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Appendix: Transcript of Video Legislative History of Public Chapter No. 4981

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APPENDIX

TRANSCRIPT OF VIDEO LEGISLATIVE HISTORY OF PUBLIC CHAPTER NO. 4981

HOUSE BILL 1358

April 12, 2011: House Judiciary Subcommittee

Rep. Vance Dennis (R-Savannah, District 71): Thank you, Mr. Chairman. This is a bill that corrects a problem that has arisen as a result of a court proceeding in regards to motions for summary judgment and the standard for determining those. I have an amendment that corrects some of the language to basically revert back to the existing standard prior to that court decision being made. And with that I'd move passage of the bill.

Chairman (Rep. Jim Coley, R-Bartlett, District 97): There's a motion on the bill. Second.

Rep. Dennis: And I would also move passage of the amendment 557077.

Chairman: There's a motion and a second. Representative Dennis, you're recognized on the amendment.

Rep. Dennis: Without any questions, I'll just renew my motion on the amendment.

Chairman: Representative Sontany?

Rep. Janis Baird Sontany (D-Nashville, District 53): Could you explain this just a little bit?

Rep. Dennis: Sure, the court--briefly, I'm not an expert on it but I'll do the best I can. We could go out of session here if an expert--but basically, the gist of it is, I think last year or the year before, the Supreme Court made a decision that changed the way they'd historically applied-- the standard they'd historically applied to summary judgment decisions. And they did it in such a way that it makes it almost impossible for the court to award summary judgment. They potentially shifted the burden of proof to the plaintiff that's

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almost--it's basically created almost an impossible standard to achieve summary judgment. So the intent of the bill is to--so that if there is no genuine, no real disputed issue of fact, and it's just a matter of law to enable the court to go back to making that decision in granting a summary judgment motion. And it shifts the standard from what—the standard that 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, thirty years, and it mirrors the federal standard for decisions on summary judgment.

Rep. Sontany: So tell me what summary judgment is and we're talking about the moving party what are we talking about there?

Rep. Dennis: Well, summary judgment-- going back to--well, let's start at the beginning. You file a lawsuit, you've been wronged, or for whatever reason you file a lawsuit, alleging somebody has harmed you or somebody owes you something. The other side files a response to that. Then you do discovery, you share all your information. Once you've shared all your information, if there is no real disputed issue of fact then either side can move the court to grant them summary judgment. Which basically means you're filing a motion with the court saying there is no issue of fact, everybody's stipulated that these are the relevant facts, and once you're at that point it's a matter of law based on those facts that the person who's claiming that they're entitled to something is not entitled to it purely as a matter of law. And the judge has the power at that time to make a decision on that motion for summary judgment. But to get to that point you've got to have everybody agreeing there are no issues of – no disputed issues of material fact. So once you get to that point, the judge makes a decision. And the court shifted its standard of proof to the extent that the person moving for summary judgment has to essentially prove a negative in what they did. And I'd have to get somebody that's more fluent on summary judgment

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practice and civil practice to explain it much better than that. But that's generally-- when you have a motion for summary judgment, your movant is moving the court to give them judgment before you get to a trial because there are no disputed issues of fact. It's purely a matter of law that the judge has to decide under the law. It's not something that a jury has to make a decision about which facts are right or you're contesting those issues of fact in order to be able to grant summary judgment.

Chairman: Representative Coley, you're recognized. Representative Dennis, would you consider rolling this bill to next Wednesday's calendar?

Rep. Dennis: I'll be glad to.

Chairman: Thank you. Wednesday the 20th. If there is no objection it's rolled.

April 27, 2011: House Judiciary Subcommittee

Chairman: Representative Dennis, you're recognized on House Bill 1358.

Rep. Dennis: Thank you, Mr. Chairman. House Bill 1358 as amended will basically change the current standard for obtaining summary judgment in response to a 2008 Supreme Court decision that fundamentally changed how you look at the Supreme Court—summary judgment issues. So for the purpose of bringing up the amendment, I move passage on the bill.

Chairman: It's been moved and properly seconded. Any questions? We have an amendment. Everybody have—it's the drafting code. Representative Dennis.

Rep. Dennis: Mr. Chairman, the drafting code on the amendment—there may be one or two amendments in your packages resulting—reflecting on various revisions over the course of the last few weeks. But the one I intend on moving today is the last four of the drafting code, 8296, which I hope is in your package.

Chairman: Is there a motion on the amendment?

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Rep. Dennis: I move the amendment.

Chairman: Seconded. All those in favor of amendment number one, say aye. Those opposed. The ayes have it.

Rep. Karen Camper (D-Memphis, District 87):
[Inaudible]

Chairman: I'm sorry. I apologize.

Rep. Camper: [Inaudible]

Chairman: You don't have one?

Rep. Camper: [Inaudible]

Chairman: We are. You want to talk—we are.

Rep. Camper: Thank you, Mr. Chairman. I was hoping that he was going to give us an explanation of the amendment before we took it to a vote.

Chairman: Okay. All right. Well, that's fine. I withdraw—I made the second, and withdraw the motion and so we're back on the bill unamended. So go ahead and ask your question.

Rep. Camper: Well, you moved and seconded to bring it—the actual motion and second so that we could discuss it. So that's the posture I thought we were in before you were going to a vote. So I want us to be in a posture of discussing so that he can tell us what this--thank you, Mr. Chairman.

Chairman: I understand, so we are—we're on the amendment. Okay. And the motion's been made and properly seconded. All right. Okay. All right. Discussion. Representative Camper.

Rep. Camper: I hope he's going to tell me what this do. [Laughter from Chairman and others]. Because the amendment is so different than what I was looking at, so I had a great expectation that he was going to outline for us what all of these “whereases” meant so we can know what we're about to vote on.

Chairman: By the way, your comment is going to be one of the comments that we have on the Best of the 107th

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General Assembly CD, which will be available in August this year. Representative Dennis, you're recognized.

Rep. Dennis: Thank you, Mr. Chairman. The substance of the bill is pretty similar on both sides. The "whereases," as you refer to them, are kind of the explanations of what has happened in our courts giving rise to the need for this change. Basically, it just addresses, if you want to follow along with the amendment, that there's 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-- an incorrect decision. They made it--they established a standard that makes it almost impossible for a court to grant summary judgment because it requires the nonmoving party-- or the moving party to essentially prove a negative. So basically, the intent of this bill and the language in this bill as far as what it actually does in establishing the review on a motion for summary judgment simply states that the person--a party who moves for summary judgment who does not bear the burden of proof at trial shall prevail in their motion for summary judgment if it either: submits affirmative evidence that negates an essential element of the non-moving party's claim or demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. So that's-- basically it goes back to what the standard was in Tennessee for several years prior to 2008 when the Supreme Court changed that.

Chairman: Representative Camper, you're recognized whether I've got the microphone or not.

Rep. Camper: Thank you, sir. And so what you said was that in the Supreme Court decision they made a change of something. So what was this change that you're talking about and was it outside of the--you have here Rule 56 of

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Tennessee Rules of Civil Procedure. What is it that was different about what they did that got us to here?

Chairman: Representative Dennis, you're recognized.

Rep. Dennis: Thank you, Mr. Chairman. Basically, and I'm--this is not an area that I'm completely an expert. We have, I think, a more skilled guest with us that might can explain it a little better than I can but I can tell you basically and if you want further explanation, certainly we can go out of session to do that. Basically, they changed the standard to make it-- they put an additional burden on the party who moves for summary judgment. Who's moving to show the court that their--that the case should stop here and not go to jury because the person who's on the other side is not entitled to the relief that they're requesting. Basically requiring--this 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. And if that doesn't explain it any better I'll be glad to go out of session to let somebody explain it that's a little better than I.

Rep. Camper: I think that would be good, if it's possible.

Chairman: If there is no objection we will stand in recess. Who is it that needs to speak?

Rep. Dennis: I know we have a, there's an individual here who can clarify a little better. Certainly if you wouldn't mind coming up and introducing yourself.

Benjamin Sanders (Farm Bureau Insurance): Thank you Representative. I'm Benjamin Sanders with Farm Bureau Insurance. Representative Camper, this bill is not our bill but I think we've adopted it because it's just such a good idea in our opinion. So let me explain my understanding of what Representative Dennis' bill does. 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

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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 to 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 that I-- that 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 we are seeing is a lot of cases that have no dispute of facts that are going to trial that probably shouldn't go to trial. Does that help explain it?

Rep. Camper: It does to some degree but I'm trying to see--if this practice has been successfully working, you're saying that in this one case--I guess we've adopted this and it has been working for, how long?

Mr. Sanders: The—Rule 56 of the Rules of Civil Procedure is what governs summary judgment. And that's been in place, I don't know when exactly it was rewritten, I'm going to say twenty or thirty years ago, and it was adopted to also be in line with the federal rule and the reason for that is to make sure that you can't pick and choose what jurisdictions you file in to go to the most favorable court. The rule hasn't changed. But in 2008, the Supreme Court changed their interpretation of that rule.

Rep. Camper: Which, that's what Supreme Courts kind of do in a way, they interpret the rule and apply it based on the evidence presented before them.

Mr. Sanders: That's correct. And when they made the ruling on that case, all the lower courts had to follow their new standard that they adopted.

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Rep. Camper: So what that would say to me, then, is that there was something about that case that the rule allowed them reasonable leeway to adopt--

Mr. Sanders: That's correct.

Rep. Camper: So I see the rule as being flexible in that way so now we're going to do what, say they can't do that, is that what this is going to say, that they could not have made that determination based on the rule that they were looking at, at that moment in time?

Mr. Sanders: I think, what I'm hearing, Representative, is that you're correct in that the court had the leeway to make that interpretation in 2008. I think what this bill says is that it is public policy that summary judgment should be able to be granted if you can't prove your case.

Rep. Camper: What? I'm sorry.

Mr. Sanders: I think--I think you're correct in that the Supreme Court certainly had the authority to make a different interpretation of that rule. What this bill says is that it's 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.

Rep. Camper: Oooh, I think that's tying the hands of the Supreme--Thank you. I appreciate that.

Chairman: Any other discussion? Representative Sontany, you're recognized, ma'am.

Rep. Sontany: Thank you, Mr. Chairman. I believe that we have someone else here that would like to speak on that issue as well, so if we can continue in recess and hear from Mr. Janney.

Chairman: Just approach the podium and just tell us who you are for the record, please. Go ahead, sir.

Doug Janney (President of the Tennessee Employment Lawyers Association): Good afternoon Mr. Chairman and members of the committee. I'm Doug Janney, President of the Tennessee Employment Lawyers Association. Actually here to speak on another bill this afternoon but I wanted to address some of the points on this summary judgment bill.

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This proposed bill actually goes farther than the Byrd case which was the case that governed summary judgment motions in Tennessee before Hannan versus Alltel, and it goes farther than the standard in Federal Rule of Civil Procedure 56. And the way that it goes farther is by giving the defendant the opportunity to prevail on a motion for summary judgment without ever giving the plaintiff the opportunity to respond in some circumstances. It says that the moving party shall prevail on its motion if it submits affirmative evidence that negates an essential element of the nonmoving party's claim or demonstrates that the nonmoving party's evidence is insufficient. If it submits an affidavit saying, well, the nonmoving party's evidence is insufficient to the court's satisfaction, then 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 courts and in state courts and the way it's always been done. You have to give the nonmoving party an opportunity to respond. Additionally, this amendment says it applies only to defendants and not to plaintiffs. And from our perspective, it doesn't happen very often in personal injury cases, but in employment cases sometimes the plaintiff files a motion for summary judgment even though the plaintiff bears the burden of proof at trial. This amendment carves out plaintiffs and says that if you file a motion for summary judgment, plaintiff, we're not treating you the same way; because you bear the burden of proof at trial, you still have to go submit additional evidence. But, so, this amendment is treating defendants and plaintiffs different. That's what that language that says "if they bear the burden proof at trial"--it should be at the very least, it should be the same standard under Rule 56 for both plaintiffs and defendants. Rule 56 in the Federal Rules of Civil Procedure and rule 56 in the state Rules of Civil Procedure don't make any distinction between a plaintiff and a defendant; it doesn't say anything about whether you bear the burden of proof at trial. It only

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says you have to create a genuine issue of material fact. And that's the issue here. It was stated earlier that the plaintiff can throw up his hands up and say, I'll prove it at trial. That's not correct. The plaintiff still bears the burden of producing evidence demonstrating a genuine issue of material fact to the trial court's satisfaction. They can't just bring a frivolous lawsuit and say I'll prove it at trial. Under Rule 56 they still must demonstrate a genuine issue of material fact. And so we would encourage you to go with the text of the rule. Go with the text of Rule 56. Don't codify this amendment. At least pass it to 2012. Thank you.

Chairman: Any questions? Yeah, Representative Dennis, you're recognized.

Rep. Dennis: Just briefly I guess I take exception to your first point that the summary judgment motion could be granted simply on--by the moving party submitting an affidavit, as under Rule 56 as it is, the nonmoving party certainly at the hearing on the motion for summary judgment will certainly have the opportunity to put on proof that the--that it is not--that the evidence is not appropriate and that there is a genuine issue of material fact. So the assertion that the nonmoving party is not going to have the opportunity to present proof to the contrary at the motion for summary judgment is not quite correct. What am I missing when you say they are not going to be able to present that proof?

Mr. Janney: What if the trial court gets your--you're the defendant, you move for summary judgment, the trial court gets your affidavit, cancels the hearing, and grants summary judgment for you?

Rep. Dennis: I don't think that the court can do that. Can the court do that now without hearing from the other side, an opportunity to be heard? I don't think that's—I don't think this bill changes the interpretation of Rule 56 and I don't think the court would go anywhere near allowing and approving that kind of interpretation. That's not the intent of the bill at all. I don't think that's what it does.

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Mr. Janney: Well, that's--it may not be the intent but that's the effect it could have. It may not have that effect but under this, under this rule if you submit affirmative evidence that negates an essential element of my claim, then I don't have a—I don't necessarily have an opportunity to respond. The court can cancel the hearing, not have a hearing on it, and grant summary judgment without giving me an opportunity to respond.

Rep. Dennis: There are other rules outside of just this particular statute that apply to those hearings and would allow you to have that hearing. Just because it doesn't specifically say in this statute that you would be entitled to have a hearing and put on proof to the contrary doesn't mean it's not so and it's not covered in other sections of the code or in other parts of the rules. So, to say that just because the statute doesn't—just because this statute says—doesn't specifically say that you have the right to have a hearing on that summary judgment motion doesn't mean it's not covered in other sections of the rules, to do that. So I still—I disagree strongly with your assertion that the nonmoving party wouldn't be able to put on proof. I just don't see where you're getting that, other than just because the statute doesn't specifically say it. My response is it doesn't have to; it's covered by other sections of the rules of procedure.

Mr. Janney: Well, there are local rules that say that a party can get a hearing in some courts not in all courts. But if you read this language in this statute a defendant can argue that we've submitted this evidence, there's no need to have a hearing on it. We've submitted an affidavit evidence that negates an essential element of their claim or that their evidence is insufficient. And, this is mainly directed at subsection one that says "submits affirmative evidence that negates an essential element of the nonmoving party's claim." What if you submit affidavits and depositions and evidence with your motion that negate an essential element

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of the claim? Could the trial court not in its discretion grant the motion?

Rep. Dennis: I don't believe so because both sides are going to have the right to have an opportunity to be heard on that motion just like any other motion that's filed. You file a motion, you have a hearing on that motion, the court hears both sides and it makes a decision after that. And that's well settled and established in law and every other motion I've ever seen unless there's specific authority to enter an ex parte order, only hearing one side, and I've never had a case where we didn't have a hearing really quick after the court entered an ex parte order. You don't file a motion and get it granted without having a hearing and the opportunity for both sides to present whatever evidence they have and the reasons why. That's a misstatement of the actual practice, not this particular section of the code. And I really don't-- wouldn't have a problem with putting that specific language in there if it made you happy. But I talked to you about this a few weeks ago and I never got any language from you that I recall to try to fix it to put anything in there to specifically say that. So to come into here and assert that this is going to be a great departure from existing state and federal standards simply because it doesn't specifically outline the rights to that hearing that are provided for in other sections of the law and code, is not accurate in my opinion. But I'm certainly opened to being convinced otherwise.

Mr. Janney: Well, Rule 56--under Rule 56, the nonmoving party should have the opportunity to respond and maybe this amendment could insert something in there that says in all--any time a motion for summary judgment is filed, the nonmoving party shall have an opportunity to respond. But the other thing that I'm concerned about is why is this applicable only to defendants and not to plaintiffs? What if I file a motion for summary judgment in a family medical leave act case where you've interfered with my rights to medical leave and fired me while I'm on

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medical leave instead of returning me to my job? And then because I bear the burden of proof on that at trial, I don't enjoy the benefits of your amendment. Why is that?

Rep. Dennis: I believe the intent is not--and that's why it doesn't specifically say plaintiffs or defendant, the standard should be different in my opinion as to when you're moving for summary judgment as to the person who bears the burden of proof. If you've got to put on proof at trial and convince a jury that something has happened, if you have that burden of proof, then to get to that trial you need to be able to show that you've got some proof to do that. You need to be able to "put up or shut up" at that summary judgment stage, which is the federal standard, essentially. And that is the intent of the bill. I think that is the language of the bill. And that is what, at least in my opinion, should be the standard.

Mr. Janney: The standard should be uniform. It should apply to--irrespective of whether you're the plaintiff or the defendant, whether you bear the burden of proof at trial or whether you don't bear the burden of proof at trial, Rule 56 is the same for all parties in all courts. And this saying that if you're moving for summary judgment and you still bear the burden of proof at trial that you can't get summary judgment on a case where you're entitled to it, say if you're the plaintiff moving for summary judgment, it's just not--it's not drafted evenhandedly for both plaintiffs and defendants. It's only giving defendants the opportunity to make use of this amendment. And that is not in accordance with the spirit and intent of Rule 56 of either the federal or the state Rules of Civil Procedure.

Rep. Dennis: Well, I guess we'll just have to agree to disagree, I guess, because that is the only functional way that I see that it would be able to work. You have to distinguish between the--I mean from the practical aspect between the entity who has the burden of proving something to the jury and the party who has no obligation to prove anything at all to the jury.

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Mr. Janney: So it applies--

Rep. Dennis: That's the difference.

Mr. Janney: In a case where a plaintiff files a motion for summary judgment, they don't-- they can't follow your amendment because they still bear the burden of proof at trial. So what does that mean in those cases? How are those motions addressed--to be addressed by the courts in light of this amendment?

Rep. Dennis: Under the existing standard.

Mr. Janney: Well, this is codifying a different standard. And it--we ought to just go with the text of Rule 56 rather than trying to codify something that is not applicable to every situation.

Rep. Dennis: The problem with going with the language of Rule 56 is we're not attempting to change the language of Rule 56. We are attempting to change how it's interpreted because the Rule--the language of Rule 56 has not changed. The court interpreted it one way under the Byrd case and the court interpreted--changed their interpretation significantly in 2008 under the Hannan case. So codifying the existing rule language doesn't do anything because if you don't get to the underlying elements of how that rule is interpreted, then it's pointless to codify the rule because the rule is already essentially codified in that it is adopted as Rule 56 of the rules of court. So to do what you're proposing and codify the language of the rule does nothing.

Mr. Janney: Right. Yeah, I'm not suggesting codifying anything. I don't think you should codify anything. I think you should let the courts—let the--the section of T.C.A. 16-3-402 says that the Tennessee Supreme Court prescribes the Rules of Civil Procedure and the way in which motions for summary judgment are handled. And so perhaps the 16-3-402 ought to apply and let the courts say how pretrial motions to dismiss lawsuits are handled.

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Chairman: Time out. Representative Watson, you're recognized.

Rep. Eric Watson (R-Cleveland, District 22): Just making a motion to go back into session, I want to make a comment. Granted? Thank you, Mr. Chairman.

Chairman: No objection? We go back in session.

Rep. Watson: Representative Dennis, would you agree to maybe sit down with John Day and Jimmy Bilbo between now and the full committee and just straighten some of this out? Maybe if we've got to write something different.

Rep. Dennis: I will be most certainly glad to do that between now and then. I know some of my friends with the Trial Lawyers' Association have looked at that specifically. Mr. Day, I believe, has looked at this amendment and we made some changes specifically after recommendations from Mr. Day in particular, I believe. So I will be more than glad between now and full to talk to all interested parties.

Rep. Watson: Now, Mr. Bilbo, is that okay? Wave your hand there. Y'all get together before next week then. Thank you, sir.

Chairman: OK. We're back on the amendment. It's been - -the motion's been made and is properly seconded. All in favor of the amendment say aye. Aye. Those opposed? The ayes have it. Those who want to be listed as "no," please raise your hand, and we'll record you as "no." Now, we're back on the bill as amended. Question? The question's been called. No objection to the question? Seeing none, all in favor of sending 1358 to the full committee say aye. Aye. Those opposed no. Moves to the full committee. This also will be one of the highlights on the best of the 107th General Assembly.

***HB 1358 sent to full committee.

May 3, 2011: House Judiciary Committee

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Rep. Dennis: Thank you, Mr. Chairman. This bill establishes a standard procedure for establishing who has the burden of proof in a motion of summary judgment, and it 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. There is an amendment, drafting code 8296, and I move passage of the amendment.

Chairman (Rep. Watson): Motion second on the bill. Motion second on the amendment. Does everyone have the amendment? 8296. Any discussion? Representative Moore, you're recognized sir.

Rep. Gary Moore (D-Joelton, District 50): Thank you, Mr. Chairman. Representative Dennis, I'm looking at the amendment which is quite substantially--does it substantially change the original language?

Rep. Dennis: No, it doesn't. The original language is very similar to the bill. The amendment added several paragraphs on--talking to other folks on both sides of the issue involved with the case, they thought it would be best to put into the bill some of the history leading up to the reason to help clarify what our intent was and that's the reason for that. The actual statutory language is at the very bottom and it's only the last one, two, three, four, five, six, the last seven pages-- last seven lines on page one.

Rep. Moore: Thank you.

Chairman: Representative Camper.

Rep. Camper: Thank you, Mr. Chairman. Representative Dennis, if I remember last week we were in the middle of some said discussion about this. And this dealt with the Rule 56, right? That's what we're talking about.

Rep. Dennis: That's correct.

Rep. Camper: And based on how the Supreme Court is interpreting that rule, is what this goes to address.

Rep. Dennis: Yes.

Rep. Camper: So would this piece of legislation then, because this was a concern I had last week--and I know we

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had to leave because of the storms--going to in some way tie the hands of the courts because right now the rule allows them, based on the evidence presented before them, to make a decision? So, to me, it appears now we're going to go back and say to them, there was something wrong in your decision making process so we're going to now do something with that rule that would allow you to only look at it and see it this way. Is that what this is doing?

Rep. Dennis: Well--

Rep. Camper: What are we doing? Because I think the rule gives them some latitude to look at the evidence and make a decision. But we want to go back and overturn it, it appears.

Rep. Dennis: The issue is not being able to look at the evidence and make a decision. The judge--the court still has the power to do that. You're not changing that at all. The only thing you're changing is who has the burden of proof on a motion for a summary judgment. Motion for summary judgment is when you finish your discovery issues, everybody's shared all their information, if there is some legal reason or some factual reason why you're not entitled to the relief that you're asking for. Or why the person who's filed the suit is not entitled to that, then the defendant can file a motion for summary judgment asking the court to dismiss the case because as a matter of law this should never be decided by a jury because there is a clear cut reason that this case can't be--this person can't get the relief they're asking for. And this deals specifically with who has the burden of proof on that motion as far as establishing that there is no real issue in contention here and which side has to prove what to--either that there is a problem or there's not a problem that the jury should hear.

Rep. Camper: So in the decision that we are citing here, who had that burden of proof and how does this change or get at that? In the case that's in the first whereas clause.

Rep. Dennis: The Hannan versus Alltel Publishing case was a case that the Supreme Court decided in 2008 where

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they basically reversed what they had been—what had been the standard in Tennessee for many years and what the federal standard was and still is. They kind of reversed that and required the party who was moving for summary judgment to--they shifted it from the person who was bringing the claim to be able to show that there was a real issue to be decided by a jury. They kind of reversed that and said the person who's being sued has the burden of proving to the court that there's no way that the plaintiff can win this case. And that's not what the state standard had been ever before and it's not what the federal standard is at all. So the purpose of this bill is to move it back to what the state standard was for--prior to 2008 and to what the federal standard still is. That the moving party has to show to the judge that there is some—there is an issue here that a jury needs to decide, and once they show that, then the judge has to let it go to the jury. But this is just dealing with when there's an issue that there is no dispute, the plaintiff has got to “put up or shut up” under this bill. Right now the court's taken that away and that's not the prior standard for Tennessee and that's not the federal standard as it is now.

Rep. Camper: And how's--

Rep. Dennis: So we're codifying--

Rep. Camper: So how're they going to achieve that? I need to see practically how they're going to achieve that with this language you've put here at the bottom. Tell--make me see how that's going to work. Can you? Like, how is this going to achieve what you just said? You perceived that there was a problem. Does this solve that problem, and how is this solving that problem, is what I'm trying to get at.

Rep. Dennis: The person who's being sued, if they file a motion for summary judgment saying, judge, there's no way the plaintiff can win this case as a matter of law or based on all the facts that are here, there's no way that the plaintiff can win this case. And if they can show the court

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that that's true—the case—if they allege that there's a specific reason why they can't prove their case, then that shifts the burden of proof to the plaintiff. The plaintiff has got to show at that motion for summary judgment that there actually is an issue here for the judge to be decided.

Rep. Camper: All right, I think I understand what you're saying. Okay, also, Mr. Chairman, last week there were some people to speak and I'm wondering are these people still here or did they show up? Did anybody want to speak on this and would be ok with you? Because we were in the middle of the tornadoes and all this stuff last week, so I don't know if they are or if they come back.

Chairman: Representative Camper, also the legal counsel can advise you of some of that stuff, too, because we've been told it might affect Mallard in a sense. I believe some of your question--she can address that also if you need her to. Is anyone here to speak? No one. Okay. Chancellor Bryant, you can speak if you need to. Okay. Jimmy Matlock? Representative Dennis, do you care to just roll this down just a notch or two?

Rep. Dennis: Be glad to.

Chairman: Thank you, thank you, sir.

Rep. Dennis: I would add, Mr. Chairman, that we've worked with the—I guess, the trial bar, the Trial Lawyers' Association, in drafting this language. It's my understanding they're not--they don't have any intent to oppose this bill. Although there was an attorney here last week who had some issues but he is not with—he was not representing the Trial Bar Association.

Chairman: Sounds good. Without objection we'll just go ahead and go back to item number one.

House Judiciary Committee moves on to two other bills but Representative Camper raises further questions about HB 1358.

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Chairman: That takes us back to item 26, HB 1355, Representative Dennis, you're recognized, sir.

Rep. Dennis: Thank you Mr. Chairman, I think we had already moved 26 but if we hadn't approved it, I'd renew my motion on item 26.

Chairman: Representative Camper, you are recognized.

Rep. Camper: Thank you, Mr. Chairman. I was--I actually was trying to get to legal to get that question answered but 1920 came up and it was so important I was trying to hear it too. So I wasn't really able to get to you because we got into 1920. So I was trying to figure out in a case like I am a--Karen Camper is a citizen who is trying to file a suit against some said corporation, big corporation, let's say AT&T, and we go before, for summary judgment, I guess. How would this bill impact that process? So, I'm this just regular person. I believe there's been an employment problem, I feel like they've done something wrong to me and I want to file a lawsuit. How is that--this bill going to impact that?

Chairman: Counsel, item 28, House Bill 1358.

Counsel (unidentified woman): This bill would change the standard by which the court uses to determine when the burden would shift to the nonmoving party as it reads.

Rep. Camper: Okay. I guess the nonmoving party is, in this case was AT&T, the company that I cited. Who--what do you mean--I'm sorry, make me, I'm like just a citizen. I don't get it. Tell me. You're trying to explain this to somebody that don't understand. Thank you.

Counsel: You make a motion for summary judgment if you don't believe that the evidence that's been presented establishes--a movant for summary judgment would move for summary judgment if they feel that the evidence that the other side has presented does not establish a particular claim, that it has not met its--the elements of a particular claim--am I talking legal?

Rep. Camper: Well no, that's okay. So I file a said lawsuit against this company. The company wants this

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summary judgment. Is that what you're saying? Okay, so now that they want this summary judgment, there are rules in place on how that works today. Is that what you're saying?

Counsel: There are rules to govern the procedure and the interpretation of that procedure would be affected by this statute.

Rep. Camper: Okay, so how then is that—how—what is that effect that this has on it?

Counsel: Currently, the Supreme Court, the Tennessee Supreme Court, has made a declaration in the case Hannan, and that was in 2008, and this would--

Rep. Camper: What did they say in Hannan? Because what you're basically saying is that's going to be the law of the land right now if nothing happens.

Counsel: In Tennessee, I'm quoting from the case—

Rep. Camper: That's fine.

Counsel: A moving party who seeks to shift the burden of production to the nonmoving party, who bears the burden of proof at trial, must either, one, affirmatively negate an essential element of the nonmoving party's claim, or two, show that the nonmoving party cannot prove an essential element of the claim at trial.

Rep. Camper: So, this bill now is going to--

Counsel: Change that standard.

Rep. Camper: Change that standard. Okay, thank you. So what you're saying, Representative Dennis, is that with the decision they made, that was somehow a change. Is that what you're saying?

Rep. Dennis: Let me kind of use your hypothetical. You work for AT&T. AT&T fired you. You think they fired you wrongly. You sued them. They file a motion for summary judgment that says you never worked for me—you're alleging that—you sued the wrong person. You never actually worked for me. You've got the wrong person sued. The question is whose burden--who's got the burden of proof on that summary judgment motion, who's got the

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burden of proof to prove whether or not you worked for them to the judge in order to move that case forward. Under the old standard, and under the federal standard, they would have to—they would raise the allegation that, no, you never worked—this person never worked for me, and then you would have to prove to the judge before this goes to a jury that, yes, you actually did. In 2008, the court reversed that and said no the employee, just because you've alleged they fired you wrongfully, they've got to prove-- this case is going to a jury unless they can prove beforehand that you didn't work for them. The issue is who has the burden of proof on that motion for summary judgment at that proceeding after you've shared all your information, you're there just on a motion for summary judgment, who's got to prove that there's an actual claim there that needs to go to the jury. You as the plaintiff or the defendant--does the defendant have to prove a negative, prove that you don't have a claim? It's kind of technical but that's about as good as I can do to summarize the issue. But the standard that we're codifying, attempting to codify here, is the standard that we used prior to 2008 and the standard that the federal law--if the suit's filed in federal court, it's the standard that the federal courts use still to this day.

Rep. Camper: And so there--I'm sorry, Mr. Chairman, to keep going on. So, okay, so then this particular case that we're using as a basis for this decision made it from the lowest all the way up to the Supreme Court level. And now what we want to do is put in statute that says, we don't need to do it that way when it went through the various levels. So everybody got a chance in that process, each of the court levels got a chance to make a decision and it was appealed and it went higher and the decision was the same, and then it was appealed and it went higher. And what you're saying now is, hey, you got it wrong so let's--

Rep. Dennis: Yes, that's exactly it. The court got it wrong. The court changed its standard. The court changed its

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standard that it had always applied. The court changed the standard away from what the federal courts apply. And we're saying yes, we do that all the time. 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 bringing that standard back in line with what it was prior to 2008 and what the federal standard is now.

Chairman: Go ahead. Representative Stewart.

Rep. Mike Stewart (D-Nashville, District 52): Here's my question. You know, I understand what you're saying about policy. You know, we set the policies and courts apply the policies. So it makes sense for us to-- if we say X, that's the policy. My question is, though, aren't we here just talking about a rule? I mean, Hannan versus Alltel, what you're trying to do is reverse what the Supreme Court said about how Rule of Civil Procedure 56 is applied, right?

Rep. Dennis: Essentially, sort of. Who has the burden of proof to prove that particular motion for summary judgment in--under Rule 56 should be granted.

Rep. Stewart: Well, I guess, is this just--all your bills are your bills but is this your own personal view? I mean, I'm just curious what brings you to select this particular ruling by the Supreme Court out of hundreds of rulings about the Rules of Civil Procedure over the years to reverse this one?

Rep. Dennis: Well, I think there's a lot of concern within the business community in particular that we've gotten to a point where cases with no real merit are getting--are going to juries because of this particular decision. And that's kind of the issue that it's trying to address. It is my personal belief that this is the appropriate standard, the standard under the Celotex case under federal law and the Byrd standard as it basically adopted the Celotex standard.

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It was the--is the appropriate standard that we should be using in determining whether or not summary judgments should be granted. But, so, it is my personal position that this is the correct standard, but in addition I believe a great deal of the business community, small and large, and those who are concerned about getting rid of frivolous complaints, frivolous lawsuits before it gets to a jury, the time and expense of a jury trial if there is no real issue of fact to be decided by a trier of fact. This is the appropriate standard to use when determining that so that you avoid the unnecessary time and expense of a full blown jury trial if there is no real issue of fact, if there is no real issue of fact.

Rep. Stewart: Well, 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 about where someone can carry a gun. You know, those are our--that's our job, we can make that decision, okay. But I'm worried—it seems like this is 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-- you think back, you know, where 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--set aside, I'm not an employment lawyer so I don't deal with this issue--but I mean if every time the Supreme Court says something about a rule that 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—we're stepping into their house and I think that's not—is that really, do you really think that's smart when it comes to rules? I mean rules about how courts work as opposed to the underlying policies that the people have sent us up here to do, to implement.

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Rep. Dennis: If it was an issue where we were actually rewriting a Rule of Civil Procedure or changing the language of the rule or passing a statute that was in direct contravention to that rule, then yes, I would have—I would share those concerns. But I don't in this case because all we're dealing with is who has the burden of proof, of proving these elements. We established who has the burden of proof to prove particular elements one way or another in a number of cases. In criminal law, for example, the state has the burden of proving beyond a reasonable doubt that a crime was committed. If we legislatively establish an affirmative defense, the defendant has the burden of proof of proving that affirmative defense to the court by a preponderance of the evidence. We always, I mean legislatively, we establish who has the burden of proof to prove certain elements of any type of offense, be it civil, be it criminal, what have you. So I don't think we're delving too far away from that. It's specific to the application of this Rule 56, but it's not rewriting the rule. The court didn't change Rule 56. The language of Rule 56 has not changed at all. The court simply dealt with who has the burden of proof in whether or not a court grants that motion, and so that's my argument in support of that. If it was directly in contravention to Rule 56, if Rule 56 said this, and we passed a law that said no you're not going to do it that way, you're going to do it a different way, then yes, I think we would run into some constitutional issues. However, I don't think this statute does it. If the court disagrees, then obviously they can find the statute to be unconstitutional as far as encroaching on their powers. If that happens in the future then so be it. I don't think it goes that far as to contravene an existing rule because, like I said, the rule has not changed. Rule 56 is still the same.

Rep. Stewart: Well, I appreciate that explanation because I think this is something we're going to revisit over time and based on past experience I have an inkling that there's a possibility you may get this bill out of committee whether

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or not I think it's a good idea. But I think that--I'm going to vote against the bill just because I think that we have to proceed with great caution when we start telling the Supreme Court, when we start reversing their decisions about the rules. And to me, I understand your explanation, yes we are not literally changing the words in this rule, but, you know, we are changing their meaning, which to me is the same thing to a litigant. And just to explain why I'm focused on this, you know, Rule 56 is not just any old Rule of Civil Procedure. This is the gate that you have to get through to get to a jury. So this is the rule that says when you're some employee, this is what you've got, this is the hump you've got to get over to have your right to a jury given to you. You know, and this is not Europe. I mean, we don't--we live in a country still where juries, our peers, make the big decisions. We keep pushing power down. I think you'd agree with me that this imposes a more restrictive standard for a litigant than the Tennessee Supreme Court has assigned and so to me I think we should leave it to their wisdom. The Tennessee Supreme Court, I think, is a pretty pro-business court and I think we should leave it to the courts to decide what the rules mean. And because of that I'm going to vote against your bill.

Chairman: Any other discussion? We're on the amendment 8296. Any discussion on the amendment? If not, you're voting on the amendment. All in favor of amendment one say aye. Aye. All opposed, say no. On the bill as amended. Representative Dennis, anything else? Any other discussion? If not, you're voting on 1358 to go to calendar rules. All in favor, say aye. All opposed, say no. Let's record it with the clerk, please. Mr. Clerk.

May 20, 2011: House Session, 38th Legislative Day

Clerk: House Bill 1358 by Representative Dennis relative to summary judgment.

Speaker: Rep. Dennis you are recognized.

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Rep. Dennis: Thank you, Madam Speaker. I move passage of House Bill 1358 on third and final consideration.

Speaker: Representative Dennis moves passage. Properly seconded. Mr. Clerk, call the first amendment.

Clerk: House Judiciary Committee Amendment Number One. Spread on the members' desks in Regular Calendar Number Two Amendment Pack.

Speaker: Representative Watson, you're recognized.

Rep. Watson: Thank you, Madam Speaker. This amendment rewrites the bill and overrules the holding in Hannan versus Alltel Publishing Company regarding the standard for summary judgment in Tennessee. Madam Speaker, I move to adopt the House Judiciary Amendment Number One and yield to the sponsor for any further explanation.

Speaker: Representative Watson moves adoption of Amendment Number One. Properly seconded. Discussion on the amendment? All those in favor of Amendment Number One say aye. All those opposed say no. You adopt. Next amendment, Mr. Clerk.

Clerk: No further amendments, Madam Speaker.

Speaker: Representative Dennis, you are recognized.

Rep. Dennis: Thank you, Madam Speaker. As was described in regards to the amendment, this bill will codify the standard of proof for summary judgment on cases in civil courts in Tennessee. I renew my motion.

Speaker: Representative Dennis renews his motion. Any discussion on the bill? Is there objection to the question? Seeing none, all those in favor of House Bill 1358 vote aye when the bell rings. Those opposed vote no. Has every member voted? Does any member wish to change their vote? Take the vote, Mr. Clerk.

[H.B. 1358 passes by a vote of 85-4. The next bill, H.B. 1641, relative to claims for employment discrimination and retaliatory discharge, is then taken up. The House Judiciary

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Amendment Number One is adopted. The floor discussion on the amended H.B. 1641 is transcribed below.]

Rep. Dennis: Thank you, Madam Speaker. This bill [H.B. 1641] in conjunction with the previous bill specifically codifies the standard of proof for summary judgment in cases involving employment discrimination and retaliation. With that I renew my motion.

Speaker: Representative Dennis renews his motion. Discussion on the bill? Representative Miller?

Rep. Larry Miller (D-Memphis, District 88): Thank you, Madam Speaker. Will the sponsor yield?

Rep. Dennis: Yes.

Rep. Miller: Representative Dennis, you were speaking pretty fast. I couldn't hear you actually. I heard discrimination and retaliation. So what are we doing with the bill as amended?

Rep. Dennis: The bill as amended codifies the specific burden of proof on a motion for summary judgment in a civil case involving employment discrimination or retaliatory discharge. It codifies the standard of proof that the court uses when it's applying under the Rules of Civil Procedure Rule 56 a motion for summary judgment who has the burden of proof in proving that a case has an existing issue of material fact sufficient to get it to a jury to be heard.

Rep. Miller: Okay, thank you.

Speaker: Representative Stewart.

Rep. Stewart: Thank you, Madam Speaker. Will the sponsor yield?

Rep. Dennis: Yes, sir.

Rep. Stewart: Just to make clear, this is one of the bills you brought—am I remembering correctly-- to essentially reverse a decision by the Tennessee Supreme Court?

Rep. Dennis: Yes. It would. It would reverse--this bill would reverse the 2010 decision in a case that's called Gossett versus Tractor Supply that changed the standard of proof in Tennessee on summary judgment in these types of

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cases away from what had been the existing law in Tennessee for about thirty years and what is the federal standard –what it was and still is. It takes us back to what the federal standard is in these types of cases.

Rep. Stewart: And I don't want to take too much of the chamber's time. But I will say I am going to vote against it just because, as we've discussed, I don't think this body should routinely overturn decisions by our high court whether or not it's to the advantage of one particular group or another just because I think separation of powers suggests that we should be very deferential to them. And I just thought I'd make that point. Thank you.

Speaker: Representative Hardaway.

Rep. G.A. Hardaway (D-Memphis, District 92): Thank you, Madam Speaker. Will the sponsor yield?

Rep. Dennis: Yes, sir.

Rep. Hardaway: Would you say that the bill now is more friendly to the plaintiff or to the defendant?

Rep. Dennis: I wouldn't say that it's more friendly to either one. When you file a motion for summary judgment on either side, you're asserting to the court that given all the facts that are there, after you—after both sides have shared all their facts, there is no issue of material fact and the person who's on the other side is not entitled to what they are requesting. And if the court makes that determination, that there is no way a jury could—legally—that a jury could allow this person to win this case, then the court dismisses the case before it ever gets to the time and expense of going to a jury. So I would not say it is particularly preferential one way or the other.

Rep. Hardaway: All right. Then let me ask if—because sometimes we seek to legislate in order to codify case law. But in this case, we're trying to, in essence, overturn case law.

Rep. Dennis: Yes. The court—the Tennessee Supreme Court, in a three-to-two decision, changed the standard of proof that had been previously applied in our state for about

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thirty years and the standard that's applied in federal court on these types of actions, and this is changing it back to what it was before the court took it on its own initiative to make that change.

Rep. Hardaway: So everything that was in place before that federal court decision--excuse me, before they, was it a state court decision?

Rep. Dennis: State Supreme Court decision in 2010. Yes.

Rep. Hardaway: All right, so, we are postured now exactly as we would have been before that decision.

Rep. Dennis: Yes.

Rep. Hardaway: No extras in here?

Rep. Dennis: That is the intent of the legislation is to take us back to the standard that was applied before that case and the standard that is applied in our federal courts.

Rep. Hardaway: All right. Thank you, sir. Thank you, Madam Speaker.

Speaker: Representative Gilmore.

Rep. Brenda Gilmore (D-Nashville, District 54): Thank you, Madam Speaker. Will the sponsor yield?

Rep. Dennis: Yes, Ma'am.

Rep. Gilmore: So, can you tell me the difference between before this legislation and if this legislation passed, how it effects?

Rep. Dennis: Sure. As the law was before, in these types of cases, and under the federal law now, the person who's bringing the lawsuit--the person who is suing claiming unlawful termination of their employment or retaliation, has the burden to show that there is an actual issue of fact that a jury needs to decide. The Supreme Court reversed the burden of proof last year and said that, no, the employer has to prove a negative, has to prove to the court--in order to avoid going to a jury trial, the employer has to prove that the plaintiff can't possibly win their case instead of the plaintiff having to prove that there is an actual case there. It's kind of technical, but that's the difference and that's

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what we're going back to is the plaintiff having to show that there is an issue of fact that a jury needs to decide.

Rep. Gilmore: So, in what year was this again?

Rep. Dennis: It was 2010. It was the Gossett versus Tractor Supply case.

Rep. Gilmore: So, does this--does this legislation reverse that decision that was made then?

Rep. Dennis: I would say that it better--more that it clarifies. In a sense it reverses, but it clarifies our standard of proof and what we're going to use in Tennessee in a motion for summary judgment to be consistent with the federal law and the law that we used to apply.

Rep. Gilmore: Okay, and if someone feels like they've been discriminated on their jobs, does it now make it more challenging for them to receive some kind of retribution?

Rep. Dennis: I wouldn't say that it's more challenging. They are going to have to show--in order to get that case to a jury, they're going to have to show proof to a judge by a preponderance of the evidence that there is an actual issue here. There is something that a jury needs to be decided. If the court looks at the case and there is an actual dispute and they are entitled to what they are claiming if everything they say is proven to the judge—to the jury.

Rep. Gilmore: So the standards are being raised now?

Rep. Dennis: It's not really being raised. It's being shifted back to what it was before 2010 and to what our federal standard is right now.

Rep. Gilmore: Thank you.

[The previous question is called. H.B. 1641, as amended, passes by a vote of 67-24, with 4 voting "present, not voting."]

SENATE BILL 1114

May 17, 2011: Senate Judiciary Committee

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Chairman (Sen. Mae Beavers, R-Mt. Juliet, District 17): You're recognized on Senate Bill 1114.

Sen. Brian Kelsey (R-Germantown, District 31): Thank you. That's number thirty-one in your packets, Senate Bill 1114. And this bill would return us to the federal summary judgment standard and it would overturn the Hannan case. It prevents a rush on the federal court for summary judgment. The--there is an amendment to the bill, which is drafting code 00718296, which clarifies that it applies only to defendants who are filing for summary judgment and so I would move adoption of amendment--well, I guess I'll move passage of the bill first.

Sen. Mike Bell (R-Riceville, District 9): Second.

Chairman: Seconded by Senator Bell on the bill.

Sen. Kelsey: And then I'll move adoption of the amendment as well.

Sen. Bell: Second.

Chairman: Okay, motion on the amendment. Seconded by Senator Bell. And I believe you've already explained what the amendment does?

Sen. Kelsey: Yes.

Chairman: Okay. Any questions on the amendment? Senator Barnes.

Sen. Tim Barnes (D-Adams, District 22): I have a question, and I don't know that much about this, but when you say that it only applies to defendants, why would it not apply equally to plaintiffs and defendants?

Sen. Kelsey: Well, because of the particulars of how you receive summary judgment in the--let me pull up the amendment, if you don't mind, for one second. It's--what we're dealing with here is when a defendant files for summary judgment and then the plaintiff comes back and responds and then the question is what is the burden on the defendant at that point. Can you use the "put up or shut up" rule. And so that's why that is not an issue on the plaintiff's side when the plaintiff is filing summary judgment.

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Sen. Barnes: Well, yeah, it seems to me that if the other side, for example, has got a counter complaint, they may be seeking a summary judgment in their counter complaint. It seems to me that it would be the same rule should apply rather than create that disparate treatment, in a way, that in that circumstance if you got a counter complaint versus a complaint, it doesn't seem there would be a rational basis for that different treatment.

Sen. Kelsey: And that is a very valid point and I misspoke when I spoke in terms of defendant and plaintiff. Actually, now that I have the amendment pulled up in front of me, it says--it speaks in terms of the party that has the burden--that bears the burden of proof at trial.

Chairman: Any other questions on amendment number one? If not, all in favor of amendment one, say aye. Opposed? We're back on the bill as amended. Questions on the bill? If there are no further questions, we're voting on Senate Bill 1114 and the motion would be to calendar committee. Madam Secretary would you call the roll?

Secretary: Senator Barnes? Senator Barnes votes no. Senator Bell? Senator Bell votes aye. Senator Campfield? Senator Campfield votes aye. Senator Ford? Senator Kelsey? Senator Kelsey votes aye. Senator Marrero? Senator Marrero votes no. Senator Overbey? Senator Overbey votes aye. Senator Yager? Senator Yager votes aye. Chairman Beavers?

Chairman: Aye.

Secretary: Chairman Beavers votes aye. Six ayes and two nays.

Chairman: Senate Bill 1114 goes to calendar committee.

May 20, 2011: Senate Session, 38th Legislative Day

Sen. Kelsey: Thank you, Mr. Speaker. I believe we're on House Bill 1358, and this is the bill on the burdens of production, and with that I renew my motion to passage on third and final consideration.

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Speaker: Senator Kelsey moves for passage on House Bill 1358. Is that seconded? Discussion on House Bill 1358. Senator Barnes, you're recognized.

Sen. Barnes: Thank you, Mr. Speaker, members. I have distributed to the members a letter from AARP that sets out their opposition to not only Senate Bill 1114, which is House Bill 1358, but also the Senate Bill 940. And it sets forth their belief that these bills 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. I'm concerned about what this does with the burden of proof in summary judgment. Summary judgment is something that is developed in Tennessee with Tennessee body of law, the law that's unique to Tennessee, and I think it's the wrong direction to go to abrogate Tennessee law and try to impose legislatively a body of law that is applied in federal courts. And that's why I oppose this bill. Thank you.

Speaker: Further discussion on House Bill 1358. Senator Kyle, you are recognized.

Sen. Jim Kyle (D-Memphis, District 28): Sponsor will you yield? Is this the bill we had up earlier on summary judgment, Senator Kelsey? If it is, then I heard that debate but is this a different bill on summary judgment?

Speaker: Senator Kelsey.

Sen. Kelsey: This is the same bill.

Speaker: Senator Kyle.

Sen. Kyle: This is the repeal of the Supreme Court decision of 2008, is that correct?

Speaker: Senator Kelsey.

Sen. Kelsey: That's correct.

Speaker: Senator Kyle.

Sen. Kyle: Thank you.

Speaker: Further discussion on House Bill 1358? Senator Finney.

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Sen. Lowe Finney (D-Jackson, District 27): I just want to ask the sponsor if he would give any more thought to letting the Rules Commission see this?

Speaker: Senator Kelsey.

Sen. Kelsey: Mr. Speaker, I believe the Rules Commission already had a chance to take a look at it last week. That's what I was told earlier today and they certainly have had chances since January, or February I should say, back when the bill was filed and they had--I believe it literally was on the Judiciary Calendar, I believe, six weeks in a row.

Speaker: Senator Finney.

Sen. Finney: Mr. Speaker, I have the agenda from the Rules Committee and it wasn't on the agenda of the Rules Commission Committee. And the way the Rules Commission works is at the request of any lawyer, or anybody, the Rules Commission will take something up. And as a member of the Rules Commission I can assure you that it will be taken up. I don't know why it wasn't, but it's not on the agenda. I can assure you that it would at least be dealt with one way or the other.

Speaker: Senator Kelsey.

Sen. Kelsey: Well the Tennessee Bar Association had the ability to take it to the Rules Committee, and at least somebody on there was aware of this particular bill and this particular issue. But 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 that's in place after the 2008 decision. And it will be the same rule that's 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.

Speaker: Senator Finney.

Sen. Finney: This will be my last statement, Mr. Speaker, and I apologize and I appreciate the patience. It's my understanding that the bill is actually a broader rule than

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what the previous-- the old law was under Celotex, and that this would actually be a broader interpretation for summary judgment, which is why I think it would be appropriate for the Rules Commission to look at. And I would just submit that when we start looking at rules of the court it is not unusual, in fact it is the standard, to allow the courts to look at their own rules and then figure out exactly how to go forward within that body. Rather than us do it by statute, do it by rule, and then those rules actually come before the Judiciary Committee, if I'm not mistaken. So you would actually see whatever the Rules Commission promulgates. They actually have to come before the body and I think we pass that in January or February--like, right away. So, it's just my preference 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. And if it--indeed this statute is bigger than the old rule, then that gives me great pause, because I'm not sure if that was fully deliberated in the Judiciary Committee, I don't think it's been fully deliberated here, and that's why it's appropriate to submit things like that to the Rules Commission.

Speaker: Senator Kyle.

Sen. Kyle: Well, I have every belief that we're going to blindly overturn the Supreme Court decision tonight, so I guess I need to ask a couple of questions. Senator Kelsey, based upon your reading of your bill that you're sponsoring, if a lawyer has been denied summary judgment in the last three years, can they then now go back and re-file for summary judgment based upon the change of our law? Or do they--or is the summary judgment motion that was denied *res judicata* and can't be revisited? There needs to be some clarity on that, because I truly believe how you apply the change of the standard for summary judgment needs to be uniform in all thirty-one judicial districts. So, I don't think the bill addresses it, but perhaps maybe it

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should, maybe it shouldn't, I don't know. But it is but a rule but I'm sure, as you have indicated, that people have lost summary judgment motions because of the standard of the court, and now we're changing that again. The question is, is how are we going to administer this particular change now that we are changing the law back?

Speaker: Senator Kelsey.

Sen. Kelsey: No. It will only apply to summary judgment motions going forward filed after July 1, 2011.

Speaker: Senator Kyle.

Sen. Kyle: Are you saying that a litigant who filed for summary judgment on an issue and was denied cannot re-file again after the effective date of this statute with the new standard?

Speaker: Senator Kelsey.

Sen. Kelsey: Not on that same particular issue. Correct.

Speaker: Senator Kyle.

Sen. Kyle: Is that your interpretation or does that statute say that?

Speaker: Senator Kelsey.

Sen. Kelsey: That's what the bill says.

Speaker: Further discussion on House Bill 1358?

[The bill passes by a vote of 19-9.]

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