



SUMMARY JUDGMENT IN TENNESSEE

**Presentation to the Tennessee Judicial
Conference**

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Roadmap of Presentation

- 1) The summary judgment standard under *Hannan* (2008)
- 2) Tenn. Code Ann. § 20-16-101 (2011)
- 3) Application of the summary judgment statute by the Court of Appeals
- 4) Constitutional analysis of the statute
- 5) Statutory delegation analysis of the statute
- 6) The end of *Hannan* (again)?

Tennessee Summary Judgment Standard Under *Hannan*

***Hannan v. Alltel Publishing Co.*,
270 S.W.3d 1 (2008)**

- In *Hannan*, the Tennessee Supreme Court clarified that its decision 15 years earlier in *Byrd v. Hall* had explicitly rejected the federal *Celotex* standard for summary judgment.
- Under *Celotex*, the movant can present no evidence supporting the SJ motion and require the nonmoving party to “put up or shut up.”
- Under *Hannan*, a party moving for summary judgment in Tennessee who does not bear the burden of proof at trial must *either*
 - Affirmatively negate an essential element of the nonmoving party’s claim or
 - Show that the nonmoving party cannot prove an essential element of the claim at trial.

The Difference between *Celotex* and *Hannan*

- The crucial distinction between *Celotex* and *Hannan* is timing.
- When a movant wants to shift the burden of production on the basis of the nonmovant's lack of evidence:
 - *Celotex* permits a showing that nonmovant lacks evidence **at the summary judgment stage**, while
 - *Hannan* requires a showing that nonmovant will lack evidence **at trial**.

Case 1

- A woman was trying on clothes in the dressing room at Target when she noticed a smoked-Plexiglas dome on the ceiling of the store.
- Two employees told her that there was a camera in the dome and that "this was a problem."
- She left the store, but she and her husband later met with the store manager, who assured them there was no camera in the "dummy dome."
- The woman filed suit against Target for, *inter alia*, IIED and misappropriation of image.
- In its summary judgment motion, Target included the deposition of the store manager.

Case 1 (cont.)

- He testified there was no camera in the globe.
- In response, the woman included her deposition testimony stating that the Target employees in the store that day told her there was a camera.
- The court held that under *Hannan*, Target failed to shift the burden of production to the plaintiff.
- It failed to negate an essential element of her claims because it did not prove that she would be unable to establish the elements at trial.
- *White v. Target Corp.*, No. W2010-02372-COA-R3-CV, 2014 WL 6599814 (Tenn. Ct. App. Dec. 18, 2012).

Contents of Summary Judgment Order: Rule 56.04

- Recently, the Supreme Court reaffirmed the importance of TRCP 56.04's requirement that the trial court "state the legal grounds upon which the court denies or grants the [summary judgment] motion, which shall be included in the order reflecting the court's ruling."
 - See *White v. Target Corp.*, 2012 WL 6599814, at *7 ("The trial court's order granting summary judgment in favor of Target does not offer much insight into the trial court's reasoning for its decision.").
- The Court confirmed that Rule 56.04 is mandatory, and that the trial court needs to comply with it before inviting the parties to draft an order.
- *Smith v. UHS of Lakeside, Inc.*, __ S.W.3d __, 2014 WL 3429204 (Tenn. July 15, 2014).

Interpretation of *Hannan*

- Some appellate courts, particularly in the W.S., have tended to overstate *Hannan's* impact.
- *Hannan* does not require the movant not bearing the burden of proof at trial to "prove a negative."
 - *Moore v. Butler*, No. W2010-02374-COA-R3-CV, 2011 WL 6004010, at *6 (Tenn. Ct. App. Dec. 1, 2011);
- It also does not instruct what a movant must do to "obtain summary judgment in its favor."
 - *White*, 2012 WL 6599814, at *7.
- Under *Hannan*, so long as the movant properly supports the motion and meets one of the prongs, the burden shifts to the non-movant.
- It is really meant to avoid the unsupported "put up or shut up" motion that is permitted in federal court.

Tenn. Code Ann. § 20-16-101

Legislative Findings of Public Chapter No. 498 (2011)

1) "[T]he Tennessee Supreme Court announced a summary judgment standard in *Hannan*...for a party who does not bear the burden of proof at trial to obtain summary judgment;"

- This one is accurate.

2) "[T]his standard differs from the standard applied by Tennessee federal courts in cases in which the federal summary judgment standard applies;"

- True, when the second prong of *Hannan* is invoked (which should be rarely).

Legislative Findings (cont.)

3) "[T]his higher *Hannan* standard results in fewer cases being resolved by summary judgment in state court, increasing the litigation costs of litigants in Tennessee state courts and encouraging forum shopping; and"

- This claim is unsupported by any evidence (empirical or anecdotal) in the legislative history.

4) "[T]he purpose of this legislation is to overrule the summary judgment standard for parties who do not bear the burden of proof at trial set forth in *Hannan* [], its progeny, and the cases relied on in *Hannan*."

Tenn. Code Ann. § 20-16-101

- “In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial **shall prevail** on its motion for summary judgment if it:”
 - Note the use of “shall prevail” language rather than “shall shift the burden of production.”
- “(1) Submits affirmative evidence that negates an essential element of the nonmoving party’s claim; or...”
 - This is identical to the first prong of *Hannan*.

Tenn. Code Ann. § 20-16-101 (cont.)

- “... (2) Demonstrates to the court that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim.”
 - This revises the second prong of *Hannan* to remove last two words (“at trial”). This is the attempt to replicate the federal *Celotex* standard.
- “Except as set forth herein, Rule 56 of the Tennessee Rules of Civil Procedure remains unchanged.”
 - Except that the “shall prevail” language appears to change the standard for granting summary judgment (compare with *Hannan* burden-shifting).
- The Public Act stated that the act applies to all civil actions filed on or after July 1, 2011.

Interpretation of *Hannan* (cont.)

- Several courts have stated the statute was intended to “return the summary judgment burden-shifting analytical framework to that which existed prior to *Hannan*, reinstating the ‘put up or shut up’ standard.”
 - See, e.g., *Coleman v. S. Tenn. Oil, Inc.*, No. M2011-01329-COA-R3-CV, 2012 WL 2628617, at n.3 (Tenn. Ct. App. July 5, 2012) (Western Section).
- Reasonable minds may differ as to whether *Hannan* heightened the *Byrd v. Hall* standard.
 - The Supreme Court said that it didn’t, but several COA opinions state *Hannan* is “substantially more rigorous.”
- It is clear, however, that *Byrd v. Hall* ≠ *Celotex*.
- *Byrd v. Hall*, citing J. White’s *Celotex* concurrence, rejected conclusory “put up or shut up” motions.

**Application of the Statute
by the Courts**

**Westlaw Search for § 20-16-101
(as of October 10, 2014)**

- **97** total results
- Statute applied (case filed on/after 7/1/11) = **32**
Hannan applied (case filed before 7/1/11) = **63**
- **Statutory analysis:**
 - 26 affirmances of summary judgment
 - 4 reversals of summary judgment
 - 2 cases affirming in part, reversing in part
- ***Hannan* analysis:**
 - 26 affirmances of summary judgment
 - 29 reversals of summary judgment
 - 8 cases affirming in part, reversing in part

Case 2

- Plaintiff fell at the entrance to the Memphis airport and alleged in complaint that her fall was caused by loose pebbles or concrete.
- However, in discovery, neither plaintiff nor her witnesses were able to say what caused her to fall. When asked what exactly was dangerous about the airport entrance, Plaintiff responded that nothing was dangerous.
- Defendant moved for summary judgment supported by deposition excerpts from Plaintiff and witnesses. Defendant did not produce evidence negating causation, instead relying on Plaintiff's lack of evidence.

Case 2 (cont.)

- Although Court held that defendant had made a “properly supported” motion that shifted the burden of production to Plaintiff, its better rationale was that Plaintiff had produced no evidence regarding the cause of her fall.
- This is a case in which the statutory standard probably made a difference.
- It is a classic *Celotex* “put up or shut up” motion that results in summary judgment under § 20-16-101, but probably not under *Hannan*.
- *Campbell v. Memphis-Shelby Cty. Airport Auth.*, No. W2013-01641-COA-R3-CV, 2014 WL 2810204 (Tenn. Ct. App. June 20, 2014).

Interpretation of § 20-16-101

- The statute applies only when the summary judgment motion is filed by party that does not bear the burden of proof at trial.
 - *State ex rel. Garrett v. City of Norris*, No. E2013-02355-COA-R3-CV, 2014 WL 4260848, at *3 (Tenn. Ct. App. Aug. 28, 2014).
- The statute applies only to cases (not motions for summary judgment) filed after July 1, 2011.
- Although the codified version of the statute does not include the effective date, the Public Act as passed governs, and the statute as codified will not be applied retroactively.
 - *Cartwright v. Jackson Capital*, No. W2011-00570-COA-R3-CV, 2012 WL 1997803, at n.6 (Tenn. Ct. App. June 12, 2012).

Constitutionality of § 20-16-101

- No appellate court has faced a constitutional challenge to Tenn. Code Ann. § 20-16-101.
- However, the Eastern Section has entertained the idea of one: “While there may be an unraised question as to the constitutionality of [the statute], we note that in the case now before us the result would be the same whether we applied the statutory standard or the standard set out by our Supreme Court in *Hannan*.”
 - *Cooper v. Robert Ledford Funeral Home, Inc.*, No. E2013-00261-COA-R10-CV, 2013 WL 3947758, at n.5 (Tenn. Ct. App. July 29, 2013).

Separation of Powers Analysis

The Tennessee Constitution's Separation of Powers Provisions

- Unlike the federal constitution, the Tennessee constitution contains an explicit separation of powers clause. See TENN. CONST. art. I, §§ 1 & 2.
- This language was added during the 1835 Constitutional Convention.
- Prior to that change, under Tennessee's original (1796) constitution, judges were elected by the General Assembly and served at its pleasure.
- Article I, sections 1 and 2, together with article VI, section 1 (establishing the Tennessee Supreme Court), created an independent and co-equal judicial branch in Tennessee.

***State v. Mallard*, 40 S.W.3d 473 (2001)**

- The Court considered a law that conflicted with TRE 404(b), which prohibits evidence of prior convictions.
- Justice Mickey Barker, writing for a unanimous Court, analyzed the separation of powers clause and the power granted to the judiciary by the Tennessee Constitution.
- "Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state."
- For any other branch to exercise this power would violate art. II, § 2 of the Tennessee Constitution, as "[t]he court is supreme in fact as well as in name."
- Any agreement by the Court to rules of procedure or evidence promulgated by the legislature was "purely out of considerations of inter-branch comity and is not required by any principle of free government."

Key Language in *Mallard*

- “[T]he legislature can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court’s exercise of judicial power. Among these inherent judicial powers are the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved.... Indeed, a court’s constitutional function to independently decide controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate.”

Applying *Mallard* to Tenn. Code Ann. § 20-16-101

- The definition of “inherent powers” of the courts in Tennessee appears, after *Mallard*, to include any activities essential to perform the judicial function, including procedural rulemaking.
- There is a persuasive argument that the ability to create and develop procedural rules is necessary to courts’ ability to exercise their independent power under the state constitution.
- This is a circumstance where the courts are unlikely to concede power to the legislature “purely out of considerations of inter-branch comity,” because that “courtesy does not extend to the surrendering of judicial power.”

Applying *Mallard*(cont.)

- The essential difference between *Celotex* and *Hannan* is the amount of evidence required at the summary judgment stage for the movant to shift the burden of production to the non-movant and, ultimately, to determine whether there is a genuine issue of material fact about each and every element of the non-movant’s claim.
- Although courts should not weigh evidence at this stage, the trial judge is surely required “to hear facts . . . and to decide the questions of law involved.”
- The imposition of a new summary judgment standard, then, impairs a “court’s constitutional function to independently decide controversies.”
- Thus, courts could hold that the Act “strike[s] at the very heart of a court’s exercise of judicial power.”

Does the Act Exceed the General Assembly's Statutory Role in the Rulemaking Process?

Can the Rules of Civil Procedure be Amended by Legislation?

- "The supreme court has the power to prescribe by general rules the forms of process, writs, pleadings and motions, and the practice and procedure in all of the courts of this state in all civil and criminal suits, actions and proceedings."
 - Tenn. Code Ann. § 16-3-402.
- The Supreme Court shall present proposed rules to the General Assembly, but the proposed rules must be "approved by resolutions of both the house of representatives and the senate."
 - Tenn. Code Ann. § 16-3-404.

The Legislature's Statutory Rulemaking Role Is Limited

- The Supreme Court's power to promulgate court rules is "full, plenary and discretionary."
 - Tenn. Code Ann. § 16-3-504.
- Based upon this statutory authority, it appears that, to the extent the General Assembly had any rulemaking power to delegate to the Tennessee Supreme Court, the General Assembly *either*:
 - retained no rulemaking power itself (since the Supreme Court's power is "full" and "plenary") or
 - self-limited its role to one of approval only, not one of originating or amending rules.

The End of *Hannan* (Again)?

Case 3

- A woman with Rh negative blood did not receive an injection of RhoGAM at the appropriate time in her third pregnancy.
- This left her Rh-sensitized, meaning she had antibodies in her body to Rh positive blood.
- This did not present an immediate risk to her third baby, but could potentially be harmful to a baby in a future pregnancy.
- The woman and her husband decided to limit their family planning due to these risks, although they were unable to use contraception because their religion frowned upon it.

Case 3 (cont.)

- The couple filed claims against the clinic and physician, including medical malpractice, NIED, and disruption of family planning.
- The defendants moved for summary judgment, and the COA applied the *Hannan* standard.
- Both parties had expert testimony attached.
- The COA engaged in a careful, claim-by-claim analysis, affirming summary judgment on some claims but not others, careful not to "weigh evidence at this stage of the proceedings."
- The only claim where the statute clearly would have mattered is the husband's NIED claim.

Case 3 (cont.)

- Unlike his wife, the husband did not suffer any physical injury to accompany his NIED claim.
- Thus, his was a "stand alone" claim requiring expert proof to prevail at trial.
- The defendants pointed out that the husband had failed to submit any expert proof at all.
- This would have sufficed for dismissal under *Celotex*, but under *Hannan* simply pointing to the non-moving party's lack of evidence is not enough to shift the burden of production.
- *Rye v. Women's Care Center of Memphis, M PLLC*, No. W2013-00804-COA-R9-CV, 2014 WL 903142 (Tenn. Ct. App. Mar. 10, 2014).

Is Rye the Case to End Hannan?

- On September 19, 2014, the Supreme Court granted the defendants' Rule 11 application in *Rye*.
- In its order, the Court stated as follows:
 - "In addition to other issues raised in the application for permission to appeal, the Court is particularly interested in briefing and argument of the question of whether the Court should reconsider the summary judgment standard previously articulated by the Court in *Hannan v. Alltel Publishing Co.*,"
- Remember that *Hannan's* impact diminishes every day (it applies only to cases filed before 7/1/11).
- It is hard to fathom the Court seeking out this case unless some of its members want *Hannan* overruled.

Questions and Answers

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20-16-101. Burden of proof in summary judgment motions.

In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:

- (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
- (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

History.

Acts 2011, ch. 498, § 1.

Compiler's Notes.

Acts 2011, ch. 498, § 2 provided that the act (which enacted T.C.A. § 20-16-101, which overruled the summary judgment standard for parties who do not bear the burden of proof at trial set forth in *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1 (Tenn. 2008)), except as set forth in the act, did not change Rule 56 of the Tennessee Rules of Civil Procedure.

Acts 2011, ch. 498, § 3 provided that the act, which enacted this section, shall apply to actions filed on or after July 1, 2011.

For the preamble to the act regarding the burden of proof in summary judgment motions, please refer to Acts 2011, ch. 498.

Effective Dates.

Acts 2011, ch. 498, § 3. July 1, 2011.

Cited:

Kennedy v. State Farm Ins. Co., — S.W.3d —, 2011 Tenn. App. LEXIS 394 (Tenn. Ct. App. July 21, 2011); *Hartman v. Tenn. Bd. of Regents*, — S.W.3d —, 2011 Tenn. App. LEXIS 479 (Tenn. Ct. App. Aug. 31, 2011); *Moore v. Butler*, — S.W.3d —, 2011 Tenn. App. LEXIS 648 (Tenn. Ct. App. Dec. 1, 2011); *Lee v. Lyons Constr. Co.*, — S.W.3d —, 2011 Tenn. App. LEXIS 674 (Tenn. Ct. App. Dec. 19, 2011); *Brown v. Brookdale Senior Living, Inc.*, — S.W.3d —, 2011 Tenn. App. LEXIS 690 (Tenn. Ct. App. Dec. 28, 2011); *Ewan v. Hardison Law Firm*, — S.W.3d —, 2012 Tenn. App. LEXIS 240 (Tenn. Ct. App. Apr. 16, 2012); *Cartwright v. Capital*, — S.W.3d —, 2012 Tenn. App. LEXIS 369 (Tenn. Ct. App. June 5, 2012); *City of*

Chattanooga v. Hargreaves Assocs., — S.W.3d —, 2012 Tenn. App. LEXIS 405 (Tenn. Ct. App. June 21, 2012); *VFS Leasing v. Bric Constructors*, — S.W.3d —, 2012 Tenn. App. LEXIS 446 (Tenn. Ct. App. June 28, 2012); *Coleman v. S. Tenn. Oil, Inc.*, — S.W.3d —, 2012 Tenn. App. LEXIS 453 (Tenn. Ct. App. July 5, 2012); *Eisenstein v. WTVF-TV, News Channel 5 Network, LLC*, 389 S.W.3d 313, 2012 Tenn. App. LEXIS 515 (Tenn. Ct. App. July 30, 2012); *In re Estate of Combs*, — S.W.3d —, 2012 Tenn. App. LEXIS 597 (Tenn. Ct. App. Aug. 28, 2012); *Woodson v. Meg Capital Mgmt.*, — S.W.3d —, 2012 Tenn. App. LEXIS 656 (Tenn. Ct. App. Sept. 21, 2012); *Nevels v. Contarino*, — S.W.3d —, 2012 Tenn. App. LEXIS 798 (Tenn. Ct. App. Nov. 16, 2012); *Skaan v. Fed. Express Corp.*, — S.W.3d —, 2012 Tenn. App. LEXIS 855 (Tenn. Ct. App. Dec. 13, 2012); *4-J L.P. v. Scarbrough & Weaver, PLC*, — S.W.3d —, 2013 Tenn. App. LEXIS 65 (Tenn. Ct. App. Jan. 31, 2013); *Ellington v. Jackson Bowling & Family Fun Ctr., L.L.C.*, — S.W.3d —, 2013 Tenn. App. LEXIS 109 (Tenn. Ct. App. Feb. 19, 2013); *Kruger v. State*, — S.W.3d —, 2013 Tenn. App. LEXIS 146 (Tenn. Ct. App. Feb. 28, 2013); *Hill Boren, P.C. v. Paty, Rymer And Ulin, P.C.*, — S.W.3d —, 2013 Tenn. App. LEXIS 184 (Tenn. Ct. App. Mar. 19, 2013); *Mann v. Alpha Tau Omega Fraternity, Inc.*, — S.W.3d —, 2013 Tenn. App. LEXIS 198 (Tenn. Ct. App. Mar. 22, 2013); *Pierce v. City of Humboldt*, — S.W.3d —, 2013 Tenn. App. LEXIS 200 (Tenn. Ct. App. Mar. 25, 2013); *Boote v. Roberts*, — S.W.3d —, 2013 Tenn. App. LEXIS 222 (Tenn. Ct. App. Mar. 28, 2013); *Saeedpour v. Virtual Med. Solutions, LLC*, — S.W.3d —, 2013 Tenn. App. LEXIS 236 (Tenn. Ct. App. Apr. 5, 2013).

NOTES TO DECISIONS

1. Applicability.

Summary judgment standard embodied in T.C.A. § 20-16-101, which was intended to replace a summary judgment standard that arose from caselaw, was inapplicable to a claim under the Tennessee Public Protection Act, or the Whistleblower Act, T.C.A. § 50-1-304, where

the cause of action accrued before June 10, 2011. *Williams v. City of Burns*, — S.W.3d —, 2012 Tenn. App. LEXIS 104 (Tenn. Ct. App. Feb. 15, 2012).

T.C.A. § 20-16-101 did not apply to a summary judgment motion as the action was filed before the July 1, 2011, effective date of the

