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October 16, 2006

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

RE: AMENDMENTS TO THE TENNESSEE RULES OF PROCEDURE & EVIDENCE

Dear Mr. Catalano:

I am writing to comment on the proposed change to Rule 56.04 of the Tennessee Rules of Civil Procedure. The proposed amendment to the rule would require a trial court judge to "state the legal grounds upon which the court denies or grants the motion, which shall be included in the order reflecting the court's ruling." While I generally welcome the proposed change to Rule 56.04, I believe that the bar would be better served if the rule read as follows:

**56.04. Motion and Proceedings Thereon.**

The motion shall be served at least thirty (30) days before the time fixed for the hearing. The adverse party may serve and file opposing affidavits not later than five (5) days before the hearing. Subject to the moving party's compliance with Rule 56.03, the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *The trial court shall state the legal grounds upon which the court denies or grants the motion, which shall be included in the order reflecting the court's ruling.* If the motion is denied because the Court finds that material facts are in dispute, the Court shall identify those facts, as enumerated in the parties' respective statements of undisputed facts, about which there is a material dispute. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

[*Italics: Amended submitted for comment;* Underline: Suggested further rule change.]

The addition of the underlined portion above would not only further the goals of Rule 56, narrowing the scope of factual issues for trial or quickly resolving cases when there are no material facts in dispute, but would also provide an additional impetus for litigants to clearly identify the material facts of their cases and increase judicial participation in the summary judgment process. To my knowledge, Tennessee is the only state which has a rule like Rule 56.03. It seems that the judiciary and the bar would be well served if we further utilized this unique procedural vehicle.

Let me reiterate that I applaud and approve of the Court's suggested change to Rule 56.04; however, I think that the legal community of attorneys and judges would benefit from the additional change to the rule as suggested herein. With regards, I am

Very Truly Yours,

Thomas H. Shields III
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**From:** Judge.Dale Workman
**To:** Mike.Catalano@tscmail.state.tn.us
**Date:** 10/26/2006 9:58:58 AM
**Subject:** Proposed Rule amendments

Since the Supreme Court believes in electronic mail for the courts, I assume the notation "written comments" also means electronic.
The following are my comments on the proposed amendments.

Rule 15.01

The proposed amendment it unwise and should be withdrawn or rejected.

The rule makes court clerks mini judges without legal training. The clerks are to be record keepers and ministerial officials. Now a clerk has to know whether a particular amendment is allowed by T.C.A. 20-1-119 or is an amendment needing an order from the judge. This is best left to have a clerk know for any amendment they are to issue process for a new party only upon a court order. How is the clerk to know if the amendment is timely? How is the clerk to know that all the requirements to add a party have been met? How does the party now being served know that the amended complaint is valid? A more efficient method to get the judge's signature would be helpful in jurisdictions of more than one county.

Rule 32.01

The proposed amendment needs to be withdrawn and reworked.

The amendment as drafted would deny either party the ability to call a "treating physician" as a fact witness by deposition. The T.R.C.P. make no distinction between "discovery" depositions and " proof" depositions that occur in trial practice. There is only a deposition in our rules. The proposed amendment either: (a) assumes that a "treating physician's" pre-trial deposition is taken under the provisions of Rule 26.02(4) with a disclosure of opinions; or (b) requires that a deposition of a fact witness, in this case a "treating physician" should not be subject to the same rules for use of depositions as any other fact witness.

Under the proposed amendment, could the plaintiff or defendant use a "deposition" of a treating physician that they had taken as part of their proof in chief under Rule 32.01(3)(D)? Under the proposed amendment, could the defendant use the deposition of the treating physician that plaintiffs took but chose not to introduce in their proof in chief?

Rule 56.04

Why? Is this just not more being added to satisfy some special interest? If you believe a trial judge has made an erroneous ruling, appeal the ruling.
On appeal the reviewing court decides a Rule 56 motion without any presumptions so it does not matter if the trial judge's action was for a good reason, no reason or bad reason. In a close case could not the trial judges statements sway the appellate judge and deny the denovo review to which the appellant is entitled? Is the purpose of the appellate courts now to point out good or bad reasoning used by the trial bench or to decide the party's rights?
I may review an appellate courts opinion and find,in my opinion, the reasoning is not sound. Should I write something critical of the appellate reasoning when it comes back? What would my writing achieve except possibly weaken respect for the appellate bench?
The same is true of appellate judges being critical of trial judges. If the reasoning is not "relevant" why do we put it in the record particularly if the appellate bench should not be using it in any way?

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November 1, 2006

Mike Catalano, Clerk
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RE: Proposed Amendments to the Tennessee Rules of Procedure and Evidence

Dear Mike:

I have reviewed the proposed changes as published in West's Tennessee Decisions in the October 10, 2006 issue.

I believe that the proposed changes to Rule 24 and 25 having to do with the completion and transmission of the record by reducing the "ninety days" to "sixty days" places an unreasonable burden on the practicing attorney involved in the Appeal.

While even the busiest attorney, and they are the ones normally involved in litigation over issues meriting an Appeal from the Trial Court's decision, can probably complete his or her responsibilities within the "sixty days". I have found that the problem arises with getting the transcript from the Court Reporter.

My fifty (50) years of experience as a practicing attorney lead me to believe that, in view of the normal time lapse in setting the case for argument in the Appellate Court and ultimately receiving an opinion, could not be seriously affected by allowing the trial attorney an additional thirty days to have the record properly presented for review, and the ends of justice could not be compromised.

I respectfully offer these comments for consideration by the Commission.

Very truly yours,

MCSWEEN AND MCSWEEN

James C. McSween, Jr.

JCMCSJR/pmc