IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 18, 2007 Session

CHARLES BURNETTE, ET AL. v. THE ESTATE OF RICHARD GUIDER, ET AL.

Appeal from the Chancery Court for Sevier County
No. 03-10-529 Telford E. Forgety, Jr, Chancellor

No. E2006-01164-COA-R3-CV - FILED DECEMBER 27, 2007

Charles Burnette and Imogene Burnette ("Homeowners") allege that their driveway was damaged as a result of the faulty repair work of Concrete Maintenance Specialists ("CMS"), a company that employed, among others, Brian Cupp ("Cupp"). The repairs by CMS made use of a product sold by Fischl Enterprises, Inc., aka Lone Star Epoxies ("Lone Star"). Art Fischl is the principal of this corporation. No defect in the product is alleged, only a faulty installation by employees of CMS. Homeowners sued CMS, Cupp, Lone Star and several others (collectively "Defendants") seeking damages, claiming that CMS is directly liable, Lone Star is liable because CMS was its agent, and Cupp is liable because CMS's corporate veil should be pierced and Cupp is a principal of CMS. Cupp and Lone Star each filed a motion for summary judgment. Cupp argues that he was only an employee of CMS, not a principal, and thus could not be liable even if CMS's corporate veil were pierced. Lone Star argues that CMS was not its agent. The trial court granted both motions. Homeowners appeal, arguing that they successfully demonstrated the existence of material factual disputes regarding the issues pertaining to Cupp and Lone Star, and also that the trial court should not have granted summary judgment before ruling on Homeowners' motion to compel. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Douglas E. Taylor, Sevierville, Tennessee, for the appellants, Charles Burnette and Imogene Burnette.

Charles Dungan, Maryville, Tennessee, for the appellee, Brian Cupp.

James M. Moore, Knoxville, Tennessee, for the appellee, Fischl Enterprises, Inc., aka Lone Star Epoxies.

OPINION

I.

The facts regarding the dispute between Homeowners and CMS need not be repeated here, as CMS's liability is not at issue on this appeal. Suffice it to say that Homeowners allege CMS not only failed to repair their driveway as promised, but made a series of mistakes that ultimately destroyed the driveway. The issue for us to resolve is whether the trial court erred in granting summary judgment to Cupp, whom Homeowners sued on the theory of piercing the corporate veil, and Lone Star, sued by Homeowners on a theory of agency.

Our standard of review on a grant of summary judgment is well-settled. "Our inquiry involves purely a question of law; therefore, we review the record without a presumption of correctness to determine whether the absence of genuine issues of material facts entitle the defendant to judgment as a matter of law." ***Robinson v. Omer***, 952 S.W.2d 423, 426 (Tenn. 1997). "Tenn. R. Civ. P. 56.03 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts." ***Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997) (citations omitted).

The proper procedure for evaluating the correctness of summary judgment was addressed by the Supreme Court in ***McCarley v. West Quality Food Serv.***, 960 S.W.2d 585 (Tenn. 1998). In that case, the High Court reversed our decision because we had, in the words of the Supreme Court, "focus[ed] on the non-moving parties' burden without first addressing whether that burden was actually triggered." ***Id.*** at 588. The court opined as follows:

> A party seeking summary judgment must demonstrate the absence of any genuine and material factual issues. Mere "conclusory assertion[s] that the non-moving party has no evidence is clearly insufficient." The movant must either affirmatively negate an essential element of the non-movant's claim or conclusively establish an affirmative defense. If the movant does not negate a claimed basis for the suit, the non-movant's burden to produce either supporting affidavits or discovery materials is not triggered and the motion for summary judgment fails.
>
> If, however, the movant does successfully negate a claimed basis for the suit, the non-movant may no longer simply rely upon the pleadings. The non-moving party must then establish the existence of the essential elements of the claim. The non-movant's burden may be met by:

> (1) pointing to evidence establishing material factual disputes that were over-looked or ignored by the moving party;
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> (2) rehabilitating the evidence attacked by the moving party;
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> (3) producing additional evidence establishing the existence of a genuine issue for trial; or
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> (4) submitting an affidavit explaining the necessity for further discovery pursuant to Tenn. R. Civ. P., Rule 56.06.
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> The non-moving party's evidence shall be taken as true. Moreover, summary judgment shall be denied if "any doubt whether or not a genuine issue exists."

Id. (citations omitted).

In the instant case, Homeowners contest both summary judgments on two grounds: first, that their motion to compel should have been heard before the motions for summary judgment, thus potentially altering the outcome of the latter motions if new evidence had come to light through an order to compel; and secondly, that summary judgment was inappropriate in any event, based on the evidence that was before the court when the judgment was made, irrespective of the motion to compel. We will begin by addressing the second issue. In so doing, we will analyze the summary judgment for each defendant in turn, first Lone Star and then Cupp. Finally, we will return to the first issue, about which our analysis is identical for both defendants.

II.

With reference to Lone Star, the trial court held that there is no genuine issue of material fact regarding the question of whether CMS was an agent of Lone Star. The lower court concluded that the undisputed material facts demonstrate that CMS was not an agent of Lone Star. The court held that the only evidence presented on the agency relationship consists of "the acts or statements of the [purported] agent himself," and "it is well established law in the State of Tennessee that agency . . . generally must be established by some . . . act or representation by the [purported] principal," not merely by the purported agent. Homeowners appeal.

As an initial matter, we note that the trial court's above-quoted statement of law is a correct one. Statements made by a purported agent to a third party cannot, without more, establish agency or apparent agency. "Apparent agency is essentially agency by estoppel; its creation and existence depend upon such conduct by the apparent principal as will preclude him from denying another's agency." ***White v. Methodist Hosp. S.***, 844 S.W.2d 642, 646 (Tenn. Ct. App. 1992). "Generally, to prove apparent agency one must establish (1) the principal actually or negligently acquiesced in another party's exercise of authority; (2) the third person had knowledge of the facts and a good faith

belief that the apparent agent possessed such authority; and (3) the third person relied on this apparent authority to his or her detriment." ***Id.***

As required by ***McCarley***, we begin our analysis of the court's summary judgment ruling by examining the essential elements of Homeowners' complaint that are at issue here, and then considering whether Lone Star has affirmatively negated any of them. Homeowners' initial complaint contains the following allegations pertinent to the purported agency relationship between Lone Star and CMS:

> 11. At all times material to this action, the Defendants, one or more of them, represented themselves to be the representative and/or owner of the products or owner of all rights to the products produced and sold by the Defendants, Art Fischel [sic], d/b/a Lone Star Epoxies.
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> * * *
>
> 55. The Defendant, CMS, and CMS employees, agents, and representative[s], represented themselves to be the owner of the rights to if not the owner of the products provided by the Defendants, Art Fischel [sic] and Lone Star Epoxies, and acted as agent, and authorized representative of the Defendant, Lone Star Epoxies.

Subsequently, in an amended complaint, the following pertinent allegations were added:

> 7. According to statements made to the Plaintiff, Charles Burnette, by the Defendant, Rick Guider, Mr. Guider was the authorized representative of the manufacturer of the product used on the subject driveway, Lone Star Epoxies. Mr. Guider also stated that he had purchased the rights and was an authorized distributor for the products of Lone Star Epoxies, and that he was also authorized to sell the distributorship rights for Lone Star Epoxies' products in the United States in the territory east of the Mississippi River.
>
> 8. Mr. Burnette was told by a representative of the Defendant, Concrete Maintenance Specialists, Inc., or Concrete Maintenance Specialists ("CMS"), that CMS was working to hire a chemist to mix the Lone Star Epoxies products in the State of Tennessee, indicating a close business relationship with Lone Star Epoxies.
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> * * *
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> 10. Due to the apparent close business relationship between Lone Star Epoxies, Fischl Enterprises, Inc. or Fischl Enterprises, and/or Art

> Fischl (hereinafter jointly "Lone Star"), and the other Defendants joined here who apparently had authority to act for and on behalf of Lone Star and who have held themselves out by personal statements and by written contract as the business associate or partner of Lone Star, all allegations attributed to the other Defendants are clearly attributable to Lone Star through partner, agent or representative, as the case may be.

(Citations omitted.)

As can be seen, Homeowners' case against Lone Star rests alternatively on one of two possible theories: apparent agency or actual agency. Most of the statements made in the complaint concern apparent agency, but the statement that CMS or its employees "acted as agent, and authorized representative of the Defendant, Lone Star Epoxies" arguably alleges actual agency, and we will read the complaint generously so as to find such an allegation. This means that, in order to trigger Homeowners' burden of going forward, Lone Star must affirmatively negate essential elements of both apparent agency and actual agency.

In an affidavit accompanying his motion to dismiss, Art Fischl states as follows:

> 6. That the co-Defendants in this case are not my personal agents, employees or representatives nor have I represented to the Plaintiffs or others that any of the Defendants were or are my agent, employee or representative.
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> * * *
>
> 8. That, in my capacity as officer of [Fischl Enterprises, a.k.a. Lone Star], I know that the co-Defendants in this case are not agents, employees or officers of Fischl Enterprises, Inc., nor have I or any other officer, employee or agent of Fischl Enterprises, Inc. represented to others that any of the Defendants were or are an agent, officer or employee of said corporation.
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> * * *
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> 11. That the Plaintiffs in this matter are not customers of Fischl Enterprises, Inc., nor have they purchased goods or services from Fischl Enterprises, Inc. or its agents nor has any officer, employee or agent of the corporation had contact, orally or in writing, directly or indirectly with Plaintiffs.

Fischl's statement that Defendants are neither his agents nor agents of his company constitutes an affirmative negation of Homeowners' allegation of actual agency. His statement that he did not represent to Homeowners that Defendants are his agents or agents of his company, and his subsequent statement that "[no] officer, employee or agent of the corporation [has] had contact, orally or in writing, directly or indirectly with [Homeowners]," constitutes an affirmative negation of Homeowners' allegation of apparent agency, since a representation of the purported principal is necessary to establish apparent agency. Thus, Homeowners' burden to "establish the existence of the essential elements of the claim" is triggered.

Any evidence offered by Homeowners, as the nonmoving party, which tends to establish the existence of the essential elements of the claim, must be taken as true. "Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor." ***Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997). However, "the facts on which the nonmovant relies must be admissible at the trial," although they "need not be in admissible form as presented in the motion." ***Byrd v. Hall***, 847 S.W.2d 208, 215-16 (Tenn. 1993). Thus, for instance, affidavits may be used even though they themselves would not be admissible at trial, but affidavits in which the affiant merely recites hearsay may not be used because the *content* of the affidavit would be inadmissible even if presented in testimonial form.

Homeowners offer three main items of evidence in an attempt to meet their burden of going forward: an affidavit by Charles Burnette, one of the homeowner plaintiffs; an affidavit by former CMS sales representative Terry Wells; and an affidavit by former CMS receptionist/secretary Teresa King. We will consider the statements of each affiant in turn.

Burnette states in his affidavit that a principal of CMS, Rick Guider, said he was a representative of Lone Star and an authorized seller and distributor for Lone Star. This evidence is inadmissible as to Lone Star because it is hearsay and because it does not tend to establish apparent or actual agency, since agency must be predicated on representations by and conduct of the purported principal, not by the purported agent. The same analysis applies to Burnette's statement, in his answers to Lone Star's request for admissions, that a CMS representative told him "that CMS was working to hire a chemist to mix the Lone Star Epoxies products in the State of Tennessee." Even if we assume, for the sake of argument, that this claim, if true, would tend to establish an agency relationship, it is inadmissible because it is hearsay and irrelevant on the issue of apparent agency because the declarant is the purported agent, not the purported principal. Likewise, Burnette's statement that Guider told him that Fischl visited the Homeowners' property would be inadmissible hearsay if offered at trial, and thus cannot be considered. Finally, Burnette states that he "believed" Lone Star and CMS "were partners or business associates." This evidence might be admissible with regard to the second and third elements of apparent agency, knowledge/belief and reliance, but it is irrelevant to the first, necessary element – the purported principal's representations or acquiescence in creating an apparent agency relationship in the first place. A third party's subjective beliefs are not evidence of actual or apparent agency. We also note that Burnette admits in his answers that "neither Art Fischl [n]or Fischl Enterprises, Inc., made direct personal representations as to the partnership with CMS and Rick Guider."

Wells, the former CMS sales representative, states in her affidavit that she is "aware that, at certain times, when Concrete Maintenance Specialists received payment for its services and products, some of the checks were made payable to both Concrete Maintenance Specialists and Lone Star Epoxies jointly, accompanied with the contract for the respective job, and Lone Star Epoxies would reimburse Concrete Maintenance Specialists after Lone Star had taken out its portion of the payment." This evidence is unhelpful to Homeowners for two reasons. First, it is inadmissible due to a lack of foundation. Wells does not explain *how* she is "aware" of the facts in question. Thus we do not know whether her testimony would be based on personal knowledge or hearsay. Secondly, we agree with the trial court that the alleged payment arrangement does not tend to establish an agency relationship. It certainly tends to show that Lone Star was put in a position to control how the funds were disposed of, but this is a far cry from saying it is proof of an agency relationship.

We agree with the trial court's observation that making Lone Star a payee on the check is a way for "the product supplier [to ensure that] he's going to get paid his money." As Lone Star noted in its brief in support of summary judgment,

> payment guarantees hardly rise to the level of establishing the business relationship of agency. If such acts were routinely construed as such, every bank and finance company in our market system would be in partnership or agency with every client organization or person in its customer base and every commercial enterprise that requires a surety or guarantee from its customers would become indelibly entangled in those customers' affairs.

We agree, and although we must accept all reasonable inferences in Homeowners' favor, we find that on this issue, Homeowners are asking us to make an unreasonable inference. The claimed payment-guarantee arrangement does not in any way imply the existence of agency or apparent agency.

Finally, we turn to the affidavit of King, the former CMS receptionist/secretary. Like Wells, King states that she is "aware" of the alleged payment-guarantee agreement. For both of the reasons stated above, this evidence does not help Homeowners' case. She also states that she "was informed by Rick Guider that Art Fischl and Lone Star entered into an agreement [with CMS] whereby Lone Star would provide raw materials to CMS who would have the various products made in Tennessee." This claim, like so much of Homeowners' evidence, is both inadmissible as hearsay and irrelevant because it relates to a representation from the purported agent, not the purported principal. Lastly, King states that "[m]uch of the technical information and some of the marketing information utilized by CMS were actually Lone Star documents which CMS used replacing the name 'Lone Star Epoxies' with the name 'Concrete Maintenance Specialists' which gave the impression that the products were actually CMS products." This statement fails to help Homeowners because it does not allege that Lone Star played any role in altering the documents, which would be necessary to establish that they were representations or conduct of the purported principal rather than of the

purported agent. In addition, the foundation of King's statement is unclear, and she does not allege that the documents were actually used to make representations to Homeowners, only that the documents existed. This is clearly inadequate to create a disputed issue of material fact on the issue of apparent agency.

Viewing the evidence in the light most favorable to Homeowners, we cannot find a disputed issue of material fact with regard to the essential elements of Homeowners' claim, and thus we must affirm the court's grant of summary judgment for Lone Star.

III.

Our analysis proceeds along much the same lines with regard to defendant Cupp, although the "essential element" in question is different. Instead of actual or apparent agency, the issue is whether Cupp is a principal of CMS, such that he could be held personally liable if CMS's corporate veil is pierced. Again, we begin by examining the pertinent claims in Homeowners' complaint. They are as follows:

> 4. The Defendant, Brian Cupp (or Brian Guider), is a citizen and resident of Sevier County, Tennessee, and conducts business as Concrete Maintenance Specialists, a sole proprietorship or partnership . . .
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> * * *
>
> 10. At all times material to this action, the Defendants represented Concrete Maintenance Specialists as a partnership or sole proprietorship, and gave only incidental and conflicting indication that the Plaintiffs were conducting business with a corporation. The Plaintiffs believed they were conducting business with a sole proprietorship or partnership and not a corporation. Therefore, the corporate veil of the Defendant, Concrete Maintenance Specialists, Inc., should be pierced and the principals of the corporation, the Defendants Richard Guider, Brian Cupp, and Peggy J. Cupp, should be held personally liable, jointly and severally, for damages to the Plaintiffs.

(Citations omitted.)

The key allegations are that Cupp "conducts business as" CMS and that he is a "principal[] of the corporation." The claim that Cupp is a principal of CMS, as opposed to a mere employee, is an essential element of any claim against him under a veil-piercing theory. Our analysis will therefore focus on this issue. Unless we find that Homeowners' claim that Cupp is a principal can withstand summary judgment, we need not consider whether there is a material dispute regarding

the broader question of CMS's corporate viability. If Cupp is not a principal of CMS, then it does not matter for purposes of this appeal whether CMS's corporate veil should be pierced. Only principals can be held liable in the event of a piercing; mere employees cannot. *See generally* 18 Am. Jur. 2d *Corporations* § 46 (2007) ("there are distinct theories . . . that justify disregarding the corporate entity and imposing personal liability upon *shareholders, officers, and directors*" (emphasis added)).

Cupp affirmatively negates Homeowners' allegations with regard to his status at CMS in his affidavit. He states as follows:

> 2. From May 2003 until September 2003 I was an employee of Concrete Maintenance Specialists, Inc.
>
> 3. Concrete Maintenance Specialists, Inc. was a corporation.
>
> 4. I was never a stockholder, officer, director, or managing agent of Concrete Maintenance Specialists, Inc.
>
> 5. I was employed in the office of Concrete Maintenance Specialists, Inc. where my duties were administrative.
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> * * *
>
> 8. I have never had an agreement with Rick Guider or Peggy J. Cupp to operate Concrete Maintenance Specialists or Concrete Maintenance Specialists, Inc. or to share in the profits and/or losses therefrom.
>
> * * *
>
> 10. I never represented to the Plaintiffs that I was an officer, director, shareholder, managing agent, or partner in Concrete Maintenance Specialists, Inc.

These statements put the burden of going forward on Homeowners, who must respond with evidence establishing a disputed issue of material fact with regard to whether Cupp is a principal of CMS, and not merely an employee, as Cupp contends.

The affidavit of King, the former CMS receptionist/secretary, states that "CMS was operated primarily by Rick Guider who made the business decisions until about the time I left CMS when Brian Cupp became involved in the business operation, but it was Rick Guider who called the shots." King's statement that Cupp "became involved in the business operation" of CMS is inadequate to support a claim that Cupp is a principal, shareholder, officer or director of the company. King

further states that "I was under the impression that CMS was a joint family venture with an uncle who worked there and especially when Brian Cupp became part of the business." This testimony would be inadmissible at trial; King's mental "impression[s]" of the company's structure are not evidence. Moreover, again, the fact that Cupp "became part of the business," and that the business was allegedly "a joint family venture," simply does not tend to establish that Cupp was a principal, shareholder, officer or director such that he can be held liable in the event CMS's veil is pierced. Cupp's affidavit stating that he is a mere employee remains unrebutted.

The affidavit of Burnette, one of the homeowner plaintiffs, states that he "was informed by Brian Cupp that he managed employees and supervised work such that he gave orders to perform certain work on my driveway[.]" Burnette further quotes Cupp as making various statements about CMS using words like "we" and "our." To bolster this argument, Homeowners point to a lengthy transcript of a recorded telephone conversation between Burnette and Cupp. Homeowners argue in their brief that Cupp's statements to Burnette are evidence that Cupp "held himself out as a person with management authority." This they may be, but they are *not* evidence that he is a *principal* of the company. A mere employee may exercise "management authority," and certainly may refer to his employer as "we" or "us." An employee may also promise that his employer company will get work done by a date certain, and he may order subordinate employees to do the work. None of these actions suggest principal status. To hold Cupp liable on a veil-piercing theory, Homeowners needed to provide evidence that he is not merely a "person with management authority" of an alleged "joint family venture," but that he is a principal, shareholder, officer or director of the company, whatever its corporate status. This they have failed to do.

Again, viewing the evidence in the light most favorable to Homeowners, we cannot find a disputed issue of material fact with regard to this essential element of Homeowners' claim, and thus we must affirm the court's grant of summary judgment for Cupp.

IV.

We return now to Homeowners' first issue, their claim that the trial court erred by deciding the motions for summary judgment before considering the motion to compel, then declaring the latter moot with respect to Lone Star and Cupp because summary judgment had already been granted. Homeowners apparently believe that summary judgment might have been denied if the evidence requested in their motion to compel had been before the court.

The basic facts of what occurred are as follows. Following a hearing on March 2, 2006, the court issued two separate written orders, one of which was originally submitted by Homeowners and the other by Defendants. The order submitted by Homeowners continued the motions for summary judgment until April 18, but made no mention of the motion to compel. The order submitted by Defendants continued the motion to compel until April 18, and also "scheduled" the motions for summary judgment for that same date. Near the bottom of Defendants' proposed order, there is a line for Homeowners' attorney to sign, thus declaring the order "APPROVED FOR ENTRY," but no signature appears there. Homeowners' proposed order contains no such line for Defendants'

attorneys to sign, and Defendants' attorneys did not sign the order. Both orders were signed by the trial judge.

On April 4, more than a month after the entry of the two orders, Homeowners' attorney sent a letter via fax to the trial judge suggesting that the orders were in conflict with one another and requesting clarification. The attorney stated:

> The Order I submitted does not include continuation of the Motion To Compel, which I would like to have ruled on as soon as possible in order to timely receive discovery answers before the five day filing deadline prior to hearing the Defendants' Motions For Summary Judgment. Consequently, I am writing to ask the Court's instructions regarding these alternative Orders.

The attorney for Lone Star responded, also via fax, on April 5. He conceded that the two March 2 orders "are mutually exclusive as to the ordered result of [Homeowners'] motion to compel." However, he argued that the court had done exactly what it intended to do:

> The previous court appearance [on March 2] was held for the express purpose of hearing Mr. Taylor's motion to compel. This court heard arguments of all counsel at that time and specifically ordered that all motions were to be heard on April 18, 2006, after the court has made its determinations with respect to each of the defendants' Motion[s] for Summary Judgment.

The record does not contain a transcript of the March 2 hearing.

Lone Star's attorney apparently contends that Homeowners' attorney changed his position with respect to the urgency of his motion to compel after the March 2 hearing. Attached to Lone Star's April 5 reply fax is a letter from Homeowners' attorney to Defendants' attorneys, dated March 2, which states:

> I'm sorry guys but in retrospect I have changed my mind. Please get me the discovery answers as soon as you can.

The letter does not indicate whether it was sent before or after the March 2 hearing, but Lone Star's attorney appears to imply that it was sent after the hearing. In his April 5 fax, he writes that he was attaching the March 2 letter to "shed further light on [Homeowners' attorney's] actual purposes with respect to his request."

It should be noted that neither of the above-quoted faxed letters were formal pleadings to the court. Moreover, the record contains no indication that the court responded to them or acted upon them in any way.

The court convened on April 18, as scheduled, to hear the motions for summary judgment and the motion to compel, as well as a motion to dismiss.[1] At the outset, the trial judge and the attorneys discussed which motions should be considered first:

> MR. COLEMAN [attorney for Lone Star]: Good morning, Your Honor. I'm not sure which of the matters you wish to take up first. We have four motions. Two of those motions are kind of dependent on the summary judgment motions. I recommend that we put those motions to the side until the summary judgment motions are heard, if a decision needs to be made.
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> * * *
>
> THE COURT: Now, what are the other two motions?
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> MR. COLEMAN: There is a motion to compel by [Homeowners], and then the fourth motion was a previous motion to dismiss, which will probably be moot or withdrawn, one or the other. That's why I say the motion to compel and the motion for dismissal probably need to be set on the back burner.
>
> THE COURT: What do you say?
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> MR. TAYLOR [attorney for Homeowners]: I agree.
>
> THE COURT: All right. Carry on then.

Later, as he argued against Lone Star's summary judgment motion, Homeowners' attorney had the following exchange with the trial judge:

> THE COURT: But you don't have any statement from anybody within Fischl Enterprises/Lone Star Epoxy, do you?
>
> MR. TAYLOR: No, Your Honor. And I wouldn't generally, as the customer here. But if my discovery, my interrogatories and request for production were answered, which is, I believe, why we have that process, maybe we would have some evidence. So far, for over a year now, we don't have those answers, Your Honor.
>
> THE COURT: Well, Mr. Taylor, you know, this dog-gone thing sat around for a year. And I'm not fussing at [you] to the exclusion of

[1] The motion to dismiss was ultimately rendered moot by the success of the motions for summary judgment.

> anybody else, by the way, and maybe even myself. You know, it's kind of beside the point. This thing sat around for a year, during which time a lot of stuff could have been done, and perhaps should have been done. I don't know. But the bottom line is, it wasn't done. And at some point in time, it just comes down to, I have got to – I mean, I've got to deal with it. And that day has come.
>
> MR. COLEMAN: I have a short rebuttal.
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> MR. TAYLOR: I would like to add, Your Honor, I filed my motion to compel February 23rd.
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> THE COURT: Pardon?
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> MR. TAYLOR: I believe my motion to compel was filed February 23rd.
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> THE COURT: Of 2006.
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> MR. TAYLOR: Yes, Your Honor. That's still enough time for us to have been able to entertain some discovery, and maybe come to a conclusion that they're not a proper party.

Mr. Taylor later added, with respect to the question of whether certain documents that might have established agency were created by CMS or by Lone Star, "Your Honor, until we do have some discovery, how will we know who printed the labels? Who printed the – Perhaps they did. Perhaps they didn't. I don't know. I've not been able to look at the documents." He again complained about the lack of discovery with regard to Cupp's employment status at CMS: "There again, discovery was filed February of last year. It would be very simple for somebody to produce a document that shows some of this." At no time during the argument, however, did Mr. Taylor specifically object to the court's decision to decide the summary judgment motions before deciding the motion to compel. Nor did he "submit[] an affidavit explaining the necessity for further discovery," as contemplated by ***McCarley***, 960 S.W.2d at 588. In fact, the record clearly reflects that he acquiesced in hearing the motion for summary judgment before the motion to compel was heard.

Immediately after the court granted summary judgment for both Lone Star and Cupp, the following exchange occurred:

> MR. COLEMAN: Your Honor, the motion to compel as to Fischl Enterprises and to Mr. Cupp would be moot given the motions for summary judgment, and the motion to dismiss would be also moot.

> MR. TAYLOR: What about the motions to compel against the remaining defendants, Your Honor?

The court then granted the motion to compel with respect to the remaining defendants, who are not parties to this appeal. In its written order, the court stated as follows: "the [Homeowners'] motion to compel discovery as to Defendants Fischl Enterprises, Inc. and Brian Cupp are hereby MOOT and are therefore DENIED[.]" (Capitalization in original).

As can be seen from the above-quoted material, the record does not reflect that Homeowners raised any objection during the proceedings below to the trial court's decision to hear the motions for summary judgment before hearing the motion to compel. On the contrary, when Lone Star's attorney recommended "that we put those motions to the side until the summary judgment motions are heard" and Homeowners' attorney was asked to respond, he stated, "I agree." Moreover, when Lone Star's attorney stated that the motion to compel was now moot with respect to Lone Star and Cupp, Homeowners' attorney did not disagree; he asked only, "What about the motions to compel against the remaining defendants, Your Honor?"

It is true that Homeowners' attorney complained in general terms about Defendants' purported uncooperativeness in discovery, but that is not the same thing as an objection to the trial court's scheduling of the motions. So far as we can tell from the record, this appeal is the first time Homeowners have raised their scheduling concern since the April 4 fax in which Homeowners' attorney told the trial judge that he "would like to have [the motion to compel] ruled on as soon as possible in order to timely receive discovery answers before the five day filing deadline prior to hearing the Defendants' Motions For Summary Judgment." That letter, however, was not a formal pleading, nor was it phrased in the form of an objection or a demand; as written, it was simply an expression of the attorney's preferences (*i.e.*, that he "would like to have" things done a certain way).

With regard to the supposedly "conflicting" scheduling orders of March 2, we note that they are not actually contradictory on their faces. One order continues the summary judgment motions to April 18 and *does not mention* the motion to compel, while the other continues the motion to compel to April 18 and "schedules" the summary judgment motions for the same day without stating whether or not the latter scheduling decision constitutes a continuance. As written, both orders can be, and indeed were, carried out. The only manner in which they are "mutually exclusive" is with regard to, as the attorney for Lone Star put it, "the *ordered result* of [Homeowners'] motion to compel" (emphasis added) – that is to say, the motion to compel would inevitably be denied if the summary judgment were granted. However, it may well have been the court's intention to schedule things in this way, and because Homeowners did not object, we are in no position to disturb the court's decision.

In sum, the record before us indicates that Homeowners failed to object to the court's scheduling of his motion to compel on the same day as the motions for summary judgment, and that on the day in question, they in fact *consented* to the order in which the court decided the motions. As in ***Pritchett v. Pritchett***, "[w]e will not permit [them] to change [their] position on appeal, and

thereby attempt to cast the trial court in error for not doing something that it was never asked to do." No. 03A01-9708-CH-00362, 1998 WL 202486, *2, (Tenn. Ct. App. E.S., filed April 28, 1998). We find this issue to be without merit.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellants, Charles Burnette and Imogene Burnette. This case is remanded to the trial court for collection of costs assessed below, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE