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October 15, 2009

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue, North
Nashville, Tennessee 37219-1407

RE: Supreme Court Order
Docket No.: M2009-01985-SC-RL2-RL

Dear Mr. Catalano:

I have received a copy of the Supreme Court's recent Order requesting comments on changes to Rules of Practice and Procedure. Pursuant to that Order, I understand comments are to be sent to you, to be submitted to the Supreme Court for consideration.

First, I would like to point out that in my 40+ years of practicing law, I have historically represented generally equal numbers of Plaintiffs and Defendants. I have also been on the deciding end of cases, serving as General Sessions Judge for over 20 years. My comments are a conglomeration of ideas taken from these three (3) perspectives.

RULE 3 AMENDMENT. Although it escapes me, apparently someone has found some seemingly obscure problem with the issuance / service of summonses. I cannot think of any reason a summons would not issue at the time of the filing of a complaint. However, once that summons is issued and turned over to a process server, it can easily get lost. Unfortunately, the various official process servers don't always promptly respond. That is out of the filing attorney's hands at that time. There is yet another Statute of Limitations *(potentially fatal)* which starts to run. Since this amendment would serve only a very limited purpose, it seems like a dangerous and unnecessary trap directed at Plaintiff's attorneys. The language of the proposed Amendment to Rule 4 would seem to adequately cover any intentional malfeasance by Plaintiff's counsel.

PROPOSED RULE 26.02 (2). I certainly applaud the Supreme Court for proposing this long overdue rule change. Since I frequently represent Insured Defendants, as well as Plaintiffs, I see absolutely no drawback to this Rule. There is some mysterious unwritten policy that some

insurance companies will not allow the disclosure of the policy limits in a timely manner. This does a significant disservice to both the Insured and the Plaintiff since it can't possibly result in anything other than more protracted litigation. As both Plaintiff and Defense Counsel will likely attest, some cases need to be settled at an early date. In 70+% of the cases, the insurance policy limits are completely inconsequential. In approximately 20 to 30% of the cases, the insurance policy limits can be a significant factor. In 10% or more of the cases, an early disclosure of the insurance policy limits will force the Plaintiff's counsel to avoid costly discovery or litigation. For example, I recently represented a seriously injured Plaintiff who had accumulated $35,000 in medical bills. Three (3) years later, after extensive discovery, a certain very powerful insurance company disclosed it had the limits of $25,000 that were tendered a few days before trial. I am reasonably certain that the three (3) years of litigation cost the parties at least $50,000.

Also lost in the shuffle is the possibility that a Defendant has no insurance. A required early disclosure would profoundly impact this litigation. I recently learned in the course of pre-trial mediation, that there was no insurance coverage available to satisfy a judgment for the Plaintiff.

PROPOSED RULE 37.03. Again, I applaud the Supreme Court for proposing this Rule change. In my practice as a Defense Attorney, nothing is worse than a last-minute disclosure of information sought many months previous.

Many thanks to the entire Supreme Court and those who labored to suggest the proposed Rules changes.

Very truly yours,

Donald J. Ray

DJR / kdh

The Memphis Medical Society

October 12, 2009

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

RE: Proposed Tennessee Rule of Civil Procedure, Rule 26 change

Dear Mr. Catalano:

The advisory commission on the Rules of Practice & Procedure has recommended amending Rule 26.02 to allow a party to obtain discovery of any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. As a member of the public sector, I strongly oppose such an amendment.

First, the existence or non-existence of insurance has no relevancy to the issue of liability and damages. Liability insurance coverage is not admissible as evidence at trial and inquiry concerning such insurance is not reasonably calculated to lead to the discovery of admissible evidence. Insurance coverage has no general relevance to the merits of a lawsuit.

Second, the broad purpose of the discovery rule is to enable parties to prepare for trial and to prevent trial by ambush. However desirable it may be to the judiciary to expedite settlements and relieve calendar congestion, the discovery of insurance will not provide information necessary for the trial of any case. It is not relevant to the merits of a lawsuit.

Third, although not stated by the committee, the only possible purpose in amending the discovery rule as to insurance information is to encourage settlements and relieve calendar congestion. While low insurance limits may expedite settlements, disclosure of high limits will slow or prevent any settlement. The value of a case will be determined not on the actual case but on the limits available. It would not serve to level the playing field but would give the plaintiff an unfair bargaining advantage over the defendant. The ability to pay has no relation to liability. Such information can be highly prejudicial to the question of liability. Introducing ability to pay into the discovery process confuses liability with the availability of money.

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The financial status of a party is not relevant in most cases. The argument for disclosure of insurance limits can also be made for the disclosure of personal financial information in any civil case, tort or contract. This would be not only a violation of the individual's right of privacy but also changes the entire focus of the Tennessee jurisprudence from the rights of the parties to the ability to pay. The Courts are trying to circumvent the legislature's determination that insurance is not discoverable. The only benefit to changing this rule will be to the plaintiff's bar. This change will not serve to decrease the number of suits filed. It will only serve as a detriment to any discussions as to settlement and negotiation. Cases that should be settled for a reasonable amount will proceed to trial because the plaintiff will hold out for policy limits. The disclosure of policy limits hinders rather than promotes settlements.

Finally, Tennessee law has been developed over more than two centuries and ingrained in our law is the concept that any amount awarded to a plaintiff by a jury should be related in some manner to the injuries that the plaintiff has proven he/she has suffered. The value of a case should be determined on the merits of the case, not the defendant's insurance limits. Invariably plaintiffs, at the outset of litigation, demand policy limits that rarely reflect any relationship whatsoever to the intrinsic value of damages alleged. The negotiation of any settlement will be adversely affected by the knowledge gained by the plaintiff regarding the limits of the insured's policy causing settlements to actually become a rare event and the cost of insurance increasing.

To allow discovery of insurance limits will allow the amounts of coverage to become public knowledge. For the physicians who carry large amounts of insurance this raises the spectra that they will become targets because of the potential "deep pocket" aspect. This would be a disincentive to any physician to purchase insurance beyond the minimum required for hospital staff privileges.

The proposed change to the discovery rule allowing for discovery of insurance will make the system more adversarial and lengthy as plaintiffs see larger dollar amounts dancing before their eyes. We urge the Court and Rules committee to abandon plans to amend Rule 26.02 by adding this provision.

Sincerely,

Clarence Watridge

Clarence B. Watridge, MD
President

CBW/jpc

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October 20, 2009

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Amendment to Rule 26.02 Tennessee Rules of Civil Procedure
M2009-01985-SC-RL2-RL

Dear Members of the Court:

I am writing to voice my objection to the proposed change to Rule 26.02 of the Tennessee Rules of Civil Procedure to allow early discovery of an individual's insurance liability limits in all cases. I believe amending the Rule to allow discovery of information clearly inadmissible in court sets a dangerous precedent. Further, I am concerned that the reputation of the legal system will be further damaged by focusing on the amount of money which may or may not be available rather than the cause of the accident and the actual damages incurred.

Most agree that insurance is normally not relevant in civil damage actions, otherwise this amendment would not be necessary. Justice Alan Highers of the Tennessee Court of Appeals, Middle Section, writing for the court in Baker v. American Paper (unpublished opinion dated January 27, 2000), reasoned that Rule 26 limits discovery to either relevant information or information that will lead to admissible evidence. Addressing the issue of the discovery of insurance limits, Justice Highers found that neither prong was met, stating:

> "Relevant" information under Rule 26.02 is information that is relevant to the subject matter of the litigation. In this case, the existence and monetary limits of any liability insurance policy does not relate to the subject matter in the underlying case, namely the actual accident. The second prong of 26.02 allows for discovery of information that will lead to admissible evidence. Again, the existence and limitations of Defendant's insurance policy does not fit within this prong. Insurance information is generally not admissible, and there is no logical connection between the information and the discovery of admissible evidence.

Id. at pages 5 and 6.

Although the Court's opinion was later withdrawn for other reasons, it succinctly states the current law on discovery of insurance in Tennessee.

Since insurance information does not relate to the subject matter and does not lead to admissible evidence, the proposed amendment simply lifts up one inadmissible area of inquiry and requires it to be disclosed. This is a major deviation from the basic premise of Rule 26 and a dangerous precedent.

The question is who is most served by release of this private information - the claimant or the attorney representing the claimant on a contingency fee? Obviously, an injury such as a broken arm should have the same compensatory value regardless of the availability of insurance. Attorneys commonly use special damages (such as medical bills and lost wages) as a benchmark against which to calculate a figure for the more elusive pain and suffering damages. As a result, the more the specials the more the value of the total claim, and, of course, the compensation to the attorney who is to be paid a percentage of the recovery. Discovery of insurance policies and limits without any other showing of relevance sets a target for which the plaintiff and his attorney may shoot. Although a clear violation of ethical rules, all litigation attorneys are aware of ways to build special damages. While the plaintiff may profit financially from continuing to miss work for repetitive and unnecessary medical care, he still pays a price in inconvenience and lack of medical progress. Only the plaintiff's attorney has nothing to lose by encouraging his client to continue to incur additional special damages, and much to gain.

Proponents of this change seek to make this an insurance industry issue even though a defendant's private and inadmissable information is at stake. Others may dismiss my concerns as tainted by the fact that I serve as General Counsel for Tennessee's largest domestic property and casualty insurer. However I believe our profession's integrity is at stake in this matter. Already our profession is portrayed as "money hungry" and the proposed amendment would exacerbate the problem. In those instances where insurance is truly relevant and at issue, Tennessee courts have allowed its discovery. I respectfully urge the Court to reject this proposed amendment.

In the interest of brevity I am limiting my comments to those raised above, however, I have attached letters from three other well respected Tennessee attorneys who discuss additional concerns for the Court to consider. If deemed necessary, I would welcome an opportunity to address the Court in person regarding this proposal. Thank you for your consideration.

Yours,

Ed Lancaster, General Counsel
BOP #11034

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February 18, 2009

VIA REGULAR MAIL & FACSIMILE 931-840-8640

Edward K. Lancaster, General Counsel
TENNESSEE FARMERS MUTUAL INS. CO.
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Columbia, TN 38402-0998

Re: Discovery of Liability Insurance Policy Information

Dear Ed:

I have reviewed the recent Supreme Court Opinion in Thomas v. Oldfield, which was filed February 2, 2009. I have been practicing law for 33 years, all of it in the field of civil litigation where the issue of discoverability of the defendant's liability insurance would arise. I strongly disagree with the Opinion of Justice Holder stating "that the time has come to align Tennessee with the rules in forty-eight states and the Federal Rule in allowing discovery of (insurance)."

First, over the last 33 years I have had many cases in state court where plaintiffs' counsel sought voluntary disclosure of this information about insurance. In each case my client, the policyholder, objected to disclosure of information relating to insurance coverage because of the client's right to privacy. In short, the client/policyholder's contract of insurance with Tennessee Farmers or any other carrier is none of the plaintiff's business. As the Supreme Court concedes, information relating to insurance "ordinarily cannot be considered, and would not lead to information that could be considered, by a court or jury in deciding any issues", citing the Unites States Supreme Court in Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).

Second, Justice Holder reaches an unfounded conclusion:

> First, discovery of insurance coverage will encourage mediation and settlement of cases by enabling counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation.

This is erroneous. A realistic appraisal of a case is based on the assessment of two factors. The first factor is defendant's liability or lack of same, which includes liability in tort cases based on

negligent conduct, and liability in contract cases based on breach of contract. The second factor is plaintiff's damages. The existence and amount of liability coverage have nothing to do with a determination of fault, or breach of contract, or the extent of plaintiff's damages.

Moreover, there is no reason to encourage mediation and settlement of cases where the defendant is not at fault. The fallacious notion that all cases should be mediated and settled simply leads to the filing of baseless and frivolous lawsuits upon the premise that an insurer will pay some amount of money to settle a claim, even if its policyholder is not at fault. The result is to drive up the cost of insurance for all policyholders.

Third, discoverability of insurance will benefit only the plaintiffs, i.e. persons bringing lawsuits. Compulsory disclosure of information relating to liability insurance will **not** benefit a defendant/policyholder in any way. It will only serve to provide leverage to plaintiffs' counsel to force a settlement. Our Supreme Court has issued several opinions over the last four years enlarging the rights of plaintiffs to sue and to recover damages. The Supreme Court's favoring discoverability of insurance is very pro-plaintiff and consistent with this recent trend.

Fourth, in cases where the defendant is insured under a minimum limits policy, discovery of that information would motivate plaintiffs counsel to do less in the representation of his client, such as expending money for medical proof, because of the notion that the case does not justify a greater expenditure of time and effort and money on behalf of the plaintiff. The tendency would be for plaintiffs counsel to be more zealous if they know there are high limits of coverage and less zealous where there are lower limits of minimum limits of coverage. In addition, frequently when a lawsuit is filed, the plaintiff is still seeking and receiving treatment for injuries. If plaintiffs counsel is able to discover that the defendant has high limits of insurance, he and/or the plaintiff will be motivated to extend the plaintiff's treatment and run up medical expense in the hope of increasing the value of a plaintiff's case. This clearly should be against public policy in Tennessee and runs afoul of Rule 1 of Tennessee Rules of Professional Conduct.

Fifth, the contention that the insurer is the real party at interest is incorrect. Most lawsuits seek damages in excess of the defendant's liability coverage. Liability policies are contracts of indemnity, and it is the policyholder who is on the line and must help with trial preparation, attendance at depositions, and at trial. It is the policyholder who faces liability for a judgment in excess of his or her coverage. Concurrently, Justice Holder's statement that "it is the insurance company, rather than the defendant, that objects to the disclosure of the policy and its limits" is simply wrong. As noted above, I have never had a client who wanted their insurance coverage information disclosed except incident to a policy limits settlement offer when necessary to verify the limits of defendants' coverage where the damages exceeded the available coverage.

It is important to remember that maintaining a defendant/policyholder's right of privacy with respect to insurance coverage does not preclude a voluntary disclosure of information relating to liability insurance. For instance, in cases of liability on the part of the defendant/policyholder where plaintiff's damages are clearly in excess of the liability coverage, the defendant is free to disclose this information in connection with an offer of the policy limits to settle the case.

The reasoning that "the insurance company may prefer to gamble on a jury verdict of non-liability where the only one who stands to lose from that gamble is the policyholder" is unfounded. On the contrary, frequently it is our policyholder/client who wants to fight the case, knowing that he or she is not at fault, and not wanting their insurance rates to rise because the insurer pays "go away money" to the plaintiff. The duty of good faith owed by the insurer to the policyholder in connection with the evaluation and settlement of cases would not be affected or enhanced by disclosure of insurance coverage.

Sixth, plaintiffs seeking compensation for personal injury or property damage from an insured defendant are **not** third party beneficiaries of the defendant's liability insurance policy. A plaintiff may not establish third party beneficiary status until after entry of a judgment or agreed settlement which would trigger the insurer's responsibility to pay proceeds from the policy. Ferguson v. Nationwide, 218 S.W. 3d, 42, 56 (Tenn.Ct.App. 2006) Concurrently, the policy provides under **Legal Action Against Us**: "No person or entity has any right under this policy to bring us into any action to determine the liability of a covered person." The intent and tenor of this provision is that by contract Tennessee Farmers and matters of insurance will **not** be brought into a tort action seeking damages against an insured/policyholder.

Finally, the fact that 48 other states have made insurance discoverable is certainly no suggestion of progress or enlightenment. It is the plaintiff's bar and liberal courts who press for this change. As we are frequently reminded, change is not always progress. There is nothing fair, equitable, or ethical about changing the Rules of Procedure to allow discovery of this information which will work to the disadvantage of the parties sued in most instances.

Sincerely,

CAMPBELL & CAMPBELL

By: Michael R Campbell

MRC/mdj

Ed Lancaster

From: Andrew Owens [andrewowens@owenslawfirm.com]
Sent: Tuesday, February 10, 2009 2:37 PM
To: elancaster@tfbf.com
Subject: RE: Discoverability of Insurance Limits

February 10, 2009

Ed Lancaster
General Counsel
Tennessee Farmers Insurance Companies
147 Bear Creek Pike
Columbia, TN 38401

RE: Discoverability of Insurance Limits

Ed

I hope you are doing well.

I understand that you will be involved in debates/discussions dealing with the question as to whether or not Tennessee law should be changed to allow for discovery of a defendant's insurance limits in tort litigation. Please allow me to share with you my thoughts and perspective on this issue.

Currently, pretrial discovery is limited by rule 26.02 (1) of the Tennessee Rules of Civil Procedure to "*any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, ... It is not grounds for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*" TRCP 26.02 (1)

In the typical case with which you and I are frequently involved, at issue is fault and the nature and extent of damages or injuries, if any. Our Tennessee Supreme Court has recently confirmed that insurance information is generally unrelated to these issues and for that reason, not discoverable under current Tennessee rules of procedure. (James G. Thomas, Junior, Brother and Next Of Kin of Karen G. Thomas, Deceased V. Elizabeth --- S.W.3d ----, 2009 WL 304800 Tenn.,2009)

Federal Rules of Civil Procedure not only allow discovery of insurance limits, its disclosure is affirmatively required at the outset of litigation as part of the initial disclosures required by FRCP 26 (a) (1) (A) (iv)

The Tennessee Supreme Court in Thomas, while affirming that insurance limits were not discoverable under Tennessee's present law, voiced its displeasure with the state of such setting out its reasons for believing discoverability of insurance limits constitutes the better practice. The Supreme Court stated, in this regard, as follows:

> *Our decision today leaves Tennessee in the extreme minority of jurisdictions that have not amended or construed their rules to expressly provide for the discovery of a defendant's liability insurance coverage.*[FN10] *We are persuaded that allowing discovery of such information reflects the current realities of litigation and settlement of cases in Tennessee. First, discovery of insurance coverage will encourage mediation and settlement of cases by "enabl[ing] counsel for both sides to make the same realistic appraisal of the case, so*

that settlement and litigation strategy are based on knowledge and not speculation." Fed.R.Civ.P. 26(b), 1970 Amendment Note to Subdivision (b)(2); see also Hill, 30 F.R.D. at 66 ("The plaintiff's knowledge of defendant's insurance permits a more realistic appraisal of a case and undoubtedly leads to settlement of cases which otherwise would go to trial."). The majority rule is therefore in accord with the policy of the Tennessee Rules of Civil Procedure, "to provide for the just, speedy, and inexpensive determination of every action," Tenn. R. Civ. P. 1 (2008), and with this Court's commitment to make the process of dispute resolution in Tennessee "more efficient, more economical, and equally fair." See Order Establishing Tenn. Sup.Ct. R. 31 Regarding Alternative Dispute Resolution pmbl. (Dec. 18, 1995).

Finally, the insurance company is often the "real party in interest to the suit to the extent of its policy limits." Tuller, 886 P.2d at 484. Thus, knowledge of the insurance agreement is helpful to the plaintiff's attorney "to prepare for the case he has to meet and be apprised of his real adversary." Johanek, 27 F.R.D. at 278. In these cases, it is the insurance company, rather than the defendant, that objects to the disclosure of the policy and its limits. Tuller, 886 P.2d at 484. When it is in the defendant's interest to settle the case within the policy limits, the insurance company may prefer to gamble on a jury verdict of non-liability "where the only one who stands to lose from that gamble is the policyholder." Szarmack v. Welch, 318 A.2d 707, 710 (Pa.1974). Thus, it is beneficial to both the plaintiff and the defendant to engage in "purposeful discussions of settlement," Johanek, 27 F.R.D. at 278, and "[a]llowing discovery in such circumstances apprises the parties of information necessary to produce results fair to both sides," Tuller, 886 P.2d at 484. JAMES G. THOMAS, JR., Brother and Next of Kin of Karen G. Thomas, Deceased v. ELIZABETH OLDFIELD, M.D. et al. (Tenn.,2009)

My experience of 27 years in litigating these types of cases causes me to differ with the Supreme Court's articulated reasons for preferring discoverability. Please allow me to comment on each such reason articulated by the Supreme Court and my thoughts and experiences concerning same.

1. *"First, discovery of insurance coverage will encourage mediation and settlement of cases by "enabl[ing] counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation."* I have not found this to be true at all nor a logical consequence of the disclosure of insurance information. If, indeed as the court recognized, appraising the case involves issues of liability and damages, the amount of insurance available would be irrelevant. To the extent "litigation strategy" includes a treating plaintiff magnifying or exaggerating their damages and medical treatment, knowledge of large limits would certainly encourage less than honest behavior.

2. *Finally, the insurance company is often the "real party in interest to the suit to the extent of its policy limits." Tuller, 886 P.2d at 484. Thus, knowledge of the insurance agreement is helpful to the plaintiff's attorney "to prepare for the case he has to meet and be apprised of his real adversary.* The court goes on to say that oftentimes the insurer acts contrary to the best interests of its insured and that some how the disclosure of insurance limits would alleviate this. Again, this statement in my opinion bears little resemblance or application to the realities of defense litigation. Often times the ad damnum in a lawsuit is in excess of the insurance limits. Certainly the insured is a "real party in interest" in such a situation. In these "excess cases" it is my firm belief that arming the plaintiff with the knowledge of the defendant's liability limits places the defendant/insured in much greater peril of an excess judgment. With such knowledge, plaintiffs and their medical care providers will tailor (read "increase") the treatment so as to maximize recovery and more closely approach the insurance limits. In those cases, a good-faith offer that is rejected followed by trial artificially increases the exposure to the defendant/insured of an excess verdict. It seems to me that plaintiffs should be guided solely by the nature and extent of their injuries when it comes to determining the course of their medical treatment, not by the size of the insurance limits available.

I'm not aware of any surveys or findings that excess verdicts are on the rise or constitute a greater peril to insureds than in the past. I don't see how it can be disputed that some uncertainty on the plaintiff side as to the

limits available to the defendant/insured increases the potential for a more favorable settlement from the defendant/insured's perspective. After all, it is the insured that pays for the insurance and an increase in insurance payouts surely drives up the cost for all.

I question why liability insurance would be treated any differently than discoverability of a defendant's personal assets. Under current Tennessee law, in tort litigation the personal assets of a defendants are not discoverable unless and until the plaintiff demonstrates some factual basis which would justify the trier of fact awarding punitive damages. Breault v. Friedli 610 S.W.2d 134 (Tenn.App., 1980) If, somehow, it is beneficial to one or both parties that the plaintiff be fully apprised as to the collectibility of its judgment, it would seem that the personal assets of the defendant would be just as relevant and helpful. There being no distinction in my opinion, the only conclusion is that those seeking discoverability are seeking to put insurance and insurance companies in a more difficult position when it comes to achieving the best resolution of a claim as possible. I'm fully aware that this argument has been likewise rejected by other jurisdictions (see Tuller v. Shallcross 1994 OK 133, 886 P.2d 481, 1994 finding a distinction between disclosure of personal assets/a person's right of privacy and insurance which is solely for the purpose of protecting against liability) but I have not found that reasoning persuasive.

I believe that the argument that keeping insurance non-discoverable is a benefit to a defendant/insured, is just as logical as those arguments contra. However, my experience at least provides anecdotal evidence that depriving the plaintiff of this information works to the benefit of the defendant.

In summary, in my career I can think of no instance where 1) the plaintiff's ignorance of my client's liability limits resulted in a case going to trial that might otherwise have been settled and 2) undoubtedly my clients and their insurance companies have benefited from settlements in lesser amounts than might otherwise have been realized because the plaintiff did not know what my clients insurance limits were.

Should you have any questions or comments, please do not hesitate to contact me.

Yours truly

Andrew H. Owens, Esq.

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STEVEN A. DIX

CHAD A. MASSEY

February 12, 2009

Mr. Edward K. Lancaster
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RE: Discovery of Liability Limits

Dear Ed:

The Court's opinion in *Thomas v. Oldfield* is absolutely correct regarding the fact that the discovery of liability limits is not reasonably calculated to lead to discoverable evidence. The logic of Justice Holder is unassailable. I disagree with the Court's rationalization of how disclosure of limits might actually be helpful. The examples cited are not valid or realistic in my opinion and based on my practice. Furthermore, I hate to see the Court write an opinion that almost apologizes for our State taking a minority position. If it is the correct position, then it should not matter what the other 49 states are doing relevant to this issue.

1. Liability limits are clearly not relevant.

The existence and amount of liability insurance available to a defendant does not have any "tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." (Rule 401, TRE) In our typical auto accident cases, the existence and amount of insurance has no bearing on any issue the plaintiff has to prove, or for that matter, any issue the defendant may assert as an affirmative defense. For example, insurance has no bearing on liability (duty, breach, causation) or damages claimed. It does not prove negligence or comparative fault on any party. I have had a plaintiff's lawyer tell me that knowledge of my client's limits was necessary to help him prove his damages. My reply was that my client's limits had nothing to do with *his* client's damages: either I would have enough to pay his claim or not. The same is obviously true in the *Thomas v. Oldfield* malpractice case.

2. Discovery of limits will not lead to admissible evidence.

The Court clearly got this point correct in its opinion. What would a plaintiff do with the information? Nothing. Presumably, the plaintiff will still need to put on proof establishing liability and then establishing damages.

3. The Court's 'practical examples' on page 6 of the Opinion are neither valid nor realistic.

I strongly disagree with the Court's conclusion that "allowing discovery of such information reflects the current realities of litigation and settlement of cases in Tennessee." The Court then states that discovery of insurance will "encourage mediation and settlement of cases by 'enabling counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation." I can only assume the Court is discussing the 'knowledge' of plaintiff's counsel since defense counsel presumably already knows the amount of coverage available. This statement is simply incorrect and obviously one-sided. As a practicing defense attorney for over 21 years. I have never used what my client's liability limits are as a factor in evaluating the claim of the plaintiff. If I see that the plaintiff's claim will clearly exceed my client's limits, then I am the first to 'sound the alarm' and suggest an offer of limits in exchange for a release. Likewise, knowledge of limits does not help plaintiff's counsel with a 'realistic evaluation of the case.' If the plaintiff has a good case and damages are $100,000, then the plaintiff has a $100,000 case whether my client has limits of $25,000 or $250,000.

The Court next stated that the "insurance company is often the 'real party in interest to the suit to the extent of the policy limits'." I strongly disagree with this statement as well. My job is to defend your insured to the best of my ability and within the liability limits I have available. In a typical third-party case, it is the *insured* who is my client, and I would think the Supreme Court and the Board of Professional Responsibility would not look favorably upon any act undertaken by me in my representation of an insured that was not in the insured's best interest but in the interest of the insurance company who hired me. The Court's bias in favor of the plaintiff is again made clear in the next sentence when it states the knowledge is helpful to the "plaintiff's attorney to prepare for the case he has to meet and be appraised of his real adversary." This comment is again one-sided and incorrect. The adversary should be doing their job regardless of the insurance issue. Anything less would be a violation of the Rules of Professional Conduct.

4. The 'reality' is just the opposite of the examples cited by the Court.

The Court's opinion cites 2 situations where knowledge of insurance would benefit the plaintiff. Interestingly, no benefit to the defendant is cited. I suggest this is because there is never a benefit to the defendant by allowing the discovery of liability limits. In my experience, this knowledge is sought by plaintiff's counsel in order to 'squeeze' the insurance company for a better settlement. The most common example: plaintiff's case is worth $15,000 to $20,000. Counsel for the plaintiff discovers that the defendant has a liability limit of $25,000. The settlement demand will then be $25,000 or $24,500 in order to raise the specter of bad faith. This is a common tactic in order to extort the last $5,000 from an insurance company that does not wish to try the case and subject their insured to any excess judgment when settlement could have been had at or within the limits of liability. In essence, the knowledge of the limit by the plaintiff's counsel gives the plaintiff leverage and forces an overpayment or unjust payment. The reality is that once the limit is learned, it becomes the 'target' of plaintiff, regardless of the legitimate value of the claim. I have actually seen attorneys send their plaintiff back for more treatment (ostensibly to run up more medical expenses, and therefore, the 'value' of the claim) after they learned the limit available was higher than originally suspected.

In conclusion, I see no fair and balanced benefit to all parties by allowing discovery of liability limits. It is clear that the Court's opinion is only discussing benefits to plaintiffs since they cite no benefit to defendants. The amount of insurance available to a defendant is often the only negotiating 'chip' remaining during settlement discussions. I would like to preserve that knowledge for my use as I see fit for the best interest of my client. If I am forced to disclose my client's limit, in many cases, I will be absolutely defenseless and the end result will be an unfair advantage to the plaintiff, and the conscientious insurance company will be forced to overpay close claims. The disclosure of the limit should be up to me as counsel and zealous advocate for my client, especially since it does nothing to prove anything the plaintiff already has the burden to prove.

These are just my thoughts and observations based on our discussion and my review of the recent Court opinion. If you need any further comment or insight from a practicing defense attorney, please feel free to call on me.

Sincerely,

DIX & ASSOCIATES, P.L.L.C.

STEVEN A. DIX

SAD/dad

From: "Mark A. Cowan" <mark.cowan@mac.com>
To: <mike.catalano@tscmail.state.tn.us>
Date: 10/21/2009 9:41 AM
Subject: Comment on Proposed Change to TRCP 5

Mike,

I was very happy to see this proposed change in John Day's blog . . . until I saw that you had to prepare and mail out a complicated certificate of service to everybody anyway. I think this really guts the purpose of the proposed change. Federal courts have been serving PDFs by e-mail for years. I'd be interested to know whether they have been having problems with lawyers saying they never received the documents. I've personally never had a problem. I think that the danger of "losing" an e-mailed document is smaller than the danger of a document getting "lost in the mail."

Otherwise, I like the proposed change.

Mark

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October 28, 2009

Ms. Jean Stone
Assistant Director
Tennessee Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, Tennessee 37219

Re: Proposed Amendment to Rule 26.02(2), Tenn. Rules of Civil Procedure

Dear Ms. Stone:

I write to offer comments on the pending proposal to amend Tenn. R. Civ. Procedure 26.02(2), to allow discovery of insurance policies in civil cases. The following are my objections to the proposal.

1. There are no empirical studies to my knowledge which determine whether disclosure of insurance limits tends to promote or obstruct settlement. My personal experience (over 35 years of practice as a trial lawyer and 11 as a mediator) suggests that in federal courts where limits are disclosed, plaintiffs' attorneys tend to value their cases in light of the available insurance more than objectively projecting potential jury awards.

2. Since insurance is generally inadmissible in Tennessee (Tenn. R. Evidence 411), discovery of insurance is not likely to lead to admissible evidence. See also Crowe v. Provost, 274 S.W. 2d 645, 663 (Tenn. App. 1963). There seems to be no reason why a private matter should be known, other than to let plaintiffs know which defendant may be the "deep pocket" and concentrate efforts toward that defendant. Such knowledge then tends to warp an otherwise reasonably fair system, and have a chilling effect on settlement negotiations.

   Both as a mediator and lawyer, it has been my experience that when it is to a defendant's advantage, policy limits will be disclosed in settlement negotiations. Hence disclosure actually already occurs in many cases.

3. There is a risk that disclosure of insurance will lead to businesses or individuals choosing to go without coverage. I have personally had a client which operates a number of small nursing homes and which has chosen to forego insurance because the cost is prohibitive. For that client, being willing to allow a judgment creditor to

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take over a nursing home to satisfy a judgment turns out, over time, to be less expensive than buying insurance. That decision was made in part because of plaintiffs trying to coerce settlements in states where insurance is discoverable.

4. Although I am aware of no study confirming this, my suspicion is that insurers will ultimately wind up paying more to defend cases that go to trial because disclosed limits were not offered in settlement negotiations, or actually paying more in settlement, or both. These possibilities each increase the expenditures of insurers, and will ultimately increase the costs of insurance as premiums must increase to offset these expenses.

5. The General Assembly has repeatedly rejected efforts to accomplish the same result. See Baker v. American Paper & Twine Co., 2000 Tenn. App. LEXIS 36.

6. In specific types of cases, minimum limits are already well-known to plaintiff attorneys. E.g., in commercial trucking cases federal regulations require minimum coverage to obtain a D.O.T. license; and in medical malpractice cases, most hospitals or clinics require physicians and other practitioners to maintain significant amounts of coverage in order to be able to practice at a particular facility

In sum, the Commission needs to be mindful of the privacy of individuals and corporations in their business affairs, and of the fact that there seems to be little scientific evidence, if any, that disclosure of insurance promotes settlement. Absent a compelling purpose other than to preview the collectability of a possible judgment and to attempt to coerce settlements by plaintiffs, I see no present valid reason to change the current Rule.

Sincerely,

Bob Redding

Robert V. Redding

RVR/pc

K:\RVR files\(2009 10-28) Stone-ProAmds.doc

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October 26, 2009

Ms. Jean Stone
Assistant Director
511 Union Street
Suite 600
Nashville, TN 37219

RE: Proposed Rule 26.02(2) to the Tennessee Rules of Civil Procedure

Dear Ms. Stone:

I am writing in connection with the proposed revision to the rules which would allow discovery of insurance limits in Tennessee.

I have been engaged in the defense of civil lawsuits in Memphis for well over thirty years. Further, I have been a Tennessee Supreme Court Alternative Dispute Resolution Specialist since 1997. I have written in opposition to similar proposals in the past.

It is my firm belief, based upon a great deal of experience, that the discovery of insurance limits actually makes it harder to resolve and settle cases. Insurance limits are discoverable in U. S. District Court, and I have handled many cases there and many mediations there as well as in state court. Empirically, my success rate in resolving cases is much higher in state court, where the limits cannot be disclosed, than it is in U. S. District Court. Once the limits are disclosed, the limits become the settlement demand.

I do not believe it is in the best interest of the citizens of the State of Tennessee to change this rule.

Please contact me if you have any questions or need additional information.

Yours very truly,

THE HARDISON LAW FIRM, P.C.

DAVID M. COOK

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November 4, 2009

Mr. Mike Catalano, Clerk
Tennessee Appellate Courts
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Nashville, Tennessee 37219-1407

RE: Amendments to the Tennessee Rules of Procedure and Evidence
No. M2009-01985-SC-RL2-RL
Tennessee Rules of Civil Procedure, Rule 26.02

Dear Mr. Catalano:

This letter will serve as our comments on the proposed amendment of Tenn. R. Civ. P. 26.02, and opposition to the proposed amendment.

The amendment to Tenn. R. Civ. P. 26.02 will allow discovery of liability insurance policies. In our opinion, this amendment does not serve the purposes for which the Tennessee Rules of Civil Procedure are enacted, will expand the Tennessee Rules of Civil Procedure that relate to discovery beyond their intended scope, and will have the harmful effect of litigation outcomes being determined by the amount of insurance limits of one or more parties rather than by a just and fair determination of the merits of the case.

Rule 1 of the Tennessee Rules of Civil Procedure defines the scope of the rules, stating, "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action." The proposed amendment to Rule 26.02 does not in our opinion support the goals of Rule 1. Based on our experience, disclosure of policy limits will create a target figure or goal for settlement or trial. Rather than encouraging settlement – an argument that is often advanced in support of such an amendment – mandatory disclosure of policy limits is as likely to deter settlement. It is likely that a party will focus on achieving a settlement at or near the policy limits target, rather than attempting to reach a settlement that is based upon the merits of the case and the application of a risk-benefit analysis of whether to settle or proceed to trial. In addition, plaintiffs' attorneys and their clients, knowing the amount of available insurance, may simply "roll the dice" and go to trial in the hope that they can approach or reach those limits – again because the focus is on the insurance policy of a defendant rather than a fair and just determination of whether the case should be settled based upon its unique facts and the law. In our society today, there seems to be an ever increasing "lottery mentality," and it is our belief that the needless disclosure of policy limits will simply serve to encourage that mentality and thwart the

goals of the just, speedy, and inexpensive determination of litigation. Similarly, mandatory disclosure of policy limits could encourage other defendants in multi-party litigation to stall, prohibit, or unduly influence settlement negotiations, by actions, for example, that may force the party with the greatest resources to bear a disproportionate amount of liability or responsibility in negotiations without a more reasonable consideration of the merits of the case and the risk-benefit of trial. It should also be pointed out that at times insurance policy limits are disclosed in the course of settlement negotiations if it is determined that such disclosure will likely facilitate those negotiations in that particular case. Disclosure should be left to the discretion of the litigants and their lawyers, as the facts and the unique nature of each case warrants. A mandatory rule will most likely have a chilling effect both on settlement and the resolution of cases based upon their merits.

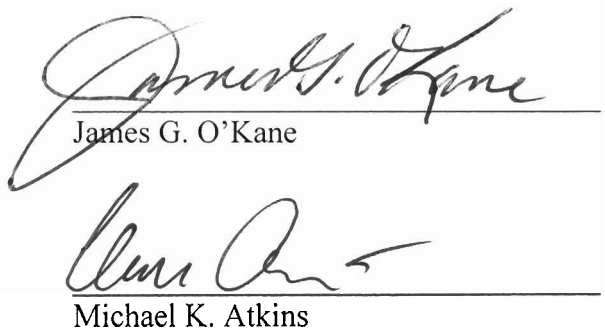
The Rules of Civil Procedure that apply to discovery enable a party to discover those facts and opinions that are relevant or will reasonably lead to the discovery of admissible evidence. A defendant's insurance policy limits, except in certain limited circumstances, are not relevant and are not admissible at trial. By allowing this amendment to Rule 26.02, the rules related to discovery will be expanded beyond those facts or opinions that are reasonably calculated to lead to discovery of admissible evidence. Since insurance policy limits or policy provisions are not relevant to whether a party is liable to a plaintiff for damages and are not admissible at trial (nor should they be), this amendment to Rule 26.02 needlessly exceeds the scope and goal of discovery. Mandatory disclosure of insurance matters creates a whole new category of information available to a party that is not warranted by prevailing law simply based upon an assumption that the discovery of these limits will promote settlement, a contention which is not supported by our litigation experience.

In our experience, in those courts which allow discovery of policy limits, we have not found that the revelation of those limits promotes settlement. If anything, disclosure of policy limits and underlying policy provisions is more likely to chill meaningful settlement negotiations or enable a plaintiff to pick and choose which party he or she will settle with, depending on who has the most money and who has the least money to contribute toward a settlement. This thwarts the goals of Tennessee tort law as expressed by our Supreme Court in *McIntyre v. Balentine*, 833 S.W.2d 52, 58 (Tenn. 1992). The imposition of liability should be fault-based, and liability will be imposed upon a defendant only for the percentage of a plaintiff's damages occasioned by that defendant's negligence. Determining who has the most or least insurance coverage in a suit involving multiple parties, and which party to take to trial in a "roll the dice" attempt to reach substantial policy limits, does not promote the fault-based system of justice that is described in *McIntyre*. We believe it can lead to an alternative motive to pursue tort cases driven by the knowledge of and desire for as much of the policy limits as can be recovered rather than a desire for a just and fair settlement or outcome at trial as the facts and law allow.

In summary, it is our belief, drawing upon many years of tort litigation experience, that the proposed Amendment to Rule 26.02 does not serve the purposes as outlined in Rule 1 of the Tennessee Rules of Civil Procedure, unnecessarily expands the scope of discovery, and is likely to have as much of an adverse effect on settlement as a beneficial effect.

Yours truly,

BAKER, O'KANE, ATKINS & THOMPSON



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M2009-01985-SC-RL2-RL

TMA™ Tennessee Medical Association

Physicians Caring for Tennesseans

November 4, 2009

Mike Catalano, Clerk
Tennessee Appellate Courts
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401 7th Avenue North
Nashville, Tennessee 37219-1407

RE: Comments Regarding Proposed Amendment to Tennessee Rule of Civil Procedure, Rule 26.02

Dear Mr. Catalano:

Please accept these comments regarding the above referenced proposed rule amendment on behalf of the 7700 members of the Tennessee Medical Association (TMA). We have reviewed the recommendation submitted by the Advisory Commission on the Rules of Practice & Procedure for amendment to Tennessee Rule of Civil Procedure 26.02. As we understand it, the amendment would allow a party to obtain discovery of any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment. TMA opposes adoption of the proposed amendment.

First, the existence of liability insurance on the part of a party to litigation is not relevant to the issues of liability or damages. Even if the discovery rule was changed, liability insurance coverage is not admissible as evidence at trial and inquiry concerning such insurance is not reasonably calculated to lead to the discovery of admissible evidence. Insurance coverage is certainly not relevant to the merits of a lawsuit. If the purpose of negligence litigation is to make the injured party whole, then medical malpractice limits should be irrelevant at any stage of litigation.

Second, the purpose of discovery and the reason it is allowed is to enable litigants to prepare for trial and to prevent trial by ambush. However desirable it may be as a matter of policy to expedite settlements, the discovery of insurance will not provide information necessary for the trial of any case and may have the unintended effect of deterring settlements of medical malpractice cases.

Third, one of the reasons cited by Chief Justice Holder in the Thomas v. Oldfield case for her espousal that discovery of insurance policy limits should be permitted is that such discovery will allow both parties to "make the same realistic appraisal of the case". If, by this comment, Justice Holder is encouraging more settlements of lawsuits, such disclosure might actually have the opposite effect, especially in medical malpractice litigation. While low policy limits may expedite settlements, disclosure of high limits will likely slow or deter any settlement. It is not desirable to be in a situation where the value of the case is perceived to be on the limits available rather than the actual damages. Introducing ability to pay into the discovery process confuses liability with the availability of money. This potential confusion of ability to pay versus actual damages is precisely why evidence of liability limits is not admissible to a jury. It clouds the issue.

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Fourth, another reason cited by Chief Justice Holder in the Thomas v. Oldfield case for her encouragement of this change is her assertion that the insurance company is the "real party in interest" in the case. The largest medical malpractice carrier in Tennessee allows the defendant insured, not the insurance company, to make the ultimate decision as to whether to settle or go to trial. So, it is simply not the case in most Tennessee medical malpractice litigation that the insurance company is the real party in interest.

For these reasons, we urge the Court not to adopt the proposed amendment to Rule 26.02. Thank you for the opportunity to submit comments.

Sincerely,

Richard DePersio, MD
President

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October 29, 2009

Michael W. Catalano
Appellate Court Clerk
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Re: Comments to Proposed Rule 26.02 of the *Tennessee Rules of Civil Procedure*

Dear Mr. Catalano:

We write to express our opposition to the proposed changes to Rule 26.02 of the *Tennessee Rules of Civil Procedure*, which would permit the discovery of liability insurance policies. For myriad reasons, this proposed change is not in the best interest of justice in Tennessee.

Perhaps the most basic tenent in Tennessee jurisprudence is that justice is, or should be, meted out objectively and impartially, without regard to identity, money, poverty, power or weakness. Justice is, or should be, blind to wealth or poverty and measured solely on the merits of a particular case. Allowing a party to discover the terms of a defendant's liability insurance policy will have the effect of tilting the scales of justice by confusing liability with the availability of money and the ability to pay.

Aside from the theoretical misgivings of this proposed rule change, there are also practical considerations that make the discoverability of liability insurance policies inadvisable. First, Rule 26.02(1) prohibits the discovery of irrelevant material and information that is not "reasonably calculated to lead to the discovery of admissible evidence"[1] and allows for the discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." The "subject matter" of a civil action alleging negligence is completely distinct from matters of a defendant's ability to pay a judgment. Whether a defendant has liability insurance does not shed

[1] *Tenn. R. Evid.* 411 declares that evidence of liability insurance is not admissible upon issues of negligence or wrongful conduct.

light on any evidence or lead to evidence of negligence. Our Supreme Court has held that "[a] person's liability in our law still remains the same whether or not he has liability insurance." *Barranco v. Jackson*, 690 S.W.2d 221, 227 (Tenn. 1985), *overruled on other grounds by Broadwell v. Holmes*, 871 S.W.2d 471 (Tenn. 1994). Because liability insurance is not part of the "subject matter" or the merits of the case, nor does it lead to discovery of admissible evidence of the subject matter, then liability insurance should not be discoverable.

Second, the contemplated goals of the proposed rule change seem to be promoting settlements. Ironically, in most cases, discovery of a defendant's liability insurance policy and its limits will likely create the opposite effect. In appropriate "policy limits" cases, a defendant will already disclose his or her policy limits in an attempt to settle meritorious claims expeditiously. Discovery of a heavily insured defendant's insurance policy will inevitably shift the focus from appropriately valuing the merits of a plaintiff's case in attempting to reach a compromise settlement to focusing on the maximum amount a defendant can afford to pay, which does not reflect any relationship whatsoever to the intrinsic value of the damages a given plaintiff has allegedly suffered. Therefore, negotiations will be couched in terms of the amount of money available rather than the amount of money that justly makes a plaintiff whole. The two sides will be viewing the value of the case through completely different criteria, thereby hindering rather than promoting settlement.

Finally, the Tennessee General Assembly has considered similar proposals in the past and rejected them each time. *See* Legislative History House Bill 1453 (1975); Senate Bill 1301 (1975); H.J.R. 34 (1976); Tennessee State Library and Archives, Tape No. S-59 (Feb. 26, 1976); House Bill 60 (1977); Senate Bill 118 (1977); Senate Bill 24 (1979); Senate Bill 284 (1987); House Bill 2214 (1990); Senate Bill 1827 (1990). We have been provided no information that anything substantively has changed to depart from following the same course this time.

We appreciate the opportunity to comment on proposed Rule 26.02(2) and thank you for your consideration.

Very truly yours,

SPEARS, MOORE, REBMAN & WILLIAMS, P.C.

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MARTY R. PHILLIPS
ATTORNEY AT LAW

November 18, 2009

Mr. Mike Catalano
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Nashville, TN 37219-1407

In re: Amendments to the Tennessee Rules of Procedure & Evidence
No. M2009-01985-SC-RL2-RL

Dear Mr. Catalano:

I write in response to the Tennessee Supreme Court's solicitation of written comments to the proposed amendment to Tennessee Rule of Civil Procedure 26, which pertains to the discovery of insurance agreements.

Amending Rule 26 to mandate the disclosure of any applicable insurance agreement during pre-trial discovery would be imprudent and hinder the desired goal of facilitating settlements. Many reasons exist for why similar amendments have repeatedly failed, and I will not address them all in this letter. However, the fact that similar amendments have been thoroughly evaluated and repeatedly rejected should give all involved great pause.

After reviewing numerous briefs and opinions on the matter, it appears that nobody advances a compelling reason for such a significant change in the law. The primary argument advanced by proponents of the amendment is that disclosing insurance coverage facilitates settlements. Despite this being the lone prevailing argument, I have not seen or heard anyone suggest that Tennessee lags behind other States in the percentage of settlements or that plaintiffs in Tennessee are being undercompensated for valid injuries in comparison to those in other States. Without accurate information suggesting that Tennessee cases are less likely to settle or that Tennessee plaintiffs are being undercompensated, it is curious why the amendment should even be considered in the first place.

Furthermore, the idea that disclosing insurance limits will facilitate settlement is not based upon the realities and practicalities of settlement negotiation. The entire argument of facilitating settlements is based upon pure speculation. While proponents of the amendment assert the conclusion that having knowledge of insurance limits places them on "equal footing" and facilitates settlement, nobody appears able to state "how" they reach this conclusion. The settlement value of a case should be based upon the alleged acts and injuries, not upon the amount of potential coverage. Requiring parties to divulge this information will only lead to contracted negotiations due to inflated demands based upon the amount of coverage. While plaintiff lawyers claim they currently have to "guess" as to insurance limits, there is no reason to do so at all. Plaintiffs and their lawyers should be evaluating the extent of the damages and strength of the claims in determining settlement value. If plaintiffs and their counsel are already attempting to focus on insurance limits in

settlement negotiations without even knowing the coverage limits, then how much more of a focus will they place on insurance if the amendment passes? Requiring disclosure will only complicate settlement negotiations and provide plaintiffs a tool in which to demand amounts beyond those that are based upon the actual merits of the case. Thus, people seeking to facilitate settlement should not favor the current amendment.

The other primary argument asserted by proponents of amending Rule 26 is even less persuasive, which is that other States have done it. This argument lacks substance and suggests that Tennesseans cannot properly evaluate the issue for themselves. The issue should be evaluated with data and true thought, not a rush to follow what some other jurisdictions decided to do. Moreover, the fact that other States have passed similar amendments helps demonstrate that revealing insurance limits does not facilitate settlement. Proponents of the amendment have set forth no data to suggest that claims were reduced or settlements increased in the jurisdictions that require the disclosure of insurance information. Tennessee certainly should not blindly follow the actions of other jurisdictions without data demonstrating that such a drastic change in the law caused its intended results.

Requiring the disclosure of insurance agreements would also create practical problems for Tennesseans both inside and outside of the litigation arena. Some people will likely decide to carry less coverage or no coverage at all. Also, plaintiffs may decide to sue or focus the lawsuit on a particular party based upon the amount of coverage, as opposed to the actual merits of the case. For obvious reasons, insurance coverage information is clearly inadmissible at trial. These same reasons should prohibit the disclosure of insurance agreements pre-trial. Just as justice would not be served by having a jury at trial consider insurance limits in determining the amount of damages suffered by a plaintiff, justice would not be served by having the plaintiff or plaintiff's counsel consider such in settlement negotiations.

Proponents of the amendment also fail to recognize that insurance coverage amounts can be disclosed and are disclosed in some cases. When settlement can actually be facilitated by the disclosure of insurance limits, such are often provided to opposing counsel. Moreover, such limits are discoverable in some cases. There simply is neither a need nor reason to force disclosure in all contexts as the proposed amendment will do if passed.

In conclusion, there should be a genuine and compelling reason for the drastic change of forcing all defendants to reveal private insurance agreements. Moreover, any proposed amendment should be based upon substantial factual data, not speculation and the mere actions of other jurisdictions. Tennessee has consistently rejected similar amendments, and it should continue to do so. No change has occurred that warrants reconsideration of the issue.

I appreciate very much the opportunity to share my comments upon this important subject.

Yours very truly,

RAINEY, KIZER, REVIERE & BELL, P.L.C.

Marty R. Phillips

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November 24, 2009

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401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Change to Rule 26.02

Dear Mr. Catalano:

I am writing in opposition to the proposed rule change to Rule 26.02 of the Tennessee Rules of Civil Procedure which would allow discovery of an individual's insurance liability limits. As one who has practiced law in the trial courts in Tennessee since 1980, representing both plaintiffs and defendants with the majority of my practice involving insurance defense, my experience leads me to the inescapable conclusion that the value of a claim should rest entirely on the merits of that claim. As such, the amount of the funds potentially available to satisfy a meritorious claim has absolutely nothing to do with how much a claim is worth and thus, should have nothing to do with how a claim should be evaluated.

Moreover, it is naive to believe that the discovery of an individual's insurance liability limits will not artificially influence how any particular claim will be developed. Allowing the disclosure of an individual's liability limit simply makes such limit a "target" and will undoubtedly encourage many litigants who file suit in our advocate/adversary system to develop "proof" not according to how something actually exists but on a "fashioned" basis of how something can be made "to be." To ignore this substantial reality is simply wrong as despite advocacy, our system should be based, as nearly as possible, on true merit and not "artificial enhancement" spurred by the knowledge of the potential fund available to satisfy a claim.

Accordingly, despite the fact that disclosure of limits is allowed in the federal system, there is no pressing necessity that Tennessee change the

approach it has followed to date. Thus, it is my sincere hope that this proposed rule change will not be adopted.

I appreciate the opportunity to express my view.

Thanking you, I am,

Very truly yours,

ORTALE, KELLEY, HERBERT & CRAWFORD

Joseph B. Klockenkemper, II

JBKII/dll

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November 24, 2009

Mike Catalano, Clerk Tennessee Appellate Court
100 Supreme Court Building
401 South Avenue, North
Nashville, Tennessee 37219-1407

Re: Proposed Opposed Revised Rule 26.02(2) Insurance Limits

Dear Mr. Catalano:

I respectfully submit opposition to the proposed amendment to Rule 26.02(2) allowing a party to obtain any insurance agreement, including the limits of that insurance. Having had the occasion to practice not only in Tennessee but in over 20 other states on a Pro Hac Vice basis, as well as numerous Federal Courts, I have seen the negative impact that the discovery of insurance agreements and limits can have on litigations.

It has been my experience that if the goal of the parties is to successfully resolve the claim short of a jury trial, that a fair evaluation of damages regardless of any insurance limits is far preferable . Discovery of insurance limits can often lead to artificial demands which reflect the policy limits and not the value of the case. Instead of facilitating a settlement, it can often be a deterrence to resolution.

While the current Rule 26.02 precluding the discovery insurance agreements in Tennessee is the minority view, it certainly does not mean that it is incorrect position. It is an example of a variation that has served the state of Tennessee well, both in the resolution of claims and in making the state attractive to live and work, both for businesses and families alike.

Very truly yours,,

F. Laurens Brock

FLB/tlt

DOMICO KYLE, PLLC

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November 24, 2009

Mr. Mike Catalano
Clerk, Supreme Court
100 Supreme Court Building
401 7th Avenue South
Nashville, Tennessee 37219

Dear Mr. Catalano:

It is our understanding that the Tennessee Supreme Court has recently promulgated a change to Rule 26.02, relative to the discovery of insurance coverage limits. We wanted to take this opportunity to respectfully share our thoughts regarding this change, which we view as a major shift in legal policy in the State of Tennessee.

We recognize and respect the right of the Court to shift this rule into parity with the current Rules of Evidence in Federal Courts. However, this shift is also viewed by some, including ourselves, as a substantial policy change that may be better suited for legislative consideration, and the discussion and public debate that venue allows.

We are, of course, available to discuss this matter further at your convenience.

Sincerely,

DOMICO KYLE, PLLC

WILLIAM D. DOMICO

Sincerely,

DOMICO KYLE, PLLC

JAMES F. KYLE

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November 24, 2009

Mr. Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Change to Rule 26.02 T.R.C.P.

Dear Mr. Catalano:

It is my understanding that the Advisory Commission to the Tennessee Rules of Civil Procedure is proposing a change to the rules that would allow for discovery of an individual's insurance liability limits.

This is a bad idea. My 43 years of experience in handling personal injury litigation, much of which is in Federal Court, where we have been required to disclose limits, leaves me to the conclusion that mandatory disclosure of insurance policy limits interjects information that is often irrelevant to the evaluation of claims. My belief has always been that claims should be evaluated on their merit, without regard to the limits of insurance coverage. I believe the Federal Rules which require disclosure of policy limits more often than not have not helped in the fair evaluation of claims but, most of the time, to the contrary, have been a detriment.

Yours very truly,

MILLIGAN & COLEMAN

By
G. P. Gaby

GPG/sw

State Farm®
Providing Insurance and Financial Services
Home Office, Bloomington, Illinois 61710

Sent via Facsimile
Original to follow by U.S. Mail

Privileged and Confidential

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November 30, 2009

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Proposed Change to Tenn. R. Civ. P. 26.02

Dear Mr. Catalano:

State Farm appreciates the opportunity to provide comments and voice our opposition to the proposed amendment to Tenn. R. Civ. P. 26.02 which will allow discovery of insurance agreements. We oppose this expanded discovery of a defendant's insurance policy limits as this information is generally irrelevant and inadmissible at trial.

The existence of an insurance policy or the size of its limits has no relevance as to whether a defendant is actually liable to a plaintiff or the amount of that liability. By allowing the discovery of this information some insured defendants will likely be subjected to increased litigation risk as the ability to defend or settle a case for what is appropriate may be compromised. The determination of fault and the estimate of damages should be based solely on the facts of the case and not on whether the defendant has liability insurance or the limits of that policy. We already believe this information could taint a jury's decision, would not this same information taint the litigants' assessment of their own case?

Overall, we do not believe this discovery change will promote additional settlements in Tennessee. Currently in Tennessee, defendants have the option of disclosing the details of insurance agreement information and often choose to do so where such disclosure will lead to settlement. However, requiring this disclosure will only serve to cloud the parties' assessment of their own cases and potentially penalize those individuals purchasing insurance coverage. With

the proposed rule in place, lawsuits are more likely to be filed or pursued merely because of the existence or amount of liability coverage rather than because of actual fault.

For these reasons State Farm opposes this change.

Sincerely,

Michael L. Lanc, Counsel
State Farm Insurance

Thomason, Hendrix, Harvey, Johnson & Mitchell, PLLC

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November 25, 2009

Mr. Mike Catalano, Clerk
Tennessee Appellate Court
100 Supreme Court Building
401 7th Ave. North
Nashville, TN 37219-1407

Re: Case No. M20009-01985-SC-RL2-RL

Dear Mr. Catalano:

I am writing to voice my opposition to the proposed amendment to Rule 26.02 of the Tennessee Rules of Civil Procedure. The proposed rule would hinder settlement, because, if the existence and terms of a policy are required to be disclosed, the plaintiff will likely focus solely on the policy limits rather than focusing on the legitimate value of their claim. Under these circumstances, the true settlement value of the case gets lost in the process of the plaintiff trying to obtain the "policy limits."

Further, requiring disclosure of the private contract between the defendant and his or her insurance company seems to be analogous to asking for the disclosure of the written contract between the plaintiff and his or her attorney. Typically, insurance policies, like contracts between the plaintiff and his or her attorney, disclose how the defendant's lawyer will be selected, compensated, and how, generally, the insured's case will be defended. For the past several decades, insurance policies have been recognized as being privileged and confidential in Tennessee, and should continue to be recognized as such. *See* ***Crowe v. Provost***, 274 S.W.2d 645, 663 (Tenn. Ct. App. 1963).

Additionally, the defendant's insurance company's insurance policy could be considered an asset of the defendant. Plaintiffs cannot discover the extent of a defendant's assets prior to judgment. Accordingly, this same rule should apply to the defendant's insurance policy. The proposed amendment is a disincentive to the responsible defendant, who would be at a disadvantage in settlement negotiations or any other stage of the lawsuit process because the plaintiff can gauge the defendant's ability to pay.

Thank you for your consideration and attention to this matter. Should you have any questions or concerns, please do not hesitate to contact my office.

Yours very truly,

THOMASON, HENDRIX, HARVEY,
JOHNSON & MITCHELL

Erika D. Roberts

Erika D. Roberts

EDR/ja

4815-2355-7637, v. 1

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November 30, 2009

Mike Catalano, Clerk
Tennessee Appellate Court
100 Supreme Court Building
401 7th Ave. North
Nashville, TN 37219-1407

Via Facsimile # 615-532-8757

RE: Docket Number M2009-01985-SC-RL2-RL

Dear Mr. Catalano:

I am writing express my concern regarding the proposed change to Rule 26 of the *Tennessee Rules of Civil Procedure*, which would permit the discovery of liability insurance policies. I am opposed to that amendment for the following reasons:

A plaintiff cannot discover the extent of a defendant's assets, prior to judgment. That same rule should apply to the defendant's insurance assets. The existence and extent of liability insurance is not relevant to the merits of any lawsuit nor is it reasonably calculated to lead to the discovery of relevant information. The proposed rule, therefore, would allow the discovery of information that is outside the scope of discovery as a defined by Rule 26. There is no reason to justify treating liability insurance different from any other type of discovery, especially in light of the fact that liability insurance is not admissible at trial. *See* T.R.E. 411.

Moreover, the amendment is contrary to public policy because it would hinder the settlement of cases. If the existence and terms of a policy are disclosed, the plaintiff will undoubtedly factor in the amount of insurance available when valuing the claim instead of focusing on the legitimate value of the claim. The value of any given case should be determined by the objective facts of that case without regard to the maximum amount the defendant can afford to pay, whether that is by personal assets or by contract of insurance. In those situations where it is a benefit to negotiations, insurance limits are routinely disclosed. This typically occurs when insurance policy limits are offered and the plaintiff's counsel needs assurance that no other coverage is available. No revision of the rule is needed for this common sense approach to settlement negotiations.

Accordingly, I am opposed to the proposed amendment.

Many thanks for your consideration.

Very truly yours,

THOMASON, HENDRIX, HARVEY,
JOHNSON & MITCHELL

Claire M. Cissell

Claire M. Cissell

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November 25, 2009

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: Proposed Amendment to Tennessee Rule of Civil Procedure Rule 26.02(2)
Docket No. M2009-01985-SC-RL2-RL

Dear Mr. Catalano:

Thank you for the opportunity to comment on the proposed amendment to Tennessee Rule of Civil Procedure 26.02(2). This letter is to express our strenuous objection to this amendment which will allow for the discovery of a defendant's liability insurance policy. The Tennessee Supreme Court and the General Assembly have long forbidden the introduction of evidence of liability insurance at trial because such evidence shifts the jury's attention from the merits of the case. The same sound reasoning behind Rule 411 should apply with equal vigor to the discovery of liability insurance by a plaintiff. A plaintiff's attention inevitably will be drawn from the important task of evaluating the merits of her case and her damages to the ignoble hope of exhausting the defendant's insurance limits.

On February 2, 2009, the Supreme Court of Tennessee announced in James G. Thomas v. Elizabeth Oldfield, MD, et al. that they believed it was time for Tennessee to align with other states and the Federal Rules by allowing discovery of liability insurance. The Court maintained that the existence of liability insurance was relevant to the subject matter of the lawsuit and that discovery of insurance coverage would encourage settlement of cases by "enabling counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation." The Court further noted that the insurance company is the "real party in interest to the suit to the extent of its policy limits . . . [t]hus, knowledge of the insurance agreement is helpful to the Plaintiff's attorney to prepare for the case he has to meet and be apprised of his real adversary."

We respectfully disagree with the Court's analysis. As the amount of an insurance policy unquestionably bears no relation to the merits of any given case, it is a worthless tool in making a "realistic appraisal" of a claim. It provides plaintiff's counsel with no admissible knowledge relevant to the case, but, instead, focuses the litigation on the insurance company's ability to pay. The substantive tort law in a medical malpractice action requires the plaintiff to prove that the defendant violated the standard of care and caused, proximately or directly, the plaintiff's injury. The insurance company is not the "real adversary" in a tort case merely because the defendant contracted with them to provide coverage. It is the defendant's conduct that is at issue and it is the defendant's name that will be reported to the National Practitioner Data Bank in qualifying cases. The Data Bank's reporting requirements are premised on the assumption that the dollar amount for which a case is disposed is reciprocal to the liability of the defendant. As a plaintiff's knowledge of the amount of the defendant's insurance coverage can do little more than color their subjective evaluation of the case, practitioners will likely be subject to higher settlement demands with a higher number of reports made to the Data Bank. In sum, the state of Tennessee, which is in little need of tort reform and is currently a great state for the practice of medicine, will become less appealing to practitioners and insurance providers alike.

The proposed amendment also creates a perverse incentive for those who purchase liability insurance. Primarily, liability insurance is acquired to protect the insured in the event of an unforeseen tortuous event and to compensate the victim(s) of said event. Under the proposed amendment, policy holders would be justified in anticipating that a plaintiff will be opposed to settling for anything less than what the insurance company can pay. Accordingly, a defendant is left with the untenable decision of whether to insure themselves to the fullest extent possible, even though their own foresight will serve as the measuring stick for the value of all claims against them, or to purchase lesser insurance coverage to mitigate claims against them. Inevitably, most defendants will eventually purchase smaller insurance policies, leaving minor claims grossly overpaid and the rare, horrific claims undercompensated.

The plaintiff's bar argues that they are prejudiced in settlement negotiations by not knowing a defendant's insurance limits. This is untrue. A defendant is equally in the dark during negotiations as to the plaintiff's bottom line. In sum, making plaintiff's counsel privy to the limits of the defendant's coverage upsets this balance and gives a plaintiff an unfair advantage in negotiations. Moreover, as cannot be said enough, giving a plaintiff this information shifts the focus of the litigation from the merits of the claim to the depth of the pocket at the table.

Importantly, the General Assembly has considered proposals similar to the current proposed amendment seven times in the past 25 years and has rejected each of them. We support the legislature's choice in rejecting this proposal and believe the Supreme Court should also reject this proposal.

We appreciate the opportunity to comment on the proposed amendment to Tennessee Rule of Civil Procedure 26.02(2) and thank you for your consideration.

Sincerely,

James H. London

James H. London

Jamie Ballinger-Holden

Jamie Ballinger-Holden

JBH:jbr

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November 30, 2009

Mr. Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407

Re: Proposed amendment to Rule 26.02

Dear Mr. Catalano:

Please note my opposition to the proposed change to Rule 26.02 allowing discovery of liability limits. It is my opinion that the amount of insurance should not determine the value of a claim. Thank you for your consideration.

Sincerely yours,

Charles Anthony Maness

CAM/afw

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November 30, 2009

VIA HAND DELIVERY

Mike Catalano, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

Re: M2009-01985-SC-RL2-RL
In re: Amendments to the Tennessee Rules of Procedure & Evidence
Comments to Proposed Rule 26.02(2) to the Tennessee Rules of Civil Procedure

Dear Mr. Catalano:

We write in response to the above-referenced Supreme Court order inviting comment on proposed Tenn. R. Civ. P. 26.02(2), which would amend the Tennessee Rules of Civil Procedure to provide that "[a] party may obtain discovery of any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." We urge the Supreme Court to reject the proposed rule for at least five reasons. These reasons are summarized below followed by an individualized discussion of each point in the corresponding five tabs, which include citation to and analysis of the relevant data and statistical evidence from Tennessee and other states.

First, proposed Rule 26.02(2) is fundamentally at odds with the balance maintained by current Rule 26.02. By undermining the threshold standards of relevancy and admissibility, it creates a new class of discovery that is divorced from the very basis for pre-trial discovery. As a matter of substantive law, the terms, conditions, and limits of a defendant's insurance agreement are rarely relevant or reasonably calculated to lead to the discovery of admissible evidence in a tort lawsuit. Rule 411 of the Tennessee Rules of Evidence specifically addresses the admissibility of insurance information and delineates those circumstances in which insurance information is potentially admissible—and therefore potentially discoverable—and those in which it is not. *See* T.R.E. 411. On one hand, "[e]vidence that a person was or was not insured against liability is not admissible upon issues of negligence or other wrongful conduct." *Id.* On the other hand, "[t]his rule does not require the exclusion of evidence of insurance against

liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." *Id.* Proposed Rule 26.02(2) upsets the current balance and creates a singular exception for the discovery of insurance information, rendering it *per se* discoverable when it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in the pending lawsuit. No other single piece of information would be afforded such treatment. For this threshold reason, the proposed rule should be rejected.

Second, the argument that proposed Rule 26.02(2) will facilitate and encourage settlement is not borne out by the data. A review of statistical evidence from Tennessee and its contiguous states suggests that litigation in those states that permit discovery of insurance agreements is more likely to end in a jury trial—as opposed to settlement—than litigation filed in Tennessee state courts where insurance information is not discoverable. Even putting aside any statistical comparison with other states and concentrating solely on the Tennessee data, the statistical evidence, especially with respect to medical malpractice cases, undermines the argument that discovery of insurance agreements is necessary or likely to assist in facilitating more settlements. In fact, the data reveal that the present system works almost flawlessly—or at least approximately 99.8% percent of time—whereby arguably meritorious claims for medical malpractice are resolved or otherwise disposed of without trial and without re-writing Rule 26.02 to compel discovery of insurance agreements. Therefore, with all due respect to those federal district courts and commentators from 40 to 50 years ago who opined that discovery of insurance information would facilitate settlement, the empirical evidence has not borne out their hypothesis. In fact, at least in Tennessee, the data—which are discussed in great depth in **Tab 2**—confirm the opposite and suggest that if anything, proposed Rule 26.02(2) will deter or defer settlement instead of promoting it.

Third, requiring the disclosure of liability insurance threatens to undermine Tennessee tort law by replacing or substantially altering the manner by which claims are valued for purpose of settlement, as the data suggest has occurred in other states. This is especially true in medical malpractice cases, where the empirical evidence suggests that the current system results in settlements that are more aligned with actual damages as opposed to the homogenization of settlement values tied to insurance limits as found in other states that permit discovery of insurance information. Thus, these data suggest that Dean Syverud may have hit the nail on the head when he hypothesized that "the value of the case, which we so often assume to be a function of the substantive tort law and costs of civil process, may be just as much a function of how much insurance coverage the defendant has purchased." Kent D. Syverud, "The Duty to Settle," 76 VA. L. REV. 1113, 1114-15 (1990). The discovery of insurance information, including limits, therefore threatens to substitute substantive Tennessee law on damages with a homogenization of damages based on defendants' insurance coverage limits. In so doing, the proposed rule also creates perverse incentives for everyone who purchase liability insurance that could translate into plaintiffs with rather minor claims going overcompensated while those plaintiffs who have truly been injured—and those who are truly in need of compensation—going undercompensated. For this third reason, the Court should reject proposed Rule 26.02(2).

Fourth, proposed Rule 26.02(2) is not needed to reveal insurers with an interest in litigation in order to "protect policyholders" from insurers gambling with their rights. Because disclosure does not promote settlement, it is difficult to understand how *requiring* disclosure of insurance information could somehow protect defendant-policyholders or why it matters that insurers have an interest in the litigation. In any event, the Tennessee Supreme Court has already made plain that insurance companies should not control or direct defense counsel. Unlike the majority of states—which also all allow for discovery of insurance information—counsel retained in Tennessee to represent an insured-defendant represents the insured and only the insured. Moreover, if the insured or defense counsel want to disclose liability limits, it is entirely within their prerogative to do so consistent with the policy terms. And if the insurer were to gamble in bad faith, there is existing law to address such a scenario. The empirical evidence reflects, however, that the threat of an insurer "gambling at the expense of its insured" is indeed a minuscule one. After all, the overwhelming majority of cases not resolved on motion or dismissed voluntarily are in fact settled. This is especially true in medical malpractice actions, where only 0.2% or less of claims actually result in a judgment in favor of the plaintiff. Correspondingly, the undersigned was able to locate only two appellate cases on Lexis since 1970 in which a Tennessee state court found an insurer to have acted in bad faith in failing to settle prior to trial. Accordingly, the fact that an insurer may have an interest in litigation affords no justifiable basis for adopting proposed Rule 26.02(2).

Finally, proposed Rule 26.02(2) creates a slippery slope. For example, if the Rule is premised on a "facilitate settlement" justification, then why not allow plaintiffs to know all of a defendant's assets, not just his or her insurance policy? There is no logical reason to allow discovery of insurance policies and not discovery of a defendant's wealth and other assets. Similarly, if the premise is that settlement is promoted by complete knowledge on both sides, then plaintiffs should have to disclose their financial condition, including their "bottom line" and financial need. After all, if the plaintiff knows the defendant's insurance limits, *i.e.*, how much the defendant may be able to pay, shouldn't the defendant be entitled to know the plaintiff's bottom line, *i.e.*, how much the plaintiff is willing to take? Tennessee currently prohibits the discovery of information pertaining to a party's wealth, assets, and financial need to ensure that tort claims are valued by their actual worth, not the worth of whoever happens to be the defendant or the financial need of whoever happens to be the plaintiff. Tennessee also recognizes the privacy rights of both plaintiffs and defendants. Proposed Rule 26.02(2) does not just undermine these important principles, but it puts us on a track to completely vitiate them.

It is for all of these reasons that the Tennessee General Assembly has rightfully rejected similar proposals in the past. *See Baker v. American Paper and Twine Co.*, No. M1999-00142-COA-R9-CV, 2000 Tenn. App. LEXIS 36, at *10 n.3 (Tenn. Ct. App. February 10, 2001) (collecting legislative history); *see also* House Bill 1453 (1975); Senate Bill 1301 (1975); H.J.R. 34 (1976); Tennessee State Library and Archives, Tape # S-59, (Feb. 26, 1976); House Bill 60 (1977); Senate Bill 118 (1977); Senate Bill 24 (1979); Senate Bill 284 (1987); House Bill 2214 (1990); Senate Bill 1827 (1990). And it is for all these same reasons that the Court should reject proposed Rule 26.02(2) now.

We appreciate the opportunity to comment on proposed Rule 26.02(2) and thank you for your consideration.

Very truly yours,

SHERRARD & ROE, PLC

By: Phillip Carver

PFC/bdp

cc: John R. Voigt, Esq.
L. Webb Campbell, Esq.

1. **The Proposed Rule Undermines the Balance Struck by Rule 26 by Permitting Discovery of Legally Irrelevant Information.**

For the past forty years, Rule 26.02 has maintained a balance in providing an effective, thoughtful, and uniform approach to the scope of discovery. It permits parties to discover any and all non-privileged information provided that it is (i) "relevant to the subject matter involved in the pending action" and (ii) "reasonably calculated to lead to the discovery of admissible evidence." Tenn. R. Civ. P. 26.02(1); *Thomas v. Oldfield*, 279 S.W.3d 259, 262 (Tenn. 2009). Tennessee courts have successfully applied this standard for decades and in so doing have recognized that while modern-day discovery is of no doubt beneficial to the parties and courts alike, "unbounded discovery can and has led to abuse." Advisory Commission Comment to 1984 Amendment.

Nowhere is the balance perhaps more evident than with respect to the discovery of insurance information. Tennessee courts have held that if such information is relevant to the issues before the Court and reasonably calculated to lead to the discovery of admissible evidence, then it is discoverable. If it is either irrelevant or unlikely to lead to the discovery of admissible evidence, then it is not discoverable. Although Tennessee courts have at times differed over whether insurance information is theoretically "relevant to the subject matter involved in the pending action,"[1] they all agree it is only discoverable when it is "reasonably calculated to lead to the discovery of admissible evidence" under the Tennessee Rules of Evidence. *See, e.g., Thomas*, 279 S.W.3d at 262 ("After a considered review, we are, unable to conclude that discovery of this information appears reasonably, calculated to lead to the discovery of admissible evidence."); *Baker*, 2000 Tenn. App. LEXIS 36, at *9 ("discovery of the Defendant's liability insurance does not fall within the scope of Rule 26.02"); *Shipley v. Tennessee Farmers Mut. Ins. Co.*, No. 01-A-01-9011-CV-00408, 1991 Tenn. App. LEXIS 346, at *21 (Tenn. Ct. App. May 15, 1991) ("party may not discover information which is relevant when it is...related to an insurance agreement under which an insurer may be liable to satisfy a judgment in the action at hand").

Rule 411 of the Tennessee Rules of Evidence specifically addresses the admissibility of insurance information and delineates those circumstances in which insurance information is potentially admissible—and therefore potentially discoverable—and those in which it is not. *See* T.R.E. 411. On one hand, "[e]vidence that a person was or was not insured against liability is not admissible upon issues of negligence or other wrongful conduct." *Id.* On the other hand, "[t]his rule does not require the exclusion of evidence of insurance against liability when offered

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[1] *Compare Thomas v. Oldfield*, 2007 Tenn. App. LEXIS 680, at *9 (Tenn. Ct. App. Nov. 7, 2007) (holding that insurance information is not relevant because "the plain meaning of 'subject matter involved in the pending action' does not extend to matters having no bearing on the preparation of the case for trial."); *Baker v. American Paper & Twine Co.*, 2000 Tenn. App. LEXIS 36, at *9 (Tenn. Ct. App. Jan. 27, 2000) (holding that "discovery of the Defendant's liability insurance does not fall within the scope of Rule 26.02" because, *inter alia*, that "the existence and monetary limits of any liability insurance policy does not relate to the subject matter in the underlying case") *with Thomas*, 279 S.W.3d at 262 (opining that "that information concerning liability insurance coverage is 'relevant to the subject matter' involved in the pending lawsuit").

for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." *Id.*

Proposed Rule 26.02(2) upsets the current balance and creates a singular exception for the discovery of insurance information, rendering it *per se* discoverable when it is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in the pending lawsuit. No other single piece of information would be afforded such treatment. As it has for the past forty years, the current iteration of Rule 26.02 serves the salutary purpose of permitting discovery of relevant and admissible information by logically connecting discovery to the legal issues in dispute instead of a party's prurient interest. Rather than being a rule to facilitate *pre-trial* discovery, proposed Rule 26.02(2) would essentially become an open records law applied to all private litigants. This is especially true in medical malpractice actions, where Tennessee law already defines the legal issues in dispute and therefore the potential scope of admissible evidence:

> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
>
> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
>
> (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and
>
> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.

Tenn. Code Ann. § 29-26-115.

As a matter of statutory law, the terms, conditions, and limits of a defendant's insurance agreement are rarely relevant or reasonably calculated to lead to the discovery of admissible evidence in a medical malpractice action. Quite simply, "the information bears no relation to the issues before the trial court." *Thomas*, 2007 Tenn. App. LEXIS 680, at *20. "[I]nsurance liability coverage has nothing to do with bringing out the facts for trial, developing and clarifying the issues, or preventing surprise." *Id.*; *see also* Tenn. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *Cooper v. Stender*, 30 F.R.D. 389, 393 (E.D. Tenn. 1962) ("the phrase 'relevant to the subject matter' contemplates either evidence to be introduced at the trial or information that may lead to the discovery of evidence to be used at the trial" and "Defendant's insurance policy has no bearing on this issue....[n]or can its production lead to any information that would have any bearing on this issue").

Proposed Rule 26.02(2) is therefore fundamentally at odds with the balance maintained by current Rule 26.02. By undermining the threshold standards of relevancy and admissibility, it creates a new class of discovery that is divorced from the very basis for pre-trial discovery. For this threshold reason, the proposed rule should be rejected.

2. Discovery of Insurance Coverage will not Facilitate more Settlements.

While acknowledging that discovery of insurance information may not be relevant to the issues in dispute or, at the very least, not reasonably calculated to lead to the discovery of admissible evidence, some commentators and courts, including the Tennessee Supreme Court in its 2009 *Thomas* opinion, have called for amending Rule 26.02 on the premise that "discovery of insurance coverage will encourage mediation and settlement of cases." *Thomas*, 279 S.W.3d at 264. Those advancing this argument typically cite—as the Supreme Court did in *Thomas*—to language from federal district court cases from the 1960s or the advisory committee comments to the 1970 revisions to the Federal Rules of Civil Procedure. *See, e.g., id.* (citing as authority the 1970 Amendment Note and the 1961 New Jersey district court opinion *Hill v. Greer*, 30 F.R.D. 64, 66 (D.N.J. 1961)). These courts and commentators acknowledge the inherent inconsistency with allowing the discovery of insurance information under the rules, but base their position on "considerations of policy." Advisory Committee Comments, 1970 (Insurance Policies).

However, for each court or commentator who advocated in favor of amending the Federal rules during the 1960s on the belief that discovery of insurance information would foster settlement, there were courts and commentators who opposed discovery of insurance information on the basis that it would *impede* settlement. *See, e.g., Cooper v. Stender,* 30 F.R.D. 389, 393 (E.D. Tenn. 1962) ("But, we are not so sure that the giving to plaintiffs the limits of a defendant's liability insurance policy will bring about more compromise settlements than will the withholding of such information. Oftentimes cases are not settled because plaintiffs ask for greater damages than their cases justify."); *Pruitt v. M/V Patignies*, 42 F.R.D. 647, 652 (E.D. Mich. 1967) (explaining that that far from promoting "fair and just" settlements, disclosure of liability insurance encourages greed and protracted litigation); *State ex rel. Bush v. Elliott*, 363 S.W.2d 631, 637 (Mo. 1963) ("Furthermore, we are not persuaded that requiring the disclosure of policy limits would lessen the number of pending cases. It seems just as likely that awareness of 'sizable policies' might warp the judgment of an injured person and perhaps his counsel as to the real worth of the claim and keep alive a case that should be settled. Where court congestion exists, there are means by which it can be attacked directly with more assurance of success.").

Regardless of which group one may find more theoretically persuasive, the waxing elocutions from forty years ago—on both sides of the argument—ring hollow today. After all, it has been forty years since the 1970 amendments to the Federal Rules of Civil Procedure and decades since most states made similar amendments to permit the discovery of insurance information. One would think that in this time the empirical data could either prove or disprove the countering hypotheses from the 1960s. Yet, the proponents of proposed Rule 26.02(2) do not justify their position on empirical evidence to corroborate the claim that the disclosure of insurance agreements and liability limits has facilitated settlement over the past forty years. *See* Wright & Miller, Federal Prac. & Proc. § 2010 (citation omitted).

Indeed, a review of statistical evidence from Tennessee and its contiguous states reveals that litigation in those states that permit discovery of insurance agreements is more likely to end in a jury trial—as opposed to settlement—than litigation filed in Tennessee state courts where insurance information is not discoverable. Consider the data:

- In FY 2007-2008, Tennessee civil courts of record disposed of 127,352 cases. *See* Annual Report of the Tennessee Judiciary, Fiscal Year 2007-2008, at 17-19. A

mere 400 of those dispositions, or 0.3%, were the result of jury trials. *See id.* This rate of jury trials was substantially lower than contiguous states that permit discovery of insurance information.[2]

- In Alabama—which permits for discovery of liability limits (Ala. R. Civ. P. Rule 26(b)(2))—jury trials were required in 0.93% of all civil matters disposed of in Fiscal Year 2008. *See* Alabama Unified Judicial System, FY 2008 Annual Report & Statistics, at 65 (Table 3). This equates to a frequency of jury trials three times higher than in Tennessee.

- In North Carolina, 1.1% of civil cases (superior court) were disposed of via jury trial. *See* 2007-2008 North Caroline Courts Annual Report, at 7. That equates to a nearly four fold increase over the jury-trial rate in Tennessee. And like Alabama, North Carolina permits discovery of insurance agreements. *See* N.C.G.S. §1A-1, Rule 26(b)(2).

- Finally, in Missouri, 1.4% of civil cases (circuit court) were disposed of via jury trial. *See* 2008 Annual Report, Supplement, Table 45, Circuit Court FY 2008, Circuit Court Cases Disposed by Manner of Disposition. This equates to a nearly five-fold increase over Tennessee; and again, Missouri permits discovery of insurance agreements whereas Tennessee does not. *See* Mo. R. Civ. P. 56.01(b)(2).

Admittedly, other variables may be involved and the author of this letter is certainly no statistician. However, it appears that the hard data do not lend empirical support to the claim that discovery of insurance information leads to more settlement. In fact, they suggest just the opposite. And given that the proponents of the proposed rule should have forty years of data with which to work, the lack of empirical proof to support the "facilitate settlement" justification speaks volumes.

Even putting aside any statistical comparison with other states and concentrating solely on the Tennessee data, the numbers reflect that the discovery of insurance cannot materially decrease the frequency of jury trials. In fact, and as discussed *infra*, the more likely result is an increase in jury trials. Again, in FY 2007-2008, Tennessee civil courts of record disposed of 127,352 cases, with only 400 of those dispositions, or 0.3%, the result of jury trials. *See* Annual Report of the Tennessee Judiciary, Fiscal Year 2007-2008, at 17-19. Quite simply, given the already relatively miniscule number of cases that do not settle and proceed to jury trial, it is virtually impossible for disclosure of insurance agreements to have any material *downward* effect on the number of cases that are not settled or otherwise resolved.

Some may respond to the above statistics by pointing out that jury trials may be an imprecise proxy because some trials are bench trials. They may also point out that the 127,352 civil cases resolved by Tennessee courts of record include many non-damages and torts cases, in which insurance is simply not in play (*i.e.*, domestic cases, fraud cases, statutory claims, contract claims, etc.). These are fair observations.

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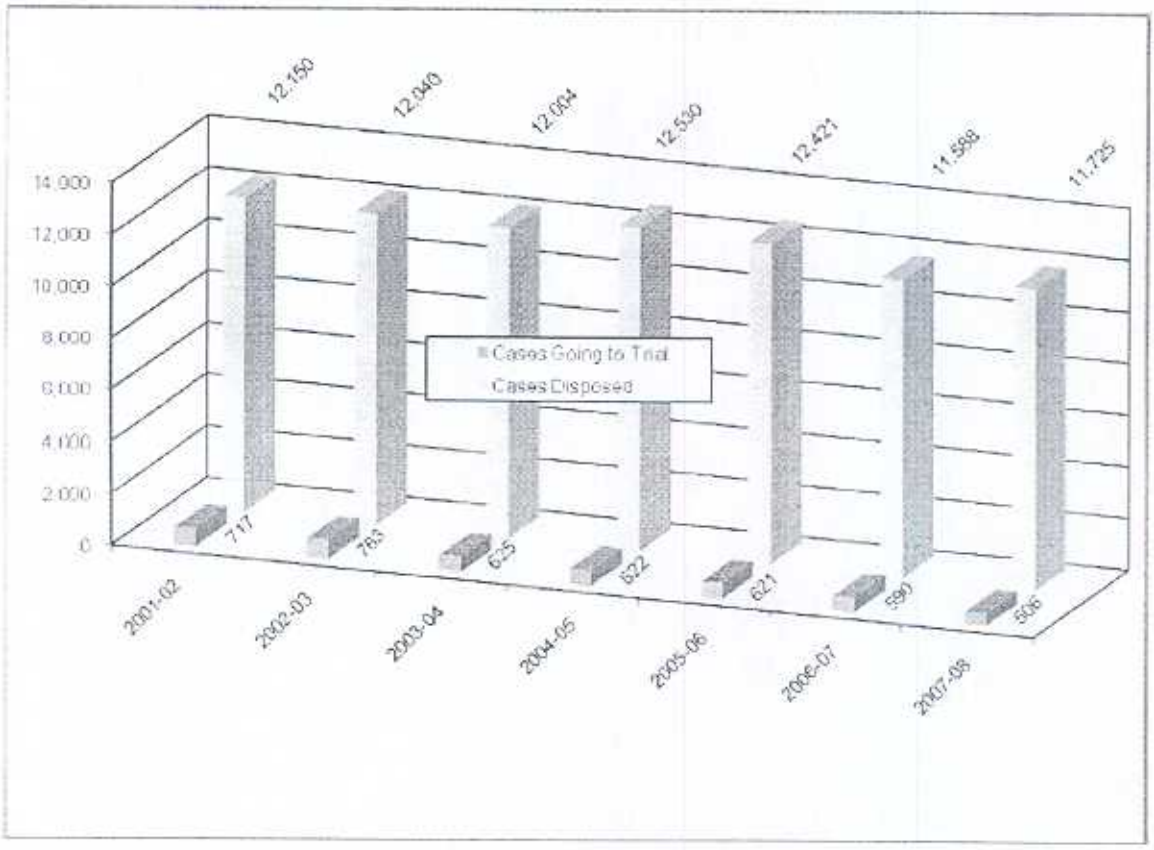
[2] The author attempted to locate publicly available and accessible data about jury trial frequency statistics from Arkansas, Georgia, Kentucky and Mississippi in addition to those detailed in this letter, but was unable to readily locate such.

However, an analysis of the data from "damages and torts" cases (*i.e.*, the category of cases in which the defendant could possibly have insurance coverage) that are not resolved prior to a trial of any kind (*i.e.*, jury or bench), only further underscores the indisputable conclusion that discovery of insurance agreements will not—and in fact cannot—have any material *downward* effect on the number of cases not resolved prior to trial. "Of the 11,725 damages and torts cases disposed of during the year, 506 (4.3 percent) proceeded to trial." Annual Report of the Tennessee Judiciary, Fiscal Year 2007-2008, at 121. And only in less than half of those proceeding to trial (237) were damages of any kind awarded to the plaintiff. *See* Annual Report of the Tennessee Judiciary, Fiscal Year 2007-2008, at 129.

Therefore, at the end of the day, of the 11,725 damages and torts cases disposed of this past fiscal year, only 237 arguably meritorious cases were not resolved prior to trial. And if one extrapolates the steady decline in cases already going to trial over the last several years as reflected in the chart below, it is difficult if not impossible to conceive how the discovery of insurance agreements could have any material *downward* effect on the number of cases not resolved prior to trial. Again, the result is likely to be the opposite.

Damages and Torts Cases Disposed Statewide

Fiscal Years 2001-02 Through 2007-08



Source: Annual Report of the Tennessee Judiciary, Fiscal Year 2007-2008, at 124.

The data are all the more compelling for medical malpractice cases. Every year, the Tennessee Department of Commerce & Insurance marshals data from throughout the state for its annual report on medical malpractice claims.[3] The reports are illuminating and the data contained therein further undercut the notion that discovery of insurance agreements is necessary or likely to assist in facilitating more settlements. The chart below summarizes the number of arguably meritorious cases that were not settled prior to a final judgment in favor of the plaintiff.

	2004	2005	2006	2007
Total Medical Malpractice Claims Disposed	2,366	2,837	2,973	3,043
Number of Claims Resolved Through Judgment for Plaintiff	6	5	6	5[4]
Percentage of Claims Resolved Through Judgment for Plaintiff	0.25%	0.18%	0.2%	0.16%

Based on these statistics, it is difficult to see how discovery of insurance agreements could possibly increase the number of settlements and decrease the number of arguably meritorious cases that go to trial. The data reveal that the present system works almost flawlessly—or at least approximately 99.8% percent of time—whereby arguably meritorious claims for medical malpractice are resolved or otherwise disposed of without trial and without re-writing Rule 26.02 to compel discovery of insurance agreements.

In fact, far from needing reform to assist the half-dozen or fewer plaintiffs each year with possibly settling their arguably meritorious cases prior to trial, the data suggest that reform is needed to protect defendants in medical malpractice cases from non-meritorious claims being brought and prosecuted. Of the reported 316 court judgments in 2007 involving medical malpractice cases, "309 of the judgments resulted in favorable rulings for the defendant where no damages were awarded to the claimaint." 2008 Medical Malpractice Claims Report, Department of Commerce & Insurance, at 4. And while the data reflect that another approximately 16% of medical malpractice claims are resolved through settlement every year, all other claims are

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[3] The 2007-2008 Annual Report of the Tennessee Judiciary also includes mention of medical malpractice cases. According to that report, for fiscal year 2007-08, only twenty medical malpractice cases proceeded to trial. *See* Annual Report of the Tennessee Judiciary, Fiscal Year 2007-2008, at 121. For perspective, the monetary damages awarded for those cases was $6,033,570, or $301,678.50 for each of the 20 cases. The Annual Report does not disclose how many of the 20 cases actually resulted in verdicts for the plaintiff(s) or how many of the 20 cases actually combined for the total damages figure of $6,033,570. Similarly, the report does not detail how much of $6,033,570 was actually collected as opposed to appealed or compromised. Presumably, the annual report from the Tennessee Department of Commerce & Insurance fills in these gaps, although it reports on a calendar year basis whereas the Tennessee Judiciary reports on a fiscal year basis.

[4] The 2008 Report notes that seven (7) judgments were entered in favor of the plaintiff in 2007, but two (2) of them were resolved pursuant to settlements. *See* 2008 Medical Malpractice Claims Report, Department of Commerce & Insurance, at 3. As of the time of the preparation of this letter, the 2009 report had yet to be released on the Department's website.

disposed of without payment by the defendant. *See* 2008 Medical Malpractice Claims Report, Department of Commerce & Insurance, at 3.

Settlement is already the norm for arguably meritorious medical malpractice cases. In 2007, $116,691,921 was paid out in settlements of medical malpractice claims. *See* 2008 Medical Malpractice Claims Report, Department of Commerce & Insurance, at 4. The numbers for 2006 ($100,223,337), 2005 ($119,091,990) and 2004 ($108,333,535) are equally substantial. *See id.* By comparison, the three medical malpractice judgments against physicians (two were against hospitals) in 2007, were for $148,000, $222,000 and $3,500,000, respectively (with the later amount including an award of punitive damages). *See id.*

Interestingly, in the case in which $148,000 was awarded as damages, the plaintiff had sought $5,000,000. *See id.* The Medical Malpractice Claims Report does not disclose the amount sought in the other two cases. Anecdotal evidence certainly suggests, however, that it is cases like the first—where the plaintiff seeks wholly unrealistic damages—that are responsible for the handful of arguably meritorious cases that are not settled and go to trial. No amount of discovery of insurance will change that outcome or facilitate settlement in such cases. If anything, discovery will lead to fewer settlements because plaintiffs will be tempted by the size of insurance policies as opposed to the size of their actual damages.

The empirical evidence is convincing that discovery of insurance agreements will not—and in fact cannot conceivably—facilitate more settlements. Nonetheless, some proponents of proposed Rule 26.02(2) may still argue that even though the data confirm that discovery of insurance agreements will not lead to more settlements, discovery will facilitate more expeditious settlements. Putting aside the questionable leap of logic, once again the data do not support such an argument.

According to data from the National Practitioner Data Bank, Tennessee's mean and median delay between incident and reported payment is measurably less (by a magnitude of at least 10 percent) than the average of those states that allow for discovery of insurance information. *See* National Practitioner Data Bank 2006 Annual Report, U.S. Department of Health and Human Services, at 74. This holds true for both 2006 (the most recent year for which data are available) as well as on a cumulative basis from 1990 through 2006. *See id.*

And remarkably, the same data reflect that the mean (although not the median) medical malpractice payment in Tennessee is slightly higher than from those states that allow for discovery of insurance information. *See id.* As discussed in **Tab 3**, the conclusion to be drawn from the data illustrates that not only are settlements more expeditious in Tennessee, but they are also more aligned with the severity of the plaintiff's actual damages as opposed to simply a by-product of how much insurance a defendant may decide to purchase.

In conclusion, with all due respect to those federal district courts and commentators from 40 to 50 years ago who opined that discovery of insurance would facilitate settlement, the empirical evidence does not appear to support their hypothesis. In fact, at least in Tennessee, the data suggest the opposite and suggest that if anything, proposed Rule 26.02(2) will deter or defer settlement instead of promoting it.

3. **Discovery of Insurance Information Is Likely not only to Deter Settlement, but to also Undermine Substantive Tort Law.**

In addition to forestalling settlement and encouraging more litigation, proposed Rule 26.02(2) is likely to lead to the circumvention of Tennessee substantive tort law. The existence and amount of damages and the plaintiff's burden to prove entitlement to damages should and must be determined independent of the existence of any insurance policy or the ability of the defendant to pay such damages. This point is thoughtfully discussed in a law review article written by the former Dean of Vanderbilt Law School, Kent Syverud:

> Who gets sued often depends on who has insurance. The complaint is often amended, and the discovery and trial strategy accordingly altered, to conform to what the insurance policy covers and what it does not. The value of the case, which we so often assume to be a function of the substantive tort law and costs of civil process, may be just as much a function of how much insurance coverage the defendant has purchased.
>
> It even may be that insurance *precedes* tort liability in the sequence -- that insurance institutions cause some forms of tort litigation to come into existence, rather than the other way around. There are some indications, for example, that the first "clergy malpractice" policies, which cover a minister or rabbi's liability for injuries caused by professional counseling, were created and marketed *before* any plaintiff's lawyer creatively drafted a complaint seeking damages for such injuries. It is certainly possible that some forms of tort litigation might never have developed had not some insurance broker first paved the way by creating awareness of the liability risk and an insurance policy to cover the judgment.

Kent D. Syverud, "*The Duty to Settle*," 76 VA. L. REV. 1113, 1114-15 (1990).

Requiring the disclosure of liability insurance threatens to undermine Tennessee tort law by replacing or substantially altering the manner by which claims are valued for purpose of settlement. This is especially true in medical malpractice cases, where damages are currently expressly defined by statute:

> In a malpractice action in which liability is admitted or established, the damages awarded may include (in addition to other elements of damages authorized by law) actual economic losses suffered by the claimant by reason of the personal injury including, but not limited to cost of reasonable and necessary medical care, rehabilitation services, and custodial care, loss of services and loss of earned income....

Tenn. Code Ann. § 29-26-119.

Again, in addition to the courts and commentators who have sounded the alarm with respect to making insurance discoverable,[5] empirical evidence supports the notion that, at least with respect to medical malpractice cases, the current system results in settlements that are more aligned with actual damages as opposed to the homogenization of settlement values tied to insurance limits. Nationally, physician medical malpractice payments in 2006 had a mean average of $311,965 and a median average of $175,000 according to the United States National Practitioner Data Bank. *See* National Practitioner Data Bank 2006 Annual Report, U.S. Department of Health and Human Services, at 74. The relative proximity of the mean and median averages certainly suggests an increasing flat-line of payments—which is confirmed by the data over the past 15 years—whereby relatively minor injuries are being over-compensated and relatively major injuries may go under-compensated.

Tennessee, which has resisted the trend toward allowing the discovery of insurance agreements, had in 2006 a mean average physician medical malpractice payment of $317,305, which is *higher* than the national average. However, it had a median average physician medical malpractice payment of $150,000, which is *lower* than the national average. *See* National Practitioner Data Bank 2006 Annual Report, U.S. Department of Health and Human Services, at 74. Further drilling down the data to compare Tennessee (pop. rank 17) with states of a similar size that permit discovery of insurance information,[6] Missouri (pop. rank 18) had a mean average physician medical malpractice payment of $330,115 and a median average physician medical malpractice payment of $200,000 in 2006. *See id.* Similarly, during that same year, Arizona (pop. rank 16) had a mean average physician medical malpractice payment of $286,898 and a median average physician medical malpractice payment of $161,375. *See id.* And in Maryland (pop. rank 19), the mean average physician medical malpractice payment was $347,477 and the median average physician medical malpractice payment was $200,000.

The relative convergence of the mean and median average payments in similarly populous states such as Missouri, Arizona and Maryland contrasts with the relative divergence of the mean and median payments in Tennessee. Thus, these data suggest that Dean Syverud may have hit the nail on the head when he hypothesized that "the value of the case, which we so often assume to be a function of the substantive tort law and costs of civil process, may be just as much a function of how much insurance coverage the defendant has purchased." Kent D.

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[5] *Thomas*, 2007 Tenn. App. LEXIS 680, at *10 ("We perceive the substance, or subject matter, of a particular case to be distinct from matters of economic strategy having no connection to that substance."); *Cox v. Livingston*, 41 F.R.D. 344, 346 (S.D.N.Y. 1967) ("whether the defendants will be able to satisfy any judgment which might be obtained against them for damages, has no relevancy to whether any judgment for damages should be rendered against them"); *Jeppeson v. Swanson*, 68 N.W.2d 649, 659 (Minn. 1955) ("That does not mean that information should be discoverable which is desired only for the purpose of placing one party in a more strategic position than he otherwise would be by acquiring information that has nothing to do with the merits of the action. There must be some connection between the information sought and the action itself before it becomes discoverable.").

[6] According to the 2008 Census Bureau, Tennessee ranked as the 17th most populous state with a population of 6,214,888. Arizona ranked 16th with a population of 6,500,180, Missouri ranked 18th with a population of 5,911,605, and Maryland ranked 19th with a population of 5,633,597. Indiana, which ranked 15th with a population of 6,376,792, is not included within the data set because according to the National Practitioner Data Bank, the data from Indiana are not adjusted for payments by State compensation funds and "[m]ean and median payments for States with payments made by these funds understate the actual mean and median amounts received by claimants." *See* National Practitioner Data Bank 2006 Annual Report, U.S. Department of Health and Human Services, at 74.

Syverud, "The Duty to Settle," 76 VA. L. REV. 1113, 1114-15 (1990). The discovery of insurance information, including limits, therefore threatens to substitute substantive Tennessee law on damages with a homogenization of damages based on defendants' insurance coverage limits.

In so doing, the proposed rule also creates perverse incentives for everyone who purchase liability insurance, not just physicians. Currently, Tennesseans purchase liability insurance to protect themselves or their shareholders in the event of an unforeseen accident or negligence. Potential defendants, of which we are all, purchase enough insurance to cover the small claims that may arise time-to-time as well as that one big claim that we never predict or anticipate.

Under the proposed rule, however, purchasers of liability insurance (and those that provide insurance) now know that plaintiffs will be privy to those policies and will resist settling for less than the total policy amount. This circumstance presents all of us with a difficult choice. Do we continue to insure ourselves to the fullest extent possible or do we realize that such an act is no longer the responsible act we thought it was because rather than it being our safety net it becomes a spring board for claims against us. The most likely result is the purchase (and perhaps only the availability) of lower insurance policies—enough to cover small and medium size claims but not enough to cover the truly horrific. For Tennesseans, this change in behavior coupled with discovery of insurance could translate into plaintiffs with rather minor claims going overcompensated while those plaintiffs who have truly been injured—and those who are truly in need of compensation—going undercompensated.

For this additional reason, the Court should reject proposed Rule 26.02(2).

4. **Discovery of Insurance Information Does not Advance the Interests of the Defendant-Policyholder.**

In light of the evidence that the discovery of insurance information does not promote settlement and in fact will undermine it, the other justification offered for proposed Rule 26.02(2) is that it protects defendant-policyholders because "the insurance company is often the 'real party in interest to the suit to the extent of its policy limits.'" *Thomas*, 279 S.W.3d at 262. Because disclosure does not promote settlement, it is difficult to understand how *requiring* disclosure of insurance information could somehow protect defendant-policyholders or why it matters that insurers have an interest in the litigation. However, even putting aside this fundamental disconnect with the proponents' reasoning, the following five points further highlight why mandatory discovery of insurance information is not needed to supposedly protect policyholders from their insurers.

First, the Tennessee Supreme Court has already made plain that insurance companies should not control or direct defense counsel. Unlike the majority of states—which also all allow for discovery of insurance information—counsel retained in Tennessee to represent an insured-defendant represents the insured and only the insured. Under the Tennessee Supreme Court's decision in *Youngblood*, "[t]he employment of an attorney by an insurer to represent the insured does not create the relationship of attorney-client between the insurer and the attorney." *In re Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995). Rather, an attorney must "devote complete loyalty to the insured regardless of the circumstances." *Id.*

Moreover, "[t]he Code [of Professional Responsibility] prohibits any relationship between the attorney and the insurer, or any other person or entity, which impairs the attorney's complete loyalty to the client with regard to the performance for the client of the agreed legal services or with regard to any matter touching the attorney-client relationship between the attorney and the insured." *Id.* The Tennessee Supreme Court, for this reason, has already admonished insurers not to "control the details of the attorney's performance, dictate the strategy or tactics employed, or limit the attorney's professional discretion with regard to the representation." *Id.* (emphasis added). Likewise, the Tennessee Board of Professional Responsibility has declared that "an attorney should devote his complete loyalty to the insured-client and not allow the insurer, or anyone else, to regulate, direct, control or interfere with his professional judgment." Tenn. Bd. of Prof'l Responsibility, Formal Op. 88-F-113 (Aug. 2, 1988).

Second, if the insured or defense counsel want to disclose liability limits, it is entirely within their prerogative to do so consistent with their policy terms. Obviously, if the insureds and/or their counsel believed that disclosure of insurance information was helpful, they would (and in fact sometimes do) voluntarily provide such. The reality is that it is seldom beneficial for the defendant or his or her counsel to disclose insurance information because rather than facilitate settlement, disclosure often hinders it. The fact that they do not do so as a matter of course reinforces the conclusion that it is far from just insurers that oppose the automatic and mandatory disclosure of insurance information.

Third, the suggestion is made in *Thomas* that "[w]hen it is in the defendant's interest to settle the case within the policy limits, the insurance company may prefer to gamble on a jury verdict of non-liability 'where the only one who stands to lose from that gamble is the policyholder.'" *Thomas*, 279 S.W.3d at 265. Setting aside how disclosure of insurance information would address such a scenario, the present law already provides an insured a remedy if an insurance company gambles on a jury verdict in bad faith and against the interests of its insured.

Tennessee law already requires insurers to act in "good faith." *Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365, 370 (Tenn. 2006). Not only is an insurer potentially subject to a bad faith claim under the scenario described by the Tennessee Supreme Court in *Thomas*, *see id.*; *State Auto. Ins. Co. v. Rowland*, 427 S.W.2d 30 (Tenn. 1968), but it is also potentially subject to the Tennessee Consumer Protection Act. *See, e.g., Myint v. Allstate Ins. Co.*, 970 S.W.2d 920 (Tenn. 1999); *Gaston v. Tenn. Farmers Mut. Ins.* Co., 120 S.W.3d 815, 822 (Tenn. 2003) (holding that "a jury could reasonably conclude" that an insurer's failure to inform insured that "her effort to settle with CNL would prohibit her from collecting under her own policy...was unfair or deceptive under the TCPA").

The empirical evidence reflects that the threat of an insurer "gambling at the expense of its insured" is indeed a minuscule one. After all, the overwhelming majority of cases not resolved on motion or dismissed voluntarily are in fact settled. This is especially true in medical malpractice actions, where only 0.20% or less of claims actually result in a judgment in favor of the plaintiff. While it is sometimes tempting to engage in theoretical discourse, a search of all Tennessee state court cases in Lexis for claims against insurers for failing to settle within policy limits reveals that it is an extremely rare circumstance indeed.[7]

Fourth, "Tennessee is not a 'direct action' state where a plaintiff can sue the liability insurance carrier of the defendant who allegedly caused the harm." *Seymour v. Sierra*, 98 S.W.3d 164, 165 (Tenn. Ct. App. 2002). Tennessee has already decided that "[a] liability insurer may well be the real party in interest, but this is not a State where a direct action is permitted against it." *Ferguson v. Nationwide Prop. & Cas. Ins. Co.*, 218 S.W.3d 42, 52 (Tenn. Ct. App. 2006) (internal quotation omitted). The fact that Tennessee has already decided for public policy reasons not to permit direct actions against insurers undercuts any justification for proposed Rule 26.02(2) on the basis that the insurer may at times be the real party in interest in litigation. After all, if Tennessee has already determined that actual direct actions do not make good public policy, then *de facto* direct actions—which is what proposed Rule 26.02 would do according to those advocating a "real party in interest" justification—make for no better public policy.

Finally, requiring the mandatory disclosure of insurance agreements because the insurer may have an interest in the litigation is a slippery slope. Under the same logic, should all

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[7] The author was able to locate only two appellate cases on Lexis since 1970 in which a Tennessee state court found an insurer to have acted in bad faith in failing to settle prior to trial. *See Johnson v. Tenn. Farmers Mut. Ins. Co.*, 205 S.W.3d 365 (Tenn. 2006); *MacLean v. Tennessee Farmers Mut. Ins. Co.*, 1994 Tenn. App. LEXIS 735 (Tenn. Ct. App. Dec. 14, 1994). More often, insurers are held to have acted in good faith in those rare instances where a jury returns an "excess" verdict. *See, e.g., Alford v. National Emblem Ins. Co.*, 469 S.W.2d 375 (Tenn. 1971); *Stubblefield v. Tennessee Farmers Mut. Ins. Co.*, 1991 Tenn. App. LEXIS 534 (Tenn. Ct. App. July 3, 1991); *Clark v. Hartford Accident. & Indem. Co.*, 457 S.W.2d 35 (Tenn. Ct. App. 1970).

shareholders of a company be subject to discovery because they have an interest in litigation involving the company (and ultimately pay for that litigation)? What about spouses of litigants or other family members? Unless the same rules are going to be applied to other parties that may have an interest in litigation, there is no legitimate reason to single out insurance information for discovery.

Accordingly, for each of the foregoing five reasons, the fact that an insurer may have an interest in litigation affords no justifiable basis for adopting proposed Rule 26.02(2).

5. Proposed Rule 26.02(2) Creates a Slippery Slope.

Proposed Rule 26.02(2) creates a slippery slope. As shown above, the justification for disclosure of liability insurance on the basis that the insurer has an interest in the litigation is nothing but a gateway toward the abusive and unbounded discovery the Advisory Commission has warned against. Moreover, the "facilitate settlement" justification if, taken to its logical conclusion, would be used to permit discovery of all types of information. For example, why not allow plaintiffs to know all of a defendant's assets, not just his or her insurance policy? There is no logical reason to allow discovery of insurance policies and not discovery of a defendant's wealth and other assets.

Similarly, if the premise is that settlement is promoted by complete knowledge on both sides, then plaintiffs should have to disclose their financial condition, including their "bottom line" and financial need. After all, if the plaintiff knows the defendant's insurance limits, *i.e.*, how much the defendant may be able to pay, shouldn't the defendant be entitled to know the plaintiff's bottom line, *i.e.*, how much the plaintiff is willing to take? Similarly, if a plaintiff is having to share a settlement payment with counsel, then the same logic should render all attorney fee agreements and engagement letters discoverable. After all, if plaintiff's counsel is receiving a percentage of the settlement or potential judgment, then the defendant should know that when engaging in settlement discussions. (At the very least, the plaintiff's counsel would have an interest in the litigation comparable to or greater than the defendant's insurer.) Again, there is no justification for treating insurance agreements differently and if one truly believes that complete knowledge on both sides will facilitate settlement, then Rule 26.02(2) utterly fails in that respect.

Tennessee currently prohibits the discovery of information pertaining to a party's wealth, assets and financial need to ensure that tort claims are valued by their actual worth, not the worth of whoever happens to be the defendant or the financial need of whoever happens to be the plaintiff. Tennessee also recognizes the privacy rights of both plaintiffs and defendants. Proposed Rule 26.02(2) does not just undermine these important principles, but it puts us on a track to completely vitiate them.

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November 30, 2009

Mike Catalano, Clerk
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100 Supreme Court Building
401 7th Avenue North
Nashville, TN 37219-1407

RE: Proposed Change to Tenn. R. Civ. P. 26.02

Dear Mr. Catalano:

State Farm appreciates the opportunity to provide comments and voice our opposition to the proposed amendment to Tenn. R. Civ. P. 26.02 which will allow discovery of insurance agreements. We oppose this expanded discovery of a defendant's insurance policy limits as this information is generally irrelevant and inadmissible at trial.

The existence of an insurance policy or the size of its limits has no relevance as to whether a defendant is actually liable to a plaintiff or the amount of that liability. By allowing the discovery of this information some insured defendants will likely be subjected to increased litigation risk as the ability to defend or settle a case for what is appropriate may be compromised. The determination of fault and the estimate of damages should be based solely on the facts of the case and not on whether the defendant has liability insurance or the limits of that policy. We already believe this information could taint a jury's decision, would not this same information taint the litigants' assessment of their own case?

Overall, we do not believe this discovery change will promote additional settlements in Tennessee. Currently in Tennessee, defendants have the option of disclosing the details of insurance agreement information and often choose to do so where such disclosure will lead to settlement. However, requiring this disclosure will only serve to cloud the parties' assessment of their own cases and potentially penalize those individuals purchasing insurance coverage. With

the proposed rule in place, lawsuits are more likely to be filed or pursued merely because of the existence or amount of liability coverage rather than because of actual fault.

For these reasons State Farm opposes this change.

Sincerely,

Michael L. Lane, Counsel
State Farm Insurance