

HERE COMES *CELOTEX*...AND *MCDONNELL DOUGLAS*: THE NEW TENNESSEE SUMMARY JUDGMENT STANDARD AND REMOVAL CONSIDERATIONS FOR ORGANIZATIONAL CLIENTS

MICHAEL A. COTTONE*

I. INTRODUCTION

While an overarching policy of the American judicial system is to adjudicate disputes on their merits, the system may work most efficiently when most disputes are settled between the opposing parties on terms of their own choosing.¹ In modern dispute resolution, lawsuits are rarely taken to the fact finder, and most organizational clients are generally unwilling to accept the risk and uncertainty of a jury trial, preferring instead to work towards a reasonable settlement of disputes.² Consequently, the availability of dispositive motions—such as motions for summary judgment—plays a large role in determining the settlement value of claims by potentially reducing the anticipated cost to defend a lawsuit.³ This relationship comes into sharp focus for organizational clients worried by the prospect of bearing the aggregate cost of fully litigating many disputes.⁴

Due to the effects on settlement value, an organizational client faced with the decision of whether to remove to federal court a lawsuit filed against it in state court should

* J.D. Candidate 2014, University of Tennessee College of Law. I would like to thank Professor Judy Cornett and Professor Paula Schaefer for their comments, feedback, and continued support.

¹ See Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 286, 288 (1999); Margaret Meriwether Cordray, *Settlement Agreements and the Supreme Court*, 48 HASTINGS L.J. 9, 9-10 (1996).

² See John Barkai, Elizabeth Kent & Pamela Martin, *A Profile of Settlement*, 42 CT. REV. 34, 34 (2006). Of course, in certain circumstances, some organizational clients may prefer not to settle for the purpose of trying to set favorable precedents or avoiding developing a reputation as an easy target for lawsuits. See David Stringer & Betsey Rader, *Top Ten Considerations When Deciding Whether to Settle an Employment Dispute*, ASSOCIATION OF CORPORATE COUNSEL (Apr. 1, 2011), <http://www.acc.com/legalresources/publications/topten/Employment-Dispute.cfm>.

³ See Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 690, 692 (2012) (explaining the strong connection between summary judgment and settlement value).

⁴ See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 772-77 (2010) (noting that litigation costs may *feel* relatively greater and less proportionate to the value of the case than they may actually be).

consider the differing summary judgment standards.⁵ However, the state of summary judgment in Tennessee is currently unsettled.⁶ The Tennessee state legislature has passed new laws attempting to alter the prevailing standard; however, no state appellate court has yet interpreted the statutes, and some commentators recognize the possibility of a constitutional attack on their validity.⁷

In anticipation of a state appellate court decision concerning the legislation, this article aims to briefly examine the recent statutes attempting to change the law of summary judgment in Tennessee, the possible practical effects of the statutes on the summary judgment standard, and the corresponding consequences for organizational defendants in determining whether to remove lawsuits to federal court. Part II of this article provides an overview of the prior standard for summary judgment in Tennessee. Part III discusses how the statutes depart from the prior standard. Finally, Part IV outlines possible appellate court treatments of the statutes and how various treatments would affect removal considerations for organizational clients.

II. SUMMARY JUDGMENT IN TENNESSEE STATE COURTS PRIOR TO JULY 1, 2012

For cases filed in Tennessee state court before July 1, 2011, meeting the standard for summary judgment was more difficult than in federal court.⁸ Tennessee Rule of Civil Procedure 56.04, like Federal Rule of Civil Procedure 56, provides for a grant of summary judgment where “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”⁹ Under *Hannan v. Alltel Publishing Co.*, the most

⁵ See Daniel E. Reidy, *Comparison with Commercial Litigation in State Courts*, in 1 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS 771, 784-86 (Robert L. Haig ed., 3d ed. 2011) (noting the importance of differences in state and federal procedural rules when considering whether to litigate in state or federal court). Of course, this consideration is applicable only to the extent grounds for removal exist. See 28 U.S.C. §§ 1441, 1446 (2012).

⁶ See Donald F. Paine, *Can the General Assembly Overrule Supreme Court Rules?*, 47-DEC TENN. B.J. 37 (Dec. 2011) (noting the uncertainty created by the enactment of TENN. CODE ANN. §§ 4-21-311(e) and 20-16-101).

⁷ See *id.* While Tennessee appellate courts have not yet ruled on the validity of the statutes, they have certainly taken note of them. See, e.g., *Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18, 25 n.2, 26 n.4, 29 n.5 (Tenn. 2011) (noting that TENN. CODE ANN. §§ 20-16-101, 4-21-311(e), and 50-1-304(g) did not apply to the case); *White v. Target Corp.*, No. W2010-02372-COA-R3-CV, 2012 WL 6599814, at *5 n.2 (Tenn. Ct. App. Dec. 18, 2012) (noting that TENN. CODE ANN. § 20-16-101 did not apply to the case); *Skann v. Fed. Exp. Corp.*, No. W2011-01807-COA-R3-CV, 2012 WL 6212891, at *4 n.4 (Tenn. Ct. App. Dec. 13, 2012) (noting that TENN. CODE ANN. §§ 20-16-101, 4-21-311(e), and 50-1-304(g) did not apply to the case).

⁸ See *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 13 (Tenn. 2008) (Koch, J., dissenting) (arguing that *Hannan* “dramatically chang[ed] the moving party’s burden of production” at the summary judgment stage); Andréa Sophia Blumstein, *Bye Bye Hannan?*, 47-AUG TENN. B.J. 14, 16 (Aug. 2011) (noting that, before the enactment of TENN. CODE ANN. § 20-16-101, “winning a motion for summary judgment [in Tennessee state court] was more challenging” than in federal court).

⁹ FED. R. CIV. P. 56(a); TENN. R. CIV. P. 56.04.

recent Tennessee Supreme Court case interpreting Rule 56.04, the burden rested on the party moving for summary judgment to “affirmatively negate an essential element of the nonmoving party’s claim” or to show that “the nonmoving party cannot establish an essential element of the claim at trial.”¹⁰ When adopting this standard, the Tennessee Supreme Court explicitly rejected the federal “put up or shut up” standard first announced in *Celotex Corp. v. Catrett*.¹¹ The Supreme Court of the United States, in *Celotex* and its companion cases, held that a party moving for summary judgment on a claim can point to a lack of admissible evidence supporting an essential element of that claim¹² and that the court may consider the quantity of evidence as it relates to the burden of proof in considering whether summary judgment is proper.¹³ That is, under *Celotex*, the plaintiff must present affirmative evidence to support its claims at the summary judgment stage to continue to trial.¹⁴

Hannan, however, took the opposite approach, allowing summary judgment only when the moving party affirmatively negated an essential element of the claim or demonstrated that the plaintiff could not prove its case “at trial.”¹⁵ Therefore, the plaintiff, in the absence of the negation of an essential element, had no obligation to come forth with affirmative evidence in support of its claims at the summary judgment stage.¹⁶ Consequently, Tennessee state courts, operating under the rule in *Hannan*, became more favorable for plaintiffs than federal courts. A claim not supported by any affirmative evidence could still survive a motion for summary judgment so long as the moving party did not negate an essential element of the nonmovant’s claim or could not show that proving the claim at trial would be impossible.¹⁷

Further, the Tennessee Supreme Court, in *Gossett v. Tractor Supply, Inc.*, held that the pervasive standard for summary judgment in employment cases, specifically the burden

¹⁰ *Hannan*, 270 S.W.3d at 6, 7.

¹¹ *Id.*; see also Blumstein, *supra* note 8, at 15; Judy M. Cornett, *Trick or Treat? Summary Judgment in Tennessee After Hannan v. Alltel Publishing Co.*, 77 TENN. L. REV. 305, 305 (2010).

¹² *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

¹³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-53 (1986). However, the Court clearly stated that the trial judge may not evaluate the credibility of evidence in determining whether proffered evidence is sufficient to meet the relevant evidentiary burden. *Anderson*, 477 U.S. at 255.

¹⁴ *Celotex*, 477 U.S. at 322-24. However, the plaintiff’s evidence does not necessarily have to be admissible. *Celotex*, 477 U.S. at 324.

¹⁵ *Hannan*, 270 S.W.3d at 7 (emphasis added). Compare Blumstein, *supra* note 8, at 16 (noting the difficulty of proving such a negative), with Cornett, *supra* note 11, at 339-40 (arguing that summary judgment under *Hannan* is possible, due to its “elegant burden-shifting procedure”).

¹⁶ See *Hannan*, 270 S.W.3d at 6-7. There are many circumstances where both *Hannan* and *Celotex* will provide for a grant of summary judgment. See Cornett, *supra* note 11, at 344. However, this piece will focus primarily on the differences between the standards, which arise out of *Hannan*’s “at trial” requirement.

¹⁷ See *Hannan*, 270 S.W.3d at 6-7.

shifting mechanics of *McDonnell Douglas v. Green*, was incompatible with the Tennessee law of summary judgment set out in *Hannan*.¹⁸ The burden-shifting framework of *McDonnell Douglas* and its progeny allows for summary judgment where a plaintiff cannot prove that a defendant-employer's proffered non-discriminatory or non-retaliatory reason for termination was pretextual.¹⁹ The mechanics of *McDonnell Douglas* work in three steps: first, the plaintiff must offer prima facie evidence of discrimination; second, the defendant may then offer evidence of a non-discriminatory motive; third, the plaintiff must then show that the defendant's offered non-discriminatory motive was merely pretextual.²⁰ In the context of a motion for summary judgment, *McDonnell Douglas* allows a defendant to succeed in its motion if the plaintiff cannot come forth with affirmative evidence showing pretext.²¹

Reasoning that summary judgment under the *McDonnell Douglas* framework "does not preclude the possibility that a discriminatory or retaliatory motive played a role in the discharge decision," the Tennessee Supreme Court held in *Gossett* that *McDonnell Douglas* burden shifting does not comport with the standard for summary judgment set out in *Hannan*.²² *Gossett* further held that summary judgment in employment cases was proper when a reasonable person could find only in favor of the movant after "tak[ing] the strongest legitimate view of the evidence in favor of the nonmoving party, allow[ing] all reasonable inferences in favor of that party, and discard[ing] all countervailing evidence."²³ Logically, this must mean that a court cannot consider a defendant-employer's nondiscriminatory explanation of an action—it must disregard it as countervailing evidence. Further, as the court is bound to give as much credence as it can to a plaintiff's allegation of discrimination or retaliation, it must deny summary judgment so long as proving discrimination or retaliation at trial is theoretically possible—even where an employer has presented a nondiscriminatory explanation.²⁴ As an employer's offering of a

¹⁸ *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777, 782-85 (Tenn. 2010). However, the Tennessee Supreme Court, in *Gossett*, also recognized the validity of the *McDonnell Douglas* burden-shifting framework to trials, limiting its opinion to the applicability of the standard at the summary judgment stage. *Gossett*, 320 S.W.3d at 783.

¹⁹ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Risch v. Royal Oak Police Dep't*, 581 F.3d 383, 390 (6th Cir. 2009) (applying *McDonnell Douglas* burden-shifting at the summary judgment stage); *Geiger v. Tower Auto.*, 579 F.3d 614, 620, 622-23 (6th Cir. 2009) (applying *McDonnell Douglas* burden-shifting at the summary judgment stage); *Blair v. Henry Filters, Inc.*, 505 F.3d 517, 523-24 (6th Cir. 2007) (applying *McDonnell Douglas* burden-shifting at the summary judgment stage).

²⁰ *Burdine*, 450 U.S. at 252-53; *McDonnell Douglas*, 411 U.S. at 802-04.

²¹ See *Burdine*, 450 U.S. at 252-53; *McDonnell Douglas*, 411 U.S. at 802-04; *Risch*, 581 F.3d at 390; *Geiger*, 579 F.3d at 622; *Henry Filters*, 505 F.3d at 523-24.

²² *Gossett*, 320 S.W.3d at 782.

²³ *Id.* at 784 (quoting *Blair v. W. Town Mall*, 130 S.W.3d 761, 768 (Tenn. 2004)) (emphasis added).

²⁴ See *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 7 (Tenn. 2008) (holding that summary judgment is improper where the movant has not affirmatively negated an essential element of the nonmovant's

nondiscriminatory or nonretaliatory motive does not shift the burden of production to the plaintiff at the summary judgment stage, it becomes relatively harder for defendants to effectively respond to a facially sufficient allegation of discrimination or retaliation at the summary judgment stage under *Hannan* and *Gossett*.²⁵ Consequently, the *Gossett* decision limited the possibility of summary judgment in employment cases where the plaintiff alleged discrimination or retaliation.²⁶

Whether or not this result is desirable from a policy standpoint,²⁷ it likely has an effect on the settlement equities of discrimination and retaliation claims adjudicated in Tennessee state courts. If summary judgment were to be granted more often in employment cases, as it would ostensibly be under *McDonnell Douglas*, then plaintiffs with relatively weak claims should be more likely to settle those claims—and at a lower cost—than they would otherwise be because of the increased risk.²⁸ Indeed, to the extent plaintiffs in employment cases have avoided removal by alleging only state claims in Tennessee courts, they have likely used the difference in the federal and state standards to raise the settlement value of their claims.²⁹ Of course, the same reasoning also applies, in reverse, to defendants. To the extent organizational defendants in employment cases have removed these cases to federal

claim); see also Blumstein, *supra* note 8, at 16 (recognizing the difficulty of affirmatively proving such a negative).

²⁵ Indeed, under the *Gossett* regime, as long as a plaintiff alleges a legally valid claim of discrimination or retaliation, summary judgment will be improper unless the underlying necessary facts cannot possibly be proven at trial or the movant is able to affirmatively negate an essential element of the claim. See *Hannan*, 270 S.W.3d at 7. However, as the court applying *Hannan* cannot consider countervailing evidence, it seems unlikely that the standard could be met in employment cases with similar frequency to the *Celotex* standard because plaintiffs having otherwise valid claims but no evidence to support pretext would survive summary judgment.

²⁶ The *Gossett* court claims that it “does not . . . make obtaining summary judgment ‘needlessly more difficult’ in employment discrimination and retaliation cases.” *Gossett*, 320 S.W.3d at 785. However, the court also recognizes that the decision does make obtaining summary judgment in employment cases more difficult than it would be if Tennessee were to operate under *McDonnell Douglas*. See *Gossett*, 320 S.W.3d at 784-85.

²⁷ Commentators on both sides of this issue have come forth with strong, persuasive arguments. See Brunett, *supra* note 3, at 691-93 (arguing that a broader summary judgment rule works to develop the law and facts of cases and helps to promote settlement); Cornett, *supra* note 11, at 343-44 (arguing that the *Hannan* standard rightfully places the burden on the movant, as the party that wants the lawsuit to come to an early conclusion).

²⁸ See Stephen Daniels & Joanne Martin, *Plaintiffs’ Lawyers: Dealing with the Possible but not Certain*, 60 DEPAUL L. REV. 337, 348-49 (2011) (describing plaintiffs’ attorneys’ valuation of claims as a process of managing and assessing risk).

²⁹ See Edward G. Phillips, ‘Gossett’ Eschews Employers’ Reliance on ‘McDonnell Douglas’ in Summary Judgment, 47-FEB TENN. B.J. 24, 25-26 (Feb. 2011) (“[P]laintiffs’ counsel will become more likely to plead state law causes of action exclusively, foregoing the corresponding federal claim, so as to defeat removal on federal question grounds.”).

court, they have likely used the difference in the standards to lower their settlement value.³⁰ Therefore, the availability of removal can greatly affect the settlement value of a case—especially the closer a case comes to being ripe for summary judgment under the *Celotex* and *McDonnell Douglas* standards.

III. THE NEW STATUTES CHANGING TENNESSEE SUMMARY JUDGMENT LAW

In response to the existing summary judgment law of *Hannan* and *Gossett*, the Tennessee General Assembly, in 2011, enacted Public Chapter No. 498 and Public Chapter No. 461, codified at sections 20-16-101, 4-21-311(e), and 50-1-304(g) of the Tennessee Code Annotated.³¹ Both statutes were designed to change Tennessee summary judgment law to comport with the federal standard.³²

Section 20-16-101 provides that, for claims filed after July 1, 2011, summary judgment is proper where the moving party “[s]ubmits affirmative evidence that negates an essential element of the nonmoving party’s claim” or “[d]emonstrates to the court that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim.”³³ While negating an essential element of a claim would satisfy the *Hannan* standard, the inclusion of language in the statute that allows for summary judgment on the basis of insufficient evidence attempts to legislatively overrule *Hannan*’s rejection of the *Celotex* line of cases.³⁴ Indeed, the language of section 20-16-101 provides for a grant of summary judgment where “the nonmoving party’s evidence is insufficient to establish an essential element of [its] claim.”³⁵ This runs directly counter to *Hannan*’s “at trial” standard; under the statute, a party can successfully move for summary judgment—even where the nonmovant could still prevail at trial—if sufficient evidence has not yet been brought forth to support the nonmovant’s claims.³⁶

³⁰ See *id.* at 25 (providing that upon the ruling in *Gossett*, “employment discrimination and retaliation cases in Tennessee [state courts] just became much more expensive for employers to defend and to settle”).

³¹ 2011 Tenn. Pub. Acts 461; 2011 Tenn. Pub. Acts 498. For a more thorough and detailed account of the legislative history of Tennessee Code Annotated section 20-16-101, see Judy M. Cornett & Matthew R. Lyon, *Redefining Summary Judgment by Statute: The Legislative History of Tennessee Code Annotated Section 20-16-101*, 8 TENN. J. L. & POL’Y 100 (2012).

³² 2011 Tenn. Pub. Acts 498 (“[T]he purpose of this legislation is to overrule the summary judgment standard for parties who do not bear the burden of proof at trial set forth in *Hannan v. Alltel Publishing Co.*, its progeny, and the cases relied on in *Hannan*[.]”); Blumstein, *supra* note 8, at 16, 18 (noting a deleted amendment that stated the purpose of the statutes was to “expressly reject and legislatively overrule” *Gossett*).

³³ TENN. CODE ANN. § 20-16-101 (2012).

³⁴ See *id.*; 2011 Tenn. Pub. Acts 498 (purporting to “overrule the summary judgment standard . . . set forth in *Hannan v. Alltel Publishing Co.*, its progeny, and the cases relied on in *Hannan*”).

³⁵ TENN. CODE ANN. § 20-16-101.

³⁶ See *Hannan v. Alltel Publ’g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008).

Sections 4-21-311(e) and 50-1-304(g), effective as of June 10, 2011, apply a burden-shifting framework to state statutory and common law claims of “intentional discrimination or retaliation.”³⁷ Under the statutes, the plaintiff has “the burden of establishing a prima facie case of intentional discrimination.”³⁸ If the plaintiff pleads a prima facie case, then a “presumption of discrimination or retaliation” arises, and the burden shifts to “the defendant to produce evidence that one . . . or more legitimate, nondiscriminatory reasons existed for the challenged employment action.”³⁹ If the defendant comes forth with the required evidence, then the presumption is rebutted, and “the burden shifts to the plaintiff to demonstrate that the reason given by the defendant was not the true reason for the challenged employment action and that the stated reason was a pretext for illegal discrimination or retaliation.”⁴⁰ Further, the General Assembly provided that this burden-shifting framework “shall apply at all stages of the proceedings, including motions for summary judgment.”⁴¹ For practical purposes, this standard laid out in sections 4-21-311(e) and 50-1-304(g) is the same as in *McDonnell Douglas*.⁴² Insofar as the statutes apply burden shifting at the summary judgment stage, they directly conflict with *Gossett* and reflect an attempt by the General Assembly to abrogate the decision.⁴³

IV. POSSIBLE TREATMENTS OF THE NEW STATUTES AND THE CORRESPONDING EFFECTS ON REMOVAL CONSIDERATIONS

As there have been no Tennessee appellate court decisions construing or applying sections 20-16-101, 4-21-311(e), or 50-1-304(g), the effect of the statutes—both in validity and interpretation—has not yet been determined.⁴⁴ Indeed, as the Tennessee Supreme Court ultimately determines whether the statutes comport with state law, the question as to the statutes’ validity may remain unanswered, at least definitively, for some time yet. However, the Tennessee Supreme Court and Court of Appeals have taken note of the new statutes and a case construing the statutes seems to be nearing.⁴⁵ Accordingly, several

³⁷ TENN. CODE ANN. §§ 4-21-311(e), 50-1-304(g) (2012).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Compare TENN. CODE ANN. §§ 4-21-311(e), 50-1-304(g) (laying out three-phase burden-shifting scheme), with Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (outlining the *McDonnell Douglas* three-phase burden-shifting scheme).

⁴³ See *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777, 782 (Tenn. 2010); see also Blumstein, *supra* note 8, at 18. However, beyond summary judgment, the effect of TENN. CODE ANN. §§ 4-21-311(e) and 50-1-304(g) is minimal. *Gossett* explicitly provided that *McDonnell Douglas* burden-shifting is proper at trial and for purposes of directed verdict. *Gossett*, 320 S.W.3d at 783.

⁴⁴ See Paine, *supra* note 6, at 37 (recognizing a separation of powers issue with the enactment of the new statutes).

⁴⁵ See cases cited *supra* note 7.

possibilities exist as to the ultimate effect the statutes will have, and these possibilities entail different effects on removal considerations for organizational defendants.

A. *Validation of Tenn. Code Ann. §§ 20-16-101, 4-21-311(e), and 50-1-304(g)*

One possible outcome, of course, is that sections 20-16-101, 4-21-311(e), and 50-1-304(g) will be found valid.⁴⁶ The issue then would be how to interpret them. One likely interpretation, and the one most supported by the text of the statutes, is that the statutes run co-extensively with the *Celotex* and *McDonnell Douglas* lines of cases.⁴⁷ To the extent that the *Celotex* and *McDonnell Douglas* standards are applied in Tennessee state courts, the motivation for plaintiffs to guard against removal by filing employment actions based only on common law or state statutes, when federal claims may also be available, merely to gain a more favorable summary judgment standard, will no longer exist.⁴⁸ That is, plaintiffs in employment cases will no longer have to take into account the difference in summary judgment standards when deciding whether to plead in a way to avoid removal. This may increase the number of removable claims brought and thus also increase organizational defendants' need to consider whether removal is beneficial.⁴⁹

Likewise, when an organizational defendant faces a state court lawsuit where removal is possible, the existence of similar, if not identical, summary judgment standards in state and federal courts may significantly alter the removal decision.⁵⁰ The focus of removal considerations then turns to other issues such as the relative costs of litigating in state and federal court, the existence of broader or more narrow geographic areas from which juries are pooled, local sentiment towards the organization, the differences in the Federal Rules of Evidence and the Tennessee Rules of Evidence, the relevant differences in procedural rules and local rules, the size of the dockets, and, perhaps, the possibility of appearing before a seemingly sympathetic judge.⁵¹ Depending on venue and the client's goals and strategies in the litigation, several of these points may weigh against removal even if it is an option.⁵² Thus, from the defendants' standpoint, Tennessee state court becomes more attractive than it would be if still operating under *Hannan* and *Gossett*, and deciding against removal becomes a more viable option.

⁴⁶ To the same ends, the Tennessee Supreme Court could consent to the legislation. *See State v. Mallard*, 40 S.W.3d 473, 480-82 (Tenn. 2001).

⁴⁷ *See Blumstein, supra* note 8, at 16-17; *Paine, supra* note 6, at 37.

⁴⁸ Of course, other considerations may lead plaintiffs to eschew federal claims in the hopes of avoiding removal. *See Reidy, supra* note 5, at 771-97 (outlining factors in determining whether to file in federal or state court).

⁴⁹ *See Phillips, supra* note 29, at 25-26 (arguing that *Gossett* incentivized plaintiffs to plead in ways that avoided removal).

⁵⁰ *See Reidy, supra* note 5, at 784-86.

⁵¹ *See id.* at 771-97.

⁵² *See id.*

B. *Successful Challenges to Tenn. Code Ann. §§ 20-16-101, 4-21-311(e), and 50-1-304(g)*

However, the validity of sections 20-16-101, 4-21-311(e), and 50-1-304(g), at least as a matter of state law, is not firmly established.⁵³ Already, some commentators have noted that the statutes may be susceptible to an attack based on the Tennessee Constitution.⁵⁴ In so far as the legislature changed the procedure of Tennessee courts, the statutes were enacted under an atypical process of rulemaking. The Tennessee Supreme Court, not the General Assembly, typically promulgates rules governing the procedure of Tennessee state courts.⁵⁵ Further, in *State v. Mallard*, the Tennessee Supreme Court held that:

The authority of the General Assembly . . . is not unlimited, and any exercise of [rule enacting] power by the legislature must inevitably yield when it seeks to govern the practice and procedure of the courts. Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state⁵⁶

The court also noted that “the power to control the practice and procedure of the courts is inherent in the judiciary and necessary ‘to engage in the complete performance of the judicial function,’”⁵⁷ and thus, “this power cannot be constitutionally exercised by any other branch of government.”⁵⁸

Sections 20-16-101, 4-21-311(e), and 50-1-304(g) may run afoul of this doctrine.⁵⁹ Section 20-16-101 specifically sets out to change summary judgment law,⁶⁰ a topic governed by the Tennessee Supreme Court and generally thought of as procedural.⁶¹ Likewise, sections 4-21-311(e) and 50-1-304(g) change the law of summary judgment as it relates to

⁵³ Some commentators argue that the *Celotex* and *McDonnell Douglas* standards severely weaken the right to a jury trial under the Seventh Amendment to the United States Constitution, *see, e.g.*, Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 145-50 (2007). However, the Seventh Amendment right to a civil jury trial has not been incorporated into the Fourteenth Amendment so as to apply to the states. *See* *Minn. & S. L. R. Co. v. Bombolis*, 241 U.S. 211, 219 (1916).

⁵⁴ Judy M. Cornett & Matthew R. Lyon, *Contested Elections as Secret Weapon: Legislative Control Over Judicial Decision-Making*, 75 ALB. L. REV. 2091, 2095-98 (2012); Paine, *supra* note 6, at 37.

⁵⁵ *See* TENN. CODE ANN. § 16-3-402 (2012).

⁵⁶ *State v. Mallard*, 40 S.W.3d 473, 480-81 (Tenn. 2001) (citing TENN. CODE ANN. §§ 16-3-401, -02 (1994) and *State v. Reid*, 981 S.W.2d 166, 170 (Tenn. 1998)).

⁵⁷ *Id.* at 481 (quoting *Anderson Cnty. Quarterly Court v. Judges of the 28th Judicial Cir.*, 579 S.W.2d 875, 877 (Tenn. Ct. App. 1978)).

⁵⁸ *Id.* (citing TENN. CONST. art. II, § 2 (“No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.”)).

⁵⁹ For a more thorough and detailed discussion of the constitutionality of the statutes than space herein will allow, *see* Cornett & Lyon, *supra* note 54, at 2098-118.

⁶⁰ *See* TENN. CODE ANN. § 20-16-101.

⁶¹ *See* TENN. CODE ANN. § 16-3-402; TENN. R. CIV. P. 56.

discrimination and retaliation claims.⁶² Therefore, to the extent sections 20-16-101, 4-21-311(e) and 50-1-304(g) encroach upon the Tennessee judiciary's control of court practice and procedure, they may be struck down as violating the Tennessee Constitution on a separation of powers basis.⁶³

If the statutes are struck down, then *Hannab* and *Gossett* would remain the law of summary judgment in Tennessee. Accordingly, the status quo would remain intact. Organizational clients faced with the possibility of removal would likely retain the same decision-making process as they do now: in cases where *Celotex* would possibly provide for a grant of summary judgment, or in employment cases where the client has evidence of a non-discriminatory or non-retaliatory motive, removal would likely have a great impact on the settlement equities of the case in favor of the organizational defendant.⁶⁴ In the absence of countervailing circumstances, the client would probably benefit from removing all possible claims to federal court. However, plaintiffs will likewise benefit from avoiding removal in these cases and will therefore likely draft their complaints accordingly.⁶⁵

C. *Validation of Tenn. Code Ann. §§ 4-21-311(e) and 50-1-304(g) but a Successful Challenge to Tenn. Code Ann. § 20-16-101*

Perhaps the most conceptually interesting and nuanced of the possible results would be the invalidation of section 20-16-101 but not sections 4-21-311(e) and 50-1-304(g).⁶⁶ There is at least some reason to believe that this may occur. The rules set forth in sections 4-21-311(e) and 50-1-304(g), which apply only to employment discrimination and retaliation claims, are much narrower than section 20-16-101, which applies to all instances of summary judgment.⁶⁷ While a narrowly-tailored rule may still “seek[] to govern the practice and procedure of the courts,” the likelihood of a violation of the separation of powers doctrine would seem to decrease the less the rule infringes into the realm of the judiciary.⁶⁸ Also, as a

⁶² TENN. CODE ANN. §§ 4-21-311(e), 50-1-304(g).

⁶³ See Cornett & Lyon, *supra* note 54, at 2116 (arguing that the statutes “clearly exceed[]” the General Assembly’s legislative power).

⁶⁴ See Amy M. Pepke, *Prove It*, 43-JUL TENN. B.J. 12, 14 (July 2007) (noting the favorability of the *Hannan* standard to plaintiffs); Phillips, *supra* note 29, at 25 (arguing that *Gossett* makes “employment discrimination and retaliation cases in Tennessee . . . much more expensive for employers to defend and to settle”).

⁶⁵ See Phillips, *supra* note 29, at 25-26.

⁶⁶ There seems to be no reason to consider the possible invalidation of TENN. CODE ANN. §§ 4-21-311(e) and 50-1-304(g) and the validation or adoption of § 20-16-101. Section 20-16-101, as a statute that applies to all summary judgments, represents a greater intrusion on the power of the judiciary than §§ 4-21-311(e) and 50-1-304(g), which apply only to employment cases. Further, as the decision in *Gossett* was based directly on *Hannan*, adopting § 20-16-101 would, in effect, remove the court’s basis for rejecting the *McDonnell Douglas* standard. See *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777, 783 (Tenn. 2010).

⁶⁷ TENN. CODE ANN. §§ 4-21-311(e), 20-16-101, 50-1-304(g).

⁶⁸ *State v. Mallard*, 40 S.W.3d 473, 480 (Tenn. 2001).

basic principle, the court will “give all legislative enactments a strong presumption of constitutionality,” especially in analyzing this sort of separation of powers issue.⁶⁹

Further, the *Mallard* court expressed a commitment to “considerations of inter-branch comity.”⁷⁰ To that end, the court could also “consent[] to the application of procedural . . . rules promulgated by the legislature.”⁷¹ On these grounds, the court may decide to recognize sections 4-21-311(e) and 50-1-304(g).⁷² Of course, it follows from this that the court may decide not to recognize 20-16-101, especially as it attempts to overrule a more broad legal decision than sections 4-21-311(e) and 50-1-304(g).

If the court strikes down section 20-16-101 and upholds or acquiesces in sections 4-21-311(e) and 50-1-304(g), the retention of the *Hannan* standard and an adoption of a burden-shifting paradigm like *McDonnell Douglas* would result, effectively returning Tennessee summary judgment law to a pre-*Gossett* state.⁷³ To a large extent, however, the practical effect of such a determination is unclear. One possible solution would be to apply *McDonnell Douglas* burden-shifting wholesale by creating a carve-out in Tennessee summary judgment jurisprudence for employment discrimination and retaliation cases. As the court recognized in *Gossett* that *McDonnell Douglas* burden-shifting is incompatible with the *Hannan* standard,⁷⁴ a carve-out seems to be the only way to preserve the *Hannan* standard intact—albeit on a somewhat limited basis—while still applying the burden-shifting of sections 4-21-311(e) and 50-1-304(g).⁷⁵

Alternatively, the ultimate solution may be for the court to employ a narrow reading of sections 4-21-311(e) and 50-1-304(g). The *Mallard* court employed such a tactic, applying a construction of a statute narrowly enough that it would not violate the Tennessee Constitution.⁷⁶ However, the court noted that this interpretive process has as its boundaries the ways in which “a statute can legitimately be construed.”⁷⁷ As sections 4-21-311(e) and 50-1-304(g) purport to directly change the law of summary judgment in clear terms, however, it seems that any such reasonable construction applying the burden-shifting laid

⁶⁹ *Id.* at 483.

⁷⁰ *Id.* at 482.

⁷¹ *Id.* at 481.

⁷² For a discussion of the political considerations that the court may make in deciding whether to acquiesce in the statutes, see Cornett & Lyon, *supra* note 54, at 2118-22.

⁷³ See TENN. CODE ANN. §§ 4-21-311(e), 50-1-304(g) (limiting their scope to discrimination and retaliation claims).

⁷⁴ *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777, 785 (Tenn. 2010).

⁷⁵ See *id.* at 782 (holding that *McDonnell Douglas*-type burden-shifting is incompatible with *Hannan*).

⁷⁶ *Mallard*, 40 S.W.3d at 483.

⁷⁷ *Id.* at 480 (citing *Marion Cnty. Bd. of Comm’rs v. Marion Cnty. Election Comm’n* 594 S.W.2d 681, 684-85 (Tenn. 1980)).

out in the statute must also apply to summary judgment.⁷⁸ Ultimately, the court will have to determine exactly what solution to this problem to employ.⁷⁹

If the court strikes down section 20-16-101 but upholds or acquiesces in sections 4-21-311(e) and 50-1-304(g), at least one clear conclusion, in terms of removal considerations, emerges in any scenario: for organizational defendants in non-employment cases, federal court would still hold the more favorable summary judgment standard.⁸⁰ That is, organizational defendants faced with removable lawsuits not concerning discrimination or retaliation would be able to access the more favorable *Celotex* standard by removing to federal court.⁸¹ While other considerations as to removal certainly exist,⁸² this places a large thumb on the scale in favor of removing, especially when considering the effect that a successful summary judgment motion could have on the settlement value of a case.

However, the specific effect on removal considerations in employment discrimination or retaliation cases is hard to discern and depends in large part on the exact standard the court applies. In the case of a carve-out for employment cases, where *McDonnell Douglas* would apply to discrimination and retaliation claims but *Hannan* would apply to all other claims, organizational defendants would not gain access to a more beneficial summary judgment standard by removing employment discrimination or retaliation claims because the standards would be substantially similar in state and federal court.⁸³ However, if discrimination or retaliation claims were joined with other claims that do not fall under *McDonnell Douglas*, then removal would allow organizational defendants to avoid the *Hannan* standard on the non-employment claims.⁸⁴ The consideration would then become one of calculating the relative values of the discrimination and retaliation claims and the non-*McDonnell Douglas* claims and balancing them against the costs of removal.⁸⁵ If there is no carve-out and the Tennessee Supreme Court adopts narrow readings of sections 4-21-311(e) and 50-1-304(g), the effects on removal considerations appear murky and would

⁷⁸ See TENN. CODE ANN. §§ 4-21-311(e), 50-1-304(g). If the statutes could be limited so as not to apply to summary judgment, this would not change the *Gossett* ruling. See *Gossett*, 320 S.W.3d at 783 (stating that *McDonnell Douglas* shifting still properly applies to trial).

⁷⁹ See Paine, *supra* note 6, at 37 (noting that “it will take a Tennessee Supreme Court opinion to resolve the issue”).

⁸⁰ See Pepke, *supra* note 64, at 14 (contrasting *Celotex* with *Hannan*).

⁸¹ See *Booth Family Trust v. Jefferies*, 640 F.3d 134, 140 (6th Cir. 2011) (holding that federal law applies to summary judgment in federal court under vertical choice of law principles).

⁸² See Reidy, *supra* note 5, at 771-97 (outlining factors in determining whether state court or federal court would be more favorable).

⁸³ See sources cited *supra* note 42 and accompanying text.

⁸⁴ See *Booth Family Trust*, 640 F.3d at 140 (holding that the federal summary judgment standard applies to claims based on diversity jurisdiction).

⁸⁵ Reidy, *supra* note 5, at 771-97 (outlining factors in determining whether state court or federal court would be more favorable).

largely depend on the exact reading given. However, as any possible narrow reading would weaken the burden-shifting structure of *McDonnell Douglas*—and it is hard to suppose that such a reading would not weaken the standard—organizational defendants of discrimination or retaliation claims would still gain favorable treatment by removing wherever possible. Further, given the uncertainty of the state of the law and the limited window for removal,⁸⁶ prudent organizational clients would likely begin the process for removal now—if removal is available—and wait for a non-removable test case to settle these issues.

V. CONCLUSION

The Tennessee Supreme Court must ultimately sort out the complexities of a constitutional challenge to sections 20-16-101, 4-21-311(e), and 50-1-304(g) under the separation of powers doctrine. The statutes are good news for organizational defendants, as they would establish a considerably more favorable summary judgment standard generally—and especially in employment discrimination and retaliation cases.⁸⁷ If the statutes are upheld or consented to by the Tennessee Supreme Court, then removal would be less attractive for organizational defendants than under the *Hannan* and *Gossett* standards.⁸⁸ Further, as the statutes provide standards substantially similar to the corresponding federal standards, a major incentive for plaintiffs to avoid pleading federal claims would evaporate.⁸⁹ However, a substantial chance exists that sections 20-16-101, 4-21-311(e), and 50-1-304(g) will be held unconstitutional, in which case the status quo would remain.⁹⁰ Also, if a middle ground is found, either by upholding only sections 4-21-311(e) and 50-1-304(g) or by giving the statutes a narrow construction, the effects on removal considerations will be complex and situation specific.⁹¹ Due to the risks of invalidation of the statutes, organizational defendants that would be inclined to remove a state court case if *Hannan* and *Gossett* were to apply ought to do so—at least until the Tennessee Supreme Court resolves this issue and a full explication of the prevailing standard can be given.

⁸⁶ See 28 U.S.C. § 1446(b) (2006) (generally setting a thirty-day time limit on filing for removal after being served with initial pleading).

⁸⁷ See *supra* notes 46-49 and accompanying text.

⁸⁸ See *supra* Part IV-A.

⁸⁹ See Phillips, *supra* note 29, at 25-26.

⁹⁰ See *supra* Part IV-B.

⁹¹ For a discussion of some possible corresponding effects on removal considerations, see *supra* Part IV-C.