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NOV 21 2008

November 20, 2008

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

RE: Comment - Proposed Amendment to Rule 51.04, TRCP

Dear Mr. Catalano:

I write to strongly urge the Supreme Court to withdraw its currently proposed amendment to Rule 51 to the *Tennessee Rules of Civil Procedure*. That amendment, submitted as Rule 51.04, would require trial judges in civil cases to submit the court's instructions to the jury in writing if any party requested the trial judge to do so.

This proposal is fraught with problems and is a bad idea, as I shall attempt herewith to show.

At the outset, however, I want to make it clear that I voice no objection to the part of the proposed rule that allows the trial judge to decide sua sponte that the instructions in an appropriate case should be given to the jury in writing. That should be a matter within the sole discretion of the trial judge. Indeed this has long been the law of Tennessee. See Runnells v. Rogers, 596 S.W.2d 87 (Tenn., 1980), stating, "We know of no authority precluding the practice of physically delivering to the jury the trial judge's charge, after oral delivery. This is a matter lying wholly within the discretion of the trial judge." The current version of Rule 51.04 embraces this notion.

Since the law of our state clearly provides that the trial judge is authorized to deliver to the jury a written copy of the Court's instructions if the judge elects to do so, it seems unnecessary to adopt a procedural rule so stating.

The vice of the Supreme Court's current proposal is that it goes much farther than merely restating the law of our State. The proposal mandatorily requires the trial judge to give the jury a written copy of the court's instructions if any party so requests.

This proposal enables one of the parties in a case to place an unwarranted burden upon the trial judge and the jury for no good reason.

It is irrefutable that the current method of instructing jurors in civil cases by the oral delivery of a properly organized charge delivered by an experienced and competent trial judge has worked extremely well in the dispensation of civil justice in our state.

Apparently someone has surmised that our current method of instructing jurors can be improved by the use of written instructions. I note, for example, that the Advisory Commission comment to the existing Rule 51.04 says, in part, that "... written jury instructions can markedly increase the jurors' understanding of the often complex law they must apply in the case ...." There is, however, not a shred of reliable evidence to support that conclusion. Further, a little reflection by anyone experienced in the trial of jury cases teaches that no one can logically and reasonably conclude that written instructions will enhance a given jury panel's understanding of the applicable law already derived from a carefully organized and effectively delivered oral charge.

Moving beyond the fact that there is no valid reason to require the trial judge to give the jury a written copy of the charge merely because some party makes that request, there lies the unwarranted problems and burdens that such a requirement creates.

The Supreme Court's proposed rule provides "... the judge shall give the jury one or more copies of the written instructions, in their entirety, for use in the jury room during deliberations." Any reasonable consideration of this proposal requires one to ask, "How is this mandate, as a practical matter, to be accomplished?" What problems, if any, will be created by compliance with the proposed rule?

One must be conversant with the way modern civil cases are tried to juries in order to answer these questions. Today most civil jury trials involve cases in which plaintiffs rely upon multiple theories of law for recovery of damages and defendants put forth multiple theories of law as matters of defense. Those cases also frequently involve multiple plaintiffs and multiple defendants. In many of the cases the litigation is further complicated by counter-claims asserted by a defendant or third party actions prosecuted by a defendant against one or more third parties. Such cases often require extensive instructions that must be organized and presented to the jury in a manner that will clearly convey to the jury what issues it must decide and what applicable legal principles govern its decision of those issues.

The complexity of modern jury trials makes it impossible for the trial judge to prepare a finished jury charge before the trial, or during the trial. The modern trial judge has no way of knowing what issues or what parties are going to be placed in the hands of the jury until the conclusion of the presentation of the evidence and consideration of motions dealing with the

sufficiency of the evidence. In some instances modifications in the anticipated jury instructions must even be made after counsel's final arguments.

The lesson to be learned from a study of the nature and complexity of modern litigation is the trial court's instructions are not simply statements that can be read from a book.

The consequence of this is that, if adopted, the proposed Rule 51.04 will create burdensome problems for both the trial judge and the jury, as well as for the parties.

There exists only two ways of complying with the rule if it is adopted. The trial judge may comply with the rule by adjourning the trial after argument of counsel for such period of time as is necessary to enable the judge to prepare and dictate the charge to his or her secretary, allow the secretary to transcribe it, and then reconvene court and read the finished charge to the jury, after which a copy can be handed to the jury. How long all of this will take will depend on a number of circumstances such as the complexity of the case, whether the judge must return to his or her home county where the secretary is located to do this work, how fast the secretary can type, etc. No matter how quickly the task can be completed, it unquestionably will involve a burdensome and unnecessary hiatus at a critical moment in the trial. That hiatus will come at a time when the jury is anxious to receive the case and complete its work.

Alternatively, the trial judge may comply with the proposed rule by delivering the jury instructions orally and then adjourning court long enough to allow the Court Reporter (if there is one) to transcribe the instructions, a copy of which can be delivered to the jury as soon as court can be reconvened. How long it will take to do all of this will depend upon a number of variables such as the length of the charge, how fast the Court Reporter can transcribe it, whether the reporter (if there is one) can do the transcription work at the place of trial rather than returning to his/her office in some distant city, whether the reporter's work will have to be proof read and corrected, etc. No matter how quickly this can be done, the time involved will be substantial in most cases; and the interruption of the trial process will be irritating and burdensome for the jury.

Any method employed by the trial court to comply with the proposed rule will involve an unnecessary and burdensome interruption of the trial process. In many instances the trial judge will have to send the jury home until the work of reducing the charge to writing is completed; otherwise, the jury will be relegated to sitting in the jury room, twiddling their thumbs for a long period of time. Conscientious trial judges do not look favorably upon this kind of waste of time of hard working jurors who have been compelled to leave their jobs, families and other life circumstances to render public service. Neither should Supreme Court Justices.

The proposed use of written instructions by jurors creates a host of other concerns that are best avoided by not using written instructions.

Typically, a jury panel is made up of individuals that have widely different levels of education. Some of the jurors may be able to read and understand highly technical and sophisticated literature. Others may be able to read and understand to a limited degree the local newspaper; some jurors will have difficulty with publications as simple as a local newspaper published in a rural community; and some jurors will not be able to read at all – at least they will not be able to read English. We must not forget that juries are supposed to represent a cross–section of the community. They are supposed to be constituted by people who will necessarily have varying levels of education and reading skills.

The use of written instructions by jurors who possess vastly different levels of reading skills is an invitation for the more highly educated juror, or jurors, to parse the instructions and become the "interpreter" of the meaning of the charge to the lesser educated jurors. In fact, if some of the jurors can't read, or can't read well, the juror or jurors who possess superior reading skills in effect will become the "judge" who "delivers" the charge to those jurors having an inferior or non-existent reading ability. The use of written instructions under such circumstances is calculated to allow some jurors to assume an improper role and to produce an "inequality" among the jurors that is not supposed to exist.

The use of written instructions possesses the potential for confusion and distraction even when all of the jurors have similar levels of education and abilities to read. In that case the written instructions will become a vehicle for quibbling and disagreement among jurors about the meaning of certain parts of the instructions, or about the importance of some parts of the instructions vis-'a-vis other parts. That quibbling and those disagreements are calculated to cause the jurors to neglect their fact-finding responsibility and to forget, or ignore, the Court's admonition to "consider the instructions as a whole."

The proposed use of written instructions produces other serious concerns and problems that I will not attempt to address in this protest.

(The Court should not erroneously conclude that the experience with written instructions in felony criminal trials has disproved the existence of the foregoing problems or the reality of the foregoing concerns that are created by the use of written instructions in civil cases. The formulistic nature of criminal cases make them somewhat more amenable to the use of written instructions. Nevertheless, the use of written instructions in those cases create, to a lesser degree, many of the same problems that are outlined here. A comparison of these two situations compels me to respectfully submit that "two wrongs do not make a right").

In conclusion I respectfully submit that the burdens and concerns created by the use of written jury instructions in civil cases far outweigh any benefits (if there are any) to be derived from the use of such instructions.

The Supreme Court proposed this rule, or a very similar one, in 1991. Wisely that proposal was withdrawn. The proposal was a bad idea in 1991. It is a bad idea today.

I urge the Court to withdraw its proposed amendment to Rule 51 of *The Tennessee Rules of Civil Procedure*.

Yours very truly,

Wheeler A. Rosenbalm
Circuit Judge

WAR:cmc