

## LAW TIMES

A DAILY NEWSPAPER of LAW, GOVERNMENT FINANCE &amp; ADMINISTRATION

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HEARD *in the* CLOAKROOM

by JOSH MACGREGOR

Welcome to the Tennessee Law Times. And may I suggest you consider the use of a seatbelt.

Law newspapers since the early 1970s have never been the darling of the courts or the established bar associations even when those papers did nothing more than print unreported trial court decisions. One legal newspaper raised the ire of a state's supreme court, and the chief court administrator sent out a formal order to the clerks of the trial courts ordering them not to give any memorandum opinions.

Small potatoes? Not exactly. How would you like to be able to read the full text of Tennessee trial court opinions from all across the state, along with having these trial court decisions indexed and cross-referenced? We will be providing that service. Four of those opinions are contained in this issue, and many more will be forthcoming. Some of the trial court opinions are scholarly and well written and may aid you in your law practice. But we will need your help. Most trial court judges will refuse to give this newspaper their memorandum opinions in electronic format. The optical character recognition scans of trial court opinions turn out to be a joke: the results are riddled with formatting problems and mistaken letters. It would greatly assist the error-free reproduction of trial court opinions to get them in electronic format, but clear paper copies are a second best alternative.

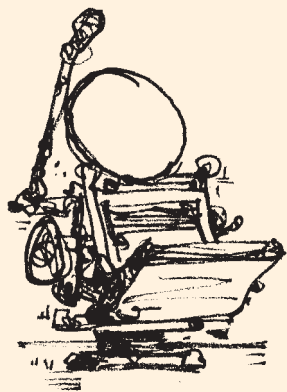
You are looking at the production model for the Tennessee newspaper, and it is labeled Number 0 for that reason. This production model will only be distributed in electronic format. The full production first run will be printed on newspaper and display more typesetting finesse, as well as plenty of paid classifieds and display advertising.

The roll out of our first issue of The Tennessee Law Times will be sent to 3,000 lawyers across the state, all state legislators, the governor and his department heads, all of Tennessee's members of congress, numerous county mayors, most of the television stations and other news outlets in the state, and many thousands of non-lawyer subscribers.

So, what of Tennessee? We are one of fifty states. And with our due tipping of our respectful hat to TAM, this state which sees fit to license and supply income to some 16,000+ attorneys, until now hasn't had a true law newspaper.

Now it does. And, may it please the court [fat chance] we will open our pages and columns to the bench and bar alike on any occasion they feel we have erred, or to simply give them equal "time".

*continued on page 3*



Printing Press  
circa 1940

## Transactional Law

*page* 20 Municipal Bond Issue in Oak Ridge. In backing a security with a hypothetical stream of income, the Oak Ridge's IDB mall development bond seems more like a bomb waiting for unsuspecting investors than a secured transaction.

## Elder Law

15 What about DHS abuse of the rights of the elderly and their families? A Tennessee state agency seizes an elderly citizen, takes every source of income the person has, places the person in a nursing home against her will, and either saddles the family with very expensive nursing home bills or sells the person's last possession, her home, to pay for the bills.

## Interstate Commerce

10 If you believe only Congress has the right to regulate interstate commerce, guess again. A confusing patchwork of sometimes conflicting opinions from different circuits of the U.S. Courts of Appeals means that regulation of interstate shipments of wine and beer, e.g., from purchases over the Internet, will likely be decided by the U.S. Supreme Court in its 2004-05 term.

## JUDICIAL OPINIONS &amp; AGENCY AWARDS

## ELDER LAW—INVOLUNTARY CONFINEMENT—DHS

DHS discovered an elderly woman living in unsanitary conditions at home and alone. The woman suffered from mild dementia. DHS seized the woman against her will and without any warning and confined her to a nursing home against her will. The Knox County Chancery Court held that DHS failed to comply with the Tennessee statute authorizing DHS to seize impaired adults who face the risk of imminent harm. The court ordered DHS to release the defendant, Mildred Yarberry, and return her to her home as she had requested. P. 16

## FAMILY LAW—DIVORCE—VISITATION &amp; CUSTODY

The Hamblen County Chancery Court filled in the standard parenting plan form for cases involving a minor child whose parents have become divorced. Unique features of this parenting plan order include (1) a re-acquaintance of the noncustodial father with his three-year old son by scheduled one hour meetings on every other Saturday, followed by nine-hour visitations on every other Saturday, followed by the noncustodial father receiving custody on every other weekend; (2) the father should not bear all the expense and inconvenience of retrieving his son for visitation. Accordingly, the two parties will meet at a half-way point between their two homes for transfer of the child on weekends when his father has custody; (3) the father, who pays child support for his son, shall receive the child support dependency exemption on his federal income tax return; and (4) the parent claiming the federal income tax child exemption must send a copy of the first two pages of his income tax return each year to the other parent. P. 16

## PLANNING &amp; ZONING PROCEDURE HIGHWAY SITING

Hamilton County Chancery court held a zoning board was not required to pronounce specific findings of facts concerning the impact of locating a highway through a town. Despite the fact that a number of citizens of Walden spoke at the hearing and expressed their opposition of the proposed PUD based on legitimate health and safety concerns, the board of zoning appeals was not required to conduct a referendum on public attitudes relative to the petition. The findings of the zoning board cannot be found illegal, arbitrary, or capricious, because the zoning board did not address these citizens' concerns in its actions. P. 18

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## STATE OF TENNESSEE JURY VERDICTS AND SETTLEMENTS

### MEDICAL MALPRACTICE—WRONGFUL DEATH FROM FAILURE TO DIAGNOSE BACTERIAL MENINGITIS

**Verdict**            \$275,000, reduced by remittitur to \$200,000  
**Case**                Bernice Rothstein, et. al. v. Orange Grove Center, Inc. et al.  
**Docket No.**        95 CV 2147  
**Court**                Hamilton County Circuit Court  
**Judge:**              W. Neil Thomas, Circuit Judge  
**Date:**                not reported, (1998?)  
**Plaintiff**            Thomas H. Dundon, Esq.  
**Attorney(s)**        William D. Bridgers, Esq.  
                               Nashville, TN

**Defense**             David E. Harrison, Esq.  
**Attorney(s)**        Tonya Kennedy, Esq.  
 Nashville, TN, for the Defendant, Christopher D. Prater, MD

Samuel R. Anderson, Esq.  
 Chattanooga, TN, for the Defendant, Orange Grove Center, Inc.

**Facts:** On November 23, 1994, Lisa Rothstein ("Lisa"), a thirty five year old mentally retarded woman who resided at the facility owned and operated by defendant Orange Grove Center, Inc., ("Orange Grove") died from bacterial meningitis. She had been suffering from headache, fever, and vomiting since about November 17, 1994, and was under the care of the physician retained by Orange Grove to treat its residents, Dr. Christopher D. Prater. ("Dr. Prater") Dr. Prater was not able to examine Lisa until November 22, and based his initial diagnosis that she had a viral infection on conversations with Orange Grove's nursing staff. Upon examining Lisa on November 22, Dr. Prater revised his diagnosis, judging that Lisa's condition was due to viremia, a viral infection of the bloodstream. He recommended that Lisa be placed in a quiet, dark room, to see if her rapid breathing and agitation would stop. Early in the morning of November 23, between 5:00 and 6:00 a.m., Lisa was found dead in her room.

**Injuries:** Death due to bacterial infection

**Result:** The jury returned a verdict of \$275,000, apportioning 20% of fault to Orange Grove Center, and 80% of fault to Dr. Christopher Prater. The award was reduced by remittitur to \$200,000.

**Demand:**            not reported  
**Offer:**                not reported  
**Trial Details:**    not reported  
**Plaintiffs' Experts**    not reported  
**Defendant's Expert**    not reported  
**Insurance Carriers**    not reported

**Post-trial** All parties appealed. Plaintiffs appealed the denial of their loss of consortium claim, while the defendants appealed the admission of certain lay and expert witness testimony, and the admission of telephone slips made after Lisa's death. The Appellate Court affirmed the trial court on all issues. At the Supreme Court, the Court affirmed the lower courts as to the defendants, but reversed and remanded the plaintiff's claim for loss of consortium

### AUTOMOBILE ACCIDENT—HEAD-ON COLLISION

**Verdict**            \$1,750,000  
**Case**                Robert Lewis Davidson et al. v. Charles R. Lindsey, et al.  
**Docket No.**        1365  
**Court**                Circuit Court for Henry County  
**Judge:**              Julian P. Guinn  
**Date:**                August 14, 2000  
**Plaintiff**            Edward L. Martindale, Esq.  
**Attorney(s)**        Jackson, TN  
**Defense**             Fred N. McLean, Esq.  
**Attorney(s)**        Paris, TN, for Defendant Charles R. Lindsey  
                               Raymond G. Price, Esq.

Nashville, TN, for the Defendants Jason R. Ross and Allen P. Ross

Russell E. Reviere, Esq.  
 Michael L. Mansfield, Esq.  
 Jackson, TN, for the Defendants Allen Briggs and Southland Transportation

**Facts:** On July 27, 1998, the plaintiffs, Robert Lewis Davidson and his wife, Joyce, ("the Davidsons") were traveling northbound on Highway 79, near Routon. At the same time, traveling southbound on 79, were defendants Charles Lindsey, ("Lindsey") in a pickup truck, Jason Ross ("Ross"), in a Honda Civic, and Allen Briggs ("Briggs"), in a semi-tractor, leased to his employer, Southland Transportation. Ross was being tailgated by Briggs, so he moved into the right southbound lane. Briggs then moved up on the next car in the left lane, Lindsey's, and began tailgating him. Lindsey attempted to move into the right lane, however he collided with Ross. Lindsey immediately pulled back into the left lane, where he collided with Briggs, who had already begun to pass. Briggs skidded across the center line of 79 and collided with an oncoming northbound vehicle driven by Juan Calderon, who is not a party to this action. Seeing these events unfold, the Davidsons had pulled off onto the shoulder and stopped on the northbound side of the highway. Briggs continued to skid after striking Calderon, however, and collided head-on with the Davidson's vehicle. Mrs. Davidson was killed instantly, and Mr. Davidson sustained serious injuries.

**Injuries:** Serious injuries to Mr. Davidson, and death to his wife, Joyce.

**Result:** The jury returned a verdict of 1,750,000, apportioning 100% of fault to Briggs and Southland. \$1,250,000 of that award was to Mr. Davidson, and the remaining \$500,000 went to the estate of his wife.

**Demand:**            \$5,000,000  
**Offer:**                not reported  
**Trial Details**        two day trial  
**Plaintiffs' Experts**    not reported  
**Defendant's Expert**    not reported  
**Insurance Carriers**    Harco National Insurance Company

**Post-trial** Defendants appealed, claiming that the trial judge failed to properly discharge his duty as the thirteenth juror because his bias against two of the defendants, Briggs and Southland, prevented him from independently weighing the evidence and objectively determining his satisfaction with the jury's verdict. The Court of Appeals concurred and reversed the trial court, allowing Briggs and Southland to stay execution of the judgment pending appeal. The Supreme Court overruled the Court of Appeals and affirmed the trial court.

# News/November 24, 2003

## Racer Cleared

A lawsuit against Winston Cup driver Sterling Marlin was dismissed by a jury in Nashville, Tenn., that decided he was innocent of throwing racing car fan Joel Whitcomb into the Jamaican surf in 2001 as part of a side altercation related to a group tug of war match at the beach. Whitcomb claimed that he injured his knee and shoulder when Marlin assaulted him and threw him into shallow surf.

## Booze & Guns

Last May 22, Tennessee Titans veteran quarterback Steve McNair was arrested for drunken driving and weapon charges. Although McNair holds a permit for the handgun, an intoxicated person may not legally carry a loaded weapon in Tennessee. A judge ruled two weeks that enough evidence exists to bound the case over to the grand jury for possible indictment.

## Tennessee Moon

A Polk County, FL judge held that a female athletic trainer's defamation lawsuit can proceed against Indianapolis Colts quarterback Peyton Manning and his father, former New Orleans Saints quarterback Archie Manning. Judge Harvey Kornstein denied a motion for summary judgment in favor of Manning. The case involved an incident in which a teammate teased Manning about his girlfriend, and he then mooned the teammate by pulling down his shorts and exposing his buttocks while former University of Tennessee trainer Jamie Ann Naughtright was examining his feet inside the locker room. In a book he co-wrote with his father, Manning said the unnamed trainer had a "vulgar mouth," however, Manning admitted that mooning his teammate in the presence of a female was "inappropriate." She is seeking only \$15,000 in damages for defamation.

## Stuffing the Box

The Tennessee Bureau of Investigation turned over the conclusions of its investigation into possible election irregularities in Hamilton County to the district attorney general. Hamilton County Election Administrator Fran Dzik told District Attorney General Bill Cox last December that she suspected voter fraud in the District 4 primary on May 7, 2002. Dzik said she suspected some people used false names to vote and addresses were changed fraudulently on election records.

## Not Mine, Judge

Tennessee seizure of vehicles in drug raids is coming under attack for violating the constitutional rights of nonparticipants or those who merely possess for personal use a small amount of marijuana. Hedy Weinberg, executive director of the American Civil Liberties Union of Tennessee, said the practice of law enforcement seizing property during drug arrests is "a real racket." "It's a form of fund-raising for law enforcement," Ms. Weinberg said. "Often this property is in no way connected to the crime or an individual who allegedly committed the crime." Chattanooga attorney Bill Speek said the Tennessee drug vehicle and property seizure statute was designed to punish drug "kingpins," not people charged with possessing small amounts of marijuana. "In its inception, [the statute] was used for people who used cars and assets in the drug trade," Mr. Speek said. "The statute allows for considerable judicial discretion. Now you see it becoming a fund-raising tool by the county governments. To me, it's a complete abuse of the statute."

## HEARD—

*continued from page 1*

Our editorial board is somewhat conservative, but we are big fans of Governor Phil Bredesen and his no-nonsense approach to management. Our publishing staff has served considerable time as senior managers of such august legal publishers as Matthew Bender & Company, the Bureau of National Affairs [US Law Week], and Times Mirror Company.

Our objective is to be professionally useful in the traditional reportorial way. But along the way its clear there will be much else to write about. A brief survey of legal newspaper yearly subscription costs across the states showed a typical price of \$375 for a weekly publication. We are marketing our paper at less than half that price. This will not be a stodgy, boring legal newspaper. We will have extensive coverage of pending bills in the state legislature and plenty of fodder for policy wonks (including those without law degrees).

We are proud to say that The Tennessee Law Times has been produced with zero company debt and thus has operated in the black from the very first issue. Our conservative business and budgeting philosophy has served us well. We intend to offer you more than a competitively priced and informative newspaper. Soon, our subscribers will be able to earn all 15 hours of CLE training for \$0 through seminars sponsored by The Tennessee Law Times. We repeat: Fifteen hours of free CLE training. Seminar participants will be expected to buy a

lunch at the restaurants where the seminars are conducted. The free CLE seminars are already offered in East Tennessee [Dec. 18 - Oak Ridge & Dec. 29 - West Knoxville] and will expand to middle and west Tennessee once there are sufficient subscribers there to generate demand.

Most legal newspapers are actually litigation newspapers. They do little more than cover various court decisions as well as litigation procedures. Our paper will offer a menu of features including a regular column on Tennessee land use law, extensive coverage of federal case law, coverage of the good and the bad with Tennessee's state government, a Tennessee jury verdict reporter service, and even some medical articles (not medical case law, actual medical articles useful to law clients). Attorneys across Tennessee will have an opportunity to contribute an occasional column or two—just write us for the details.

This newspaper is produced from a high tech operation. The best way to contact us is via e-mail: [lawtimes@myrealbox.com](mailto:lawtimes@myrealbox.com). You may get a response back from us within a couple hours if you use e-mail. We need all submissions for letters to the editor and potential articles in electronic format. If you contact us by postal mail, fax, or phone, it may take over a week for you to receive a response.

Many of you recall the famous jurist who wrote of sunlight being the best deterrent of evil and misdoing in a democratic society. Yes, we have mangled the quote. Meanwhile, we got the sunlight part right. Just turn the pages!

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# Sounding the Docket

## The Supreme Court's 2003-2004 Term

MICHAEL A. S. GUTH, *Ph.D., J.D.*

**L**AST YEAR the U.S. Supreme Court tackled such socially divisive topics as affirmative action in school admissions and homosexual conduct in the privacy of the home. The Court's docket this year, reflected in the 50 or so cases that the Court has thus far accepted for hearing, will likely generate fewer headlines and less controversy than last year.

This year's docket concerns more esoteric and arcane applications of the law. For example, in *Virginia v. Maryland*, the Court will reach back to Eighteenth and Nineteenth Century statutes to determine if Virginia has a right to build in the Potomac River, and thereby draw water away from Maryland. Elsewhere, in *Till v. SCS Credit Corporation*, the Court will decide the appropriate discount rate to use for deferred payments to an undersecured creditor. The *Till* case will require the Court to answer the esoteric question of what is the appropriate discount rate to calculate the present value of property held by a debtor under the Chapter 13 bankruptcy cramdown provision found at 11 U.S.C. §§ 1325(a)(5)(B)(ii).

But even esoteric cases can have practical consequences. The decision in *Till* will establish a formula (based on economic principles contained in the briefs) that bankruptcy courts all across the country will employ to set the interest rate on outstanding debt, where debtors keep property—such as automobiles—that they purchased through financing.

Each term the High Court hears cases of general interest to companies, government agencies, and private parties. The business law cases coming before the Supreme Court this fall range from a case involving competition for local Internet service—pitting municipal utilities against the state and large telecommunications firms—to a case involving limitations on employers' ability to refuse to hire rehabilitated job applicants because of their prior substance abuse of drugs or alcohol.

The Court has at least one consumer rights case this fall. The case concerns how credit card companies

and card-issuing banks disclose to customers the fees they are being assessed for exceeding their cards' credit limits. The Federal Reserve Board had previously held that those fees should be displayed as a separate charge on the monthly bill, but a federal appeals court ruled that the fees should be shown as part of the finance charge. Consumers would probably be more interested in limits on the amount that banks and credit card companies can charge for fees, rather than under what category the fees appear on their bills.

**Employment Law.** In *General Dynamics v. Cline* and *Raytheon v. Hernandez*, the court will hear two employment discrimination cases with potentially broad impact on labor unions, benefits with seniority systems, and employers that currently offer preferential treatment to older employees. The *General Dynamics* case poses the question of whether employers can offer a retirement plan that grants full health benefits only to those who retire after age 50, or does the Age Discrimination in Employment Act (ADEA) require companies to offer the same retirement option to every employee over the age of 40. "If the employer has to extend retirement health benefits to everyone age 40 or older or to nobody, he'll extend it to nobody," predicts Donald Verrill, a lawyer in the Washington, D.C., office of Jenner & Block. Superior benefits for older or more senior employees are fairly common with many companies across the nation. Most employers probably could not afford to offer the same enhanced benefits to every employee over age 40. The Bush Administration is backing the side of Dennis Cline and 175 of his fellow workers aged 40-49, and will argue that the ADEA prevents discrimination against any employee over age 40—even if the discrimination benefits a class of older employees.

The *Raytheon* case tests the limits of the Americans with Disabilities Act (ADA) as applying to employees who were fired for using illegal drugs or consuming alcohol on the job but who then completed rehabilitation programs. If reformed substance

abusers are covered by the ADA, then employers will be prohibited from refusing to hire these applicants based solely on their past drug use. The U.S. Court of Appeals for the Ninth Circuit held in favor of the employee-applicants.

**Governments.** The most closely watched case this term, *McConnell v. FEC*, pertains to the constitutionality of the McCain-Feingold Bipartisan Campaign Reform Act of 2002, which seeks to limit the sources and dollar amounts of political campaign contributions. Of course, bipartisan is somewhat of a misnomer for the Act, because McCain-Feingold passed Congress with tepid Republican support and very strong support from Democratic legislators.

In an unusual move, the Court briefly reconvened for one day last September—one month before the traditional opening of its new term—to hear four hours of oral arguments concerning the Act. Ironically, the last time the court met in special session in September was in 1976, when the Court ruled on the federal campaign finance law of that time. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

In a brief asking the Court to find McCain-Feingold unconstitutional, the American Civil Liberties Union (ACLU) warned against "a seismic shift in American politics" if the Act were upheld. The American public would have to decide if that seismic shift was a positive or negative change in our political campaigns, but the ACLU implied it would be negative. Similarly, a brief filed on behalf of business interests argues "[a]ll Americans, including American voters and government officials, have a vital interest in hearing what corporations have to say on the key issues of the day." The business groups went on to say McCain-Feingold would put "broad and vague new restrictions on the ability of corporations (and labor unions) to speak, associate, and petition the government." Most legal commentators expect the Court to hand down its decision by the end of 2003.

Another politically charged case on the Court's docket this term concerns unabashed gerrymandering to produce a greater number of

Republican representatives in Congress. For the past two years, the Republican party has adopted a strategy of accelerating redistricting battles in order to maximize partisan advantage. The case, *Vieth v. Jubelirer*, is an appeal by Pennsylvania Democrats of the 2002 redistricting plan in Pennsylvania. Democrats now hold only seven out of the state's nineteen congressional districts, yet Democrats account for about half of Pennsylvania's voters. The Democrats are invoking a 1986 Supreme Court precedent that held that a partisan gerrymander so severe as to thwart majority will violates the equal protection clause of the 14th Amendment, yet the Court set a very high standard to prove these allegations.

By establishing a very high standard of proof, the Court tried to limit the number of cases that would be brought any time one party felt slighted by a majority party's redistricting plan. The federal district court in this case held that standard meant courts should intervene only if one party was "completely shut out of the political process." According to Steven Shapiro, legal director of the American Civil Liberties Union, Republicans and Democrats "are equally guilty" of brazen and partisan gerrymandering, depending on which party controls a legislature. Should the Supreme Court side with the Democrats, University of Pennsylvania law professor Nate Persily warned that the decision could "open the floodgate" to litigation on redistricting plans all across the nation.

*Vieth* will force the Court to reenter, for the first time since 1986, the increasingly bitter and partisan process of establishing boundaries for congressional districts. Bitter partisan revolts against redistricting plans erupted in Texas and Colorado earlier this year.

Another case involving state and local governments concerns whether the state of Tennessee violated the ADA by failing to provide handicapped access to all of its state court buildings. A separate dispute over state benefits focuses on whether the court will continue to protect states,

in this case Texas, from lawsuits filed by individuals who have been denied Medicaid care for children.

In *Tennessee v. Lane*, No. 02-1667, the appellant Tennessee claims sovereign immunity from lawsuits challenging the state's failure to make its courthouses available to people using wheelchairs. Briefs filed in the case show that one plaintiff-appellee, George Lane, had to crawl up two flights of stairs to make a required court appearance. Another plaintiff-appellee is a court reporter, Beverly Jones, who could not gain access to four Tennessee courthouses where lawyers had hired her to record the proceedings. Both Lane and Jones use wheelchairs.

As a historical backdrop for *Tennessee v. Lane*, the Court held in 2001 that states could not be sued by their employees under the section of the ADA that bars employment discrimination. Tennessee invoked that precedent in its appeals, but the U.S. Court of Appeals for the Sixth Circuit held that access to court is itself a fundamental right that trumped the state's sovereign immunity claim. Separately, in a case from its last term, the Court permitted suits against states under the Family and Medical Leave Act. So the decision in *Tennessee v. Lane* is being closely watched to resolve the recent conflicts in the Court's federalism and state immunity jurisprudence.

In other federalism cases before the Court this fall, the court will decide (1) whether the Environmental Protection Agency (EPA) has authority to override a state-granted permit to allow some air pollution emissions from an electric power generator, and (2) the division of power between national and state governments to control emissions of fleets of trucks. In *Alaska Department of Environmental Conservation v. EPA*, Alaska is appealing a 9th Circuit decision that found the EPA had authority to overturn the state's decision to issue a pollution permit to a zinc-mining company operating a power generator in the state. In its appeal to the Supreme Court, Alaska argues that the EPA only has authority to overturn a state's permitting decision when the state has violated the Clean Air Act, and that no violation occurred in this case. EPA contends that the Clean Air Act gives it authority to determine the best available technology to abate pollution and whether a given company is implementing it.

The Court will also hear a case involving the federal government's duty to maintain the privacy of individuals' social security numbers. *Doe v. Chao* poses the question of whether the Federal Privacy Act, 5 U.S.C. sec. 552(a), allows recovery of the minimum statutory damage of \$1,000 without proof of any actual damages. The case arises out of a class action against the U.S. Department of Labor on behalf of a number of coal miners whose Social Security numbers were shown on posted lists of black lung disease claims. The U.S. Court of Appeals for the Fourth Circuit held the claimants were entitled to no recovery, because they failed to prove any actual damages.

Turning from privacy invasions to tax evasion, the statute of limitations on collecting partnership taxes will be the central issue in *U.S. v. Galletti*.

In that case the Internal Revenue Service (IRS) sought to recover partnership tax deficiencies from individual partners. The IRS sent a deficiency notice for unpaid employment taxes to the partnership within the three-year limitations period for assessing a tax deficiency after filing a return. However, the IRS did not send a deficiency notice to the individual partners within that three-year limitations period defined at 26 U.S.C. § 6501(a). The IRS argued that its timely assessment against the partnership permitted it to collect taxes directly from individual partners, but the Ninth Circuit held in favor of the partners.

The court will also hear a case involving state and local governments

with business law implications. The Supreme Court will decide whether the states have the power to forbid their local governments to go into the Internet service provider business on their own. The average cost of cable modem service (bundled with a basic cable service subscription) in this country is nearly \$60/month. As long as the cost of high-speed Internet access to the home remains relatively expensive, the dream of having an interconnected society that grows its economy through rapid and efficient access to information over the Internet will never be realized.

Against this backdrop of relatively expensive high-speed Internet access for the average American home, the Supreme Court will decide

whether the state of Missouri can bar municipal utilities from offering telephone, cable TV, and high-speed Internet access to local residents using fiber optic systems owned by municipalities. The issue before the Court: whether the U.S. Telecommunications Act of 1996 pre-empts local and state laws prohibiting the utilities from competing with telecommunications firms to offer these services.

Finally, the Court will consider a case involving a claim against a foreign government. *Republic of Austria v. Altmann* poses the question of whether displaying works of art in a public museum constitutes commercial activity or inherently governmental activity. The case has broader

implications for whether a foreign country be sued in U.S. courts for Holocaust-era actions. This case seeks to recover six paintings by the artist Gustav Klimt that were commissioned or purchased by Viennese Jewish businessman Ferdinand Bloch-Bauer, who headed Austria's sugar industry at the time. The Nazis seized the paintings in 1938 during the German Anschluss of Austria, and these paintings later became the property of an Austrian state gallery. Two of the paintings were commissioned portraits of Bloch-Bauer's wife, Adele. If the Supreme Court decides the display of these works of art is inherently governmental activity, then the case falls within the purview of

the Foreign Sovereigns Immunity Act, which makes foreign governments immune from lawsuits in United States courts.

**Health Care.** The California case of Marcus Conant, a medical doctor who challenged a federal law that forbade him from even discussing the potential use of marijuana for the relief of appetite disorders suffered by his patients with cancer and AIDS, was scheduled to be argued this fall. The case was styled *U. S. v. Oakland Cannabis Buyers' Cooperative* before the Supreme Court. However, in a surprise move, the High Court on Tuesday, Oct. 14, issued a per curiam decision that let stand a U.S. Court of Appeals for the Ninth Circuit decision

upholding the state laws permitting doctors to discuss marijuana use. The Ninth Circuit also held that the federal policy that created a gag rule prohibiting doctors from discussing marijuana usage for medicinal purposes violated both the free speech rights of doctors and the "principles of federalism."

According to Dr. Conant, who has treated 5,000 HIV-infected men and women and was the original plaintiff in the trial court hearing, "In my practice, marijuana has been of greatest benefit to patients with wasting syndrome. I do not routinely recommend marijuana to my patients, nor do I consider it the first line of defense against AIDS-related symptoms.

However, for some patients, marijuana proves to be the only effective medicine for stimulating appetite and suppressing nausea, thus allowing the AIDS patient to recover lost body mass and become healthier." The respondents' brief explained why some very ill patients cannot tolerate ingesting the prescription drug Marinol, which contains the same active ingredient that causes hunger sensations as marijuana, but are able to absorb the drug from inhaling marijuana.

Although states have the authority to issue licenses to practice medicine, the federal Drug Enforcement Administration (DEA) has authority to issue licenses to prescribe drugs. That is why doctors frequently list their DEA authorization number on their prescription forms. As a practical matter, a doctor who was prevented from writing prescriptions would find it difficult to practice medicine. Thus, the Bush Administration, like the Clinton Administration before it, sought to use the strong arm of the DEA to thwart legislation in various states allowing medicinal use of marijuana. At present, Alaska, Arizona, Hawaii, Nevada, Oregon, Washington, and California - seven of the nine states within the Ninth Circuit - as well as Maine, Colorado, and Maryland have various statutes decriminalizing either the doctor's conduct in prescribing marijuana or the patient's consumption of marijuana for medicinal purposes.

Court watchers have been puzzled why the Supreme Court would issue a per curiam decision in a case it had already put on its docket this fall. These legal commentators noted that the Court may have been swayed by the unusually strong opinion written by a three-judge panel of the Ninth Circuit that included Chief Judge Mary M. Schroeder, the author of the opinion, Senior Judge Betty B. Fletcher, one of the Ninth Circuit's most liberal members, and Judge Alex Kozinski, a libertarian who some legal commentators mistakenly label as the Ninth Circuit's most conservative member. From a libertarian perspective, a decision that tells the federal government to stay out of the doctor-patient relationship (under the guise of respecting states' rights) fits perfectly into the libertarian philosophy of a minimal role for government.

In *Frew vs. Hawkins*, the Court will decide whether a federal judge can force the state of Texas to comply with an agreement to provide Medicaid preventive health services for children of indigent families. The Frew case involves a suit filed against the state in 1993 by several families in East Texas who thought that the state failed to comply with federal Medicaid guidelines to provide preventive health services for children.

By 1996, the suit had been certified as a class action. After the presentation of considerable evidence and arguments, the state agreed to provide the services, thereby settling the suit as part of a consent decree, in which the parties make an agreement subject to the court's supervision. The court accepted the settlement, and the state did not appeal. But two years later, when the families went back to court to have the agreement enforced, the state resisted.

The state argued that even

though it had agreed to settle the suit, it had not specifically waived its sovereign immunity, so the 11th Amendment barred the federal judge from enforcing the agreement. Not surprisingly, the federal judge decided he had such power and ruled against the state. The U.S. Court of Appeals for the Fifth Circuit sided with Texas that because no federal rights had been violated, suit could not be brought in federal court. Based on the reasoning of the Fifth Circuit, citizen access to Medicaid services is a privilege and not a federal right. Buoyed by its victory in the appellate court below, Texas is now taking its sovereign immunity argument to the Supreme Court.

In *Olympic Airways v. Husain*, the Court will determine whether an airline's refusal to help a passenger who becomes ill and dies during an international flight (in this case, refusing to move a man with asthma away from the smoking section) constitutes an "accident" within the meaning of the Warsaw Convention. If the Court holds that it does constitute an accident, then the airline could be liable for the passenger's injuries and wrongful death.

**Church and State.** In *Locke v. Davey*, the state of Washington established taxpayer-financed scholarships for post-high school education to Washington residents with financial need. The state awarded Joshua Davey one of these so-called Promise Scholarships for \$1,125, based on his grades and family income. The eligibility requirements stated that the scholarship could not be used to pursue a degree in theology. The Washington constitution prohibits public money from being used to provide any religious instruction, or to support any religious establishment.

When Davey declared a major in Pastoral Ministries at a Christian college, he lost his scholarship. He then sued the state in federal court claiming violations of his free exercise of religion, freedom of speech, and equal protection rights. The district court granted summary judgment against Davey, but the U.S. Court of Appeals for the Ninth Circuit reversed in a 2-1 decision. The Ninth Circuit found that the prohibition on majoring in theology discriminated on the basis of religion and could be upheld only if the state advanced a compelling purpose. The Ninth Circuit further determined that the state's interest in avoiding conflict with its constitution was not a compelling reason. The appellant in this case, Gary Locke, is the governor of Washington.

"Washington's constitutional prohibition against public funding of religious instruction does not impair Davey's free exercise of his religion - he is free to believe and practice his religion without restriction," the state argues in its brief before the Supreme Court. "The Washington Constitution does not even prevent Davey from majoring in theology. He is free to use his scholarship at Northwest College to obtain a degree in business management and administration, while simultaneously pursuing a theology degree at a different college - using his own funds."

*Locke v. Davey* comes on the heels of the Supreme Court's Ohio school voucher decision in 2002. That case held states did not violate the

Establishment Clause by offering tuition subsidies that parents, exercising their private choice, can apply toward parochial education.

Thirty seven states, including the state of Washington, have constitutional prohibitions against using public money to support religious education.

While seemingly neutral on their face, such provisions may have been enacted in response to religious bigotry at the time. In 1875, anti-Catholic Congressman James G. Blaine first proposed a constitutional amendment designed to prevent any public funding for religious schools. That proposed constitutional amendment was narrowly defeated, but Congress passed legislation requiring new applicants for statehood to include such a provision in their state constitutions. Thus, many of the western states still have this legacy in their state constitutions. The Arizona Supreme Court recently described this provision against public support for religious schools in its state constitution as a "clear manifestation of religious bigotry."

According to Mark Brnovich of the Goldwater Institute, "Blaine Amendments" in state constitutions are barriers for the expanding school voucher initiatives across the country and have been used successfully in Maine, Vermont, and Puerto Rico to block voucher programs in primary and secondary education.

The two dozen briefs that have been filed in *Locke v. Davey* indicate that the stakes are high in this case: the future of the school-choice movement could depend on the outcome of this case. Brnovich summarizes the importance of the case this way. "At stake is the educational fate of millions of schoolchildren and the freedom of parents to choose where they may send their children to school." The Bush administration has sided with student Joshua Davey and will argue before the Supreme Court that Washington's refusal to subsidize a student majoring in theology while paying for other higher education options is unconstitutional.

After procrastinating for several months, the Supreme Court on Oct. 14 accepted for hearing the controversial "Pledge of Allegiance" case from the Ninth Circuit, which held that requiring teachers to lead students in recite the phrase "under God," amounted to an unconstitutional endorsement of religion. The press has made this case into a cause celebre, even though the Supreme Court's jurisprudence on these issues is now well settled. For the same reasons that the Supreme Court turned back Establishment Clause challenges to the phrase "in God we trust" on our coinage, we can expect the Supreme Court to characterize "under God" as a historical recognition of the founding fathers' faith, but not as a prayer. The last time the Supreme Court addressed the constitutionality of references to God in public schools was June 2000, when the Court struck down state laws permitting student-led prayers before high school football games. Over the years, several justices have written in their individual opinions that they believe the pledge is constitutional as written, but the Court has never officially spoken on this issue.

This case has one of the most

interesting procedural postures of any case that came before the court. First, in 1943, the Supreme Court decided, in a case brought by Jehovah's Witnesses, that public school systems could not compel students to recite the Pledge of Allegiance. The Elk Grove School District--where this Sacramento, California case arose -- does not require students to recite the pledge. Unwilling students are permitted to refrain from reciting the pledge. However, the Ninth Circuit concluded that students who refrained would feel left out and possibly ostracized by their classmates. So the question becomes who is more obligated to show tolerance: those students willing to recite the pledge or those students unwilling to recite the pledge.

As a historical footnote, the phrase "under God" has not been a part of the Pledge of Allegiance for centuries as many Americans believe. The phrase was added by Congress in 1954 during the Cold War to distinguish the United States from the self-proclaimed atheistic, communist Soviet Union. The original pledge, without the reference to God, was adopted in 1942.

Second, the press significantly heralded the Ninth Circuit's decision last June 2002 as holding the Pledge of Allegiance was unconstitutional. However, the 3-judge panel of the Ninth Circuit revised its prior decision earlier this year and narrowly confined it to public schools. The amended decision of the Ninth Circuit struck down state policies that require teachers to lead "willing students" in the pledge. If the Supreme Court merely affirms the Ninth Circuit decision without offering further guidance, it will lead to further litigation of cases involving public school teachers who voluntarily choose to lead the class in the pledge. Similar test cases are working their way through the federal courts in Colorado and Pennsylvania. In accepting the Ninth Circuit Pledge case, the Supreme Court said it would rule only on the limited question of public schools, not on the constitutionality of the pledge in general.

Third, the Supreme Court may never even reach the constitutional issues in this case, if the state is successful in challenging the appellee's standing. Michael Newdow, an atheist, filed the case in federal district court saying his daughter should not have to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that ours is 'one nation under God.'" Newdow is not married to the girl's mother, and the mother has sole custody of their daughter. The mother has been quoted in the press and in the opposition briefs as being opposed to the litigation: she does not want her daughter involved as the subject of the litigation. In accepting the Newdow case for its docket, the Supreme court stated that it would decide the issue of whether a non-custodial parent can bring a lawsuit against the wishes of a custodial parent. Ironically, for justices of the Supreme Court, this issue of standing may turn out to be more important than the substance of the "under God" wording.

Fourth, Michael Newdow is both

a medical doctor (emergency room physician) and a lawyer representing himself pro se. Only a select few lawyers will have the privilege of arguing a case before this nation's highest court, and only a tiny fraction of those lawyers will ever appear before the court as a pro se litigant. Dr. Newdow wrote his own brief and carried his case all the way to the U.S. Supreme Court. It would take extensive research to find a precedent for the last time pro se litigation reached the U.S. Supreme Court, and the pro se party argued his own case before the High Court. It gives new meaning to the phrase "the People's Court."

Fifth, Justice Antonin Scalia has recused himself from hearing this case. Scalia did not offer any explanation for his recusal, but the recusal is likely tied to a speech Scalia delivered to the Knights of Columbus in Fredericksburg, VA, in January 2003. According to news reports, Justice Scalia's speech before the Knights pointed to the Ninth Circuit's decision in his case as an example of how courts were misinterpreting the Constitution to "exclude God from the public forums and from political life." Based on these news reports, Newdow questioned Scalia's objectivity and suggested in a document that he filed with the Supreme Court that Scalia should recuse himself. Newdow won. Not only is Dr. Newdow arguing his own case before the High Court, he appears to have persuaded his harshest critic on the bench to withdraw from the case.

**Criminal Procedure.** The Supreme Court's docket comprises three cases challenging police searches and interrogations of prisoners with dubious Miranda warnings. The Miranda cases have criminal law experts paying closing attention. All three cases test the Court's "fruit of the poisonous tree" doctrine, which states that any evidence acquired as the result of a constitutional violation must be excluded.

The new Miranda cases will force the court to clean up an apparent discrepancy between two previous rulings. In *Oregon v. Elstad* (1985), the Court struggled to define circumstances in which a confession can be "truly voluntary once the 'cat is out of the bag,'" yet concluded that confessions could be introduced as evidence despite a Miranda violation, so long as the confessions were not coerced. The Elstad Court said these tainted confessions were admissible, because Miranda warnings were not constitutionally required. But in a subsequent ruling in *Dickerson v. U.S.* (2000), the court reaffirmed that Miranda warnings were indeed a matter of constitutional rights, and not merely a prophylactic measure. The Supreme Court noted that "the modern practice of in-custody interrogation is psychologically rather than physically oriented."

The police interrogation cases before the Court this term "are very, very serious threats to Miranda rights," said University of Michigan law professor Yale Kamisar. "They'll be determining whether Miranda means anything at all in these cases. If police can violate Miranda at will, and in one case, purposely, and still bring in evidence they got as a result of the violation, what good is it?"

In *Missouri v. Seibert*, the Court

will examine the increasingly popular police tactic to obtain first a statement from a suspect without Miranda warnings, then administer the warnings and obtain a confession from the suspect. The Court will decide whether such a confession, even if preceded by a "voluntary" waiver of a suspect's Miranda rights, can be used as evidence when the original failure to give the warnings was deliberate.

In *Seibert*, a police officer deliberately chose not to give the Miranda warnings to a woman he suspected of taking part in a fatal house fire. The defendant was arrested and questioned following the death of a teenager in a fire set by the defendant's son and his friend at the defendant's home. The woman then admitted her role and that she knew the victim would die in the fire. In a second round of questioning, the officer then read her the Miranda warnings but persuaded her to repeat her self-incriminating statement. Missouri is appealing a ruling that said the second statement should not have been admitted into the trial of the woman, who was convicted of second-degree murder.

The Court will most likely conclude that deliberate and intentional police withholding of the Miranda rights justifies the exclusion of the evidence obtained in *Seibert*. However, instead of excluding all statements by the suspect, the Court may try to limit the exclusion to the second confession in this case. If so, that would leave the Court in the precarious position of holding the second confession was poisonous fruit, but the first confession was not poisonous fruit - even though both stemmed from a deliberate attempt to circumvent the Fifth Amendment's prohibition of compelled self-incrimination.

In *United States v. Patane*, a Colorado man interrupted police while they were giving him the Miranda warnings, then he told them about an illegal weapon he had. The Court's decision will address whether physical evidence (a gun in this case) discovered as a "fruit" of an imperfect Miranda warning can be introduced at trial. The Supreme Court will likely base its decision on the suspect's voluntary interruption of the police officers and hold that the defendant sealed his own fate when he chose not to listen to the Miranda warnings.

In a third Miranda case, police in Nebraska obtained a confession from a suspect before they had informed him of his right to an attorney. Later, they arrested him and read him his rights, then took a second confession that they used at trial against him. This case should be comparatively simple for the Court to decide. Prior precedents indicate that police must advise suspects of their right to counsel at the point that they begin any interrogation, not at a point that is convenient or strategically useful for the police.

In a drug arrest case, *Maryland v. Pringle*, the justices will review a decision by Maryland's highest court that a blanket arrest of all passengers in a car violates the U.S. Constitution's Fourth Amendment ban on unreasonable searches and seizures. The state court's ruling overturned the conviction and 10-year prison sentence of a passenger who, after the controversial arrest, confessed to police that the

cocaine in the car belonged to him. On appeal, the state of Maryland will argue that the Constitution allows police to arrest all passengers when a car is stopped, the police find drugs in the car, and no one admits ownership.

"Having seen a large roll of bills and a quantity of crack cocaine in the car, the officer may not have been certain who possessed the money and drugs, but he certainly was reasonable in believing that one or more of the current occupants were guilty of crime," Maryland's Attorney General argues in his brief to the High Court. "Experience, logic and common sense suggest that where there are three occupants in a car, there is a fair probability that they are engaged in a common enterprise with the driver and all are implicated. Thus ... the officer had probable cause to arrest Pringle (as well as the other two occupants)."

But Defendant Joseph Pringle counters that he was a front-seat passenger in the car, and the police had no probable cause to arrest him based on items found exclusively in the back seat. He argues his arrest marked a "deviation from the basic, fundamental principle that the right to search a vehicle for contraband does not carry with it a concomitant right to arrest a mere passenger in the vehicle absent a link connecting such passenger to the contraband."

In a roadblock case, *Illinois v. Lidster*, the state is appealing a state Supreme Court decision overturning the drunk-driving conviction of Robert Lidster, who was arrested after driving erratically from a police checkpoint in a suburb of Chicago. The police had set up the barrier to find witnesses to a fatal hit-and-run incident that occurred at the same time the previous week. While driving from the roadblock checkpoint, Lidster almost ran into an officer. His vehicle was stopped again, and Lidster was then arrested on a charge of driving under the influence of alcohol. He was convicted and sentenced to a year of conditional discharge, counseling and a 14-day work program. He was also ordered to pay a \$ 200 fine. Both the Illinois Court of Appeals and the Illinois Supreme Court held the police roadblock stopping all traffic as part of a criminal investigation violated the Fourth Amendment's prohibition on unreasonable seizures.

On appeal, the state argues that the checkpoints were narrowly designed to investigate a single, well-publicized homicide and not created in a general effort to uncover crime. In addition, the motorist stops were very short in duration, a mere 10 to 15 seconds, during which police did not ask for the drivers' names, licenses, registrations or proof of insurance. The officers simply handed out flyers about the hit-and-run and asked whether the drivers or their passengers had seen anything related to the hit-and-run accident.

The state's brief to the Supreme Court argues, "[c]ommon sense dictates that setting up a checkpoint exactly one week after the crime, at approximately the same time of day - in order to stop motorists who regularly travel that route at the end of their work shifts - will increase the likelihood of finding witnesses to the crime." The state would ask the Court to find that crime-specific informational checkpoints are constitutional,

and that any adverse finding would prevent "law enforcement officers from performing their historic, normal and necessary functions of trying to find witnesses to a known crime."

Lidster challenges the constitutionality of the roadblocks as intrusive on motorists. His brief notes the police could have discovered witnesses to the hit-and-run accident by placing public service announcements on the radio, television, or newspaper, or by putting up flyers in adjacent businesses to the crime scene. Unlike prior checkpoints upheld by the Supreme Court - -to catch drunk drivers or to stop the smuggling of illegal aliens --Lidster argues the police must reasonably suspect that an individual has broken the law before pulling him or her over. He states in his brief, "[a]n investigative stop can be upheld only where individualized suspicion exists or a significant public interest faces an immediate and great threat. Otherwise, the police would be able to routinely stop citizens without just cause, thereby violating another public interest, that being the security guaranteed by the Fourth Amendment."

In *U.S. v. Banks*, the government is urging the Supreme Court to overturn a Ninth Circuit decision that FBI agents broke down the door of a criminal suspect's apartment too quickly after announcing they had a search warrant for his apartment. The agents waited 15-20 seconds before busting down the door to Lashawn Banks' apartment in North Las Vegas. Inside the apartment, agents found a .40 caliber semi-automatic pistol; a .380 caliber semi-automatic pistol with a laser sight and seven rounds in the magazine; a .22 caliber Beretta pistol; a bullet-proof vest; rock and crack cocaine, and a scale.

Banks was arrested and charged with possession of cocaine with intent to distribute and possession of a firearm. He sought to have the evidence suppressed, arguing that the officers violated his Fourth Amendment right against unreasonable searches by failing to follow appropriate knock and announce procedures when serving the warrant. The federal government disputes this contention. "Under an analysis for reasonableness, officers may almost always conclude that they have effectively been refused admittance, thus justifying a forcible entry, when 15-20 seconds have elapsed after knocking and announcing their presence," the government writes in its brief to the Supreme Court. "Indeed, a shorter period of delay is generally reasonable when officers are executing a warrant to search for drugs, where the object of the search is subject to easy destruction and where violent armed responses are common. Officers need not let prolonged delay frustrate the purpose of the search or expose them to undue danger."

Banks argues the Court should affirm the exclusion of evidence collected in his case, because the police should have waited more than 20 seconds. The officers had no reason to suspect that their lives would be placed in danger or that evidence would be lost if they waited for a verbal response from him. "Apparently, the government wants this court to announce a rigid rule that 15-20 seconds constitutes sufficient time to

infer a refusal under the knock and announcement statute," Banks states in his Supreme Court brief. "The adoption of a rigid rule of 20 seconds would short-circuit Fourth Amendment reasonableness inquiries."

The Supreme Court will likely reverse the Ninth Circuit and hold the evidence is admissible, without adopting a rigid rule on how long police must wait before forcibly entering a suspect's residence or business. The Court will likely say the amount of time must be "reasonable," but leave it to the individual officers to determine that length of time based on the exigencies of the circumstances they face.

Finally, in *United States v. Flores-Montano*, the Court will review yet another Ninth Circuit search and seizure case. This case will require the justices to decide whether customs officers, conducting searches at the border, can remove, disassemble and search a vehicle's fuel tank without the "reasonable suspicion" that the Constitution would ordinarily require. The Ninth Circuit invalidated the search of a Ford Taurus station wagon's gas tank, where agents found some 81 pounds of marijuana, in a vehicle that had crossed the Mexican border into California at the Otay Mesa entry point near San Diego.

Writing for the Ninth Circuit panel, libertarian judge Alex Kozinski wrote that aside from delaying an innocent person, customs agents may put the driver in danger if they fail to reassemble the vehicle correctly. "Where the search includes the dismantling of a mechanical part in the motor vehicle, the driver has little independent opportunity to allay his fear that the vehicle may leave him stranded on the freeway - or far worse," he wrote.

However, the Bush Administration's Solicitor General Theodore Olson described the removal and inspection of gas tanks as "quick, safe and nondestructive" and "not outside the routine sorts of inspections that international travelers should anticipate when seeking entry into this country." It is not clear from Olson's brief whether American citizens would be subjected to inspection of their vehicle parts, but presumably so. Olson also cited the arrest and conviction of terrorist Ahmed Ressay, who was seized in 1999 by a U.S. Customs agent after he crossed the Canadian border with explosives hidden in the trunk of his car. As part of the so-called millennium terrorist plot, Ressay was supposed to detonate the bombs at the Los Angeles International Airport. According to Olson, if the Supreme Court upholds the Ninth Circuit, then terrorists could seek to hide explosives in fuel tanks in the future.

Thus a routine case of interdicting drug traffic at the border has been recast by the Bush Administration into a homeland security case. Clearly, the average American citizen would be highly offended at having the fuel tank removed from the car he was driving and inspected at the border. Those inspections would never become "quick [and] safe," and would significantly deter most motorists from driving their own valuable cars outside of the country. The Supreme Court will have to decide if practical-

ly any form of inspection by police at the borders can be justified in the name of homeland security.

Congressional Spending Clause Power. Under the so-called Spending Clause, Congress may attach conditions to the use of federal money that it could not impose directly on the money's recipients. For example, the states were required by Congress to increase the age for legal consumption of alcohol in order to receive federal highway funds. Up to now, the Spending Clause has not been subjected to the Supreme Court's scrutiny to place curbs on Congress exceeding its authority. In contrast, the Supreme Court has struck down Congress's attempts to interfere with the states under the (interstate) Commerce Clause. See *U.S. v. Lopez* (1995) (limiting Congress's ability to pass laws preventing guns to be carried on school grounds) or *U.S. v. Morrison* (2000).

Many scholars predicted that the Court would soon focus its attention on limiting congressional authority under the Spending Clause. "The conservatives have been looking for this opportunity," said George D. Brown, a professor at Boston College Law School. For the fall 2003 term, the Court agreed to decide whether Congress had exceeded its authority under the Spending Clause in 1984 when it enacted a criminal law known as the federal bribery statute. The statute makes it a federal crime to give a bribe of at least \$5,000 to a state or local official if the official's government agency receives more than \$10,000 a year from the federal government. The law does not require federal prosecutors to prove any connection between the offense and the federal money, other than its existence.

In *Sabri v. United States*, a real estate developer in Minneapolis who was charged with bribing a city council member to get regulatory approval for a proposed development. The Minneapolis housing agency receives about \$23 million a year from the federal government. The federal district court in Minneapolis dismissed the indictment against the developer, Basim Omar Sabri, on the ground that the bribery law, also known as Section 666, was unconstitutional in the absence of a required nexus between the conduct and the federal money. In a somewhat surprise move, the United States Court of Appeals for the Eighth Circuit, in St. Louis, then reinstated the charges under an alternative source of congressional authority. In a split decision, the appeals court agreed that the law could not be justified under the Spending Clause, but it upheld the statute under the constitution's Necessary and Proper Clause.

This ruling by the Eighth Circuit put it at odds with decisions by the Second and Third Circuits to strike down similar attempts to prosecute under the federal bribery statute. The National Association of Criminal Defense Lawyers has filed a brief urging the Supreme Court to strike down the statute. Congress is not authorized to "criminalize bribery merely because the corrupt transaction in question involves an agent of an organization that, somewhere, receives federal-program funds," according to the criminal defense lawyers.

The U.S. Supreme Court will likely overrule the Eighth Circuit and bring it into conformance with decisions of the other circuits. Thus the dissent in the Eighth Circuit case may turn out to become the law of the land, as the Supreme Court will likely borrow from the Eighth Circuit dissent's reasoning for its decision.

Judge Bye stated in his Eighth Circuit dissenting opinion, "[t]he majority's sweeping view of the Necessary and Proper Clause calls to mind Congress' unbounded deployment of its Commerce Clause authority before *Lopez* and *Morrison*. Both *Lopez* and *Morrison* curtailed federal power, forbidding Congress from piling 'inference upon inference' to demonstrate a relationship between crimes and federal interests."

He wrote that the federal bribery statute "upsets the delicate balance between federal and state authority that animates our Constitution. . . . Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else. . . . The Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog."

**Online Pornography.** For the third time since 1997, the Supreme Court has agreed to review the constitutionality of a congressional statute designed to punish the publication of sexually explicit material on the Internet. The case now on the Court's fall 2003 docket concerns the Child Online Protection Act, passed by Congress in 1998 to replace the Communications Decency Act, which the Supreme Court unanimously struck down in 1997. In *Asbcraft v. American Civil Liberties Union* the Court will hear for the second time a case that it had overruled, with a divided majority, and remanded back to the U.S. Court of Appeals for the Third Circuit in Philadelphia.

Once again, the Third Circuit invalidated the Child Online Protection Act, because it was too broad and was likely to deter too much expression that was appropriate for adults. The Third Circuit also held that the undifferentiated definition of "minors," comprising all children from birth to age 17, was too imprecise to meet the First Amendment's requirement of "narrow tailoring" for restrictions on speech. After all, the movie industry has classifications of G, PG, PG-13, and R, and recognizes the differences in appropriate entertainment for younger and older minors.

The Child Online Protection Act makes it a crime to display material "harmful to minors" on the World Wide Web for "commercial purposes" in a manner that permits children to gain access. Requiring the use of a credit card or special access code is a permissible defense under the law; however, many adults want to view web sites anonymously. They do not want to identify themselves with credit cards or other adult-access codes. In addition, educational sites that offer information on controlling the spread of HIV often include explicit accounts. These sites could be subject to prosecution if they operate at a profit, even though some teenagers might save their lives from viewing the material on these sites.

The Bush Administration views

the matter in black and white terms. The administration wrote in a brief to the High Court that there "is no alternative to the Child Online Protection Act." But of course there are better alternatives. Warning pages designed to keep children under the age of 18 from viewing a site should be an acceptable defense under the Act. Web site developers should not have the burden of policing the age of people who view their sites. A warning page would enable adults to peruse personals and other entertainment sites without having to disclose their identities.

**Dodging a Bullet.** Although the Supreme Court did not hear oral arguments on Monday, Oct. 6, in deference to the Jewish holiday of Yom Kippur, the Court did announce that it would let stand the decisions of lower courts in a number of cases, including one case that could have reignited passions over abortion rights in this country. The case denied certiorari on Oct. 6 involved Regina McKnight, who was described in court documents as having low intelligence and whose mother helped manage her everyday needs. Her lawyers said that after her mother was killed in a car accident, McKnight "quickly spiraled downward, becoming homeless, addicted to cocaine and marijuana and pregnant."

During her 35th week of pregnancy, McKnight delivered a stillborn female baby, whom she had wanted to name Mercedes. Blood samples taken from McKnight and her stillborn baby both tested positive for cocaine. South Carolina had previously prosecuted women for child abuse if their delivered babies showed traces of cocaine, but McKnight's was the first drug-related case to be tried and convicted for murder under South Carolina's "homicide by abuse" law. The South Carolina Supreme Court first upheld the constitutionality of treating a fetus as a person in connection with the prosecution of pregnant women who used drugs. The South Carolina Supreme Court then went on to affirm McKnight's conviction for second-degree murder. McKnight was given a 20-year prison sentence, with 8 years of the sentence suspended.

Abortion rights proponents were justifiably concerned when any court finds a fetus has rights, let alone declares a fetus to be a person. However, the U.S. Supreme Court apparently plans to stay clear of cases pertaining to abortion or fetal rights controversies this term. It is expected that the Supreme Court will ultimately rule on the constitutionality of any ban on partial birth abortions that passes through Congress.

Separately, Congress now faces a pending bill to confer limited legal rights to fetuses killed in a homicide. The bill was inspired by the circumstances of the death of Laci Peterson and her eight-month old unborn child. Both the bodies of Laci Peterson and her unborn son were recovered last year in a nationally publicized case from California. The bill pending in Congress would attach criminal sanctions against attackers for harming a pregnant woman and her unborn fetus. The Bush administration supports the legislation. Fifteen states currently have laws recognizing fetuses as victims, and 13 states have partial coverage, accord-

ing to the National Right to Life organization.

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# The Perambulating Grape!

## *Spotlight on Interstate Shipment of Wine Litigation*

Numerous states have attempted to protect their native industries by banning many forms of e-commerce, including sales of wines, cars, contact lenses, and other products from vendors outside the state. These types of laws also obstruct Internet based travel agencies, pharmacies, mortgage brokers, and many other services. In the case of Internet sales of wine and other alcoholic beverages, constitutional challenges to these barriers to interstate commerce are hindered by authority vested in states through the 21st Amendment.

At present, twenty-four states prohibit direct shipments of wine to consumers by out-of-state wineries, thereby impeding the ability of small wineries to market their wines and of consumers to purchase them. Some states make it a felony to ship wine from out-of-state into their borders. A number of states that prohibit out-of-state wineries nevertheless allow in-state wineries to ship directly to consumers.

The U.S. Supreme Court will eventually have to decide this issue. The Supreme Court frequently hears cases that will resolve a split among the lower federal appellate court circuits. The U.S. Courts of Appeals have now produced an unusual patchwork of conflicting decisions on the constitutionality of state laws to ban interstate shipments of wine directly to consumers.

**Seventh Circuit.** The Seventh Circuit reversed a federal district court and upheld Indiana's ban on direct shipments of wine under the 21st Amendment. The Supreme Court most likely blundered when it denied certiorari to the appeal.

In *Bridenbaugh v. Wilson*, Judge Frank Easterbrook wrote, "This case pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not." Easterbrook continued that the 21st Amendment (which repealed prohibition) "directly authorizes state control over imports, while the premise of dormant commerce clause jurisprudence is an inference that the grant of power to Congress in Art. I sec. 8 cl. 3 implies a limitation on state authority over the same subject. We must decide how the combination of express grant and implied withdrawal of state power applies to" the Indiana wine shipment law.

Article I, Section 8, of the Constitution provides that "The Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States ..." The dormant commerce clause is the judicial concept that the Constitution, by delegating certain authority to the Congress to regulate commerce, thereby bars the states from legislating on certain matters that affect interstate commerce, even in the absence of Congressional legislation. The 21st Amendment provides, in part, that "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating

liquors, in violation of the laws thereof, is hereby prohibited."

**Fifth and Sixth Circuits.** Earlier this year, the Fifth Circuit affirmed a judgment from the district court that struck down Texas's wine shipment ban under the Commerce Clause. The Fifth Circuit held that the state's power to regulate alcohol under the 21st Amendment could not save the statute. Interstate shipments of any good in commerce could only be regulated by the U.S. Congress. The state of Texas chose not to appeal the ruling. Later, the Sixth Circuit struck down Michigan's ban using the same reasoning as the Fifth Circuit.

**Fourth Circuit.** In *Beskind v. Easley*, the Fourth Circuit entered a ruling that was a hybrid of the other circuits. The Fourth Circuit held that North Carolina's ban violated the Commerce Clause; however, the remedy proposed by the court was not to allow direct interstate shipment of wine, but rather to forbid shipping by in-state wineries. The decision seemingly made no economic sense, but instead put pressure on the state legislature to revisit the problem, which it did. The Fourth Circuit decision prohibited North Carolina wineries from participating in retail commerce inside the state of North Carolina while permitting out-of-state vendors to tap into the North Carolina market.

In *Beskind*, the Fourth Circuit observed that, "A facial examination of North Carolina's [wine shipment] laws leaves little doubt that those laws treat in-state manufacturers of wine differently from out-of-state manufacturers of wine, with the undoubted effect of benefitting the in-state manufacturers and burdening the out-of-state manufacturers." And, "Because North Carolina's [wine shipment laws] discriminate against out-of-state wine manufacturers and shippers in favor of in-state wine manufacturers and shippers, the scheme violates a central tenet of the Commerce Clause." The appeals panel concluded that "North Carolina retains great flexibility to determine what sort of relief to provide to cure the discriminatory treatment, and thus we follow North Carolina's indication of its preference." That is why the Fourth Circuit provided the remedy of banning in-state shipments of wine: to force the state legislature to redress the economic barrier. Fortunately, the North Carolina legislature responded by opening up direct shipping of wine to consumers, and the governor signed the bill into law.

Separately, in Virginia, a federal district court struck down the Commonwealth's ban, which was then legislatively repealed while the case was pending before the Fourth Circuit to allow direct interstate shipment of wine to consumers.

**Eleventh Circuit.** The 11th Circuit overturned a district court decision upholding Florida's ban, remanding the case to the district court to determine whether the State's alleged concerns about taxation presented a viable defense.

**Second Circuit.** The challenge to New York's ban is the latest "wine

shipment" case to reach a U.S. Court of Appeals. In *Swedenburg v. Kelly*, two proprietors of small, family-owned wineries in Virginia and California and three New York consumers have brought a lawsuit against the state of New York challenging a portion of New York's Alcoholic Beverage Control (ABC) Law as unconstitutional. People magazine described the New York case this way. "Juanita Swedenburg may not look like a fire-breathing radical. But in wine-drinking circles, that's exactly what she is. 'My ancestors,' she says, 'fought the tax on tea.' And what she's fighting, with startling success, is the multibillion-dollar wholesale wine industry." According to the libertarian Institute of Justice in Washington, D.C., "the liquor distributors, who intervened to defend the law that requires all wine shipped into New York be handled by wholesalers, receive a markup of up to 25 percent on wine imported into New York."

Currently, New York prohibits out-of-state wineries to ship wine directly to New York consumers. However, in-state wineries have been allowed to ship wine directly to New York consumers since 1993. The New York attorney general claims that the 21st Amendment supercedes the Commerce Clause and allows New York State to ban interstate direct shipments of wine. The U.S. Supreme Court will most likely wait for a decision from the Second Circuit before it moves to resolve the conflict among the circuits.

The Institute of Justice is providing legal assistance to the challenge to New York's law. In a brief before the Second Circuit, the Institute of Justice writes, "[The liquor distributors'] brief has something of an Alice-in-Wonderland quality. In it, a quartet of multibillion-dollar oligopolists accuse the two small winemaker plaintiffs of 'avarice' for wanting to sell a few dozen cases of wine directly to consumers in New York. If a picture is worth a thousand words, the spectacle of these wholesalers fighting feverishly to prevent what they refer to as a de minimis amount of wine from entering the state without flowing through their profit-taking grasp is utterly priceless."

According to Kathleen Holland, Asst. General Counsel of the New York Farm Bureau, New York's wine and grape industry contributes significantly to the state's economy. New York has nearly 1,000 grape farms and over 170 wineries covering approximately 32,000 acres across 32 counties. New York's wine and grape industry is the third largest in the United States behind California and Washington. New York held the second spot until it was surpassed by Washington, when the latter state began to allow interstate direct shipment of wine. "In 2001, 149,000 tons of grapes worth \$45 million were harvested by New York's grape farms. New York's wineries have over \$500 million in gross sales producing \$85 million in state and local revenues and directly employing upwards of 18,000 New Yorkers," according to Holland. "New

York is the second largest wine consumption state (in total gallons consumed), but eighteenth in adult per capita consumption due to the restricted opportunities for consumers in New York to purchase wine," Holland writes on the Farm Bureau web page.

Who will ultimately win this contest over the right to buy and sell in the interstate wine market? "The direct shipment of wine pits consumers and small wineries against wholesalers seeking to protect their multi-billion-dollar monopoly over alcohol distribution," said Steve Simpson, an Institute of Justice senior attorney. "In the end, I have no doubt that consumers and America's free market will win the day."

**Open Markets.** With free trade and open markets now in Virginia, North Carolina, South Carolina, and Texas, a total of twenty-five states now permit direct interstate shipment of wine to consumers. Thirteen of those states have "reciprocal" agreements allowing residents in one state to order wine from another state with reciprocity. Lawyers for the plaintiffs in the various "wine shipment" cases are coordinating their efforts. They are also working with former Solicitor General and Whitewater Special Prosecutor Kenneth Starr, who has been retained by a group of small wineries. The wholesale wine industry and large liquor distributors have retained former White House counsel C. Boyden Gray, former Solicitor General and U.S. Court of Appeals Judge Robert Bork, and other legal strategists.

The Federal Trade Commission has concluded that state bans on direct shipping hurt Internet commerce and limit consumer choices. The FTC's study of online orders for wine found consumers save as much as 21% off some wines, when they have out-of-state sources of competition available to them. "E-commerce can offer consumers lower prices, greater choices and increased convenience," FTC Chairman Timothy Muris said. "In wine and other markets, however, anti-competitive barriers to e-commerce are depriving consumers of those benefits." Addressing concerns that online wine sales could give minors easier access to alcohol, Muris said the FTC found no evidence or reporting of problems that online ordering of wine contributes to underage consumption. He said many of those states that permit interstate shipments of wine to consumers require a sober adult's signature to accept delivery.

At present winemakers face a confusing patchwork of state laws that force them to determine if shipping to a particular residence is legal. Using the Internet would allow wine suppliers, particularly smaller wineries, to market and ship directly to consumers, thereby circumventing the add-on costs of wholesalers and retailers.

*Written by a staff writer of the Tennessee Law Times.*

## UNITED STATES COURT OF APPEALS for the SIXTH CIRCUIT

### DIGEST OF CASES FROM THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT AUG. 20 – OCT. 20, 2003

#### Franchisee Payment of Royalties.

The U.S. Court of Appeals for the Sixth Circuit affirmed an award of lost future royalty payments (profits) to a printing shop franchisor that had terminated a franchisee for nonpayment of royalties. *American Speedy Printing Centers, Inc. v. AM Marketing, Inc. et al.* The franchisee admitted that it breached the franchise agreement by failing to pay royalties. Unfortunately for the franchisee, the Sixth Circuit held it bound to the royalty payments it would have made over the 20-year franchise contract. The Sixth Circuit affirmed a trial court finding that the franchisor was entitled to all damages necessary to put it in the status quo ante position if the agreement had continued in operation.

To some, the Sixth Circuit's decision may seem like a case in which a plaintiff received two bites at the apple: the franchisor was attempting to benefit from dissolving the franchise agreement and simultaneously receive damages for lost profits/royalties even after the dissolution. But the Sixth Circuit rejected this viewpoint. It held the franchisor just wanted monetary compensation for the franchisee's actual breach.

**Immunity of States in Bankruptcy Suits.** The U.S. Supreme Court has agreed to hear an appeal by the state of Tennessee of a Sixth Circuit decision that states are subject to jurisdiction of the federal bankruptcy courts. The case has potential to be a major addition to the High Court's federalism jurisprudence, due to the widespread problem of unemployed graduates being unable to pay back their student loans owed to state agencies.

States are often brought into federal bankruptcy proceedings as creditors for loans they guarantee. In this case, Pamela L. Hood, a bankruptcy applicant, sought to discharge her student loan debt of \$4,169.13 owed to the Tennessee Student Assistance Corporation, a state agency that guaranteed her loan. The federal bankruptcy code does not treat student loans guaranteed by governmental agencies as ordinary debts. Instead, government-guaranteed student loans can only be discharged in bankruptcy proceedings with proof that repaying the loan would produce "an undue hardship" on the applicant.

To litigate the "undue hardship" issue, Hood had to name the state agency as a defendant. But Tennessee refused to take part in the proceeding, arguing that it was protected by 11th Amendment, which deprives the federal courts of jurisdiction to hear certain suits against states. Both the federal bankruptcy court and the Sixth Circuit rejected the state's position. For the record, five other circuits had ruled that states indeed have sovereign immunity in bankruptcy proceedings, and those rulings reflect the current trend in federal appellate practice.

The current debate over limits on federal court jurisdiction originated in 1996, when the Supreme Court held, by a sharply divided 5-4 decision, that Congress lacked constitutional

authority to permit suits by Indian tribes against the states. The majority's theory in *Seminole Tribe v. Florida* was that the 11th Amendment trumped Article I of the Constitution, which enumerates the specific powers of Congress.

In a dissenting opinion in *Seminole Tribe*, Justice John Paul Stevens warned that the majority's theory would prohibit Congress from enforcing federal bankruptcy, copyright, and antitrust laws against the states. Chief Justice Rehnquist, writing for the majority, scoffed at Justice Stevens' suggestion as "exaggerated both in its substance and in its significance." But it turns out Justice Stevens was right, at least as far as bankruptcy jurisprudence is concerned. The limits on federal bankruptcy courts to discharge various kinds of debts owed to the states is now raging all across the country. "Assertion of state sovereign immunity is now commonplace in bankruptcy cases and has an enormous impact on the bankruptcy system, debtors, and creditors," according to a brief by bankruptcy law scholars now part of the case file before the Supreme Court.

Traci Cotton, bankruptcy counsel for the University of Texas System, is quoted on University Wire news service as saying the loss of immunity of state agencies would hurt the Texas System. "If we lose immunity, any bankruptcy court across the U.S. could call us to argue 'undue hardship,'" Cotton said. "It will be extremely expensive and time consuming, and if they prevail, the debt goes away and we lose the money." In *Tennessee Student Assistance Corporation v. Hood*, 48 states--all but New Jersey--have filed a brief on behalf of Tennessee warning the Supreme Court that any adverse decision against the states would affect their ability to control their revenues. According to the state brief, bankruptcy is no different from other laws under which the states enjoy immunity.

In rejecting Tennessee's immunity claim, the Sixth Circuit explained why bankruptcy laws are different from other federal laws for a couple of reasons. First, the framers of the Constitution felt it was essential to have a uniform bankruptcy code apply on a national level so that states would not set up their own systems to favor in-state creditors. Second, the states knowingly ceded part of their sovereignty when they ratified a Constitution that gave Congress the power to establish "uniform laws on the subject of bankruptcies throughout the United States."

Given the fact that the members of the Supreme Court are the same in 2003 as in 1996, we would expect the same 5-4 majority will decide to limit the jurisdiction of federal bankruptcy courts over the states and their agencies. Although the Sixth Circuit decision is well reasoned in both constitutional law theory and history, the Supreme Court will probably decide this issue as a matter of federalism and the need for states to control their own finances. In effect, the Supreme Court's decision will likely gut the federal bankruptcy law as it pertains to "undue hardships," because these debts will never be discharged if the states cannot be forced to appear in

federal bankruptcy courts. But given the conservative mood of the country, there will be little public outcry or concern for the plight of (indigent) bankruptcy applicants.

Many educational institutions "prey" on the ability of students to get government-backed loans; without a continuing pool of student loan-backed applicants, these educational institutions--many operating as for-profit corporations--would go bankrupt. They sell applicants on the idea that their earning potential will increase dramatically if they have a college degree, any degree. It is not until the students graduate and find they are still unemployed that they realize they were duped.

With no jobs, the students do not have income to repay their student loans, and the taxpayers foot the bill. What is the solution? State and federal government agencies could do a better job of requiring educational institutions to link educational studies with post-graduation employment, e.g., by requiring students to participate in a one-semester or one-year apprenticeship with an employer prior to receiving a degree.

**Marketing With Celebrity Names and Likeness.** Court watchers say the U.S. Court of Appeals for the Sixth Circuit has issued two conflicting decisions this summer in *Parks v. LaFace Records* and *ETW Co. v. Jireh Publishing Inc.* These two cases address the First Amendment defense to claims of false endorsement under the Lanham Act as well as violations of the common law right of publicity. These cases forced the Sixth Circuit to weigh the rights of celebrities--civil rights pioneer Rosa Parks and golfer Tiger Woods, respectively--and those of artists to express themselves using a celebrity's name or likeness.

In the first case, a rap duo, Outkast, wrote a song entitled "Rosa Parks" for their album "Aquemini." The song became a hit for the duo. Rosa Parks objected to the use of her name and sued Outkast for violating her right of publicity under Michigan common law and under Section 43(a) of the Lanham Act due to the commercial nature of Outkast's work. Outkast claimed they used Rosa Parks' name as a metaphor. At trial, a member of the Outkast duo explained the metaphor this way: "We never intended for the song to be about Rosa Parks or the civil rights movement. It was just symbolic, meaning that we comin' back out, so all you other MCs move to the back of the bus." The phrase "move to the back of the bus" is used ten times in the chorus of the Outkast song.

According to the federal district court, "The Rosa Parks song has received widespread acclaim and was nominated for a Grammy award. This result is not altered by defendants' promotion of their album and hit single because the fundamental right to free expression would be illusory if defendants' were permitted to entitle their song 'Rosa Parks,' but not advertise it to the public. The law imposes no such artificial limitation."

The Sixth Circuit reversed the district court's summary judgment in Outkast's favor and held there was a genuine issue of material fact as to whether the title "Rosa Parks" was artistically related to the song lyrics.

Court watchers expected the Sixth Circuit to apply a more objective standard: the First Amendment's freedom of expression trumps a celebrity's publicity rights when those rights are adapted to artistic expression rather than commercial exploitation. Instead the Sixth Circuit questioned whether the defendants were using Rosa Parks' name as a symbolic metaphor or merely a slick "marketing tool."

The Sixth Circuit even went so far as to suggest an alternative title, "Back of the Bus," for the group's now hit song. So much for artistic expression when U.S. Court of Appeals judges try to come up with imaginative titles for hip-hop or rap songs. Obviously, the defendants cannot turn back the clock and rename their song once it has become known as "Rosa Parks." According to the Sixth Circuit, the alternative title "would be obviously relevant to the content of the song, but it also would not have the marketing power of an icon of the civil rights movement." The court admitted that "Rosa Parks (the person) is universally known for and commonly associated with her refusal ... to ... 'move to the back of the bus.'" Therefore, even if Outkast could retroactively change the title of their song to "Back of the Bus," it would still conjure up images of Rosa Parks. Whether the three-judge panel realized it or not, they had just proved the close nexus between the title and the lyrics of the song.

The Sixth Circuit seemed to get it right in *ETW Co. v. Jireh Publishing*, where the question focused on whether Tiger Woods' rights were violated when an artist put his name and likeness on prints of a painting titled "The Masters of Augusta." The limited reproduction commemorates Woods' victory in the Masters Championship. A sports artist, Rick Rush, depicted Woods in three golf poses with his caddy; the Augusta National Clubhouse was in the foreground, and the likeness of past Masters champions, including Arnold Palmer, Sam Snead, Ben Hogan, Walter Hagen, Bobby Jones, and Jack Nicklaus, looked down on him.

The Sixth Circuit concluded that Mr. Rush's work contained significant "transformative elements" that makes it worthy of First Amendment protection and less likely to interfere with the economic interests protected by Mr. Woods' publicity right. The court stated that Rush's work consisted of a collage of images that combine to describe an historic sports event and to convey the significance of Tiger Woods' achievement in that event. Accordingly, Tiger Woods' right of publicity must yield to the First Amendment.

**Opting Out of Class Action.** The Sixth Circuit will hear an appeal by Nevada residents who received silicone breast implants manufactured by Dow Corning. The Nevada claimants are the only remaining litigants in Dow Corning's \$4.5 billion bankruptcy reorganization plan. The Nevada claimants contend if they choose to opt out of the creditor settlement, then they should be allowed to bring future claims against Dow Corning's two parent companies, Dow Chemical Co. and Corning Inc. The federal district court for the Eastern District of Michigan held that

## UNITED STATES COURT OF APPEALS for the SIXTH CIRCUIT

the release and injunction provisions set forth in the bankruptcy reorganization plan applied to all claimants, whether they accepted or rejected the plan.

Despite the pending appeal to the Sixth Circuit, Dow Corning has mailed claim forms to approximately 300,000 recipients of Dow Corning silicone gel breast implants. These women will share \$3.2 billion, and thousands of other creditors will receive \$1.3 billion. The Dow Corning trust settlement facility is beginning to process those claims.

**Coal Contract with TVA.** The Tennessee Valley Authority has petitioned the U.S. Court of Appeals for the 6th Circuit to rehear en banc a case involving Diversified Energy's claim that the electric utility breached its coal purchase contracts. A three-judge panel of the Six Circuit ruled that TVA must reimburse Diversified Energy \$1.14 million plus interest for profits the company lost when the agency canceled its coal supply contract in 1993.

All was going well under a 1990 series of contracts under which Diversified supplied coal produced by Sigmon Coal to TVA's John Sevier coal-burning power plant. However, when TVA learned in 1993 that Diversified President Randy Edgemon made a personal loan to TVA transportation specialist Daniel Bradshaw, the agency abruptly canceled the contracts. The coal supply contracts contained a clause prohibiting contractors from giving gratuities to TVA officials. The clause also stated that a breach of its mandates would be considered material.

While the TVA was investigating the alleged loan, it contacted Diversified to discuss the reopening of negotiations on one of the contracts. However, the parties did not reach an agreement on extension of the contract prior to its expiration date of March 19, 1993. On that same day, the TVA notified Diversified by letter that the clause prohibiting gratuities had been violated and that the four existing coal supply contracts would not be extended. The letter stated the contracts were terminated to the extent they had not already expired.

In its first pass at this litigation, the Sixth Circuit held that TVA could not use Diversified's alleged breach of the gratuities clause as a defense to TVA's own repudiation of the contracts, because the TVA contracting officer never brought a valid claim against Diversified as required under the Contract Disputes Act, 41 U.S.C. § 606 et seq. The trial court, which had refused to award monetary relief to Diversified, then went back on the remanded case and awarded \$1.14 million in damages representing commissions the company would have received from its coal supplier if TVA had accepted further deliveries.

The Sixth Circuit affirmed the trial court's computation and award of damages. The Sixth Circuit noted that Diversified was not entitled to an award based on the difference between the contract price for coal and the market price.

**Bankruptcy Practice.** The Sixth Circuit in *In re Hurtado* held that the recipient of a fraudulent conveyance possessed requisite dominion and control over the disputed funds to be

strictly liable for the return of such funds regardless of any good faith intent on the part of the recipient. The federal Bankruptcy Code authorizes the trustee [or Chapter 11 debtor in possession who is accorded essentially the same powers as a trustee in bankruptcy] to avoid certain liens and transfers that were made prior to the debtor's bankruptcy filing. Bankruptcy Code § 550(a)(2) allows recovery of avoided transfers from "immediate transferees and 'mediate transferees.'" However, if the party is either an "immediate" or "mediate" transferee, then he or she may raise the good faith defense to recovery by the trustee: the party received the transfer from the debtor in good faith, not as a fraudulent conveyance to avoid inclusion in the bankruptcy estate.

An "initial" transferee does not have the benefit of a good faith exception under the Bankruptcy Code. In the case under discussion, the Sixth Circuit determined that the party was neither an immediate nor a mediate transferee, but instead was an initial transferee: the transferee can be held liable for the proceeds where they were forwarded to a third party.

In *Hurtado*, the son and daughter-in-law of Barbara Hurtado filed for Chapter 7 bankruptcy. Three years prior to their bankruptcy filing, the son and daughter-in-law sold their home and received proceeds in the amount of \$83,000 and settled a lawsuit in which they received approximately \$130,000. The two transferred these funds to Mrs. Hurtado, who deposited them in her savings account and dispersed the funds to pay for son and daughter-in-law's living expenses and to specific creditors as directed by her son and daughter-in-law. Ms. Hurtado did not commingle any of her own money with the bankruptcy debtors' money held in the savings account.

Mrs. Hurtado admitted at a deposition that she knew the money was being used to pay certain creditors to whom she was writing individual checks. Within the first year, the \$213,000 in debtor funds had been depleted: two years prior to the bankruptcy filing. The bankruptcy trustee sought to recover from Mrs. Hurtado the \$213,000 that had been dispersed by her to creditors and for paying her son's living expenses. The Sixth Circuit held that Mrs. Hurtado had dominion and control over the funds in her savings account, that she was an initial transferee, and that she was personally liable to the trustee for the \$213,000 she had disbursed. The Sixth Circuit found that Mrs. Hurtado had no legal obligation to follow the commands or direction of her son and daughter-in-law. Therefore, no principal/agent relationship was created, which would have provided her with a good faith defense to the trustee's claims.

This case deals with a mother who was trying to help her son and daughter-in-law pay off their debts and retain enough money to pay their living expenses and survive. But the family went about it in a manner that the Sixth Circuit and district court determined to be a fraudulent conveyance, even though it happened three years prior to the bankruptcy filing. Now the mother, Barbara Hurtado has been hit with a bill for \$213,000.

**Interstate and Internet Shipments of Wine.** The Sixth Circuit struck down Michigan's statute banning on out-of-state shipments of wine to Michigan residents as an unconstitutional violation of the Commerce Clause. Plaintiff John Arundel of Lansing commented, "I was motivated by the fact that I just can't get access to the wines I like. . . I've tried to get these wines through the beer and wine wholesalers in Michigan, and I've never gotten any response."

The Michigan law required out-of-state wine shipments to pass through Michigan licensed wholesalers; the court rejected arguments that the statute was needed to protect tax revenues and prevent access to liquor by minors. Michael Lashbrook, president of the Michigan Beer and Wine Wholesalers Association, is quoted in the *Flint Journal* as saying, "There certainly are those who would use the Internet to sell whatever to whomever to make a buck." One can only wonder if Michigan's wine and beer wholesalers ever made a buck off the former statutory limits on outside competitors to supply Michigan consumers.

**Ambulance Chasing.** In *Amelkin vs. McClure*, a three-judge panel of the Sixth Circuit unanimously upheld a Kentucky law designed to prevent ambulance-chasing. The Kentucky law restricts access to police accident reports to news organizations, those involved in the accident, and their insurers. Lawyers and chiropractors, who wanted to use the police report information to generate business, challenged the constitutionality of the statute.

The court said the statute does not violate the equal protection rights of the Plaintiffs, nor does it abridge their First Amendment right to freedom of speech. The unanimous decision stated the Kentucky law "insofar as it applies to the plaintiffs, does not restrict or even regulate expression. Rather, it simply restricts access to confidential information possessed by the government. Counsel for the plaintiffs contended at oral argument that § 189.635 restricts the uses to which the plaintiffs may put accident reports if and when they obtain the reports. But the statute imposes no such restriction. It prohibits news-gathering organizations that have obtained accident reports from using them for commercial purposes." The court went on to say that the statute in question placed no restrictions on how lawyers and chiropractors could use information on accident reports if they somehow received it. However, these plaintiffs did not have a right to force the police or government to give them this information.

The Sixth Circuit found that the limitations on access to accident reports were rationally related to the state's legitimate interest in protecting the privacy of accident victims. The U.S. Supreme Court denied certiorari for an appeal on Oct. 2, 2003.

**Labor Union Access.** In *Wolgast Corp. v. NLRB*, the Sixth Circuit addressed the issue of union representative access to employees at a construction site outside the control of a subcontractor that was working there. More generally, this case concerns employees who work at multiple locations or customer sites, where the unionized employer has less con-

trol over a union's access to the employees--and even less control over the property on which the employees are working. In this case, a non-employee union representative wanted access to the unionized employees of a subcontractor, who were working on a general contractor's site. Without site access, the union representative could not perform his standard oversight duties, such as checking the safety of scaffolding for the unionized workers. The general contractor ordered the union representative off its property, and--after a shouting match in which a supervisory employee of the general contractor lifted a makeshift table, flipped it over, tools went flying off the table and struck a union employee but caused no injury--the union charged the contractor with unfair labor practices.

Section 8(a)(1) of the National Labor Relations Act pertains to employer interference with union access to its members at a job site. The National Labor Relations Board (NLRB) ruled that the general contractor violated Section 8(a)(1) and was obligated to allow onto its property the union representative of its subcontractor's employees. The Sixth Circuit deferred to the NLRB on issues of union access to employee sites and affirmed the NLRB's decision.

In *First Healthcare Corporation v. NLRB*, the Sixth Circuit granted the NLRB's application of an enforcement order against a nursing home operator in California. The NLRB found that First Healthcare violated section 8(a)(1) of the Act by enforcing against off-site employees its solicitation and distribution policy prohibiting non-employees from any solicitation and distribution at its nursing home properties, including the parking lots and other non-work areas. The Board also held First Healthcare violated section 8(a)(1) by maintaining a company policy that prohibited an off-duty employees from returning to the non-work areas of the facilities unless the off-duty employees were there to pick up their paychecks or had company authorization to return to the facilities. The rule effectively prevented off-duty employees from organizing for the union on the company's premises during their off-duty hours.

The Sixth Circuit ordered First Healthcare to cease and desist from engaging in these unfair labor practices, particularly with respect to enforcing its no-solicitation policy in a manner that denied its off-duty employees access to parking lots and other non-work areas for the purpose of union solicitation and/or distribution. The Sixth Circuit also ordered the company to notify employees of the rescission of this policy by posting a remedial notice at all of its nonunion facilities in California.

In *NLRB v. Sliman's Sales and Services, Inc.*, the Sixth Circuit held that a union's representative's offer to give employees t-shirts, hats, and stickers if they voted in the union did not constitute financial rewards sufficient to invalidate an election to have the union represent workers as a sole bargaining agent. The NLRB "found no evidence that Castro distributed any items during the Union's campaign. Assuming arguendo that hats, T-shirts, and stickers were distributed, the Board concluded that the 'distribution of inexpensive pieces of campaign propaganda such as buttons, stickers, or T-shirts is not per se objectionable' and a distribution will not be considered objectionable unless it occurs 'at the election site immediately after the voters left the polling area,' as an obvious reward for voting in favor of union representation."

The Sixth Circuit ordered Sliman to cease and desist from refusing to bargain with the union elected to represent the workers.

## STATE OF TENNESSEE SUPREME COURT

### Digest of Tennessee Supreme Court Cases 2003

**Search and Seizure.** In *State v. Garcia*, No. M2000-01760-SC-R11-CD (Oct. 1, 2003), the Supreme Court reversed the conviction of Gonzalo Moran Garcia, who was sentenced to 20 years in prison for drug trafficking. In May 1999, Nashville police claimed Garcia was swerving the car he was driving in traffic and pulled him over. A search of his car revealed forty pounds of methamphetamine hidden in the rocker panels of his car. The discovery led to the largest one-time seizure of methamphetamine in the state.

But the Tennessee Supreme Court held that the police vehicle videotape did not support the arresting officer's claim that Garcia's car was swerving in traffic. There, the police had no probable cause to stop the car and subsequently search it. At the time of his arrest, Mr. Garcia resided in Maywood, CA.

**Jury Verdicts in Insanity Cases.** Also in August, a sharply divided Supreme Court reinstated two murder convictions of Christopher Flake, 31, of Germantown. The court's 3-2 decision in *State v. Flake*, No. W2001-00568-SC-R11-CD (April 10, 2003), indicated wide deference should be given to jury verdicts in insanity cases. Flake has now resumed serving two consecutive life sentences without parole for the April 5, 1997, murders of former employee Mike Fultz, 31, and acquaintance Fred Bizot, 70.

**Child Support Enforcement.** In *Gallaber v. Elam*, No. E2000-02719-SC-R11-CV, \_\_\_ S.W.3d \_\_\_, 2003 Tenn. LEXIS 337, 2003 WL 2010731 (Tenn. May 2, 2003), a Knox County married man, who fathered a child out of wedlock, argued that the trial court's child support enforcement order did not give him credit for the amount he spends to support three children who live with him. Yet he would receive credit if, instead of taking care of these children as a custodial parent, the man had been ordered to pay child support for these three children. The Tennessee Supreme Court found that the state has a rational basis for this distinction, because children who live with their parents benefit from the parent's lifestyle. The court also found no due process violation, because no fundamental right was implicated. The appellee had argued that her expenses should be taken into consideration in setting the child support amount, but the court held that the father's income alone may be used by the state to determine his child support obligation.

The Supreme Court's decision may not be sound economics. Economists frequently focus on disposable income, and a man supporting a wife and three children has less disposable income than a man who earns the same income but lives alone. By ignoring the number of children that the married father supports at home, the court's decision leads to the following conclusion. According to Tennessee's highest court, a single parent with 12 children living at home can afford to pay the same amount in child support as another

person earning the same salary but living alone. The court's decision was unanimous and reversed a decision by the Court of Appeals.

**Confidentiality of Complaints Against Attorneys.** Aggrieved clients who file complaints against their attorneys with the Board of Professional Responsibility (BPR) could be found in contempt and face fines and jail sanctions if they publicize their complaints. The case that reached the Supreme Court arose from a certified question to the Supreme Court from a federal district judge in Memphis. The Memphis fed-

eral case concerns a challenge to the constitutionality of the BPR's confidentiality rule. The plaintiff in that federal case is prevented from publicizing the way in which an attorney mishandled his case as well as the BPR's failure to find anything wrong.

Both the disciplinary rules for attorneys in Tennessee as well as the BPR's own governing authority are contained in the Rules of the Tennessee Supreme Court, namely Rules 8 and 9. One of the BPR rules states that all information relating to proceedings against an attorney must be kept confidential unless and until

the BPR chooses to make it public. When the BPR decides not to take action or takes minor action, the cases generally remain private.

In 2001, Memphis attorney Ronald Krelstein filed a federal constitutional challenge to the BPR's confidentiality rule on behalf of a man identified in court records by the fictitious name of Richard Roe. The constitutional challenge contends the BPR rule violates the client's First Amendment right of free speech. The client believes his right to talk about his former lawyer's alleged misconduct and how the BPR chose to take

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## STATE OF TENNESSEE SUPREME COURT

no action in against the lawyer is being abridged by the BPR confidentiality rule.

In May 2003, the Tennessee Supreme Court responded to a certified question by the Memphis federal judge and held that under Tennessee law, non-lawyers are required to keep confidential the substance of their BPR complaints as well as the BPR's conduct in handling the complaint. *Doe v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn.*, 104 S.W.3d 465 (Tenn., May 8, 2003). The Supreme Court's decision now adds a legal basis to "Richard Roe's" claim that the state is forcing him to remain silent under threat of contempt. The Memphis attorney who filed the constitutional challenge remains optimistic. "I think I will be successful, because everyone else has been successful on these issues," said attorney Ronald Krelstein.

While confidentiality of BPR proceedings preserves the reputation of lawyers who are unfairly accused of wrongdoing by disgruntled clients, it also leaves the BPR free to operate without any public scrutiny. The Supreme Court ruling means that anyone who violates the confidentiality rule in Tennessee may be found in criminal contempt and ordered to pay a fine of up to \$50 as well as serve a sentence of up to 10 days in jail. But for Roe, the Supreme Court's decision is a victory, because it means his case can proceed in federal court.

**Parental Consortium.** In March, the Supreme Court unanimously ruled that children in Tennessee may not collect consortium damages for injuries that their parents sustained. *Taylor v. Beard*, 104 S.W.3d 507 (March 3, 2003). The Memphis case that reached the Supreme Court on appeal concerned children whose mother had been hurt in an automobile accident. However, Tennessee does permit children to recover damages for a parent's wrongful death under the state wrongful death statute. Tennessee has no similar statute governing damages to children of parents who are injured but not killed.

For cases involving injuries but not death of a family member, Tennessee only recognizes spousal loss of consortium. For years, the action for loss of consortium remained available only to husbands as the Supreme Court of Tennessee chose to defer its further development to the legislature. The legislature responded in 1969 by codifying the common law action for loss of consortium and making it available to both spouses in personal injury cases. 1969 Tenn. Pub. Acts ch. 86, § 1, now codified at Tenn. Code Ann. § 25-1-106 (2000).

In *Taylor v. Beard*, the high court recognized the reality of the children's loss when the relationship with a parent is impaired. However, the court left it to the state legislature to enact a law that would authorize the recovery of consortium damages by children of an injured parent. "There's really no surprise in it whatsoever," said attorney John Day, of the Brentwood law firm Branham & Day. "Tennessee courts are historically conservative, and this decision reflects their willingness to follow that conservative trend and not push the envelope on new law."

Nationally most states don't recognize the right of children to collect for loss of the companionship of an injured parent, Justice E. Riley Anderson wrote for the court. Nashville attorney Bob Boston, of Waller Lansden Dortch & Davis, said the decision may affect where some lawsuits are filed, based on whether another state recognized the children's right. But attorney Randall Kinnard, president of the Tennessee Trial Lawyers Association, said, "There are just very few parental (injury) situations where consortium is just totally lost."

### Digest of Tennessee Supreme Court Workers' Compensation Cases

**"On Call" But Not At Work.** Each year the Tennessee Supreme Court hears a number of interesting cases involving workers' compensation claims. One unpublished decision from 2001 deserves special attention. In that case, the Supreme Court reversed the judgment of a Special Workers' Compensation Panel that had awarded compensation to physician Larry Donald Howard for injuries he sustained when a car crossed the median and crashed into his car. *Howard v. Cornerstone Medical Associates*, (Tenn., August 31, 2001). At the time of the accident, Dr. Howard was traveling to see new patients at a nursing home, where he served as medical director as part of his contract with his employer.

From the automobile accident, the doctor sustained severe facial injuries, a closed head injury, and the loss of his left eye. The head injury caused him to lose fine motor skills in his right hand. The disability in his right hand affected the doctor's ability to write progress notes or perform delicate procedures.

For the first two years after his accident, Dr. Howard was covered by his medical group's self-insured workers' compensation plan. But in August 1998, he was informed that his contract would not be renewed, because injuries did not allow him to see enough patients to justify his salary. The doctor lost his workers' compensation coverage at the same time his employment ended and sued for continued coverage. The trial court granted summary judgment to the employer and ruled that because the doctor did not stop by his office before heading for the nursing home, the accident did not occur "within the course" of his employment, and was therefore not compensable.

The state's Special Workers' Compensation Appeals Panel reversed and held that an injury "is in the course and scope of employment, for workers' compensation purposes, if it has a rational connection to the work, and occurs while the employee is engaged in the duties of his employment." On appeal, the Tennessee Supreme Court reversed the decision and ruled that since the doctor's accident occurred while traveling to or from work, it was not covered by workers' compensation.

This case depends less on interpretations of the law and more on how we define a professional "on call" who responds to a request for service. The Supreme Court determined

that Dr. Howard is "at work" when he is performing medical services, not when he is driving his car. That ruling would be appropriate if the doctor had been involved in a car accident, e.g., while on his way to purchase supplies for his office.

However, in this case, the doctor had just returned from vacation and was summoned to the nursing home by a duty nurse who said patients needed to see him. The doctor's duties of employment included serving as medical director for the nursing home. Arguably, the doctor began his medical service / employment when he grabbed his medical bag and headed for the nursing home. It is surprising that with his scope of employment defined as caring for nursing home patients, the Supreme Court would hold that the doctor was not "at work" on his trip to the nursing home.

**Fear of HIV Not Compensable.** In a separate workers' compensation case, *Guess v. Sharp Mfg. Co. of Am.*, No. W2002-00818-WC-R3-CV (August 27, 2003), the Tennessee Supreme Court again reversed a Special Workers' Compensation Panel's decision to award compensation for stress-related injuries to a Shelby County woman who feared she had been exposed to HIV by a co-worker. Last August, in an unanimous decision, the Tennessee Supreme Court ruled that the woman's claims must be substantiated by proof of actual exposure to the virus. "If a plaintiff were allowed to recover under the facts of the present case, anybody suffering from a mental injury stemming from any perceived or imagined exposure to harmful substances or situations would be entitled to recovery," according to the court.

Claimant Mary Guess was splattered with a co-worker's blood in an accident at work. The co-worker was believed to be HIV-positive. Guess was subsequently diagnosed with post-traumatic stress disorder caused by a "work related injury," although she never tested positive for HIV.

**Temporary Benefits Before Trial.** In *McCall v. National Health Corp.*, No. M2001-03166-SC-R9-CV (March 14, 2003), the Tennessee Supreme decided a case of first impression. The court ruled that a trial court can initiate temporary workers' compensation benefits before trial and without holding a full evidentiary hearing. The employer had denied Charlotte McCall's request for temporary workers' compensation benefits based on what doctors agreed was a mental injury from when McCall's supervisor shook her violently by the shoulders and

screamed at her. McCall then petitioned a trial court for temporary benefits, which it granted.

On appeal, the Tennessee Supreme Court rejected the employer's contention that under the Tennessee workers' compensation statute, only specialists can initiate pretrial temporary benefits. The high court ruled that the specialist program was implemented as an alternative, faster track to filing a lawsuit in court. However, the specialist statute did not divest trial courts of their power to award pretrial benefits.

**Aggravating Preexisting Condition.** In *Andrews v. Maint. & Indus. Servs.*, 2003 Tenn. LEXIS 679 (Tenn., July 18, 2003), the Supreme Court heard a rare Tenn. Code Ann. § 50-6-225(e)(3) Appeal as of Right direct from the Chancery Court for Rutherford County. The appellee injured employee suffered an accident arising out of and in the course and scope of his employment with the appellant. He injured his left knee and, after surgery, exacerbated a condition in his right knee. The trial court concluded that the employee sustained a vocational disability of 28 percent to the left leg and 15 percent to the right leg. The Tennessee Supreme Court held that the evidence did not preponderate against the trial court's finding and affirmed the judgment.

The employer had argued that the employee did not show proof of an additional injury to the right knee that exacerbated the pre-existing arthritis. It contended that the injuries to his right knee were not compensable, as they resulted from the natural progression of osteoarthritis. The employee's surgeon testified that the pre-existing condition in the employee's right knee was aggravated during the post-operative period following the left knee surgery. Further, another doctor's testimony revealed that the employee's increased reliance on the right leg following the left knee surgery may have had some small aggravating affect to the right knee. A pseudogot was discovered in the right knee aspiration performed during the period following the left knee surgery.

Given that medical testimony, the Supreme Court of Tennessee found that the evidence did not preponderate against the trial court's finding that the pre-existing condition to the right knee was aggravated by the work-related injury to the left knee and was compensable under the Workers' Compensation Act, Tenn. Code Ann. § 50-6-101 et seq. Additionally, the right knee replacement would last only 12 to 15 years.

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# 'Whatsoever you do the least of my brothers'

## *Abuse of the Elderly vs. DHS Abuse of Police Power*

### **PART I: Physical Abuse of the Elderly**

During the week of October 26, 2003, newspapers across the state of Tennessee published an Associated Press story that featured the glaring news headline, "Reports of neglect and abuse of senior citizens up 40% in six years." The second sentence of the story indicated the Tennessee Department of Human Services' (DHS) Division of Protective Services has a staff of only 83 to cover Tennessee's 95 counties. Juxtaposed this way, the Associated Press story implied that abuse of the elderly in Tennessee is growing, the state has far too few resources devoted to the problem, and by implication the state needs to rearrange its priorities and spend more, much more, on adult protective services.

This perspective was echoed by state Rep. David Shephard, D-Dickson, who was quoted in the article as saying, "We are looking at a problem that is going to get bigger as medical advances continue and people live longer." State Rep. Dennis Ferguson, D-Kingston, who chairs the House Health and Human Resources Committee, shifted the focus to preventing fraud perpetrated on the elderly: "A lot of time people are getting old and they don't have a family and people take advantage of that. They go over and say 'We want to help you' and the first thing you know is they have their checking account and run through their money."

While it is true that fraud and other scams perpetrated against the elderly is a serious and growing national problem, the extent of physical abuse and neglect of the elderly in Tennessee needs further scrutiny. The source of the Associated Press's "40% increase" figure is none other than the Tennessee DHS. After reviewing how DHS classifies complaints, reasonable people may conclude that DHS is not properly closing its cases.

In the spirit of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), The Tennessee Law Times has constructed the following composite scenario based on actual cases that we have investigated and verified are true. This composite scenario respects the privacy rights of both medical patients and DHS staff, who may not want to be identified by name. The paper recognizes that some DHS staff may have been directed to take actions that violated their own sense of ethical standards and fair play.

An elderly patient with a broken hip was placed in a nursing home to recuperate following his hip repair surgery. The orthopedic surgeon initially places orders for nurses that the patient should not place weight on the leg associated with the repaired hip. Over time the surgeon changes the orders to allow 25% weight bearing, then 50% weight bearing, as the bone heals and the patient needs more physical therapy. Eventually, the surgeon is to allow full weight bearing on the leg with the repaired hip.

Through negligence of the nursing home, the patient is not brought to the surgeon for a scheduled follow-up appointment. Consequently, the surgeon's 50% weight-bearing instruction is left on the patient's chart long after the doctor's order has become stale and the patient is seen walking on his own without assistance using both legs.

A family member visits the patient in the nursing home and helps him walk by providing assistance with his arm. A physical therapist at the nursing home and his assistant witness the patient walking with the family member, and they claim the family member was encouraging the patient to put full weight on his leg. The following day a social worker at the nursing home phones in a complaint to the Tennessee DHS Adult Protective Services unit. One might expect the over-worked and stressed DHS staff would quickly surmise that the patient is walking on his own, that the doctor's orders are stale, and that a family member's assisting the patient to walk certainly does not constitute physical abuse.

Wrong! In actual cases, DHS's Adult Protective Services unit initially labels the family member as an "accused" physical abuser of the elderly patient. The fact that more than one witness observes the alleged "abuse" automatically transforms the status of the family member from "accused" to "indicated" abuser, in DHS terminology. Meanwhile, the family member has no due process rights to learn the identity of the nursing home staff members who filed a complaint or even learn the circumstances of what they allege to DHS has occurred.

When the family member explains to DHS's Adult Protective Services staff that the medical orders are stale, that the patient is walking on his own, that he merely provided a guiding arm to assist the patient who walked on his own, the DHS staff refuses to close the case. They continue their investigation and try to seek medical records on the patient from other doctors to seek evidence of physical abuse reported anywhere by anyone. No evidence of abuse is found after contacting multiple doctors, and still DHS will not close its investigation.

The family member, who is also healthcare attorney in fact for the patient, orders that the patient be brought to the surgeon's office, using an ambulance at Medicare's expense as the bureaucracy requires. The surgeon observes the patient walking and promptly corrects his now stale medical orders for the physical therapist to allow the patient to place full weight on the repaired hip and leg. This change in medical orders within a few days of the complaint being filed with DHS's Adult Protective Services, thereby suggesting that the patient has been able to have full use of his leg for days. But still DHS will not close its investigation.

Within a week, the family member discharges the patient from the nursing home and brings him home.

DHS insists on conducting a home study visit, afterwards concluding that the family member is providing "excellent care" for the senior citizen. But still DHS will not close its investigation. DHS wants assurance that the former patient will not live alone, but the family is not prepared to offer such a blanket guarantee until they can observe how well the patient adjusts to living at home. For two months, DHS continues to call the patient's home and calls relatives living out of state to learn whether the patient will be living with family members.

As an interesting footnote to this story, a social worker at the nursing home told the family member that in her professional opinion, the patient was so mentally impaired that he needed 24-hour assisted living care of the kind provided in their nursing home. But the nursing home in fact provided grossly negligent care. A nurse practitioner at the nursing home unilaterally took the patient, who has atrial fibrillation, off a life-sustaining drug, Coumadin, in violation of doctors' orders. For patients with atrial fibrillation, the absence of Coumadin increases the risk of stroke on a logarithmic scale.

The result was that this patient had an increased risk of developing a blood clot and stroke that was 6.5 times the normal risk: not a 6.5% increase in risk, a 650% increase in risk that went on for six weeks until the family member detected the negligence. When the family member told the social worker that under no circumstances would his father be left in the nursing home, the social worker retaliated a day later by phoning in a complaint of patient abuse to the DHS Adult Protective Services. In its defense, the nursing home stated the timing of the complaint was just a coincidence.

One would think that DHS staff could look into the motives of those alleging abuse to see if they were trying to confine the patient indefinitely to the nursing home against his will and also question whether there had been any animosity or retaliation of the nursing home staff directed at the family member. But DHS staff did not evince any deductive reasoning. Instead DHS Adult Protective Services staff viewed all doctors' orders as black and white. They could not conceive of orders becoming stale. DHS staff also stated that doctors' orders apply not only to nurses and physical therapists, but also to lawyers, family members, and visitors. According to DHS, doctors have a right to order lawyers, family members, and visitors how to care for a patient.

DHS staff failed to recognize the basic elements of the legal relationship between doctor and patient, e.g., any patient has a right to fire a doctor she feels is not properly treating her, or patients could challenge any doctor's orders by seeking a second opinion from another doctor. More important, even without benefit of a second medical opinion, a patient and her health care attorney have a right to listen to a doctor's advice and reject it.

That is what the legal doctrine of informed consent is all about.

Yet DHS acted as if they have a right to supersede the wishes of an elderly citizen and decide for him what is best for him to live the remaining years of his life. DHS intruded into the family's peace and care for their elderly parent and would not back off when ordered to close the case by the patient, by his educated and articulate health care attorney in fact, and by other family members. DHS knew that it could not prevail in court in such a case. Yet DHS continued to harass the patient's family and repeatedly refused to rule out the possibility that DHS would use the police powers of the state to place the patient in a nursing home against his will.

This case was an enormous waste of the taxpayer's resources, and the only good DHS accomplished was to recommend that family members install handicapped bars on the complete circumference of the patient's shower room at home. Once DHS begins an investigation, the citizens and taxpayers have no oversight. DHS thus spends as much time and resources as it chooses on any given case. The state legislators imposed specific guidelines requiring DHS to close obvious cases of non-abuse within a week or two.

These guidelines require DHS to cease prosecution of cases in which a subject cannot be shown to face imminent risk of harm. But DHS routinely ignores this legislative constraint and, in the several cases presented to The Tennessee Law Times, has stretched trivial cases into investigations taking several months. Consequently, DHS' Adult Protective Services has expropriated for itself absolute power to prolong its investigations and snoop around at the taxpayers' expense. As the British historian Lord Acton once said, "Absolute power corrupts absolutely."

A number of state legislators are to blame for the continuing lack of oversight over DHS's overreaching behavior. For many years, state Rep. Joe Armstrong (D - Knoxville) formerly chaired the House Health and Human Services Committee. Armstrong continuously refused to allow the family member or the 79-year old patient to testify before his committee on DHS's overreaching behavior with its Adult Protective Services. On six separate occasions, Armstrong rebuffed the family's offer. Perhaps Armstrong did not want to hear direct criticism of DHS by highly articulate and educated witnesses, or perhaps Armstrong was embarrassed that a patient labeled by a licensed Tennessee nursing home social worker as so mentally impaired he required 24-hour nursing home care would indeed have the mental capacity to testify before a committee of the Tennessee General Assembly.

Similarly, state Rep. Dennis Ferguson (D - Kingston), the current chair of the committee, wrote to the patient's family that then DHS Commissioner Angela Metcalf said her

*continued on page 16*

## STATE OF TENNESSEE CHANCERY COURT—HAMBLLEN COUNTY

### IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE

**State of Tennessee  
Department of Human Service:  
Petitioner:**

**Vs.  
Mildred Yarberry,  
Respondent:  
June 29, 2000.**

### Findings of Fact And Conclusions of Law

CATE, C. This matter is before the court on the complaint of State of Tennessee Department of Human Service to provide protective services to respondent, Mildred Yarberry, pur-

*continued from previous page*

department's staff did not engage in overreaching behavior. Ferguson was satisfied to take Metcalf's word for it (over the objections of several of his own constituents in Roane County).

In contrast, a number of state senators advised the patient's family that they had received numerous complaints about overreaching and overbearing behavior by Adult Protective Services staff. In a subsequent article, *The Tennessee Law Times* would like to highlight the positive changes in oversight, if any, that these legislators will implement with respect to DHS.

Regrettably, this composite true story is not an isolated case of DHS overreaching behavior. In the Mildred Yarberry case reprinted in the next section on trial court opinions, a courageous Knox County chancellor stood up to DHS violations of their own governing statutes for protective services and ordered DHS to release a senior citizen that DHS had seized and placed in a nursing home against her will. The facts in this case are stated clearly in the chancellor's opinion. Two points deserve special mention.

First, in this case DHS unquestionably encountered living conditions in the patient's home that most readers would find appalling: roach infestation, rotten food in the refrigerator and on the front porch, unsanitary bathroom, living areas in various states of disarray. However, neither the readers nor DHS has the right to say in what level of cleanliness a senior citizen in Tennessee must live or that a citizen of Tennessee must, in the final year of her life, give up the only home she has known.

Second, although DHS professed to have "good intentions" towards Mildred Yarberry, they seized her against her will and without any warning, they confined her in a nursing home against her will, and DHS adopted the attitude that Mildred Yarberry, like so many of the other helpless victims of DHS overreaching behavior, was mentally impaired and therefore whatever she stated that she wanted could be legitimately ignored. DHS did not respect the "risk of imminent harm" statutory obligation in this case, nor do they respect that obligation in other cases they are investigating at the present time.

Mildred Yarberry said that she felt she was in a prison while confined against her will in the nursing home, but DHS did not care. Her elderly brother pleaded with the court to let her sister return home and said he

suant to T.C.A. ON 71-6-101, et. Seq. Ms. Yarberry was taken into custody of DHS on September 30, 1999, was placed at the Serene Manor Nursing Home. She came under the care of Dr. Richard W. Robinson, a staff physician with that facility, who testified by deposition.

Ms. Sheila Kite, is the social counselor with the Knox County Of DHS, testified that she had followed with Ms. Yarberry for several months prior to her being taken into DHS, custody. Ms. Kite's testimony showed that Ms. Yarberry did suffer from some degree of dementia and that she was unable to attend to the activities of daily living. Specifically, she was unable to cook for herself and unable to keep her house and her person clean. Furthermore,

would do what he could to assure she was well, but DHS was not moved by the wishes of family members or next of kin. Mildred Yarberry went into deep depression at the nursing home and had given up on life, but DHS was content to have her die in the nursing home prematurely rather than let her live out her life as she desired: in her own home.

Readers should put themselves in the place of Mildred Yarberry. Suppose you are aware your mind is failing, although you may not be aware of the extent of your own limitations. DHS seizes you against your will and confines you to a nursing home. DHS seizes your social security checks and every possible source of income you have. You are trapped. You do even have the money to pay for a taxi ride back home. You do not know who to call for assistance; you are helpless. In all likelihood, DHS will attempt to take ownership of your house, sell it, and use the proceeds to pay for the \$120/night cost of the nursing home, which you do not want. You will lose your home and all your possessions - all in the name of doing what is best for you. Under those circumstances, it is clear why patients seized by DHS feel they have been robbed of every cent they own and why families feel DHS is burdening them with nursing home bills that could drive them into bankruptcy.

The state legislature needs to equip DHS and its Adult Protective Services unit with more assistance to those in need and less draconian solutions. DHS should be able to arrange for "meals on wheels" to be brought to people who cannot cook for themselves. Instead of seizing an elderly person in an unclean house, DHS should arrange for the house to be cleaned. It comes down to whether Tennessee is going to respect the dignity of each individual or continue to threaten and force elderly people into nursing homes against their will.

This article is the first part of a two-part article on Tennessee state agencies seizing custody of medically challenged citizens against their wishes. This first article pertained to nursing home staff and DHS abuse of the adult protective services program. The second part of this article, which will appear in the next edition, pertains to hospital doctors abusing the protective services program of the Tennessee Department of Children's Services with allegations of Munchausen Syndrome by Proxy.

Ms. Kite testified that Ms. Yarberry, who is a chain smoker, was careless in her smoking habits in that she left burning cigarettes around the house.

She furthermore, testified that the house was cluttered and roach infested. There was evidence of spoiled food in the refrigerator and on the front porch. For some time the Mobile Meals delivered food to Ms. Yarberry through the week. She received a number of other services from various home assistance agencies prior to her being placed at Serene Manor. In this case, the Department acknowledges that it must prove by a preponderance of the evidence that Ms. Yarberry is in need of protective services, that in the absence of those services she will be in imminent danger of irreparable physical or mental harm and that she lacks the capacity to consent to protective services.

The Department relies upon the testimony of Dr. Robinson to establish from a medical standpoint that Ms. Yarberry lacks capacity to consent to DHS services and that she faces imminent danger of irreparable physical or mental harm if she does not receive such services. Dr. Robinson testified that within minutes of his first contact with Ms. Yarberry he determined that she was suffering from dementia to the extent that she was unable to make rational sound judgments concerning her health and physical care. He is concerned that she will not take her medication but, in the end his primary concern is her smoking habits. Ms. Yarberry, according to Dr. Robinson, does not agree that she needs any help and Dr. Robinson feels that this is evidence of poor judgment on her part.

Dr. Robinson agrees that her lack of personal hygiene does not create a life-threatening situation nor does it create the risk of irreparable physical or mental harm. If she fails to take her medication then Dr. Robinson is of the opinion that her dementia would be accelerated. He concedes that with medication the disease will gradually progress and that the only associated harm with failure to medicate is the acceleration of the condition.

Ms. Yarberry initially declined to appear for the hearing in this cause. The Court, however, was of the opinion that Ms. Yarberry's testimony was essential and requested her presence on June 29, 2000, for in-chambers examination by counsel and the Court Respondent along with her brother, Elmer Grimes, appeared on this date and testified.

Ms. Yarberry stated that she considered herself as being incarcerated. Continually referred to the nursing home as a jail. She stated that she would rather die than be forced to stay there and expressed an earnest desire to be allowed to go home.

Ms. Yarberry had some difficulty communicating because of slurred speech her brother attributes to the mini-strokes she has suffered in the past. She also has a very loose fitting lower denture which contributes to her speech problems. On one occasion she stated that she would let no one but, Ms. Kite, the DHS worker, check on her if she was allowed to go home. Later she stated that she would be willing to accept DHS services. When asked how would care for herself? She replied "The best I can".

She denied that she is unsafe in her smoking habits but acknowledged that there are burn marks on her floors. She stated these had accumulated over time and her brother confirmed this.

She stated that she would accept help getting her house straightened back up. Mr. Grimes testified that the house had been broken into four times since she was taken into DHS custody and many of her household items had been stolen. He said Ms. Yarberry was very despondent over the loss of items, such as her television and her microwave.

Respondent testified that she had a pill dispenser that allowed her to keep track of her daily medications. She testified that she did in the past and would in the future take her medication as prescribed.

Mr. Grimes felt his sister should be allowed to go home where she "has lived all her life". He felt she was grieving herself to death at the nursing home. He offered to check on her frequently and to arrange for someone to live with her, although he was very vague on the details.

Mr. Grimes himself suffers from health problem that may impeded his ability to assist respondent.

Further, he is extremely hard of hearing which coupled with Ms. Yarberry's speech problem makes it somewhat difficult for them to communicate. It should be noted that Ms. Kite testified that in the past she had solicited Mr. Grimes aid in caring for his sister and was told that due to his own health problem he could barely care for himself much less take care of her. Without question, Ms. Yarberry is living in a cleaner and safer environment at the nursing home. There have been concerns expressed about her eating habits but the Court notes that there is no indication either at the time she was taken into custody of DHS or at the present that she suffers from any degree of malnutrition. Of course, Dr. Robinson expressed no immediate concern for malnutrition resulting from her eating habits.

In *State Department of Human Services v. Northern*, (Tennessee Ct. App. 1978) the Court of appeals examined the terms "imminent danger" and "capacity to consent". There the Court defined the term imminent danger of death as meaning conditions calculated to and capable of producing within a short period of time a reasonable strong probability of resultant cessation of life if conditions are not removed or alleviated.

Capacity to consent means "mental ability to make a rational decision, which includes the ability to perceive, appreciate all relevant facts and to reach a rational judgment upon such facts". *Id.* at page 209 Based upon personal observation of the respondent and after carefully considering her testimony, the Court concludes that she indeed lacks the capacity to consent to DHS services in that she does not have the ability to perceive and appreciate all relevant facts and to reach a rational judgment upon such facts.

There is no question that Ms. Yarberry needs the assistance of DHS services or other services and further no question but that she lacks the ability to perceive that need.

In this case there is no immediate threat of cessation of life to Ms.

STATE OF TENNESSEE  
CHANCERY COURT—HAMBLLEN COUNTY

Yarberry so the definition of imminent danger must be applied to physical harm as opposed to death. Accepting the Court of Appeals definition of imminent danger this Court holds the the State has the burden of proving by a preponderance of evidence that Ms. Yarberry, if allowed to return to her home, would face conditions calculated to and capable of producing within a short period of time a reasonably strong probability of irreparable physical harm.

Even though the concerns of Ms. Kite and Dr. Robinson are well founded there is no proof in this case that Ms. Yarberry's smoking habits create condition calculated to and capable of producing within a short period of time a reasonably strong probability of resultant irreparable physical harm.

While it unquestionably is in ms. Yarberry's best interest to receive DHS services, her best interest is not the issue in this case. The Legislature has cloaked the Department of Human Services with an overwhelming authority over the person of citizens of this State over the age 60. however, that authority has been tempered by imposing a burden upon the State to prove, although only by a preponderance of evidence, that there exists a reasonably strong probability of resultant irreparable physical harm if conditions are not removed or alleviated. The proof in this case fails to even establish that it is more likely than not that Ms. Yarberry, who has been a long time smoker, will suffer some irreparable physical harm as a result of her smoking. At best, if such imminent danger exists, the danger is relatively mild.

If Ms. Yarberry was left under the care of DHS there is no question that would be kept in a cleaner, safer environment. There is likewise no question that she would be better fed and better cared for than if she is released from the nursing home.

Thus, the Court finds that Ms. Yarberry is in need of the services of DHS, lacks the capacity to consent to such services, and is in a relatively mild danger of suffering irreparable physical or mental harm. The Court, accordingly, finds that custody in a nursing home is not appropriate under the circumstances and orders that Ms. Yarberry be released from Serne Manor at the earliest possible date, dependent upon when her residence can be restored to a livable condition. However, DHS may continue to provide such services at home as may be necessary and the release from the nursing home is conditioned upon Ms. Yarberry's continued cooperation and the assistance from her brother, Mr. Grimes.

Counsel for respondent is to prepare the judgment in this case after consultation with counsel for the Department. Should counsel be unable to agree upon the language of the order, or if further matters need to be brought to the Court's attention, then counsel is to arrange for an in-chamber meeting with the Court.

STATE OF TENNESSEE  
THIRD JUDICIAL DISTRICT  
HAMBLLEN COUNTY  
CHANCERY COURT

TIMOTHY WAYNE WOODFIN  
VS.

**AMY LYNN COCKRUM Defendant**  
NO. 2002-141  
October 28, 2003

MEMORANDUM OPINION  
AND ORDER

PROCEDURAL HISTORY

FRIERSON, C. The parties were divorced by Final Decree entered October 9, 2002. In connection with the divorce, the Court approved a Permanent Parenting Plan addressing the residential sharing schedule and other relevant parenting arrangements for the minor child, Jordan Chase Woodfin.

On March 3, 2003, the Child Support Division of the District Attorney's General Office requested the issuance of a Show Cause Order directing Mr. Woodfin to appear for an alleged failure to pay his child support obligation as previously ordered by the Court. On March 11, 2003, Mr. Woodfin, pro se, filed a petition with reference to his parenting time with the minor child. On April 29, 2003, the Child Support Referee filed certain findings and recommendations with reference to Mr. Woodfin's current child support obligation, as well as a child support arrearage. By Order entered May 2, 2003, the Court directed that the parties proceed with mediation. The findings and recommendations of the Referee were affirmed by the Court on May 9, 2003.

On October 17, 2003, Mr. Woodfin filed a motion to enforce visitation and for sanctions. Both parties, pro se, appeared for a trial on the merits on October 27, 2003. The Court directed that all issues regarding child support be referred to the Child Support Referee. Following an evidentiary hearing with reference to the remaining issues joined, the Court took the matter under advisement. Having considered the testimony of parties and witnesses, the evidence admitted and the record as a whole, the Court makes the following findings of fact and conclusions of law.

ISSUES PRESENTED

The primary issues presented for adjudication include the following:

1. Has there been shown to exist a material change of circumstances so as to warrant a modification in the allocation of parental responsibilities as defined by the existing Permanent Parenting Plan.
2. What residential schedule and allocation of parental responsibilities shall promote and protect the child's manifest best interests.
3. Is Ms. Cockrum in contempt of any previous Order of this Court.

FACTUAL BACKGROUND

The parties' minor child, Jordan Chase Woodfin, was born on September 21, 2000. The child presently resides with Ms. Cockrum in Morristown, Tennessee. Ms. Cockrum remarried on February 14, 2003.

Mr. Woodfin currently resides in Clinton, Tennessee. His last parenting time with the minor child was on December 27, 2002. Mr. Woodfin is self-employed and enjoys an income of approximately \$700.00 per month.

MODIFICATION OF PERMANENT PARENTING PLAN

"Courts understand the traumatic effect that divorce has on children, as well as the children's need for continuity and stability in their personal relationships", *Hall v. Honeycutt*, 489 S.W.2d 37 (1972); *Hill v. Robbins*, 859 S.W.2d 355 (1993). Courts contemplate that most children find stability by "bonding" to the initial custody situation following a divorce, *McDaniel v. McDaniel*, 743 S.W.2d 167 (1987).

The party seeking to change primary residential status must prove (1) that the child's circumstances have materially changed in a way that could not have been reasonably foreseen at the time of the original custody decision, and (2) that the child's best interests will be served by changing the existing custody arrangement, *Adelsperger v. Adelsperger*, 970 S.W.2d 482 (1997). "The courts may change custody if a custodial parent moves to another state in order to interfere vindictively with the non-custodial parent's visitation or if there is specific proof that the move will cause serious harm to the child", *Adelsperger*.

The court in *In Re: Bridges*, 63 S.W.3d 346 (2001) recently elucidated the applicable standard and factors to be addressed with reference to a petition seeking a modification in parenting schedules and responsibilities:

In a custody modification proceeding, the burden is on the non-custodial parent to prove a change of circumstances. See, e.g., *Nichols v. Nichols*, 792 S.W.2d 713, 714 (Tenn. 1990); *Musselman v. Acuff*, 826 S.W.2d 920, 922 (Tenn. Ct. App. 1991). Because an original custody decree is res judicata, there is a strong presumption in favor of the custodial parent which the non-custodial parent can only overcome by demonstrating that the alleged change in circumstances is "material." See *Taylor v. Taylor*, 849 S.W.2d 319, 322 (Tenn. 1993); *Nichols*, 792 S.W.2d at 715-16. This Court has described "changed circumstances" as follows:

When two people join in conceiving a child, they select that child's natural parents. When they decide to separate and divorce, they give up the privilege of jointly rearing the child, and the divorce court must decide which parent will have primary responsibility for rearing the child. This decision of the Court is not changeable except for "change of circumstances" which is defined as that which requires a change to prevent substantial harm to the child. Custody is not changed for the welfare or pleasure of either parent or to punish either parent, but to preserve the welfare of the child. Custody is not changed because one parent is able to furnish a more commodious or pleasant environment than the other, but where continuation of the adjudicated custody will substantially harm the child.

"Changed circumstances" includes any material change of circumstances affecting the welfare of the child, including new factors or changed conditions which could not be anticipated by the custody order", *Blair v. Badenhope*, infra; *Dalton v. Dalton*, 858 S.W.2d 324 (1993). Tennessee courts recognize that remarriage of either parent does not, of itself, constitute a material change

of circumstances warranting a change of custody, *Arnold v. Arnold*, 774 S.W.2d 613 (1989); *Tortorich v. Erickson*, 675 S.W.2d 190 (1984). "Changed circumstances" include new factors or changed conditions which could not be anticipated by the original custody order, *Dalton v. Dalton*, supra, and evidence that the children have grown closer to the noncustodial parent is a circumstance that is hoped for in granting regular visitation, not an unexpected circumstance, *Blair v. Badenhope*, 940 S.W.2d 575 (1996).

"The change of circumstances must involve the child's circumstances rather than those of either or both parents", *Taylor v. Yanusz*, 2002 LEXIS 446 (Tenn. App. 2002); *Steen v. Steen*, 61 S.W.3d 324 (2001); *Hoalcraft v. Smithson*, 19 S.W.3d 822 (1999). Moreover, hostility between the parents regarding the care of children will not constitute a change of circumstances warranting a modification in parenting responsibilities absent a showing that such was not the situation at the time of the divorce decree, *Rubin v. Kirshner*, 948 S.W.2d 742 (1997). Finally, when the consideration of all applicable factors results in an even balance, the presumption in favor of continuity of placement mandates that a modification in parenting responsibilities be denied, *Steen*, supra; *Placencia v. Placencia*, 3 S.W.3d 497 (1999).

The Supreme Court in *Kendrick v. Shoemaker*, 90 S.W.3d 566 (2002) recently elucidated the pertinent factors to be considered by the trial court in determining whether a material change of circumstances has occurred:

While "there are no hard and fast rules for determining when a child's circumstances have changed sufficiently to warrant a change of his or her custody," the following factors have found a sound basis for determining whether a material change in circumstances has occurred: the change "has occurred after the entry of the order sought to be modified," the change "is nor one that was known or reasonably anticipated when the order entered," and the "change" is one that affects the child's well-being in a meaningful way." We note that a parent's change in circumstances may be a material change in circumstances for the purposes of modifying custody if such a change affects the child's well-being.

The original Permanent Parenting Plan established a residential sharing schedule for the minor child whereby Mr. Woodfin was to gradually reestablish a parent/child relationship with Jordan Chase Woodfill. Specifically, Mr. Woodfin was to exercise quality parenting time with the minor child each Wednesday for three consecutive weeks, beginning at 5:30 p.m. During this period, Mr. Woodfin was directed to meet with the child's physician for instruction and training with reference to the child's medical needs. Following such term of parenting time, Mr. Woodfin was granted expanded parenting time every other Sunday from 1:00 p.m. until 4:00 p.m. at College Square Mall in Morristown, Tennessee. Beginning March 1, 2003, Mr. Woodfin was to enjoy overnight parenting time with the minor child on alternating weekends from Friday

## STATE OF TENNESSEE CHANCERY COURT—HAMBLLEN COUNTY

at 7 :00 p.m. until Sunday at 6:00 p.m. The evidence preponderates in favor of a finding that Mr. Woodfin never met with the child's physician for the purpose of acquiring instruction and training regarding the child's medical care and needs. The last parenting time exercised by Mr. Woodfin was December 27, 2002. Subsequent to that date, Mr. Woodfin attempted to spend time with the child, but by virtue of the child's illness in February 2003, as well as deteriorating lines of communication between Mr. Woodfin and Ms. Cockrum, no further parenting time was exercised by Mr. Woodfin. On one recent occasion, Mr. Woodfin's utilities were disconnected and later restored upon his acquisition of financial assistance.

This Court concludes that Mr. Woodfin, as Petitioner, has failed to establish a material change in circumstances warranting a modification in the primary residential parent status in favor of Ms. Cockrum. This Court does determine however, that the manifest best interests of the child warrant an alteration in parenting schedules as defined by the original Permanent Parenting Plan.

### ALLOCATION OF PARENTAL RESPONSIBILITIES

Effective January 1, 2001, the Tennessee General Assembly adopted the Parenting Plan legislation codified at T.C.A. 36-6-401, et seq. The legislative findings undergirding the new legislation are elucidated by T.C.A. 36-6-401 as follows:

#### 36.6.401. Findings

(a) Parents have the responsibility to make decisions and perform other parental duties necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The general assembly recognizes the detrimental effect of divorce on many children and that divorce, by its nature, means that neither parent will have the same access to the child as would have been possible had they been able to maintain an intact family. The general assembly finds the need for stability and consistency in children's lives. The general assembly also has an interest in educating parents concerning the impact of divorce on children. The general assembly recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care.

(b) The general assembly finds that mothers and fathers in families are the backbone of this state and this nation. They teach children right from wrong, respect for others, and the value of working hard to make a good life for themselves and for their future families. Most children do best when they receive the emotional and financial support of both parents. The general assembly finds that a different approach to dispute resolution in child custody and visitation matters is useful.

With an aim toward promoting, protecting and preserving the manifest best interests of minor children of a divorce, courts and parents are guided by the new legislation in establishing parenting arrangements which best maintain a child's emotional growth, health, stability and physical care. Terms such as "custody" and "visitation" have been replaced by new language to be contained in a "permanent parenting plan" which allocates parenting responsibilities and establishes a residential schedule for the child. Under the permanent parenting plan, the primary residential parent is that parent with whom the child resides more than fifty percent of the time, T.C.A. 36-6-402(4). "The statute contemplates that the designation of 'primary residential custodian' will be based upon an analysis of the total time the child is under the legal care and supervision of each parent - a concept which basically equates to the concept of residence", *Hansen v. Hansen*, 2000 LEXIS 267 (Tenn. App., 2000). As the Court in Hansen noted: Our approach to the concept of "primary residential custodian" also recognizes that a parent's responsibilities do not end when a child is at school or asleep or otherwise outside the presence of that parent. Rather, such responsibilities continue during the entire time that a child is under the general care and supervision of a parent, regardless of what the child is doing or where he or she is doing it.

Though the terms custody and "visitation" have been replaced, previous appellate decisions incorporating such language are instructive to the trial court in determining the appropriate parenting arrangement, schedule and responsibilities. Trial courts maintain broad discretion in determining matters of custody and visitation and such determinations are factually driven involving the consideration of several factors, *Parker v. Parker*, 986 S.W.2d 557 (1999); *Gaskill v. Gaskill*, 936 S.W.2d 626 (1996); *Adelsperger v. Adelsperger*, 970 S.W.2d 482 (1997).

Regarding child custody and visitation arrangements, the needs and best interests of the children are paramount concerns while the desires and interests of the parents are secondary, *Lentz v. Lentz*, 717 S.W.2d 876 (1986); *Whitaker v. Whitaker*, 957 S.W.2d 834 (1997). Custody should never be used to punish or reward the parents, *Turner v. Turner*, supra; but rather should promote the children's best interests by placing them in an environment that will best serve their physical and emotional needs, *Luke v. Luke*, 651 S.W.2d 219 (1983).

No hard and fast rules exist for determining which custody and visitation arrangement will best serve a child's needs, *Taylor v. Taylor*, 849 S.W.2d 319 (1993). However, the Court in *Ilfulb v. Bab*, 668 S.W.2d 663 (1983) established some guidelines for making the determination of best interest:

To arrive at the point of deciding with whom to place a child in preparation for a caring and productive adult life requires consideration of many relevant factors, including but certainly not limited to the age, habits, mental and emotional make-up of the child and those parties competing for custody; the education and experience of those seeking to raise the child; their character and propensities

as evidenced by their past conduct; the financial and physical circumstances available in the home of each party seeking custody and the special requirements of the child; the availability and extent of third-party support; the associations and influences to which the child is most likely to be exposed in the alternatives afforded, both positive and negative; and where is the greater likelihood of an environment for the child of love, warmth, stability, support, consistency, care and concern, and physical and spiritual nurture.

The Court in *Russell v. Russell*, 2000 LEXIS 716 (Tenn. App., 2000) also explained:

"In determining the best interest of the child and in engaging in the comparative fitness test, subtle factors such as parent's demeanor and credibility during the pendency of the divorce trial can be a determining factor for the trial court".

In establishing an appropriate residential schedule, the Court must make residential provisions for the child consistent with the child's developmental level and the family's social and economic circumstances with an aim toward encouraging each parent to maintain a loving, stable and nurturing relationship with the child, T.C.A. 36-6-404(b). The residential schedule shall be established upon the Court's consideration of the following factors:

- (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society which the child faces as an adult;
- (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
- (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;
- (4) Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings;
- (5) The disposition of each parent to provide the child with food, clothing, medical care, education and other necessary care;
- (6) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;
- (7) The love, affection, and emotional ties existing between each parent and the child;
- (8) The emotional needs and developmental level of the child;
- (9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;
- (10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
- (11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;

(12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;

(13) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;

(14) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children;

(15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and

(16) Any other factors deemed relevant by the court.

Based upon the applicable factors and other criteria upon which Tennessee courts have made parenting determinations, this Court concludes that the manifest best interests of the child will be served by establishing a residential schedule with attendant parenting responsibilities in accordance with the Amended Permanent Parenting Plan attached hereto as Exhibit A. By virtue of the residential schedule established, Ms. Cockrum is designated as the primary residential parent.

Each party shall inform the other parent of the current address and telephone number where he/she may be reached in the event of an emergency. Any parent who desires to relocate outside the State of Tennessee or more than 100 miles from the other parent within this state shall send a written notice to the other parent at that parent's last known address by registered or certified mail. Said notice shall be mailed not later than 60 days prior to the anticipated move. In such instances, the parties shall comply with all provisions of T.C.A. 36-6-108 and any amendments thereto.

### CONTEMPT

"An act of contempt is a wilful or intentional act that offends the court and its administration of justice", *Ahern v. Ahern*, 15 S.W.3d 73 (2000); T.C.A. 29-9-102. In Tennessee, contempt is classified as either civil or criminal, depending upon the action taken by the court to address the contempt. Title 29, Chapter 9, of the Tennessee Code on Remedies and Special Proceedings provides the grounds for contempt and the remedies available to courts. T.C.A. 29\_9-102 provides:

The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:

- (1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice.
- (2) The willful misbehavior of any of the officers of said courts, in their official transactions.
- (3) The willful disobedience or resistance of any officer of the said courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of said courts.
- (4) Abuse of, or unlawful interference with, the process or proceedings of the court.
- (5) Willfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them.
- (6) Any other act or omission declared a contempt by law.

To find contempt under this statute, a court must determine the behavior, disobedience, resistance [sic], or interference to be willful. Considering the testimony of parties and witnesses and the evidence admitted, this Court determines that Ms. Cockrum has not been shown to have exhibited willful misbehavior, disobedience, resistance [sic] or interference relative to previous Orders of this Court.

Mr. Woodfin's request for reimbursement of his travel expenses is denied. Travel expenses are not allowable discretionary costs, T.R.C.P. 54.04. All costs in connection with this matter shall be divided equally between the parties. Each party shall bear his/her own attorney's fees. This Memorandum and Order shall constitute a Final Judgment.

## STATE OF TENNESSEE CHANCERY COURT—HAMBLLEN COUNTY

**IN THE CHANCERY COURT FOR  
HAMILTON COUNTY, TENNESSEE**

**GIBRALTAR TAFT HIGHWAY,  
LIMITED  
PARTNERSHIP, through its general  
partner  
THE RAINES GROUP, INC.  
NO. 02-1030 Part II  
Vs.  
THE TOWN OF WALDEN and ITS  
BOARD  
OF ALDERMEN  
Defendant.**

**MEMORANDUM OPINION AND  
ORDER**

PEOPLES, C. This cause is before the Court on the Petition for Certiorari filed by Gibraltar Taft Highway Limited Partnership, through its general partner, The Raines Group, Inc. („Plaintiff%”), against the Town of Walden („Town%”) and its Board of Aldermen („Board%”) seeking to reverse the action of the Board, in September 2002, denying an application for a Special Exceptions Permit („Special Permit%”) for an R-1 PUD for the property of Plaintiff.

The property at issue is a 15-acre tract on Taft Highway in the corporate limits of the Town of Walden. This is the second attempt to obtain a Special Conditions Permit for a Planned Unit Development. Both the professional staff and the Board of the Chattanooga-Hamilton County Regional Planning Agency approved the proposed project. The Board of Aldermen by a vote of two against and one abstaining denied the application for the Special Permit.

### Scope of Review

The Board of Aldermen is the legislative body of the Town. It is also the body that determines whether a Special Permit for multi-family townhomes, or a PUD, is granted. Multi-family townhomes are a „permitted use%” within a R-1 zone under Walden,s Zoning Ordinance. The grant or denial of a Special Permit does not change the zoning designation for a property, and thus, it is an administrative action rather than a legislative action.

The scope of review of the action of the Board of Aldermen in this case is set out in *Youth Emergency Shelter v. Wilson County*, 13 S.W.3d 338 at 342 ((Tenn.App. 1999) (citing *McCallen v. City of Memphis*, 786 S.W.2d 633 (Tenn. 1990) as follows:

A review of an administrative action is by common law writ of certiorari. See T.C.A. § 27-8-101. See also *McCallen v. City of Memphis*, 786 S.W.2d at 639. „Whether the action by the local governmental body is legislative or administrative in nature, the court should refrain from substituting its judgment for the broad discretionary authority of the local governing body. Id. at 641-42. However, a court should invalidate a decision that is clearly illegal, arbitrary, or capricious.%” Id.

The question of whether there is sufficient evidence to sustain a zoning action is a question of law. *M.C. Properties, Inc. v. City of Chattanooga*, 994 S.W.2d 132, 134 (Tenn.App.1999). Hence, appellate review is de novo without a presumption of correctness. Id. If there is no evidence to support the zoning

action, it is arbitrary. *Sexton v. Anderson County*, 587 S.W.2d 663, 667 (Tenn.App. 1979). In reviewing a zoning action, an appellate court must do so with the recognition that „the discretionary authority of the government body must be exercised within existing standards and guidelines. *McCallen*, 786 S.W.2d at 639.

### Issues

1. Did the Town act beyond its authority in denying the application for a Special Permit?
2. Did the Town act illegally, arbitrarily, and/or capriciously in denying the application for a Special Permit?
3. Did the Town act without material evidence in support of its decision to deny the application for a Special Permit?

### Discussion

The issues set out are merely three different ways of asking whether the Town acted illegally, arbitrarily, and/or capriciously. The answer to all three questions turns on a determination of the extent of the discretion vested in the Board of Aldermen, and whether that discretion has been abused.

It is undisputed that the proposed PUD met the requirements explicitly listed in the Zoning Ordinance and the additional conditions imposed by the Planning Agency to the satisfaction of the Agency, and that Plaintiff has followed the proper procedures in seeking approval. It is asserted that the Board of Aldermen, as an administrative body, has no discretion to deny the application if the requested use complies with all current zoning laws. *Youth Emergency Shelter v. Wilson County*, 13 S.W.3d at 343.

The standards for issuance of a Special Permit are set out at Sec. 201.4 of the Zoning Ordinance as follows:

### Special Exceptions for Planned Unit Development

Flexibility in the arrangement of residential uses may be permitted by the (Town of Walden) as special exceptions in any Urban Residence District, provided that the minimum size of any tract of land sought to be used for the planned unit shall be ten (10) acres and that a desirable environment through the use of good design procedures is assured allowing flexibility in individual yard requirements to provide for multi-family dwelling units, townhouses, and two-family units, except that such use or uses shall require a Special Conditional Permit under the terms of ARTICLE VI of these Regulations.

The Town asserts that the words, „a desirable environment,%” refer to the Board of Aldermen determining whether the applicant meets criteria such as:

- (a) The effect on adjacent property;
- (b) The public health, safety, morals and general welfare;
- (c) The need for such development; and
- (d) Reasonable assurance that the development will proceed according to the spirit and letter of the approved plans. Walden Zoning Ordinance, Art. VI, Sec. 107.3.

At the hearing conducted by the Board, Plaintiff, its witnesses and attorney, and citizens of Walden stat-

ed opinions and made statements based on experience, training, and personal observation. Concerns and questions about the application expressed by citizens included the following:

1. The applicant,s announcement at the hearing of a new alternative proposal for handling sewage.
2. The need to protect and prevent harm resulting from abandoned coal mine shafts being disturbed by a septic system and other underground installations of the PUD, and the dangers if natural gas lines serving the project should leak gas into the mine shafts which run under the subject site and to other surrounding properties.
3. The destruction of the natural watershed and the impact on storm water run-off.
4. The location of the entrance to the PUD, a blind curve, and the impact of fog and slick roads as regards the sight distance for cars approaching the entrance.
5. The impact of the PUD on density of traffic and the natural beauty of Walden.

At the conclusion of the hearing, the Board voted to deny the application by a vote of two against and one abstaining. No member of the Board expressed any reasons or basis for their decision to deny the application. Counsel for Plaintiff argues that the Board has failed to state a reason for its action and there is no basis for denial in the record.

There is a split in the Tennessee Court of Appeals over whether an administrative body is required to make findings of facts. In *Hoover, Inc. v. Metropolitan Bd. of Zoning Appeals*, et al, No. 01A01-9307-CH-00312, 1994 WL 26093, filed June 15, 1994 (Hoover I) the Western Section of the Tennessee Court of Appeals found it was not necessary for the Board to make any findings of fact. In *Hoover Inc. v. Metro Bd. of Zoning Appeals*, 924 S.W. 2d 900 at 905 (Tenn. App. 1996) (Hoover II), a second appeal of the same case, the Middle Section stated:

It is the position of this court that a reviewing court cannot determine whether the decision of an administrative body is supported by material evidence unless the administrative body makes findings of facts setting forth the reasons for its decision.[1] We do not express an opinion as to whether the Western Section was correct in concluding that it was not necessary for the Board to set out findings of facts absent four concurring votes. Instead, it is our opinion that a reviewing court cannot determine if there was material evidence to support a decision if the reviewing court is unaware of the basis for the decision.

Footnote: [1] The Tennessee Court of Appeals, Eastern Section, discussed the requirement of findings of fact in *Weaver v. Knox County Bd. of Zoning Appeals*, No. E2002-02000-COA-3-CV, 2003 Tenn. App. LEXIS 468, filed June 30, 2003, as follows:

The decision in *Hoover II* was not based on a material evidence review; hence it is clear to us that the above quote is dicta. Furthermore, and more importantly, it is clear that the reference to *Hoover I* and *II* regarding findings of fact is rooted in a Davidson County ordinance explicitly requiring such findings. (footnote omitted) We are not aware of any gen-

eral precedent placing an affirmative duty on a zoning board to pronounce specific findings of facts. In our judgment, such findings, while helpful, are not essential to judicial review under the material evidence standard. Accordingly, we conclude that the absence of express findings of fact does not render the BZA,s decision illegal, arbitrary or capricious.

In this case, the absence of findings of fact make it more difficult to determine whether a basis for the denial exists in what is an administrative action by the Board. Nevertheless, this court will follow the holding of the Eastern Section in *Weaver* that a finding of facts is not necessary.

A number of citizens of Walden spoke at the hearing and expressed their opposition of the proposed PUD. Plaintiff correctly asserts that „it is not a function of the board to conduct a referendum on public attitudes relative to the petition.%” *Sexton v. Anderson County*, 587 S.W.2d 663 at 664 (Quoting *City of Apopka v. Orange County*, 299 So.2d 657 (Fla.App. 1974)). A review of the transcript of the proceedings before the Board on September 10, 2001 reveals that various citizens made statements about the impact of the PUD on their surrounding property, the potential hazard of leaking gas lines, the loss of the natural beauty of the area caused by the removal of trees and other vegetation, the lack of specific details about the operation of proposed detention ponds to handle surface water run-off and the impact on surrounding properties, the absence of information about the design, size and location of a proposed pumping station for sewage from the plan, and the increased traffic hazard resulting from the location of the entrance to the PUD.

While some persons merely expressed opposition to the PUD, other persons stated their personal experiences and observations and/or raised questions or concerns that were not fully addressed by the Plaintiff. Could the Board reasonably conclude that the PUD proposed by the Plaintiff would not assure a „desirable environment%” and, thus, be denied? Based upon the record, there are concerns affecting health, safety, and environment for the citizens of Walden that the Board could conclude are not satisfactorily resolved, addressed, or assured by the proposed plan. „(A)dmistrative decisions are presumed to be valid and a heavy burden of proof rests upon the shoulders of the party who challenges the action.%” *McCallen*.% 786 S.W.2d at 641. In the present case, the court finds that the Plaintiff has failed to meet the burden of showing an abuse of discretion by the Board or that its actions were illegal, arbitrary or capricious.

It is therefore ORDERED that the Petition for Certiorari be dismissed. Clerk,s fees and costs are taxed against the Plaintiff and surety.

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**Government  
Accountability**

# Atomic City's Bomb

## *Asset-Backed Securities have Dubious Collateral Income Stream*

*The following article incorporates some verbatim statements, used with permission, from press releases issued by the Oak Ridge Accountability Project, a group of Oak Ridge families interested in helping government reach for that next higher level of accountability and performance. The Tennessee Law Times has independently added commentary and verified the key facts contained in this article. We are pleased to debate the merits of Oak Ridge's mall redevelopment scheme with any proponents and have already used the previous Oak Ridge mall redevelopment proposal as a case study for an undergraduate economics course taught last year at Tusculum College in Knoxville.*

Recently, the Industrial Development Board (IDB) in Oak Ridge, Tennessee, home to atomic research reactors and the Y-12 nuclear weapons complex, proposed a five-million-dollar revenue bond to support the remodeling of Oak Ridge's downtown shopping mall. Under the plan, the bond will be repaid by diverting future property tax payments above the current level paid by the mall. Future property taxes would rise only if the market value increased as a result of the remodeling of the downtown mall. In backing a security with a hypothetical stream of income, the Oak Ridge's IDB mall development bond seems more like a bomb waiting for unsuspecting investors than a secured transaction.

**Mall Property Taxes Held Constant.** Under the IDB bond financing scheme, Anderson County would continue to receive for thirteen years its current property taxes of \$90,000, and the city of Oak Ridge would continue to receive its current \$85,000 in property taxes on the downtown mall. The city provides more local public services to the downtown mall and should receive more taxes than does Anderson County, but we will put that issue aside.

**Current Mall Value in Dispute.** The current IDB financing plan calls for repayment of the bond over 13 years, but questions remain about who will have to repay the bond if the mall value fails to increase on target. The parties cannot even agree on the current value of the downtown mall. The mall's previous owner, Crown American Corp., and the current owner, Steve Arnsdorff, are suing the county for a reassessment of the taxable value of the mall. Crown American and Arnsdorff contend the mall is worth less than the \$14.2 million value assessed by Anderson County. Arnsdorff bought the mall earlier this year from Crown America for about \$6 million, and they contend this sales price should be the market value and tax-assessed value of the mall. Real estate law in Tennessee would tend to support Crown America and Arnsdorff.

If a judge finds the downtown mall is worth \$14.2 million, then Anderson County would normally collect \$178,780 in property tax revenue

from the mall. If the downtown mall is found to be worth \$6 million, then Anderson County would normally collect \$75,360 yearly in property taxes, according to the local Oak Ridge newspaper.

**Divided Electorate.** At present, the citizens and voters of Oak Ridge are fairly evenly divided into two camps. One group is fed up with unachieved past promises from city council and the mall owners to transform the downtown mall and thereby increase business and sales. The other camp is committed to revamping the mall anyway necessary; no matter how costly the proposal for mall redevelopment, they will support it.

**Prior Remodeling of the Mall.** About twenty years ago, the downtown mall in Oak Ridge was converted from a large U-shaped outdoor mall to an L-shaped enclosed mall at a cost of several million dollars. Initially sales took off and a food court at the mall with seven or more restaurants had a thriving lunchtime business. For whatever reason, the mall owner systematically forced the food court

prior 70 - 80% increase in city taxes over the preceding seven years. With so many tax increases to pay for city council capital spending blunders, it is no surprise that the four-person majority on city council, also known as "The Committee of Four to Bankrupt Oak Ridge," attempted to force the mall redevelopment on the taxpayers without any public referendum.

The current bond proposal contains essentially the same level of direct financial subsidy for the mall owner as last year's bond contained. In last year's bond, the mall subsidy was factored into the cost of a number of overlying public works projects. While those projects were advertised at the time as very important for the health of the city, the city has not attempted to resurrect any of them since the bond's defeat. The projects are also absent from the current mall bond strategy—leaving the impression that last year's projects were mere camouflage for the real bond driver, a multi-million-dollar bailout payment for the mall owner. If that impression

dishonesty mistakes by assuring citizens that a "revitalized" Oak Ridge Mall would be able to compete with newer and more extensive shopping areas located outside of Oak Ridge. Last year, students in our Tusculum College economics class questioned whether local governments should stay out of the mall development business, and they thought the city government was arrogant to think it knew better than private industry how to stimulate sales at local retail stores.

**Restrictive Land Covenants.** The "Crown Covenants" in the Oak Ridge downtown mall leases also make the mall redevelopment more difficult and problematic. The covenants are 50 pages of detailed land restrictions that were placed upon the property by the previous mall owner, Crown American. They remain in effect for the next one hundred years and preclude a number of important and potentially lucrative mall options. The Crown Covenants are well known to top city officials, yet many in the community are unaware of their existence (or their impact on the future of the mall).

As one Oak Ridge Accountability Project supporter stated: "I hope that the city really levels with citizens about the costs and risks of this bond. People love Oak Ridge and want to see it grow. I think that folks are more than willing to invest in these types of projects and even accept some downside risk—but they have to be told the truth up-front. Right now, the city's heavy sales pitch sounds like Parcel "A"-rhetoric, warmed over. It makes you wonder: what are they exaggerating or keeping from us now?" Parcel "A" was a city development plan and publicly owned golf course, which ultimately proved a major financial failure, costing Oak Ridge taxpayers millions of dollars. In fact, the Parcel "A" land development scheme is still costing the city taxpayers to this day.

**Too Much Flatulence.** Oak Ridge Mayor David Bradshaw, basking in the glow of his recent re-election, and Vice-Mayor Tom Beehan, two members of the city council majority that supports mall redevelopment, have shown no concern with adhering to the citizens' preferences expressed in the last referendum. They were both prepared to support a previous version of the IDB downtown mall development scheme that would have diverted all of the mall's property taxes to the city and county over the next eight years towards repayment of the IDB bond.

After the city staff reformulated the bond repayment formula, with the county and city retaining their current levels of property taxes from the mall, the Anderson County Commission voted 10-5 on Nov. 17, 2003, to endorse the mall development scheme.

The Oak Ridge Accountability Project charges that the overall benefit to the mall owner (and cost to the taxpayer) from this bond will be in the neighborhood of seven to eight million dollars—with bond interest factored in. But city council has not

*Oliver Spring Mayor Ed Kelly said it best when he wondered what Oak Ridge would think if he used the Oliver Springs Industrial Development Board to rebuild the shopping center in Oliver Springs.*

vendors out of operation with too high rent or other restrictions. Soon they all moved out of the mall, other stores followed. Radio Shack's rent was increased so high that the company would have paid more per square foot to lease a store in the struggling Oak Ridge mall than it paid for its store in West Knoxville's opulently decorated WestTown mall. Today the mall is about 75% vacant. The remodeled mall building still serves as a rather excellent indoor walking track utilized by fitness enthusiasts and Oak Ridge's large senior citizen population.

The most recent proposal to remodel the downtown mall in Oak Ridge is the second taxpayer-funded mall bond issue to surface in Oak Ridge within the last year and a half. The first bond proposal involved tearing down a large segment of the mall and paving a new road to run through the middle of the former mall building. The \$15 million cost of the proposal generated a storm of citizen protest and created the single most successful petition drive in city history. A third of all registered voters (over 5,500 citizens) came forward to sign protest petitions in a period of less than three weeks—and force a referendum vote on the measure.

**Voter Referendum Overrules City Council.** In August 2002, Oak Ridge voters overruled city council and soundly defeated the mall redevelopment scheme. That \$15 million scheme would have raised Oak Ridge city taxes by an estimated 9% annually for at least six years on top of a

is accurate, the Oak Ridge Accountability Project contends it would justify the belief that Oak Ridge government is overly calculating, manipulative, and willing to employ deception in the pursuit of its goals. If city council members were held to the same standard of honesty in public announcements as firms in the securities industry, then several city council members would be in hot water right now.

Unlike last year, the bond proposal currently under discussion does not include a provision for a citizen-sponsored referendum. Should the Oak Ridge City Council choose to enact a bond on the same subject without a citizen vote, it will be hard to escape the conclusion that they are intentionally nullifying last year's referendum decision. Such ongoing action by the city council could have a seriously negative and lasting impact on citizen trust of their civic government.

**Deception.** Members of city council and their agents tried to assure taxpaying voters that last year's mall redevelopment scheme would have a trivial impact on taxpayers. One of their agents even appeared on local television news to announce that most taxpayers would only pay "a nickel a day" for the mall redevelopment. A nickel per day is a far cry from the 9% projected increase in property tax rates for six years that would have been required to fund the ill-conceived mall development scheme last year.

City council is repeating its same

told the voters how the taxpayers of Oak Ridge are ultimately liable for the bond repayment. If the Oak Ridge city taxpayers lose another seven to eight million dollars, on top of the losses foisted upon the taxpayers with the Parcel "A" land development scheme, it would have a devastating impact on the city's ability to fund local public services.

**Stream of Income?** Holding property taxes constant for the mall owner does not generate a stream of income. It is possible, and indeed likely, that this "revitalizing" of the downtown mall will have no more success than the last remodeling of the mall. If the market value of the mall does not increase significantly, and annual sales increases on the order of 20% may be required for the whole IDB bond financing scheme to work, then the bondholders will either have recourse against the general tax fund for the city of Oak Ridge, or the income backing the IDB bond is illusory.

The proposed Oak Ridge city mall IDB bond shares many attributes of an asset-backed security. Normally, an asset-backed security has a readily identifiable stream of income to repay the bondholder for advancing investment funds. These streams of income include bundled repayments on mortgage loans (for collateralized mortgage obligations), repayments of automobile loans, even streams of income from the sale of tickets at movie theaters.

In practice, these streams of income are often transferred to an independent trustee, who holds title to the underlying assets so that the income will be preserved for the benefit of the bondholders. No such transfer mechanism is possible with the Oak Ridge IDB bond issue, because the repayment income is illusory, at least at the time the bonds would be issued.

The dollars spent revitalizing the mall building does not directly equate to increased mall transactions and revenues. If that were true, then the millions spent on enclosing the Oak Ridge mall and decorating the interior would have guaranteed millions in increased sales at the mall, not a 75% vacancy rate. Thirty years of history stands in the way of transforming the Oak Ridge downtown mall from a big white elephant into a busy hub.

**Consumers Want Lower Prices.** Ironically, the WalMart superstore located adjacent to the downtown mall has a thriving business. The current mall owner ought to turn the entire mall space over to the WalMart superstore, because the management of WalMart clearly does know how to maximize sales and profits in each square foot of its floor space. Perhaps WalMart would relocate a Sam's Wholesale Club the unoccupied downtown mall. Even better, the mall owner could bring to Oak Ridge the one store chain that has proven its ability to consistently beat WalMart on prices: Costco Wholesale. Costco has a store in Memphis, but none in middle or east Tennessee.

Between a Sam's Wholesale Club, a Costco Wholesale, and a Lowe's hardware store, there would be a constant stream of consumers buying products at the downtown mall. Little specialty stores, which have always been the darlings of the Oak Ridge mall owners, will always be perceived

by consumers as overpriced due to the comparatively high rents at the downtown mall. If the mall owner focused on filling the mall with wholesale outlets (read Costco Wholesale) and stores that offered cheaper prices than Knoxville malls, the downtown mall might be viable. All of this revitalization could take place without \$15 million in capital spending; it would take a dramatic change in business philosophy for the Oak Ridge mall: compete for consumers based on lower prices, not on remodeling gimmicks.

**No Business Plan.** Thus far, the IDB has not required Steve Arnsdorff to provide a public plan describing how the public money would be used. Simply put, the mall redevelopment project appears to have no business plan, and that is a scary prospect if millions of dollars of taxpayer funds are ultimately at risk. Instead, the plan calls for an IDB member to review all construction expenditures. But that IDB member will not be able to determine whether the construction expenditures are over- or under-budget, or whether money is being wasted. No member of the Oak Ridge IDB has any background in internal auditing. So for practical purposes, having of Elmer from the IDB review project expenditures will reassure no one.

Despite declining retail sales within the main downtown mall building, overall sales tax revenue from Oak Ridge retailers has risen in recent years. The rise in sales taxes comes from the addition of the WalMart superstore and a large multi-screen movie house to the Oak Ridge mall property.

**Taxpayer Risk Management.** The Oak Ridge Accountability Project has expressed concern for the absence of "common sense" financial safeguards within the IDB proposal. The Oak Ridge city government's no-questions-asked approach could easily lead to serious sales tax losses for both county and city schools over time, and it was a hallmark of the Parcel "A" land development debacle, as well as the fifteen-million-dollar bailout for the former owner of the downtown mall that the Oak Ridge voters rejected last year.

The Oak Ridge City Council majority always announced the potential benefits of great big capital spending plans. It would be boring to serve on city council and have to tell people the city only has money for essential government services. It is much more fun for city council members to spend the taxpayers' money on big projects that leave an impact on the city. Any good lawyer would always advise his client to think about the worst-case scenario and form a reasonable exit strategy for a contract or investment. City council never considers the worst-case scenario, which always seems to visit their speculative capital spending projects.

Several important safeguards need to be put in place by the IDB in order to reduce the overall risk to more reasonable levels. These safeguards represent key financial protections which lay dormant as long as the project performs as expected by the IDB—but which spring into action to minimize taxpayer loss, if the project falls short of its claims. They make the recipient of tax money accountable to taxpayers.

**Future Mall Retailers.** As an example, consider the matter of future mall occupancy. Should mall retail space be turned into commercial office space in the future, county sales tax revenue could take a major hit—since office space yields no sales tax. At one point last year, the former mall owner wished to transform a large portion of the Oak Ridge Mall into commercial office space. A safeguard should be installed to ensure that this type of arrangement is not established in the future to the detriment of city and county taxpayers.

The reformulated mall development plan calls for the mall owner to provide evidence that 50,000 square feet of mall space is leased to retail businesses "new to Oak Ridge and Anderson County." This new covenant appears to address the future mall occupancy issue; however, there is no guarantee that the 50,000 square feet will be maintained with new retailers to Oak Ridge for more than a year. Businesses can get out of leases if they are losing money and going bankrupt.

In past development cycles at Oak Ridge's downtown mall, the redeveloped mall has strong sales and fully occupied space in the first two years after the redevelopment is completed. Then the downward spiral will begin in which stores move out, the mall owner must raise rents on the remaining tenants to cover the lost revenue, and the higher rents force more retailers out of the mall. It would be possible to show evidence of 50,000 square feet leased to new retailers one year and see that number drop to 20,000 square feet the next year. When stores start to leave a mall location, they often leave in herds. One store's relocation triggers other stores to move out as well as fewer and fewer consumers have reasons to visit the mall.

**Setting a Precedent for Other Towns.** Did the Anderson County Commission consider these revenue loss scenarios when they endorsed the Oak Ridge mall development scheme? The Anderson County Commission may have set a dangerous precedent in endorsing the Oak Ridge mall development scheme. Nothing would prevent other municipalities in the county from grabbing their "fair share" of county property tax money to help redevelop their shopping centers. Oliver Spring Mayor Ed Kelly said it best when he wondered what Oak Ridge would think if he used the Oliver Springs Industrial Development Board to rebuild the shopping center in Oliver Springs.

Two thirds of Anderson County's population, nearly fifty thousand people, currently live outside the city of Oak Ridge and have absolutely no tie to the Oak Ridge Industrial Development Board. Oak Ridge City Council was poised to move ahead with mall redevelopment regardless of the "taxation without representation" for all of these non-Oak Ridge residents of Anderson County.

The Oak Ridge Accountability Project was concerned with the taxation without representation issue as well those enumerated as follows:

1. The full implications—both political and financial—of the proposed revenue bond must be spelled out clearly by the IDB and the Oak Ridge City Council. The implications

and consequences of increased sales revenues not meeting targeted levels must be stated in a manner that city and county residents can easily understand.

**2. Implications for the Oak Ridge Economy.** The Oak Ridge economy is currently held down by its very high property tax rates (the second highest in the state). As it is currently structured, the bond will cost the City of Oak Ridge and Anderson County millions of dollars of property tax revenue. There is no guarantee that increased future sales tax revenue will ever be able to offset this loss—especially if the main effect of a revitalized mall is to simply shift existing Oak Ridge and Anderson County retailers from their present locations to a mall location. If the bond ends up pushing city and county property taxes higher, it could have a distinctly negative (rather than positive) impact on the overall Oak Ridge economy.

**3. Nullification of Last Year's Mall Bond Referendum.** Last year, Oak Ridge voters rejected a mall bond in a prominent citizen-sponsored referendum. Enacting a new bond on the same subject, without an accompanying referendum, will act to overrule and nullify that referendum—a move which will fundamentally undermine the credibility of Oak Ridge government.

**4. Implications of Breaking Mayor David Bradshaw's Promise.** Prior to the referendum last year, Mayor David Bradshaw anticipated the potential defeat of the first mall bond and personally guaranteed city residents that they would be able to vote on a second mall bond—should he be given an opportunity to develop one. The recent IDP proposal is a "second" mall bond. If it is now passed without an accompanying referendum, his promise will have been broken.

**5. Impacts on Other Oak Ridge Shopping Centers.** A significant portion of last year's prospective tenants for a revitalized mall turned out to be retailers already located in Oak Ridge (and Anderson County). Presumably, the same thing will happen this year. If it does, the mall subsidy will end up having a distinctly negative financial impact on those shopping centers and their owners. Is it wise or fair to offer the downtown mall owner a major financial subsidy that directly penalizes other Oak Ridge and Anderson County shopping centers?

**6. The Absence of WalMart Approval.** The previous owner of the mall, Crown American, sold a series of important major land covenants (the "Crown Covenants") to WalMart. These land restrictions give WalMart the right to veto virtually any substantive change (as well as many minor types of changes) to the mall property for the next hundred years. This means that mall development strategies must be considered WalMart-Friendly (or at least WalMart-Neutral) to be pursued. This also means that WalMart must have formally bought-in to a mall revitalization strategy, before that strategy can be considered a realistic option. Official WalMart approval has not been obtained for the current revitalization strategy, rendering it little more than an interesting (but speculative) possibility.

**7. The Total Size of the Proposed Taxpayer Investment.** The total size of the proposed tax-dollar investment in the mall has not been publicized. It will be much larger than the five million dollar figure that is currently being discussed, because it will include millions of dollars in bond interest. Citizens should be told the total projected cost of the bond.

**8. The Size of the Developers Financial Risk.** The true amount of money that the developer plans to put at risk in a mall revitalization project should be clearly understood. Last year, the so-called "developer's investment" turned out to include money that prospective mall retailers were expecting to invest in their individual stores rather than just reflecting the funds the developer had at personal risk.

**9. Contractual Safeguards to Protect the City.** The current IDB plan appears to give five million dollars to a developer without a corresponding contractual commitment to a detailed development plan. The developer should be required to work to a specific development plan and there should be contractual safeguards in place to suitably penalize the developer, should the mall project fail to perform as advertised.

**10. Furnishing Public Money Up-Front (Versus Providing Down-Stream Performance Awards).** Placing city money into this project before the mall owner demonstrates that the mall can and will perform at a sustained higher level is inherently risky. A safer and more successful strategy, given the uncertainties in this case, would be to offer a set of down-stream financial rewards to the developer, based upon actual growth in sales tax revenue. This strategy makes perfect sense

from a risk management perspective, yet it somehow has escaped comprehension by the city council majority.

**11. Inadvertent Bailout of Crown American.** The possibility that the current bond will still act as a taxpayer bailout of Crown American should be ruled out. If Crown, the previous mall owner, is partnered or in any way contractually linked to the current owner, the IDB bond could act as a taxpayer-funded reimbursement for past business decisions including the decision to place far-reaching land restrictions (the Crown Covenants) on the mall property. City taxpayers should not reward Crown for its past business practices.

**12. New Oak Ridge Residents.** A large number of people who work in Oak Ridge now, choose to live elsewhere due to Oak Ridge's high property tax rates. The mall bond should recognize this important phenomenon. It should include a guarantee that mall employees actually live in Oak Ridge and support the city and county tax base. (Otherwise, Oak Ridge taxpayers are stuck paying for salaries of people who spend they income outside the city.)

To these concerns, The Tennessee Law Times would add the following:

**13. Sales Tax Revenues.** What impact will the proposed mall redevelopment have on sales taxes? Will these sales taxes be paid at the same rates after redevelopment as before? Is any portion of sales tax revenue being used to support repayment of the bond?

**14. Source of Income Backing the Bond.** What is the source of income that the bondholders will view as ultimately backing repayment of the bonds? Can that stream of income be segregated from other funds and serve as collateral for the bond repayment?

**15. Municipal Guarantees.** If the city is issuing government-backed bonds, what are the possible scenarios in which the taxpayers would get stuck footing the bill for repayment of the IDB bonds? What steps have the city planners taken to prevent these scenarios from occurring? If the bondholders have ultimate recourse against the city through its IDB, then that role as ultimate guarantor must be explained to the voters and then put up for public referendum.

**16. Property Tax Rates.** Will the mall redevelopment scheme have any negative impact on the city of Oak Ridge residential property tax rates, under even a worst-case scenario? Every time city council runs short of money, they raise the property tax rates in Oak Ridge, which now has the second-highest property tax rates in the state of Tennessee.

**Misplaced Priorities.** The Oak Ridge city mall development scheme appears to be much less risky to the taxpayers of Oak Ridge than before the city staff reformulated the plan to maintain the existing payments for mall property taxes. Nevertheless, somewhere along the line, the city government and city council lost sight of the objective for IDB bonds: industrial development. These tax-exempt bonds are supposed to be issued for economic development. Having a new downtown mall is not going to attract new businesses or industries to move to the atomic city.

**One-Company Town.** For more than forty years, the mantra of the Oak Ridge City Council has been to diversify the economy of Oak Ridge, so that the city workforce is not so heavily reliant on a single employer: the U.S. Department of Energy and the contractors for its facilities. But the Oak Ridge economy is as badly tied to the fortunes of the federal facil-

ities today as it was in 1960, 1970, 1980, or 1990. Despite millions being spent on economic development, Oak Ridge remains a "one-company town" with a declining and aging population.

A new facade on the old shopping mall in downtown Oak Ridge seems an unlikely source of industrial recruiting or economic development. A "revitalized" mall is not going to bring new technical and professional jobs to Oak Ridge, nor will it enhance or expand the city's tax base. The city of Oak Ridge is violating the intent of the Tennessee statute, if not the letter of the law, by using a state-authorized tax-exempt tool to spruce up its mall, instead of using the money to recruit the next Nissan, General Motors, or Toyota factory to the state.

If Oak Ridge can use IDB bonds to spruce up its mall, then what would stop a city in west Tennessee from using IDB bonds to spruce up its police and fire stations, or a middle Tennessee town from using IDB bonds to expand its local hospital? Any town could claim that improved fire stations or hospitals would help recruit industry to their area, but they would be contorting the intent of the state legislature.

The Atomic City would do better to focus its IDB bonds on supporting the relocation to Oak Ridge of some major firm with no ties to the Department of Energy facilities. Maybe that firm could employ the many laid off scientists, engineers, and other professionals in the area. But it is a whole lot easier to refurbish the mall than recruit non-Department of Energy businesses to Oak Ridge, so guess which one the Oak Ridge City Council will pursue?

*Written by a staff writer if the Tennessee Law Times*

# Big Brother, Can You Spare a Dime?

## *Rowland's Revenge: Weicker's Income Tax—Just Another Revenue Stream*

*Due to our expertise in law and economics, the Connecticut state organization of towns and municipalities asked the editorial board to prepare a special supplement, to be distributed to all its members, analyzing the impact of the Connecticut state budget on Connecticut towns and municipalities. Our newspaper has also agreed to sponsor public forums in Connecticut featuring roundtable discussions with mayors and state legislators on the impact of the state budget on local communities.*

*The article below is just the introduction to this special supplement. We have decided to reprint the article in The Tennessee Law Times, because the latter half of the article contains numerous references to Tennessee. If the Tennessee League of Municipalities, or even select counties or cities, were interested, we could prepare a similar 8-page special supplement on the impact of Tennessee's state budget on its towns and municipalities.*

### **An Introduction to the Connecticut State Budget for 2004-2005**

The Connecticut Conference of Municipalities (CCM) is interested in the state's budgetary health, so that the conference can estimate how much money the state will transfer to local towns and municipalities. To determine the fiscal health of any state, the first place to examine is expenditures on prescription drugs for the state's Medicaid program. Rising prescription drug costs are the single most important explanatory factor for the increases in health care costs, health insurance premiums across the country, and state budget deficits. Connecticut is no exception.

With little or no public fanfare, Connecticut took an important step in gaining control over escalating drug costs when the state legislature passed a preferred drug formulary. The formulary requires pharmaceutical companies to provide the state with "supplemental rebates" above and beyond those already mandated by federal law for prescription drugs provided under the Medicaid law. The pharmaceutical industry is suing to stop the U.S. Department of Health and Human Services from approving these kinds of rebate plans; the pharmaceutical industry contends the states are violating federal law by establishing drug formularies based upon the cost of drugs, not the efficacy of the medications. But the whole point of a preferred drug formulary is to contain costs, so naturally the price of drugs—on and off the formulary—should be relevant.

Connecticut had to take some step to contain its cost of providing state-supported prescription drugs. A presentation at a 2001 meeting of the International Society for Pharmaceutical Economics and Outcomes Research, available on the Internet at [http://www.ispor.org/meetings/va0503/presentations\\_pdf/poster/PHP17.pdf](http://www.ispor.org/meetings/va0503/presentations_pdf/poster/PHP17.pdf), showed the national average cost for the top five main-

tenance drugs prescribed through Medicaid was \$1200/person. However, the cost in Connecticut for these same top five Medicaid-supplied drugs was \$2,732/person. Clearly, Connecticut needed a range of different financial controls to bring its prescription drug costs in line with the national average. The two main forms of price controls adopted in Connecticut were the drug formulary and the prior authorization plan.

The preferred drug formulary and the prior authorization plan apply to Connecticut's Medicaid, General Assistance, and ConnPace programs. The state legislature exempted a certain class of drugs, i.e., atypical antipsychotic drugs, from the preferred formulary. In Connecticut, a pharmacist shall not dispense any initial maintenance drug prescription for which there is a generic substitute without obtaining prior authorization from the state's Social Services department. These two price control measures have enabled Connecticut to exercise modest control over state spending on prescription drugs. That is good news for Connecticut taxpayers and the CCM.

But Connecticut still faces challenges on the health care front. The National Alliance for Mental Illness reports Connecticut has (1) 6000 people who are homeless and mentally ill, (2) almost 2600 people with serious mental illnesses in nursing homes, (3) over 12% of the CT prison population with serious mental illnesses and over 70% with addictive disorders, and (4) emergency rooms overflowing with children and adults in crisis with no place to go. "Yet, the [Governor's budget] has proposed eliminating all medical help for poor, single adults, slashing medical insurance for working poor families, cutting community health centers, and several more pages of reckless cuts and fees imposed on people who survive at less than 50% of the federal poverty level," according to the Connecticut chapter of the National Alliance. Traditionally, neither the county nor the municipal governments have been required to pay for medical services for the poor and those without insurance. However, county and municipal facilities will feel the impact, directly and indirectly, of state budgetary cuts in health care services.

Outside of health care expenditures, Connecticut is facing the same budget deficit environment as the other forty-nine states. The downturn in the economy has meant less tax revenues were collected from all sources. At this point, Connecticut needs to focus on reshaping its tax and spending habits in a way that induces future economic activity, rather than focus on even more ways to tax the citizens of Connecticut. In this regard, Connecticut has received very poor advice from Governing Magazine and its associated web site, governing.com.

In a special report entitled "Grading State Tax Systems," governing.com offers a prescription of forcing income taxes on states that don't

have them and raising these taxes for states that do. The report is not an objective piece of public finance analysis. It is propaganda for a pro-tax, bigger government services, bigger government spending agenda. The report ranks every state without a state income tax as ipso facto unfair and regressive in its tax structure. The absence of debilitating state income taxes in no way establishes the unfairness of a state's revenue tax stream, as evidenced by the fact that polls show both rich and poor, Democrat and Republican, young and old, favor the status quo over the introduction of a state income tax. The ipso facto conclusions of governing.com are nothing more than unsubstantiated ipse dixit.

The governing.com report emphasizes that elected officials should never give the taxpayers an opportunity to vote on tax increases or new forms of taxation. Instead of government of the people, and by the people, and for the people, the governing.com report adopts the position that government should come at the people and try to sock them with as many taxes as necessary to achieve a desirable level of local and state public services. Never, never give the citizens a chance to vote on tax increases, governing.com advises its readers, because citizens will routinely and consistently vote to keep taxes down. The premise of the governing.com report is un-American, undemocratic, and unsupportable.

Consider the report's unabashed endorsement of Connecticut's state income tax: "What's more, there's a widespread belief on the part of many voters that any change is going to hurt them. A little more than a decade ago, that was precisely the situation in Connecticut, which did not have an income tax but did have high taxes on all sales, corporate profits, utilities and estates. There were recommendations to acquire an income tax, but governors Ella Grasso and William A. O'Neill both took 'the pledge' to make sure that such a thing would never sully the liberty-loving citizens of the Nutmeg State. Residents who would have clearly benefited from the new tax dreaded it, believing those who predicted that once it was installed, it would just be raised and raised again until it didn't pay to get out of bed and go to work in Connecticut."

"As existing taxes skyrocketed, Governor Lowell Weicker pushed for the new tax. He was burned in effigy, but he and a courageous group of legislators worked to bring the new income stream into existence in 1991. And, despite all the dire predictions, the income tax seems to have given Connecticut a balanced tax system for the first time. 'In 1990, we had a sign on the door, don't invest here, don't form a corporation here and don't retire here,' says Connecticut state Senator William Nickerson, the ranking member of the Finance, Revenue and Bonding Committee. 'Tax reform took away significant disincentives.'"

Similarly, governing.com goes on to state, "Today, Florida, Tennessee and Texas are all facing serious financial

problems. They don't have an income tax. And leaders in these states have taken 'the pledge' to make sure they don't get one." The governing.com piece offers these types of assertions without any proof. Today, the budget crises in Florida, Tennessee, and Texas are in fact far less perilous than most of the states that have state income taxes.

The absence of a state income tax in Tennessee was cited by Nissan Corporation as one of the quality of life factors it considered for its workers when it decided to build a large plant in Smyrna, Tennessee, to produce the Nissan Altima and other vehicles. Similarly, the absence of a state income tax and the quality of life for workers was cited by General Motors in its decision to locate the Saturn production plant outside Nashville, Tennessee. Just last month, Toyota announced that it would build a \$100 million dollar parts factory in Tennessee. When was the last time any major automotive manufacturer announced plans to build a plant in Connecticut? If the citizens of Connecticut believe the comments of state Senator William Nickerson that the introduction of Connecticut's state income tax encouraged business and economic activity, then they can marvel at Connecticut's current economic plight and the disarray in the state budgeting process.

Tennessee is a long state in the shape of a parallelogram with common borders to eight states: Arkansas, Missouri, Kentucky, Virginia, North Carolina, Georgia, Alabama, and Mississippi. Each of the eight states bordering Tennessee has a state income tax. Each of the states bordering Tennessee pledged to keep their state sales taxes low in exchange for having a state income tax. In fact, each of these states has raised its sales tax rates slowly over time along with raising the rates on income taxes. The very piece of advice offered by polemics at governing.com and Governing Magazine, that critics of income taxes were flat out wrong when they charged "that once it was installed, it would just be raised and raised again until it didn't pay to get out of bed and go to work" has indeed been borne out by evidence with each of Tennessee's border states.

The citizens of Tennessee view with a mix of contempt and amusement the newspaper stories coming from its neighboring states that, once again, politicians have had to face tough choices and raise the state income tax rates. In 2001, with talk of raising the state income tax rates even higher in North Carolina, angry citizens used to drive by the state capitol building in Raleigh and just blow their horns. The same was true in Tennessee in the late 1990s when the lame-duck governor, Don Sundquist, tried to force the legislature to adopt a state income tax. Do the members of the CCM want their constituents so angry with them that they are blasting their horns and shaking their fists in protest, or do they want a calm and rational discussion about the state budget and its priorities?

Like it or not, Connecticut borders Massachusetts. Ever since Michael Dukakis was the standard bearer for the Democratic Party's 1988 presidential campaign, Massachusetts has been repeatedly dubbed "Taxachusetts" in articles appearing in the national press. The rest of the country views Massachusetts and its neighbors in the Northeast as demanding a very high level of state and local public services, and taxing the daylight out of its citizens to pay for these expenditures. At this juncture in November 2003, it is important for Connecticut to try to distance itself from the woes of its neighbors with government spending barely under control and foster instead a new image of government accountability.

Once again, the CCM cannot learn about government accountability from either *Governing Magazine* or *governing.com*. The special report on state tax systems decries giving voters and taxpayers any direct or meaningful say in tax and spending plans. As evidence that ordinary citizens are irrational and automatically vote down any tax increase, *governing.com* offers the following evidence. "In the first half of the 20th century, many voter initiatives focused on new programs and increased spending. But in the last half of the century, the pendulum moved in the other direction. A study of voter behavior by Bill Piper, of the Initiative and Referendum Institute, shows that from 1978 to 1999 there were 130 tax initiatives on statewide ballots. Roughly two-thirds of them were anti-tax — cutting, eliminating or limiting taxes in some way. Of these, 41 passed. The numbers for more recent times are quite dramatic. A whopping 67 percent of all 'anti-tax' initiatives on the ballot between 1996 and 1999 passed."

Where *governing.com* finds evidence of taxpayers killing off any reasonable compromise with a tax increase, others would see our democratic ideals alive and at work. Why were politicians bombarding the citizens with 130 tax initiatives on statewide ballots? Why didn't politicians wait for the public outcry for government services to match the politician's spending preferences? Does anyone believe that the 130 tax initiatives were good ideas and would have benefited the statewide societies as a whole? The state of Florida passed a state income tax, and the citizens of Florida went into open revolt. The Florida income tax was hastily repealed, and this experiment in unrepresentative government wasted millions of Florida taxpayer dollars to set up and then dismantle the state income tax apparatus.

And if that were not enough, the *governing.com* reports goes on to blast one of the major grassroots initiatives spreading across the country: the Taxpayer Bill of Rights (TABOR) movement. "When citizens put their hands directly on the tax levers, it often gets much harder for states to pay the bills. California, whose Proposition 13 became the poster boy for hobbling ballot box measures, is just one name on a list of states that are choking on tax policies put in place by voters. Washington, Oregon and Colorado are just a few of the others confronted with adequacy prob-

lems thanks to these measures. These maneuvers not only have been influential in changing individual taxes but also in paralyzing state legislatures and local governments."

Once again, the *governing.com* special report is filled with propaganda and very little evidence to support its conclusions. A case in point is Colorado. Within the community of state and local governments, Colorado is known for having a state TABOR. As such, it has been an experimental laboratory, exactly as the framers envisioned with our federalist form of government, for showcasing to other states the economic impacts of a TABOR. Contrary to the *governing.com* report, Colorado has enjoyed economic growth rates since passing its TABOR that exceed the national economic growth rate.

Colorado added a TABOR to its constitution circa 1992, and the measure remains very popular with Colorado residents today. Under a Bill of Rights, Colorado has refunded a billion dollars of surplus revenue to its citizens. Beyond its effectiveness at controlling government expansion, the Colorado "Bill of Rights" has proven a definite plus for Colorado's economy.

Colorado Governor Owens recently suggested to California's then Governor-elect Schwarzenegger that California should make "a Taxpayer Bill of Rights its highest priority, because it works." News about Governor Owens phone call to Arnold Schwarzenegger made the national news in the print media and was featured on evening network news broadcasts. If the TABOR were such a terrible straightjacket on the state government of Colorado, as *governing.com* claims, why would the incumbent governor recommend it to his fellow governors?

The TABOR in Colorado has been such a success that numerous states are now considering similar constitutional amendments. During the 2002 gubernatorial campaign in Maryland, the liberal-leaning Baltimore Sun opined in an open editorial to both major party candidates that Maryland should consider adopting a TABOR. Georgia already has a TABOR, although Georgia's TABOR is limited to property tax assessments. In Tennessee, state Sen. Jim Bryson has introduced a bill to add a TABOR to the state constitution. If adopted, Bryson's bill would (1) cap (except in emergencies) increases in state spending to a formula which factors in: inflation, population growth and tax increases previously approved by voters; (2) require future increases in state tax rates to be approved by the public in referendums; and (3) refund excess state revenues above this cap back to state taxpayers.

Bryson's bill can be viewed at <http://www.legislature.state.tn.us/bills/currentga/BillCompanionInfo.asp?BillNumber=SJR0088>. More information is available at Senator Bryson's website ([www.SenatorBryson.org](http://www.SenatorBryson.org)), at the Tennessee Taxpayer Bill of Rights website ([www.TNTABOR.org](http://www.TNTABOR.org)), and at the Tennessee Tax Revolt website ([www.tntaxrevolt.org](http://www.tntaxrevolt.org)).

State Sen. Bryson traveled to Colorado in October 2003 to see first hand the effects of Colorado's TABOR on that state. While there, he met with the Colorado senate majority

leader and the deputy director of the governor's budget office to learn whether the TABOR was good or bad for Colorado's state government. "Both thought it had made the state more efficient and more responsive to the people of Colorado," Bryson said.

In a head-to-head comparison, Colorado under a TABOR has consistently beaten Tennessee's economy. In the 1990s, Colorado per capita income grew at a rate of 51%, compared to 38% growth in Tennessee. The number of jobs increased 32% in Colorado, compared to 17% in Tennessee. Colorado's gross state product increased by 79% compared to 49% in Tennessee.

In referring to Tennessee's tendency over the last two decades of passing tax increase after tax increase, Bryson noted in a recent speech in Oak Ridge, Tennessee, "Enough is enough. The Tennessee Legislature has overridden spending controls within the Tennessee State Constitution in eleven of the last nineteen years. We need to address this problem systematically."

Bryson observed that Tennessee spending has grown substantially faster than taxpayer paychecks over the last few years. Tennessee personal income has risen at an average annual rate of 5.5%, edging out inflation that grew at 3.3%. However during the same period, Tennessee spending increased at an average of 7.6% per year, according to Bryson. In addition, Tennessee's rainy day fund for real emergencies is currently very low.

Had a TABOR been in place, the Tennessee spending growth would have been held to just 4.5% per year and the state's emergency reserve would have been increased to (and maintained at) 5% of revenue, according to Sen. Bryson. He also emphasized the value of a TABOR to government efficiency. He pointed to the protracted waste of time and wrangling that Tennessee's last Governor and legislature spent over the best way to raise taxes. In the end, a billion dollar tax increase was passed, which raised sales taxes to 9.75% in many areas of Tennessee. A TABOR would have brought this matter to a conclusion much faster. It also would have also provided substantial incentive to government officials to find less

expensive alternatives.

"A Taxpayer Bill of Rights helps government face its tough decisions," said Sen. Bryson. "People walk into my office every day with proposals for new state programs."

The town of Spring Hill became the first community within Tennessee to adopt a local TABOR earlier this year, following the example set by a few towns and counties in Nevada. According to local officials, the Spring Hill measure brought with it an almost immediate economic boost in a manner very similar to that seen in Colorado. The idea of moving to a location where citizens are allowed to vote on tax increases proved to be a potent marketing advantage for the town.

"Beyond its potential economic advantages, a 'Bill of Rights' also brings important accountability benefits to citizens," said Martin McBride, Spokesperson for the Oak Ridge (Tennessee) Accountability Project. "The act of having to explain a tax increase directly to the public really helps government officials focus better. It reminds them that tax money is a precious commodity and it motivates them to work to make government more effective and more efficient. This in turn lowers costs, builds citizen trust, and fundamentally strengthens American government."

Connecticut needs to study and compare its economy to that of Colorado under a TABOR. If the numbers are as unfavorable as those for the head-to-head comparison in Tennessee, then Connecticut could do well to broach the idea of a TABOR in its state legislature, capitalize on the groundswell of public support the proposal would likely engender, and create a business and economic climate in which businesses would associate Connecticut with reasonable and evenhanded taxes. CCM can take the lead in this effort by sponsoring a series of town hall meetings with roundtable discussions on the advantages and disadvantages of a TABOR. More than finding some new scheme to extract money from the state and local governments, the CCM would do itself and its citizenry an enormous favor by enabling citizens to participate more directly in the government's spending plans at the state and municipal level.



*Bush really loaded up that Medicare Bill with sleepers, didn't he?*

# LETTERS TO THE TIMES.

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## *Gov't Accountability, Taxpayer Rights*

### THE EDITORS:

Why does Tennessee need a constitutional amendment to require approval of ALL state tax increases by direct voter referendum?

- Because in the TN General Assembly there are 533 lobbyists who are paid an estimated \$24 million yearly to represent everyone except taxpayers. Most of these lobbyists have one objective: to get as much money out of your pocket as possible.
- Because the \$24 million paid to lobbyists is an estimated figure. Tennessee is one of only two states that doesn't require disclosure of money paid to lobbyists.

- Because the leadership of the TN General Assembly refuses to apply the Sunshine law to itself. They made it apply to all other areas of government except the General Assembly.
- Because the leadership of the TN House of Representatives refuses to support bills which require committee votes to be recorded. You read that correctly, when the TN House votes in committee to spend over \$20 billion dollars, they refuse to require recorded votes.

Do you think Taxpayers receive fair treatment? It's TIME for a Tennessee Taxpayer Bill of Rights. For more information, please see the web site [www.TnTaxRevolt.org](http://www.TnTaxRevolt.org).

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## *Debtors' Prisons*

### THE EDITORS:

I am writing you in the hope that some attorney will read this letter and represent me. I am the noncustodial father of three children: two daughters who live just north of Chattanooga and a son who lives in Morristown. Currently, the amount of child support I must pay is excessively high and not compliant with the Tennessee child support guidelines.

In April 2003, I filed a petition to modify the custody order pertaining to my daughters in Chattanooga. One of my daughters was born with a birth defect, and her mother was not ensuring that my daughter maintained proper hygiene. Her mother responded with a counter-complaint asking the court to find me in contempt for failing to pay all of my child support. In August 2003, the Hamilton County Circuit Court held a hearing and ordered mediation. The judge also said that I would go to jail if I did not pay child support.

Because I was threatened with jail, I filed an affidavit of indigency and a motion for appointment of counsel on Sept. 11, 2003. A hearing was held on Sept. 15, 2003, and I was permitted to testify by phone. The judge denied my motion for appointment of counsel. The judge sentenced me to jail for 10 days, suspended the sentence, and said she would reserve her ruling on contempt.

On Sept. 30, 2003, I filed a motion to amend the judgment. The court's order made no sense. The judge sentenced me to jail but did not find me in contempt. She said I lacked credibility, but she could not state one single fact that contradicted any portion of my affidavit of indigency, which showed that I earned approximately \$700/month. Her order was filled with various numbers on child support. The judge could not explain any of the amounts, because she just rubberstamped whatever the child support attorney wrote in the order for her to sign.

Based on my poverty, and the fact that water to my home had been shut off because of my inability to pay that bill, my ex-wife filed a petition to deny my visitation with my daughters on Oct. 7, 2003. I told my ex-wife that I planned to take my daughters on visitation weekends to my parents'

home in Cleveland, TN, which has adequate guest bedrooms for all of us. But these facts were conveniently and intentionally left out of her petition.

I filed an opposition to the petition on Oct. 14 and asked the court to let me testify by phone. On Oct. 20, 2003, due to circumstances (read poverty) beyond my control, I was unable to travel again to Chattanooga for the motion hearing. The morning of the hearing, I pleaded with the Court to allow me to testify by phone, but to no avail. The motion was reset for Nov. 3, 2003. On Oct. 30, 2003, I submitted a notice to the court stating why I could not be there for the Nov. 3 hearing, and once again repeated that my written opposition contained everything that I could possibly say in person.

The judge decided to punish me for failing to attend the Monday, Nov. 3 hearing. Judges don't seem to appreciate that if a laborer does not show up for work on Monday, he is in danger of losing an entire week's amount of work when a crew is assembled. The judge denied my motion to amend her judgment of Sept. 15, which is now being appealed. Furthermore, Judge Marie Williams did not even sign any order compelling me to attend the hearing on Nov. 3, 2003, until a day after the hearing was heard. If you don't believe a judge would act so maliciously, then I would be happy to send you a copy of her order entered on Nov. 4, 2003.

To make a long story short, I was arrested and jailed on Saturday, Nov. 8, 2003, when I traveled to Morristown to visit my son. Bail was set at \$5,000, and I was transferred to Hamilton County. I did not have money to make bail. Judge Marie Williams' arrest order said I would have to remain in jail until the next court hearing date, Dec. 8, 2003. Tennessee is supposed to limit the time a person can be punished with contempt to 10 days in jail. My landlord and two friends in Chattanooga raised the 10% bail amount, and I was released from jail on Sunday, Dec. 9, 2003.

I have now filed a notice of appeal to the Tenn. Court of Appeals and separately filed a complaint against Marie Williams and Hamilton County. I am having a hard time finding an attorney with the courage to allege abuse of contempt power by a sitting judge. I believe the following case is directly relevant to my situation: "Due process requires that the contemnor's rights to notice and a hearing be respected. It is much more difficult to argue that action without notice or hearing of any kind is necessary to preserve order and enable the court to proceed with its business, particularly in view of the heightened potential for abuse posed by the contempt power." *International Union, UMW v. Bagwell*, 512 U.S. 821 (1994).

Judge Marie Williams executed an arrest warrant for me even though she had zero personal knowledge of any material facts that contradicted my affidavit of indigency. Her honor refuses to follow the Supreme Court. "Alleged contempts committed beyond the court's presence where the judge has no personal knowledge of the material facts are especially suited for trial by jury. A hearing must be held, witnesses must be called, and evidence taken in any event. And often . . . crucial facts are in close dispute. Such contempts do not obstruct the court's ability to adjudicate the proceedings before it, and the risk of erroneous deprivation from the lack of a neutral fact finder may be substantial. Under these circumstances, criminal procedural protections such as the rights to counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due process rights of parties and prevent the arbitrary exercise of judicial power." *International Union, UMW v. Bagwell*, 512 U.S. 821 (1994).

I witnessed Marie Williams preside on the bench for three hours one morning. She behaved in such a way that she treated everyone who came before

her as already guilty before she even heard what they had to say. Judge Williams routinely assigns people to debtor prison. I was denied my right to notice of a hearing and an opportunity to be heard. The courts can get away with it, because most of the affected citizens, like me, are too poor and too scared to know how to stop it.

When I talk to fathers in similar circumstances, they agree that the child support enforcement offices and child support judges can get away with anything. That means Tennessee parents with child support obligations are not protected by the U.S. constitution. Instead we are treated like trash and forced into sham trials, just like Communist China, and then sent off to debtor prison regardless of our poverty.

TIMOTHY WAYNE WOODFIN  
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Clinton, TN 37716  
(865) 591-8374

*Mr. Woodfin lodged a federal civil lawsuit against Judge Marie Williams on Friday, Nov. 14. As of press time on Nov. 24, Judge Williams had refused to recuse herself from his state court case. A call to the office of the Tennessee Court of the Judiciary confirmed that in Tennessee, judges are not required to recuse themselves from a case even if they are being sued by one of the parties appearing before them. Judges who are sued by a party can still function as neutral, impartial, and unbiased triers of law under the Code of Judicial Conduct in Tennessee.*

## *Granny Grabbing*

### THE EDITORS:

I'm working out of my state (with a firm that scupulously handles elder law issues) and was interested that your first issue would focus on an issue I dubbed "granny grabbing." Most people don't know there is public as well as private grabbing when the dowry is big enough.

One of my first connections with both false reporting of Adult Protective Services and how it covers some nursing homes (if not doctors) was through a call from an attorney I'd worked with in Northern Virginia. People find the private granny grabbing really intriguing, but if they knew about the public grabs and who gets what because of it, I HOPE they will be surprised and horrified.

I've also called it the worst of the sandwich generation: people working overtime to pay taxes to agents of the state to "protect" their aging parents and their own progeny from THEM. What a world! It is past time for common sense and sanity to prevail over the current trammeling of the Bill of Rights protections for those who are accused or "suspected."

Your article on Tennessee's Department of Human Services (DHS) is excellent. I hope it will be the beginning of plenty of articles for Tennessee lawyers, state legislators, and the public to discuss and take steps to end the free passes for DHS and others who constructively traffic in human flesh.

DHS is backed in this behavior by adjunct professionals and aspects of the judicial system that blindly endorse whatever petitions DHS might offer a court. There is a kind of unholy backscratching never anticipated in the Bill of Rights.

The article is very well written. I hope it inspires attorneys to describe their own experiences and frustrations. It matters so much for good attorneys who care about who rarely, if ever, are allowed to win on facts or law (since administrative agencies have their shadow systems minus accountability and constitutional law) to know that shared experience and exposure of trafficking can ultimately tame such heart-breaking and home-wrecking practice.

BARBARA BRYAN  
Roanoke, VA

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