

Tennessee Supreme Court's agenda holds variety of issues

The Tennessee Supreme Court began 2007 with over 50 pending cases. The “voluntary speech” rule in tort actions, the class action tolling doctrine, the judicial selection process, the law enforcement privilege applicable to the disclosure of documents, and the constitutionality of the child exploitation statute are among the many issues that the state’s highest court has agreed to hear.

Torts. The Supreme Court granted permission to appeal in a case brought by electricians who, while testing a fuse, were hit by a high voltage current operating at an unexpected 4,150 volts. In reversing the trial court’s grant of summary judgment in favor of the property owner (defendant), the Court of Appeals adopted the “voluntary speech” rule. Specifically, the intermediate appellate court ruled that when the defendant knew that the power box was high voltage, yet informed the plaintiffs that it was low voltage, the defendant, having chosen to speak, had a duty to speak truthfully. *Bennett v. Trevecca Nazarene University*, 30 TAM 47-9, *appeal granted 3/20/06, oral argument 10/5/06.*

The Supreme Court will hear a case in which a steel subcontractor (defendant) cut a hole in the roof of a partially constructed warehouse, a temporary cover was put over the hole, and the plaintiff, an employee of a roofing subcontractor, fell through the hole one week later. The injured plaintiff received workers’ comp benefits from the roofing subcontractor and then filed a personal injury suit against the defendant. The trial court denied the defendant’s motion *in limine* to assert fault against a non-party general contractor in charge of the entire warehouse construction project. The Court of Appeals held that the jury should have been permitted to allocate fault to the principal contractor. *Troup v. Fischer Steel Corp.*, 31 TAM 37-4, *appeal granted 12/18/06.*

The Supreme Court will hear a case in which the Court of Appeals ruled that the credentialing process is a part of the peer review process. The Court of Appeals held that documents generated as a part of the peer review process are not to be considered as being made “in the regular course of business” of a hospital for the purpose of the exception to confidentiality contained in TCA 63-6-219(e). The intermediate appellate court also held that documents or records “otherwise available from original sources” are not immune from disclosure from either the original source or the peer review committee. *Stratienko v. Chattanooga-Hamilton County Hospital Authority*, 31 TAM 16-4, *appeal granted 9/25/06, oral argument 1/3/07.*

The Supreme Court will hear a case in which a claimant filed a claim against the state alleging that the Department of Children’s Services failed to properly investigate physical abuse of the claimant’s son by the child’s mother on April 5, 2003, or take appropriate action to prevent the mother from abusing the child again on June 17, 2003, causing the child’s death. The Court of Appeals held that the claims commission lacked jurisdiction to consider the claim. *Holloway v. State*, 31 TAM 11-2, *appeal granted 8/21/06.*

The Supreme Court will decide whether TCA 20-1-119 applies when a defendant files an answer which effectively shifts the blame to a nonparty but does not expressly allege the comparative fault of the nonparty. *Austin v. State*, 31 TAM 28-12, *appeal granted 10/30/06, oral argument 2/2/07.*

Employment. The Supreme Court will review a case in which the Court of Appeals ruled that a president of a state university is not a proxy for the state, and hence, that the *Faragher/Ellerth* affirmative defense was available to the state in a suit alleging a sexually hostile work environment. *Allen v. McPhee*, 31 TAM 24-8, *appeal granted 12/18/06*.

Insurance. The Supreme Court will review a decision in which a divided panel of the Court of Appeals held that a power of attorney does not grant an attorney-in-fact the power to change the beneficiary designation on a life insurance policy. *Tennessee Farmers Life Reassurance Co. v. Rose*, 31 TAM 18-10, *appeal granted 9/25/06*.

The Supreme Court agreed to hear a case involving the “your work” exclusion in an insurance policy issued to a general construction contractor. *Travelers Indemnity Co. of America v. Moore & Associates Inc.*, 30 TAM 46-5, *appeal granted 3/20/06, oral argument 10/6/06*.

The Supreme Court granted permission to appeal in a case in which the Court of Appeals ruled that when the total recovery of an insured from a settlement and from insurance companies exceeded the amount of damages proven at trial, the insured was made whole by the settlement, and the insurer was entitled to reimbursement from the insured. *Health Cost Controls Inc. v. Gifford*, 31 TAM 18-11, *appeal granted 12/27/06*.

Arbitration. The Supreme Court will review a holding that an attorney-in-fact’s authority to execute any necessary waiver, release, or other document for implementing health care decisions includes executing a nursing home admission contract which contains an agreement to arbitrate. The Court of Appeals upheld an arbitration agreement when it did not change a nursing home’s duty to use reasonable care in treating the patient, or limit the nursing home’s liability for any breach of that duty, but merely shifted disputes to a different forum. *Owens v. National Health Corp.*, 31 TAM 33-5, *appeal granted 11/20/06*.

Property. The Supreme Court will decide whether the placement of a modular home on the owner’s property violated a subdivision restriction prohibiting “trailers or mobile homes.” *Williams v. Fox*, 31 TAM 19-7, *appeal granted 9/25/06, oral argument 1/3/07*.

The Supreme Court agreed to hear a case in which the trial court interpreted the holding of *Winborn v. Alexander*, 279 SW2d 718 (Tenn.App. 1954), to be that the failure to pay taxes is not a bar to claiming real estate if the disputed portion of the land is believed or considered to be a part of the main parcel of land on which taxes are being paid and the dispute does not pertain to a separate parcel. The Court of Appeals disagreed, holding that *Winborn v. Alexander* did not create a “contiguous property exception” to the operation of TCA 28-2-110(a). *Cumulus Broadcasting Inc. v. Shim*, 31 TAM 5-7, *appeal granted 8/21/06, oral argument 2/2/07*.

Estates & Trusts. The court will review a case in which attorneys-in-fact (fiduciaries) were found to have acted in direct contravention of their power of attorney and TCA 34-6-108(c)(1) and (c)(6) by depositing the proceeds from the sale of the decedent’s property in a series of certificates of deposit with themselves as co-owners with the right of survivorship upon the decedent’s death. The Court of Appeals held that a constructive trust should be imposed on the proceeds of the sale of the realty. The Court of Appeals ruled that the plaintiff could recover the assets held in the trust — the

proceeds of the sale of the realty — or could recover a general pecuniary devise equal to the net sales price pursuant to TCA 32-3-111(b). The Supreme Court will decide whether the intermediate appellate court erred in applying TCA 32-3-111 as the statute was not adopted until six years after the decedent's death. *Stewart v. Sewell*, 30 TAM 23-6, *appeal granted 4/24/06, oral argument 10/5/06*.

The Supreme Court will decide the issue of whether a child born before the execution of a will but not legitimated until after the execution of the will can be considered a pretermitted child under TCA 32-3-103. *Lanier v. Rains*, 31 TAM 8-11, *appeal granted 8/21/06, oral argument 2/2/07*.

Family law. The Supreme Court agreed to hear a case involving a custody dispute between a child's biological Chinese immigrant parents and the child's foster parents. The Court of Appeals upheld the termination of parental rights in the case. *In re Adoption of AMH*, 31 TAM 1-10, *appeal granted 4/24/06, oral argument 10/4/06*.

The Supreme Court granted permission to appeal in a case in which the Court of Appeals ruled that factoring in the reality that two of the parties' children had become emancipated for the purpose of determining the amount of the father's child support arrearage was not retroactive modification of any earlier child support order. *Lichtenwalter v. Lichtenwalter*, 31 TAM 10-11, *appeal granted 8/21/06*.

The Supreme Court will review a case in which a trial court concluded that a father's sale of stock was a "one-time capital gain" and, as such, should not be considered in calculating the father's income for child support purposes. *Moore v. Moore*, 31 TAM 36-15, *appeal granted 11/20/06*.

Civil procedure. The Supreme Court granted permission to appeal in a medical malpractice case in which the trial court considered both whether the defendants' counsel had a race-neutral reason for exercising peremptory challenges against African-American prospective jurors and whether counsel had a gender-neutral basis for exercising peremptory challenges against female jurors. *Zakour v. UT Medical Group Inc.*, 30 TAM 49-3, *appeal granted 4/24/06, oral argument 11/14/06*.

The Supreme Court will decide whether a trial court should have invoked the class action tolling doctrine to toll the running of the statute of limitation. *Tigg v. Pirelli Tire Corp.*, 31 TAM 6-20, *appeal granted 9/25/06*.

The Supreme Court will review a case in which the Court of Appeals held that the execution of a durable power of attorney, even if it authorizes an attorney-in-fact to handle "claims and litigation," does not deprive a disabled person or a disabled person's representative of the tolling benefit of TCA 28-1-106. *Sullivan v. Chattanooga Medical Investors L.P.*, 31 TAM 11-12, *appeal granted 8/21/06, oral argument 2/1/07*.

The Supreme Court will review a case in which the Court of Appeals vacated a jury verdict in a medical malpractice case based on the trial court's erroneous "dynamite" charge. *Waters v. Coker*, 31 TAM 33-16, *appeal granted 11/20/06*.

Government. The Supreme Court assumed jurisdiction, pursuant to the reach-down statute, in a case involving the process for filling the current vacancy on the Supreme Court. *Bredesen v. Tennessee Judicial Selection Commission*, 32 TAM 3-1, *oral argument 2/1/07*.

The Supreme Court will review a case in which the Court of Appeals recognized the law enforcement privilege, which protects from disclosure a file of law enforcement officers when the disclosure of the documents might impair the functioning of law enforcement. The Court of Appeals applied the privilege to “field interview cards,” which are used to identify suspects, witnesses, and informants, and to gather information on the location of criminal or gang-related activity. *Schneider v. City of Jackson*, 31 TAM 30-13, *appeal granted 10/30/06*.

Victims’ rights. The court accepted permission to appeal in two cases and will decide the issue of whether a trial court abused its discretion and infringed upon the constitutional authority of the district attorney when it refused to grant leave to dismiss a charge under TRCrP 48(a). Also before the court will be issues of whether victims have the right to be heard at pretrial proceedings, whether the victims’ bill of rights applies to pretrial proceedings, whether the victim’s family may retain an attorney and participate in proceedings to oppose a plea agreement, and whether a victim’s family may offer unsworn hearsay statements that are not subject to cross-examination. *State v. Layman*, 30 TAM 41-32, *appeal granted 1/30/06, consolidated oral argument 9/6/06*, and *State v. Taylor*, 30 TAM 42-18, *appeal granted 1/30/06, consolidated oral argument 9/6/06*.

Child exploitation. The court has agreed to hear and has consolidated for oral argument two cases involving TCA 39-17-1003, the child exploitation statute. The court will decide whether the terms “possess” and “material” in TCA 39-17-1003(a) are unconstitutionally vague or overbroad. *State v. Harwood*, 30 TAM 45-24, *appeal granted 1/30/06, consolidated oral argument 10/4/06*, and *State v. Pickett*, 30 TAM 48-17, *appeal granted 2/21/06, consolidated oral argument 10/4/06*.

Carjacking. The Supreme Court has granted permission to appeal in two carjacking cases.

The Court of Criminal Appeals rejected an unarmed defendant’s claims that he did not use force or intimidation to take the victim’s vehicle. The intermediate court also ruled that robbery and theft are not lesser included offenses of carjacking. *State v. Wilson*, 30 TAM 33-24, *appeal granted 12/5/05, oral argument 10/5/06*.

The Supreme Court will review a holding that “possession,” as used in the carjacking statute, includes the taking of the car in the presence of the victim. A conviction was upheld when the victim was “three cars away” from her car when the defendant confronted her and demanded her car keys. *State v. Edmondson*, 31 TAM 36-24, *appeal granted 11/20/06*.

Search & seizure. The Supreme Court granted permission to appeal in a case in which the Court of Criminal Appeals ruled that a “frisk and sit” of a defendant constituted an unreasonable search and seizure that was not based upon reasonable suspicion. In the case, the defendant, a Hispanic male, was driving an automobile with Texas license tags on the interstate eight miles per hour over the speed limit, he was ordered out of his vehicle, frisked, detained for approximately 43 minutes in the locked back seat of the officer’s cruiser, and handcuffed and formally arrested after the officer drilled into the body of the defendant’s vehicle and discovered cocaine. *State v. Berrios*, 31 TAM 16-25, *appeal granted 8/21/06*.

Criminal procedure. The Supreme Court agreed to hear a case in which the Court of Criminal Appeals ruled that although a trial court’s application of the hearsay rule in denying a defendant’s request to present testimony of the victim’s father was not

erroneous, the right to present a defense may override an otherwise legitimate exclusion of hearsay evidence. The intermediate appellate court concluded that because the proposed evidence was critical to the defendant's defense, the proposed evidence bore sufficient indicia of reliability, and the defendant's constitutional right to present a defense was violated by exclusion of the proffered hearsay evidence, the defendant's rape convictions had to be reversed. *State v. Flood*, 31 TAM 12-18, *appeal granted 6/26/06, oral argument 1/3/07*.

The court granted permission to appeal in a case in which the Court of Criminal Appeals found plain error based on the failure to follow the procedure set out in *Momon*. One of the issues to be considered is whether the trial court's failure to ascertain whether the defendant personally waived his right to testify warranted relief. Other issues include whether the defendant's conviction should be set aside because of the systematic exclusion of African-Americans from the petit jury and the office of grand jury foreperson, whether the failure of the indictment to charge criminal responsibility violated due process, and whether the use of leg restraints at trial violated due process. *State v. Copeland*, 30 TAM 45-19, *appeal granted 1/30/06, oral argument 1/3/07*.

Effective counsel. The Supreme Court will hear a case in which trial counsel was found to be ineffective in failing to object to the trial court's taking a motion for judgment of acquittal under advisement and in failing to stand on the motion, effectively waiving the issue on appellate review. The Court of Criminal Appeals granted the motion for judgment of acquittal that it found should have been granted at the conclusion of the state's proof. *Finch v. State*, 31 TAM 12-31, *appeal granted 8/21/06, oral argument 2/1/07*.

Death penalty. The Supreme Court will hear a case in which the Court of Criminal Appeals found that the evidence preponderated against the trial court's determination that a defendant was mentally retarded and could not be sentenced to death. The intermediate appellate court ruled that TCA 39-13-203 does not allow for manifestation of mental retardation past the age of 18. *State v. Strode*, 31 TAM 29-22, *appeal granted 9/25/06*.