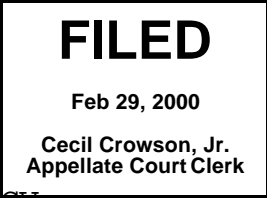


IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE



OLYMPIA CHILD DEVELOPMENT ) E1999-02448-COA-R3-CV  
CENTER, INC., )  
 )  
Appellant, )  
 )  
 )  
v. ) APPEAL AS OF RIGHT FROM THE  
 ) BLOUNT COUNTY CIRCUIT COURT  
 )  
 )  
 )  
RODNEY PARTON, )  
 )  
Appellee. ) HONORABLE W. DALE YOUNG,  
 ) JUDGE

CONCURRING OPINION

I concur completely in the majority opinion. I write separately to express my belief that Parton's *oral* motion for summary judgment, made on the day of trial, and the trial court's willingness to consider a motion in this form at the "eleventh hour," together constitute a procedure that is contrary to the letter and spirit of Rule 56, Tenn.R.Civ.P.

Prior to the day of trial, the court below considered and denied Parton's written motion for summary judgment. This motion complied with the provisions of Rule 56, which clearly contemplates the filing of a *written*, rather than an oral, motion

for summary judgment. The rule also contemplates the filing of written material in support of that motion. See, e.g., Rules 56.03 and 56.04, Tenn.R.Civ.P. Finally, as pertinent here, Rule 56 contemplates a before-the-day-of-trial filing. See Rule 56.04 ("The motion shall be served at least thirty (30) days before the time fixed for the hearing.")

In the instant case, the only written motion for summary judgment filed prior to trial had been disposed of by the trial court before the day of trial, *i.e.*, it had been denied unconditionally. When the parties went to court on the day of trial, they were there for precisely that -- a trial. In my judgment, the trial court should not have considered Parton's oral motion for summary judgment made on the day of trial. It was not in proper form and came too late. The time for a disposition "on the papers" had passed. It was time for trial. Furthermore, if the trial court's granting of Parton's motion *in limine* to exclude evidence resulted in the plaintiff's inability to prove all or any portion of its case, this is a matter that could have been addressed at the conclusion of the plaintiff's proof.

Lest there be any doubt about the basis of my concurrence, it should not be read as a blanket disapproval of a trial court's consideration of a summary judgment motion on the day of trial. There are many instances where this is an entirely

appropriate procedure. For example, there is nothing inherently wrong with a trial court's decision to defer its judgment on a pending motion for summary judgment until the day of trial. However, I do not believe it is appropriate to address summary judgment on the day of trial where the trial court has previously denied a motion for such relief unconditionally and a new written motion has not been timely filed and properly supported.

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Charles D. Susano, Jr., J.