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Is Summary Judgment the Right Move for Your Case? The answer probably depends upon where your case is pending.

by James N.L. Humphreys



In Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), the United States Supreme Court said that the rules of procedure "as a whole" were supposed "to secure the just, speedy and inexpensive determination of every action." In order for this to be true, the rules provide a mechanism for bringing certain cases to a conclusion without the necessity of a trial. The mechanism is a motion for summary judgment.

Because of significant differences both in the text and application of the rules, a case for which summary judgment is proper in one jurisdiction may not be a proper case for summary judgment in another jurisdiction. Knowledge of these important differences is necessary in order to assess whether such a motion is a good idea.

Summary judgment is a procedure only for resolving questions of law. Summary judgment is not a procedure by which the court decides which set of disputed facts it believes. Summary judgment is a procedure by which any of the above courts takes a given record and first determines whether material

facts are genuinely in dispute. If material facts are genuinely in dispute, the case is not a case in which summary judgment is proper.

If material facts are not genuinely in dispute, then the case could be a good case for summary judgment because the answer to a question of law may determine the outcome of the case without the need for a trial. For the client who seeks summary judgment, this is desirable for a couple of reasons. First, the case comes to a conclusion sooner. Second, the record the court considers at the summary judgment stage is fixed since it is in writing. Therefore, a party does not face the risk that—during a trial—something unexpected will become a part of the record and perhaps change the outcome.

The big issues in determining whether a case is a good one for summary judgment are the following:

- 1. The record that the rules allow the court to consider in deciding a motion for summary judgment.
2. The burden placed upon the parties in supporting or opposing a motion for summary judgment.

The rules with regard to the record and the burdens are different in federal court, Tennessee state court, and Virginia state court. Therefore, a good case for summary judgment in federal court may not be a good case for summary judgment in one of the state courts.

In both federal court and the courts of Tennessee, a party can support a motion for summary judgment with the same type of record, namely ". . . pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any . . ." Fed. R. Civ. P. 56(c); Tenn. R. Civ. P. 56.04. Under these rules, a party can basically support a motion for summary judgment with any written testimony under oath.

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Summary Judgment, *cont'd* by James N.L. Humphreys

In Virginia, the rules are more restrictive about the record that the court may consider in deciding the motion. In making a decision on a motion for summary judgment, Virginia Supreme Court Rule 3:20 allows the court to consider a record which consists of “the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings . . .” Rule 3:20 goes on to exclude certain items from the summary judgment record, namely “[n]o motion for summary judgment . . . shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the action shall agree that such depositions may be so used.” By implication, a Virginia court may not consider affidavits. Whether a Virginia court may base summary judgment against a party while relying upon that party’s interrogatory answers is uncertain. The outcome of this depends upon whether a party’s interrogatory answers are “admissions.” In *Andrews v. Ring*, 585 S.E.2d 780, 783 n.2, 788 (Va. 2003), the Virginia Supreme Court arguably determined that interrogatory answers are not “admissions” for the purposes of a motion for summary judgment.

Solely based upon the record which is permissible for the court to consider, the opportunities for filing successful motions for summary judgment are more plentiful in federal court and in the courts of Tennessee. In ruling on motions for summary judgment, the applicable rules authorize the federal courts and the courts of Tennessee to consider more material than the courts of Virginia. The occasions are rare in which summary judgment is available in the courts of Virginia. In Virginia, the opportunities a party has for filing a successful motion for summary judgment are generally in cases where the transactions took place in writing and the parties agree that the writings are authentic, or in the rare cases where all counsel agree to let the court consider depositions, affidavits, and interrogatory answers.

Even though the rules governing summary judgment are similar in federal court and the courts of Tennessee, the application of these rules is significantly different, the difference primarily lying in the burden on the party who files the motion.

If a party files a motion for summary judgment in federal court, the party can demonstrate that summary judgment is appropriate by showing that the record evidence is insufficient to establish the opposing party’s claim. In other words, if the opposing party has the burden of producing sufficient evidence, and the motion for summary judgment reveals that the record (depositions, interrogatory answers, admissions, and affidavits) does not contain sufficient evidence, then the court should grant the motion for summary judgment unless the opposing party can come forward with additional evidence (written testimony under oath) which demonstrates that sufficient evidence does exist. In federal court, a party is entitled to summary judgment by showing the court that evidence to support the opposing party’s claim is simply absent. *Celotex Corp. v. Catrett*, 477 U.S. at 312, 325.

For example, in a slip and fall case under Tennessee law, a customer who sues a business must present sufficient evidence that the business had actual or constructive notice of a hazardous condition in order to prevail against the business. In federal court, a business has a reasonable chance

of success on a motion for summary judgment in such a case if the business can demonstrate that the customer has failed to produce sufficient evidence in the record that the business had actual or constructive notice of the hazardous condition.

In the courts of Tennessee, the party who files a motion for summary judgment faces a heavier initial burden than does the party in federal court. In the courts of Tennessee, the party who moves for summary judgment cannot just point out the insufficiency of the record evidence. The moving party must “affirmatively negate an essential element of the non-moving party’s claim or conclusively establish an affirmative defense.” *Blair v. West Town Mall*, 130 S.W.3d 761, 767 (Tenn. 2004). This is precisely the interpretation of Fed. R. Civ. P. 56 that the United States Supreme Court rejected in *Celotex Corp. v. Catrett*, 477 U.S. at 323. Despite similar wording, the authoritative interpretations of Fed. R. Civ. P. 56 and Tenn. R. Civ. P. 56 are different.

The practical effect of this different interpretation upon a party who moves for summary judgment in the courts of Tennessee is that a moving party cannot simply point out the insufficiency of the record evidence. The moving party must go a step further by presenting record evidence that contradicts an element of the opposing party’s claim. Using the slip and fall example in a Tennessee court, the business must first come forward with record evidence that the business did not have notice of the hazardous condition. Therefore, the business must present written testimony under oath that the business was unaware of the hazardous condition until after the accident, or that the business had checked the accident scene just before the accident and the condition that caused the accident was absent. Under the applicable Tennessee rules, the customer only has an obligation to come forward with contradictory evidence after the business has presented this type of evidence initially. In the absence of such a showing by the business, the customer does not have to come forward with any evidence and summary judgment is not proper.

In conclusion, even though a case may be susceptible to resolution solely by determining the answer to a question of law, whether summary judgment is the vehicle for attempting to get the court to make this determination probably depends upon the court in which the case is pending. The case is most susceptible to a successful motion for summary judgment in federal court. It is least susceptible to a successful motion for summary judgment in the courts of Virginia. If the case is in the courts of Tennessee, the chances are somewhere in between.

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It's (Not) Just Like Buying Inventory (Successor Liability in Asset Purchases)

by Scott T. Powers

Of the three primary business acquisition forms (stock purchase, statutory merger and asset purchase), an asset purchase typically lists as one of its advantages the capacity to avoid the debts and liabilities of the selling company unless specifically assumed by the buyer as part of the acquisition. Although generally true in most situations, successor liability, or the degree to which the purchaser will be responsible for the obligations and liabilities of the seller, may still flow to the purchaser, even if the business was bought in an asset purchase.

In most instances, a company that another company in an asset purchase will not be responsible for the debts and obligations of the seller. However, in circumstances where the purchaser fits the characteristics attributable to a "successor in interest," the courts have determined that the purchaser may be liable for the obligations of the seller, even though the transaction took the form of an asset purchase. Although determined based on all the facts and circumstances attributable to the acquisition, courts have considered the following attributes in establishing successor liability in asset purchases:

1. **Substantial Continuity of the Business** - the degree to which the purchaser resembles the seller in name, location, products, employees, managers, directors and shareholders.
2. **"Acquisition-Proof" Claims** – survive the closing of the asset purchase by federal and/or state law and may include:
 - a. **Environmental Liability** - resulting from federal laws such as CERCLA or Superfund resulting in responsibility for clean-up being shared between purchaser and seller regardless of fault.

- b. **Products Liability** – referred to as the "product line theory," purchaser may be bound by strict liability for injuries caused by pre-closing products – courts differ state-by-state on application of this standard.
 - c. **Employment/Labor Issues** – applies to certain collective bargaining responsibilities, unfair labor practices and discrimination remedies; liability attaches based on continuity of business, majority of employees hired from predecessor or knowledge of purchaser regarding the issue in question.
3. **Ability of Seller to Provide Relief** – based on principles of equity when successor is in a better position to deal with continued liability and is obligated to assume the responsibility along with the continued benefit of operating the business.

As in all business acquisitions, there is no substitute for thorough due diligence as part of the acquisition process, as well as a carefully drafted Asset Purchase Agreement. Purchasers must rely on the representations, warranties and indemnities built into the acquisition documents to provide protection post closing. Price adjustments, purchase price holdback provisions, and personal guarantees from the seller's owners also may be necessary to provide additional protection from post closing liabilities. In the end, knowledge of the seller's business, liabilities and obligations along with the negotiation of proper contingencies prior to closing is the best way to defend against successor liability in an asset purchase.

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Thank you for visiting our website to register for our employment law seminar. In order to serve our clients we have changed the format.

10 Things Every Employer Needs to Know Moving into the New Era of Immigration Enforcement

Thursday, September 21, 2006

Presenters Julie P. Bennett, Laura A. Steel and Senitria A. Goodman

Luncheon

11:30a.m. to 1:00 p.m.

Millennium Centre, Johnson City

\$20.00 per person

Fall-Out From the 2004 Tennessee Workers' Compensation Act

Thursday, November 16, 2006

Presenters Michael L. Forrester, Gregory K. Haden and Leslie T. Ridings

Luncheon

11:30 to 1:00 p.m.

Meadowview Conference Center, Kingsport

\$20.00

Burlington Northern & Santa Fe Railway Co. v. White

If you have heard the whispers, or groans, about "Burlington," but you are wondering why it is on everyone's lips, watch for the next edition of *All Things Legal*. The U.S. Supreme Court, in a decision handed down in June, removed the requirement from retaliation claims that an employee must show s/he suffered an adverse employment action. In its place was substituted a more expansive requirement, where an employee only needs to show that the alleged retaliatory actions "would have been materially adverse to a reasonable employee or applicant."

We will discuss the details of *Burlington Northern & Santa Fe Railway Co. v. White*, and its anticipated impact on employers when dealing in situations that are ripe for a retaliation claim.

Space is limited. Please visit our website www.hsdlaw.com to register or call Melissa Sizemore at 423-378-8860.

Wimberley named to "40 Under Forty" list for 2006



Matthew H. Wimberley, a member of the Hunter, Smith & Davis Corporate/Business practice group has been named to the Tri-Cities Business Journal's "40 Under Forty" list for 2006.

Mr. Wimberley graduated cum laude from David Lipscomb University in 1999 where he received his B.S. in

Accounting. In 2002, he attained his J.D degree from the University of Tennessee. He has been an associate with Hunter, Smith & Davis for four years. He is a member of the Firm's Corporate/Business Practice Group and a former member of the Firm's Litigation Practice Group. He is in his second year as editor of the Firm's award winning quarterly newsletter "All Things Legal".

Matt is admitted to practice before the Tennessee Supreme Court, the Virginia Supreme Court, the United States District Courts for the Eastern District of Tennessee and the Western District of Virginia, and the United States Bankruptcy Court for the Eastern District of Tennessee and the Western District of Virginia.

He serves on the Board of Directors of the Second Harvest Food Bank of Northeast Tennessee and on the Food Bank's Finance Committee. He is the editor of the Kingsport Bar Association newsletter and a member of the Tennessee Bar Association and the Kingsport Bar Association. He also holds the rank of Eagle Scout from the Boy Scouts of America.

Matt and his wife Cecile, who is also an attorney, reside in Kingsport.

Editor's note: Matt Wimberley may be reached by phone at (423) 378-8824 or by e-mail at mwimberley@hsdlaw.com

Chad W. Whitfield Returns to Estate Planning



The law firm of Hunter, Smith and Davis, LLP is pleased to announce that Chad Whitfield has returned to the Estate Planning practice at Hunter, Smith & Davis, LLP where he will concentrate on estate planning and estate succession and administration. He was previously with Hunter, Smith &

Davis from 2000 to 2005 and returns to practice law after working in the financial services and wealth management field. Mr. Whitfield received his B.A from East Tennessee State University in 1993 and his law degree from St. Thomas University in 1996. He is licensed to practice law in Tennessee and Florida. He is also admitted to practice before the United States Tax Court.

He is a member and past President and Board member of the Tri-Cities Estate Planning Council and is a member of the American, Tennessee, Johnson City and Kingsport Bar Associations. Mr. Whitfield will work in the firm's offices in both Johnson City and Kingsport. He and his wife, Lisa, have 3 children and reside in Johnson City, Tennessee.

Editor's note: Chad W. Whitfield may be reached by phone at (423) 283-6308 or by e-mail at cw Whitfield@hsdlaw.com

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Hunter, Smith & Davis, LLP funds Educational Scholarships

Hunter, Smith & Davis, LLP, the largest law firm headquartered in Northeast Tennessee, announced earlier this summer that it has committed to fund \$50,000 in educational scholarships over the next 10 years. These scholarships will be awarded to students graduating from Tri-Cities area high schools as well as students attending area colleges and universities. These scholarships will be awarded on a year by year basis and may be funded through an endowment, foundation or other similar commitment program to be established by Hunter, Smith & Davis.

Hunter, Smith & Davis announces this scholarship program in recognition of its 90th anniversary. Hunter, Smith & Davis was formed in 1916 under the name Morison, Penn & Kelly. The firm's founders worked closely with John B. Dennis, J. Fred Johnson and George L. Carter in acquiring the land and property rights necessary to facilitate railroad and industrial development in the Northeast Tennessee/Southwest Virginia region. In 1917, the firm assisted in chartering and incorporating the City of Kingsport. Today, the firm has offices in Johnson City and Kingsport.

In announcing the scholarship program, Bill Argabrite, the managing partner of Hunter, Smith & Davis, commented: "Since the firm's formation, we have been privileged to work with local and regional businesses and industries. Today, over one-half of our staff of 55 persons graduated from Tri-Cities area high schools. In order to celebrate our 90th anniversary, we are undertaking this 10 year scholarship program as a way to support the continued growth and progress of the Tri-Cities region and, hopefully, do our part to foster an educational and business environment which will provide attractive career opportunities for future generations."