

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

**IN RE: AMENDMENTS TO TENNESSEE RULES OF CIVIL
PROCEDURE**

Filed: December 29, 2005

ORDER

The Court adopts the attached amendments effective July 1, 2006, subject to approval by resolutions of the General Assembly. The rules amended are as follows:

RULE 8.03	GENERAL RULES OF PLEADING;
RULE 23.05	CLASS ACTIONS;
RULE 32.01(3)	USE OF DEPOSITIONS IN COURT PROCEEDINGS;
RULE 34A	SPOILIATION OF EVIDENCE;
RULE 37	FAILURE TO MAKE OR COOPERATE IN DISCOVERY: SANCTIONS;
RULE 41.01	DISMISSAL OF ACTIONS [COMMENT ONLY];
RULE 69	EXECUTION ON JUDGMENTS.

FOR THE COURT:

WILLIAM M. BARKER
CHIEF JUSTICE

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 8

GENERAL RULES OF PLEADING

. . . .

8.03 Affirmative Defenses.—In pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to constitute accord and satisfaction, arbitration and award, express assumption of risk, comparative fault (including the identity or description of any other alleged tortfeasors), discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, statute of repose, waiver, workers' compensation immunity, and any other matter constituting an affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

2006 Advisory Commission Comment

The affirmative defenses of statute of repose and workers' compensation immunity are added to the list in Rule 8.03.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 23

CLASS ACTIONS

23.05 Dismissal or Compromise.—A certified class action shall not be voluntarily dismissed or compromised without approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If attorney fees are sought as part of a compromise, a motion for fees must be filed and served on all parties and, for motions by class counsel, directed to class members in a reasonable manner. A class member, or a party from whom payment is sought, may object to the motion.

2006 Advisory Commission Comment

The second and third sentences of Rule 23.05 are new. Objections can be made to attorney fees sought as part of a settlement.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 32

USE OF DEPOSITIONS IN COURT PROCEEDINGS

32.01 Use of Depositions.—At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Tennessee Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof in accordance with any of the following provisions:

. . . .

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is “unavailable” as defined by Tennessee Rule of Evidence 804(a). But depositions of experts taken pursuant to the provisions of Rule 26.02(4) may not be used at trial except to impeach in accordance with the provisions of Rule 32.01(1).

2006 Advisory Commission Comment

The new language in Rule 32.01(3) incorporates by cross-reference all of the unavailability grounds listed in Evidence Rule 804(a). That list includes deponents who are more than 100 miles from the courthouse on trial day. The more restrictive provision for discovery depositions of experts is retained.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 34A

SPOILIATION OF EVIDENCE

34A.01 Testing of Tangible Things.—Before a party or an agent of a party, including experts hired by a party or counsel, conducts a test materially altering the condition of tangible things that relate to a claim or defense in a civil action, the party shall move the court for an order so permitting and specifying the conditions. Rule 37 sanctions may be imposed on an offending party.

34A.02 Other Spoliation.—Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence.

2006 Advisory Commission Comment

The rule has a new, broader heading. Rule 34A.02 is new. Also, Rule 37 sanctions are made available against offenders. Those sanctions include, at 37.02, refusal to allow claims or defenses; even dismissal of a plaintiff's complaint and entry of default judgment against a defendant are possible.

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 37

FAILURE TO MAKE OR COOPERATE IN DISCOVERY: SANCTIONS

37.03 Failure to Disclose or Refusal to Admit.--

[Number existing language as paragraph (2) and add the following language as paragraph (1):]

(1) A party who without substantial justification fails to supplement or amend responses to discovery requests as required by Rule 26.05 is not permitted, unless such failure is harmless, to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court on motion may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses (including attorney fees) caused by the failure, these sanctions may include any of the actions authorized under Rule 37.02(A), (B), and (C) and may include informing the jury of the failure to supplement or amend.

2006 Advisory Commission Comment

Rule 37.03(1) expressly provides sanctions for failure to supplement or amend discovery responses. The usual sanction will be exclusion of evidence at trial. Courts already have this power under the common law. *Lyle v. Exxon*, 746 S.W.2d 694 (Tenn. 1988), and *Ammons v. Bonilla*, 886 S.W.2d 239 (Tenn. Ct. App. 1994).

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 41

DISMISSAL OF ACTIONS

41.01 Voluntary Dismissal—Effect Thereof.—

2006 Advisory Commission Comment

Although Rule 41.01(2) allows two nonsuits without prejudice, a plaintiff must carefully consider the *separate* issue of whether the saving statute, T.C.A. § 28-1-105, authorizes a recommencement of the plaintiff's action after a nonsuit. A plaintiff should note that taking a second nonsuit, which is permitted by Rule 41.01(2), does not initiate a second one-year period for recommencing the action under the saving statute. *See Payne v. Matthews*, 633 S.W.2d 494, 495-96 (Tenn. Ct. App. 1982) (stating, "It has long been held that after the taking of any nonsuit to the original action, any additional suits would have to be filed within one year of the first nonsuit to be within the purview of T.C.A. Sec. 28-1-105.>").

TENNESSEE RULES OF CIVIL PROCEDURE

RULE 69

EXECUTION ON JUDGMENTS

69.07 Execution on Realty.—

. . . .

(2) Judgment Lien.—A judgment lien against the judgment debtor’s realty is created by registering a certified copy of the judgment in the register’s office of the county where the realty is located. Once a judgment lien is created by registration, it will last for the time remaining in a ten-year period from the date of final judgment entry in the court clerk’s office and for any extension granted by the court pursuant to Rule 69.04. For the extension of the lien to be enforceable, the judgment creditor must register the court’s order extending the judgment.

2006 Advisory Commission Comment

The only change in Rule 69.07(2) is to drop the final word in the original paragraph, “lien.” The court’s order granted pursuant to Rule 69.04 extends the judgment, not the judgment lien. The lien is extended by registering that order.