



## Tennessee Journal of Law and Policy

---

Volume 8 | Issue 1

Article 5

---

June 2012

### Redefining Summary Judgment by Statute: The Legislative History of Tennessee Code Annotated Section 20-16-101

Judy M. Cornett

*University of Tennessee College of Law*

Matthew R. Lyon

*Lincoln Memorial University - Duncan School of Law*

Follow this and additional works at: <https://trace.tennessee.edu/tjlp>

 Part of the [Law Commons](#)

---

#### Recommended Citation

Cornett, Judy M. and Lyon, Matthew R. (2012) "Redefining Summary Judgment by Statute: The Legislative History of Tennessee Code Annotated Section 20-16-101," *Tennessee Journal of Law and Policy*. Vol. 8 : Iss. 1 , Article 5.

Available at: <https://trace.tennessee.edu/tjlp/vol8/iss1/5>

This Article is brought to you for free and open access by Volunteer, Open Access, Library Journals (VOL Journals), published in partnership with The University of Tennessee (UT) University Libraries. This article has been accepted for inclusion in Tennessee Journal of Law and Policy by an authorized editor. For more information, please visit <https://trace.tennessee.edu/tjlp>.

ARTICLE

**REDEFINING SUMMARY JUDGMENT BY STATUTE:  
THE LEGISLATIVE HISTORY OF TENNESSEE  
CODE ANNOTATED SECTION 20-16-101\***

*Judy M. Cornett*<sup>1</sup>  
*Matthew R. Lyon*<sup>2</sup>

**I. Introduction**

In its 2011 session, the Tennessee General Assembly purported to overrule a landmark decision of the Tennessee Supreme Court that had clarified the burden of production on summary judgment motions.<sup>3</sup> The stage was set for this legislation by the November 2010 election, in which Republicans won majorities of twenty to thirteen in the State Senate and sixty-four to thirty-four (plus one GOP-leaning independent)<sup>4</sup> in the House of Representatives.<sup>5</sup> In addition, Bill Haslam, the Republican Mayor of Knoxville, won the election for Governor

---

\*For a transcript of the legislative history of the Bill discussed in this Article, see the Appendix that begins on Page 206.

<sup>1</sup> Professor, University of Tennessee College of Law. I wish to thank my research assistants, Amanda Morse and Mitchell Panter, Class of 2013, for their outstanding research assistance.

<sup>2</sup> Assistant Professor, Lincoln Memorial University - Duncan School of Law. Thank you to my research assistant, Danielle Goins, for her timely and diligent work.

<sup>3</sup> *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008).

<sup>4</sup> That independent state representative is Kent Williams (I-Elizabethton), who served as Speaker of the Tennessee House of Representatives during the 106th General Assembly from 2009 to 2011.

<sup>5</sup> Richard Locker, *Republican-Led Tennessee Legislature Gets Ready to Launch Tuesday*, THE COM. APPEAL, Jan. 10, 2011, available at <http://www.commercialappeal.com/news/2011/jan/10/gop-led-legislature-launches-tuesday/>.

## 8.1 Tennessee Journal of Law and Policy 101

handily, leaving Republicans “large and in charge” and in control of the executive branch and both houses of the legislature in Tennessee for the first time since 1869.<sup>6</sup> Republicans took control of power in Nashville vowing that they would govern responsibly,<sup>7</sup> despite hard feelings resulting from years of Democratic control,<sup>8</sup> not to mention the surprise, last-minute denial of the Speaker of the House position to the Republican leader in the 106th General Assembly.<sup>9</sup> The Republican leadership stated at the outset

---

<sup>6</sup> Andy Sher, *Tennessee Republicans 'Large and in Charge' of Legislature*, CHATTANOOGA TIMES FREE PRESS, Feb. 14, 2011, available at <http://timesfreepress.com/news/2011/feb/14/tennessee-republicans-large-and-in-charge-of/>; see also Tom Humphrey, *With Haslam's Election, GOP Power Greatest Since 1869*, KNOXVILLE NEWS SENTINEL, Nov. 3, 2010, available at <http://www.knoxnews.com/news/2010/nov/03/with-haslams-election-gop-power-greatest-since-186/>.

<sup>7</sup> Andy Sher, *Tennessee's First Female State House Speaker, Beth Harwell, Says GOP Can Shine*, CHATTANOOGA TIMES FREE PRESS, Jan. 4, 2011, available at <http://www.timesfreepress.com/news/2011/jan/04/harwell-says-gop-can-shine/>.

<sup>8</sup> See, e.g., Jeff Woods, *Republican Majority Members Tout Haslam's Jobs Agenda as Top Priority; Revenge Might be No. 2*, NASHVILLE CITY PAPER, Dec. 26, 2010, available at <http://nashvillecitypaper.com/content/city-news/republican-majority-members-tout-haslams-jobs-agenda-top-priority-revenge-might-b>.

<sup>9</sup> The election of Rep. Williams as Speaker was a bizarre turn of events that illustrates the fiercely partisan environment of the modern Tennessee legislature. In the 2008 legislative elections, Tennessee Republicans had bucked the national Democratic trend and secured a fifty to forty-nine majority in the House, their first in decades. All fifty of the GOP legislators, including Williams, signed a pledge to back Rep. Jason Mumpower (R-Bristol) as Speaker. However, on January 13, 2009, the date of the leadership elections, Williams voted for himself for Speaker and was elected with the votes of all 49 Democrats, who had previously agreed to the arrangement. See generally Tom Humphrey, *Williams Elected as House Speaker*, KNOXVILLE NEWS SENTINEL, Jan. 14, 2009, available at <http://www.knoxnews.com/news/2009/jan/14/williams-elected-as-house-speaker/>; Andy Sher, *Williams Elected Speaker in Upset; Mumpower Loses*, CHATTANOOGA TIMES FREE PRESS, Jan. 13, 2011, available at <http://>

## 8.1 Tennessee Journal of Law and Policy 102

that its top priority at the beginning of the legislative session was “job creation,”<sup>10</sup> and this goal translated into the passage of a slew of legislative proposals friendly to the business community, many of which had stalled under the previous Democratic regime.<sup>11</sup> The most notable of these was a “tort reform” package that limited non-economic damages to \$750,000, and capped punitive damages at two times the amount of compensatory damages awarded or \$500,000, whichever is greater.<sup>12</sup> While this initiative and others, such as the abolition of collective bargaining for teachers, received greater public attention, the new legislative majority also set its sights on overruling certain Tennessee Supreme Court decisions that the business community had interpreted as unfriendly to its interests.<sup>13</sup>

---

northgeorgia.timesfreepress.com/news/2009/jan/13/williams-elected-speaker-upset-mumpower-loses/. Then-Speaker Williams was subsequently stripped of his membership in the Republican party. Shaila Dewan, *Tennessee House Member Wins Top Job, but Loses Party*, N.Y. TIMES, Feb. 11, 2009, at A16, available at <http://www.nytimes.com/2009/02/11/us/11tennessee.html>. Rep. Williams now refers to himself as a member of the “Carter County Republican Party.” See TENNESSEE GENERAL ASSEMBLY, <http://www.capitol.tn.gov/house/members/h4.html>, (last visited Jan. 2, 2012).

<sup>10</sup> Sher, *supra* note 7. Speaker-to-be Harwell’s top three priorities at the outset of the 2011 legislative session were: (1) “job creation . . . looking forward to supporting Gov. Haslam and what he has in store for really creating an environment that’s conducive for job creation in this state”; (2) “the budget . . . pass[ing] a balanced budget without raising taxes”; and (3) “keep[ing the state] moving forward on education reform.” *Id.*

<sup>11</sup> See, e.g., Tom Humphrey, *Business Interests had Only Each Other to Fight*, KNOXVILLE NEWS SENTINEL, June 6, 2011, available at <http://www.knoxnews.com/news/2011/jun/06/business-interests-only-had-each-other-to-fight/> (“In many cases, the business lobby found it could simply sit on the sidelines and cheer for Haslam and the Legislature’s Republican super-majority.”).

<sup>12</sup> Tennessee Civil Justice Act of 2011, 2011 Tenn. Pub. Acts 510.

<sup>13</sup> Brandon Gee, *Turf Battle between Legislature, Judiciary Lies on Horizon in Tenn.*, THE TENNESSEAN, Jan. 2, 2012, available at <http://www.tennessean.com/article/20120103/NEWS02/301030023/Tur>

## II. Background

In 2008, the Tennessee Supreme Court explicitly rejected the federal *Celotex* summary judgment standard<sup>14</sup> in *Hannan v. Alltel Publishing Co.*<sup>15</sup> Some members of the bench and bar reacted with dismay. Critics claimed that the Tennessee Supreme Court's requirement that the movant either "negate an essential element of the nonmovant's claim" or "show that the nonmoving party cannot prove an essential element of the claim at trial"<sup>16</sup> made it unreasonably difficult for defendants to obtain summary judgment.<sup>17</sup> According to the critics of *Hannan*, only the *Celotex* standard, which permits the movant to carry its initial burden by demonstrating that the nonmovant lacks evidence of an essential element of its claim at the summary judgment stage, is effective in weeding out nonmeritorious claims prior to trial.<sup>18</sup>

Apparently persuaded by the critics' arguments, the Tennessee General Assembly, on the last day of the 2011 regular session, May 20, 2011, passed Public Chapter No. 498, which purported to overrule *Hannan* by adopting the

---

f-battle-between-legislature-judiciary-lies-horizon-Tenn ("Two bills that easily passed the General Assembly in 2011 go so far as to tell the courts how to interpret their own procedural rules for resolving disputes").

<sup>14</sup> *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

<sup>15</sup> 270 S.W.3d at 1.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> See, e.g., Edward G. Phillips, 'Gossett' Eschews Employers' Reliance on 'McDonnell Douglas' in Summary Judgment, 47 TENN. B. J. 24, 25 (Feb. 2011); Andrée Sophia Blumstein, *Bye, Bye Byrd? Summary Judgment After Hannan and Martin: Which Way to Go?*, 45 TENN. B. J. 23, 23 (Feb. 2009).

<sup>18</sup> See, e.g., Andrée Sophia Blumstein, *Bye Bye Hannan? What a Difference Two Little Words, at Trial, Can Make in the Formulation of Tennessee's Summary Judgment Standard*, 47 TENN. B. J. 14, 14 (Aug. 2011).

## 8.1 Tennessee Journal of Law and Policy 104

*Celotex* standard for summary judgment. The operative section of the Act creates a new section of the Tennessee Code Annotated, which reads as follows:

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:

- (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.<sup>19</sup>

The enacted bill contained findings that expressed the legislature's purpose to overrule *Hannan* on the basis of its conflict with federal law and the unsupported finding that "this 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."<sup>20</sup> The enacted bill also provided that "[e]xcept as set forth herein, Rule 56 of the Tennessee Rules of Civil Procedure remains unchanged."<sup>21</sup>

---

<sup>19</sup> 2011 Tenn. Pub. Acts 498.

<sup>20</sup> *Id.* at Preamble. One commentator has mistakenly asserted that "[t]he preamble did not make it into the final version of the law." Blumstein, *supra* note 18, at 19 n.14.

<sup>21</sup> 2011 Tenn. Pub. Acts 498.

### III. *Celotex* in Tennessee: The History behind *Hannan*

In 1993, the Tennessee Supreme Court addressed the *Celotex* trilogy for the first time in *Byrd v. Hall*<sup>22</sup>—an opinion that would later be recognized as Tennessee’s “departure from the federal [summary judgment] standard.”<sup>23</sup> Although the *Byrd* court set out to “establish a clearer and more coherent summary judgment jurisprudence,” the court’s treatment of *Celotex* was ambiguous.<sup>24</sup> On the one hand, the court “embrace[d]” the *Celotex* trilogy;<sup>25</sup> however, the court went on to declare that in Tennessee “[a] conclusory assertion that the nonmoving party has no evidence is clearly insufficient.”<sup>26</sup> Further, the court held that a moving party in summary judgment may meet its burden of production in one of two ways: (1) by “affirmatively negat[ing] an essential element of the nonmoving party’s claim,” or (2) by “conclusively establish[ing] an affirmative defense that defeats the nonmoving party’s claim.”<sup>27</sup> Thus, despite the Tennessee Supreme Court’s self-professed goal of clarity, the *Byrd* decision left many doubts about whether a *Celotex*-type motion could succeed in Tennessee.<sup>28</sup>

Any ambiguity that remained about Tennessee’s embrace of the *Celotex* standard was erased five years later

---

<sup>22</sup> *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993).

<sup>23</sup> *Hannan*, 270 S.W.3d at 7.

<sup>24</sup> See Blumstein, *supra* note 18, at 23 (noting *Byrd*’s ““schizophrenic” approach to *Celotex*). See generally Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping about Summary Judgment in Tennessee*, 69 TENN. L. REV. 175 (2001).

<sup>25</sup> *Byrd*, 847 S.W.2d at 214.

<sup>26</sup> *Id.* at 215.

<sup>27</sup> *Id.* at 215 n.5.

<sup>28</sup> See generally Blumstein, *supra* note 18, at 23. Cf. *Hannan*, 270 S.W.3d at 5 (stating that apparently conflicting statements in *Byrd* “have led to some confusion among Tennessee courts as to the proof required for the moving party to meet its burden of production.”).

## 8.1 Tennessee Journal of Law and Policy 106

when the Tennessee Supreme Court issued its decision in *McCarley v. West Quality Food Service*.<sup>29</sup> In *McCarley*, the plaintiff alleged that he became ill after eating Kentucky Fried Chicken sold by one of the defendant's K.F.C. franchises.<sup>30</sup> He was diagnosed with food poisoning caused by campylobacter. During discovery, it was revealed that the plaintiff had also eaten bacon the morning before consuming the allegedly tainted chicken.<sup>31</sup> No sample of either food had been saved. The plaintiff's treating physician testified that either the chicken or the bacon could have caused plaintiff's illness, but that the chicken "was at the top of the list."<sup>32</sup> With the expert testimony in this state of near-equipose, the defendant moved for summary judgment, alleging that the plaintiff could not "carry his burden of proof to prove by a preponderance of the evidence that the chicken caused the food poisoning."<sup>33</sup> The trial court granted summary judgment, and the court of appeals, citing *Byrd*, affirmed.<sup>34</sup> The supreme court reversed, concluding that, although the defendant's assertions "may cause doubt as to whether the chicken or the bacon caused [the plaintiff's] illness . . . [t]his evidence, however, does not negate the chicken from the list of possible causes."<sup>35</sup> Because the defendant had not negated an essential element of the plaintiff's claim, the plaintiff's burden of production was not triggered, and summary judgment was improperly granted.

In the ten years between *McCarley* and *Hannan*, the Tennessee Supreme Court continued to insist that a movant must negate an essential element of the nonmovant's claim

---

<sup>29</sup> *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585 (Tenn. 1998).

<sup>30</sup> *Id.* at 587.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 587-88.

<sup>35</sup> *McCarley*, 960 S.W.2d at 588.



in order to trigger the nonmovant's burden of production.<sup>36</sup> Despite this consistent line of decisions over a ten-year period, the Tennessee bench and bar still occasionally cited *Byrd* for the proposition that a movant could carry its burden of production by demonstrating that the nonmovant could not prove an essential element of its claim—essentially, by complying with the *Celotex* standard.<sup>37</sup>

Finally, the Tennessee Court of Appeals in *Hannan* invited the Tennessee Supreme Court to grant permission to appeal in order to “address (1) the issue of exactly what is meant by ‘negating’ an element of a plaintiff’s claim, and (2) whether Tennessee follows the Sixth Circuit’s ‘put up or shut up’ interpretation of *Celotex*.”<sup>38</sup>

In *Hannan*, Mr. and Mrs. Hannan owned two businesses in a small town in East Tennessee: (1) a real estate company, and (2) a bed and breakfast.<sup>39</sup> In 2003, the plaintiffs contracted with the defendant to advertise their businesses in the local saffron-colored pages.<sup>40</sup> The advertisement for the real estate firm, however, was never published, so the plaintiffs filed an action for lost profits.<sup>41</sup> Interestingly, the plaintiffs’ income tax returns actually revealed an *increase* in income for 2003.<sup>42</sup> Furthermore,

---

<sup>36</sup> See *Staples v. CBL & Assoc.*, 15 S.W.3d 83 (Tenn. 2000); *Blair v. West Town Mall*, 130 S.W.3d 761 (Tenn. 2004).

<sup>37</sup> See Blumstein, *supra* note 18, at 15 (asserting that “*Byrd* was . . . widely – but by no means universally – read to have articulated a ‘put-up-or-shut-up’ standard just like the *Celotex* standard.”). *But see* Judy M. Cornett, *Trick or Treat? Summary Judgment in Tennessee After Hannan v. Alltel Publishing Co.*, 77 TENN. L. REV. 305, 317 n.80 (2010) (demonstrating that in the fifteen-year interval between *Byrd* and *Hannan*, courts rarely misread *Byrd* as adopting *Celotex* standard).

<sup>38</sup> *Hannan v. Alltel Publ’g Co.*, No. E2006-01353-COA-R3-CV, 2007 WL 208430, at \*8 (Tenn. Ct. App. Jan. 26, 2007), *aff’d*, 270 S.W.3d 1 (Tenn. 2008).

<sup>39</sup> *Hannan*, 270 S.W.3d at 3.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

## 8.1 Tennessee Journal of Law and Policy 108

neither of the plaintiffs could explain the increase in income, nor could either quantify the lost profits they alleged they had suffered.<sup>43</sup> Accordingly, Alltel moved for summary judgment on the ground that the plaintiffs could not prove that they suffered lost profits—an essential element of their claim.<sup>44</sup> The trial court granted summary judgment for Alltel, but the court of appeals reversed.<sup>45</sup>

Affirming the court of appeals, the Tennessee Supreme Court unequivocally rejected *Celotex* and reaffirmed a modified version of the *Byrd* standard.<sup>46</sup> Noting that “[d]ecisions within the federal circuits vary, but most seem either to follow the [Sixth Circuit’s] ‘put up or shut up’ approach or to require the moving party merely to point to deficiencies in the nonmoving party’s evidence,” the court reiterated its departure from the federal standard.<sup>47</sup> The court affirmed the *Byrd* standard, modifying the second prong to eliminate any reference to “conclusively establish[ing] an affirmative defense”:

In summary, in Tennessee, a moving party who seeks to shift the burden of production to the non-moving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party’s claim; or (2) show

---

<sup>43</sup> *Id.* at 4. Indeed, during her deposition, Mrs. Hannan was asked, “Do you have any way of [quantifying in dollars the amount of loss]?” She replied, “I have absolutely no way of doing that. And neither does anyone else.” *Hannan*, 270 S.W.3d at 4.

<sup>44</sup> *Id.* at 3. The Tennessee Supreme Court clarified that the existence of lost profits was an essential element of the Hannans’ claim, while the amount of any lost profits was a matter for proof at trial, as long as they could “lay[] a sufficient foundation to allow the trier of fact to make a fair and reasonable assessment of damages.” *Id.* at 10.

<sup>45</sup> *Id.* at 4-5.

<sup>46</sup> *Id.* at 6.

<sup>47</sup> *Id.* at 5-6.

## 8.1 Tennessee Journal of Law and Policy 109

that the nonmoving party cannot prove an essential element of the claim at trial.<sup>48</sup>

Justice William C. Koch, Jr. dissented. Consistent with his assertion that “[t]he Court’s decision in this case brushes aside fifteen years of post- *Byrd v. Hall* decisions . . . ,”<sup>49</sup> the dissenting opinion utilized a vocabulary of metamorphosis. For example, Justice Koch accused the majority of “*dramatically changing* the moving party’s burden of production.”<sup>50</sup> He declared that movants “will *no longer* be able to shift the burden of production” as easily as they could pre-*Hannan*.<sup>51</sup> He questioned the “*change in direction*” supposedly signaled by *Hannan*.<sup>52</sup> Given his assertion that *Hannan* changed Tennessee law, Justice Koch looked to the future: “What practical effect will this decision have on litigation in Tennessee’s courts? The answer is that its effects will be *significant and far-reaching*.”<sup>53</sup> Finally, Justice Koch made a prediction that

---

<sup>48</sup> Thus, the difference between the Tennessee standard and the federal *Celotex* standard is essentially one of timing. The federal standard permits summary judgment if the non-movant cannot prove an essential element of its case at the summary judgment stage. The Tennessee standard permits summary judgment only if the non-movant cannot prove an essential element of its case at trial. *See generally* Blumstein, *supra* note 18, at 14 (noting importance of two words “at trial”); Cornett, *supra* note 37, at 334 (noting that in *Hannan* “the Tennessee Supreme Court rejected the federal approach to summary judgment as a way of testing the sufficiency of the nonmovant’s evidence pre-trial.”).

<sup>49</sup> *Hannan*, 270 S.W.3d at 17 (Koch, J., dissenting). Justice Koch’s assertion was refuted by the majority, who pointed out that the interpretation of Rule 56 applied in *Hannan* is identical to that adopted in *McCarley v. West Quality Food Services*, 960 S.W.2d 585 (Tenn. 1998).

<sup>50</sup> *Hannan*, 270 S.W.3d at 11 (emphasis added). *Accord id.* at 17 (“Such a *dramatic change* in established summary judgment practice prompts several questions.”)

<sup>51</sup> *Id.* at 11 (emphasis added).

<sup>52</sup> *Id.* at 12 (emphasis added).

<sup>53</sup> *Id.* at 19 (emphasis added).

## 8.1 Tennessee Journal of Law and Policy 110

was echoed in later criticism of *Hannan* and in Public Chapter No. 498 itself: “The Court's decision will undermine, rather than enhance, the utility of summary judgment proceedings as opportunities to weed out frivolous lawsuits and to avoid the time and expense of unnecessary trials.”<sup>54</sup>

Taking their cue from Justice Koch’s dissent, some members of the Tennessee bar, especially the defense bar, expressed alarm at the *Hannan* decision.<sup>55</sup> Indeed, one prominent Tennessee law firm asserted that “*Hannan* had placed such a heavier burden [sic] on parties seeking a summary judgment that summary judgment was, in effect, relegated to the spectator seats and no longer a viable alternative to trial.”<sup>56</sup> Although the court in *Hannan* merely reaffirmed and clarified its fifteen-year-old approach to summary judgment,<sup>57</sup> the defense bar, echoing the *Hannan* dissent, insisted on viewing *Hannan* as something new and different.<sup>58</sup> Consternation at the decision was undoubtedly heightened by the bad facts of *Hannan*, which presented a worst case scenario in which the plaintiffs admitted that they lacked proof of the amount of their lost profits – perceived as an essential element of their claim at the summary judgment stage. Under *Hannan*, such plaintiffs can escape summary judgment and proceed to the trial

---

<sup>54</sup> *Id.* at 12.

<sup>55</sup> See, e.g., Blumstein, *supra* note 18, at 14; Cornett, *supra* note 37, at 330 n.169, 334 n.196 (citing reactions from the bench and bar).

<sup>56</sup> Press Release, Miller & Martin PLLC, Tennessee General Assembly Changes Standard for Summary Judgment (May 24, 2011) (on file with author). Although this assertion found its way into the preamble of Public Chapter No. 498, there has never been any empirical study supporting a finding that fewer summary judgments were granted after *Hannan* than before it, or that summary judgment was granted less often in Tennessee than in federal court.

<sup>57</sup> See Cornett, *supra* note 37, at 332.

<sup>58</sup> E.g., David E. Long, “I Understand TRCP 56”: *The Evolving Tennessee Summary Judgment Standard*, DICTA (Nov. 2010) at 14.

## 8.1 Tennessee Journal of Law and Policy 111

stage, thereby inducing defendants to settle potentially nonmeritorious cases.<sup>59</sup>

Almost two years elapsed between the *Hannan* decision and the introduction of the bill that became Public Chapter No. 498. In the interval came another controversial court decision deemed unfriendly to business, *Gossett v. Tractor Supply Co.*,<sup>60</sup> a common-law retaliatory discharge case in which the Tennessee Supreme Court jettisoned the *McDonnell Douglas*<sup>61</sup> framework in favor of the general summary judgment burden-shifting analysis. The Court noted two main problems with applying the *McDonnell Douglas* framework at the summary judgment stage. First,

---

<sup>59</sup> The *Hannan* case ended in a confidential settlement. See generally Cornett, *supra* note 37, at 337 nn.219-20.

<sup>60</sup> *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777 (Tenn. 2010).

<sup>61</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As described in *Gossett*, the *McDonnell Douglas* framework is as follows:

Pursuant to *McDonnell Douglas*, if an employee proves a prima facie case of discrimination or retaliation, the employee creates a rebuttable presumption that the employer unlawfully discriminated or retaliated against him or her. The burden of production shifts to the employer to articulate a legitimate and nondiscriminatory or nonretaliatory reason for the action. If the employer satisfies its burden, the presumption of discrimination or retaliation “drops from the case,” which sets the stage for the factfinder to decide whether the adverse employment action was discriminatory or retaliatory. The employee, however, “must ... have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination.” Tennessee courts have applied this evidentiary framework to statutory employment discrimination and retaliation claims.

*Gossett*, 320 S.W.3d at 780-81 (citations omitted).

## 8.1 Tennessee Journal of Law and Policy 112

“evidence of a legitimate reason for discharge does not necessarily show that there is no genuine issue of material fact” because the articulated reason “is not always mutually exclusive of a discriminatory or retaliatory motive . . . .”<sup>62</sup> Thus, the Court implied, the mere articulation of a legitimate, nondiscriminatory reason should not necessarily shift the burden of production to the plaintiff. Second, under the *McDonnell Douglas* framework, once the defendant articulates its legitimate reason, the “presumption of discrimination or retaliation” established by the plaintiff’s prima facie case “‘drops from the case.’”<sup>63</sup> This aspect of the *McDonnell Douglas* framework means that “[i]n addressing the issue of pretext, a court may fail to consider the facts alleged by the employee to show a prima facie case.”<sup>64</sup> Indeed, the Court found an example of this defect in its earlier decision, *Allen v. McPhee*,<sup>65</sup> which the Court implicitly overruled in *Gossett*.<sup>66</sup>

---

<sup>62</sup> *Id.* at 782. The common-law tort of retaliatory discharge requires only that the employee’s protected action or inaction be a “substantial factor” in the employer’s decision. *Id.* at 781.

<sup>63</sup> *Id.* at 780.

<sup>64</sup> *Id.* at 783.

<sup>65</sup> *Allen v. McPhee*, 240 S.W.3d 803 (Tenn. 2007), cited in *Gossett*, 320 S.W.3d at 783-84.

<sup>66</sup> *Gossett*, 320 S.W.3d at 784. Regarding *Allen*, the Court stated, “Without the *McDonnell Douglas* framework, our summary judgment analysis in *Allen* would have reached a different outcome. . . . Our reaffirmation of longstanding Tennessee law on summary judgment . . . convinces us that our application of the *McDonnell Douglas* framework in *Allen* skewed our summary judgment analysis in favor of the employer.” *Id.* at 784. Although the Court did not explicitly overrule *Allen*, most commentators have read *Gossett* as doing so. Edward G. Phillips, *The Law at Work: “Gossett” Eschews Employers’ Reliance on “McDonnell Douglas” in Summary Judgment*, 47 TENN. B.J. 24, 24 (Feb. 2011) (“[T]he upshot of the *Gossett* majority’s criticism of *Allen* is that if a plaintiff can establish temporal proximity between the protected activity and the termination, without more, the plaintiff prevails at summary judgment.”); see also *West v. Genuine Parts Co.*,

## 8.1 Tennessee Journal of Law and Policy 113

Like *Hannan*, *Gossett* caused consternation among members of the defense bar. The following excerpt is representative:

In a surprise split decision, the Tennessee Supreme Court potentially has made life more expensive for companies sued by current or former employees for discrimination.

The 3-2 decision in *Gossett v. Tractor Supply Inc.* is a sharp departure from a decades-long precedent that puts the burden on employees to prove their firing was discrimination or retaliation (as opposed to legitimate reasons) before a case can go to trial. The *Gossett* decision forces employers to do the heavy lifting and prove a worker's allegation is false.

“The initial reaction from some folks in our community is this is egregious,” Jim Brown, Tennessee director for the National Federation of Independent Business, told the *Insurance Journal*. “Big businesses will likely settle, but many small businesses will likely go out of business. The consequences of this will be significant.”<sup>67</sup>

Even the Associated Press report on *Gossett* misstated its holding and overstated its implications. According to the Associated Press, *Gossett* held “that employers must prove that workers’ claims of discrimination or retaliation are

---

2011 WL 4356361, at \*4 (E.D. Tenn. Sept. 16, 2011) (observing that *Gossett* “abrogated” *Allen*).

<sup>67</sup> Courtney Rubin, *Tennessee Ruling Makes Discrimination Cases Harder for Businesses*, INC., Sept. 29, 2010, available at <http://www.inc.com/news/articles/2010/09/in-discrimination-cases-tennessee-puts-burden-on-employers.html>.

## 8.1 Tennessee Journal of Law and Policy 114

false or else face a trial.”<sup>68</sup> Consequently, *Gossett* “made it easier for workers to sue their employers.”<sup>69</sup> The perceived extension of *Hannan* into the employment discrimination arena, combined with Republican domination of the General Assembly, set the stage for Public Chapter No. 498.

### IV. The Legislative History

In February of 2011, legislation was introduced in both the House and Senate to overrule *Hannan* and adopt a standard for courts to apply at the summary judgment stage of litigation that purported to more closely match the federal standard. After House Bill 1358 and Senate Bill 1114 were introduced in their respective chambers in mid-February, they were referred to their respective Judiciary Committees. The House version of the summary judgment legislation, House Bill 1358, was introduced by Rep. Vance Dennis on February 16, 2011.<sup>70</sup> Rep. Dennis is a thirty-five-year-old Republican from Savannah, in Hardin County in West Tennessee.<sup>71</sup> He is a University of Tennessee College of Law graduate who was first elected to the House of Representatives in 2008.<sup>72</sup> The Senate companion

---

<sup>68</sup> *Court Sides with Fired Employees*, KNOXVILLE NEWS SENTINEL, Sept. 27, 2010, at A12, available at <http://olive.knoxnews.com/olive/ODE/Knoxville/LandingPage/LandingPage.aspx?href=S05TLzIwMTAvMDkvMjc.&pageno=MTI.&entity=QXIwMTIwMQ..&view=ZW50aXR5>.

<sup>69</sup> *Id.* Accord Pamela Reeves, *Certain Firings Made More Difficult*, KNOXVILLE NEWS SENTINEL, October 17, 2010, at C2 (“it will be much more difficult for employers to get cases dismissed on motions for summary judgment. . . .”); Phillips, *supra* note 17, at 25 (“*Gossett* largely eviscerates a Tennessee employer’s ability to obtain summary judgment in employment discrimination and retaliation [cases] . . .”).

<sup>70</sup> H.B. 1358, 107th Gen. Assem., Reg. Sess. (Tenn. 2011).

<sup>71</sup> Tennessee General Assembly, <http://www.capitol.tn.gov/house/members/H71.html> (last visited Jan. 2, 2012).

<sup>72</sup> *Id.*



legislation, Senate Bill 1114, was introduced by Sen. Brian Kelsey.<sup>73</sup> Sen. Kelsey is a thirty-three-year-old Georgetown University Law Center graduate, also a Republican, who has served in both the House and Senate and hails from Germantown, an affluent Memphis suburb.<sup>74</sup> Rep. Dennis and Sen. Kelsey sponsored other successful business-friendly pieces of legislation in 2011, including the tort reform bill<sup>75</sup> and the legislation to overrule *Gossett*.<sup>76</sup>

#### A. *The House*

The summary judgment legislation sat dormant for months in both chambers, but moved first in the House when the Judiciary Subcommittee considered it on April 12, 2011. When asked by Rep. Janis Baird Sontony (D-Nashville) to explain the legislation, Rep. Dennis stated

---

<sup>73</sup> S.B. 1114, 107th Gen. Assem., Reg. Sess. (Tenn. 2011).

<sup>74</sup> Tennessee General Assembly, <http://www.capitol.tn.gov/senate/members/S31.html> (last visited Jan. 2, 2012).

<sup>75</sup> The version of the Civil Justice Act that Rep. Dennis introduced in the House varied slightly from the version that Gov. Haslam signed into law in June 2011. Opponents of the bill were successful in adding an amendment in the Judiciary Committee to remove the damage cap awards when the tort upon which the defendant is sued results in a felony conviction of the defendant. Richard Locker, *Tennessee House Panel OKs Limits on Liability: Haslam Says Curbs will Improve Tenn. Business Prospects*, THE COM. APPEAL, Apr. 20, 2011, available at <http://www.commercialappeal.com/news/2011/apr/20/house-panel-oks-limits-on-liability/?partner=RSS>. Although Rep. Dennis initially resisted the amendment, he later vowed to restore the provision excluding felons from the cap during a future legislative session. Andy Sher, *Lawsuit Caps Legislation Goes to Tennessee Governor*, CHATTANOOGA TIMES FREE PRESS, May 20, 2011, available at <http://www.timesfreepress.com/news/2011/may/20/lawsuit-caps-legislation-goes-tennessee-governor/> (“Rep. Vance Dennis, R-Savannah, the House bill’s sponsor, said while he disagrees with the Senate version, it was important to get the bill to Haslam. He said senators have agreed to work him on separate legislation to restore the House version, although that will likely to occur next year.”).

<sup>76</sup> H.B. 1641, 107th Gen. Assem., Reg. Sess. (Tenn. 2011).

## 8.1 Tennessee Journal of Law and Policy 116

that he was “not an expert on it but” would do the best he could to explain it.<sup>77</sup> His explanation as to why it is necessary to overrule *Hannan* is somewhat difficult to understand, but appears to rely upon two assertions that he and other supporters of the bill repeated throughout the legislative process: (1) *Hannan* fundamentally changed the summary judgment practice in Tennessee from the standard that existed prior to that case; and (2) the standard in Tennessee prior to *Hannan* was the same as the federal *Celotex* standard, and it is preferable for Tennessee to conform to the federal standard.<sup>78</sup> As discussed,<sup>79</sup> the first of these assertions was made by Justice Koch in his *Hannan* dissent and formed the basis for much of the hand-wringing over *Hannan* among the business community and defense bar from late 2008 until 2011. The premise that *Hannan* changed, rather than simply clarified, the burden shifting test on a summary judgment motion is at least arguable, although likely inaccurate. The second rationale that Rep. Dennis provides for the legislation – that the standard for summary judgment in Tennessee that existed prior to *Hannan*, under *Byrd v. Hall*, was the same as the federal standard – is clearly incorrect. While the standard

---

<sup>77</sup> Statement of Rep. Dennis, House Judiciary Subcommittee, Apr. 12, 2011, available at [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=41700](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=41700). Rep. Dennis, who as the sponsor presumably drafted the legislation, went on to state that he would prefer “to get somebody that is more fluent on summary judgment practice and civil practice to explain [the bill] much better than [he] could.” *Id.*

<sup>78</sup> “Basically, the gist of [the legislation] is, I think last year or the year before the Supreme Court made a decision that changed the way the standard they had historically applied the summary judgment decisions. And they did it in such a way that it makes it almost impossible for the court to award summary judgment. . . . [The bill] shifts the standard from what the court adopted, it shifts it back to what it was prior to that decision and what it had been in Tennessee for the last, I don’t know, twenty to thirty years, and it mirrors the federal standard for decisions on summary judgment.” *Id.*

<sup>79</sup> *Supra*, section III.

## 8.1 Tennessee Journal of Law and Policy 117

the Tennessee Supreme Court adopted in *Byrd* may not have been completely transparent, there is no doubt that the Court declined to adopt the *Celotex* standard. At any rate, Rep. Dennis agreed to “roll” – that is, hold over – the bill until a future meeting of the Judiciary Subcommittee.<sup>80</sup>

The Subcommittee next considered the bill on April 27, 2011. At this hearing, the rationale for the bill was challenged by Rep. Karen Camper (D-Memphis), a non-lawyer whose understandable lack of familiarity with the highly technical summary judgment process provided Rep. Dennis with an opportunity to educate the Subcommittee as to why the bill was necessary. Although Rep. Dennis’s explanation of the summary judgment process to the Subcommittee was somewhat more cogent than it had been a couple of weeks earlier, the justification for the bill remained essentially unchanged: it was necessary to overrule *Hannan* because that case changed summary judgment practice in Tennessee for the worse<sup>81</sup> and because it would be preferable to return to *Celotex*, which was the standard in Tennessee for years under *Byrd v. Hall*.<sup>82</sup> At

---

<sup>80</sup> Statement of Rep. Jim Coley, House Judiciary Subcommittee, Apr. 12, 2011, available at [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=4170](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170).

<sup>81</sup> “[T]here is a particular Tennessee Supreme Court case called *Hannan* versus Alltel Publishing where the court kind of changed how they look at and apply Rule 56 of the Rules of Civil Procedure dealing with summary judgments and made a really, at least in my opinion, made a wrong incorrect decision . . . they established a standard that makes it almost impossible for a court to grant summary judgment . . . . So, it basically goes back to what the standard was in Tennessee for several years prior to 2008 when the Supreme Court changed that.” Statement of Rep. Dennis, House Judiciary Subcommittee, Apr. 27, 2011, available at [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=4170](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170).

<sup>82</sup> “[T]his would go back to the standard that was in place for a number of years before, under the *Byrd* case essentially which is a several year old Tennessee case. This would codify the standard under the *Byrd* case and effectively reverse the standard that the Supreme Court put in place under the *Hannan* case.” *Id.*

## 8.1 Tennessee Journal of Law and Policy 118

this hearing, Rep. Dennis came prepared with “a more skilled guest . . . that might can explain [the bill] a little better”<sup>83</sup> – namely, Benjamin Sanders from Farmers Bureau Insurance of Tennessee (“Farmers”). The Subcommittee went out of session and Rep. Dennis called upon Mr. Sanders to address the Subcommittee directly.<sup>84</sup>

Mr. Sanders began his statement to the Subcommittee with the caveat that, although the summary judgment bill was not Farmers’ bill,<sup>85</sup> the organization had

---

<sup>83</sup> *Id.*

<sup>84</sup> This practice of having lobbyists address the members of the legislature directly on a pending bill was described by then-Tennessee Governor Phil Bredesen during a 2007 interview with the Associated Press. The Governor observed that “[b]ecause lawmakers spend only part of the year in session and have a limited support staff, they depend on lobbyists for help developing - and sometimes debating and killing - complex legislation.” Beth Rucker, *Ethics Reforms Didn’t Take Away Lobbyists’ Power, Bredesen Says*, MEMPHIS DAILY NEWS, July 31, 2007, available at <http://www.memphisdailynews.com/editorial/Article.aspx?id=33447>. In this role, “[l]obbyists are often called on during legislative committee meetings to explain the merits of a bill or answer lawmakers’ questions.” *Id.*

<sup>85</sup> Despite this caveat, Rep. Dennis himself privately referred to the bill as “Farmers’ bill” and referred questions about the bill to lobbyists for Farmers’ Insurance. Telephone interview with John Day, Brentwood, Tennessee (Jan. 23, 2012). In a “State Capital Bulletin” dated May 23, 2011, the Property Casualty Insurers Association of America took credit for the *Hannan* legislation: “[I]n the wee hours of the last day of the legislative session, PCI was successful in amending the summary judgment law back to the pre-Hannon [sic] decision. This was another major win for PCI in Tennessee!” Property Casualty Insurers Association of America, *State Capital Bulletin* (May 23, 2011). The Bulletin went on to explain, “The purpose of the bill was to addresses [sic] the Supreme Court’s 2008 decision in *Hannan v. Alltel Pub* where the Tennessee Supreme Court decision which makes it almost impossible for a court to grant summary judgment by requiring a party to essentially prove a negative.” *Id.* (syntax as in original). On its website, PCI boasts that it has “1000+ members – the broadest cross section of insurance companies of any national trade group.” Property Casualty Insurers Association of America, <http://www.pciaa.net/web/sitehome.nsf/main> (last visited Jan. 2, 2012). Under the tab “Member

## 8.1 Tennessee Journal of Law and Policy 119

“adopted it because it’s just such a good idea.”<sup>86</sup> Mr. Sanders then explained the need for the legislation in more detailed, but similar, terms to those that Rep. Dennis had used:

Summary judgment is a judicial tool that determines whether a case should go to trial or not. In other words, if Representative Dennis sues me then I can challenge under our old standard of summary judgment...I can move for summary judgment and challenge the sufficiency of evidence. And essentially saying if you don’t have enough evidence to go to trial we need to stop it right here. Under the old standard, the court could grant that. They could say, if he doesn’t prove evidence now we’re not going through the time and expense of going to trial. Under the standard that they adopted in 2008 they changed that. Instead of granting summary judgment by me challenging his evidence, they put the burden on the defendant and said we now have to prove that he can’t prove his case. So, in other words, if I move for summary judgment now, under the new standard, all Representative Dennis has to say is I’ll prove it at trial and doesn’t have to show at that point that he has any evidence. So what

---

Benefits,” PCI makes the following pitch: “The value of joining PCI is clear from your first day of membership. It starts with having the most respected, persuasive voice on Capitol Hill and in 50 statehouses representing you and our industry.” *Id.*

<sup>86</sup> Statement of Benjamin Sanders, Farmers’ Bureau Insurance of Tennessee, to House Judiciary Subcommittee, Apr. 27, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=4170](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170).

## 8.1 Tennessee Journal of Law and Policy 120

we are seeing is a lot cases that have no disputed facts that are going to trial and that probably shouldn't go to trial.<sup>87</sup>

This description by Mr. Sanders adds a new justification for the legislation: the claim that *Hannan* has led to an increase in the number of cases that have no disputed issue of material fact but nevertheless survive summary judgment and proceed to trial. Mr. Sanders provided no empirical or even anecdotal proof in support of this assertion, nor did the Subcommittee hold a hearing to take such evidence.<sup>88</sup> Mr. Sanders provided yet another reason for the bill in response to Rep. Camper's question as to whether the Tennessee Supreme Court was simply acting within its rights to interpret the Rules of Civil Procedure when it decided *Hannan*. While he conceded to Rep. Camper "that the Supreme Court certainly had the authority to make a different interpretation of [Tennessee Rule of Civil Procedure 56] . . . this bill says it is the public policy of Tennessee that if you don't have enough evidence to go to trial for your case that you shouldn't move past the summary judgment stage."<sup>89</sup> This justification addresses an important separation of powers concern, because the legislature generally has the power to articulate public

---

<sup>87</sup> *Id.*

<sup>88</sup> The Fiscal Note prepared by the General Assembly's Fiscal Review Committee on March 1, 2011, estimated the fiscal impact of HB 1358/SB 1114 to be "Not Significant," and assumed that "[c]odifying a standard for granting summary judgment will have no significant impact on the case load of trial or appellate courts." <http://www.capitol.tn.gov/Bills/107/Fiscal/HB1358.pdf>. In fact, Brentwood trial lawyer John Day has suggested the new legislation could "cost millions of dollars in attorneys' time to try to figure out what this law means." Gee, *supra* note 13.

<sup>89</sup> Statement of Benjamin Sanders, Farmers' Bureau Insurance of Tennessee, to House Judiciary Subcommittee, Apr. 27, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=4170](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170).

## 8.1 Tennessee Journal of Law and Policy 121

policy, whereas reversing the judicial branch's interpretation of a procedural rule is more questionable. Unlike Mr. Sanders' earlier rationale regarding the increased number of cases surviving summary judgment, however, this legislative purpose was not included in the legislation.

After Mr. Sanders finished speaking, Rep. Sontany (D-Nashville) called upon another outside speaker, Doug Janney of the Tennessee Employment Lawyers' Association, to speak against the bill.<sup>90</sup> Mr. Janney remarked on what he viewed to be weaknesses in the bill, focusing in particular on the provision that the party who does not bear the burden of proof at trial "shall prevail" if it either affirmatively negates an essential element of the non-moving party's claim or shows that there is insufficient evidence to prove an element of the non-moving party's claim.<sup>91</sup> He then engaged in an extended colloquy with Rep. Dennis on the subject, with Rep. Dennis stating that it

---

<sup>90</sup> Statement of Rep. Sontany, House Judiciary Subcommittee, Apr. 27, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=41700](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=41700). According to their website, the Tennessee Employment Lawyers Association is an "authorized affiliate of the National Employment Lawyers Association, the largest group of plaintiff employment lawyers in the country. We are a group of attorneys dedicated to eradicating employment discrimination in all its forms from the workplace, and are constantly seeking to influence the law to better protect workers' rights." The Tennessee Employment Lawyers Association, <https://www.tennela.org/index.php> (last visited Jan. 3, 2012). Unlike Benjamin Sanders, Doug Janney is not a registered lobbyist.

<sup>91</sup> "If [the moving party] submits an affidavit that saying well the nonmoving party's evidence is insufficient to the courts satisfaction, than the nonmoving party may not get any opportunity to respond and have the lawsuit dismissed. And that's inconsistent with summary judgment practice in federal and in state courts and in the way it's always been done. You have to give the nonmoving party opportunity to respond." Statement of Doug Janney to the House Judiciary Subcommittee, Apr. 27, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=41700](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=41700).

## 8.1 Tennessee Journal of Law and Policy 122

was not the intent of the bill to permit a court to grant summary judgment without allowing the non-moving party the opportunity to be heard,<sup>92</sup> and Mr. Janney responding that “it may not be the intent but that’s the effect it could have.”<sup>93</sup> Rep. Dennis reminded Mr. Janney that he had asked him for language to insert into the statute a few weeks earlier, but had not received any.<sup>94</sup> The back-and-forth between the two men continued with Mr. Janney expressing concern that the bill would codify a separate standard for plaintiffs who move for summary judgment than for defendants who do so. Finally, Rep. Eric Watson (R-Cleveland) asked Rep. Dennis if, prior to the bill’s discussion by the full Judiciary Committee, he would meet with representatives of the trial lawyers’ lobby to “just straighten some of this out” and “[m]aybe . . . write something different.”<sup>95</sup> Rep. Dennis indicated that he was willing to do so, but that he had already made changes to the legislation suggested by John Day of the Tennessee Association for Justice, an organization representing Tennessee’s trial lawyers.<sup>96</sup> With this understanding, the bill was passed through to full committee.

---

<sup>92</sup> Statement of Rep. Dennis, House Judiciary Subcommittee, Apr. 27, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=4170](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170).

<sup>93</sup> Statement of Mr. Janney, House Judiciary Subcommittee, Apr. 27, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=4170](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170).

<sup>94</sup> Statement of Rep. Dennis, House Judiciary Subcommittee, Apr. 27, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=4170](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170).

<sup>95</sup> Statement of Rep. Watson, House Judiciary Subcommittee, Apr. 27, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=4170](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4170).

<sup>96</sup> Statement of Rep. Dennis, House Judiciary Subcommittee, Apr. 27, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=41700](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=41700). *But see* Telephone interview with John Day, *supra* note 85 (noting that he never suggested specific changes to the language of the bill but instead questioned the lobbyists for Farmers’ Insurance about the purposes of the bill and merely suggested that those



## 8.1 Tennessee Journal of Law and Policy 123

The full House Judiciary Committee considered HB 1358 on May 3, 2011. Rep. Dennis stressed that the bill “would codify the court’s previous status prior to a Supreme Court decision in 2008 and take us back to the way the law was on summary judgment before 2008.”<sup>97</sup> In fact, he repeated several times in response to questioning from Rep. Camper that the purpose of the bill was to move the summary judgment standard “back to what the state standard was prior to 2008 and what the federal standard has always been . . . the plaintiff has got to ‘put up or shut up.’”<sup>98</sup> Following up on the charge he was given at the end of the Subcommittee’s meeting, Rep. Dennis stated that he had “worked with the trial bar, the Trial Lawyers’ Association, in drafting this language,” and it was his “understanding they don’t have any intent to oppose this bill. Although there was an attorney here last week who had some issues but he was not representing the Trial Bar

---

purposes be set forth more clearly). According to its website, the Tennessee Association for Justice “works to protect the civil justice system and advocates for accountability and the rights of all citizens.” <http://www.tnaj.org/>. In the brochure for its 2010 Annual Convention, the Tennessee Association for Justice identifies John Day as a “past president.” [https://www.tnaj.org/temp/ts\\_2FEC6BFC-BDB9-505C-1D647EEE78013B1F2FEC6C2B-BDB9-505C-176165F3D961C5C5/Brochure10.pdf](https://www.tnaj.org/temp/ts_2FEC6BFC-BDB9-505C-1D647EEE78013B1F2FEC6C2B-BDB9-505C-176165F3D961C5C5/Brochure10.pdf).

<sup>97</sup> Statement of Rep. Dennis, House Judiciary Committee, May 3, 2011, available at [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=419](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=419).

<sup>98</sup> *Id.* Rep. Dennis went so far as to provide an example of a hypothetical lawsuit in an effort to explain the meaning of summary judgment and the potential effects of the legislation to Rep. Camper. Significantly, throughout this hypothetical, Rep. Dennis implied that the bill would change the burdens of *proof*, not the burdens of *production*, at the summary judgment stage. The implications of this hypothetical could be misleading in that *Hannan* dealt only with the parties’ burden of production and the bill was represented as merely changing the result in *Hannan*.

## 8.1 Tennessee Journal of Law and Policy 124

Association.”<sup>99</sup> With regard to his views on the *Hannan* decision, Rep. Dennis stated:

The court got it wrong. The court changed its standard. The court changed its standard that it had always applied. The court changed the standard away from what the federal courts applied. And we’re saying yes, we do it all the time, that if the court makes a decision wrong, incorrectly, if the people think it was done incorrectly, we change the law to rein that in unless it’s a constitutional issue which has constitutional protections that are greater than normal. But yes, the court adopted a standard that was too far to one side. If we codify this, we will be bring that standard back in line with what it was prior to 2008 and what the federal standard is now.<sup>100</sup>

During the Judiciary Committee meeting, Rep. Mike Stewart (D-Nashville) asked Rep. Dennis whether the legislation might violate separation of powers principles. He was the only member of either the House or the Senate to voice this concern that the legislation might violate separation of powers. Specifically, Rep. Stewart said:

---

<sup>99</sup> *Id.* Rep. Dennis was apparently referring to Doug Janney of the Tennessee Employment Lawyers Association. *See also* Telephone Interview with John Day, *supra* note 85 (indicating that the Tennessee Association for Justice did not actively oppose the bill but also did not support the bill or express approval of it).

<sup>100</sup> *Id.* When asked by Rep. Mike Stewart (D-Nashville) whether this bill represented his personal feelings, Rep. Dennis responded that “there’s a lot of concern within the business community that we’ve gotten to the point that cases with no merit are getting to juries because of *Hannan* – but it is my personal view that we should be using the *Celotex* standard, and the *Byrd* standard, which adopted *Celotex*.”

## 8.1 Tennessee Journal of Law and Policy 125

I guess my concern is on a rules case, do we really want to . . . you know . . . it's different from creating an environmental law or a law where a person can carry a gun. That's our job, we can make that decision, okay. But I'm worried that this seems like a bad precedent because the courts ultimately create these rules. We have a hand in it, but aren't we really encroaching upon an independent branch of government? You know, the reason I say that is if you think back, you know, where [Franklin] Roosevelt, a very popular president, ran into trouble with his own Democrats is when he tried to pack the Supreme Court and the Democratic senate said no because they respected, even though they had respect for the president, they respected even more this separate branch of government. Seems to me what we're doing here . . . I mean if every time the Supreme Court has said something about a rule we don't like, if we're going to start getting in the business of rewriting the rules every time a case is lost, it seems like we're stepping into their house and I think that is not . . . do you really think that's smart when it comes to rules? I mean rules about how a court works as opposed to the underlying policies that the people sent us up here to do, to implement.<sup>101</sup>

---

<sup>101</sup> Statement by Rep. Stewart, House Judiciary Committee, May 3, 2011, available at [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=419](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=419).

## 8.1 Tennessee Journal of Law and Policy 126

Rep. Dennis responded that he did not believe the bill raised constitutional concerns, because the bill neither changed the language of Rule 56 nor was in direct contravention to it; rather, the legislation would simply be establishing a burden of proof, something the General Assembly had done in many other contexts, both civil and criminal.<sup>102</sup> To Rep. Dennis, the constitutionality of the legislation seems to turn on whether the legislature actually changed the language of the rule itself, although he added the caveat that if the Supreme Court disagreed, it was their prerogative to find the bill unconstitutional sometime in the future.<sup>103</sup> Rep. Stewart responded that he would be voting against the bill because although the legislation did not literally change the words of Rule 56, it changed their meaning, which, to a litigant, was the same thing.<sup>104</sup> Rep. Stewart did vote against the bill, but it passed easily out of the Judiciary Committee, and then passed the full House, after no discussion, by an eighty-five to four vote on May 20.<sup>105</sup>

---

<sup>102</sup> Statement of Rep. Dennis, House Judiciary Committee, May 3, 2011, available at [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=419](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=419).

<sup>103</sup> *Id.*

<sup>104</sup> Statement by Rep. Stewart, House Judiciary Committee, May 3, 2011, available at [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=419](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=419). Rep. Stewart added that “[t]he Tennessee Supreme Court . . . is a pretty pro-business court and I think we should leave it to the courts to decide what the rules mean.” *Id.*

<sup>105</sup> Although there was no discussion on the House floor about HB 1358, there was relevant discussion during the House’s consideration of HB 1641, companion legislation also sponsored by Rep. Dennis that overruled the Supreme Court’s 2010 *Gossett* decision. During this debate, Rep. Stewart stated: “I don’t think this body should routinely overturn decisions by our high court whether or not it’s to an advantage of one particular group or another just because I think separation of powers suggest that we should be very deferential to them.” Statement of Rep. Stewart, House Floor, May 20, 2011, available at [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=438](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=438). Rep. Dennis reiterated, “the intent of the legislation is to take us back to

*B. The Senate*

The legislation's trip through the Senate was even less eventful than its companion bill's journey through the House. Only one question was raised when Senate Bill 1114 was brought before the Judiciary Committee on May 17,<sup>106</sup> and it quickly passed out of committee by a six-to-two vote. Unlike in the House, however, there was some debate over the bill on the floor of the Senate. Sen. Tim Barnes (D-Adams), who had raised the lone question in the Judiciary Committee, stated that the American Association for Retired Persons ("AARP") was opposing the bill because it "would make it all but impossible for victims of employment discrimination or of any other employment law violation to be able to prove their case and get their rightful day in court."<sup>107</sup> Sen. Barnes further stated that he would be voting against the bill because he did not agree with jettisoning the Tennessee summary judgment standard

---

the standard that was applied before that case and the standard that is applied in our federal courts." Statement of Rep. Dennis, House Floor, May 20, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=438](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=438). Rep. Dennis also opined, in response to questioning from Rep. Brenda Gilmore (D-Nashville), that the bill "clarifies" rather than "reverses" the Supreme Court's opinion in *Gossett* and makes it no harder for an employee to receive restitution through an employment discrimination suit. *Id.*

<sup>106</sup> The question from Sen. Tim Barnes (D-Adams) was whether the proposed legislation applies equally to defendants and plaintiffs. *See* Statement of Sen. Barnes, Senate Judiciary Committee, May 17, 2011. Sen. Kelsey clarified that the bill refers not to defendants and plaintiffs, but "speaks in terms of the party that . . . bears the burden of proof at trial." Statement of Sen. Kelsey, Senate Judiciary Committee, May 17, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=428](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=428).

<sup>107</sup> Statement by Sen. Barnes, Senate Floor, May 20, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=4328](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4328).

## 8.1 Tennessee Journal of Law and Policy 128

in favor of the federal standard.”<sup>108</sup> Another member, Sen. Jim Kyle (D-Memphis), expressed concern that the General Assembly was “blindly overturn[ing] the Supreme Court decision” in *Hannan*.<sup>109</sup>

Sen. Lowe Finney (D-Jackson) raised specific concerns that the bill was not sent to the Rules Commission prior to consideration by the General Assembly.<sup>110</sup> He asked Sen. Kelsey if he would consider sending the proposal to the Rules Commission and allowing them to consider it, as it is generally standard for the courts to promulgate their own rules of procedure.<sup>111</sup> Sen. Kelsey

---

<sup>108</sup> Specifically, Sen. Barnes stated that “[s]ummary judgment is something that is developed in Tennessee with Tennessee body of law, the law that’s unique to Tennessee, and I think it a wrong direction to go to abrogate Tennessee law and try to impose legislatively a body of law that is applied in federal courts.” *Id.*

<sup>109</sup> Statement by Sen. Kyle, Senate Floor, May 20, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=43288](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=43288).

<sup>110</sup> Under a statutory procedure in Tennessee, the Supreme Court’s Advisory Commission drafts and vets amendments to the Tennessee Rules of Civil or Criminal Procedure or Rules of Evidence. The Supreme Court sends them in a package to the General Assembly, which (unlike the process for the Federal Rules) must approve them by joint resolution before they have the force of law. *See* TENN. CODE ANN. §§ 16-3-401 to -403 (2011). Ironically, during the pendency of the *Hannan* legislation, the General Assembly approved amendments to the Tennessee Rules of Civil Procedure promulgated by the Tennessee Supreme Court. H.R. 0034 (signed by House Speaker May 2, 2011); S.R. 0012 (signed by Speaker of Senate April 6, 2011).

<sup>111</sup> Statement of Sen. Finney, Senate Floor, May 20, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=43288](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=43288). Sen. Finney went on to express concern that the Senate had not fully deliberated over the bill, and stated a preference that “when we start telling the courts how to expedite dockets, how to get cases moving along, that we let those rules, that we let those courts decide how to do it rather than doing it by statute because it’s very specialized.” *Id.* Nashville plaintiff’s attorney Mark Chalos recently opined that “[t]he Tennessee Constitution and Tennessee law is clear that that it is exclusively in the courts’ purview to make rules for resolving disputes.

## 8.1 Tennessee Journal of Law and Policy 129

responded that the bill had been on the Rules Commission agenda,<sup>112</sup> and that the Tennessee Bar Association or any other interested party had ample opportunity to take the legislation before the Rules Committee after it was introduced in February, but had not done so.<sup>113</sup> He also believed that, at any rate, it was unnecessary for the Rules Committee to consider the legislation because the bill did not change Rule 56, but rather overruled the Court's interpretation of it.<sup>114</sup> After this brief debate, the bill passed the Senate by a nineteen-to-nine vote.

---

There is a concern that this legislature is ignoring the constitutional limits on its powers." Gee, *supra* note 13.

<sup>112</sup> In fact, the bill was never on the Commission's agenda and was never considered by the Commission. See Agenda, Advisory Commission to the Supreme Court on Rules of Practice and Procedure (Feb. 18, 2011); Minutes, Advisory Commission to the Supreme Court on Rules of Practice and Procedure (Feb. 18, 2011); Agenda, Advisory Commission to the Supreme Court on Rules of Practice and Procedure (May 13, 2011); Minutes, Advisory Commission to the Supreme Court on Rules of Practice and Procedure (May 13, 2011) (on file with authors).

<sup>113</sup> Statement of Sen. Kelsey, Senate Floor, May 20, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=4328](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=4328). Sen. Finney responded that he served on the Commission and had the agenda, and the issue was never raised. Statement of Sen. Finney, Senate Floor, May 20, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=43288](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=43288).

<sup>114</sup> "I think the bigger issue is that the rule didn't change. It's been the rule, it's been there for a number of years. It's the same rule that was in place before the 2008 decision. It's the same rule in place after the 2008 decision. And it will be the same rule that will be in place after the passage of this bill. So we're really not looking to change the rule. We're simply looking to change the law on the burdens of production and how that is interpreted." Statement of Sen. Kelsey, Senate Floor, May 20, 2011, *available at* [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=43288](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=43288).

### V. The “Stealth” Bill

The bills that became Public Chapter No. 498, House Bill 1358 and Senate Bill 1114, were both introduced on February 16, 2011. The bills were passed by their respective chambers on May 20, 2011.<sup>115</sup> The Senate then substituted House Bill 1358 for Senate Bill 1114, and the final bill, House Bill 1358, was signed by the Speaker of the House on May 24, 2011 and by the Speaker Pro Tempore of the Senate on May 25, 2011. The legislation was signed as enacted by Governor Haslam on June 16, 2011.

Between February 16, 2011 and June 16, 2011, there is not a single mention of either the House or Senate bill, or the Act as passed, in the media, either legal or popular. Much media attention was given to the tort reform legislation that was ultimately passed, but even in this coverage, the bills attempting to overrule *Hannan* were not mentioned.<sup>116</sup> The “stealth” nature of the *Hannan* bills may explain why they were part of the flood of bills—154 in all—that were passed during the final three days of the legislative session.<sup>117</sup> Because of the end-of-session rush, “some [bills] are going to need to be redone in the next session because they contained mistakes.”<sup>118</sup>

The combination of stealth and rush to passage may explain the most glaring error in Public Chapter No. 498: its purported directive that a movant “shall prevail” upon

---

<sup>115</sup> *Supra* Part IV.

<sup>116</sup> This lack of linkage between the tort reform legislation and the *Hannan* legislation appears to negate the suggestion made by one commentator that Public Chapter 498 could be seen as part of the tort reform package. See Blumstein, *supra* note 18, at 17.

<sup>117</sup> See Lucas L. Johnson II, *Tennessee General Assembly Passed 154 Bills in 3 Days*, THE COM. APPEAL, July 17, 2011, available at <http://www.commercialappeal.com/news/2011/jul/17/tennessees-general-assembly-passed-154-bills-in-3-days>.

<sup>118</sup> *Id.*



## 8.1 Tennessee Journal of Law and Policy 131

making the specified showing. If read literally, this language totally changes the current standard for summary judgment stated in Tennessee Rule of Civil Procedure 56.04:

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.<sup>119</sup>

Under Public Chapter No. 498, to prevail on a motion for summary judgment, the movant need no longer prove 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."<sup>120</sup> Instead, all the movant must do is either "[s]ubmit[] affirmative evidence that negates an essential element of the nonmoving party's claim; or . . . [d]emonstrate[] to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim."<sup>121</sup>

## VI. Context and Implications

### A. Context

This legislation can be viewed through a few different lenses. Perhaps the sponsors had a personal belief, or believed that their constituents would feel, that *Hannan*

---

<sup>119</sup> TENN. R. CIV. P. 56.04 (2011).

<sup>120</sup> *Id.*

<sup>121</sup> 2011 Tenn. Pub. Acts 498.

## 8.1 Tennessee Journal of Law and Policy 132

was wrongly decided and that it was necessary for the legislature to step in and require courts adjudicating summary judgment motions in Tennessee to apply the *Celotex* standard. This seems unlikely given the inability of Rep. Dennis, in particular, to elucidate the precise meaning and effect of the bill, and his decision to call on Mr. Sanders from Farmers to describe it to the Judiciary Committee for him. Another explanation is that the Republican majorities were determined to pass a business-friendly agenda during the 2011 session after years in the political wilderness, and that overturning *Hannan* was simply something that their business constituencies wanted and they had the votes to accomplish. This is a more reasonable possibility. A third prism looks at the issue more broadly and tries to place it in context of the ongoing power struggle between the conservative legislature and the judicial branch, which the legislature arguably views as the last check on its complete control of state government.<sup>122</sup> Some of the most significant issues causing this rift between the legislature and judiciary in Tennessee are: (1) the method by which Attorney General is selected; (2) the make-up of the Court of Judiciary; and (3) the Tennessee Plan, which determines the method of selection of appellate judges in Tennessee.<sup>123</sup> Any of these could form the basis for its own article, but a brief survey of the issues helps to place the summary judgment legislation in context.

---

<sup>122</sup> Indeed, the attempts of legislatures to extend their power at the expense of the judiciary have become an epidemic nationwide. See generally John Gilbeaut, *Co-Equal Opportunity: Legislators are Out to Take Over Their State Judiciary Systems*, ABA JOURNAL (Jan. 2012), at 45.

<sup>123</sup> For a detailed analysis of the current dynamic in Tennessee regarding the threat of contested judicial elections – and how Public Chapter No. 498 contributes to that dynamic – see Judy M. Cornett & Matthew R. Lyon, *Contested Elections as Secret Weapon: Legislative Control over Judicial Decisionmaking*, \_\_ ALBANY L. REV. \_\_ (2012) (forthcoming).

## 8.1 Tennessee Journal of Law and Policy 133

### i. Appointment of the Attorney General

Tennessee's method of selecting its Attorney General is unique among the fifty states. Rather than selecting the office through popular election, or even through appointment by the Governor, the Attorney General is appointed by the Tennessee Supreme Court for a term of eight years.<sup>124</sup> Some have referred to the Attorney General, both positively<sup>125</sup> and derogatively,<sup>126</sup> as the "fourth branch of government" in Tennessee. Over the past several years, there have been several attempts, primarily among conservatives, to amend the Constitution to allow for popular election of the Attorney General.<sup>127</sup> This movement gained steam when Tennessee's current Attorney General, Robert Cooper, declined to join with a group of other state attorneys general who were challenging the constitutionality of the federal Patient Protection and Affordable Care Act that passed in 2009.<sup>128</sup> Popular

---

<sup>124</sup> TENN. CONST. art. VI, § 5.

<sup>125</sup> See generally Paul Summers, *Attorney General Impartiality is an Asset for Tennesseans*, THE TENNESSEAN, Oct. 18, 2011, available at <http://www.tennessean.com/article/20111018/OPINION03/310180004/Attorney-general-impartiality-an-asset-Tennesseans?odysey=mod%7Cnewswell%7Ctext%7CFRONTPAGE%7Cp>.

<sup>126</sup> See Andrea Zelinski, *Multiple Proposals Filed to Reform How TN Picks a Chief Attorney*, THE TENNESSEE REP., Jan. 31, 2011, available at <http://www.tnreport.com/2011/01/multiple-proposals-filed-for-reforming-how-tn-picks-a-chief-attorney/> (statement by Rep. Joe Carr (R-Lascassas)).

<sup>127</sup> See, e.g., Bonna de la Cruz, *104th General Assembly*, THE TENNESSEAN, January 17, 2005, available at 2005 WLNR 26776267; *Proposal Would Add 5 Office to Statewide Elections*, ASSOCIATED PRESS, Apr. 3, 2007, available at <http://www.wate.com/story/6324679/proposal-would-add-5-offices-to-statewide-elections?clienttype=printable&redirected=true>; *Tennessee Senate Delays Vote on Plan to Elect Attorney General*, THE TENNESSEAN, Apr. 20, 2010, available at 2010 WLNR 8142261.

<sup>128</sup> See, e.g., Mark Todd Engler, *Guv to Pressure AG Cooper on ObamaCare?*, THE TENNESSEE REP., Jan. 22, 2011, available at

## 8.1 Tennessee Journal of Law and Policy 134

election of the Attorney General has become a major priority of the Tennessee Tea Party, and Sen. Brian Kelsey, the sponsor of the summary judgment legislation, has been one of the lead proponents.<sup>129</sup> Due to the difficulty of amending the state constitution, an alternative proposal has been made to create a Solicitor General's office that will take on many of the functions that the critics of the Attorney General wish his office would embrace.<sup>130</sup>

### ii. Court of the Judiciary

Established by statute,<sup>131</sup> the Court of the Judiciary investigates allegations of misconduct by Tennessee judges and imposes discipline. Currently, the Court is made up of sixteen members: ten judges appointed by the Tennessee Supreme Court, three members appointed by the Tennessee Bar Association, and one member each appointed by the Governor, the House Speaker, and the Senate Speaker Pro Tempore.<sup>132</sup> Recently, the Court of the Judiciary has been criticized by Republicans for failing to effectively police the judiciary, with critics pointing to the fact that few complaints result in discipline, and much of the discipline

---

<http://www.tnreport.com/2011/01/guv-to-pressure-ag-cooper-to-fight-obamacare/>; Greg Johnson, *AG Cooper Should Fight Health Care Law or Resign*, KNOXVILLE NEWS SENTINEL, Dec. 17, 2010, available at <http://www.knoxnews.com/news/2010/dec/17/ag-cooper-should-fight-health-care-law-or-resign/>.

<sup>129</sup> Andrea Zelinski, *Tea Party Wants People's Choice for Top State Litigator*, THE TENNESSEE REP., Jan. 13, 2011, available at <http://www.tnreport.com/2011/01/tea-party-wants-peoples-choice-for-top-state-litigator/>.

<sup>130</sup> See, e.g., H.B. 1073, 107th Gen. Assem., Reg. Sess. (Tenn. 2011); Chas Sisk, *Lawmakers Target AG Office*, THE TENNESSEAN, Mar. 26, 2011, available at 2011 WLNR 5909301.

<sup>131</sup> TENN. CODE ANN. § 17-5-101 (2011).

<sup>132</sup> *Id.*

## 8.1 Tennessee Journal of Law and Policy 135

is issued in the form of private reprimands.<sup>133</sup> In response, a Republican legislator introduced a bill this past session to shrink membership on the Court of the Judiciary to twelve, all of them appointed by either the House Speaker or the Senate Pro Tempore.<sup>134</sup> Although the legislation failed in the 2011 session, it is an additional example of the tension between the legislative and judicial branches, and represents “a fairly straightforward assault on the independence of the judicial branch.”<sup>135</sup> Most recently, an ad hoc committee of legislators appointed by the House Speaker and Lieutenant Governor held hearings on the

---

<sup>133</sup> Tom Humphrey, *Tennessee Leaders Struggle Over Who Judges the Judges*, KNOXVILLE NEWS SENTINEL, Aug. 28, 2011, available at <http://www.knoxnews.com/news/2011/aug/28/tennessee-leaders-struggle-over-who-judges-the/>; see also Press Release, Tennessee Senate Republican Caucus, Senator Mae Beavers: Judges Judging Judges is Not Sufficient (Sept. 23, 2011), available at [http://www.tnsenate.com/blog/Newsroom/post/Senator\\_Mae\\_Beavers\\_Judges\\_Judging\\_Judges\\_is\\_not\\_Sufficient/](http://www.tnsenate.com/blog/Newsroom/post/Senator_Mae_Beavers_Judges_Judging_Judges_is_not_Sufficient/).

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* An even more straightforward assault on the judiciary was made by Senator Mae Beavers on January 13, 2012, when she introduced S.B. 2348, which would have abolished the Tennessee Supreme Court’s power of judicial review of legislation. S.B. 2348, 107<sup>th</sup> Gen. Assembly, 2d Sess. (2012) (“The supreme court shall have no jurisdiction to determine the constitutionality of a statute which has been properly enacted by the general assembly and become law in accordance with Article II, § 18 and Article III, § 18 of the Tennessee constitution.”). See generally Bill Raftery, *Tennessee Bill Would End Judicial Review of All Statutes*, GAVEL TO GAVEL (Jan. 13, 2012) available at <http://gaveltogavel.us/site/2012/01/13/tennessee-bill-would-end-judicial-review-of-all-statutes> (noting that bill attempts to strip judicial review by statute rather than by constitutional amendment as is being attempted in New Hampshire). Sen. Beavers later withdrew her bill under pressure from legislators in both parties. Erik Schelzig, *Sen. Mae Beavers Withdraws Bill to Ban Judicial Review*, THE TENNESSEAN (Jan. 24, 2012), available at <http://www.tennessean.com/article/20120124/NEWS0201/301240029/Sen-Mae-Beavers-withdraws-bill-ban-judicial-review?odyssey=mod|newswell|text|News|s>.

## 8.1 Tennessee Journal of Law and Policy 136

Court of the Judiciary, with one lawmaker suggesting that the legislature do away with the body entirely and have the members of the judiciary investigated exclusively by members of the legislature.<sup>136</sup>

### iii. Tennessee Plan

Probably the greatest source of tension between the legislature and the judiciary in Tennessee is the constant threat of revising the method of selecting appellate judges in Tennessee, known as the Tennessee Plan.<sup>137</sup> The Tennessee Constitution provides that “[t]he Judges of the Supreme Court shall be elected by the qualified voters of the State.”<sup>138</sup> In 1993, the legislature enacted the Tennessee Plan, under which vacancies on appellate courts in Tennessee are filled by gubernatorial appointment, with that appointee being called up for a retention vote at the next biennial election.<sup>139</sup> A number of different proposals have circulated to change the Tennessee Plan, including popular election and, most recently, adoption of a system similar to the federal model (appointment by the Governor with confirmation by the Senate).<sup>140</sup> Most recently,

---

<sup>136</sup> Brandon Gee, *Lawmakers Grill Courts' Disciplinary Body*, THE TENNESSEAN, Sept. 21, 2011, available at 2011 WLNR 18857433 (statement of Sen. Mike Bell (R-Riceville)). The testimony taken by legislators at the hearing included John Jay Hooker, a long-time, outspoken critic of the Tennessee Plan and the Court of the Judiciary, and individuals “telling tales of judicial misconduct, including that of a judge who ordered a Hispanic woman to learn English and use birth control or he would take away her kids.” *Legislature Aims Scrutiny at Court of the Judiciary*, TENN. ATTORNEYS MEMO, Oct. 3, 2011, at 1.

<sup>137</sup> See Cornett & Lyon, *supra* note 123.

<sup>138</sup> TENN. CONST. art. VI, § 3.

<sup>139</sup> See TENN. CODE ANN. § 17-4-115 (2011).

<sup>140</sup> Sen. Kelsey plans to propose this option in the 2012 legislative session. Brandon Gee, *New Way to Pick TN Judges Proposed*, THE TENNESSEAN, Oct. 11, 2011, at 1B, available at <http://www.tennessean.com/article/20111019/NEWS/310190132/New-way-pick->

Governor Bill Haslam, House Speaker Beth Harwell, and Senate Speaker and Lieutenant Governor Ron Ramsey have joined in supporting a constitutional amendment that would explicitly authorize the Tennessee Plan.<sup>141</sup> Because the Tennessee Plan expires in 2012, judicial selection is expected to be a major focus of the 2012 legislative session.<sup>142</sup>

### *B. Implications*

This fascinating attempt to legislatively overrule the Tennessee Supreme Court's interpretation of Tennessee Rule of Civil Procedure 56 (or, alternatively, to legislatively amend Rule 56) raises many questions – among them, whether the Act violates the separation of powers provision of the Tennessee Constitution.<sup>143</sup> Our examination of the legislative history reveals a number of concerns. First, the legislative history provides no support for any of the legislative findings in the Act. The General Assembly held no hearings on the legislation. No data was presented to demonstrate the validity of the assertions that *Hannan* had made summary judgment more difficult to

---

TN-judges-proposed. Proponents of popular elections have suggested that they might be able to support the plan, *id.*; however the judiciary has reacted skeptically, at least initially. Brandon Gee, *Nomination Plan Draws Skepticism Among TN Judges*, THE TENNESSEAN, Oct. 21, 2011, at 4B, available at 2011 WLNR 21625761.

<sup>141</sup> Chas Sisk & Brandon Gee, *Gov. Bill Haslam Wants TN Constitutional Amendment on Merit Selection of Judges*, THE TENNESSEAN (Jan. 26, 2012) available at <http://www.tennessean.com/article/20120126/NEWS0201/301250149/Gov-Bill-Haslam-wants-TN-constitutional-amendment-merit-selection-judges>. Gov. Haslam stated that “the amendment is needed to settle once and for all the long dispute over how Tennessee’s judges are named and elected.” *Id.*

<sup>142</sup> Brandon Gee, *Nomination Plan Draws Skepticism Among TN Judges*, THE TENNESSEAN, Oct. 21, 2011, at 4B, available at 2011 WLNR 21625761.

<sup>143</sup> See Cornett & Lyon, *supra* note 123.

## 8.1 Tennessee Journal of Law and Policy 138

obtain and, concomitantly, that the courts were being overburdened by trials of nonmeritorious cases. Instead, the reiteration of this unsupported assertion simply echoed the doom-saying by the defense bar in the wake of *Hannan*.<sup>144</sup> Principled lawmaking – especially lawmaking that purports to overrule a decision of the Tennessee Supreme Court on a procedural matter – should be based on more than mere speculation and doom-saying.

Second, the bills' sponsors provided inaccurate descriptions of the Tennessee law of summary judgment both pre- and post-*Hannan*. The bills' sponsors, both lawyers, consistently represented to the other legislators, some of them laypersons, that the bill would return Tennessee law to its pre-*Hannan* state, *which was identical to the federal Celotex standard*. As shown above, the assertion that Tennessee summary judgment law was ever identical to the federal standard is simply wrong. The erroneous representations about the effect of the bills served to mislead other legislators, who undoubtedly had even less of a grasp of the fine points of Tennessee's summary judgment law than did the lawyer-sponsors.

Exacerbating the sponsors' inability to accurately depict either the state of Tennessee summary judgment law or the effect of the proposed legislation is the fact that third parties had to be called upon to explain the bill. In the House, Benjamin Sanders, a registered lobbyist for Tennessee Farmers Insurance Company, who was apparently standing by, was called upon to "clarify" the bill, but he also inaccurately described the pre-*Hannan* law.<sup>145</sup> Also apparently standing by was Doug Janney,

---

<sup>144</sup> See Phillips, *supra* n. 17, Blumstein, *supra* n. 18.

<sup>145</sup> Statement of Mr. Sanders, House Judiciary Subcommittee, Apr. 27, 2011, available at [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=41700](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=41700). ("[U]nder our old standard of summary judgment I can move for summary judgment and challenge the sufficiency of evidence. And essentially saying if you don't have enough evidence to



President of the Tennessee Employment Lawyers Association,<sup>146</sup> who accurately pointed out the error discussed above by noting that the bill “give[s] the defendant the opportunity to prevail on the motion of summary judgment without ever giving the plaintiff the opportunity to respond in some circumstances.”<sup>147</sup> While the legislative history does not reveal the precise role played by lobbyists in drafting the bill and briefing its sponsors, the need for third parties to participate in explaining the bill demonstrates how poorly understood the bill actually was.

Third, the General Assembly failed to utilize procedures designed to ensure careful consideration of such changes to court practice and procedure by not submitting the bills to the Tennessee Supreme Court Advisory Commission on the Rules of Practice and Procedure (the “Rules Commission”), as has been customary. In the Senate debate, Senator Lowe Finney, a member of the Rules Commission,<sup>148</sup> stated, “I think [Senate bill 1114] would be appropriate for the Rules Commission to look at.” When Senator Kelsey asserted “the Rules Commission already had a chance to take a look at it last week,” Senator Finney responded, “I have the agenda from the Rules Committee and it wasn’t on the agenda of the Rules Commission Committee [sic].” Senator Kelsey then replied, “Well the Tennessee Bar Association had the ability to take it to the

---

go to trial we need to stop it right here. Under the old standard, the court could grant that.”)

<sup>146</sup> See *supra*, note 90.

<sup>147</sup> Statement of Mr. Janney, House Judiciary Subcommittee, Apr. 27, 2011, available at [http://tnga.granicus.com/MediaPlayer.php?view\\_id=186&clip\\_id=41700](http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=41700).

<sup>148</sup> See TENN. CODE ANN. § 16-3-601 (2011) (establishing the Advisory Commission on the Rules of Practice and Procedure); <http://www.tncourts.gov/boards-commissions/boards-commissions/advisory-commission-rules-practice-procedure> (listing current members of the Commission).

## 8.1 Tennessee Journal of Law and Policy 140

rules committee and at least somebody on there was aware of this particular bill and this particular issue.” Although it is unclear why someone from the Tennessee Bar Association would have known about the bill given the complete lack of publicity it received, what is obvious from this colloquy is that the bill’s sponsors did not present the bill to the Rules Commission.<sup>149</sup> The General Assembly thereby lost the opportunity to receive a variety of perspectives and expert advice about the state of Tennessee summary judgment law and the potential effect of the bill.

### VII. Conclusion

Taken together, these concerns reflect an overall lack of public attention and significant debate among legislators. The old canard that “you wouldn’t want to know how the sausage is made” seems to apply here. A citizen or a court looking to the legislative history to discover the logic and policy underlying Public Chapter No. 498 would be frustrated, at best. The oft-repeated mantra that the bill returns Tennessee law to an edenic state that existed prior to *Hannan* is simply wrong; the reports of decreased grants of summary judgments and increased numbers of trials post-*Hannan* is unsupported; and, in addition to constitutional concerns, the legislature’s failure to follow customary procedures to secure expert advice and to demonstrate respect for a coordinate branch of government casts doubt on the wisdom, as well as the validity, of the legislation.

---

<sup>149</sup> The Commission met twice while the bill was pending. In neither meeting was the bill considered. *See supra* note 112 (citing sources).

**8.1 Tennessee Journal of Law and Policy 141**