the plaintiff by taking all factual allegations in the complaint as true, and by giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts. Robert Banks, Jr. & June F. Entman, Tennessee Civil Procedure § 5-6(g), at 254 (1999).

See also, SNPCO, Inc. v. City of Jefferson City, 363 S.W.3d 467, 472 (Tenn. 2012); Tigg v. Pirelli Tire Corp., 232 S.W.3d 28, 31–2, 182 L.R.R.M. (BNA) 2658, 154 Lab. Cas. (CCH) P 10892 (Tenn. 2007).

In re Estate of Rinehart, 363 S.W.3d 186, 188 (Tenn. Ct. App. 2011), appeal denied, (Mar. 7, 2012); Collier v. Greenbrier Developers, LLC, 358 S.W.3d 195, 204 (Tenn. Ct. App. 2009); Foster Business Park, LLC v. J & B Investments, LLC, 269 S.W.3d 50, 54 (Tenn. Ct. App. 2008).

support any possible claim upon which relief may be granted.[91]

Review of a judgment on the pleadings dismissing a complaint under Tenn. R. Civ. P. 12.03 is the same as that for a dismissal for failure to state a claim.[92] A trial court's determination of whether to grant a Rule 59.04 motion to alter or amend a judgment is reviewed under an abuse of discretion standard.[93]

Appeals regarding the denial of new trials are discussed in § 28:1, Motion for new trial.

A Rule 60.02 motion for relief from judgment addresses the sound discretion of the trial judge; thus, the scope of review on appeal is whether the trial judge abused its discretion.[94]

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[91]Pursell v. First American Nat. Bank, 937 S.W.2d 838, 840 (Tenn. 1996); Hawk v. Chattanooga Orthopaedic Group, P.C., 45 S.W.3d 24, 28–29 (Tenn. Ct. App. 2000); Winchester v. Little, 996 S.W.2d 818, 822 (Tenn. Ct. App. 1998); Waller v. Bryan, 16 S.W.3d 770, 773 (Tenn. Ct. App. 1999).

Marshall v. Cintas Corp., Inc., 255 S.W.3d 60, 76 (Tenn. Ct. App. 2007). On appellate review of a trial court's dismissed of a claim on the face of the complaint pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure, the appellate court must take all allegations of fact in the complaint as true and review the trial court's legal conclusions *de novo* with no presumption of correctness. *See* Tenn. R. App. P. 13(d).

Sutton v. Barnes, 78 S.W.3d 908, 917 (Tenn. Ct. App. 2002). A motion to dismiss for failure to state a claim upon which relief can be granted should be denied "unless it appears that the plaintiff[s] can prove no set of facts in support of [their] claim that would entitle [them] to relief." Stein, 945 S.W.2d at 716.

[92]Cherokee Country Club, Inc. v. City of Knoxville, 152 S.W.3d 466, 470 (Tenn. 2004). (1) In reviewing a trial court's ruling on a motion for judgment on the pleadings, an appellate court must accept as true all well-pleaded facts and all reasonable inferences drawn therefrom alleged by the party opposing the motion. (2) In reviewing a trial court's ruling on a motion for judgment on the pleadings, conclusions of law are not admitted nor should judgment on the pleadings be granted unless the moving party is clearly entitled to judgment.

City of Alcoa v. Tennessee Local Government Planning Advisory Committee, 123 S.W.3d 351, 355 (Tenn. Ct. App. 2003). Tenn. R. Civ. P. 12.03 requires the trial court to accept all well pleaded allegations of the opposing party's pleading as true, and all allegations denied by the moving party are construed as false. Conclusions of law are not admitted.

[93]Discover Bank v. Morgan, 363 S.W.3d 479, 487 (Tenn. 2012); Van Grouw v. Malone, 358 S.W.3d 232, 236 (Tenn. Ct. App. 2010), appeal denied, (Feb. 16, 2011); Williams v. Williams, 286 S.W.3d 290, 295 (Tenn. Ct. App. 2008); Linkous v. Lane, 276 S.W.3d 917, 924 (Tenn. Ct. App. 2008).

[94]Underwood v. Zurich Ins. Co., 854 S.W.2d 94, 97, 26 A.L.R.5th 820 (Tenn. 1993). See also Rogers v. Estate of Russell, 50 S.W.3d 441, 444 (Tenn. Ct. App. 2001); Howard v. Howard, 991 S.W.2d 251, 255 (Tenn. Ct. App. 1999).

McNeary v. Baptist Memorial Hosp., 360 S.W.3d 429, 441–2 (Tenn. Ct. App. 2011), appeal denied, (Aug. 25, 2011). (1) The standard of review on appeal of the disposition of motions under Rule 60.02 is whether the trial court abused its discretion in granting or denying relief. (2) A court abuses its discretion when it causes an injustice to the party challenging the decision by (a) applying an incorrect legal standard, (b) reaching an illogical or unreasonable decision, or (c) basing its decision on a clearly erroneous assessment of the evidence. (3) An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. (4) The abuse of discretion standard of review envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal. It reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives. Thus, it does not permit reviewing courts to

second-guess the court below or to substitute their discretion for the lower court's. (5) The abuse of discretion standard of review does not, however, immunize a lower court's decision from any meaningful appellate scrutiny. (6) Discretionary decisions must take the applicable law and the relevant facts into account. (7) To avoid result-oriented decisions or seemingly irreconcilable precedents, reviewing courts should review a lower court's discretionary decision to determine (a) whether the factual basis for the decision is properly supported by evidence in the record, (b) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (c) whether the lower court's decision was within the range of acceptable alternative dispositions.

Henderson v. SAIA, Inc., 318 S.W.3d 328 (Tenn. 2010). The standard of review on appeal regarding a disposition of a Rule 60.02 motion is whether the trial court abused its discretion in granting or denying relief. This deferential standard reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives, and thus envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal.

Lindsey v. Lambert, 333 S.W.3d 572, 576 (Tenn. Ct. App. 2010), appeal denied, (May 20, 2010) and appeal denied, (Nov. 18, 2010). An appellate court will overturn a trial court's decision to grant or deny relief under Rule 60.02 only if the court has abused its discretion.

Ussery v. City of Columbia, 316 S.W.3d 570, 574 (Tenn. Ct. App. 2009), appeal denied, (Mar. 15, 2010). Appellate courts review decisions dealing with Tenn. R. Civ. P. 60.02 under an abuse of discretion standard since these requests for relief are addressed to the trial court's discretion.

Toney v. Mueller Co., 810 S.W.2d 145, 147 (Tenn. 1991): "A motion for relief from judgment pursuant to Rule 60.02 addresses the sound discretion of the trial judge; the scope of review on appeal is whether the trial judge abused his discretion."

Henry v. Goins, 104 S.W.3d 475, 479 (Tenn. 2003). (1) In reviewing a trial court's decision to grant or deny relief pursuant to Rule 60.02, an appellate court gives great deference to the trial court. Consequently, an appellate court will not set aside the trial court's ruling unless the trial court has abused its discretion. (2) An abuse of discretion is found only when a trial court has applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining. The abuse of discretion standard does not permit an appellate court to merely substitute its judgment for that of the trial court. See also, Beason v. Beason, 120 S.W.3d 833, 839 (Tenn. Ct. App. 2003)

Bilyeu v. Bilyeu, 196 S.W.3d 131, 137 (Tenn. Ct. App. 2005). The standard of appellate review of the denial of Tenn. R. Civ. P. 60.02 relief is whether the trial court has abused its discretion. With respect to legal issues, the appellate standard of review of the denial of Rule 60.02 relief is conducted "under a pure de novo standard of review, according no deference to the conclusions of law made by the lower courts."

State ex rel. Russell v. West, 115 S.W.3d 886, 889 (Tenn. Ct. App. 2003). (1) A trial court's decision to grant relief pursuant to Tenn. R. Civ. P. 60.02(5) is discretionary and may be disturbed only if the court below has abused its discretion. (2) A trial court abuses its discretion if its decision is based on a misapplication of controlling legal principles or a clearly erroneous assessment of the evidence, or if it affirmatively appears that the trial court's decision was against logic or reasoning, and caused an injustice or injury to the complaining party.

NCNB Nat. Bank of North Carolina v. Thrailkill, 856 S.W.2d 150, 153 (Tenn. Ct. App. 1993), citing Tenn. R. App. P. 13(d). The appellate court reviews the trial court's decision on a Rule 60.02 motion on the basis of whether he abused his discretion. Under Rule 13(d), the appellate court presumes the trial court's findings of fact are correct unless the evidence preponderates against the findings, but this presumption does not exist with regard to the trial court's legal determination or when the trial court's conclusions are based on uncontroverted facts.

Reynolds v. Battles, 108 S.W.3d 249, 251 (Tenn. Ct. App. 2003). (1) An appellate court reviews a trial court's entry of a default judgment and its refusal to set that judgment aside pursuant to a Tenn. R. Civ. P. 60.02 motion under an abuse of discretion standard. (2) In the interests of justice, however, the courts have expressed a clear preference for a trial on the merits. Thus, Tenn. R. Civ. P. 60.02 is construed

On appellate review of a trial court's discretionary decision, e.g., whether to admit or exclude evidence, there is a presumption that the trial court's decision is correct and the appellate court should review the evidence in the light most favorable to the decision.[95] In its review

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liberally in the context of default judgments. (3) In deciding whether to grant a Tenn. R. Civ. P. 60.02 motion to set aside the default judgment, courts consider three criteria: (a) whether the default was willful; (b) whether the defendant has asserted a meritorious defense; (c) the amount of prejudice which may result to the non-defaulting party. If there is any reasonable doubt about whether the judgment should be set aside, the court should grant relief.

[95](a) Admission of Evidence

State v. Gomez, 367 S.W.3d 237 (Tenn. 2012). An appellate court reviews a trial court's decision to admit evidence by determining if the trial court abused its discretion. A decision to admit evidence will be reversed "only when the court applied an incorrect legal standard, or reached a decision which is against logic or reasoning" and the admission of the evidence "caused an injustice to the party complaining." See also, Holder v. Westgate Resorts Ltd., 356 S.W.3d 373 (Tenn. 2011).

State v. Parker, 350 S.W.3d 883 (Tenn. 2011). An appellate court reviews a trial court's decisions about the admissibility of evidence for an abuse of discretion. Reviewing courts will find an abuse of discretion only when the trial court applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party.

Sanford v. Waugh & Co., Inc., 328 S.W.3d 836 (Tenn. 2010). On appellate review of the trial court's decision to admit or exclude evidence in ruling on a motion in limine, an appellate court applies a deferential abuse of discretion standard.

State v. Jordan, 325 S.W.3d 1 (Tenn. 2010), cert. denied, 131 S. Ct. 1815, 179 L. Ed. 2d 775 (2011). An appellate court reviews a trial court's decisions about the admissibility of evidence for an abuse of discretion. Reviewing courts will find an abuse of discretion only when the trial court applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party.

See also, State v. McCloud, 310 S.W.3d 851, 865 (Tenn. Crim. App. 2009). When the admission or exclusion of opinion evidence is challenged on appeal, it is reviewable only for abuse of discretion.

State v. Gilley, 297 S.W.3d 739, 760 (Tenn. Crim. App. 2008). While a trial court typically reviews a trial court's ruling regarding the admissibility of hearsay under an abuse of discretion standard, State v. Maclin, 183 S.W.3d 335 (Tenn. 2006), has held that the issue of whether the admission of hearsay statements has violated a defendant's rights under the Confrontation Clause is purely a question of law.

State v. Robinson, 146 S.W.3d 469, 490 (Tenn. 2004). A trial court's exercise of discretion in ruling on the admissibility of evidence will not be reversed for abuse of discretion on appeal unless the court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining."

Bravo v. Sumner Regional Health Systems, Inc., 148 S.W.3d 357 (Tenn. Ct. App. 2003). Application of the wrong legal standard constitutes an abuse of discretion.

Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 708–709 (Tenn. Ct. App. 1999).

Kelley v. Johns, 96 S.W.3d 189, 194 (Tenn. Ct. App. 2002). A challenge to the evidentiary foundation for a jury's verdict in a civil case requires a reviewing court to search the record to ascertain whether material evidence supporting the verdict is present. The concept of materiality does not relate to the weight of evidence. Rather, it involves the relationship between the proposition that the evidence is offered to prove and the issues in the case.

Buckner v. Hassell, 44 S.W.3d 78, 83 (Tenn. Ct. App. 2000). In reviewing whether a trial court has abused its discretion in admitting or excluding evidence, the question before the appellate court is not whether it would have reached the same decision the trial court did, but whether the trial court has misconstrued or misapplied the controlling legal principles or has acted inconsistently with the substantial weight

of the evidence. Further, appellate courts should permit a discretionary decision to stand if reasonable judicial minds can differ concerning its soundness.

Richardson v. Miller, 44 S.W.3d 1, 21 (Tenn. Ct. App. 2000). While decisions regarding the admissibility of evidence address themselves to the trial court's discretion, and trial courts have wide latitude in making these decisions, trial courts must take into consideration the factual circumstances and the relevant legal principles. Accordingly, appellate courts will not overturn a trial court's evidentiary ruling unless the trial court applied an incorrect legal standard, based its decision on a clearly erroneous view of the evidence, or has reached a decision against logic and reason that caused injustice to the complaining party.

(b) Discovery

Lee Medical, Inc. v. Beecher, 312 S.W.3d 515 (Tenn. 2010). Decisions regarding pretrial discovery are inherently discretionary, and are reviewed using the abuse of discretion standard of review. An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. A trial court abuses its discretion when it causes an injustice to the party challenging the decision by: (a) applying an incorrect legal standard, (b) reaching an illogical or unreasonable decision, or (c) basing its decision on a clearly erroneous assessment of the evidence. An appellate court reviews a lower court's discretionary decision to determine: (a) whether the factual basis for the decision is properly supported by evidence in the record, (b) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (c) whether the lower court's decision was within the range of acceptable alternative dispositions. In its review of a trial court's discretionary decision, the appellate court should review the underlying factual findings de novo using the preponderance of the evidence standard contained in Tenn. R. App. P. 13(d) and should review the lower court's legal determinations de novo without any presumption of correctness.

Powell v. Community Health Systems, Inc., 312 S.W.3d 496 (Tenn. 2010). The standard of review in discovery disputes involving the application of the privilege in T.C.A. § 63-6-219(e) is like any other discovery dispute; a trial court's decision with regard to the application of the privilege under T.C.A. § 63-6-219(e) is reviewed using the "abuse of discretion" standard of review. Lee Medical, Inc. v. Beecher, 312 S.W.3d 515 (Tenn. 2010).

See Amanns v. Grissom, 333 S.W.3d 90, 98 (Tenn. Ct. App. 2010), appeal denied, (Dec. 7, 2010); Langlois v. Energy Automation Systems, Inc., 332 S.W.3d 353, 357 (Tenn. Ct. App. 2009), appeal denied, (June 18, 2010); Johnston v. Metropolitan Government of Nashville and Davidson County, 320 S.W.3d 299, 308–9 (Tenn. Ct. App. 2009), appeal denied, (June 17, 2010).

Jones v. LeMoyne-Owen College, 308 S.W.3d 894, 901, 256 Ed. Law Rep. 981 (Tenn. Ct. App. 2009), appeal denied, (Mar. 1, 2010). A trial court's decisions concerning discovery are reviewed on appeal under an abuse of discretion standard. Decisions in matters of discovery will not be reversed absent a clear abuse of discretion.

Lewis ex rel. Lewis v. Brooks, 66 S.W.3d 883, 886 (Tenn. Ct. App. 2001). The decision of the trial court in discovery matters will not be reversed on appeal unless a clear abuse of discretion is demonstrated. See also, Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville, 154 S.W.3d 22, 41 (Tenn. 2005); Freeman v. Freeman, 147 S.W.3d 234, 241, 242, 11 A.L.R.6th 801 (Tenn. Ct. App. 2003); Alexander v. Jackson Radiology Associates, P.A., 156 S.W.3d 11, 14 (Tenn. Ct. App. 2004).

Johnson v. Nissan North America, Inc., 146 S.W.3d 600, 604, 15 A.D. Cas. (BNA) 1148 (Tenn. Ct. App. 2004). An appellate court may conclude that a trial court has "abused its discretion," here in a discovery dispute when the trial court has applied an incorrect legal standard, has reached a decision that is illogical, has based its decision on a clearly erroneous assessment of the evidence, or has employed reasoning that causes an injustice to the complaining party. In its review, an appellate court reviews the trial court's underlying factual findings using the preponderance of the evidence standard in Tenn. R. App. P. 13(d); however, the court reviews the trial court's legal determinations de novo without a presumption of correctness.

(d) Sanctions

Pegues v. Illinois Cent. R. Co., 288 S.W.3d 350, 353 (Tenn. Ct. App. 2008). Ap-

pellate courts review a trial court's decision to impose sanctions and its determination of the appropriate sanction under an abuse of discretion standard.

(e) Interest

Coleman Management, Inc. v. Meyer, 304 S.W.3d 340, 354 (Tenn. Ct. App. 2009). An award of prejudgment interest is also reviewed for an abuse of discretion.

(f) Motions to Alter or Amend

Ussery v. City of Columbia, 316 S.W.3d 570, 574 (Tenn. Ct. App. 2009), appeal denied, (Mar. 15, 2010). Appellate courts review decisions dealing with Tenn. R. Civ. P. 59.04 under an abuse of discretion standard since these requests for relief are addressed to the trial court's discretion.

See also, Van Grouw v. Malone, 358 S.W.3d 232, 236 (Tenn. Ct. App. 2010), appeal denied, (Feb. 16, 2011).

(g) Child Support

Massey v. Casals, 315 S.W.3d 788, 798 (Tenn. Ct. App. 2009), appeal denied, (May 12, 2010). Determinations of child support lie within the discretion of the trial court.

(h) Injunctions

Vintage Health Resources, Inc. v. Guiangan, 309 S.W.3d 448, 466, 158 Lab. Cas. (CCH) P 60863 (Tenn. Ct. App. 2009), appeal denied, (Feb. 22, 2010). A trial court's decision regarding whether to grant injunctive relief is reviewed under an abuse of discretion standard.

See also, Gentry v. McCain, 329 S.W.3d 786, 793 (Tenn. Ct. App. 2010), appeal denied, (Oct. 12, 2010).

(i) Jury Arguments

Elliott v. Cobb, 320 S.W.3d 246 (Tenn. 2010). An appellate court reviews a trial court's decision regarding jury argument using the "abuse of discretion" standard. A trial court abuses its discretion by: (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.

(j) Review of Default Judgment

Patterson v. SunTrust Bank, 328 S.W.3d 505, 509 (Tenn. Ct. App. 2010), appeal denied, (Nov. 12, 2010). A trial court's entry of a default judgment is reviewed under an abuse of discretion standard.

See Discover Bank v. Morgan, 363 S.W.3d 479, 487, 493–494 (Tenn. 2012).

(k) Attorneys Fees

First Peoples Bank of Tennessee v. Hill, 340 S.W.3d 398 (Tenn. Ct. App. 2010), appeal denied, (Nov. 17, 2010). Normally, an appellate court will afford the trial judge who has handled the pre-trial proceedings and presided over the trial considerable discretion in determining a reasonable attorney's fee. When the trial court has exercised its discretion in light of the appropriate factors and found the fee to be reasonable, an appellate court simply review for abuse of discretion. Where, however, there is no finding that the fee is reasonable, and no way to ascertain whether the court made the award in light of the appropriate factors, there is no way for us to accord the normal deference to the trial court.

Andrews v. Andrews, 344 S.W.3d 321 (Tenn. Ct. App. 2010), appeal denied, (Mar. 9, 2011). The decision to award attorney fees incurred on appeal lies solely within the discretion of the appellate court.

(l) Spousal Support

Gonsewski v. Gonsewski, 350 S.W.3d 99 (Tenn. 2011). Trial courts should be accorded wide discretion in determining the factually driven question of whether spousal support is needed and, if so, the nature, amount, and duration of the award. These issues involve the careful balancing of many factors. As a result, appellate courts are generally disinclined to second-guess a trial judge's spousal support decision. Rather, the role of an appellate court in reviewing an award of spousal support is to determine whether the trial court applied the correct legal standard and reached a decision that is not clearly unreasonable.

See also, Forbess v. Forbess, 370 S.W.3d 347, 356–357 (Tenn. Ct. App. 2011), appeal denied, (Apr. 12, 2012).

(m) Discretionary costs

of a trial court's discretionary decision, the appellate court should begin with the presumption that the trial judge's discretionary decision is correct, and the appellate court should review the evidence in the light most favorable to the trial judge's decision.[96] An appellate court reviews the underlying factual findings de novo, presuming that the trail court's findings of fact are correct unless the preponderance of the evidence is to the contrary.[97] The appellate court, however,

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Andrews v. Andrews, 344 S.W.3d 321, 345 (Tenn. Ct. App. 2010), appeal denied, (Mar. 9, 2011). The award of discretionary costs is reviewed under an abuse of discretion standard.

Freeman v. CSX Transp., Inc., 359 S.W.3d 171, 179–180 (Tenn. Ct. App. 2010), appeal denied, (Apr. 14, 2011). On appeal, an appellate court will not substitute its own discretion for that of the trial court in awarding Rule 54.04(2) discretionary costs, and will only overturn a discretionary decision when the trial court has abused its discretion by applying an incorrect legal standard, reaching an illogical decision, based its decision on a clearly erroneous assessment of the evidence, or employing reasoning that causes an injustice to the complaining party. The appellant bears the burden of demonstrating that the award constitutes an abuse of discretion by the trial court.

(n) Parenting status and visitation

James v. James, 344 S.W.3d 915, 921 (Tenn. Ct. App. 2010), appeal denied, (Mar. 9, 2011). An appellate court reviews the trial court's determinations with respect to parenting status and the details of visitation under an abuse of discretion standard, affording the trial court great deference. It is also within a trial court's discretion to award attorney's fees as an award of alimony in solido in a divorce action.

See also, Andrews v. Andrews, 344 S.W.3d 321 (Tenn. Ct. App. 2010), appeal denied, (Mar. 9, 2011). In setting alimony, the trial court enjoys broad discretion. Consequently, the trial court's alimony decision will not be altered on appeal unless the trial court has manifestly abused its discretion. In a divorce action, an award of attorney fees and discretionary costs is likewise within the trial court's discretion and will not be altered on appeal unless the trial court has abused that discretion.

(o) Jury Selection

State v. Sexton, 368 S.W.3d 371 (Tenn. 2012), opinion corrected and superseded, 2012 WL 4800459 (Tenn. 2012). Appellate courts must uphold a trial court's ruling with respect to the impartiality of prospective jurors absent a finding of manifest error.

(p) Recusal

4215 Harding Road Homeowners Ass'n. v. Harris, 354 S.W.3d 296, 308 (Tenn. Ct. App. 2011), appeal denied, (Aug. 25, 2011) and reconsideration of denial of appeal denied, (Sept. 8, 2011). Whether a trial judge should grant a motion for recusal is within the discretion of the trial judge. Such a decision will not be reversed unless a clear abuse of discretion appears on the face of the record. A trial court has abused its discretion only when the trial court has applied an incorrect legal standard, or has reached a decision which is illogical or unreasonable and causes an injustice to the party.

(q) Enforcement of Local Rules

4215 Harding Road Homeowners Ass'n. v. Harris, 354 S.W.3d 296, 308 (Tenn. Ct. App. 2011), appeal denied, (Aug. 25, 2011) and reconsideration of denial of appeal denied, (Sept. 8, 2011). Trial courts have broad discretion with respect to the enforcement of local rules.

[96]Lee Medical, Inc. v. Beecher, 312 S.W.3d 515 (Tenn. 2010).

See State v. Phelps, 329 S.W.3d 436 (Tenn. 2010); Amanns v. Grissom, 333 S.W.3d 90, 98 (Tenn. Ct. App. 2010), appeal denied, (Dec. 7, 2010).

[97]Tenn. R. App. P. 13(d).

Urtuzuastegui v. Kirkland, 366 S.W.3d 128 (Tenn. Ct. App. 2011), appeal denied, (Aug. 24, 2011); McNeary v. Baptist Memorial Hosp., 360 S.W.3d 429, 442 (Tenn. Ct. App. 2011), appeal denied, (Aug. 25, 2011).

should review the lower court's legal determinations de novo.[98] Under the abuse of discretion standard, the appellate court may not substitute its judgment for that of the trial court.[99] Appellate courts should permit a trial court's discretionary decision to stand if reasonable judicial minds can differ concerning its propriety.[100] Appellate courts will set aside a trial court's discretionary decision only where there has been an abuse of discretion, i.e., where there has been a misselection of law or when the decision is based on a misapplication of controlling legal principles or on a clearly erroneous assessment of the evidence amounting to an abuse of discretion.[101] Even if there has

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[98]Henderson v. SAIA, Inc., 318 S.W.3d 328 (Tenn. 2010); Ussery v. City of Columbia, 316 S.W.3d 570, 574 (Tenn. Ct. App. 2009), appeal denied, (Mar. 15, 2010).

See also, McNeary v. Baptist Memorial Hosp., 360 S.W.3d 429, 442 (Tenn. Ct. App. 2011), appeal denied, (Aug. 25, 2011); Urtuzuastegui v. Kirkland, 366 S.W.3d 128 (Tenn. Ct. App. 2011), appeal denied, (Aug. 24, 2011).

[99]Discover Bank v. Morgan, 363 S.W.3d 479, 487, 494 (Tenn. 2012). In determining whether a trial court abused its discretion by reaching an illogical conclusion, basing its decision on a clearly erroneous assessment of the evidence, or employing reasoning that caused an injustice, an appellate court will not substitute its judgment for that of the trial court, and will uphold the trial court's ruling so long as reasonable minds can disagree as to the propriety of the decision made.

Ferguson v. Brown, 291 S.W.3d 381 (Tenn. Ct. App. 2008).

[100]Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 708–709 (Tenn. Ct. App. 1999). See Discover Bank v. Morgan, 363 S.W.3d 479, 487, 494 (Tenn. 2012); Greer v. City of Memphis, 356 S.W.3d 917, 921 (Tenn. Ct. App. 2010); State v. Phelps, 329 S.W.3d 436 (Tenn. 2010); Lindsey v. Lambert, 333 S.W.3d 572, 576 (Tenn. Ct. App. 2010), appeal denied, (May 20, 2010) and appeal denied, (Nov. 18, 2010); Gentry v. McCain, 329 S.W.3d 786, 793 (Tenn. Ct. App. 2010), appeal denied, (Oct. 12, 2010); Williams v. Williams, 286 S.W.3d 290, 295 (Tenn. Ct. App. 2008); In re Estate of Greenamyre, 219 S.W.3d 877, 886 (Tenn. Ct. App. 2005); Brown v. Daly, 83 S.W.3d 153, 157 (Tenn. Ct. App. 2001); McPeek v. Lockhart, 174 S.W.3d 751, 756 (Tenn. Ct. App. 2005); Riley v. Whybrew, 185 S.W.3d 393, 400 (Tenn. Ct. App. 2005).

Massachusetts Mut. Life Ins. Co. v. Jefferson, 104 S.W.3d 13, 35 (Tenn. Ct. App. 2002). Appellate courts do not have the latitude to substitute their discretion for that of the trial court. Thus, a trial court's discretionary decision will be upheld as long as it is not clearly unreasonable, and reasonable minds can disagree about its correctness.

[101]Biscan v. Brown, 160 S.W.3d 462, 468 (Tenn. 2005). (1) An appellate court reviews a trial court's decision to admit or exclude evidence by an abuse of discretion standard. (2) A trial court abuses its discretion 'only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining.

Discover Bank v. Morgan, 363 S.W.3d 479, 487 (Tenn. 2012). (1) Abuse of discretion is found only when the trial court applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party. (2) The abuse of discretion standard does not permit an appellate court to merely substitute its judgment for that of the trial court. Instead, under the abuse of discretion standard, a trial court's ruling will be upheld so long as reasonable minds can disagree as to the propriety of the decision made.

State v. Jordan, 325 S.W.3d 1 (Tenn. 2010), cert. denied, 131 S. Ct. 1815, 179 L. Ed. 2d 775 (2011). An appellate court reviews a trial court's decisions about the admissibility of evidence for an abuse of discretion. Reviewing courts will find an abuse of discretion only when the trial court applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party.

Henderson v. SAIA, Inc., 318 S.W.3d 328 (Tenn. 2010). A trial court abuses its discretion when it causes an injustice by applying an incorrect legal standard, reach-

been an abuse of discretion, reversal is appropriate only if an appellate court finds that the error affected the substantial rights of the parties, e.g. by substantially damaging appellant's case so as to con-

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ing an illogical decision, or by resolving the case "on a clearly erroneous assessment of the evidence."

Lee Medical, Inc. v. Beecher, 312 S.W.3d 515 (Tenn. 2010). An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. A trial court abuses its discretion when it causes an injustice to the party challenging the decision by: (a) applying an incorrect legal standard, (b) reaching an illogical or unreasonable decision, or (c) basing its decision on a clearly erroneous assessment of the evidence. An appellate court reviews a lower court's discretionary decision to determine: (a) whether the factual basis for the decision is properly supported by evidence in the record, (b) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (c) whether the lower court's decision was within the range of acceptable alternative dispositions.

State v. Phelps, 329 S.W.3d 436 (Tenn. 2010). A trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party. An appellate court will also find an abuse of discretion when the trial court has failed to consider the relevant factors provided by higher courts as guidance for determining an issue.

Wicker v. Commissioner, 342 S.W.3d 35, 37 (Tenn. Ct. App. 2010), appeal denied, (Nov. 15, 2010). Under the relevant standard, where a trial court applies an incorrect legal principle, reversal is required, even though such a reversal does not indicate any "abuse" as that word is commonly understood. A trial court that premises its analysis on an erroneous understanding of the governing law acts outside its discretion. If a trial court ignores, misunderstands, or misapplies the applicable legal principles, reversal is required under the abuse of discretion standard.

See also, Urtuzuastegui v. Kirkland, 366 S.W.3d 128 (Tenn. Ct. App. 2011), appeal denied, (Aug. 24, 2011); McNeary v. Baptist Memorial Hosp., 360 S.W.3d 429, 441–2 (Tenn. Ct. App. 2011), appeal denied, (Aug. 25, 2011); Patterson v. SunTrust Bank, 328 S.W.3d 505, 509 (Tenn. Ct. App. 2010), appeal denied, (Nov. 12, 2010); Farnham v. Farnham, 323 S.W.3d 129, 133 (Tenn. Ct. App. 2009), appeal denied, (May 12, 2010); State v. Cannon, 254 S.W.3d 287, 295 (Tenn. 2008); State v. Taylor, 240 S.W.3d 789, 794 (Tenn. 2007); Williams v. Williams, 286 S.W.3d 290, 295 (Tenn. Ct. App. 2008); DePasquale v. Chamberlain, 282 S.W.3d 47, 57 (Tenn. Ct. App. 2008); Moody v. Hutchison, 247 S.W.3d 187, 197 (Tenn. Ct. App. 2007).

Marshall v. Cintas Corp., Inc., 255 S.W.3d 60, 71 (Tenn. Ct. App. 2007). An abuse of discretion occurs when the decision of the lower court has no basis in law or fact and is therefore arbitrary, illogical, or unconscionable.

State v. Thomas, 158 S.W.3d 361, 414 (Tenn. 2005). The trial court has broad discretion in resolving questions concerning the qualifications, admissibility, relevance, and competency of expert testimony, and an appellate court should not overturn a trial court's decision in admitting or excluding a proposed expert's testimony unless it finds the trial court abused its discretion.

See State v. Reid, 91 S.W.3d 247, 279 (Tenn. 2002). The law is well settled that the decision of whether or not to enter a mistrial rests within the sound discretion of the trial court, and an appellate court will not interfere with the trial court's discretion absent a clear abuse of discretion on the record.

State v. Powers, 101 S.W.3d 383, 394-95 (Tenn. 2003). Generally, when an appellate court reviews a claim that calls into question a trial court's exclusion of evidence on the grounds of irrelevance, the appellate court will not disturb the decision of the trial court absent an abuse of discretion.

Henry v. Goins, 104 S.W.3d 475, 479 (Tenn. 2003). An abuse of discretion is found only when a trial court has applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining. The abuse of discretion standard does not permit an appellate court to merely substitute its judgment for that of the trial court.

stitute reversible error.[102]

In reviewing findings of fact by a master concurred in by the trial judge, the approved findings have the same weight as a jury verdict that has been approved by the trial judge.[103] An appellate court may reverse only if the matter should not have been referred to the master, is based on an error of law or mixed question of law and fact, or if there is no substantial material evidence to sustain the findings.[104]

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[102]Tenn. R. App. P. 36(b). See Godbee v. Dimick, 213 S.W.3d 865, 880 (Tenn. Ct. App. 2006); Carpenter v. Klepper, 205 S.W.3d 474, 484–5 (Tenn. Ct. App. 2006).

State v. Cannon, 254 S.W.3d 287, 299 (Tenn. 2008). In determining whether an error in admitting evidence has prejudiced a defendant under a harmless error analysis, prejudice is gauged by the substance of the evidence, its relation to other evidence, and the peculiar facts and circumstances of the case, and whether such admission is sufficient ground for reversal depends on the facts in each case; and the appellate court will consider the record as a whole in determining the question of prejudice or reversibility.

Jacks v. City of Millington Bd. of Zoning Appeals, 298 S.W.3d 163, 173 (Tenn. Ct. App. 2009). The erroneous exclusion of evidence does not require reversal on appeal unless the appellate court determines that admission of the evidence would have affected the outcome of the trial.

Hampton v. Braddy, 270 S.W.3d 61, 65 (Tenn. Ct. App. 2007). An erroneous exclusion of evidence requires reversal only if the evidence would have affected the outcome of the trial had it been admitted.

[103]Aussenberg v. Kramer, 944 S.W.2d 367, 370 (Tenn. Ct. App. 1996); Archer v. Archer, 907 S.W.2d 412, 415–16 (Tenn. Ct. App. 1995); Walker v. Moore, 745 S.W.2d 292, 301 (Tenn. Ct. App. 1987); Schoen v. J.C. Bradford & Co., 642 S.W.2d 420, 424 (Tenn. Ct. App. 1982); Ferrell v. Elrod, 63 Tenn. App. 129, 469 S.W.2d 678 (1971).

Blankenship v. Blankenship, 59 S.W.3d 115, 117 (Tenn. Ct. App. 2001).

[104]T.C.A. § 27-1-113; Security Land Co., Inc. v. Touliatos, 716 S.W.2d 918, 921–22 (Tenn. 1986), opinion modified on reh'g, 721 S.W.2d 250 (Tenn. 1986); Gammo v. Rolen, 253 S.W.3d 169, 174 (Tenn. Ct. App. 2007).

Fayne v. Vincent, 301 S.W.3d 162, 170 (Tenn. 2009). Concurrent findings of fact made by the chancellor and special master and supported by material evidence are binding upon the appellate court. T.C.A. § 27-1-113 (2000). However, issues not proper to be referred, findings based on an error of law, mixed questions of fact and law, and findings unsupported by material evidence are not.

In re Estate of Ladd, 247 S.W.3d 628, 636-7 (Tenn. Ct. App. 2007). A concurrent finding of a master and chancellor is conclusive on appeal, except where it is upon an issue not proper to be referred, where it is based on an error of law or a mixed question of fact and law, or where it is not supported by any material evidence. The material evidence standard of review only applies to findings that are made by both the Special Master and the Chancery Court. Thus, the findings of fact made by the Chancery Court but not by the Special Master are not subject to the aforementioned standard of review. Rather, when the findings of the Special Master and the trial court are not concurrent, the standard of review of a trial court's findings of fact is *de novo,* and an appellate court presumes that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). For the evidence to preponderate against a trial court's finding of fact, it must support another finding of fact with greater convincing effect. Issues of law are reviewed *de novo* with no presumption of correctness.

O'Connell v. Metropolitan Government of Nashville & Davidson County, 99 S.W.3d 94, 99 (Tenn. Ct. App. 2002). Findings of fact by a master concurred in by the trial court are conclusive on appeal if supported by any material evidence.

See In re Estate of Haskins, 224 S.W.3d 675, 678 (Tenn. Ct. App. 2006); Manis v. Manis, 49 S.W.3d 295, 301 (Tenn. Ct. App. 2001); Gates, Duncan & Vancamp Co. v. Levatino, 962 S.W.2d 21, 25 (Tenn. Ct. App. 1997); Long v. Long, 957 S.W.2d 825, 828–30 (Tenn. Ct. App. 1997); Aussenberg v. Kramer, 944 S.W.2d 367, 370 (Tenn. Ct. App. 1996); Shepherd v. Griffin, 929 S.W.2d 336, 344 (Tenn. Ct. App. 1995); Archer v.

Where the master, trial court and appellate court concur on factual issues and there is any evidence to support the findings, the findings are conclusive on the Supreme Court.[105] The concurrent findings rule, however, is not applicable to questions of law or mixed questions of law and fact,[106] or where it is not supported by any material evidence.

T.C.A. § 20-10-101 and T.C.A. § 20-10-102, as amended by 1987 Tenn. Pub. Acts 232, provide that trial court additurs and remittiturs are to be reviewed on appeal under the de novo review provisions of Tenn. R. App. P. 13(d) applicable to decisions of trial courts sitting without a jury.[107] It has been held, however, that when a trial judge has approved a jury's verdict and has denied a defendant's motions

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Archer, 907 S.W.2d 412, 415–16 (Tenn. Ct. App. 1995).

Genesco, Inc. v. Scolaro, 871 S.W.2d 487, 491–92 (Tenn. Ct. App. 1993). A special master's findings of law, as distinguished from its findings of fact, which are confirmed by a chancellor, are not conclusive under T.C.A. § 27-1-113.

In re Estate of Wallace, 829 S.W.2d 696, 699–700 (Tenn. Ct. App. 1992). Findings concerning the fees charged by executors, administrators, and other professional assisting in the administration of an estate involve mixed questions of law and fact and are, therefore, not subject to the concurrent finding rule under T.C.A. § 27-1-113.

Blankenship v. Blankenship, 59 S.W.3d 115, 117 (Tenn. Ct. App. 2001); Efird v. Clinic of Plastic and Reconstructive Surgery, P.A., 147 S.W.3d 208, 218 (Tenn. Ct. App. 2003).

[105]T.C.A. § 27-1-113; Staggs v. Herff Motor Co., 216 Tenn. 113, 390 S.W.2d 245 (1965); Evans v. Wheeler, 209 Tenn. 40, 348 S.W.2d 500 (1961); Efird v. Clinic of Plastic and Reconstructive Surgery, P.A., 147 S.W.3d 208, 218 (Tenn. Ct. App. 2003).

[106]Staggs v. Herff Motor Co., 216 Tenn. 113, 390 S.W.2d 245 (1965); Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 718 (Tenn. Ct. App. 1999); Bubis v. Blackman, 58 Tenn. App. 619, 435 S.W.2d 492 (1968); Murdock Acceptance Corp. v. Jones, 50 Tenn. App. 431, 362 S.W.2d 266 (1961).

Blankenship v. Blankenship, 59 S.W.3d 115, 117 (Tenn. Ct. App. 2001).

In re Estate of Ladd, 247 S.W.3d 628, 636-7 (Tenn. Ct. App. 2007). A concurrent finding of a master and chancellor is conclusive on appeal, except where it is upon an issue not proper to be referred, where it is based on an error of law or a mixed question of fact and law, or where it is not supported by any material evidence. The material evidence standard of review only applies to findings that are made by both the Special Master and the Chancery Court. Thus, the findings of fact made by the Chancery Court but not by the Special Master are not subject to the aforementioned standard of review.

[107]Hunter v. Ura, 163 S.W.3d 686, 705 (Tenn. 2005) citing Tenn. R. Civ. P. 13(d). Appellate review of a trial court's suggested remittitur is "de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise."

Long v. Mattingly, 797 S.W.2d 889, 896 (Tenn. Ct. App. 1990): "The role of the appellate courts is to determine whether the trial court's adjustments were justified, giving due credit to the jury's decision regarding the credibility of the witnesses and due deference to the trial court's prerogatives as thirteenth juror. . . . The contours of the scope of appellate review have changed over the years. Now, the appellate courts customarily conduct a three-step review of a trial court's adjustment of a jury's damage award. First, we examine the reasons for the trial court's action since adjustments are proper only when the court disagrees with the amount of the verdict. . . . Second, we examine the amount of the suggested adjustment since adjustments that 'totally destroy' the jury's verdict are impermissible. . . . Third, we review the proof of damages to determine whether the evidence preponderates against the trial court's adjustments. See T.C.A. § 20-10-102(b). If, after reviewing the record, we determine that the adjusted damage award is still excessive, we have the prerogative under T.C.A. § 20-10-103(a) (Supp. 1989) to reduce the damages further. . . ."

Russell v. Crutchfield, 988 S.W.2d 168, 171 (Tenn. Ct. App. 1998). A trial court's remittitur of a jury verdict and its failure to grant a larger remittitur are

for judgment notwithstanding the verdict, for new trial, and for remittitur, the scope of appellate review, when the defendant seeks remittitur on appeal, is governed by the material evidence standard; i.e., if there is any evidence to support the award, it should not be disturbed.[108] It has also been held that on a defendant's appeal arguing that a jury verdict, even though remitted by the trial judge, is still

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governed by the standard of review set forth in T.C.A. § 20-10-102(b). Under the statute, the appellate court is required to "utilize the standard of review provided in Rule 13(d) of the Tennessee Rules of Appellate Procedure applicable to decisions of the trial court sitting without a jury." Thus, review "shall be de novo upon the record of the trial court, accompanied by a presumption of correctness of the finding, unless the preponderance of the evidence is otherwise." Tenn. R. App. P. 13(d). In this case, the Court held that the evidence did not preponderate against the verdict as remitted.

Coffey v. Fayette Tubular Products, 929 S.W.2d 326, 331, 12 I.E.R. Cas. (BNA) 37, 132 Lab. Cas. (CCH) P 58167 (Tenn. 1996). Where an appellate court increases the amount of a remittitur suggested by the trial judge and accepted by the plaintiff under protest, the Supreme Court reviews the record to determine if the preponderance of the evidence is contrary to the *trial court's* findings.

Beske v. Opryland USA, Inc., 923 S.W.2d 544, 547–48 (Tenn. Ct. App. 1996). In a slip and fall action filed by a patron against an amusement park, defendant appealed from a judgment in favor of the plaintiff in the amount of $125,000 for personal injuries. The jury awarded plaintiff $200,000, but the trial judge suggested a remittitur of $75,000 which was accepted by the plaintiff without protest. The Court of Appeals held that (1) the evidence did not preponderate against the suggested remittitur and (2) the amount of the verdict, as reduced by remittitur, was supported by substantial and material evidence.

Holt v. Compton Sales Co., Inc., 900 S.W.2d 291 (Tenn. Ct. App. 1995). Following the trial court's remittitur of a jury verdict on defendant's post-trial motion, which was accepted by the plaintiff, the *defendant* appealed and requested the Court of Appeals to further reduce the judgment entered on the trial court's remittitur. The Court of Appeals held that although such further remittitur is not specifically statutorily authorized, T.C.A. § 20-10-103(a) implicitly recognizes the authority of an appellate court to grant a further remittitur when the award, even as remitted by the trial court, is deemed excessive. The Court held that there is no statutory mandate as to the standard of review of a trial court in failing to grant a larger remittitur, but then added that the proper standard is that set out in T.C.A. § 20-10-103(b) as to the trial court's action in granting a remittitur, i.e., Tenn. R. App. P. 13(d) review applicable to nonjury cases.

Miller v. Choo Choo Partners, L.P., 73 S.W.3d 897, 908 (Tenn. Ct. App. 2001). An appellate court reviews a trial court's remittitur pursuant to Tenn. R. App. P. 13(d). See T.C.A. § 20-10-102(b). Accordingly, the Court must determine whether the evidence preponderates against the trial court's judgment. Un the present case, the Court affirmed the trial court's remittitur as it could not say, upon reviewing the record, that the evidence preponderated against the trial court's determination that the verdict rendered by the jury was excessive and that a remittitur was appropriate in this case.

[108]Pettus v. Hurst, 882 S.W.2d 783, 788 (Tenn. Ct. App. 1993), citing Tenn. R. App. P. 13(d), Poole v. Kroger Co., 604 S.W.2d 52, 54 (Tenn. 1980), and Cary v. Arrowsmith, 777 S.W.2d 8, 23 (Tenn. Ct. App. 1989) (when a trial judge concurs with a jury's verdict after properly exercising its role as thirteenth juror, appellate review of the trial court's denial of additur is limited to determining whether the record contains material evidence that supports the verdict). See also Benson v. Tennessee Valley Elec. Co-op., 868 S.W.2d 630, 640, Prod. Liab. Rep. (CCH) P 13622 (Tenn. Ct. App. 1993); Coyle v. Prieto, 822 S.W.2d 596, 601 (Tenn. Ct. App. 1991).

Kinnard v. Taylor, 39 S.W.3d 120, 121 (Tenn. Ct. App. 2000), citing Tenn. R. App. P. 13(d). Upon appellate review of the sufficiency of a jury verdict and of the propriety of a trial judge's denial of a motion for additur, the jury's verdict will be sustained if the record contains material evidence to support the jury's verdict. Where an appellant/plaintiff asserts that the jury's award is insufficient, the appellate court's focus is on the "lower limit" of the "range of reasonableness." See Foster v.

excessive, the remitted verdict will be affirmed on appeal if material evidence supports the verdict as remitted.[109] The material evidence rule has been applied on appellate review where a trial judge has approved a jury's verdict and has denied a plaintiff's motion for additur, and the plaintiff appeals the denial of additur.[110] On appellate review of a determination regarding punitive damages, an appellate court conducts a de novo review of the amount of punitive damages to determine whether the award meets due process requirements.[111]

As a general rule, a trial court's enforcement of an arbitration provision is reviewed de novo.[112] A determination of an administrative

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Amcon Intern., Inc., 621 S.W.2d 142, 146 (Tenn. 1981).

Thrailkill v. Patterson, 879 S.W.2d 836, 841–42 (Tenn. 1994), discusses the standard of review in the Supreme Court when a remittitur originates in the Court of Appeals. In this wrongful death action, the jury's verdict was approved by the trial judge, notwithstanding defendant's motion for remittitur or a new trial, but the Court of Appeals initiated a remittitur. On further appeal, the Supreme Court noted that T.C.A. § 20-10-101(b)(2) and T.C.A. § 20-10-102(b) were amended by 1987 Tenn. Pub. Acts 232 to provide that Tenn. R. App. P. 13(d) governs appeals regarding additurs and remittiturs. The Supreme Court reinstated the jury's verdict, apparently relying on the material evidence standard of the second sentence in Tenn. R. App. P. 13(d), which is applicable where the trial judge and jury have agreed, by stating on p. 840, that there was "ample proof" presented to the jury upon which they could base their award, and by stating on p. 843: "[W]e do not find the award to be excessive but rather that it stemmed legitimately and naturally from the tragic facts of the suffering and death of the [decedent]."

Van Sickel v. Howard, 882 S.W.2d 794, 795 (Tenn. Ct. App. 1994). When a plaintiff appeals a jury verdict approved by the trial judge, on grounds of the inadequacy of the amount of the verdict, the appellate court reviews the evidence not merely to determine the bare preponderance, but to determine whether the evidence so greatly preponderates against the amount awarded as to show passion, prejudice, or unaccountable caprice.

[109]Miller v. Choo Choo Partners, L.P., 73 S.W.3d 897, 907 (Tenn. Ct. App. 2001). On a jury verdict as remitted, the appellate court is required to take the strongest legitimate view of all the evidence, including all reasonable inferences therefrom, to sustain the verdict; to assume the truth of all the evidence that supports it; and to discard all evidence to the contrary. If there is material evidence to support the trial court's judgment, the appellate court must affirm.

[110]McPeek v. Lockhart, 174 S.W.3d 751 (Tenn. Ct. App. 2005). In this action arising out of an automobile accident, plaintiffs wife and her husband appealed judgment based on a jury verdict in favor of wife for $4,000 (wife had been found 40% at fault) and a jury verdict of $0 dollars on the husband's claim for loss of consortium. Plaintiffs appealed claiming that the Trial Court erred in refusing to grant an additur or a new trial as to the husband's loss of consortium claim. The Court of Appeals affirmed finding that there was material evidence to support the jury's award.

[111]Flax v. DaimlerChrysler Corp., 272 S.W.3d 521, Prod. Liab. Rep. (CCH) P 18055 (Tenn. 2008). See § 7:11, supra.

[112]Rosenberg v. BlueCross BlueShield of Tennessee, Inc., 219 S.W.3d 892, 903–4 (Tenn. Ct. App. 2006). (1) A trial court's order on a motion to compel arbitration addresses itself primarily to the application of contract law. Accordingly, an appellate court reviews such an order with no presumption of correctness on appeal. (2) To the extent that findings of fact are necessary concerning the "cost-prohibitive" nature of the arbitration sought, these findings come to the appellate court with a presumption of correctness absent a preponderance of evidence to the contrary Tenn. R. App. P. 13(d).

Mitchell v. Kindred Healthcare Operating, Inc., 349 S.W.3d 492 (Tenn. Ct. App. 2008). An appellate court reviews a grant or denial of a motion to compel arbitration under the same standards that apply to bench trials. I.e., the appellate court will review the record *de novo* and will presume that the findings of fact are correct unless

tribunal entered under the procedures of the Tennessee Uniform Administrative Procedures Act (TAPA) is subject to de novo review and reversal where the administrative tribunal has exceeded its authority or renders a decision contrary to statute.[113]

Unless otherwise provided by statute, appellate review of an administrative board's factual findings is governed and limited by the provisions of Tennessee Code Annotated section 4-5-322,[114] while ap-

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the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). The Court will review the trial court's resolution of legal issues without a presumption of correctness.

[113]County of Shelby v. Tompkins, 241 S.W.3d 500, 506 (Tenn. Ct. App. 2007). A *de novo* review in this case comports with the UAPA standard allowing for reversal where the administrative tribunal exceeds its authority or renders a decision contrary to statute. *See* T.C.A. § 4-5-322(h)(2), (1) (2005).

Owens v. National Health Corp., 263 S.W.3d 876 (Tenn. 2007). Pre-dispute arbitration agreements in nursing-home contract was not per se invalid, and did not violate public policy, but the Court vacated the Court of Appeals' judgment insofar as it held that the arbitration agreement was not an unconscionable contract of adhesion, and remanded for further proceedings on that issue.

[114]H & R Block Eastern Tax Services, Inc. v. State, Dept. of Commerce and Ins., Div. of Ins., 267 S.W.3d 848 (Tenn. Ct. App. 2008). In cases involving a petition for judicial review of a state administrative agency's determination under the Uniform Administrative Procedures Act ("UAPA"), codified at T.C.A. § 4-5-322, the Court of Appeals reviews the trial court's determination regarding a board's determination, not under the usual standard of appellate review as stated in Tenn. R. App. P. 13(d), but rather looks to T.C.A. § 4-5-322(h), which sets out the standard by which agency and trial court decisions are to be reviewed. (2) T.C.A. § 4-5-322(h) states as follows: "The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are: (1) In violation of constitutional or statutory provisions; (2) In excess of the statutory authority of the agency; (3) Made upon unlawful procedure; (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record. (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." The Court added that a Commissioner's ruling is "entitled to consideration and respect," but not necessarily to "deference." Thus, the ruling is neither controlling nor presumed correct, and if an appellate court finds error in either the Commissioner's interpretation of the statute or her application of the statute to the case's undisputed facts, an appellate court will be impelled to depart from it. T.C.A. § 4-5-322(h) reversed or modified "if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are in violation of constitutional or statutory provisions" or "characterized by abuse of discretion or clearly unwarranted exercise of discretion. An error of law is an abuse of discretion "by definition."

Davis v. Shelby County Sheriff's Dept., 278 S.W.3d 256, 262, 28 I.E.R. Cas. (BNA) 1783 (Tenn. 2009). Appellate review of an administrative board's factual findings is confined to the provisions of Tennessee Code Annotated section 4-5-322.

See however, BMC Enterprises, Inc. v. City of Mt. Juliet, 273 S.W.3d 619 (Tenn. Ct. App. 2008), in which the Court held: (1) that the proper method for obtaining judicial review of a decision by a local board of zoning appeals is by filing a petition for a common law writ of certiorari. (2) The scope of review afforded to courts by a writ is extremely limited, i.e. review is restricted to determining whether the Board exceeded its jurisdiction or acted illegally, arbitrarily, or fraudulently. Review under a common-law writ of certiorari does not extend to a redetermination of the facts found by the board or agency whose decision is being reviewed. The courts may not (a) inquire into the intrinsic correctness of the decision, (b) reweigh the evidence, or (c) substitute their judgment for that of the board or agency. However, they may

pellate review of matters of law is de novo with no presumption of correctness.[115] Where an administrative board has heard conflicting testimony and, as trier of fact, has resolved issues of credibility, reviewing and appellate courts must give considerable deference to the trier of fact's factual findings.[116]

Where there are conflicting determinations of fact by separate triers of fact, e.g., by a judge and a jury, an appellate court may conceivably and logically disagree with, but sustain the jury's verdict as supported by material evidence, and also hold that the evidence does not preponderate against the trial court's finding. Thus where (1) a jury has made finding as a matter of fact that a plaintiff decedent was 25% at fault for his own death; (2) the trial court has made a finding of fact as Claims Commissioner that the decedent was at least 50% at fault; and (3) the trial court has found as 13th juror that no reasonable jury could find that the Decedent was less than 50% at fault, an appellate court may find that there was material evidence to support the first finding, the evidence does not preponderate against the second finding, and the trial court erred as to the third.[117]

§ 30:8 Appellate court judgment and mandate

Upon the rendition of an appellate court's judgment and opinion, the clerk of the appellate court, unless otherwise ordered by the court, enters a notation of judgment on its docket, this notation constituting entry of judgment.[1] On the same day that it makes its notation constituting entry, the clerk must mail a copy of the opinion and notice of the date of entry of judgment to the parties or their counsel of record.[2] The costs may be assessed either at the time of entry of judg-

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review the record solely to determine whether it contains any material evidence to support the decision because a decision without evidentiary support is an arbitrary one. (3) The issue of whether there is sufficient evidence to support a zoning decision is a question of law and an appellate court therefore, reviews the record de novo without a presumption of correctness while applying the limited standard of review applicable here.

[115]Davis v. Shelby County Sheriff's Dept., 278 S.W.3d 256, 262, 28 I.E.R. Cas. (BNA) 1783 (Tenn. 2009). Although appellate review of an administrative board's factual findings is confined to the provisions of Tennessee Code Annotated section 4-5-322, appellate review of matters of law is de novo with no presumption of correctness. Tenn. R. App. P. 13(d); Cumulus Broadcasting, Inc. v. Shim, 226 S.W.3d 366, 373 (Tenn. 2007).

BMC Enterprises, Inc. v. City of Mt. Juliet, 273 S.W.3d 619, 624 (Tenn. Ct. App. 2008).

[116]Davis v. Shelby County Sheriff's Dept., 278 S.W.3d 256, 265–6, 28 I.E.R. Cas. (BNA) 1783 (Tenn. 2009) citing Seals v. England/Corsair Upholstery Mfg. Co., Inc., 984 S.W.2d 912, 915 (Tenn. 1999).

[117]Usher v. Charles Blalock & Sons, Inc., 339 S.W.3d 45, 63–4 (Tenn. Ct. App. 2010), appeal denied, (Feb. 17, 2011).

[Section 30:8]

[1]Tenn. R. App. P. 38; Tenn. S. Ct. R. 4(1). See State v. Goodson, 77 S.W.3d 240, 242-3 (Tenn. Crim. App. 2001).

[2]Tenn. R. App. P. 38. See also T.C.A. § 27-1-114, as amended by 1981 Tenn. Pub. Acts 449, § 2(13); T.C.A. § 27-1-119 and T.C.A. § 27-1-120 (reasons for reversal must be furnished to the trial court in writing).

Reynolds v. Battles, 108 S.W.3d 249, 251 (Tenn. Ct. App. 2003). A party to an

§ 30:19 Media coverage of appellate court proceedings

By Order dated December 14, 1995, the Tennessee Supreme Court adopted Tenn. S. Ct. R. 30, which provides that media coverage of public judicial proceedings in the appellate courts of Tennessee shall be allowed in accordance with the provisions of this Rule, for a one-year period beginning on January 1, 1996, and ending on December 31, 1996. By Order dated December 30, 1996, Rule 30, subject to an amendment to section (D)(2), was "made permanent and shall govern media coverage of judicial proceedings in Tennessee." The Supreme Court further ordered that Rule 10, Canon 3A(7)(a), which governed media coverage of judicial proceedings prior to the adoption of Rule 30, be withdrawn.

§ 30:20 Appellate opinions—Weight of authority

Tennessee Supreme Court opinions that have been designated for publication have stare decisis effect, i.e., they are binding and have controlling precedential effect in all subsequent state court actions involving the same issue and the same or substantially similar facts, unless they have been overruled by a later Supreme Court opinion or superseded by later legislation.[1] In contrast, a previous unreported Supreme Court decision is not controlling authority, but it is entitled

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ters only, the Supreme Court's answering a certified question is not an adjudicative function, is not an exercise of the Court's jurisdiction, and is not prohibited by Article VI, section 2. (2) The Supreme Court does not exercise its "jurisdiction" unless it finally disposes of a cause. Answering a certified question does not finally dispose of the cause; it merely informs the district court, which retains jurisdiction over the cause, how to interpret the state law at issue. Thus, by answering a state-law question certified by a federal court, the Supreme Court may affect the outcome of federal litigation, but it is the federal court who hears and decides the cause. (3) The Supreme Court's power to answer certified questions comes not from the Tennessee Constitution's grant of jurisdiction; rather, the Court's power to answer certified questions is grounded in Tenn. Const. Art. VI, § 1, which provides that "the judicial power of this State shall be vested in one Supreme Court and in such Circuit, Chancery and other inferior Courts as the Legislature shall from time to time, ordain and establish; in the Judges thereof, and in Justices of the Peace." Under Tenn. Const. Art. VI, § 1, the Tennessee Supreme Court may answer certified questions consistent with the inherent power of the Court and with the Court's responsibility to protect the sovereignty of the state. (4) The inherent power of the Supreme Court consists of all powers reasonably required to enable the Court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. (5) As a sovereign state, Tennessee has the power to exercise and the responsibility to protect the sovereignty granted to it by the United States Constitution.

Seals v. H & F, Inc., 301 S.W.3d 237, 241 (Tenn. 2010). Under Rule 23 of the Tennessee Supreme Court Rules, the Supreme Court may "accept and answer a question of state law certified . . . by the federal court to assist the federal court in deciding a question of state law." Although "answering a certified question is not an adjudicative function" and, in consequence, "not an exercise of this Court's jurisdiction," the Supreme Court is authorized to answer certified questions as part of its inherent judicial power under Tenn. Const. art. VI, section 1.

[Section 30:20]

[1]See Union Trust Co. v. Williamson County Bd. of Zoning Appeals, 500 S.W.2d 608, 614 (Tenn. 1973). See also State v. Irick, 906 S.W.2d 440, 443 (Tenn. 1995); Swift v. Kirby, 737 S.W.2d 271, 277 (Tenn. 1987); Barger v. Brock, 535 S.W.2d 337, 341 (Tenn. 1976); Staten v. State, 191 Tenn. 157, 159, 232 S.W.2d 18, 19 (1950).

Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 32 I.E.R.

Cas. (BNA) 1124 (Tenn. 2011). The Court of Appeals has no authority to overrule or modify Tennessee Supreme Court opinions. See also, Roberts v. Bailey, 338 S.W.3d 540 (Tenn. Ct. App. 2010), appeal denied, (Mar. 9, 2011).

In re Estate of Davis, 308 S.W.3d 832, 841 (Tenn. 2010). Stare decisis only applies with reference to decisions directly upon the point in controversy, and only arises in respect of decisions directly upon the points in issue.

Jordan v. Knox County, 213 S.W.3d 751, 780, 216 Ed. Law Rep. 982 (Tenn. 2007): " Stare decisis, of course, is a fundamental principle of law. The appellate courts are not composed of judges free to write their personal opinions on public policy into law. Lewis F. Powell, Jr., Stare Decisis and Judicial Restraint, Journal of Supreme Court History, 1991, at 13, 16. This doctrine is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)."

Clinton Books, Inc. v. City of Memphis, 197 S.W.3d 749 (Tenn. 2006). Stare decisis only applies with reference to decisions directly upon the point in controversy.

Glanton v. Lord, 183 S.W.3d 391, 398 (Tenn. Ct. App. 2005). Judicial opinions are authority only for the points actually considered and decided.

See In re Estate of McFarland, 167 S.W.3d 299, 305 (Tenn. 2005), discussing the principle of stare decisis, notes: (1) Whenever a judicial decision has been submitted to and for some time, acted under, and is not manifestly repugnant to some rule of law of vital importance in the system, it should not lightly be departed from, nor for purposes which are not of the highest value to the community. (2) The doctrine of stare decisis is one of commanding importance, giving, as it does, firmness and stability to principles of law. (3) Stability in the law allows individuals to plan their affairs and to safely judge of their legal rights. (4) Generally, well-settled rules of law will be overturned only when there is obvious error or unreasonableness in the precedent, changes in conditions which render the precedent obsolete, the likelihood that adherence to precedence would cause greater harm to the community than would disregarding stare decisis, or an inconsistency between precedent and a constitutional provision. (5) The power of the Supreme Court to overrule former decisions is very sparingly exercised and only when the reason is compelling. (6) Radical changes in the law are best made by the legislature.

See Carroll v. Whitney, 29 S.W.3d 14, 25–26 (Tenn. 2000) (Anderson, dissenting). Under the fundamental principle of stare decisis, which is designed to achieve consistency in the law and to promote confidence and reliance on the Supreme Court's decisions, a court should depart from its prior decisions only upon rare and exceptional occasions. Accordingly, under stare decisis, when a supreme court reexamines a prior holding it is required to ask whether related principles of law have so far developed that the old rule has been left no more than a remnant of abandoned doctrine, whether facts have changed from those which furnished the justification for the earlier decision so as to rob the old rule of its justification, whether the rule has been subject to the kind of reliance that would lend hardships to the consequences of overruling it and add inequity to the cost of repudiation, and finally, whether the rule has proven to be intolerable in defying practical workability. In the present case, the dissent stated that because it was convinced that the majority's decision created inconsistency in the law and undermined the reliability of the Supreme Court's decisions as an institution, this was a classic example of when adherence to stare decisis is appropriate.

See Dotson v. Blake, 29 S.W.3d 26, 30–31 (Tenn. 2000) (Holder, concurring). Stare decisis only applies with reference to decisions directly upon the point in controversy. The equally important doctrine of judicial restraint should compel the Supreme Court from deciding issues not before the Court, as the Court does not render advisory opinions on questions which are premature and contingent and may never arise in the future.

Mercer v. Vanderbilt University, Inc., 134 S.W.3d 121 (Tenn. 2004) expressly overruled Gray v. Ford Motor Co., 914 S.W.2d 464 (Tenn.1996), but then acknowledged that the present case could be distinguished from Gray. In so holding, the majority stated it was convinced that the need for clarity required a reexamination of the

underpinnings of Gray and its continued viability. The minority opinion states that Gray does not control this case and did not need to be overruled. "By overruling Gray v. Ford Motor Co., 914 S.W.2d 464 (Tenn.1996), a decision released only eight years ago, the majority disregards the principle of stare decisis and undermines the fairness goal of our prior comparative fault decisions."

Consider State v. Kendricks, 891 S.W.2d 597, 603 (Tenn. 1994). Although the principle of stare decisis demands that decisions not be casually overruled, the Supreme Court has a duty to reject a principle of law that no longer works. See also State v. Rogers, 992 S.W.2d 393, 400 (Tenn. 1999), aff'd, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001): "This Court has 'not hesitated to abolish obsolete common-law doctrines,' and we have recognized that 'we have a special duty to do so where it is the Court, rather than the Legislature, which has recognized and nurtured' the common law rule. . . . Indeed, we have stated that 'we abdicate our function, in a field peculiarly non-statutory, when we refuse to consider an old and court-made rule.'"

Alcazar v. Hayes, 982 S.W.2d 845, 852 n.5 (Tenn. 1998) (rejected by, Clementi v. Nationwide Mut. Fire Ins. Co., 16 P.3d 223 (Colo. 2001)). While recognizing the doctrine of stare decisis and stating its reluctance to overturn established precedent, the Court recognized that stare decisis, while tending to consistency and uniformity of decision, is not inflexible.

Consider Rogers v. Tennessee, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001). (1) While the ex post facto provisions of U.S. Const. Art. I, § 9, cl. 3 and Art. I, § 10, cl. 1, do not apply to the judicial branch of government, retroactive application of a Tennessee Supreme Court decision that is a marked and unpredictable departure from prior precedent may violate the "fair warning principle" of due process of law under U.S. Const. Amend. XIV. In the present case, however, the Court held that the Tennessee Supreme Court's changing the previous common law "year and a day" rule did not represent the exercise of unfair, arbitrary, unexpected, and indefensible judicial action, so as to violate the "fair warning principle" of due process of law. Rather, the Tennessee Supreme Court's decision was a routine exercise of common law decision making, which brought the common law into conformity with reason and common sense.

Buddy Lee Attractions, Inc. v. William Morris Agency, Inc., 13 S.W.3d 343, 360 (Tenn. Ct. App. 1999) (Koch, concurring). (1) The Court of Appeals cannot reverse decisions of the Tennessee Supreme Court, see Richardson v. Johnson, 60 Tenn. App. 129, 136, 444 S.W.2d 708, 711 (1969), and the principle of stare decisis mandates caution when revisiting issues that have already been decided. (2) Stare decisis, however, does not compel courts to perpetuate manifest error, see Summers v. Thompson, 764 S.W.2d 182, 199 (Tenn. 1988) (Drowota, J., concurring); Arnold v. City of Knoxville, 115 Tenn. 195, 202, 90 S.W. 469, 470 (1905), and does not apply to dicta. See Shousha v. Matthews Drivurself Service, Inc., 210 Tenn. 384, 389–90, 358 S.W.2d 471, 473–74 (1962).

Tenn. S. Ct. R. 4(H)(2), as amended on November 1, 1999, provides that opinions reported (published) in the official reporter shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction. Tenn. S. Ct. R. 4(A)(2), as amended on November 1, 1999, provides: "Unless explicitly designated 'Not for Publication,' all opinions of the Tennessee Supreme Court shall be published in the official reporter. Concurring and dissenting opinions shall be published along with the majority opinion."

Weston v. State, 60 S.W.3d 57, 59 (Tenn. 2001) citing State v. Irick, 906 S.W.2d 440, 443 (Tenn. 1995). Inferior courts must abide the orders, decrees and precedents of higher courts.

State v. Gomez, 163 S.W.3d 632, 650-1 (Tenn. 2005) (rejected by, State v. Natale, 184 N.J. 458, 878 A.2d 724 (2005)) and cert. granted, judgment vacated, 549 U.S. 1190, 127 S. Ct. 1209, 167 L. Ed. 2d 36 (2007). The Tennessee Supreme Court is not the final arbiter of the United Constitution, as it is of the Tennessee Constitution. Like all Tennessee courts, the Supreme Court is bound by the United States Supreme Court's interpretation of the United States Constitution. Parties dissatisfied with the Tennessee Supreme Court's interpretation of the United States Constitution can seek review in the United States Supreme Court.

to persuasive force.[2] Unpublished opinions of a Special Workers' Compensation Appeals Panel of the Supreme Court shall be considered persuasive authority.[3]

Tennessee Supreme Court Rule 4, adopted November 1, 1999, recognizes three types of denials of applications for permission to appeal Court of Appeals judgments: (a) denials with a recommendation that the opinion of the Court of Appeals be published; (b) denials with a "Not for Citation" designation; and (c) denials without recommendation or designation.

Rule 4 provides that if an application for permission to appeal is filed and denied with the recommendation that the intermediate appellate court opinion be published, the author of the intermediate appellate court opinion shall ensure that the opinion is published in the official reporter.[4] The Rule further provides that opinions reported in the official reporter shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction.[5]

If an application for permission to appeal is denied by the Supreme Court with a "Not for Citation" designation, Rule 4 provides that the opinion of the intermediate appellate court has no precedential value,[6]

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[2]McConnell v. State, 12 S.W.3d 795, 799 n.5 (Tenn. 2000). While a previous unreported Supreme Court decision is not controlling authority, it is entitled to persuasive force. In so holding, the Court noted that in Allstate Ins. Co. v. Watts, 811 S.W.2d 883, 886 n.2 (Tenn. 1991), it had previously noted that "[u]npublished intermediate court opinions have persuasive force."

See also, In re D.Y.H., 226 S.W.3d 327, 332 n.3 (Tenn. 2007). While unpublished opinions are not considered controlling authority except between the parties to the case, they are considered persuasive authority. Tenn. S.Ct. R. 4(H)(1); McConnell v. State, 12 S.W.3d 795, 799 n.5 (Tenn. 2000) (citing Allstate Ins. Co. v. Watts, 811 S.W.2d 883, 886 n.2 (Tenn. 1991)).

Edwards v. City of Memphis, 342 S.W.3d 12, 17–8 (Tenn. Ct. App. 2010), appeal denied, (Apr. 13, 2011). While it is true that unpublished opinions are not controlling, Tenn. Sup. Ct. R. 4(G) specifically states that unpublished cases constitute persuasive authority.

[3]Tenn. S. Ct. R. 4(A)(3) provides, however, that opinions of the Special Workers' Compensation Panels shall not be published unless publication is ordered by a majority of the Supreme Court. Tenn. S. Ct. R. 4(H)(1) provides that unpublished opinions of the Special Workers' Compensation Appeals Panel shall be considered persuasive authority.

[4]Tenn. S. Ct. R. 4(D), as amended on November 1, 1999.

[5]Tenn. S. Ct. R. 4(H)(2), as amended on November 1, 1999.

In Meadows v. State, 849 S.W.2d 748 (Tenn. 1993), the Supreme Court, prior to the 1999 amendment to Tenn. S. Ct. R. 4, held that it is not committed to all views expressed in an opinion of an intermediate appellate court where the Supreme Court has denied permission to appeal, but published opinions of intermediate appellate courts are opinions which have precedential value and may be relied upon by the bench and bar of this state as representing the present state of law with the same confidence and reliability as published Supreme Court opinions, so long as they are not overruled or modified by subsequent decisions. In so holding, the Court stated: "To the extent that Spalding v. Davis, 674 S.W.2d 710 (Tenn. 1984) holds otherwise, it is overruled."

Francois v. Willis, 205 S.W.3d 915, n.2 (Tenn. Ct. App. 2006). Tenn. S.Ct. R. 4(H)(2) requires an appellate court to consider a reported Court of Appeals opinion, from which permission to appeal has been denied, as "controlling authority."

[6]Tenn. S. Ct. R. 4(F)(1), as amended on November 1, 1999.

and no persuasive authority.[7] The Rule adds that an opinion designated "Not for Citation" shall not be published in any official reporter nor cited by any judge in any trial or appellate court decision or by any litigant in any brief, or other material presented to any court, except when the opinion is the basis for a claim of res judicata, collateral estoppel, or law of the case, or to establish a split of authority, or when the opinion is relevant to a criminal, post-conviction or habeas corpus action involving the same defendant.[8]

If an application for permission to appeal is denied by the Supreme Court without either a recommendation for publication or a "Not for Citation" designation, Rule 4 provides that the opinion of the intermediate appellate court may be published in the official reporter in accordance with the rules of the intermediate appellate court if the opinion meets one or more of the following standards of publication: "(i) the opinion established a new rule of law, alters or modifies an existing rule, or applies an existing rule to a set of facts significantly different from those stated in other published opinions; (ii) the opinion involves a legal issue of continuing public interest; (iii) the opinion criticizes, with reasons given, an existing rule of law; (iv) the opinion resolves an apparent conflict of authority, whether or not the earlier opinion or opinions are reported; (v) the opinion updates, clarifies or distinguishes a principle of law; or (vi) the opinion makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law. See Court of Appeals Rule 11(b) and Court of Criminal Appeals Rule 19.1(1)."[9] Rule 4 provides that opinions reported in the official reporter shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction.[10]

Where an application for permission to appeal a Court of Appeals decision has been denied without recommendation for publication or designation, and the Court of Appeals determines that its opinion shall not be published, Rule 4, as amended in 1999, provides that the Court of Appeals opinion shall only be considered controlling authority between the parties to the case when relevant under the doctrine of the law of the case, res judicata, collateral estoppel, or in a criminal, post-conviction, or habeas corpus action involving the same defendant.[11] An unpublished opinion that has not been designated "Not for Citation," "Denied, Concurring in Result Only" or "Denied, Not for Publication" may be cited for other purposes as persuasive

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[7]Tenn. S. Ct. R. 4(H)(1), as amended on November 1, 1999. See Baines v. Wilson County, 86 S.W.3d 575, 579 n.2 (Tenn. Ct. App. 2002).

[8]Tenn. S. Ct. R. 4(F)(2), as amended on November 1, 1999.

[9]Tenn. S. Ct. R. 4(E), as amended on November 1, 1999.

[10]Tenn. S. Ct. R. 4, as amended on November 1, 1999.

[11]Tenn. S. Ct. R. 4(H)(1), as amended on November 1, 1999.

Pero's Steak and Spaghetti House v. Lee, 90 S.W.3d 614, 622 (Tenn. 2002). The Supreme Court is not bound by unpublished decisions of the Court of Appeals. Tenn. Sup. Ct. R. 4(H)(1). While the Court held that litigants generally may rely upon unpublished opinions as persuasive authority, the reasoning of cited unreported case was not persuasive as to the particular issue in this appeal.

authority.[12]

Prior to the 1999 amendment to Supreme Court Rule 4, Rule 4 permitted denials of applications for permission to appeal designated "Denied, Concurring in Results Only" (DCRO), or "Denied, Not for Publication" (DNP).[13] Rule 4, as amended in 1999, provides that from

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[12]Tenn. S. Ct. R. 4(H)(1), as amended on November 1, 1999.

Smith County Regional Planning Com'n v. Hiwassee Village Mobile Home Park, LLC, 304 S.W.3d 302, 314 n.15 (Tenn. 2010). Based upon Tenn. Sup. Ct. R. 4 in its past and present forms, an appellate court may consider a previous opinion marked "Not Designated for Publication," as persuasive authority in deciding a later case involving different parties, insofar as it is similar to the facts in the previous case, provided the earlier opinion has not specifically been marked as "not for citation pursuant to Tenn. S. Ct. R. 4." At most, an earlier version of Rule 4 stated, "No opinion so designated [as not for publication] shall be cited in any court unless a copy thereof shall be furnished to the court and to adversary counsel." Tenn. Sup. Ct. R. 4, § 5 (1988). As amended in November 1999, Rule 4 allows the citation of opinions marked "Not Designated for Publication" In relevant part, the amended rule reads: "An unpublished opinion shall be considered *controlling authority between the parties* to the case when relevant. . . . Unless designated 'Not for Citation,' '[Denied, Concurring in Results Only]' or '[Denied, Not for Publication]' . . ., unpublished opinions for all other purposes shall be considered persuasive authority." Tenn. S. Ct. R. 4(H)(1) (1999).

See Allstate Ins. Co. v. Watts, 811 S.W.2d 883, 886 n.2 (Tenn. 1991): "Opinions that are not officially published may be cited in briefs as long as copies are furnished to the Court and adversary counsel, and this rule was complied with in this case. The reference by this Court to an unreported decision is a departure from the general rule that unpublished opinions should not be cited in published opinions. Unfortunately, many of the best opinions of our intermediate appellate courts are unpublished. As Justice Henry stated in Pairamore v. Pairamore, 547 S.W.2d 545, 552 (Tenn. 1977), 'many outstanding opinions of our intermediate Appellate Court are consigned to oblivion and much scholarly research is lost to the profession.' In Almany, Supreme Court review was not sought. Unpublished intermediate court opinions have persuasive force and in Almany the research and reasoning of Justice Koch was found to be helpful, thus the citation."

In re Adoption of E.N.R., 42 S.W.3d 26, 31 n.2 (Tenn. 2001). A trial court is not bound to follow an unpublished Court of Appeals' decision. Rather, an unpublished decision is nonbinding persuasive authority.

Glanton v. Lord, 183 S.W.3d 391, 397 n.6 (Tenn. Ct. App. 2005). An appellate court's opinion, that has not been officially reported, is considered "persuasive" but not "controlling." Tenn. Sup. Ct. R. 4(H)(1).

Townes v. Sunbeam Oster Co., Inc., 50 S.W.3d 446, 452 (Tenn. Ct. App. 2001). A statutory interpretation by one panel of the Court of Appeals is not "controlling authority" on another panel of the Court where it has not been reported in the official reporter. Tenn. S. Ct. R. 4(H)(2). See also Brown v. Knox County, 39 S.W.3d 585, 589 (Tenn. Ct. App. 2000) (an unpublished Court of Appeals' opinion is persuasive authority).

[13]Tennessee Supreme Court Rule 4(4), adopted on January 28, 1981, recognized that there were two types of denials of applications for permission to appeal for Court of Appeals judgments: (1) a denial concurring in result only, and (2) a denial without restricting language.

Ladd by Ladd v. Honda Motor Co., Ltd., 939 S.W.2d 83, 91 n.4, Prod. Liab. Rep. (CCH) P 14709 (Tenn. Ct. App. 1996), discusses the confusion in the law regarding the effect of these various types of denials of permission to appeal as follows: "Few appellate dispositions have caused more confusion among the bench and bar than the Tennessee Supreme Court's practice of declining to review an intermediate appellate court's opinion 'concurring in results only.' One justice has characterized the practice as 'patently unfair' because it leaves the intermediate appellate courts, the trial courts, and the litigants to speculate about the reasons for the Court's action. Pairamore v. Pairamore, 547 S.W.2d at 552 (Henry, J., dissenting). The Tennessee

and after November 1, 1999, the precedential and citation value applicable to these intermediate appellate court decisions shall be the same as decisions with a "Not for Citation" designation.[14] Thus, these decisions may not be published in any official reporter nor cited by any judge in any trial or appellate court decision or by any litigant in any brief, or other material presented to any court, except when the opinion is the basis for a claim of res judicata, collateral estoppel, or law of the case, or to establish a split of authority, or when the opinion is relevant to a criminal, post-conviction or habeas corpus action involving the same defendant. Further, under Rule 4(F)(1), as amended on November 1, 1999, the opinion of the intermediate appellate court has no precedential value,[15] and under Rule 4(H)(1), the opinion has no persuasive authority.[16]

Tennessee Supreme Court Rule 4, as amended on November 1, 1999, provides that if no application for permission to appeal is filed, or if an application is filed but dismissed as untimely, publication of the intermediate appellate court opinion shall proceed in accordance with either Court of Appeals Rule 11 or Court of Criminal Appeals Rule

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Supreme Court has never satisfactorily explained the difference between the 'd.c.r.o.' disposition and a simple denial of an application for permission to appeal. When the Court denies an application for permission to appeal 'concurring in results only,' it is obviously concurring only in the opinion's results, not necessarily its reasoning. However, the Court has never held that the simple denial of an application for permission to appeal amounts to an endorsement of both the reasoning and the results of the intermediate appellate court's opinion. While it has pointed out that the denial of a Tenn. R. App. P. 11 application, without more, 'emphasizes the concurrence of the Court in the opinion of the . . . [intermediate appellate court],' Beard v. Beard, 158 Tenn. 437, 442, 14 S.W.2d 745, 747 (1929), it has also explained that it is primarily concerned with the results reached, Adams v. State, 547 S.W.2d 553, 556 (Tenn. 1977); Bryan v. Aetna Life Ins. Co., 174 Tenn. 602, 611, 130 S.W.2d 85, 88 (1939), and that the simple denial of an application for permission to appeal does not commit the Court to all the views expressed in the particular intermediate appellate court opinion. Swift v. Kirby, 737 S.W.2d 271, 277 (Tenn. 1987); Street v. Calvert, 541 S.W.2d 576, 587 (Tenn. 1976) (abrogated by, McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992)). Thus, it would appear that the Court's simple denial of an application for permission to appeal does not have any greater jurisprudential significance than a denial 'concurring in results only.' Thus, the distinction between a 'd.c.r.o.' disposition and the simple denial of an application for permission to appeal is extremely subtle. On the face of things, the Court appears to be engaging in a result-oriented analysis in both circumstances and is not necessarily agreeing with the intermediate appellate court's reasoning when it simply denies the Rule 11 application. A better understanding of the two dispositions will only come when the Court provides a clearer explanation of the differences between them."

[14] Tenn. S. Ct. R. 4(F)(3), as amended on November 1, 1999. See Baines v. Wilson County, 86 S.W.3d 575, 579 n.2 (Tenn. Ct. App. 2002).

[15] Tenn. S. Ct. R. 4(F)(1), as amended on November 1, 1999.

Texaco Refining & Marketing, Inc. v. State Dept. of Environment and Conservation, Div. of Underground Storage Tanks, 185 S.W.3d 818, 822 (Tenn. Ct. App. 2005). In a case where the Supreme Court has denied an appeal with the notation it was "concurring in results only," Tenn. Sup. Ct. R. 4(F)(1) and (3) combine to render such opinions of no precedential value. See also, Meadows v. State, 849 S.W.2d 748, 752 (Tenn. 1993) which discusses the rationale why the Supreme Court's denial of discretionary review concurring in result only, is not necessarily committed to all the views expressed in the opinion of the intermediate appellate court.

[16] Tenn. S. Ct. R. 4(H)(1), as amended on November 1, 1999.

19.[17] Rule 4, however, provides that no opinion of the Court of Appeals or Court of Criminal Appeals shall be published in the official reporter until after the time for filing an application for permission to appeal has expired.[18] As previously noted in other contexts, Rule 4 provides that opinions reported in the official reporter shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction.[19]

Rule 4, as amended on November 1, 1999, also provides that if an application for permission to appeal is filed and granted, the opinion of the intermediate court shall not be published in the official reporter, unless otherwise directed by the Tennessee Supreme Court.[20]

Further, Rule 4, as amended on November 1, 1999,[21] provides that a copy of any unpublished opinion cited shall be furnished to the court and all parties by attaching it to the document in which it is cited. Moreover, the title page of the copies and any citation to the unpublished decision shall contain a notation indicating whether or not an application for permission to appeal has been filed and, if filed, the date and disposition of the application. Where appropriate, the notation shall indicate that an application has been filed and is currently pending.

Tenn. R. App. P. 10, as amended in 2001, addresses "memorandum opinions."[22] The 2001 amendment deleted previous Tenn. Ct. App. R. 10(a), addressing "affirmance without opinion."

Tenn. Ct. App. R. 12, "Citation of Unpublished Opinions," as amended March 5, 2001 and effective April 2, 2001, provides: "(a) No opinion of any court that has not been published shall be cited in

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[17]Tenn. S. Ct. R. 4(G), as amended on November 1, 1999.

Tenn. Ct. App. R. 11, "Publication of Opinions Where No Application for Permission to Appeal to the Tennessee Supreme Court Is Filed," as amended March 5, 2001 and effective April 2, 2001, provides: "(a) Opinions of this Court, including abridgements thereof, from which no application for permission to appeal to the Tennessee Supreme Court has been filed, shall be published only with the approval of this Court as provided for herein. (b) An opinion of this Court from which no application for permission to appeal to the Tennessee Supreme Court has been filed shall be published only if, in the determination of the members of this Court, it meets one or more of the following criteria: (1) The opinion establishes a new rule of law or alters or modifies an existing rule or applies an existing rule to a set of facts significantly different from those stated in other published opinions; (2) The opinion involves a legal issue of continuing public interest; (3) The opinion criticizes, with reasons given, an existing rule of law; (4) The opinion resolves an apparent conflict of authority; (5) The opinion updates, clarifies or distinguishes a principle of law; or (6) The opinion makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law."

[18]Tenn. S. Ct. R. 4(B), as amended on November 1, 1999. See also Tenn. Ct. App. R. 11(c)(1), as amended March 5, 2001 and effective April 2, 2001.

[19]Tenn. S. Ct. R. 4(H)(2), as amended November 1, 1999.

[20]Tenn. S. Ct. R. 4(C), as amended November 1, 1999.

[21]Tenn. S. Ct. R. 4(I), as amended November 1, 1999.

[22]Tenn. Ct. App. R. 10, as amended in 2001, provides that the Court of Appeals "with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated 'MEMORANDUM OPINION,' shall not be published, and shall not be cited or relied on for any reason in any unrelated case."

papers filed in this Court unless a copy thereof has been furnished to this Court and to adversary counsel. Such unpublished opinions shall be included as appendices to any brief or other paper filed with this Court. (b) In the case of unpublished Tennessee intermediate appellate court opinions, the title page of any opinion cited to this Court shall contain either a notation that no appeal to the Tennessee Supreme Court has been filed or a notation of the date and manner in which the Tennessee Supreme Court acted upon the application for permission to appeal. Where appropriate, this shall include a notation that an appeal has been applied for but has not been acted upon by the Tennessee Supreme Court."

In a 1996 opinion, the Supreme Court discussed the "precedential" effect of "obiter dictum" and "judicial dictum."[23]

Opinions of the Attorney General are not binding on courts, but government officials rely upon them for guidance.[24]

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[23]Holder v. Tennessee Judicial Selection Com'n, 937 S.W.2d 877, 881-82 (Tenn. 1996): "We observe . . . that trial courts must follow the directives of superior courts, particularly when the superior court has given definite expression to its views in a case after careful consideration. Taylor v. Taylor, 162 Tenn. 482, 488–89, 40 S.W.2d 393, 395 (1931); Rose v. Blewett, 202 Tenn. 153, 161–62, 303 S.W.2d 709, 712–13 (1957); Davis v. Mitchell, 27 Tenn. App. 182, 223–24, 178 S.W.2d 889, 905–906 (1943). Accordingly, inferior courts are not free to disregard, on the basis that the statement is obiter dictum, the pronouncement of a superior court when it speaks directly on the matter before it, particularly when the superior court seeks to give guidance to the bench and bar. To do otherwise invites chaos into the system of justice." On page 882 at n. 5, the Court added: "[T]here is a legal distinction between obiter dictum and judicial dictum. Judicial dictum refers to pronouncements in an opinion that are long regarded by the bench and bar as establishing the rule of law. Rose v. Blewett, 202 Tenn. at 161–62, 303 S.W.2d at 712–13. Although such language may not be necessary to the decision in a case, judicial dictum is controlling as precedent. Id."

In re Estate of Davis, 308 S.W.3d 832, 841 (Tenn. 2010). Even if the language in a previous case technically qualifies as dicta, the case has persuasive value.

Regions Financial Corp. v. Marsh USA, Inc., 310 S.W.3d 382, 398 (Tenn. Ct. App. 2009). The very definition of the term dicta indicates that it "has no bearing on the direct route or decision of the case but is made aside or on the way and is, therefore, not a controlling statement to courts when the question rises again that has been commented on."

Messer Griesheim Industries, Inc. v. Cryotech of Kingsport, Inc., 131 S.W.3d 457, 466 (Tenn. Ct. App. 2003). Obiter dictum does not constitute binding precedential authority under the doctrine of stare decisis. Shepherd Fleets, Inc. v. Opryland USA, Inc., 759 S.W.2d 914 (Tenn. Ct. App. 1988).

See Fye v. Kennedy, 991 S.W.2d 754 (Tenn. Ct. App. 1998), citing Holder v. Tennessee Judicial Selection Com'n, 937 S.W.2d 877, 882 (Tenn. 1996).

But see, Breeding v. Edwards, 62 S.W.3d 170, 174 (Tenn. Ct. App. 2001), citing National Life & Acc. Ins. Co. v. Eddings, 188 Tenn. 512, 523, 221 S.W.2d 695, 699 (1949). It is an important maxim not to be disregarded that general expressions, in every opinion are to be taken in connection with the case in which those expressions are used. In other contexts, a court's holding is not a precedential bar.

[24]Scott v. Ashland Healthcare Center, Inc., 49 S.W.3d 281, 287 (Tenn. 2001), quoting State v. Black, 897 S.W.2d 680, 683 (Tenn. 1995): "Although opinions of the Attorney General are not binding on courts, government officials rely upon them for guidance; therefore, this opinion is entitled to considerable deference."

CAO Holdings, Inc. v. Trost, 333 S.W.3d 73, 85 (Tenn. 2010). An Attorney General's opinion is not an adjudication, and is not binding on the courts.

See Corum v. Holston Health & Rehabilitation Center, 104 S.W.3d 451, 454 n.1 (Tenn. 2003): "While Attorney General opinions are not binding upon the courts, we note that Op. Att'y Gen. No. 99-230, 1999 Tenn., states that 'the clerk must decline to

When a federal court undertakes to decide a state law question in the absence of authoritative state precedent, the state courts are not bound to follow the federal court's decision.[25] Similarly, a Tennessee appellate court is not bound by a decision of another state's courts but it neverheless constitutes pesuasive authority for consideration by

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accept any final order in a worker's compensation case unless it is submitted along with a fully completed statistical data form.'"

H & R Block Eastern Tax Services, Inc. v. State, Dept. of Commerce and Ins., Div. of Ins., 267 S.W.3d 848 (Tenn. Ct. App. 2008). Although opinions of the Attorney General are not binding on courts, government officials rely upon them for guidance; therefore, such opinions are entitled to considerable deference. Attorney General opinions are particularly persuasive when they have been consistently repeated. In the present case, the Court held that Attorney General opinions are especially persuasive where, as here, the State is a litigant arguing for a more expansive statutory interpretation that it had previously disavowed-particularly where that interpretation is one that has apparently never been asserted in any recorded case since the disputed language was written, more than a century ago.

Methodist Healthcare-Jackson Hosp. v. Jackson-Madison County General Hosp. Dist., 129 S.W.3d 57, 68 n.5 (Tenn. Ct. App. 2003). Although opinions of the Attorney General are not binding on courts, these opinions are enttitled to considerable deference.

Brown v. Knox County, 39 S.W.3d 585, 589 (Tenn. Ct. App. 2000). Opinions of the Attorney General rendered pursuant to T.C.A. § 8-6-109(b) are frequently persuasive on a given subject, but are not binding on appellate courts.

State v. Blanchard, 100 S.W.3d 226, 230 (Tenn. Crim. App. 2002) citing Washington County Bd. of Educ. v. MarketAmerica, Inc., 693 S.W.2d 344, 348, 26 Ed. Law Rep. 863 (Tenn. 1985). Opinions of the state attorney general are merely advisory and do not constitute legal authority binding of an appellate court.

[25]Townes v. Sunbeam Oster Co., Inc., 50 S.W.3d 446, 452 (Tenn. Ct. App. 2001).

Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 32 I.E.R. Cas. (BNA) 1124 (Tenn. 2011). Although federal judicial decisions interpreting rules similar to Tennessee's own are persuasive authority for purposes of construing the Tennessee rule, they are non-binding even when the state and federal rules are identical.

Knox County ex rel. Environmental Termite & Pest Control, Inc. v. Arrow Exterminators, Inc., 350 S.W.3d 511 (Tenn. 2011). A Tennessee state court's reliance on a federal courts' interpretation of federal statutes and rules provisions that are similar or analogous to Tennessee provisions is appropriate when relying on federal authority is consistent with the General Assembly's express or implicit legislative intent. "There are occasions, however, when it is neither necessary nor helpful for Tennessee courts to consider or adopt the federal courts' interpretation of federal statutes or rules that are similar to our own. For example, when the language of a Tennessee statute is clear and the statute can be interpreted and enforced as written, there is little need to consider or follow the federal courts' interpretation of similar federal provisions."

Frye v. Blue Ridge Neuroscience Center, P.C., 70 S.W.3d 710, 716 (Tenn. 2002). While the decisions of the Sixth Circuit are not binding on this Court, they are insightful on the resolution of issues of Tennessee law in our courts.

In re All Assessments, 67 S.W.3d 805, 818 (Tenn. Ct. App. 2001). A (1) Tennessee state court is not bound, even in the interpretation of the United States Constitution, by the decisions of federal district and circuit courts. While decisions of federal district and federal courts in interpreting the United States Constitution are persuasive authority, only the decisions of the United States Supreme Court on issues of federal law are bound to be followed. (2) Tennessee state courts are not bound to follow any federal court decision construing the state constitution. (3) Tennessee courts are not bound by the obiter dicta in federal cases.

State v. Hunt, 302 S.W.3d 859, 863-4 (Tenn. Crim. App. 2009). A federal court's interpretation of Tennessee law is not binding on the courts of this state.

Tennessee courts.[26]

§ 30:21 Appeals as of right—termination of parental rights

Tenn. R. App. P. 8A, effective July 1, 2004, establishes special procedures to expedite appeals as of right in termination of parental rights proceedings. The other rules of appellate procedure also apply to such an appeal; however, when a provision of this 8A conflicts with another rule of appellate procedure, the provision of Rule 8A shall control.

Tenn. R. App. P. 8A(a)(1) provides; "It shall not be necessary for a party to file a motion to alter or amend the judgment or a motion for new trial in order to obtain appellate review of the judgment of the trial court.

Tenn R. App. P. 8(a)(2) provides: "(2) In addition to meeting the requirements of Tenn. R. App. P. 3(f) ("Content of the Notice of Appeal"), a notice of appeal in a termination of parental rights proceeding shall indicate that the appeal involves a termination of parental rights case."

Tenn. R. App. P. 8A(b) governing "Stay of Injunction Pending Appeal" provides: "Any party may obtain review of an order entered pursuant to Rule 62 of the Tennessee Rules of Civil Procedure or Rule 39(g)(4) of the Rules of Juvenile Procedure granting, denying, or altering the conditions of a stay of execution pending appeal, or granting, denying, or altering the conditions of additional or modified relief pending appeal; such appellate review shall be conducted pursuant to Rule 7 of the Rules of Appellate Procedure."

Tenn. R. App. P. 8A(c), paragraph 1, governing the Content and Preparation of the Appellate Record, provides: "In addition to the papers excluded from the record pursuant to [Tenn. R. App. P.] Rule 24(a), any portion of a juvenile court file of a child dependency, delinquency or status case that has not been properly admitted into evidence at the termination of parental rights trial shall be excluded from the record."

Tenn. R. App. P. 8A(c)(1) provides: Any transcript of the evidence or proceedings [in the trial court] filed [with the trial court] pursuant to [Tenn. R. App. P.] Rule 24(b) shall be filed within 45 days after filing the notice of appeal. If the appellee has objections to the transcript as filed, the appellee shall file objections thereto with the clerk of the trial court within 10 days after service of notice of the filing of the transcript. Unless the time has been extended by order, if the appellant fails to file within 45 days from the filing of the notice of appeal either the transcript or statement of evidence or notice that no transcript or statement is to be filed, the clerk of the trial court shall provide written notice within 10 days to the clerk of the appellate court of the appellant's failure to comply with this subdivision, with a copy provided to counsel and pro se parties.

Tenn. R. App. P. 8A(c)(2) provides: "Any statement of the evidence or proceedings filed [with the trial court] pursuant to Rule 24(c) shall

[26]Ottinger v. Stooksbury, 206 S.W.3d 73, 78 (Tenn. Ct. App. 2006). A Tennessee appellate court is not bound by a decision of the Idaho courts but it nevertheless constitutes persuasive authority for this Court's consideration.