

TENNESSEE GENERAL SESSIONS JUDGES 2024 MID-WINTER CONFERENCE

FEBRUARY 28, 2024
CIVIL PROCEDURE AND EVIDENCE
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CIVIL PROCEDURE

Service of Process

Scarlett v. AA Properties, GP, 616 S.W.3d 815 (Tenn. Ct. App., Swiney, 2020), perm. app. denied Nov. 16, 2020.

- Forcible entry and detainer action in General Sessions Court.
- Petitioner claims no notice of action until writ of possession received March 12, 2019.
- Claims no personal service of process; detainer warrant invalid, and court has no jurisdiction.
- Files Petition for Writ of Certiorari in Circuit Court.

T. C. A. § 29-18-115

(2) If, after attempting personal service of process on three (3) different dates and documenting such attempts on the face of the warrant, the . . . process server is unable to serve any . . . named defendant personally, service of process . . . may be had by the . . . process server taking the following actions at least six (6) days prior to the date specified therein for the defendant or defendants to appear and make a defense:

- (A) Posting a copy of the warrant or summons on the door of the premises; . . .

- Warrant reflects that it was “posted” on March 1, 2019, March 4, 2019, and March 5, 2019, and then set for trial on March 12, 2019.
- Need not state specifically that personal service was attempted unsuccessfully.
- Listing “Posted Dates” and dates served sufficient.

- Hearing date March 12 after third posting March 5 met statutory 6 day requirement.
- Under T.R.Civ.P. 6.01, Saturdays, Sundays don’t count.
- But that rule does not apply in General Sessions court.
- T.C.A. § 1-3-102:
- “The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is a Saturday, a Sunday, or a legal holiday, and then it shall also be excluded.”

SERVICE BY EMAIL; RULE 5.02(2)

- Rule 5.02(2) is amended to provide self-represented parties the same convenience in sending and receiving documents by email that is afforded to attorneys.
- Requirement of a mailed, faxed, or hand-delivered certificate advising that a document has been transmitted electronically has been eliminated.

PERSONAL JURISDICTION

Baskin v. Pierce & Allred Construction, Inc., 676 S.W.3d 554 (Bivins, 2023)

- Suit in Davidson County Chancery by Tennessee plaintiff against Alabama contractor over construction of custom home in Alabama.
- Complaint properly dismissed for lack of personal jurisdiction.
- Insufficient minimum contacts between defendant and State of Tennessee.
- Registration as Tennessee business, having Tennessee contractor's license not enough.

Rule 52 Requires Trial Court to Make Findings of Fact and Conclusions of Law

Artry v. Artry, No. W2020-00224-COA-R3-CV (Tenn. Ct. App., Armstrong, Sept. 22, 2022).

- In this divorce case, trial court failed to designate all property as either marital or separate, failed to assign values to all property, and failed to consider the factors set out in T.C.A. § 36-4-121(c).
- Trial court's division of the marital estate and its denial of alimony vacated.

COMPUTATION OF ATTORNEY FEES AWARD

St. Paul Community Limited Partnership v. St. Paul Community Church n/k/a Green Hills Community Church, No. M2021-01548-COA-R3-CV (Tenn. Ct. App., Davis, Feb. 9, 2023), perm. app. denied June 12, 2023.

- Lease provided for award of attorney fees incurred to enforce lease.
- Prevailing party sought award of fees of \$448,605, based on an hourly rate of \$450 for 996.90 hours, plus expenses of \$4,563.90. Engagement letter provided for fees at \$295 hourly rate.
- Additional email said if attorney was awarded fees at a higher rate, he got to keep the extra amount.
- Found: Lower hourly rate in engagement letter was amount of fees client incurred.

EVIDENCE

RULE 201: JUDICIAL NOTICE

Doe v. Rosdeutscher, (Tenn. Ct. App. 2023).

- Claims for invasion of privacy abuse of process, etc., arising from filing certain discovery in the court record.
- Plaintiff stated a date within the statute of limitations as the date the documents were filed.
- Trial court took judicial notice of the earlier date the documents were filed.
- Appropriate under TRE 201 as items appearing in record of court case are capable of determination from sources whose accuracy cannot be reasonably questioned.

RULE 403 BALANCING – TESTIMONY OF SEVEN-YEAR-OLD WITNESS

In re Kansas B., 664 S.W.3d 22 (Tenn. Ct. App., 2022).

- DCS dependency and neglect petition alleging sexual abuse by step-father.
- Step-father sought to call seven-year-old child as witness.
- Trial court denied request to call child by balancing the probative value of testimony with the potential emotional and psychological harm the child could suffer from testifying.

RULE 403 BALANCING – TESTIMONY OF SEVEN-YEAR-OLD WITNESS

- Reversed – trial court erred in utilizing balancing test.
- Under Rule 601, every person is presumed competent.
- Neither the child's best interest nor threat of emotional harm are included in the list of concerns under Rule 403 that a trial court may consider to balance against the probative value.

EXPERT TESTIMONY; RULES 702 AND 703

Defendant health care provider not required to testify about another defendant's standard of care; **Privilege**

Borngne ex rel. Hyter v. Chattanooga-Hamilton County Medical Authority, 671 S.W.3d 476 (Tenn. 2023).

- Health care liability action against several defendants including doctor who performed C-section and nurse mid-wife who treated the patient before the doctor got there.

EXPERT TESTIMONY; RULES 702 AND 703

- During deposition, plaintiff asked the doctor to give his opinion on the nurse's performance during the time she cared for plaintiff prior to the doctor's arrival.
- Whether trial court appropriately declined to order the doctor to answer questions regarding his expert opinion of the nurse's mid-wife care.
- Issue of first impression.
- Court of Appeals noted that under *Waterman*, defendant experts may be compelled to answer questions about whether their conduct conformed to the applicable standard of care.

- Supreme Court creates an evidentiary privilege here.
- Privilege grounded in TRE Rule 706 saying expert witness shall not be appointed by the Court unless the witness consents to act.
- Defendant doctor had a privilege to refuse to opine on co-defendant's standard of case.
- Dissent: no ground for creation of new privilege.

HANDWRITING EXPERT

Estate of Hargett v. Brown, (Tenn. Ct. App. 2023).

- Estate dispute. Decedent and wife separated for years.
- Appellant *Brown* (Decedent's girlfriend) lived with decedent after his wife moved out.
- After decedent got cancer, changes were made to life insurance policy naming girlfriend *Brown* sole beneficiary.
- Handwriting expert Pearce opined signatures were forged.

- At trial, appellant's counsel asked whether several other documents from the same day were forged.
- Expert declined to opine.
- Court finds no error in refusing to require expert to conduct handwriting analysis on the stand.
- Under Rule 702, the expert was qualified and opined it would not be professional to judge the samples without complete analysis.

HEARSAY

State v. Gray, (Tenn. Crim. App. 2023).

- Defendant *Gray* convicted of felony murder and robbery.
- Victim was shot in her friend's car outside laundromat.
- Defendant's fingerprints on the victim's friend's car.
- Defendant claimed fingerprint card was testimonial hearsay.
- Extensive testimony re: print matching process. Admissible.
- State was allowed to take additional fingerprints from defendant on the morning of trial.

HEARSAY

- No due process violation in taking evidence on the day of the trial.
- No prejudice.
- Second issue regarding error in allowing a fingerprint expert to testify regarding the conclusions of another non-testifying expert; the issue was waived.
- Failure to lodge contemporaneous confrontation clause challenge results in waiver.

STATEMENTS TO MEDICAL PROVIDERS REGARDING USE OF MARIJUANA

Chapter 270, Public Acts 2023, adding T.C.A. 24-7-103

- Prohibits admission of defendant's statement regarding use of marijuana to medical provider for purpose of obtaining medical advice on possible adverse effects of marijuana.

CAN A QUESTION BE HEARSAY? EXCITED UTTERANCE; STATE OF MIND

State v. James, (Tenn. Crim. App., McMullen, June 1, 2023), perm. app. denied 9/14/23.

- Defendant convicted of first-degree murder of his mother at family gathering.
- Aunt was a witness.
- Defense counsel wanted to ask Aunt if defendant had called her later that night.
- Asked if he had hit his mother and that he then said he wasn't trying to.
- Evidence excluded after State objected.
- Question is typically not hearsay because it does not assert the truth or falsity of the fact.

CAN A QUESTION BE HEARSAY? EXCITED UTTERANCE; STATE OF MIND

- A question can contain an **implied assertion**.
- Here, the question did he hit his mother contained an assertion that he shot at her and was not aware the bullet had struck her.
- Properly excluded.
- The statement that he was not trying to was not admissible under 803(3) as evidence of the existing state of mind because too self-serving.
- Not admissible as excited utterance because it was made at least a half an hour later.

ADMISSIBILITY OF CHILD FORENSIC INTERVIEW

Public Chapter 139.

- If certain circumstances are met, the video recording of a child forensic interview can be admitted as evidence in a criminal case.
- Some of the requirements include that the interviewer be qualified and the Court find trustworthiness.
- This amendment drastically changes the prior requirements.
- It now includes a statement made by a **child under 18**, instead of 13.

ADMISSIBILITY OF CHILD FORENSIC INTERVIEW

Public Chapter 139.

- It also adds that the statement can be about *any abusive or violent contact* instead of just *sexual contact*.
- Either against the child or witnessed by the child.
- It can now be admitted at any stage of the criminal proceeding or juvenile proceeding as opposed to just the trial.
- The amendment broadens the list of people who can be determined qualified through previous supervision.
- Tennessee Supreme Court has previously upheld the process, but for children 13 and younger.

RULE 901 – AUTHENTICATION OF TEXT MESSAGES

State v. Haymer, 671 S.W.3d 568 (Tenn. Crim. App. 2023).

- Defendant contacted associate by text and offered to purchase a gun. Concern regarding beef with former co-worker.
- The officer met with the third-party and took photographs of the text messages.
- Officer testified at trial that the photographs were a copy of the text messages that the individual gave him.

RULE 901 – AUTHENTICATION OF TEXT MESSAGES

- The recipient of the text messages did not testify.
- Sufficient under TRE 901 to show that the messages were what they purport to be.
- Arguments go to the weight of evidence rather than to admissibility.
- Plain error review.

2023 Don Paine Memorial Redneck Litterbug Beer of the Year

- Careful research
- Methodology
- Trends
- Competition

Heavy Competition




