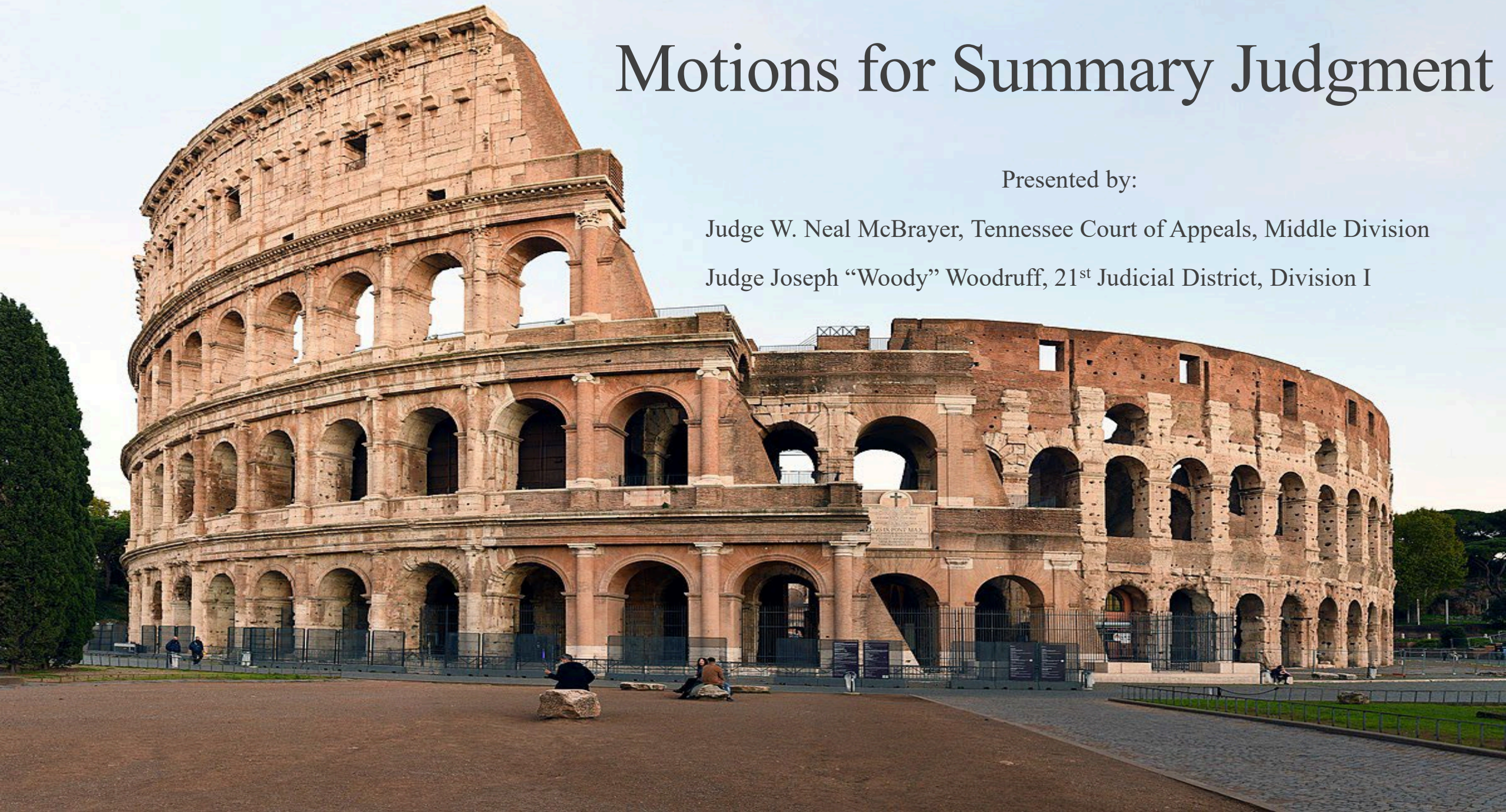

Motions for Summary Judgment

Presented by:

Judge W. Neal McBrayer, Tennessee Court of Appeals, Middle Division

Judge Joseph “Woody” Woodruff, 21st Judicial District, Division I

Introduction and Overview

I. Tennessee Rule of Civil Procedure 56 Standard

II. What constitutes a “properly supported motion” and a “properly supported opposition”?

III. How, and when, are motions for summary judgment heard/argued?

IV. How are motions for summary judgment to be decided?

V. Motions for summary judgment in special circumstances.

VI. Real-world examples of motions for summary judgment.

Tenn. R. Civ. P. 56 Standard

- Summary judgment is appropriate when "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 judgment *as a matter of law***." Tenn. R. Civ. P. 56.04. (emphasis supplied).
- In assessing whether there exists a genuine issue of material fact, this Court "does not weigh the evidence, but must accept the nonmoving party's evidence as true, and view both the evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the nonmoving party." *Shipley v. Williams*, 350 S.W.3d 527, 551 (Tenn. 2011); *see Copeland v. Healthsouth/Methodist Rehab. Hosp., LP*, 565 S.W.3d 260, 276 (Tenn. 2018).

Moving Party vs. Nonmoving Party

- A moving party not bearing the burden of proof at trial shall prevail on a motion for summary judgment if it submits "affirmative evidence that negates an essential element of the nonmoving party's claim" or demonstrates that the nonmovant's evidence "is insufficient to establish an essential element of the nonmoving party's claim." Tenn. Code Ann. § 20-16-101.
- When a motion for summary judgment has been properly supported by compliance with Tenn. R. Civ. P. 56.03, the burden shifts to the nonmoving party to "demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015).

Moving Party vs. Nonmoving Party

- Procedurally, a nonmovant attempting to establish a material factual dispute must either (1) demonstrate that a fact stated by the movant is disputed by specific citation to the record; or (2) provide additional disputed facts in separate, numbered paragraphs with specific citations to the record. Tenn. R. Civ. P. 56.03. The adverse party "may not rest upon the mere allegations or denials of [its] pleading," but must show an issue for trial through affidavits or other evidence. Tenn. R. Civ. P. 56.06.

Audience Questions

- How many cases reviewing summary judgment decisions have the Tennessee Supreme Court and the Tennessee Court of Appeals decided since October 26, 2015 – the date of the opinion filed in *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015)?*
  - Tennessee Supreme Court:
    - A: 1-5 cases
    - B: 6-20 cases
    - C: 21-40 cases
    - D: 41-60+ cases

*AS OF JANUARY 31, 2023.

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  - Tennessee Supreme Court: 29 cases
    - A: 1-5 cases
    - B: 6-20 cases
    - **C: 21-40 cases**
    - D: 41-60+ cases

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  - Tennessee Supreme Court: 29 cases
    - The most common types of cases reviewed are tax law (5) and torts other than negligence (4).
    - Justice Kirby authored 15 opinions of the total 29 cases reviewed. The next most-frequent author is a three-way tie between Justice Clark, Justice Lee, and Chief Justice Page, with 5 opinions each.
  - Tennessee Court of Appeals:
    - A: 1-100 cases
    - B: 101-200 cases
    - C: 201-300 cases
    - D: 301-400+ cases

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  - Tennessee Court of Appeals: 669 cases
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    - **D: 301-400+ cases**

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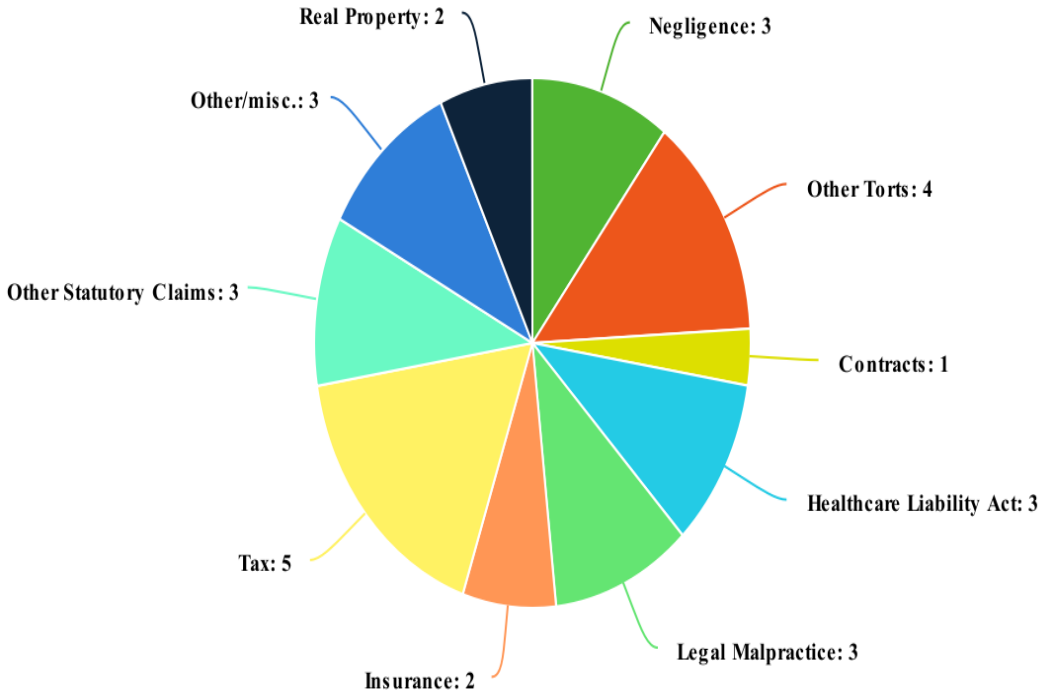
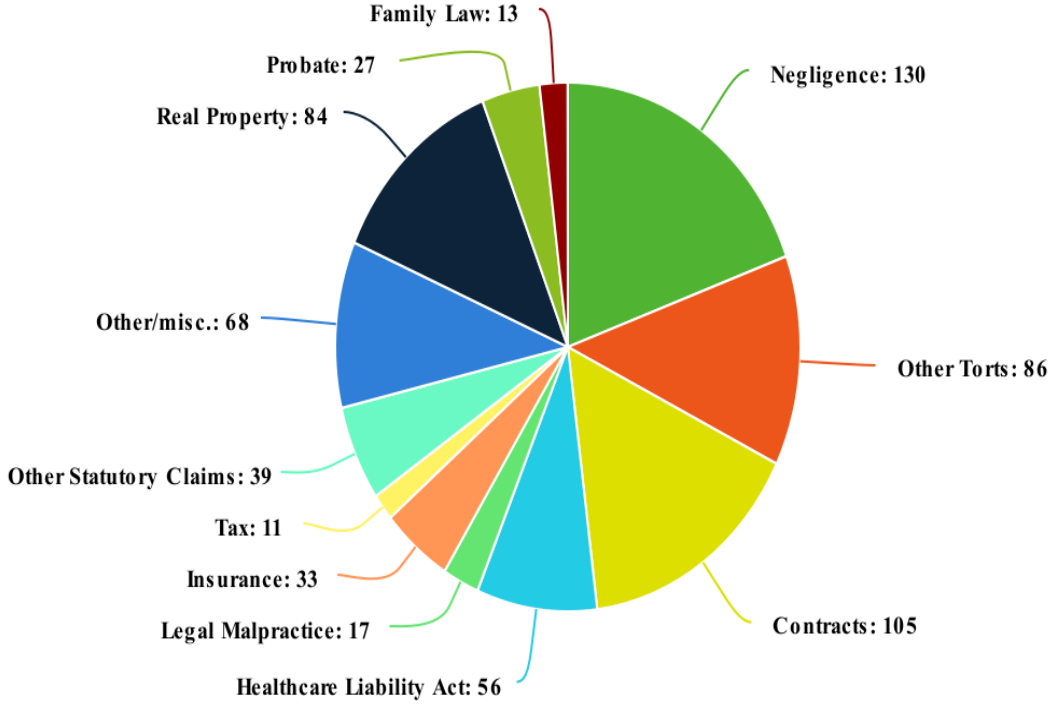
    - Justice Kirby authored 15 opinions of the total 29 cases reviewed. The next most-frequent author is a three-way tie between Justice Clark, Justice Lee, and Chief Justice Page, with 5 opinions each.
  - Tennessee Court of Appeals: 669 cases
    - The most common types of cases reviewed are negligence (130) and contracts (105).
    - Judge Clement authored 82 opinions of the total 669 cases reviewed. The next most-frequent author being Judge McClarty, authoring 67 cases, closely followed by Judge Stafford, authoring 65 cases.

*AS OF JANUARY 31, 2023.

Audience Questions



Tennessee Supreme Court*



Tennessee Court of Appeals*

*AS OF JANUARY 31, 2023.

Audience Questions

- How many cases reviewing summary judgment decisions resulted in the trial court's grant of summary judgment being reversed or reversed in part since October 26, 2015 – the date of the opinion filed in *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015)?*
  - Tennessee Supreme Court:
    - A: 1 – 7 cases
    - B: 8 – 15 cases
    - C: 16 – 23 cases
    - D: 24 – 29 cases

*AS OF JANUARY 31, 2023.

Audience Questions

- How many cases reviewing summary judgment decisions resulted in the trial court's grant of summary judgment being reversed or reversed in part since October 26, 2015 – the date of the opinion filed in *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015)?*
  - Tennessee Supreme Court: 17 cases
    - A: 1 – 7 cases
    - B: 8 – 15 cases
    - **C: 16 – 23 cases**
    - D: 24 – 29 cases

*AS OF JANUARY 31, 2023.

Audience Questions

- How many cases reviewing summary judgment decisions resulted in the trial court's grant of summary judgment being reversed or reversed in part since October 26, 2015 – the date of the opinion filed in *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015)?*
  - Tennessee Supreme Court: 17 cases
    - 3 out of 3 legal malpractice cases resulted in reversal of the trial court.
    - 2 out of 2 real property cases resulted in reversal of the trial court.

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  - Tennessee Supreme Court: 17 cases
    - 3 out of 3 legal malpractice cases resulted in reversal of the trial court.
    - 2 out of 2 real property cases resulted in reversal of the trial court.
  - Tennessee Court of Appeals:
    - A: 1 – 150 cases
    - B: 151 – 350 cases
    - C: 351 – 500 cases
    - D: 501 – 669 cases

*AS OF JANUARY 31, 2023.

Audience Questions

- How many cases reviewing summary judgment decisions resulted in the trial court's grant of summary judgment being reversed or reversed in part since October 26, 2015 – the date of the opinion filed in *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015)?*
  - Tennessee Supreme Court: 17 cases
    - 3 out of 3 legal malpractice cases resulted in reversal of the trial court.
    - 2 out of 2 real property cases resulted in reversal of the trial court.
  - Tennessee Court of Appeals: 175 cases
    - A: 1 – 150 cases
    - **B: 151 – 350 cases**
    - C: 351 – 500 cases
    - D: 501 – 669 cases

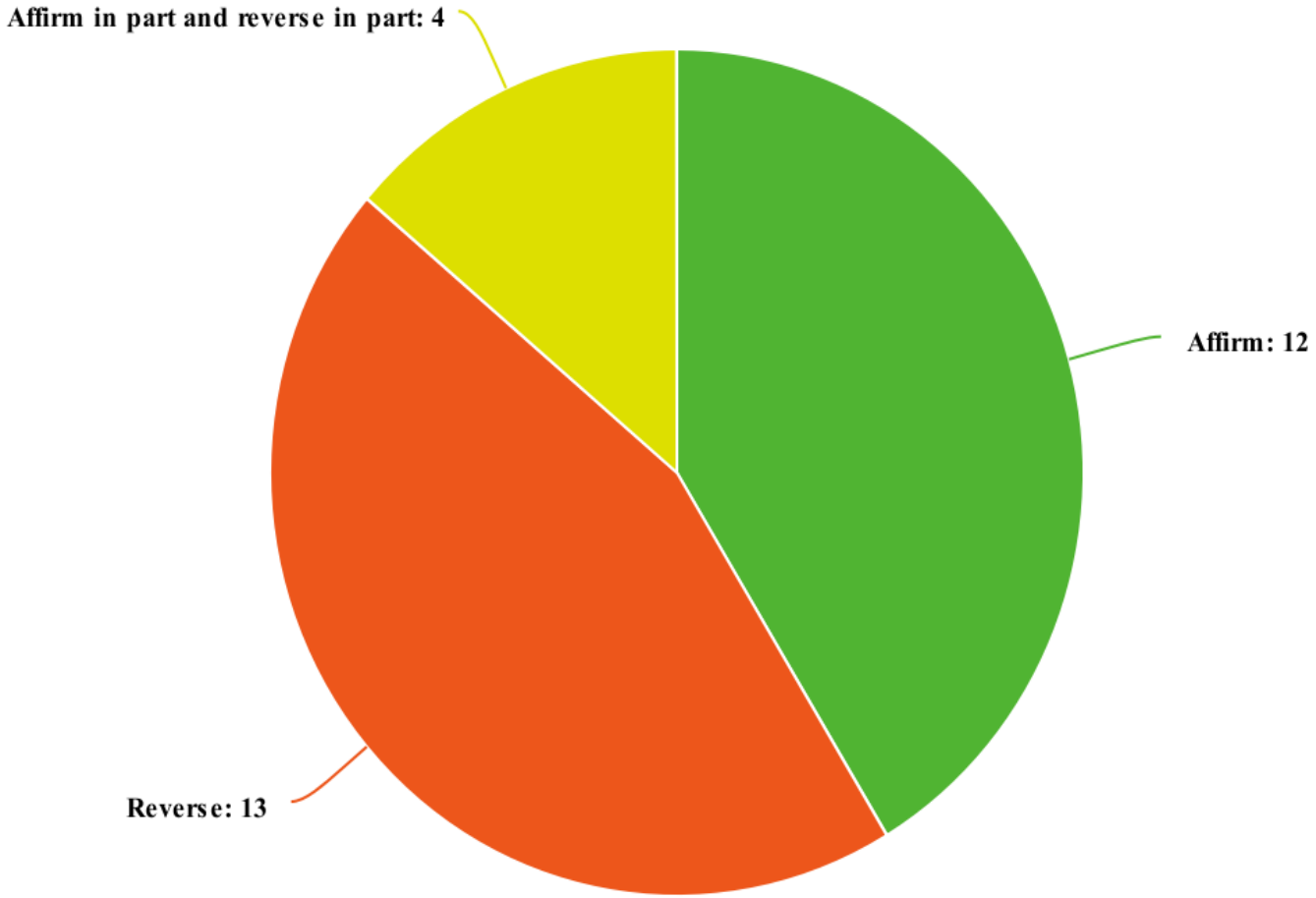
*AS OF JANUARY 31, 2023.

Audience Questions

- How many cases reviewing summary judgment decisions resulted in the trial court's grant of summary judgment being reversed or reversed in part since October 26, 2015 – the date of the opinion filed in *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015)?*
  - Tennessee Supreme Court: 17 cases
    - 3 out of 3 legal malpractice cases resulted in reversal of the trial court.
    - 2 out of 2 real property cases resulted in reversal of the trial court.
  - Tennessee Court of Appeals: 175 cases
    - 5 out of 11 tax law cases resulted in reversal of the trial court.
    - 5 out of 13 family law cases resulted in reversal of the trial court.

*AS OF JANUARY 31, 2023.

Tennessee Supreme Court*



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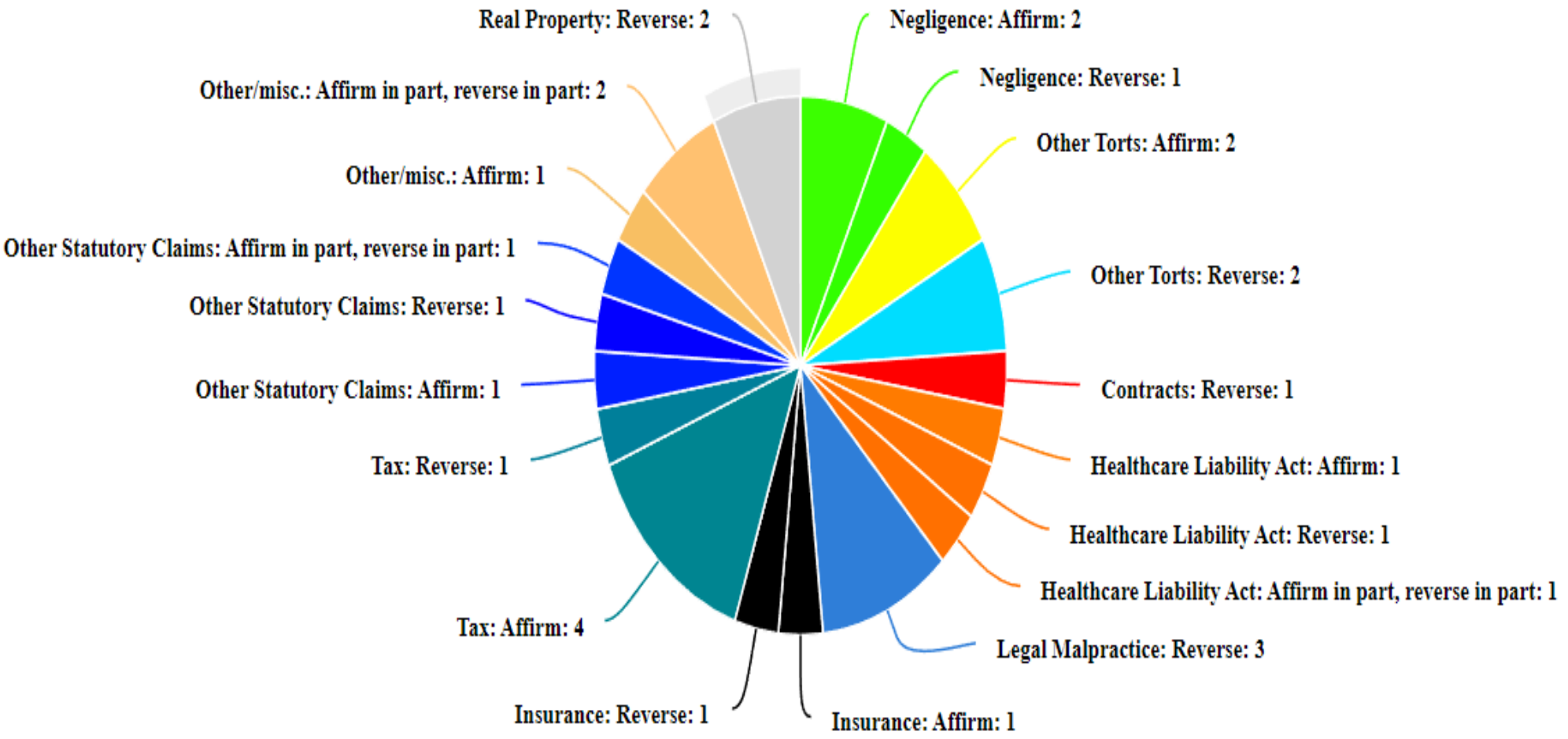

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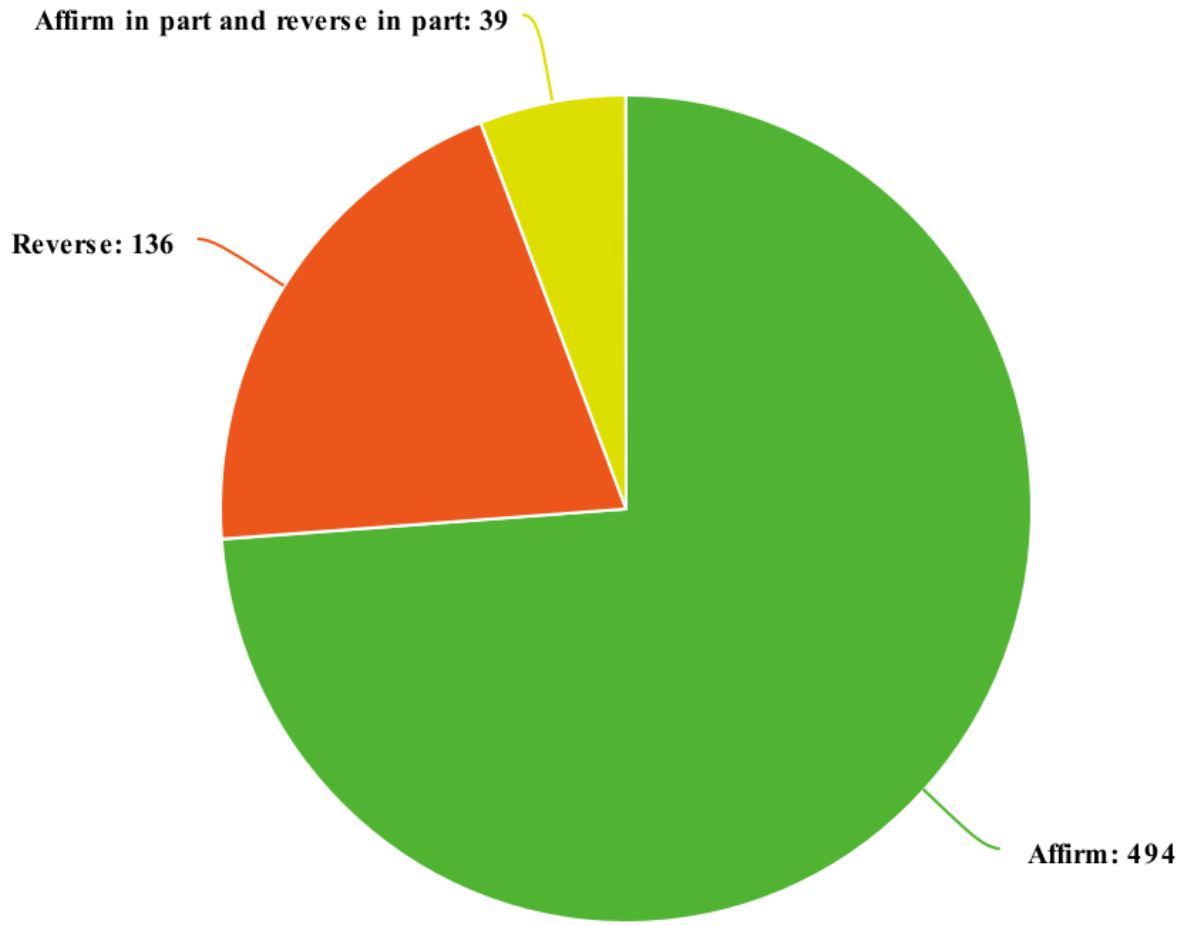
Tennessee Court of Appeals*



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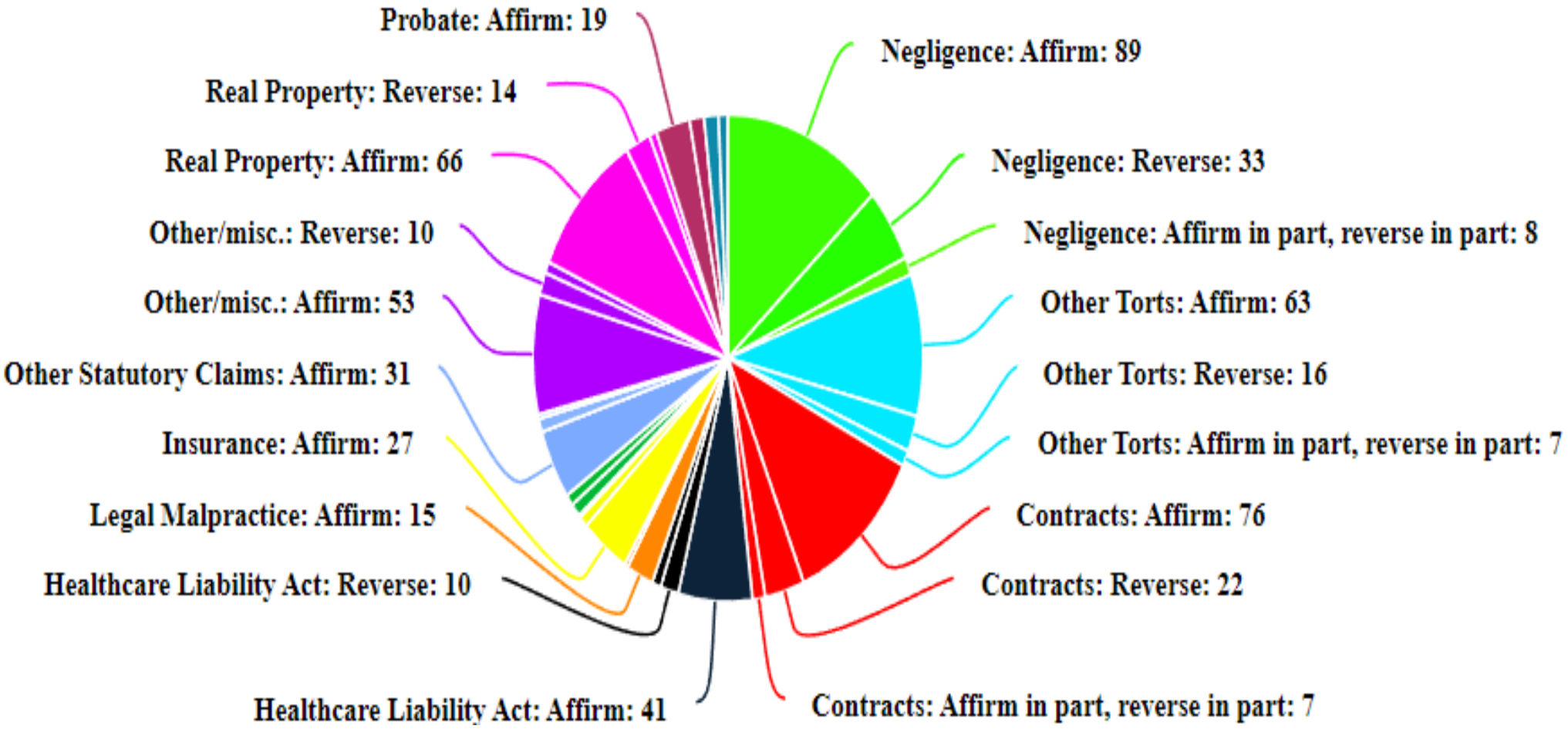
Tennessee Court of Appeals*



*AS OF JANUARY 31, 2023.

II. What constitutes a "properly supported motion" and a "properly supported opposition"?

- Rule 56 admissible evidence
- Rule 56.03 statement and response
- Converting a Rule 12.02(6) motion into a Rule 56 motion
- What is a "genuine dispute" of a "material fact"?
  - Affidavit contradicting prior deposition testimony

Rule 56 Admissible Evidence

- "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 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. . ." Tenn. R. Civ. P. 56.04.

Tenn. R. Civ. P. 56.03 Statement and Response

- The movant shall file with any Rule 56 motion a "separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial."
- The movant shall set forth these facts in separate, numbered paragraphs, and each fact shall supported by a specific citation to the record.

Tenn. R. Civ. P. 56.03 Statement and Response

- How to respond to a movant's statement of undisputed material facts:
  - Agree that the fact is undisputed;
  - Agree that the fact is undisputed for purposes of ruling on the motion for summary judgment only;
  - Demonstrate that the fact is disputed by citing evidence in the record; OR
  - File a statement of additional facts that the nonmovant contends are material and as to which the nonmovant contends there exists a genuine issue to be tried.

Tenn. R. Civ. P. 56.03 Statement and Response

- Statements of undisputed material facts and responses thereto must state facts, not legal conclusions. *See Byrd v. Hall*, 847 S.W.2d 208, 215-16 (Tenn. 1993). If the statement of undisputed facts includes legal conclusions, Rule 56.03 only requires the nonmovant to respond to the facts. *See id.*
- If a party fails to properly respond to the movant's statement of material facts, the trial court may deem those facts as admitted. *See Brennan v. Goble*, 2021 WL 2156443, at *6 (Tenn. Ct. App. Feb. 23, 2021); *Holland v. City of Memphis*, 125 S.W.3d 425, 428-29 (Tenn. Ct. App. 2003).
- However, the trial court must still independently determine the movant is entitled to summary judgment as a matter of law.

Converting a Rule 12.02(6) motion into a Rule 56 motion

- "If . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and **all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56**." Tenn. R. Civ. P. 12.02 (emphasis supplied).

Converting a Rule 12.02(6) motion into a Rule 56 motion

- "The trial court may consider exhibits attached to the complaint or items required to be attached under Rule 10.03 without converting a motion to dismiss to a motion for summary judgment." *Sifuentes v.D.E.C., LLC*, 2020 WL 4760329, at *2 (Tenn. Ct. App. Aug. 17, 2020); *Ivy v. Tenn. Dep't of Corr.*, 2003 WL 22383613, at *3 (Tenn. Ct. App. Oct. 20, 2003).
- But "any written or oral evidence" submitted by the parties "that provides some substantiation for and does not merely reiterate what is said in the pleadings" is "outside the pleadings." *Patton v. Estate of Upchurch*, 242 S.W.3d 781, 786 (Tenn. Ct. App. 2007) (quoting *BJC Health Sys. v. Columbia Cas. Co.*, 348 F.3d 685, 687 (8th Cir. 2003)).

What is a "genuine dispute" of a "material fact"?

- "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed. Therefore, when confronted with a disputed fact, the court must examine the elements of the claim or defense at issue in the motion to determine whether the resolution of that fact will effect the disposition of any of those claims or defenses. By this process, courts and litigants can ascertain which issues are dispositive of the case, thus rendering other disputed facts immaterial." *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993).
- "[E]vidence that, if uncontroverted at trial, would entitle [the moving party] to a directed verdict." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (Brennan, J., dissenting)).

What is a "genuine dispute" of a "material fact"?

- "A genuine factual dispute arises when reasonable minds can justifiably reach different conclusions based on the evidence at hand." *COA Holdings, Inc. v. Trost*, 333 S.W.3d 73, 82 (Tenn. 2010).
- "A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed." *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993).

Affidavit contradicting prior deposition testimony

- Cancellation Rule
  - The cancellation rule applies when a witness offers contradictory statements regarding the same fact.
  - If the cancellation rule applies, "the statements 'cancel each other out' and will not be considered as evidence." *Church v. Perales*, 39 S.W.3d 149, 169 (Tenn. Ct. App. 2000).
  - "While it is true that Dunlap may explain or contradict prior testimony with an affidavit, the effect is merely that the conflicting statements cancel each other out." *Boatmen's Bank of Tennessee v. Dunlap*, 1997 WL 793507, at *5 (Tenn. Ct. App. Dec. 30, 1997).
  - "[C]ontradictory statements by the same witness amount to 'no evidence' of the fact sought to be proved." *TWB Architects, Inc. v. Braxton*, 578 S.W.3d 879, 895 (Tenn. 2019).

Affidavit contradicting prior deposition testimony

- Cancellation Rule
  - "When the cancellation rule is invoked at the summary judgment stage to challenge evidence opposing the motion, the courts must view the challenged evidence in the light most favorable to the opponent of the motion." *Church v. Perales*, 39 S.W.3d 149, 170 (Tenn. Ct. App. 2000).
  - Consider whether the challenged evidence can be interpreted consistently with other testimony. *Gambill v. Middle Tenn. Med. Ctr., Inc.*, 751 S.W.2d 145, 151 (Tenn. Ct. App. 1988).
  - In disregarding a later-filed affidavit that was materially inconsistent with a prior deposition, the Court of Appeals stated, "'[t]wo sworn inconsistent statements by a party are of no probative value in establishing a disputed issue of material fact.'" *Friedenstab v. Short*, 174 S.W.3d 217, 223 (Tenn. Ct. App. 2004) (quoting *Price v. Becker*, 812 S.W.2d 597, 598 (Tenn. Ct. App. 1991)).

Rule 56.08 – Affidavits Made in Bad Faith

- Affidavits "presented in bad faith or solely for the purpose of delay."
- The court may:
  - Order the payment of "the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees."
  - Adjudge "any offending party or attorney" guilty of contempt.

Audience Question #1

- Facts:
  - A child was born to Mother and Father, but Mother died unexpectedly.
  - Maternal Grandparents visited the child at Father's residence "at least on Mondays and Thursdays, and sometimes on weekends."
  - Disputes arose between Father and Maternal Grandparents, at which point, Father stopped allowing visitation.
  - Maternal Grandparents filed a petition for grandparent visitation, asserting that the child would suffer substantial harm if denied a relationship with them.
  - During litigation, Father began allowing Maternal Grandparents one-and-one-half hours of visitation per month.
  - Father moved for summary judgment, arguing that (1) Maternal Grandparents did not have a relationship with the child, and (2) there was not a severe reduction of any relationship that did exist.

Audience Question #1

- Relevant law:
  - To establish visitation, a grandparent must prove, among other things, that there is a danger of substantial harm if visitation with the child is denied. Tenn. Code Ann. § 36-6-306(a)(6).
  - "[I]f the child's parent is deceased and the grandparent seeking visitation is the parent of that deceased parent, there shall be a rebuttable presumption of substantial harm to the child based upon the cessation or severe reduction of the relationship between the child and grandparent." *Id*. § 36-6-306(b)(4).
- Polling Question:
  - Yes or No: Was there a genuine dispute about there being a severe reduction of a relationship between the child and Maternal Grandparents?

Audience Question #1

- Answer:
  - Yes. The Court of Appeals concluded that Maternal Grandparents' visitation 2-3 times per week created a genuine issue about whether they had a relationship with the child. Similarly, the Court of Appeals concluded the reduction of visitation from 2-3 times per week to one-and-one-half hours per month created a genuine issue about whether visitation with the child was severely reduced.
- *Beltz v. Hefner*, 2019 WL 5607467, at *4-5 (Tenn. Ct. App. Oct. 30, 2019).

Audience Question #2

- Facts:
  - An elevator in a building malfunctioned, causing it to stop several inches below the floor level.
  - The plaintiff tripped and fell while exiting the elevator, injuring her knee.
  - The plaintiff sued the elevator manufacturer, alleging negligence.
  - After discovery, the elevator manufacturer moved for summary judgment, arguing that there was no evidence that it breached a duty owed to the plaintiff.
  - The plaintiff responded that there existed a genuine dispute of material fact. Specifically, an employee from the defendant's company could not remember whether he inspected the elevator two days before the accident, or one month before the accident. According to the plaintiff, this created a dispute about whether the defendant and employee were concealing evidence of a known elevator malfunction. Plaintiff argued a genuine dispute about the employee's credibility precluded summary judgment.

Audience Question #2

- Relevant law:
  - "[S]ummary judgments should not be granted in cases where the outcome hinges squarely upon the state of mind, intent, or credibility of the witnesses." *Knapp v. Holiday Inns, Inc.*, 682 S.W.2d 936, 952 (Tenn. Ct. App. 1984). But the "credibility concerns that warrant denying a summary judgment must rise to a level higher than normal credibility questions that arise whenever a witness testifies." *Hepp v. Joe B's, Inc.*, 1997 WL 266839, at *3 (Tenn. Ct. App. May 21, 1997). A genuine issue of material fact exists "if the opponent to a motion for summary judgment succeeds in raising a genuine doubt concerning a witness' credibility by a sufficient showing of the witness' bias, prejudice, or interest." *Knapp*, 682 S.W.2d at 942.
- Polling Question:
  - Yes or No: Was the employee's credibility a material fact?

Audience Question #2

- Answer:
  - No. The Court of Appeals concluded that the date at which the employee last inspected the elevator was not a material fact.
  - "The [plaintiff's] challenge to [the employee's] credibility does not go to the heart of the matter. Whether the elevator was serviced a month before or two days before is not a material fact in this case. Had [the plaintiff] alleged that [the defendant] did not maintain the regular service schedule for the elevator and thus caused its malfunction, then the elevator's last service date before [the plaintiff's] fall would likely be relevant. However, [the plaintiff is] merely alleging that [the employee's] inability to remember the date infers that [the defendant] is concealing damaging evidence. There is no proof of this in the record, and [the employee's] inability to remember a service date is merely peripheral to the issue of whether the [defendant] breached a duty owed to [the plaintiff], that caused the elevator to mislevel."
- *Dennis v. Donelson Corp. Ctr. I, LP*, 2016 WL 2931096, at *4 (Tenn. Ct. App. May 13, 2016).

Audience Question #3

- Facts:
  - Plaintiff slipped and fell near a gasoline pump at Defendant's convenience store.
  - It had ben raining earlier in the day.
  - Plaintiff did not see any oil, gas, or spills before or after her fall.
  - Both EMTs who arrived to help Plaintiff slipped and almost fell while tending to her.
  - Neither EMT observed a spill, but they put a blanket down to prevent Plaintiff from "rolling into the oil" that was on the ground.
  - Defendant's employees filled out incident reports describing the incident as: "[p]umping gas, slipped and fell, not for sure if it was slick from oil or gas. [Plaintiff] was told by EMT that it could have been oil or gas but wasn't for sure."
  - Defendant moved for summary judgment because Plaintiff could not identify the cause of her fall.
  - Plaintiff responded that a genuine dispute of material fact existed about whether there was a dangerous condition that Defendant could have discovered with reasonable diligence.

Audience Question #3

- Relevant law:
  - A premises liability claim is one of negligence, requiring the plaintiff to prove five essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause. *Biscan v. Brown*, 160 S.W.3d 462, 478-79 (Tenn. 2005). Further, "a plaintiff is required to prove that the injury was a reasonably foreseeable probability and that some action within the defendant's power more probably than not would have prevented the injury." *Dobson v. State*, 23 S.W.3d 324, 331 (Tenn. Ct. App. 1999).
- Polling Question:
  - Yes or No: Was the cause of Plaintiff's fall a material fact?

Audience Question #3

- Answer:
  - Yes. The Court of Appeals found the condition that caused the plaintiff to fall was a material fact.
  - "[W]e hold that Plaintiff offered proof to establish that a question remained as to whether an injury-causing condition existed on [Defendant's] property. For instance, the photographs marked as exhibits to the depositions show what could be characterized as damp conditions on the pavement around the gasoline pump where Plaintiff fell. Plaintiff testified that the EMTs both slipped and almost fell while tending to her, but both EMTs testified that they did not see any oil or spilled gasoline in the location where Plaintiff fell. Three incident reports were made, one of which describes the incident as: '[p]umping gas, slipped and fell, not for sure if it was slick from oil or gas. [Plaintiff] was told by EMT that it could have been oil or gas but wasn't for sure.' These factual disputes bear directly on the question of whether [Defendant] caused or created any injury-causing condition or had actual or constructive notice of any such condition before Plaintiff fell on the premises. With these considerations in mind, we conclude that the trial court erred in granting the motion for summary judgment at this point in the proceedings because material questions of fact remained."
- *Wilson v. Weigel Stores, Inc.*, 2020 WL 2529859, at *4 (Tenn. Ct. App. May 19, 2020).

III. How and when are motions for summary judgment heard/argued?

- Do summary judgment motions have to be "heard"? If not, what are the alternatives?
- *Sua sponte* grant of summary judgment / ground not raised by moving party
- Practice tip
- Avoidance tactics

Do summary judgment motions have to be "heard"? If not, what are the alternatives?

- "The motion shall be served at least thirty (30) days before the time fixed for the hearing." Tenn. R. Civ. P. 56.04.

State ex rel. Working v. Costa, 216 S.W.3d 758 (Tenn. Ct. App. 2006)

- On August 31, 2004, the State of Tennessee filed a *quo warranto* action against the managing trustee of a charitable trust alleging the trustee violated her fiduciary duty by transferring the trust to Mississippi from Tennessee and transferring assets to a new corporation without prior consent.
- On November 15, 2004, Defendant filed a collusive action wherein Defendant and the Mississippi corporation were sued by the State of Mississippi seeking a declaration that Tennessee law did not apply to the Mississippi foundation and enjoin the Defendant from transferring any assets from Mississippi to Tennessee.
- On August 1, 2005, the State of Tennessee filed a partial motion for summary judgment seeking declaratory relief that the transfer of the situs of the trust from Tennessee to Mississippi was ineffective and that the subsequent transfer of assets from the Tennessee charitable trust to the Mississippi not-for-profit corporation was also invalid and ineffective. This motion was served by hand-delivery to defense counsel on July 29, 2005.
- In accordance with the local rules, the State of Tennessee set the motion for summary judgment to be heard on September 9, 2005. At the request of Defendant, an agreed order was filed resetting the motion for summary judgment hearing to September 16, 2005.

State ex rel. Working v. Costa, 216 S.W.3d 758 (Tenn. Ct. App. 2006)

- On August 26, 2005, Defendant filed a motion for summary judgment in Mississippi, seeking a declaration that the Tennessee statute did not apply to the charitable trust, that the change of situs was valid, and that the State of Mississippi had exclusive jurisdiction over the Tennessee trust and the Mississippi corporation.
- On August 29, 2005, the State of Tennessee filed an emergency motion to reschedule the hearing on the State of Tennessee's motion for summary judgment.
- The same day, the Tennessee probate court entered an order requiring the parties to the Tennessee litigation to appear in court on August 30, 2005 at 1:30 P.M.. Further, the probate court notified the parties, in that order, that if the emergency motion was granted, it would hear the motion for summary judgment immediately thereafter.
- The probate court granted the emergency motion, heard the motion for summary judgment, and entered a written order granting the motion for summary judgment on August 30, 2005, which was the 30th day after service. *See* Tenn. R. Civ. P. 56.04 ("The motion shall be served at least thirty (30) days before the time fixed for the hearing.").

Do summary judgment motions have to be "heard"? If not, what are the alternatives?

- The default practice in most federal district courts is for motions for summary judgment to be decided on the papers. *See* *Sama v. Hannigan*, 669 F.3d 585, 590 (5th Cir. 2012) ("District courts are not required to hold oral hearing on summary judgment motion."); *Smith v. School Bd. of Orange County*, 487 F.3d 1361, 1367 (11th Cir. 2007) ("It is well settled in this circuit that [Federal Rule of Civil Procedure] 56(c) does not require an oral hearing.") (quoting *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984)).
- However, district courts may adopt a rule stating otherwise.
- Tennessee appellate courts have not offered an opinion on whether a motion for summary judgment must be "heard" or whether it may be decided solely on the papers.

Sua sponte granting of summary judgment / ground not raised by moving party

- Only appropriate in "rare cases" and when taken "with meticulous care." *Griffis v. Davidson Cty. Metro. Gov't*, 164 S.W.3d 267, 284 (Tenn. 2005).
- "[T]he party against whom summary judgment is to be rendered must have had notice and a reasonable opportunity to respond to all the issues to be considered." *Id.* (citing *Thomas v. Transp. Ins. Co.*, 532 S.W.2d 263, 266 (Tenn. 1976)).

Practice Tip

- Example: Local Rules of Practice, 21st Judicial District (effective March 1, 2023)
  - **Section 5.04. Motions for Summary Judgment**
    - "Absent leave of court, motions for summary judgment must be heard at least thirty (30) days before the scheduled trial date. Motions for summary judgment shall be set for hearing only by the court. The moving party shall file and serve the motion and all supporting material with sufficient time to allow the court to set a hearing date at least thirty-seven (37) days after the motion was filed and served.

      In order to assist the court in setting the motion for hearing and establishing a schedule for briefing by the non-moving party, the moving party shall also file and serve the form ***Notice and Order of Hearing Summary Judgment Motion*** at **Appendix A** as a proposed order. The Clerk shall forward the ***Notice and Order of Hearing Summary Judgment Motion*** to the chambers of the assigned judge who will then establish a briefing schedule, set the motion for hearing and return the completed ***Notice and Order of Hearing Summary Judgment Motion*** to the Clerk for entry."

IN THE CIRCUIT/CHANCERY *[choose appropriate court]* COURT FOR
WILLIAMSON COUNTY, TENNESSEE
21ST JUDICIAL DISTRICT AT FRANKLIN

ABC,	)	
	)	
PLAINTIFF,	)	
	)	
VS.	)	CASE NO. 12345678
	)	
THE BEST COMPANY EVER,	)	
	)	
DEFENDANT.	)	

NOTICE AND ORDER OF HEARING
SUMMARY JUDGMENT MOTION

Notice is hereby given the *Motion for Summary Judgment* filed by _____ _____ [moving party] on _____ [date motion was filed] will be heard on _____ [date of hearing as designated by Court's Judicial Legal Assistant] at _____ (a.m.) (p.m.) [time of hearing as designated by Court's Judicial/Legal Assistant] at the Williamson County Judicial Center, 135 Fourth Avenue South, Franklin, Tennessee 37064. It is anticipated this hearing will take _____ [total anticipated time of hearing] **TOTAL** to be heard, which includes argument from each party.

The following briefing schedule applies to this Motion for Summary Judgment:

1. Non-movant's written responses in opposition to the Motion and to the Rule 56.03 statement, together with all supporting evidentiary matters shall be filed and served not later than _____ [date to be inserted by the Court's Judicial/Legal Assistant].

2. Movant's reply brief (not to exceed twenty (20) pages) and reply to new factual matters asserted in the non-movant's Rule 56.03 response (if any) shall be filed and served not later than _____ [date to be inserted by the Court's Judicial Legal Assistant].

The Court hereby requests the parties file chambers' copies the Motion for Partial Summary Judgment as well as any and all supporting memoranda of law in accordance with Section 5.05, Local Rules of Practice for the 21st Judicial District.

Any party seeking relief from the foregoing hearing date and briefing scheduled shall do so by timely written motion.

The parties may not alter or amend this Order upon their agreement absent Court approval.

This matter is not currently scheduled for trial.

All other matters are reserved.

ENTERED this ____ day of _____, 20___.

_____
[insert appropriate Judge's name here]
Circuit Court Judge/Chancellor

CLERK'S CERTIFICATE OF SERVICE

I hereby certify a true and exact copy of the foregoing Notice of Hearing was mailed, postage prepaid, and/or emailed, and/or faxed, to:

[insert all counsel of record (or party if *pro se*)'s full name, address, fax number and/or email address for proper service]

This the _____ day of _____, 20___.

_____
Circuit Court Clerk/Clerk & Master
[choose appropriate clerk]

Avoidance tactics

- Rule 56.07
- Rule 15.01
- Rule 41.01 and Tennessee Public Participation Act (“TPPA”) counterclaims

Rule 56.07

- Tennessee Rule of Civil Procedure 56.07 permits the party opposing summary judgment to request a continuance in order to acquire additional discovery that may be necessary to effectively contest the pending motion. Tenn. R. Civ. P. 56.07.
- Whether to grant a continuance is within the discretion of the trial court. *Regions Fin. Corp. v. Marsh USA, Inc.*, 310 S.W.3d 382, 401 (Tenn. Ct. App. 2009).

Rule 56.07

- Although unable to find a case concluding that a trial court's denial of a Rule 56.07 motion was an abuse of discretion, there are three scenarios where appellate courts have held that a trial court did not abuse its discretion in denying a Rule 56.07 motion.
  - (1) When a party does not comply with the procedural requirements of Rule 56.07;
    - *See, e.g.*, *In re Rhyder C.*, 2022 WL 2837923, at *5 (Tenn. Ct. App. July 21, 2022).
  - (2) When a party fails to describe why they require additional discovery to respond to the motion for summary judgment; and
    - *See, e.g.*, *Fed. Nat'l Mortg. Ass'n v. Daniels*, 517 S.W.3d 706, 714 (Tenn. Ct. App. 2015); *Cardiac Anesthesia Services, PLLC v. Jones*, 385 S.W.3d 530, 537-38 (Tenn. Ct. App. 2012).
  - (3) When a party already had sufficient time to obtain the required discovery before filing its Rule 56.07 motion.
    - *See, e.g.*, *Guo v. Rogers*, 2022 WL 1220917, at *8 (Tenn. Ct. App. Apr. 26, 2022).

Rule 15.01

- "A party may amend the party's pleadings **once as a matter of course at any time before a responsive pleading is served** or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it at any time within fifteen (15) days after it is served. Otherwise a party may amend the party's pleadings **only by written consent of the adverse party *or* by leave of court**; and leave shall be freely given when justice so requires . . ." Tenn. R. Civ. P. 15.01 (emphasis supplied).
- "A motion for summary judgment is not a 'responsive pleading.'" *Bailey v. Blount County Bd. of Educ.*, 303 S.W.3d 216, 238 (Tenn. 2010) (internal citation omitted).

Rule 15.01

- "There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summonsed under the provisions of Rule 14; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or to a third-party answer." Tenn. R. Civ. P. 7.01.

Rule 41.01 motion and TPPA counterclaims

- "(1) Subject to the provisions of Rule 23.05, Rule 23.06, or Rule 66 or any statute, and except when a motion for summary judgment made by an adverse party is pending, the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties . . . or by an oral notice of dismissal made in open court during the trial of a cause . . . If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of a plaintiff's motion to dismiss, the defendant may elect to proceed on such counterclaim in the capacity of a plaintiff." Tenn. R. Civ. P. 41.01.

Rule 41.01 motion and TPPA counterclaims

- *Adamson v. Grove*, 2022 WL 17334223 (Tenn. Ct. App. Nov. 30, 2022)
  - The plaintiff filed a complaint alleging defamation and related causes of action. Before the defendants filed an answer or any other pleading, the plaintiff filed a notice of voluntary dismissal, and the trial court entered an order of voluntary dismissal without prejudice. Within thirty days, the defendants filed a combined motion to alter or amend and petition to dismiss the complaint with prejudice, pursuant to the TPPA.
  - The trial court entered an order altering or amending the order of voluntary dismissal without prejudice, granting the defendants' petition to dismiss with prejudice under the TPPA, and ordering the plaintiff to pay $15,000 in attorney fees in addition to $24,000 in sanctions.

Rule 41.01 motion and TPPA counterclaims

- *Adamson v. Grove*, 2022 WL 17334223 (Tenn. Ct. App. Nov. 30, 2022)
  - The Court of Appeals reversed the trial court's order granting the motion to alter or amend, vacated the trial court's order granting the defendants' petition to dismiss with prejudice and awarding attorney fees and sanctions.
  - The Court of Appeals determined the defendants' TPPA petition to dismiss would be considered a counterclaim within the meaning of Rule 41.01 because it "amounted to more than 'mere denials of the plaintiff's cause of action' and sought 'affirmative relief' under the TPPA including attorney fees and sanctions." (internal citations omitted).
  - However, the Court of Appeals reversed the trial court's order granting the defendants' petition to dismiss, concluding that the trial court lacked jurisdiction over the petition that was filed after plaintiff had already taken a voluntary nonsuit.

Rule 41.01 motion and TPPA counterclaims

- *Flade v. City of Shelbyville, Tennessee*, 2023 WL 2200729 (Tenn. Ct. App. Feb. 24, 2023)
  - Plaintiff filed multiple causes of action against the City of Shelbyville, amongst others.
  - Two of the nongovernmental defendants filed petitions for dismissal under the TPPA. The non-governmental defendants also moved the trial court to stay its discovery order with respect to plaintiff's action against the City. The trial court denied this motion. The non-governmental defendants filed applications for permission for extraordinary appeal to the Court of Appeals and to the Tennessee Supreme Court, but those applications were denied.

Rule 41.01 motion and TPPA counterclaims

- *Flade v. City of Shelbyville, Tennessee*, 2023 WL 2200729 (Tenn. Ct. App. Feb. 24, 2023)
  - Upon remand to the trial court, plaintiff voluntarily non-suited his action.
  - After the non-governmental defendants filed motions to hear their petitions to dismiss, notwithstanding plaintiff's non-suit, the trial court determined that the petitions were not justiciable following plaintiff's non-suit.
  - The Court of Appeals affirmed the trial court, determining (1) the TPPA is not a statutory bar to voluntary non-suit, as contemplated in Rule 41.01; (2) a TPPA petition to dismiss does not survive a voluntary non-suit; (3) a TPPA petition to dismiss is not a counterclaim; and (4) the TPPA does not fall within the "vested right" exception to Rule 41.01.

Audience Question

- What famous event occurred in history on March 15th?
  - A: The sinking of the Titanic.
  - B: Confederate General Lee surrenders to Union General Grant.
  - C: The day the term “March Madness” was coined, referring to the NCAA.
  - D: The assassination of Julius Caesar.

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  - **D: The assassination of Julius Caesar.**

IV. How are motions for summary judgment to be decided?

- Standard of appellate review
- "Unopposed" or no response to the motion
- Findings and conclusions; delegation of drafting responsibility
- Denied motions; designation of facts established as not genuinely disputed

Standard of Appellate Review

- The standard of appellate review is de novo – make a fresh determination about whether the requirements of Rule 56 have been met. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015) (citing *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013)).
- To determine whether the requirements of Rule 56 have been met:
  - Accept the evidence presented by the nonmoving party as true;
  - Allow all reasonable inferences in the nonmoving party's favor; and
  - Resolve any doubts about the existence of a genuine issue of material fact in favor of the nonmoving party.
- *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 887 (Tenn. 2019).

"Unopposed" or no response to the motion

- If a party fails to properly respond to the movant's statement of material facts, the trial court may deem those facts as admitted. *See* *Brennan v. Goble*, 2021 WL 2156443, at *6 (Tenn. Ct. App. Feb. 21, 2021); *Holland v. City of Memphis*, 125 S.W.3d 425, 428-29 (Tenn. Ct. App. 2003).
- "[A] nonmoving party's failure to comply with Rule 56.03 may result in the trial court's refusal to consider the factual contentions of the nonmoving party even though those facts could be ascertained from the record." *Owens v. Bristol Motor Speedway, Inc.*, 77 S.W.3d 771, 774 (Tenn. Ct. App. 2001).
- The trial court also has "the discretion to waive the requirements of Rule 56.03 if it found [the nonmoving party's] responses insufficient." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 889 (Tenn. 2019).

Findings and conclusions; delegation of drafting responsibility

- *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303 (Tenn. 2014).
  - A medical patient died after his treatment for viral encephalitis was delayed because he was also being assessed for involuntary commitment to a psychiatric hospital.
  - The widow of the deceased patient filed suit against three health care providers, asserting numerous claims.
  - The trial court eventually granted a series of summary judgments, dismissing all the claims against one of the providers without explaining the grounds for its decisions and requested counsel for the provider prepare appropriate orders "establish[ing] the rationale for the [c]ourt's ruling in quite specific detail." *Smith*, 439 S.W.3d at 311.
  - The provider's counsel prepared detailed orders adopting all the arguments the provider made in favor of its summary judgment motions, and the trial court signed these orders over the widow's objection.
  - The Tennessee Supreme Court determined "the record establishe[d] that the contested orders were not the product of the trial court's independent judgment," and therefore, held that "the trial court failed to comply with Tenn. R. Civ. P. 56.04." *Id*. at 305.

Findings and conclusions; delegation of drafting responsibility

- *Scharsch v. Cornerstone Financial Credit Union*, 2023 WL 2256134, at *2 (Tenn. Ct. App. Feb. 28, 2023)
  - "Under Rule 56.04 of the Tennessee Rules of Civil Procedure, the trial court must 'state the legal grounds upon which the court denies or grants' a motion for summary judgment. Tenn. R. Civ. P. 56.04. **This standard requires trial courts to 'fashion[] a considered, independent ruling based on the evidence, the filings, argument of counsel, and applicable legal principles.'** *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 315 & n.24 (Tenn. 2014) (citing John J. Brunetti, *Searching for Methods of Trial Court Fact-Finding and Decision-Making*, 49 Hastings L.J. 1491, 1502 (1998)). **In doing so, a trial court may use counsel-prepared orders *as long as two conditions are satisfied*: 'the findings and conclusions . . . accurately reflect the [court's] decision' and the record does not 'create doubt that the decision represents the trial court's own deliberations and decision.'** *Smith*, 439 S.W.3d at 316." (emphasis supplied).

Denied motions; designation of facts established as not genuinely disputed

- "If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." Tenn. R. Civ. P. 56.05.

Denied motions; designation of facts established as not genuinely disputed

- *Walker v. Walker*, 2020 WL 507645 (Tenn. Ct. App. Jan. 31, 2020)*
  - Wife filed a complaint for divorce against Husband, alleging irreconcilable differences and inappropriate marital conduct.
  - Husband filed a motion for partial summary judgment, requesting the Court find the parties' antenuptial agreement was valid and enforceable, and governed the division of assets and liabilities in this divorce action.
  - Wife argued, due to Husband's failure to disclose a condominium he owned with his longtime ex-girlfriend, that the agreement was not entered into in good faith nor did Wife have the benefit of full and fair disclosure of Husband's assets.
  - Husband argued he did not realize he received title to the condominium and merely thought he was signing a financial guaranty for his ex-girlfriend's mortgage on the condominium.

Denied motions; designation of facts established as not genuinely disputed

- *Walker v. Walker*, 2020 WL 507645 (Tenn. Ct. App. Jan. 31, 2020)*
  - The trial court denied Husband's motion, finding genuine disputes of material fact existed as to whether Husband entered the agreement in good faith, the circumstances surrounding Husband's failure to disclose the condominium, Husband's knowledge of the extent of his ownership in the condominium, and whether Husband intentionally kept the ownership of the condominium a secret from Wife and, therefore, deliberately failed to disclose the asset or whether Husband inadvertently failed to disclose the ownership of the condominium to Wife.
  - At Husband's request, the trial court bifurcated the hearing on the question of whether the antenuptial agreement was valid. The trial court ruled that the uncontroverted material facts, as specified in the memorandum and order denying summary judgment, would be deemed established for purposes of the hearing, in accordance with Tenn. R. Civ. P. 56.05.

*TRIAL COURT MATERIALS PROVIDED

Denied motions; designation of facts established as not genuinely disputed

- *Walker v. Walker*, 2020 WL 507645 (Tenn. Ct. App. Jan. 31, 2020)*
  - After hearing the bifurcated trial, Husband appealed. The Court of Appeals affirmed the trial court's judgment that the antenuptial agreement was invalid due to Husband's bad faith failure to disclose the material fact of his joint ownership of the condominium with his ex-girlfriend.
  - Husband argued that the trial court had given insufficient "weight" to the uncontested facts from the earlier denial of the motion for summary judgment.
  - "Rule 56.05 only grants the trial court the discretion to identify material facts not in substantial controversy, not to make factual findings." *Walker*, 2020 WL 507645, at *4 n.2.

V. Motions for summary judgment under special circumstances

- Divorce cases
- Probate cases; decedent's estates and conservatorships

Special circumstance SJ motions – Divorce Cases

- Case #1 – antenuptial agreement
  - *Walker v. Walker*, 2020 WL 507645 (Tenn. Ct. App. Jan. 31, 2020)* – dispute regarding an antenuptial agreement and the failure to disclose a condominium (discussed previously).

*TRIAL COURT MATERIALS PROVIDED

Special circumstance SJ motions – Divorce Cases

- Case #2 – antenuptial agreement
  - Husband required Wife to sign an antenuptial agreement prior to their marriage, entered 3 days before their anticipated wedding date.
  - The agreement provided, among other things that, if Wife should challenge the agreement, Wife must repay all the money Husband has paid towards financial debt Wife incurred throughout their marriage within 30 days of her filing a formal pleading asserting that challenge, plus interest from the date of each payment at 10% per annum compounded monthly. Further, if Wife failed to make such full repayment to Husband within the prescribed time period, the outstanding balance incurred a 15% interest rate per annum, compounded monthly, until the outstanding balance was paid in full.

Special circumstance SJ motions – Divorce Cases

- Case #3 – postnuptial agreement
  - After Wife had an affair during the parties' marriage, the parties signed a postnuptial agreement.
  - Wife argued she entered the postnuptial agreement under duress, claiming Husband pressured her to sign the agreement while she was suffering from post-partum depression and Husband threatened divorce if she refused to sign the agreement.
  - Husband denied pressuring Wife to sign the agreement and stated Wife engaged in numerous rounds of negotiations in the drafting of the agreement. Further, Husband argued Wife entered the agreement several weeks after she claimed to suffer from post-partum depression. Further, Husband argued Wife underwent elective surgery, less than 30 days after she signed the agreement, wherein she self-reported she had not suffered from post-partum depression within the last 30 days.

Special circumstance SJ motions – Divorce Cases

- *Vanbenthuysen v. Vanbenthuysen*, 17CV-193 (21st Jud. Dist. Jan. 6, 2020)*
  - Husband married his first wife in Florida on December 17, 1988.
  - On January 2, 2003, Husband filed for divorce against his first wife in Florida and, on March 27, 2003, the court entered a final judgment by default dissolving Husband's first marriage.
  - On April 7, 2003, Husband and Wife engaged in a marriage ceremony in Las Vegas, Nevada.
  - On December 4, 2003, Husband's first wife filed a motion to set aside the judgment of dissolution of marriage for ineffective service of process, which the Florida court granted and declared the divorce judgment void on March 19, 2004.

*TRIAL COURT MATERIALS PROVIDED

Special circumstance SJ motions – Divorce Cases

- *Vanbenthuysen v. Vanbenthuysen*, 17CV-193 (21st Jud. Dist. Jan. 6, 2020)*
  - Husband and Wife moved from Florida to Tennessee in 2005 and lived as husband and wife for 14 years until Wife filed her divorce complaint on April 6, 2017.
  - Husband's first wife died on February 11, 2014.
  - Husband filed a motion for summary judgment, requesting the Court declare the parties' marriage void *ab initio* as a bigamous marriage.
  - Wife argued the parties' marriage was valid under the laws of Nevada and Florida, where the parties celebrated their marriage and lived as husband and wife.
  - In granting Husband's motion for summary judgment, the trial court determined that it was undisputed that Husband and his first wife were never divorced and that Husband and Wife's marriage was never valid in Nevada because of Husband's existing marriage to his first wife, at that time.

*TRIAL COURT MATERIALS PROVIDED

Special circumstance SJ motions – Probate cases; decedent's estates and conservatorships

- Trial court correctly granted summary judgment based on statute of limitations (Tenn. Code Ann. § 35-15-1005) for action against trustee of a testamentary trust. Nonmoving party argued that limitation period was tolled due to mental incapacity (Tenn. Code Ann. § 28-1-106) of the beneficiary, but no facts offered to demonstrate incapacity. *In re Conservatorship of Cross*, 2020 WL 6018759, at *9 (Tenn. Ct. App. Oct. 9, 2020).
- The will construction cases are especially suited to the summary judgment procedure because they generally involve legal issues only. Provided there are no ambiguities in the will's language, the "scope of the inquiry is limited to determining the intent of the testator from the will itself." *Estate of Robinson v. Carter*, 701 S.W.2d 218, 220 (Tenn. Ct. App. 1985).

Special circumstance SJ motions – Probate cases; decedent's estates and conservatorships

- Trial court correctly granted the will contestants summary judgment based on the unrebutted presumption of undue influence. Although invalidating a will based on undue influence is generally not a simple undertaking, "a presumption of undue influence arises where the dominant party in a confidential relationship receives a benefit from the other party." *Estate of Hamilton v. Morris*, 67 S.W.3d 786, 793 (Tenn. Ct. App. 2001); Thomas M. Fleming, *Sufficiency of Evidence to Support Grant of Summary Judgment in Will Probate or Contest Proceedings*, 53 A.L.R.4th 561 (Originally published in 1987).

BUT

- Trial court incorrectly granted the will contestants summary judgment based on the presumption of undue influence. A genuine issue of material fact existed as to whether the proponent exercised sufficient dominion and control to establish a confidential relationship. *In re Estate of Brevard*, 213 S.W.3d 298, 305 (Tenn. Ct. App. 2006).

VI. Real-World Examples

- Seemingly simple cases may not be suitable for summary judgment.
  - *Gordon v. Tractor Supply Co.*, 2016 WL 3349024 (Tenn. Ct. App. June 8, 2016)*
  - *Shacklett v. Rose*, 2018 WL 2074102 (Tenn. Ct. App. May 2, 2018)*
  - *Folad v. Quillco, LLC*, 629 S.W.3d 134 (Tenn. Ct. App. 2021)*

Gordon v. Tractor Supply Co., 2016 WL 3349024 (Tenn. Ct. App. June 8, 2016)*

- Facts:
  - Two men purchased merchandise from the defendant store by passing a forged check.
  - The next day, the plaintiff went to the store and was identified by employees as one of the men who passed the bad check.
  - When the plaintiff tried to leave, employees tried to stop him but the plaintiff was able to leave the premises.
  - The employees then reported the plaintiff to the police and stated that he threatened the employees with a box cutter.

*TRIAL COURT MATERIALS PROVIDED

Gordon v. Tractor Supply Co., 2016 WL 3349024 (Tenn. Ct. App. June 8, 2016)*

- Facts:
  - The plaintiff was arrested the same day and charged with forgery, theft, and aggravated assault. He was also charged with a violation of his parole because he had traveled to a location in another county without notifying his parole officer, as he was a convicted felon on parole from TDOC. The district attorney later dismissed the charges and the jury acquitted the plaintiff of the assault charge.
  - The plaintiff then sued the defendant for malicious prosecution, among other things.
  - The defendant moved for summary judgment.

*TRIAL COURT MATERIALS PROVIDED

Gordon v. Tractor Supply Co., 2016 WL 3349024 (Tenn. Ct. App. June 8, 2016)*

- Relevant law:
  - A private party can be held responsible for malicious prosecution if the party knowingly provided law enforcement with false information, and the information resulted in a criminal prosecution. *See* *Wykle v. Valley Fidelity Bank & Trust Co.*, 658 S.W.2d 96, 99 (Tenn. Ct. App. 1983); *Cohen v. Ferguson*, 336 S.W.2d 949, 954 (Tenn. Ct. App. 1959).
  - "[T]here is a distinction between situations in which private parties report what they believe to be true information to the police and situations in which private parties knowingly tell the police false information." *Gordon*, 2016 WL 3349024, at *5.

*TRIAL COURT MATERIALS PROVIDED

Gordon v. Tractor Supply Co., 2016 WL 3349024 (Tenn. Ct. App. June 8, 2016)*

- The trial court granted defendant's motion, in part.
- The trial court dismissed the malicious prosecution claim, concluding that there was no evidence indicating that the defendant's employees knew the information they provided to the police was false and that the prior criminal proceeding was instituted with probable cause because none of defendant's employees or agents testified to the grand jury and the grand jury returned an indictment, thereby establishing probable cause and negating an essential element of plaintiff's claim.

*TRIAL COURT MATERIALS PROVIDED

Gordon v. Tractor Supply Co., 2016 WL 3349024 (Tenn. Ct. App. June 8, 2016)*

- The trial court relied upon *Bovat v. Nissan North America*, 2013 WL 6021458 (Tenn. Ct. App. Nov. 8, 2013), determining *Bovat* squarely controlled the result on the question of probable cause and, therefore, found it "unnecessary to decide whether TSC is vicariously liable for [the employee's] claim that Mr. Gordon threatened him with a box cutter." *Gordon*, 10CV-246 (21st Jud. Dist. Mar. 13, 2015).
- In relevant part, the *Bovat* Court stated:
  - "An indictment by a grand jury equates to a finding of probable cause. . . .

    The foregoing notwithstanding, 'even though one has probable cause to initiate criminal charges, there can be liability for the malicious continuation of a criminal proceeding.' **However, the private person must take an active part in continuing or procuring the continuation of criminal proceedings. '[W]here the instigator has no control over the case once prosecution has begun, his participation will not subject him to liability' and, in Tennessee, 'a private prosecutor does not control the prosecution. This is left in the hands of the District Attorney and of the Court.**'" *Id*. at *3 (internal citations omitted) (emphasis supplied by trial court).

Gordon v. Tractor Supply Co., 2016 WL 3349024 (Tenn. Ct. App. June 8, 2016)*

- The Court of Appeals reversed the trial court on the malicious prosecution claim, specifically as to the issue of whether the plaintiff threatened anyone with a box cutter.
- The Court of Appeals determined that "the relevant question is whether there is a genuine dispute of material fact as to whether this information was known to be false when it was given."
- The Court of Appeals determined that there was a genuine dispute of material fact because the employees who made the report to the police were present at the alleged incident so, if they made a false statement to the police, they would have done so knowingly. Thus, there was a genuine issue of material fact about whether the defendant's employees knowingly made a false statement to police.
- Ultimately, the case turned upon a credibility determination between the plaintiffs and the employees, which could not be resolved at the summary judgment stage.

*TRIAL COURT MATERIALS PROVIDED

Shacklett v. Rose, 2018 WL 2074102 (Tenn. Ct. App. May 2, 2018)*

- Facts:
  - The plaintiff worked for a catering service that was working an event at the defendants' home.
  - At the end of the night of the event, the plaintiff fell down the stairs outside of the defendants' home.
  - The plaintiff sued the defendants, alleging that the staircase was defective and the area was not well lit.
  - The defendants moved for summary judgment, arguing that they did not owe the plaintiff a duty. According to the defendants, plaintiff acted negligently by failing to turn on the exterior lights before walking down the stairs. Defendants argued the plaintiff's actions were unreasonable and her accident was not foreseeable. Therefore, the defendants argued they did not owe her a duty.

*TRIAL COURT MATERIALS PROVIDED

Shacklett v. Rose, 2018 WL 2074102 (Tenn. Ct. App. May 2, 2018)*

- Relevant law:
  - Duty Balancing Test – A defendant owes a duty to a plaintiff when the reasonably foreseeable probability and gravity of harm to the plaintiff outweighs the burden upon the defendant to engage in alternative conduct which would have prevented a risk of harm to the plaintiff. *See Shacklett*, 2018 WL 2074102, at *8.

Shacklett v. Rose, 2018 WL 2074102 (Tenn. Ct. App. May 2, 2018)*

- The trial court granted the defendants' motion, finding that an essential element of plaintiff's *prima facie* case for negligence was negated. Specifically, the trial court found that, while the defendants owed plaintiff a duty to maintain the premises in a reasonably safe and suitable condition and while it was foreseeable plaintiff would leave the catering event at the conclusion of the evening, it was not foreseeable that she would forego common sense and voluntarily descend an unlit stairwell without first exercising her own due diligence.
- The trial court reasoned that the defendants were not required to be the "absolute insurer of [the plaintiff's] safety at all times while she was on their premises." Therefore, the trial court found the defendants' general duty of care did not encompass the duty to guard against the acts alleged by plaintiff.
- The trial court relied on *Eaton v. McLain*, 891 S.W.2d 587 (Tenn. 1994), which involved a visiting relative who, at night, fell down on an unlit interior staircase where she thought she was entering a hallway bathroom. The Court of Appeals in *Eaton* affirmed the trial court's grant of summary judgment for the homeowner because plaintiff went through the wrong door and did not turn on the light.

*TRIAL COURT MATERIALS PROVIDED

Shacklett v. Rose, 2018 WL 2074102 (Tenn. Ct. App. May 2, 2018)*

- The Court of Appeals reversed the trial court, concluding there were genuine disputes of material fact precluding summary judgment.
- The Court of Appeals concluded that a court could not determine whether the defendants owed the plaintiff a duty until the court resolved the factual issues of whether the area around the stairs was lit, and whether the railing on the staircase was defective.
- The Court of Appeals stated there was "a dispute over whether the railing became a dangerous latent condition on the [defendants'] property under cover of darkness, and it [wa]s also disputed whether the lighting (or lack thereof) as it existed at the time of the accident was the cause in fact of [the plaintiff's] accident."
- The Court of Appeals opined that "[t]he resolution of these factual issues by the jury will affect the [trial] court's application of the duty balancing test."

*TRIAL COURT MATERIALS PROVIDED

Folad v. Quillco, LLC d/b/a The Bottle Shop At McEwen, 629 S.W.3d 134 (Tenn. Ct. App. 2021)*

- Facts:
  - Ms. Coviello owned two dogs as well as 100% of the membership interest in the LLC, d/b/a "The Bottle Shop" at McEwen. She frequently took the dogs with her to work.
  - One day, the dogs escaped the rear door of the Bottle Shop and roamed at large, generally around the strip mall area. The dogs encountered Plaintiff and barked at her. Plaintiff was fearful and ran away. The dogs did not pursue Plaintiff but she fell and injured herself.
    - The dogs were regularly present at the business and photographs of the dogs were sometimes used to help promote the business.
  - Plaintiffs sued the LLC and Ms. Coviello for not controlling the dogs, as required by Tenn. Code Ann. § 44-8-413.
  - The parties settled and filed an agreed order dismissing Ms. Coviello as a defendant so the LLC was the only remaining defendant.
  - The LLC moved for summary judgment, arguing that the business was not the "owner" of the dogs and, therefore, had no liability to Plaintiff under the statute.

Folad v. Quillco, LLC d/b/a The Bottle Shop At McEwen, 629 S.W.3d 134 (Tenn. Ct. App. 2021)*

- Relevant law:
  - "The owner of a dog has a duty to keep that dog under reasonable control at all times, and to keep that dog from running at large. A person who breaches that duty is subject to civil liability for any damages suffered by a person who is injured by the dog while in a public place or lawfully in or on the private property of another." Tenn. Code Ann. § 44-8-413(a)(1).
  - "'Owner' means a person who, at the time of the damage caused to another, regularly harbors, keeps, or exercises control over the dog, but does not include a person who, at the time of the damage, is temporarily harboring, keeping, or exercising control over the dog; provided, however, that land ownership alone is not enough to qualify a landowner as a regular harborer even if the landowner gave permission to a third person to keep the dog on the land." *Id.* § 44-8-413(e).

*TRIAL COURT MATERIALS PROVIDED

Folad v. Quillco, LLC d/b/a The Bottle Shop At McEwen, 629 S.W.3d 134 (Tenn. Ct. App. 2021)*

- The trial court determined that, "[a]t all relevant times, the dogs remained under the care, custody, and control of [Ms.] Coviello. Neither the dogs' physical presence in the store nor their apparent presence in the store's promotional materials was sufficient to remove the dogs from the care, custody, and/or control of their owner [Ms.] Coviello and place the dogs under the care, custody, and/or control of the LLC. There is no evidence in the record which indicates that the dogs were engaged in any activity which would benefit or further [the LLC's] business at the time of [the plaintiff's] injury. As a matter of law, [Ms.] Coviello, in her capacity as an individual, owned [the two dogs] at the time of [the plaintiff's] injury. At no relevant time did [the LLC] assume ownership of the dogs."
- The trial court granted the LLC summary judgment, determining that Ms. Coviello was the "owner" of the two dogs.

*TRIAL COURT MATERIALS PROVIDED

Folad v. Quillco, LLC d/b/a The Bottle Shop At McEwen, 629 S.W.3d 134 (Tenn. Ct. App. 2021)*

- The Court of Appeals reversed the trial court, determining that "the pivotal question" was "whether the evidence at summary judgment was sufficient to establish that [the LLC] was *not* an owner of the dogs at issue, within the meaning of the statute."
- The statute did not categorically exclude businesses, like the LLC, from being considered the "owner" of a dog. Therefore, a material fact existed, precluding summary judgment.

*TRIAL COURT MATERIALS PROVIDED

VI. Real-World Examples cont'd

- Complicated cases may be suitable for summary judgment.
  - *Boeh v. Dial*, 2022 WL 2678594 (Tenn. Ct. App. July 12, 2022)
  - *Smythe v. Fourth Ave. Church of Christ*, 2021 WL 4770249 (Tenn. Ct. App. Oct. 13, 2021)
  - *Hughes v. New Life Development*, 387 S.W.3d 453 (Tenn. 2012)
- "If there's more than a banker's box of documents, there must be a genuine dispute somewhere!"

Boeh v. Dial, 2022 WL 2678594 (Tenn. Ct. App. July 12, 2022)

- Buyers filed suit against seller and its engineering firm, asserting claims for negligent misrepresentation, breach of contract, and violation of the Tennessee Consumer Protection Act of 1977 ("TCPA"), resulting from the sale of real property that was incorrectly listed as not being in a flood plain.
- The defendants filed separate motions for summary judgment. Buyers did not file a response in opposition to either motion and did not appear at the summary judgment hearing.
- The seller voluntarily continued the hearing on its motion while the engineering defendants proceeded with the hearing.

Boeh v. Dial, 2022 WL 2678594 (Tenn. Ct. App. July 12, 2022)

- The trial court granted summary judgment in the engineering defendants' favor.
- Buyers filed a motion to set aside the order, claiming they did not receive proper notice of the hearing.
- The trial court determined the buyers had constructive notice of the hearing and also granted summary judgment in favor of the seller on the claims for breach of contract and the TCPA. The trial court determined that the contract permitted the defendants to "grade" the land and rectify the flood plain issue even after closing, disposing of buyers' claim for breach of contract. The trial court further determined that the TCPA requires some degree of fault, which was not present.
- The Court of Appeals determined the trial court did not abuse its discretion in denying the buyers' Rule 59.04 motion. Further, the Court of Appeals affirmed the trial court's decision to grant summary judgment in favor of the seller.

Smythe v. Fourth Ave. Church of Christ, 2021 WL 4770249 (Tenn. Ct. App. Oct. 13, 2021)

- The parties entered into a land purchase agreement wherein seller sold a twenty-acre property with a 50 foot easement to buyer.
- The agreement required buyer to place a refundable deposit of $60,000 in escrow to be held through the course of a 60 day diligence period, and that period was then followed by a 30 day period for closing. Once the parties proceeded with the closing, the $60,000 in escrow would become a non-refundable deposit.
- The parties entered into an addendum modifying the agreement which provided, in part, "[b]uyer's ability to terminate the Agreement within the sixty (60) day diligence period is absolute." The parties entered into a second addendum, extending the diligence period from June 19, 2017 to September 1, 2017. The parties negotiated a third addendum, which did not expressly address whether the parties intended to extend the diligence period beyond September 1, 2017.
- On October 10, 2017, buyer filed a petition asking the trial court to declare the rights and obligations of the parties under the agreements and its addenda.

Smythe v. Fourth Ave. Church of Christ, 2021 WL 4770249 (Tenn. Ct. App. Oct. 13, 2021)

- Seller filed a motion for summary judgment which the trial court granted, concluding that there was no mutual asset on at least one material term: whether the modification would include a new date-certain deadline for the diligence period or be open-ended.
- The trial court concluded that there was no genuine issue of material fact regarding the parties' failure to form a complete agreement on all terms essential to a modification of the agreement. The trial court reasoned that, because the parties did not agree to an extension of the diligence period, the second addendum controlled and the 30 day deadline to close was triggered. Thus, buyer's failure to close within that 30 days was a default causing his $60,000 to be forfeited under the terms of the agreement.
- The Court of Appeals affirmed.

Hughes v. New Life Development, 387 S.W.3d 453 (Tenn. 2012)

- Two families purchased lots in a new subdivision that advertised permanent access to a set of dedicated wilderness preserves on the property surrounding their homesites. The promotional materials, however, also indicated the concept was subject to change by the developer without notice.
- After the death of the president of the original corporate developer, a successor developer purchased all the assets of the original corporate developer and amended the concept plan to develop the reserves as a golf course and additional homesites.
- The two homeowners filed suit, alleging that the successor developer's new development plan violated express and implied restrictive covenants.

Hughes v. New Life Development, 387 S.W.3d 453 (Tenn. 2012)

- The trial court granted the successor developer a judgment on the pleadings. The homeowners appealed.
- The Court of Appeals affirmed the trial court's judgment that no express restrictive covenants existed but remanded the case for further proceedings to resolve what the Court of Appeals deemed to be an ambiguity in the definition of "common areas," as used in the covenants and HOA by-laws.
- While the case on remand was pending, the developer, who controlled the HOA, amended the HOA by-laws and the restrictive covenants to eliminate the ambiguity identified by the Court of Appeals.

Hughes v. New Life Development, 387 S.W.3d 453 (Tenn. 2012)

- The homeowners filed a second suit, principally contesting the validity of the amendments, which was consolidated into the original suit.
- The trial court granted the successor developer summary judgment on all claims in both suits and entered a declaratory judgment dismissing the plaintiffs' case, finding that:
  - The successor developer had the authority to exercise all the powers of the original developer;
  - The amendments were properly noticed and approved by the required super-majority of the HOA members;
  - The amendments cured the ambiguity in the definition of "common areas;" and
  - The plaintiffs were not proper derivative plaintiffs under the Tennessee Nonprofit Corporation Act.

Hughes v. New Life Development, 387 S.W.3d 453 (Tenn. 2012)

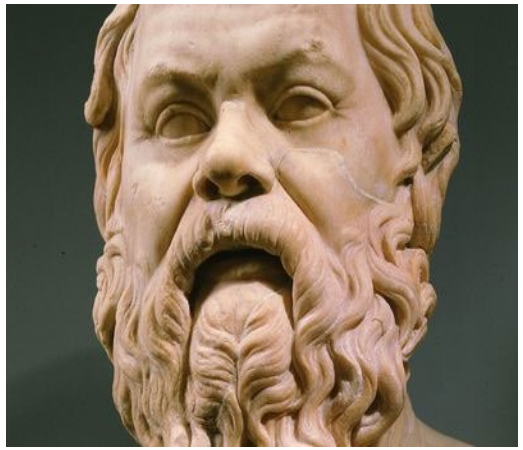
- The Court of Appeals determined the trial court properly dismissed all claims but remanded the case to determine whether the amendments were "reasonable."
- The Tennessee Supreme Court determined that the amendments were properly adopted and there was no basis for implied restrictive covenants arising from a general plan of development or from the plat. The Tennessee Supreme Court further refused to adopt the "reasonableness" test announced by the Court of Appeals because it interfered with the power of private parties to enter into contractual agreements.

VII. Audience Vote

- Who has the best beard?

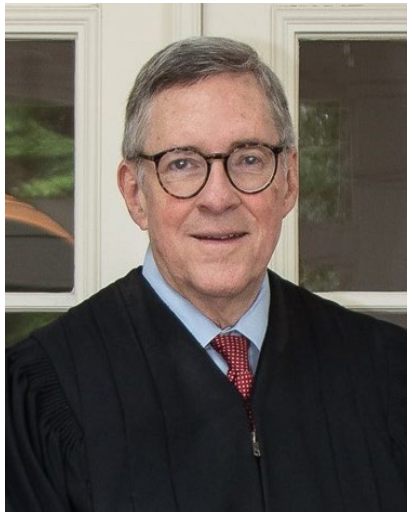
A: Judge McBrayer

B: ZZ Top



C: Socrates

D: Judge Woodruff



VII. Audience Vote

- Who has the best beard?
  - **Judge Jeffrey Usman**