IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:	)	
	)	
Petition of Piedmont Natural Gas Company, Inc. for Approval of Service Schedule No. 317 and Related Energy Efficiency Programs	)	**DOCKET NO. 09-00104**

RESPONSE OF THE CONSUMER ADVOCATE TO PIEDMONT'S OPPOSITION TO THE CONSUMER ADVOCATE'S MOTION REQUESTING PERMISSION TO ISSUE MORE THAN FORTY (40) DISCOVERY REQUESTS

Robert E. Cooper, Jr., Attorney General and Reporter for the State of Tennessee, by and through the Consumer Advocate and Protection Division ("Consumer Advocate"), pursuant to TRA Rule 1220-1-2-.11(5)(a), hereby submits this response to Piedmont's opposition to the Consumer Advocate's request for permission to issue more than forty discovery requests to Piedmont Natural Gas Company, Inc. ("Piedmont" or "Company").

I. INTRODUCTION

The crux of the Company's argument can be broken down into two conclusory points: (a) the Consumer Advocate has asked discovery requests that address issues no longer under consideration and are therefore burdensome and; (b) the Consumer Advocate has asked too many discovery requests, the sheer number of which is burdensome in and of itself. For the reasons herein, the Consumer Advocate submits that the Piedmont's arguments have no merit and fail to provide a basis for denying the Consumer Advocate's discovery requests grounded in Tennessee law.

It must also be noted that the Company does not base an objection upon relevance of any discovery request.[1] Rather, Piedmont's opposition is based on the failure of the Consumer Advocate to utilize the specific wording of the issues enumerated in the Hearing Officer's *Order Granting Intervention, Determining Issues, and Establishing Procedural Schedule* ("*Order*"), filed on October 13, 2009, in the Consumer Advocate's memorandum establishing good cause for its discovery requests. As discussed herein, the Consumer Advocate did not receive notice of the *Order* until October 15, 2009, a fact which was made known to Piedmont on October 15, 2009. By that time, the Consumer Advocate had already filed and served its discovery requests prior to the close of business on October 13, 2009, in an effort to provide the Company additional time to respond to discovery and insure a process that allows for an expedited hearing, as requested by the Company, remains on schedule.

In reviewing the Company's objection, the Authority should consider the basic principles of discovery in Tennessee legal practice. Discovery should enable the parties and the court to seek the truth so that disputes will be decided by facts rather than *legal maneuvering*. *White v. Vanderbilt University*., 21 S.W. 3d 215, 223 (Tenn. Ct. App. 1999). Discovery should allow both the court and the parties to have an intelligent grasp of the issues to be litigated and knowledge of the *facts underlying them*. *Vythoulkas v. Vanderbilt University Hospital*, 693 S.W. 2d 350, 356 (Tenn. Ct. App. 1985).

II. PROCEDURAL HISTORY

On October 13, 2009, the Consumer Advocate filed and served electronically discovery requests in excess of forty (40) questions. Pursuant to TRA Rule 1220-1-2-.11(5)(a), the Consumer Advocate filed and served electronically a motion and memorandum establishing

[1] In an October 9, 2009, filing, Piedmont did not object to any specific issue submitted by the Consumer Advocate in the Statement of Issues filed on October 8, 2009.

good cause for service of the additional discovery requests beyond forty (40). The Consumer Advocate filed discovery prior to the October 15, 2009, deadline set for discovery, the date set by the Hearing Officer at the September 28, 2009, status conference. The Consumer Advocate took the action of filing discovery in advance of the October 15, 2009, deadline in an effort to allow Piedmont additional time to respond to discovery and in order to insure this docket has an expedited hearing as requested by the Company.

In support of the discovery request, the Consumer Advocate submitted a memorandum to establish good cause. In doing so, the Consumer Advocate utilized the statement of issues filed by the Consumer Advocate on October 8, 2009. Unbeknownst to the Consumer Advocate, the Hearing Officer issued the *Order* on October 13, 2009. The *Order* adopted an issues list which the Hearing Officer characterized as broad. The Consumer Advocate received no service or notice of the Hearing Officer's *Order*, or of the wording of the specific issues contained therein and determined by the Hearing Officer, until the document was posted online on the Authority's website on the morning of October 15, 2009. In an e-mail correspondence on October 15, 2009, the Consumer Advocate advised both the Hearing Officer and the respective attorneys for Piedmont that the Consumer Advocate had received no prior notice of the *Order*. [2]

On October 19, 2009, Piedmont filed an objection to the Consumer Advocate's request for permission to issue more than forty (40) discovery requests.

III. PIEDMONT'S OBJECTION IS WITHOUT MERIT

Piedmont's argument is based upon the assumption that the Hearing Officer's *Order* limits any discovery request to only those matters specifically referenced to the issues adopted by the *Order*. Furthermore, the Company deems the Consumer Advocate's discovery request as burdensome because the Consumer Advocate did not utilize the specific wording of the Hearing

[2] A copy of this electronic correspondence is attached.

Officer's issue list in establishing good cause to serve more than forty (40) discovery requests. In doing so, Piedmont is apparently assuming that the Consumer Advocate's Statement of Issues, filed on October 8, 2009, suffers no relation, overlap or relevance to the specific wording of the issues list adopted by the Hearing Officer on October 13, 2009.

a. Possible Modifications to Piedmont's Decoupling Proposal are Relevant to this Docket

Piedmont asserts that any question relating to modifications to the proposed decoupling mechanism "in order to balance the interests of consumers and Piedmont", as enumerated in Issue 3 in the Consumer Advocate's October 8, 2009, filing is "no longer under consideration" in this docket and that any related discovery request that exceeds the limit of forty (40) should be prohibited.[3] Thus, Piedmont apparently contends no modifications can be made or even considered to its proposed decoupling mechanism. The Consumer Advocate would respectfully disagree. Issue 1 of the *Order* reads as follows:

> **What is the most appropriate mechanism, or financial incentive, to insure that Piedmont's financial incentives are aligned with the state's energy conservation policy as set out in 2009 Public Acts 531, Section 53?**

Similar to the mandate in the state's new energy conservation policy, Issue 1 of the *Order* is fairly broad and neither embraces nor rejects Piedmont's proposed decoupling mechanism. The Consumer Advocate submits that under Issue 1 of the *Order*, Piedmont's proposal could be adopted, an alternative adopted or perhaps even a hybrid design or modified design could be adopted. The policy makes no reference to any specific mechanism. It is within the discretion of the Authority to formulate the specifics of the state's new policy, the scope and broadness of

[3] "Issue 3" of the Consumer Advocate's Statement of Issues, filed on October 8, 2009, is as follows: "Whether modifications to Piedmont's proposed decoupling mechanism are required in order to balance the interests of consumers and Piedmont as required by the State's policy."

which is reflected in Issue 1 of the *Order*. Based on Issue 1 of the *Order*, it would appear premature for Piedmont to argue otherwise.

b. The Impact of Price Elasticity on a Decoupling Mechanism is Relevant to this Docket

Piedmont further contends that the Consumer Advocate's issue related to "price elasticity", or the impact of natural gas prices on consumer usage, is apparently beyond consideration in this docket.[4] However, the Consumer Advocate respectfully submits that this in an important issue for the Authority to consider. As documented in the North Carolina Utilities Commission report of October 2, 2008, Piedmont's decoupling mechanism goes beyond making the Company whole from utility conservation program efforts, but rather extends to raising the rates paid by consumers due overwhelmingly, not from utility conservation programs, but from lower usage based on price elasticity. The Consumer Advocate submits that price elasticity is relevant to Issue 1 of the *Order* for purposes of the necessity to evaluate the need for safeguards during times of market price spikes. Furthermore, this issue is important to Issue 4 of the *Order* which reads as follows:

> **Does the implementation of a decoupling mechanism lower the business risk for Piedmont, thereby justifying an adjustment to its rate of return? If so, what method or evaluation tools should be utilized to quantify an appropriate adjustment to the rate of return?**

The decoupling mechanism proposed by the Company would likely insulate Piedmont from any economic impact (i.e. price elasticity, economic downturn, etc.) upon residential customer usage level and guarantee revenues for reasons beyond just energy conservation. Thus, it is apparent to the Consumer Advocate that price elasticity is relevant to Issue 4 in terms of

[4] "Issue 5" of the Consumer Advocate's Statement of Issues, filed on October 8, 2009, is as follows: "Whether the proposed decoupling mechanism or any alternative proposal should take into account the impact of natural gas market prices on customer usage."

evaluating whether a decoupling mechanism lowers the business risk of the Company. Furthermore, price elasticity should be considered in determining whether Piedmont should be required to meet specific, verifiable and measurable energy efficiency goals. For example, reported results should focus on the effects of Piedmont's consumer-funded conservation programs for any benchmarks set in this docket while accounting for changes in customer usage falling due to price elasticity or other economic factors.

c. Cost Effectiveness of Any Approved Conservation Program is Relevant to this Docket

Piedmont contends that the Consumer Advocate's Issue 6, related to the cost effectiveness of Piedmont's conservation programs, is beyond consideration in this docket.[5] Furthermore, Piedmont contents that the ability of the Company to provide measurable and verifiable savings from conservation programs and evaluating the financial impact of reduced customer usage on Piedmont's revenues participating in the Company's proposed programs is out of bounds for consideration in this docket.[6] Thus, the Company contends any related discovery request should be deemed extraneous and prohibited based on the *Order* and presumably outside the scope of the consideration of the Authority.

The Consumer Advocate submits such issues are extremely relevant. First, the state policy specifically requires conservation programs which are cost-effective.

> The general assembly declares that the policy of this state is that the Tennessee regulatory authority will seek to implement, in appropriate proceedings for each electric and gas utility, with

[5] "Issue 6" of the Consumer Advocate's Statement of Issues, filed on October 8, 2009, is as follows: "Whether the conservation programs proposed by Piedmont will achieve cost-effective results and measurable and verifiable energy efficiency savings in a way that sustains or enhances utility customers' incentives to use energy more efficiently."

[6] At page 4 of Piedmont's Objection, the Company apparently is also objecting any discovery requests related to the content of Issue 7 submitted by the Consumer Advocate. "Issue 7" of the Consumer Advocate's Statement of Issues, filed on October 8, 2009, is as follows: "Whether the TRA should set specific, verifiable, known and measureable energy efficiency goals and benchmarks for any energy efficiency or conservation program approved." This language closely tracks the wording of Issue 5 of the *Order*.

> respect to which the authority has rate making authority, a general policy that ensures that utility financial incentives are aligned with helping their customers use energy more efficiently and that provides timely cost recovery and a timely earnings opportunity for utilities associated with *cost-effective* measurable and verifiable efficiency savings, in a way that sustains or enhances utility customers' incentives to use energy more efficiently.

2009 Public Chapter 531, Section 53 (emphasis added). A concern the Consumer Advocate has is the lack of any requirement or incentive within Piedmont's proposal for a cost-effective program that will produce real results. The Consumer Advocate has no objection to consumers contributing funding to conservation programs, but such inniative must bear fruit. Ineffective and inefficient conservation programs should not be used as window dressing to justify decoupling or any other alternative mechanism.

For example, the Company's petition proposes a rebate program for the purchase of energy efficient equipment which Piedmont proposes to fund at the level of $250,000 annually, constituting half of the proposed annual funding for the entire decoupling/conservation iniative. Over three years, consumers are expected to fund the rebate program with a total of $750,000. However, a rebate program instituted by Piedmont in North Carolina was apparently ineffective and was discontinued.[7] Thus, given the requirements of the state's new policy and the ineffective track record of at least one of the programs proposed by the Company, the Consumer Advocate respectfully submits the cost effectiveness of the proposed conservation programs is not an extraneous or foreign issue to this docket.

In addition, any actual impact the results of a conservation program would have on Piedmont's revenues fits squarely within Issue 1 of the *Order*. For example, if the financial impact of the results of the proposed conservation programs seriously erode the Company's

[7] "Conservation Effectiveness Report of Piedmont Natural Gas" filed March 31, 2009 with the North Carolina Utilities Commission in Docket No. G-9, Sub 499.

revenues or have a diminimus effect, such facts should weigh on the Authority's decision within a determination of Issue 1 of the *Order* as to the appropriate mechanism under the state's policy. Finally, Issue 5 of the *Order* clearly addresses the question of specific, verifiable, measureable energy efficiency goals and benchmarks for approved conservation programs. Thus, Piedmont's objection to consideration of these issues has no merit.

IV. THE BASIS OF PIEDMONT'S OBJECTION IS NOT SUPPORTED BY TENNESSEE LAW

To the extent Piedmont claims the "sheer number" of discovery requests is burdensome, the Company's claim has no basis in Tennessee law. The Tennessee Rules of Civil Procedure constitute state law in Tennessee. *State v. Hodges*, 815 S.W. 2d 151, 155 (Tenn.1991). Under TRA Rule 1220-1-2-.11(1), discovery is sought and effectuated in accordance with the Tennessee Rules of Civil Procedure. Rule 26 of the Tennessee Rules of Civil Procedure governs discovery in Tennessee. Rule 26.02(1) provides the following:

> **In General.** Parties may obtain discovery regarding 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, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things, and electronically stored information, i.e. information that is stored in an electronic medium and is retrievable in perceivable form, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of *undue burden* or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden and cost. If that showing is made, the court may nonetheless order discovery from such

> sources if the requesting party shows good cause, e.g., where the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. The court shall specify conditions for the discovery.
>
> The frequency or extent of use of the discovery methods set forth in subdivision 26.01 and this subdivision shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or, *(iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.* The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision 26.03.

Tennessee Rules of Civil Procedure, Rule 26.02(1)(emphasis added). Thus, limitations on discovery require much more depth than a claim the number of requests is burdensome. A party seeking to limit discovery must demonstrate the limitations sought are necessary to protect a party from annoyance, embarrassment, oppression or undue burden or expense. *Glanton v. Shelby Insurance Company*, 1996 WL 82678, *1 (Tenn. Ct. App. 1996) (copy attached). Piedmont has not demonstrated any of these factors. Rather, Piedmont simply claims the sheer number is burdensome. Moreover, the required context for Piedmont's claim is not whether discovery is burdensome, but rather if discovery is *unduly* burdensome. Even if a request is burdensome, Rule 26 requires that such a question must take into account the needs of the case, the amount in controversy, limitations on resources, and the importance of issues at stake in the proceeding.

The Consumer Advocate submits that the amount in controversy is not entirely known based on the content of the record. Piedmont's petition in this matter does not disclose the

financial impact of its proposed decoupling mechanism. To date, the bare record in this matter contains only the factual results of Piedmont's decoupling mechanism in North Carolina which produced $50 million in revenue for the company over a roughly three year period.[8]

While Piedmont's North Carolina distribution operation serves a much larger customer base than in Tennessee, the results of the Company's proposed decoupling mechanism in Tennessee could possibly be quite sizeable. While Piedmont contends the petition is a fairly straight forward filing, the company has not disclosed the short and long term financial impact of the proposed decoupling mechanism. To an extent, the cost to consumers for the proposed conservation programs is known at approximately $1 million over three years based on the petition. Moreover, the financial impact of Piedmont's proposals does not consist of one time costs to consumers, but rather carry forward and cumulatively with each year Piedmont's proposal is in effect.

The issues at stake loom large in this docket. The implementation of the new state conservation policy, enumerated in Section 53 of Public Chapter 531, is a matter of first impression for the Authority. The policy is extremely broad and neither endorses nor rejects decoupling mechanisms. Moreover, the decisions made in this docket may carry a degree of precedence or framework for other local natural gas distribution companies. As to the question of resources, Piedmont is a regulated public utility, which according to its most recent surveillance report the Consumer Advocate has on hand indicates the Company has revenues in Tennessee of $268,924,730.[9]

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[8] *See* Report of the North Carolina Utilities Commission, dated October 2, 2008, attached to the Consumer Advocate's *Addendum to the Memorandum in Support of Motion Requesting Permission to Issue More Than Forty Discovery Requests*.

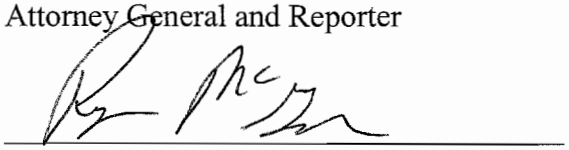
[9] Revenue figure from TRA 3.03 Report showing data based on 12 months to July, 2009.

V. EFFICIENCY IN THE DISCOVERY PROCESS

The Hearing Officer's *Order* admonishes the parties to attempt to resolve any discovery dispute that should arise. The Consumer Advocate has offered to allow Piedmont personnel responding to the Consumer Advocate's discovery requests to contact and discuss any discovery issues with Terry Buckner, an expert witness expected to testify on behalf of the Consumer Advocate in this matter. The only condition for such communications is that attorneys or other legal personnel from both parties not take part in such discussions. The Consumer Advocate submits this may be a more efficient and less costly approach for the parties to at least attempt to resolve any discovery dispute, especially given the expedited nature of this proceeding.

Respectfully Submitted,

ROBERT E. COOPER, JR., BPR # 10934
Attorney General and Reporter



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Dated: October 21, 2009.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing foregoing was served via U.S. Mail or electronic mail upon:

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This the 21 day of October, 2009.

Ryan L. McGehee
Assistant Attorney General

Ryan McGehee

From: Ryan McGehee
Sent: Thursday, October 15, 2009 3:52 PM
To: Gary Hotvedt
Cc: 'Jim Jeffries'; 'Grimes, Dale'
Subject: Docket 09-00104

Gary,

This is a note to advise you the Consumer Advocate did not receive notice of your Order in this docket of October 13, 2009, until this morning when it was posted on the TRA website.

Thanks,

Ryan

Westlaw

Not Reported in S.W.2d, 1996 WL 82678 (Tenn.Ct.App.)
(Cite as: 1996 WL 82678 (Tenn.Ct.App.))

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Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.
Luvell L. GLANTON, et al., Plaintiffs/Appellants.
v.
SHELBY INSURANCE COMPANY, et al., Defendants/Appellees.
No. 94C-3329

Feb. 28, 1996.

Tusca R.S. Alexis, Nashville, Tennessee Attorney for Plaintiffs /Appellants.

C. Hayes Cooney, WATKINS, McGUGIN, McNEILLY & ROWAN, Nashville, Tennessee Attorney for Defendants/Appellees.

FARMER.

***1** This case is the converse of the typical case where the insured is insisting that the insurer settle a claim against the insured within policy limits, thus protecting the insured from a potential judgment in excess of the policy limits.

Plaintiffs, Luvell L. Glanton and Luvell L. Fisher, sued the defendants, Shelby Insurance Company and Sharon Bates, for breach of contract. Glanton was insured with Shelby on June 6, 1994 when his son, Luvell L. Fisher, was involved in a vehicular accident with Daniel Bell. The complaint alleges that Glanton informed Shelby that he did not want Shelby to investigate the complaint and that it was his opinion that the other party, Bell, was 100% at fault. It is further alleged that Sharon Bates, an employee of Shelby, phoned Glanton and advised him that she wanted to investigate the claim but would not pay anything on the claim without first consulting him. Glanton subsequently received a letter from Bates stating that she had found Luvell at fault, had paid 70% of the claim and if he decided to discuss it further he should contact her. It is further alleged that Glanton's insurance premiums had tripled because of the payment of this claim. Defendants responded with a motion for summary judgment or dismissal with a copy of the policy attached. The policy includes a provision which states

We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the insured. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. (Emphasis in original.)

The trial court entered summary judgment in behalf of Defendants and Plaintiffs appeal. The issues presented are:
I. Did the trial court err in refusing to grant the plaintiffs' request for the production of documents?

II. Did the trial court err in granting summary judgment motion to the defendants?

Plaintiffs moved the court for an order requiring Defendants to produce recorded statements of the driver of the other vehicle, Daniel Bell. The motion states that the request was pursuant to Rule 34 T.R.C.P. and that Defendants had failed to comply. The trial court denied the motion, stating that Plaintiffs had the same opportunity to obtain Bell's statement.

Decisions with regard to pretrial discovery matters are within the sound discretion of the trial court. *Benton v. Snyder,* 825 S.W.2d 409, 416 (Tenn.1992). A party may discover anything "relevant and not privileged" involved in the pending action. Discovery may be limited by the court in certain instances, including whenever the court determines that it is obtainable from some

other source that is more convenient, less burdensome or less expense or the party seeking discovery has had ample opportunity by discovery to obtain the information sought. Rule 26.02 T.R.C.P. However, the party opposing discovery must demonstrate that limitations being sought are necessary to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Rule 26.03 T.R.C.P. A trial court should decline to limit discovery if the party seeking the limitation cannot support its request. The trial court should balance the competing interests and hardships involved and consider whether less burdensome means for acquiring the requested information are available. If the court limits discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved and the procedural posture of the case. *Duncan v. Duncan,* 789 S.W.2d 557, 561 (Tenn.App.1990).

***2** It is the defendants' position that Plaintiffs had ample opportunity to obtain Bell's statement directly. They did agree to furnish a transcript of Fisher's recorded conversation. The record before us does not indicate any effort on the part of Plaintiffs to obtain Bell's statement or any refusal on Bell's part to cooperate. We note that it is not unlikely that a claimant such as Bell would be more apt to voluntarily give a statement to a representative of the insurance company for the party against whom the claim was being made as opposed to giving one to the adverse party. Defendants failed to demonstrate sufficient basis for refusing Plaintiffs' request for production. Therefore, we find the trial court erred in denying the motion to compel.

The policy language set forth above, which states that the insurer "will settle or defend, as we consider appropriate," is the cornerstone of Defendants' argument that they are entitled to summary judgment. In response to the motion for summary judgment, Plaintiffs filed the affidavit of Luvell L. Glanton basically reiterating the allegations in the complaint concerning his conversation with Ms. Bates. The affidavit states that Ms. Bates stated to Mr. Glanton that she merely wanted to investigate the claim and would not pay on the claim without first consulting him. The affidavit further states that he informed Bates that his son was not at fault, he did not want the claim to be paid and he would handle the claim himself. Her response was to request a letter from him to this effect so that Shelby could not be held responsible for failure to pay or investigate the claim and he complied by sending the letter. He subsequently received a letter from her stating that she had found his son at fault in the accident and had paid 70% of the claim. Defendants have not rebutted this assertion. We note that the policy further provides "[t]his policy contains all the agreements between you and us. Its terms may not be changed or waived except by endorsement issued by us." As a general rule, parol evidence is not admissible at law to vary the terms of a written contract. *Galbreath v. Harris,* 811 S.W.2d 88, 91 (Tenn.App.1990). However, these contractual provisions can be waived or abrogated by the parties, even if the contract provides it can only be modified in writing. *Knoxville Rod and Bearing, Inc. v. Bettis Corp.,* 672 S.W.2d 203, 207 (Tenn.App.1983). Any provision of the policy may be waived by acts of the insurer's agent. *Bill Brown Constr. Co. v. Glens Falls Ins. Co.,* 818 S.W.2d 1, 13 (Tenn.1991). According to Glanton's affidavit, Ms. Bates orally agreed to modify the insurance contract.

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56.03 T.R.C.P. In determining whether a genuine issue of material fact exists, the trial court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. If there is a dispute as to any material fact or any doubt as to the conclusions to be drawn therefrom, the motion is to be denied. The burden is on the movant to persuade the court that no genuine and material fact issues exist. Once this is shown by the moving party, the

nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial.

***3** Our examination of this record convinces us that the Plaintiffs, through the affidavit of Mr. Glanton, have created a factual issue as to whether the insurance contract was modified as stated in his affidavit. "Whether a contract has been modified by the parties is a question of fact for the trier of fact." *Baldwin v. United American Land Co.,* No. 03A01-9508-CH-00250 (Tenn.App. December 12, 1995) (citing 17A Am Jr 2d § 523). Therefore, the grant of summary judgment is reversed and the cause remanded to the trial court for further proceedings consistent with this opinion. Costs of this appeal are taxed to the defendants, for which execution may issue if necessary.

CRAWFORD, P.J., W.S. and HIGHERS, J., con- cur.

Tenn.App.,1996.
Glanton v. Shelby Ins. Co.
Not Reported in S.W.2d, 1996 WL 82678 (Tenn.Ct.App.)

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