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December 10, 2003

VIA HAND DELIVERY

Deborah Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37219

Re: Petition of Chattanooga Gas Company, Nashville Gas Company, a division of Piedmont Natural Gas Company, Inc. and Atmos Energy Corporation for a Declaratory Ruling regarding the Collectibility of the Gas Cost Portion of Uncollectable Accounts under the Purchase Gas Adjustment ("PGA") Rules
Docket No. 03-00209

Dear Chairman Tate:

Enclosed you will find a copy of Seals vs. Tri-State Defender, Inc., 1999 WL 628074, which was cited on page 3 of Petitioners' Response in Opposition to Motion for Summary Judgment of the Consumer Advocate Division. In a footnote we had indicated that we had attached all unpublished cases, however although this case is published electronically with Westlaw, it may not be available in hardbound reporters. The case was inadverterly left out of our filing. We have also enclosed a copy of the section Banks, Entman on Tennessee Civil Procedure which was cited on page 4 on our brief.

Sincerely,

D. Billye Sanders

D. Billye Sanders
Attorney for Chattanooga Gas Company

DBS/hmd
Enclosures

979825.1

cc: Shilina Chatterjee, Esq.
Archie Hickerson
Bill Morris
James Jeffries, Esq.
Patricia Childers
Joe A. Conner, Esq.

***628074** Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Judy F. SEALS, Plaintiff-Appellant,
v.
TRI-STATE DEFENDER, INC.; Sengstacke Enterprises, Inc.,
Frederick Sengstacke, Audrey P. McGhee, and Chicago Daily Defender, a division of Sengstacke Enterprises, Inc.,
Defendants-Appellees.
No. 02A01-9806-CH-00172.
Aug. 16, 1999.

FROM THE SHELBY COUNTY CHANCERY COURT THE HONORABLE C. NEAL SMALL, CHANCELLOR

Gregory D. Cotton of Memphis for Plaintiff-Appellant

Bruce C. Harris of Memphis for Appellees

W. Frank CRAWFORD, Presiding Judge, W.S.

****1** Plaintiff-Appellant, Judy F. Seals, appeals the order of the trial court granting summary judgment to Defendants-Appellees, Tri-State Defender, Inc., et al.

Seals's complaint filed in June 1996 alleges that she is employed by Tri-State Defender, Inc., a weekly newspaper publication, and has been employed by the newspaper for approximately twenty years. As part of her employment compensation, the newspaper provided her with health insurance through its parent company, Sengstacke Enterprises, Inc. Seals was covered under the health insurance plan until the parent company failed to make payments thereby allowing the policy to lapse in or around June 1994.

After the policy lapsed, Seals, unaware that she was not covered by health insurance, incurred several medical bills. After she became aware that she was not covered, Seals notified her employer of the problem and was told that they would take care of her medical bills. Seals's employer subsequently contacted Seals's medical providers requesting monthly payment schedules in order to pay her outstanding medical bills. However, before all of her outstanding medical bills were paid by her employer, suit was brought against Seals by some of her medical providers.

The complaint names as defendants Tri-State Defender, Inc. and its parent company, Sengstacke Enterprises, Inc., Frederick Sengstacke, president of Sengstacke Enterprises, Inc., Audrey P. McGhee, general manager of Tri-State Defender, Inc., and Chicago Daily Defender, a division of Sengstacke Enterprises, Inc. The complaint avers that the defendants had paid a portion of her outstanding medical bills, but approximately $32,000.00 of medical bills remain unpaid. The complaint alleges that the defendants were guilty of breach of contract, negligent misrepresentation, and fraudulent misrepresentation (FN1) and seeks compensatory and punitive damages.

Defendants' answers admit that plaintiff should have had medical insurance and admit the allegation that she was told her bills would be paid. The complaint denies the allegations of wrong-doing and joins issue thereon. The answers make no separate defenses for various named defendants, although the answer of Frederick Sengstacke, Sengstacke Enterprises, Inc., and Chicago Daily Defender avers that the complaint fails to state a claim against them upon which relief can be granted.

After the complaint was filed, the parent company paid all of Seals's outstanding medical bills and also provided insurance coverage for her. The defendants then filed a motion for summary judgment wherein they averred, *inter alia*, that Seals is only entitled to damages available for breach of contract since her damages arose out of the defendants' failure to perform their contractual obligations, that Seals failed to state a claim for which relief can be granted as it relates to extra-contractual damages including punitive damages, and that the claim of misrepresentation or promise without intent to perform is not legally sufficient to support a claim of damages. Seals's response to the defendants' motion for summary judgment avers that "there does exist a genuine issue of material fact."

****2** After a hearing, the trial court, on May 27, 1998, entered an order granting the defendants' motion for summary judgment. The trial court found that in order for Seals to recover, she had to meet the following three-tiered test: (1) defendants must have a duty to plaintiff; (2) defendants must have breached their duty to plaintiff; and (3) plaintiff must have suffered damages. While determining that the plaintiff had met the first two tiers of the test, the trial

court found that the plaintiff had not suffered any damages since the defendants had paid her medical bills and provided her with health insurance coverage. The court granted defendants' motion for summary judgment.

Seals has appealed and presents the following issues for review as stated in her brief:

> I. Whether the Chancery Court erred in granting the Appellees' motion for summary judgment on the basis that the Appellant had suffered no damages, when the Chancery Court considered solely the Appellant's contract claims and did not consider the evidence of damages under the Appellant's claims for fraud and negligent misrepresentation.
>
> II. Whether the Chancery Court erred in granting the Appellees' motion for summary judgment on the basis that the Appellant had suffered no damages, when the Appellant made a claim for punitive damages with respect to her counts for fraud and negligent misrepresentation and the record contained evidence supporting an award of punitive damages.

After reviewing the record in this case, we perceive that the only real issue for review is whether this case should be remanded to the trial court for further proceedings. Admittedly, defendants filed the affidavit of Audrey McGhee stating that all medical bills have been paid, but the affidavit further stated that there are no outstanding medical bills "to my best knowledge and ability." Thus, it appears that the affidavit is not made on personal knowledge. Plaintiff filed no counter-affidavit to this affidavit.

In her complaint, plaintiff attempted to include claims for fraudulent misrepresentation and negligent misrepresentation. Defendants included in the motion for summary judgment a prayer for dismissal of these claims on the ground that they failed to state a claim upon which relief can be granted. Apparently, defendants made no other attempt to argue or obtain a ruling from the court on this ground. Until such a ruling is obtained, we have a complaint alleging more than one cause of action against defendant, and obviously the court has ruled only on one claim. This is not a final judgment appealable as of right.

This case illustrates the necessity for following the rules of procedure. Tenn. R. Civ. P. 56.03 provides:

> 56.03. Specifying Material Facts.--In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure shall be accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be supported by a specific citation to the record.
>
> ****3.** Any party opposing the motion for summary judgment must respond to each fact set forth by the movant either (i) agreeing that the fact is undisputed; (ii) agreeing that the fact is undisputed for purposes of ruling on the motion for summary judgment only; or (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by specific citation to the record. Such response shall be filed with the papers in opposition to the motion for summary judgment.
>
> In addition, the non-movant's response may contain a concise statement of any additional facts that the non-movant contends are material and as to which the non-movant contends there exists a genuine issue to be tried. Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute.
>
> If the non-moving party has asserted additional facts, the moving party shall be allowed to respond to these additional facts by filing a reply statement in the same manner and form as specified above.

There has been no compliance by defendants with this rule.

Tenn. R. Civ. P. 56.04 specifically provides: " *Subject to the moving party's compliance with Rule 56.03*, judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." (Emphasis added). The moving party (defendants herein) failed to comply with Rule 56.03, and therefore, the trial court erred in granting summary judgment.

The order of the trial court granting summary judgment is vacated, and this case is remanded to the

trial court for such further proceedings in compliance with the rules of procedure as necessary. Costs of appeal are assessed one-half to plaintiff and one-half to defendant.

HIGHERS and FARMER, JJ., concur.

(FN1.) Seals filed a motion for leave to file an amended complaint in which she further alleged that the defendants violated the Tennessee Consumer Protection Act, T.C.A. § 47-18-101 *et seq.* The trial court denied the motion, and Seals does not present an issue concerning this denial.

disputed fact must be supported by specific citation to the record. Such response shall be filed with the papers in opposition to the motion for summary judgment.

In addition, the non-movant's response may contain a concise statement of any additional facts that the non-movant contends are material and as to which the non-movant contends there exists a genuine issue to be tried. Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute.

If the non-moving party has asserted additional facts, the moving party shall be allowed to respond to these additional facts by filing a reply statement in the same manner and form as specified above.

Advisory Commission Comment to Rule 56.03 (1997). *New Rule 56.03 tracks the language of a local federal rule of the Middle District of Tennessee. The Commission believes it will not only assist the Court in focusing on the crucial portions of the record, but it will cause lawyers to ascertain whether there is "a genuine issue as to any material fact."*

§ 9-4(i). Summary Judgment — Specifying Material Facts — Discussion of Rule 56.03.

Rule 56.03, adopted in 1997, adds a requirement that the movant for summary judgment submit with the motion a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact must be set forth in a separate, numbered paragraph and supported by a specific citation to the record. This requirement is in addition to the provision in Rule 7.02(1) that motions "state with particularity the grounds therefor."[269] With respect to the non-movant, Rule 56.03 requires a specific response to each fact set forth by the movant with citations to the record for each disputed fact.[270] If the non-movant wishes to assert additional material facts in dispute, he must follow the same format required of the movant.

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269. *See* Nichols v. Atnip, 844 S.W.2d 655, 658 (Tenn App. M.S. 1992) (noting movants' failure to comply with Rule 7.02(1)). While admitting that it is "somewhat of a technicality," the court of appeals has stated that "it is essential to the consideration of a motion for summary judgment that the motion recite that there is no genuine issue of fact." Union Planters Corp. v. Peat, Marwick, Mitchell & Co., 733 S.W 2d 509, 515 (Tenn. App. W.S. 1987). *See also* Keasler v. Estate of Keasler, 973 S.W.2d 213, 216 (Tenn. App. W.S. 1997) (absence of "magic language" corrected by filing of amended motion for summary judgment after conclusion of hearing on the motion)

270. *See* TENN R. CIV. P. 56.06 ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

Rules similar to Rule 56.03 have been in effect for a number of years in local rules of federal district courts[271] and in state rules of procedure.[272] The primary purpose of such rules is to assist the court[273] and, accordingly, the rule may be strictly applied.[274]

Unlike some other versions of the rule, Tennessee Rule 56.03 does not specify the consequence of failure to comply. Rule 56.04, however, provides that summary judgment shall be rendered "[s]ubject to the moving party's compliance with Rule 56.03." Thus, a court presumably should refuse to grant or even consider a motion for summary judgment if the moving party has not complied with Rule 56.03.

With respect to the non-moving party's duties under rules like Rule 56.03, courts generally hold that non-compliance in and of itself is not a basis for granting summary judgment.[275] Non-compliance, however, may result in the court refusing to consider the party's factual contentions. A non-moving party's failure to file the separate statement of additional facts alleged to be undisputed may mean that those facts will not be considered, even if the facts may be found

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271. *See, e g*, Midwest Imports, Ltd v Coval, 71 F 3d 1311, 1313 (7th Cir 1995) (discussing Northern District of Illinois Local Rule 12(M)), Waldridge v American Hoechst Corp., 24 F.3d 918, 921 (7th Cir. 1994) (applying Southern District of Indiana's Rule 56 1 and citing Local Rule 11, Northern District of Indiana, Local Rule 6 05, Eastern District of Wisconsin, "Rule on Procedure to be Followed on Motions for Summary Judgment," Western District of Wisconsin, Local Civil Rule 2 9, Central District of Illinois, Local Rule 5, Southern District of Illinois), Dunlap v Transamerica Occidental Life Ins. Co., 858 F 2d 629, 630-31 (11th Cir 1988) (discussing Local Rule 220-5 of the Northern District of Georgia); American Standard, Inc v Crane Co , 510 F 2d 1043, 1056 (2d Cir. 1974), *cert denied*, 421 U S 1000 (1975) (applying Rule 9(g) of the General Rules of United States District Courts for the Southern and Eastern Districts of New York), Hall v. Doering, 997 F Supp. 1464, 1467-68 (D Kan 1998) (applying D Kan Rule 56 1 to *pro se* party)

272. *See* CAL. CIV PROC CODE § 437c(b), IOWA R CIV. P 237(h)); ME R CIV. P 7(d)(2). *See generally* Sinclair & Hanes, *Summary Judgment A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV 1633, 1703-04 (1995)

273. *See* TENN R. CIV P 56 03, advisory commission comment (1997).

274. *See* Midwest Imports, Ltd. v Coval, 71 F.3d 1311, 1316 (7th Cir 1995) ("We have consistently and repeatedly required strict compliance with rule 12(N) . the district court's significant interest in maintaining the integrity of its calendar and in streamlining its caseloads justifies this strict position "), Waldridge v. American Hoechst Corp., 24 F 3d 918, 923-24 (7th Cir. 1994) (district court did not abuse discretion in invoking the rule *sua sponte*).

275. *See* Henry v. Gill Indus., Inc , 983 F.2d 943, 949-50 (9th Cir 1993) (Local rule that requires entry of summary judgment simply if no papers opposing motion are filed or served, and without regard to whether genuine issues of material fact exist, would be inconsistent with summary judgment rule and, thus, would violate federal rule that allows local rules only if they are "not inconsistent" with federal rules), Wienco, Inc. v. Katahn Associates, Inc , 965 F 2d 565, 568 (7th Cir 1992) ("district court must give its reasons on the merits for granting summary judgment"). *See also* FED R CIV P. 56(e), advisory committee note (1963) ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented ")

in the evidentiary materials and the memorandum in support or opposition to the motion.[276] In addition, as explicitly stated in one federal court local rule, "All material facts set forth in the statement required of the moving party will be deemed admitted unless controverted by the statement of the opposing party."[277] Once a non-moving party's alleged facts are not considered, or the movant's alleged facts are deemed admitted, the court is likely to grant the motion for summary judgment on the merits.[278] Thus, even if non-compliance with Rule 56.03 is not itself deemed a default, the effect may be the same, even when the non-moving party is not guilty of the kind of wilful and recalcitrant conduct that is usually prerequisite to judgment by default.[279]

§ 9-4(j). Summary Judgment — Motion and Proceedings Thereon — Text of Rule 56.04 and Commission Comment.

Rule 56.04 Motion and Proceedings Thereon. *The motion shall be served at least thirty (30) days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. Subject to the moving party's compliance with Rule 56.03, the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.*

Advisory Commission Comment (1997). *The change in the third sentence of renumbered Rule 56.04 is necessary to conform with Rule 56.03.*

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276. Midwest Imports, Ltd v. Coval, 71 F.3d at 1315-16; Waldridge v. American Hoechst Corp., 24 F 3d at 923 (the required statements are "roadmaps, and without them the court should not have to proceed further, regardless of how readily it might be able to distill the relevant information from the record on its own").

277. *Midwest Imports, Ltd.*, 71 F.3d at 1313 n.1. *See also Waldridge*, 24 F.3d at 921 (quoting similar provision in Southern District of Indiana's Rule 56.1); Petrolite Corp. v. Baker Hughes Inc., 96 F.3d 1423, 1425-26 (Fed. Cir. 1996) (district court acted properly by enforcing its local summary judgment rules and deeming alleged infringer's statement of facts admitted for patentee's failure to contest them).

278. The non-moving party, therefore, loses the benefit of the usual rule that all facts are construed in favor of that party. *See, e g*, Johnson v. Gudmundsson, 35 F.3d 1104, 1108 (7th Cir. 1994).

279. *See* Wienco, Inc. v. Katahn Associates, Inc., 965 F 2d 565, 567-68 (7th Cir. 1992).

§ 9-4(k). Summar Service Rule 56.

Rule 56.04's provisi thirty days before the limit in Federal Rule motion itself, but by virtue of Rule 56.03 a

An early Tenness however, declined to trial court's grant of made. The court's o Rule 56.04 (numbere an admission in the reasoned that the tri ings,[285] misnamed su to the thirty-day requ

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280. The advisory co the thirty-day period wa § 9-4(a). Extensions be discretion. Laue v. Rich WL 9374, at *4 (Tenn. judgment is longer than both TENN. R. CIV. P. 6.

281. *See* TENN. R. C be served with the moti

282. TENN. R. CIV. moving party contends specific citation to the the time the motion i compliance with Rule

283. 493 S.W.2d 72

284. With respect t during a hearing or tr 56.04, however, in ad govern with respect to

285. *See* TENN. R.