2006: Tennessee Supreme Court in Review

A statewide professional standard of care in legal malpractice cases, the constitutionality of requiring a benefit review conference before filing a workers' compensation case, requiring a parent to pay part of a child's private school tuition, the constitutionality of term limits on county legislators, the applicability of the "foreign object" exception to the statute of repose in a medical malpractice case, the constitutionality of entry identification checkpoints, the use of anonymous juries, and the right of juveniles who are tried as adults to a jury trial were among the many issues decided by the Tennessee Supreme Court during 2006. In all, the court handed down about 90 decisions.

Medical malpractice. The Supreme Court ruled that in order to satisfy the locality rule, an expert in a medical malpractice case must demonstrate how he or she has knowledge of the applicable standard of the profession either in the community in which the defendant physician practices or in a similar community. The court found that the affidavit of an expert simply asserting that he is "familiar with the recognized standard of acceptable professional medical care in the metropolitan areas of Tennessee and specifically in Memphis, Tennessee and similar communities" did not satisfy the locality rule. *Williams v. Baptist Memorial Hospital,* 193 SW3d 545.

In a medical malpractice case, the court reversed an order permitting *ex parte* communications between defense counsel and a decedent's non-party treating physicians. The court reasoned that *ex parte* communications unnecessarily endanger the integrity of the covenant of confidentiality between a patient and a physician by risking the disclosure of the decedent's medical information not relevant to the suit, and that formal methods of discovery provided for in TRCP 26.01 are sufficient to provide defendants with all of decedent's relevant medical information. *Alsip v. Johnson City Medical Center,* 197 SW3d 722.

Legal malpractice. The court refused to adopt a "locality rule" for legal malpractice cases. The court held that in all legal malpractice cases, a single, statewide professional standard of care exists for attorneys practicing in Tennessee. Expert witnesses testifying in a legal malpractice case must be familiar with a statewide professional standard of care. *Chapman v. Bearfield,* 31 TAM 47-1.

Workers' compensation. The Supreme Court upheld the key provisions of the 2004 workers' compensation reform act. The court held that the benefit review conference requirement before filing a lawsuit does not violate due process protections, the separation of powers doctrine, or the open courts doctrine. The court also held that the method used to determine permanent partial disability benefits — the multiplier provision and the use of the AMA Guides to determine anatomical impairment — do not violate equal protection or due process. *Lynch v. City of Jellico,* 31 TAM 37-1.

The court affirmed a trial court's ruling that an employee's death arose out of and within the course of employment when an employee was shot while he waited outside the employer's office to get paid for a day's work in accordance with the employer's payment procedure. *Hurst v. Labor Ready,* 197 SW3d 756.

The court found that when a plaintiff, a passenger in a vehicle driven by an employee, was injured in an auto accident on her way to an orientation session at a location away from the defendant's nursing home facility at which she had been hired to work, the plaintiff was an employee of the defendant at the time of the accident. The defendant was not entitled to credit for the amount paid by the driver's insurer as there was no right of subrogation against a third party tort-feasor as the driver, a co-employee acting within the scope of her employment, was not liable to the plaintiff. *Hubble v. Dyer Nursing Home,* 188 SW3d 525.

The court held that while workers' comp law does not contemplate an employer paying for wheelchair-accessible housing in its entirety, it does require an employer to pay for medically-necessary modifications to make an existing house wheelchair-accessible. *Dennis v. Erin Truckways Ltd.,* 188 SW3d 578.

The court ruled that a provision in a settlement agreement waiving an employee's reconsideration rights was contrary to both the plain language of TCA 50-6-114(a) and public policy. The legislature has clarified, in TCA 50-6-241(d)(1)(B)(v), that employees who are injured on or after July 1, 2004, are prohibited from waiving their reconsideration rights. *Overman v. Altama Delta Corp.,* 193 SW3d 540.

The court held that reconsideration of a prior workers' compensation award under TCA 50-6-241(a)(2) is not precluded by a subsequent work-related injury for which the employee seeks compensation. But the employee may not recover for a new injury by seeking to enlarge a prior award. Instead, a new lawsuit must be filed. *Clark v. Lowe's Home Centers,* 201 SW3d 647.

The court held that an employer's subrogation interest under TCA 50-6-112 applies to a wrongful death recovery received by the employee's spouse in a suit against a third-party tort-feasor. But the court held that the employer's subrogation interest does not attach to the recovery by the employee's spouse from a third party tort-feasor for the loss of consortium. *Correll v. E.I. DuPont de Nemours & Co.,* 31 TAM 47-2.

The court held that a county which has not opted into workers' compensation statutes may not exempt itself from liability under the Governmental Tort Liability Act by adopting a policy purporting to be an employee's exclusive remedy for work-related injuries. *Crawley v. Hamilton County,* 193 SW3d 453.

The court released two opinions regarding the calculation of an employee's average weekly wage.

- Eight weeks during which an employee was on leave of absence and received short-term disability benefits for unrelated injuries must be excluded from the average weekly wage calculation. *Cantrell v. Carrier Corp.,* 193 SW3d 467.
- Twenty-eight weeks that an employee spent on strike are to be included when calculating the average weekly wage. *Goodman v. HBD Industries Inc.,* 31 TAM 47-3.

The court held invalid a local rule of the 25th Judicial District prohibiting the taking of medical depositions in workers' compensation cases in the absence of leave of court. *Glisson v. Mohon International Inc.,* 185 SW3d 348.

Insurance. The court ruled that an insurer's motion for directed verdict was properly denied in a case in which the plaintiff contended that a judgment in excess of his

liability coverage was the result of the insurer's bad faith in failing to adequately investigate and settle his case within policy limits. *Johnson v. Tennessee Farmers Mutual Insurance Co.,* 31 TAM 36-2.

The court reversed a grant of summary judgment in favor of an insurance company which sought subrogation or reimbursement for funds it paid in medical expenses after the plaintiffs settled their lawsuit. The court found genuine issues of material fact regarding whether the plaintiffs were "made whole" and whether the plaintiffs' insurance carrier waived its reimbursement rights. *Abbott v. Blount County,* 31 TAM 47-4.

Consumer Protection Act. The court ruled that a plaintiff may be awarded reasonable attorney fees incurred during an appeal on a claim brought under the Tennessee Consumer Protection Act (TCPA) when a provision of the TCPA has been violated. In order to be awarded such fees, the plaintiff must initially request them in his or her appellate pleadings in a timely manner. *Killingsworth v. Ted Russell Ford Inc.,* 31 TAM 43-2.

Contracts. The court held that the "party to be charged" in the statute of frauds analysis refers to the party against whom the enforcement of a contract is sought. The legislature enacted similar legislation a few months earlier. *Blair v. Brownson,* 197 SW3d 681.

The court ruled that the privilege of a parent corporation to interfere with contractual relations of its subsidiary corporation does not apply when the parent corporation owns less than 100% of its subsidiary. *Cambio Health Solutions LLC v. Reardon,* 31 TAM 52-2.

Landlord & tenant. The Supreme Court reviewed a case in which the landlord's insurer paid the landlord for a fire loss and then filed a suit against the tenant asserting its subrogation rights. The court found that a provision in the lease making the tenant responsible for all damages "intentional or non intentional" was ambiguous. In accordance with the intent of the parties, the lease was construed to impose liability upon the tenant only for damages he intentionally or negligently caused. The trial court found that the tenant did not intentionally or negligently damage the rental property. Because the tenant was not liable to the landlord under the lease, the landlord's insurer was not entitled to recover. *Allstate Insurance Co. v. Watson,* 195 SW3d 609.

Family law. The Supreme Court reviewed a case in which a wife had an extramarital affair, became pregnant, and let her husband believe he was the child's father. The man with whom the wife had the affair filed a paternity action, and genetic testing showed a 99.95% probability that he was the father. The court held that once a child's biological father has established his paternity, his constitutionally-protected fundamental right to parent the child vests, and he is the child's "legal" father, and that right may only be stripped pursuant to statutory parental termination procedures. *In re T.K.Y.,* 31 TAM 36-4.

The court held that in order to constitute "mistreatment or abuse" of a child necessary for a Tennessee court to be able to exercise temporary emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, the threat of mistreatment or abuse to a child's well-being must be "immediate." *Button v. Waite,* 31 TAM 51-1.

The court ruled that an obligee parent is not required to prove a "significant variance," as defined in the Child Support Guidelines, in the obligor-parent's income before a trial court can order an obligor-parent to pay a portion of the children's private school tuition and expenses. The "significant variance" standard is inapplicable to the modification of child support for the payment of extraordinary educational expenses. *Kaplan v. Bugalla,* 188 SW3d 632.

The court ruled that the child support obligation of a non-residential parent continues after the death of a residential parent when the custody of the child is awarded to a third party instead of the surviving parent. The non-residential parent's obligation to support a minor child continues until the child reaches majority, no matter who retains custody of the child. *Kirkpatrick v. O'Neal,* 197 SW3d 674.

The court reviewed a case in which the parties entered into a marital dissolution agreement that included both a provision requiring the husband to pay a fixed amount of child support each month and a provision requiring the husband to pay 21% of all bonuses and other income as child support. The court ruled that the 21% provision was legally enforceable as part of the parties' agreement. Because the 21% provision was merged into the final divorce decree, it became subject to modification. *Kesser v. Kesser,* 201 SW3d 636.

The court held that when both parties signed a written marital dissolution agreement (MDA) in the presence of a notary, the MDA was an enforceable contract even though the husband repudiated the agreement prior to the entry of the judgment. A MDA may be enforceable as a contract even if one of the parties withdraws his or her consent to the agreement prior to the entry of a judgment by the trial court, so long as the agreement is an otherwise validly enforceable contract. *Barnes v. Barnes,* 193 SW3d 495.

Government. The court held that TCA 5-1-210(4) does not violate Tenn. Const. Art. VIII, Sec. 1, to the extent that the statute authorizes a county with a charter form of government to impose term limits upon members of its legislative body. *Bailey v. Shelby County,* 188 SW3d 539.

Statute of limitation. The Supreme Court ruled that a hemoclip that is intentionally used but negligently placed and negligently left in a patient's body following surgery may be a "foreign object" under TCA 29-26-116(a)(4), which establishes an exception to the one-year statute of limitation and three-year statute of repose in a medical malpractice case. *Chambers v. Semmer,* 197 SW3d 730.

The court ruled that "disability of unsound mind" referenced in TCA 28-1-106 is not removed when a disabled person's legal representative is appointed and/or accepts responsibility of the disabled person's tort claims. *Abels v. Genie Industries Inc.,* 202 SW3d 99.

In a workers' compensation case, the court ruled that the one-year statute of limitation for a gradually occurring injury begins to run on the last day an employee worked for his or her employer, unless the employee has knowledge of the existence of a compensable work-related injury and gives the required notice of that injury to the employer, in which case the date that the notice is given is the date of the injury. *Barnett v. Earthworks Unlimited Inc.,* 197 SW3d 716.

The court ruled that discriminatory pay is a continuing violation under the Tennessee Human Rights Act. A claim of discriminatory pay may be brought at any time

within one year that the plaintiff has received discriminatory pay, and back pay is available for the duration of the unequal pay. *Booker v. Boeing Co.,* 188 SW3d 639.

The court held that the three-year statute of limitation applicable to property torts, rather than the one-year statute of limitation applicable to personal injuries, applied when the plaintiffs' claim for damages for emotional distress was merely an element of their overall claim for damages for injury to their property. *Whaley v. Perkins,* 197 SW3d 665.

The court held that when a plaintiff utilizes TCA 20-1-119 to amend a complaint in a comparative fault case to add a nonparty as a defendant, the plaintiff must first seek permission of the trial court or adverse parties as provided by TRCP 15.01. The plaintiff's failure to file a motion to amend before filing an amended complaint and securing service of process is not fatal when the requirements of TRCP 15.01, including the trial court's grant of a motion to amend, occur within the 90-day window created by TCA 20-1-119. *Jones v. Professional Motorcycle Escort Service LLC,* 193 SW3d 564.

Interrogation. The court held that once a suspect has made a knowing and voluntary waiver of his or her *Miranda* rights, there is no per se requirement to continually re-advise him or her of those rights. Renewed *Miranda* warnings are not required based solely on a change in a suspect's status from non-custodial to custodial. *State v. Rogers,* 188 SW3d 593.

The court held that the fact that a sheriff's department has a policy against electronically recording interrogations does not violate heightened due process concerns that apply in capital cases. A defendant's statement need not be suppressed because a law enforcement agency has adopted a policy against recording interrogations. *State v. Rollins,* 188 SW3d 553.

Search & seizure. The Supreme Court held that an entry identification checkpoint at which police officers stop and question a person attempting to enter a public housing development and whose conduct is unremarkable and free from suspicion is an unreasonable seizure in violation of both the state and federal constitutions. *State v. Hayes,* 188 SW3d 505.

The court ruled that when officers observed a large crowd of individuals standing around a housing project and witnessed some of the individuals engage in "hand-to-hand" drug transactions, the officers decided to approach the group in order to gather gang intelligence, the officers observed the defendant walking toward a housing project and yelled to the defendant to "hold up," and the defendant turned and ran, the defendant was not seized until the officers began pursuing him yelling, "stop, police." Although the language and conduct expressed by police in initially approaching a citizen could be so forceful and intimidating such that, standing alone, it effectuates a "seizure," the simple statement "hold up" does not rise to that level. The court ruled that the officers lacked reasonable suspicion or probable cause to effectuate the "seizure" of the defendant based upon his flight. Hence, the evidence flowing from the "seizure" was properly suppressed. *State v. Nicholson,* 188 SW3d 649.

The court ruled that a defendant, whose vehicle was stopped with its engine running, in one lane of a two-lane road, was seized by a police officer when the officer approached the defendant in his patrol car and activated his blue emergency lights. The court found that in light of the fact that the defendant was not obstructing traffic — no other vehicles were present in the area around the defendant's vehicle — the officer had

no reasonable suspicion that a crime either had been committed, was being committed, or was going to be committed. Hence, the seizure of the defendant was unreasonable, and the trial court properly suppressed the evidence discovered as a result of the seizure. *State v. Williams,* 185 SW3d 311.

The court ruled that although collection of a defendant's blood for DNA analysis and identification purposes constitutes a search under the Fourth Amendment, searches of incarcerated felons undertaken pursuant to Tennessee's DNA collection statute are constitutional under both the federal and state constitutions when they are reasonable under all of the circumstances. Subsequent DNA analysis performed upon the biological specimen is constitutional. *State v. Scarborough,* 201 SW3d 607.

Search warrant. The Supreme Court ruled that the exact copy requirement of TRCrP 41(c) applies to search warrants only and does not apply to incorporated affidavits. *State v. Davis,* 185 SW3d 338.

The court found that an affidavit relied upon by a magistrate in issuing a search warrant failed to establish probable cause for a search. The reference in the affidavit to a confidential informant as an "agent," alone, was not sufficient to establish that the informant was a law enforcement officer whose information is considered reliable. *State v. Smotherman,* 201 SW3d 657.

Anonymous jury. The court held that an anonymous jury may be empaneled in a criminal case in Tennessee when there is a strong reason to believe that the jury needs protection and when reasonable precautions will minimize prejudice to the defendant and ensure that his or her fundamental rights are protected. *State v. Ivy,* 188 SW3d 132.

Lesser included offenses. The Supreme Court ruled that TCA 40-18-110(c), which provides that the failure to request a lesser included offense instruction in writing waives the right to assign it as an issue in a motion for new trial or on appeal, does not violate a defendant's right to trial by jury and does not violate the separation of powers doctrine. The statute renders the omission of an instruction on a lesser included offense subject to the general rule that issues concerning instructions are considered waived in the absence of an objection or written request, unless they contain plain error. *State v. Page,* 184 SW3d 223.

Seating arrangement. The Supreme Court found that a trial court did not abuse its discretion in ordering a defendant to sit in the first row behind the defense counsel's table when the seating arrangement did not impair the defendant's presumption of innocence. Requiring the defendant to sit directly behind his attorneys is not the same as making the defendant wear prison attire or shackles in the courtroom, which would suggest to the jury that the defendant is "dangerous." *State v. Rice,* 184 SW3d 646.

Juveniles. The court ruled that a juvenile charged with being delinquent by virtue of having committed an offense which would be a felony if committed by an adult is not entitled under the Tennessee Constitution to a jury trial on appeal *de novo* to circuit court. *State v. Burns,* 31 TAM 40-1.

Guilty pleas. The Supreme Court stated that package plea agreements are not invalid per se, but that certain safeguards should apply. The prosecution must act in good faith in cases involving leniency toward a third party or a promise not to prosecute a third party, and the nature and terms of a package plea agreement must be disclosed to the trial court prior to questioning a defendant at the plea hearing. The court added that the current

procedures that trial courts in Tennessee are required to follow in guilty plea hearings are sufficient to assess the voluntariness of a guilty plea entered as part of a package plea agreement. *Howell v. State,* 185 SW3d 319.

Confrontation Clause. The court held that depending upon the particular facts of a case, an excited utterance can be "testimonial" in nature. If the statement is found to be "testimonial," then under the Sixth Amendment analysis outlined in *Crawford v. Washington,* 541 US 36 (2004), and under Tenn. Const. Art. I, Sec. 9, which guarantees defendant's right to "meet the witnesses face to face," it is inadmissible unless the witness was unavailable and the defendant had a prior opportunity for cross-examination. If the statement is not "testimonial," then its admissibility is governed by the standards of *Ohio v. Roberts,* 448 US 56 (1980), which holds that an out-of-court statement by an unavailable witness is admissible if it falls within a firmly rooted exception to the hearsay rule or if it contains such particularized guarantees of trustworthiness that adversarial testing of the statement through cross-examination would add little to the assessment of whether the evidence is reliable. *State v. Maclin,* 183 SW3d 335.

The court held that the Sixth Amendment right to confrontation of witnesses and the state constitutional right to confront witnesses "face-to-face" does not apply to a capital sentencing hearing. *State v. Stephenson,* 195 SW3d 574.

Post-conviction relief. The court held that the civil standard for mental incompetence adopted in *State v. Nix,* 40 SW3d 459 (Tenn. 2001), applies to competency determinations during post-conviction proceedings. To trigger a hearing on competency, the petitioner must make a prima facie showing of incompetence by the submission of affidavits, depositions, medical reports, or other credible evidence, and the petitioner bears the burden of proving that he or she is incompetent by clear and convincing evidence. The trial court should appoint, if necessary, a "next friend" or a guardian *ad litem* to pursue an action on behalf of the petitioner, and the "next friend" may challenge a criminal judgment on behalf of another if it is shown that the "real party in interest is unable to litigate his own case due to mental incapacity, lack of access to court, or other similar disability." *Reid v. State,* 197 SW3d 694.

The court held that a post-conviction action may not be initiated by a "next friend" on behalf of a death-sentenced inmate, who is alleged to be mentally incompetent, when the petition has not been verified under oath or signed by the petitioner. A prima facie showing to file a post-conviction petition as "next friend" requires evidence of an inmate's present mental incompetency "by attaching to the petition affidavits, depositions, medical reports, or other credible evidence that contains specific factual allegations showing the petitioner's incompetence." If this prima facie showing is satisfied, and if there is likewise a showing that the putative "next friend" is acting in the best interest of the petitioner, additional hearings may be held for a determination of mental competency. *Holton v. State,* 201 SW3d 626.