

Unclear Boundaries—Rye v. Women’s Care Center of Memphis, MPLLC: The Transformation of Tennessee’s Summary Judgment Burden of Production

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I. INTRODUCTION

Summary judgment is a relatively new legal concept developed and adopted by courts across the United States within the last century.¹ Courts were initially skeptical of the procedure’s constitutionality² and

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1. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1017 (2003) (describing the development of summary judgment procedures in the United States).

2. See Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 76 (1990).

only used summary judgment as a method for striking frivolous defense claims that unjustifiably delayed a plaintiff's recovery.³ The adoption of the Federal Rules of Civil Procedure in 1938, however, expanded summary judgment's applicability to all parties involved in a civil suit.⁴ After this summary judgment expansion in the federal court system, state courts adopted the procedure and began refining summary judgment burdens of production.⁵

In 2015, the Tennessee Supreme Court heard an appeal of a trial court's denial of a summary judgment motion and addressed whether Tennessee's common law summary judgment standard should be reconsidered.⁶ In their summary judgment motion, the defendants argued that the plaintiffs had failed to adequately establish the existence of present or future damages in their healthcare liability action.⁷ In an attempt to simplify Tennessee's summary judgment procedure, the Tennessee Supreme Court *held* that, after adequate time for discovery elapses, a court must grant summary judgment when a moving party, who does not bear the burden of persuasion at trial, either (1) "negat[es] an essential element of a nonmoving party's claim," or (2)

3. *See id.* ("[T]he purpose of summary judgment was 'to preserve the court from frivolous defences and to defeat attempts to use formal pleading as means to delay the recovery of just demands.'" (quoting *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902))).

4. *Id.* at 76–77 ("The Federal Rules of Civil Procedure . . . extended the applicability of this device to all cases, including those arising in equity, and to all parties . . . [and] made summary judgment available . . . as a broad-scale tool for the entry of a final decree on the merits of all claims before the federal courts. This expansion represented a significant alteration of American jurisprudence, which had guaranteed access to trial by jury as a right of constitutional magnitude.").

5. *See, e.g.,* *Molko v. Holy Spirit Ass'n*, 762 P.2d 46, 53 (Cal. 1988) (explaining that a defendant moving for summary judgment has the burden of conclusively negating an element of the plaintiff's case); *Northrip v. Montgomery Ward & Co.*, 529 P.2d 489, 497 (Okla. 1974) (describing the requirements for a defendant to succeed on a motion for summary judgment); Grady R. Champion, *Summary Judgment in Alaska*, 32 ALASKA L. REV. 181, 188–89 (2015) (summarizing the development of early summary judgment procedures in Alaska, which began in 1962); Issacharoff & Lowenstein, *supra* note 2, at 77–79 (noting the origins and development of summary judgment practice in state and federal court and describing differing federal court interpretations of the procedure, which resulted in a lack of procedural uniformity in the federal court system).

6. *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015).

7. *Id.*

“demonstrate[es] that the nonmoving party’s evidence at the summary judgment stage is insufficient to establish the nonmoving party’s claim” by “do[ing] more than mak[ing] a conclusory assertion that summary judgment is appropriate.”⁸

Instead of streamlining summary judgment procedures in Tennessee, the *Rye* court’s faulty interpretation of the federal summary judgment standard created a confusing summary judgment procedure with unclear burdens of production for every party involved in the proceeding. First, the *Rye* court neglected to explain how a movant can highlight insufficiencies in a nonmovant’s claim without making “conclusory assertions,” thereby distorting the movant’s supposedly “relaxed” burden of production. Second, the *Rye* court failed to resolve the disconnect between the stringent federal discovery rules and Tennessee’s informal approach to discovery completion; this lack of clarity hinders a movant’s ability to determine whether an “adequate time for discovery” has elapsed before filing a motion for summary judgment. Finally, the *Rye* court created an unduly harsh burden for non-movants that encourages defendants to file a motion for summary judgment in every civil suit, regardless of the motion’s merits.

II. THE FEDERAL SUMMARY JUDGMENT STANDARD

Any analysis of summary judgment burden-shifting dynamics must begin with a review of the notorious “*Celotex* trilogy.”⁹ In 1986, the U.S. Supreme Court issued three cases that reformed summary judgment practice in federal courts: two cases establishing precedent that significantly heightened a nonmovant’s burden for defeating summary judgment, thus increasing the likelihood that a trial court will

8. *Id.* at 264. *Rye* specifically addresses the burden of production for a summary judgment movant that does *not* bear the burden of persuasion at trial. *Id.* at 264–65. Accordingly, this comment analyzes the effects of this new summary judgment standard for defendant-movants and plaintiff-nonmovants. Therefore, for purposes of this comment, the “movant” does not possess the burden of persuasion at trial, and that the “nonmovant” does bear the burden of persuasion at trial. Typically, this means the movant is a defendant and the nonmovant is a plaintiff.

9. The *Celotex* trilogy is a series of three U.S. Supreme Court cases that established the foundation for summary judgment analysis in federal courts. Issacharoff & Lowenstein, *supra* note 2, at 73.

grant summary judgment,¹⁰ and one case regarding a movant's ability to satisfy its burden of production.¹¹

The saga begins with *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, an antitrust case in which the plaintiffs alleged that several Japanese-owned enterprises conspired to drive American corporations out of the consumer electronic products market via a predatory pricing conspiracy.¹² To recover damages under § 1 of the Sherman Anti-Trust Act,¹³ a plaintiff may not solely rely on evidence establishing that a defendant engaged in conduct consistent with both permissible competitive behavior *and* illegal conspiring.¹⁴ Thus, the plaintiffs were required to present evidence “that ‘tend[ed] to exclude the possibility’ that the conspirators acted independently” to satisfy their burden of persuasion at trial.¹⁵ The Court reasoned that the plaintiff's theory made “no practical sense”: the plaintiffs failed to explain how the defendants could reasonably plan to economically recuperate from the losses they would have agreed to suffer in order to create the alleged conspiracy.¹⁶ Accordingly, the Court held that the plaintiffs failed to establish that the “record taken as a whole could [] lead a rational trier of fact to find for the nonmoving party” because a reasonable trier of fact would determine that the premise of the plaintiffs' argument was implausible.¹⁷ Consequently, the Court established that a party opposing summary judgment must provide evidence showing that a genuine

10. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

11. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

12. *Matsushita*, 475 U.S. at 577–78. Specifically, the plaintiffs presented un rebutted expert testimony to establish that the defendants agreed to temporarily lose money and sell their products below market price in the American market in order to obtain a monopoly over the American consumer electronic products (“CEP”) market. *Id.* Accordingly, under the plaintiff's theory, the defendants would “cartelize the American CEP market” to recuperate their losses and raise CEP market prices well above the pricing levels that fair market competition would produce. *Id.* at 584.

13. 15 U.S.C. § 1 (2004).

14. *Matsushita*, 475 U.S. at 588.

15. *Id.*

16. *Id.* at 597.

17. *Id.* at 586–87. In his dissent, Justice White pointed out that the Court took extreme liberty in reviewing the record and breached the divide between judge and jury, thus permitting trial courts to “go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff.” *Id.* at 600 (White, J., dissenting).

issue of material fact exists by “do[ing] more than simply show[ing] that there is some metaphysical doubt as to the material facts.”¹⁸

To clarify the applicability of the *Matsushita* decision, the Court issued *Anderson v. Liberty Lobby, Inc.*, which involved plaintiffs suing a magazine for libel.¹⁹ Due to the plaintiffs’ “limited-purpose public figure” status, they were required to provide clear and convincing evidence at trial that the defendants acted with actual malice, as opposed to the “preponderance of the evidence” burden of persuasion required for non-public figures engaged in a libel suit.²⁰ On appeal, the Court of Appeals determined that the plaintiffs were not required to prove their case in accordance with the clear and convincing evidence standard of review at the summary judgment stage.²¹ The Supreme Court, however, reversed the appellate ruling and held that the standard of proof applied during the summary judgment phase must mirror the burden of persuasion required in a jury trial.²² Further, the Court held that a nonmovant must provide evidence to combat a summary judgment motion: a nonmovant cannot survive a summary judgment motion by merely asserting that the movant’s contentions are meritless or by fabricating a cockeyed theory explaining the nonmovant’s claim.²³ Accordingly, the Court vacated the grant of summary judgment and remanded the case for summary judgment review using the clear and convincing evidence standard.²⁴

The federal court system’s significant shift in summary judgment practice culminated in *Celotex Corp. v. Catrett*, where the Supreme Court plurality defined the burden of production for a movant that does not bear the burden of persuasion at trial.²⁵ In *Celotex*, the

18. *Id.* at 578 (majority opinion) (citing *Deluca v. Atlantic Refining Co.*, 176 F.2d 421, 423 (2d Cir. 1949)).

19. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

20. *Id.* at 244–45.

21. *Id.* at 246–47 (citing *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1570 (D.C. Cir. 1984), *vacated*, 477 U.S. 242 (1986)).

22. *Id.* at 251.

23. *Id.* at 252 (“The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.”); *see also* Miller, *supra* note 1, at 1036.

24. *Anderson*, 477 U.S. at 257.

25. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The *Celotex* plurality opinion held that a movant must support its motion for summary judgment by directing the district court’s attention to “pleadings, depositions, answers to interrogatories, and

plaintiff claimed that her husband's death was caused by his exposure to the defendant's asbestos products.²⁶ The defendant filed a motion for summary judgment on the basis that the plaintiff had failed to produce any evidence establishing that the decedent was *actually* exposed to the defendant's product.²⁷ The issue before the Supreme Court was whether a defendant's motion for summary judgment is "fatally defective" if the defendant "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion."²⁸ Although five Justices agreed that a defendant is not required to support a motion for summary judgment with evidence or affidavits affirmatively showing an absence of a genuine issue of material fact, only three Justices wholly joined Justice Rehnquist's opinion.²⁹ Thus, the Court produced a plurality decision that failed to establish a firm summary judgment

admissions on file, together with affidavits, if any," that exemplify the movant's claim that an absence of genuine material fact exists. *Id.* at 322.

26. *Id.* at 319.

27. *Id.* at 319–20.

28. *Id.* at 321–22 (quoting *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184 (D.C. Cir. 1985), *rev'd sub nom. Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (emphasis in original)).

29. *See Celotex*, 477 U.S. at 328 (White, J., concurring) (noting his agreement with part of the opinion and the ultimate decision to reverse and remand the case but specifying that the movant must do more than make "a conclusory assertion that the plaintiff has no evidence to prove his case").

standard.³⁰ Rather, the *Celotex* decision presented three potential summary judgment standards: Justice Rehnquist's plurality opinion,³¹ Justice White's concurrence,³² and Justice Brennan's dissent.³³

30. Notably, scholars disagree about whether Justice Rehnquist's opinion in *Celotex* constitutes a majority opinion or a plurality opinion. Compare Matthew R. Lyon, *Shady Grove, the Rules Enabling Act, and the Application of State Summary Judgment Standards in Federal Diversity Cases*, 85 ST. JOHN'S L. REV. 1011, 1033 (2011) (arguing that under the Marks Rule, Justice White's concurrence establishes the position of the Court) (citing *Marks v. United States*, 430 U.S. 188, 192 (1977)), and Issacharoff & Lowenstein, *supra* note 2, at 81 (describing *Celotex* as a plurality and noting that *Celotex* established three separate opinions), with Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 101 n.131 (2006) (arguing that categorizing *Celotex* as a plurality decision "overlook[s] the fact that Justice White also joined Justice Rehnquist's opinion, which makes Rehnquist's opinion a majority opinion supported by five justices"). As most circuit courts have distinguished Justice Rehnquist's opinion from the standard Justice White proposed in his concurrence, this comment proceeds with the presumption that the three opinions drafted in *Celotex* operate as separate proposed summary judgment standards. See Lyon, *supra*, at 1034 (noting that most circuit courts have interpreted *Celotex* as establishing that a movant, who does not bear the burden of persuasion at trial, lacks any burden of production during the summary judgment stage of litigation); see also *Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007) ("[W]e have consistently held that summary judgment is 'not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events.'") (quoting *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)); *Berkeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 201 (3d Cir. 2006) ("In this respect, summary judgment is essentially 'put up or shut up' time for the non-moving party: the non-moving party must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument.") (citing *Jersey Cent. Power & Light Co. v. Lacey Twp.*, 772 F.2d 1103, 1109–10 (3d Cir. 1985)); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998) (noting the movant's burden to point out a lack of evidence for an essential element of the nonmovant's claim and the shift in burden to the nonmovant, who would bear the burden of persuasion at trial, to go beyond the pleadings and set forth admissible facts); *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) (noting that summary judgment is the "put up or shut up" moment in litigation); *Kauffman v. P.R. Tel. Co.*, 841 F.2d 1169, 1173 (1st Cir. 1988) ("[S]ummary judgment should be entered against a party bearing the burden of proof on an issue at trial who fails to establish that there exists a genuine and material factual dispute about that issue.").

31. See *Celotex*, 477 U.S. at 317–27.

32. See *id.* at 328–37 (White, J., concurring).

33. See *id.* at 329–39 (Brennan, J., dissenting).

First, Justice Rehnquist's plurality opinion allows a movant to satisfy its summary judgment burden of production by merely "identifying . . . the absence of a genuine issue of material fact."³⁴ Thus, under this standard, so long as the movant does not bear a burden of persuasion at trial, a movant's summary judgment motion may advance even if the movant does not provide any affirmative evidence or support for its motion.³⁵ Second, although Justice White concurred in the Court's decision to reverse the D.C. Circuit's holding, he disagreed with Justice Rehnquist's conclusion that a movant may satisfy its burden by merely asserting that the nonmovant lacks evidence to support its case.³⁶ Specifically, Justice White opined that a movant must do more than simply provide the court with a "conclusory assertion that the plaintiff has no evidence to prove his case,"³⁷ which conflicts with Justice Rehnquist's assertion that a movant may simply point to problems in the opposing party's case to satisfy its burden of production.³⁸ Finally, in his dissent, Justice Brennan instructed that a movant must "affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party."³⁹ Further, Justice Brennan cautioned the Court, noting that allowing a movant to submit a conclusory assertion that the nonmovant possesses no evidence to support its claim "would simply permit summary judgment procedure to

34. *Id.* at 323 (plurality opinion).

35. *Id.*

36. Justice White asserted that the Court must impose a higher burden of production upon movants than Rehnquist's opinion required:

I agree that the Court of Appeals was wrong in holding that the moving defendant must always support his motion with evidence or affidavits showing the absence of a genuine dispute about a material fact. I also agree that the movant may rely on depositions, answers to interrogatories, and the like, to demonstrate that the plaintiff has no evidence to prove his case and hence that there can be no factual dispute. But the movant must discharge the burden the Rules place upon him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case.

Id. at 328 (White, J., concurring).

37. *Id.*

38. *See id.* at 323 (noting that the moving party is entitled to summary judgment when the nonmoving party fails to make a sufficient showing on an essential element of her claim and she bears the burden of proof).

39. *Id.* at 332 (Brennan, J., dissenting).

be converted into a tool for harassment.”⁴⁰ Although the Court did not produce a majority opinion in *Celotex*, most federal courts have interpreted *Celotex* as establishing that a movant, who does not bear the burden of persuasion at trial, lacks *any* burden of production during the summary judgment stage of litigation.⁴¹

III. TENNESSEE'S SUMMARY JUDGMENT TRILOGY

The movant's burden of production is the most commonly debated element of summary judgment proceedings.⁴² A majority of states have adopted some variation of the *Celotex* standard.⁴³ A few

40. *Id.*

41. *See supra* note 30. *But cf.* *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 921 (5th Cir. 1992) (“[W]hen the record already contains evidence that creates a genuine issue of material fact, *Celotex* requires a moving party to do more than simply answer that there is no evidence of that fact, even if the nonmovant will bear the burden of proof on that issue at trial.”).

42. *See generally* Paul J. Cleary, *Summary Judgment in Oklahoma: Suggestions for Improving a “Disfavored” Procedure*, 19 OKLA. CITY U.L. REV. 251 (1994) (“Oklahoma should better equalize the evidentiary burdens on each side to reflect the fact that today, after sufficient opportunity for discovery, a litigant must be prepared to demonstrate his entitlement to a jury trial in a civil case.”); Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping About Summary Judgment in Tennessee*, 69 TENN. L. REV. 175 (2001) (arguing that *Byrd* provided “a firm foundation for a stable summary judgment practice and . . . spared Tennessee some of the problems that have been noted in federal practice.”); Issacharoff & Lowenstein, *supra* note 2 (“In light of the limited burden placed upon the moving party and the significant burden on the nonmovant of documenting each point of material fact that remains in dispute, summary judgment motions will move closer to the center of the litigation landscape once the bar absorbs the ramifications of the *Celotex* standard.”); Leonard D. Pertnoy, *Summary Judgment in Florida: The Road Less Traveled*, 20 ST. THOMAS L. REV. 69 (2007) (“Florida courts should recognize the impact of the current summary judgment standard and correct the problem by allowing partial summary judgments to be used as a viable tool to help assist judges blaze a new path to a sensible, well-reasoned, and effective use of the summary judgment rule.”).

43. *Compare, e.g.*, *Tibbits v. Verizon N.Y., Inc.*, 40 A.D.3d 1300, 1301–02 (N.Y. App. Div. 2007) (noting a defendant-movant must show “an absence of evidence to support the nonmoving party’s case” and describing the defendant’s burden to specifically disprove plaintiff suffered a disability in the employment discrimination case at issue), *with Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826, 849 (Cal. 2001) (“[W]e believe that summary judgment law in this state now conforms, largely but not completely, to its federal counterpart as clarified and liberalized in *Celotex*, *Anderson*, and *Matsushita*.”), *and Saelzler v. Advanced Group*, 23 P.3d 1143, 1155

states, however, fully reject the *Celotex* standard because they are wary that the adverse effects of creating a lenient summary judgment standard would potentially replace a jury trial with a bench trial.⁴⁴ Tennessee's summary judgment standard resulted from its own trilogy: *Byrd v. Hall*,⁴⁵ *Hannan v. Alltel Publishing Co.*,⁴⁶ and *Rye v. Women's Care Center of Memphis, M PLLC*.⁴⁷

While *Rye* is the final chapter in Tennessee's summary judgment trilogy, *Byrd v. Hall*—a tortious employment interference case—was the first.⁴⁸ The *Byrd* fact pattern exemplifies a he-said she-said scenario: the plaintiff claimed the defendants (the plaintiff's colleagues) tortiously interfered with the plaintiff's employment and caused his termination, while the defendants denied the allegations outright in their motion for summary judgment.⁴⁹ The *Byrd* court reversed the lower court's grant of summary judgment, reasoning that “[t]he parties’ basic disagreement as to whether these incidents even occurred at all raises genuine issues of material fact that the trier of fact must legitimately resolve.”⁵⁰ At the beginning of the opinion, the *Byrd* court noted its intent to clarify Tennessee's summary judgment

(Cal. 2001) (Kennard, J., dissenting) (criticizing the majority's variance from the adopted federal standard and inappropriately weighing evidence).

44. See *Romero v. Philip Morris Inc.*, 148 N.M. 713, 721 (2010) (“We continue to refuse to loosen the reins of summary judgment, as doing so would turn what is a summary proceeding into a full-blown paper trial on the merits.”); see also *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 519–20 (Alaska 2014) (“Summary judgment does not require the non-moving party to prove factual issues according to the applicable evidentiary standard, and does not allow trial judges to predict how a reasonable jury would decide the case”); Christopher D. Lee, *Summary Judgment in New Mexico Following Bartlett v. Mirabal*, 33 N.M. L. REV. 503, 519 (2003) (discussing the New Mexico Supreme Court's fear that adopting the *Celotex* standard would result in trial courts “weigh[ing] evidence during summary judgment proceedings . . . [and] supplant[ing] the jury as trier of fact and arbiter of the credibility of witnesses.”).

45. 847 S.W.2d 208 (Tenn. 1993), modified by *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008).

46. 270 S.W.3d 1 (Tenn. 2008), overruled by *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235 (Tenn. 2015).

47. 477 S.W.3d 235 (Tenn. 2015).

48. *Byrd*, 847 S.W.2d at 215.

49. *Id.* at 216.

50. *Id.* at 217.

standard;⁵¹ in the rest of the opinion, however, the *Byrd* court's mischaracterization of the *Celotex* standard⁵² suggests that the court intended to adopt a more rigorous standard than the federal system's standard.⁵³ For example, the *Byrd* court described the *Celotex* holding as a determination regarding the sufficiency of the plaintiff's response to the motion for summary judgment, when in fact *Celotex* evaluated whether the defendant's motion *itself* was sufficient, as it was only supported by the defendant's assertions that the plaintiff lacked any evidence to support its case.⁵⁴ Although the *Byrd* court purported to adopt Justice White's *Celotex* concurrence,⁵⁵ it also implied that a movant must affirmatively negate an element of the nonmovant's claim to succeed.⁵⁶ This unclear summary judgment standard paved the path for continued judicial analysis of Tennessee's summary judgment standard.

In Tennessee's second summary judgment chapter, *Hannan v. Alltel Publishing Co.*, the Tennessee Supreme Court attempted to remedy the confusion created in *Byrd v. Hall*.⁵⁷ In *Hannan*, the plaintiffs attempted to recover damages for the defendants' failure to appropriately remedy a breached advertising agreement.⁵⁸ The *Hannan* defendants moved for summary judgment, claiming that the plaintiffs had failed to establish the existence of damages.⁵⁹ In its decision to deny summary judgment, the *Hannan* court explained that *Byrd* was intended to establish a high burden for defendants attempting to move

51. *Id.* at 209.

52. *Id.* at 212–13. Additionally, the *Byrd* court conflated Justice Rehnquist's plurality, Justice White's concurrence, and Justice Brennan's dissent as one compatible summary judgment standard. *Id.* at 214–16, 215 n.4–5. For a detailed analysis of *Byrd v. Hall* and its incompatibility with the federal summary judgment standard, see Cornett, *supra* note 42.

53. *Byrd*, 847 S.W.2d at 212–13.

54. *Id.*

55. *Id.* at 215 (“A conclusory assertion that the nonmoving party has no evidence is clearly insufficient.”).

56. *See id.* at 215 n.5 (“The moving party could . . . make [its] required showing in several ways. First, the moving party could affirmatively negate an essential element of the nonmoving party's claim Second, the moving party could conclusively establish an affirmative defense that defeats the nonmoving party's claim.”).

57. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (Tenn. 2008), *overruled by* *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235 (Tenn. 2015).

58. *Id.* at 4.

59. *Id.*

for summary judgment and required the movant to either (1) affirmatively negate an essential element of the nonmoving party's claim or (2) show that the nonmovant is unable prove an essential element of its claim.⁶⁰ However, *Hannan* explained that for a movant to successfully establish that a nonmovant is incapable of proving its case, the movant must do more than merely "cast doubt" on the nonmovant's ability to prove an element at trial.⁶¹ The *Hannan* court expressly rejected the *Celotex* trilogy's standards regarding a movant's burden of production and permitted a nonmovant to use the possibility of additional proof surfacing at trial to support its arguments opposing summary judgment.⁶²

In the third and final chapter of Tennessee's summary judgment trilogy, *Rye v. Women's Care Center of Memphis, M PLLC*, the Tennessee Supreme Court overruled *Hannan* and claimed to embrace the *Celotex* trilogy standard for summary judgment.⁶³ In this case about a plaintiff suffering from an undisputed medical malpractice injury,⁶⁴ the *Rye* court held that the plaintiff's permanently altered physical state, as well as her inability to have children in the future without risking potential harm to both herself and the child, were inadequate to prove present or future damages.⁶⁵ Accordingly, the *Rye* court refused to permit the plaintiff to continue to trial.⁶⁶

Contrary to its assertions, the Tennessee Supreme Court's analysis and application of its newly adopted summary judgment standard does *not* align with the *Celotex* trilogy's pedagogy.⁶⁷ In support of its decision to overrule *Hannan* and adopt the federal summary judgment standard, the *Rye* court concluded that *Byrd* articulated Tennessee's intent to adopt the federal standard and then scolded *Hannan* for establishing a standard that was "incompatible with the history and text

60. *Id.* at 9.

61. *Id.*

62. *Id.*

63. *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 238 (Tenn. 2015).

64. *Id.*

65. *Id.* at 272–73.

66. *Id.* at 273.

67. *Id.* at 254–55 (stating that Tennessee fully accepts the *Celotex* standard, then subsequently describing Justice White's concurrence rule regarding "conclusory assertions" and negating its proposed adoption of Justice Rehnquist's standard).

of Tennessee Rule 56.”⁶⁸ Specifically, the *Rye* court declared that *Hannan* “functioned in practice to frustrate the purposes for which summary judgment was intended—a rapid and inexpensive means of resolving issues and cases about which there is no genuine issue regarding material facts.”⁶⁹

Additionally, the *Rye* court briefly addressed the differing discovery standards in Tennessee and the federal system. Namely, the court noted that although Tennessee discovery procedures do not require parties establish a formal discovery timeline, Tennessee trial courts are permitted to order continuances that allow nonmovants to “engage in [] forms of discovery.”⁷⁰ Thus, according to the *Rye* court, any concerns regarding these differing discovery procedures are meritless because a nonmovant is able to acquire an adequate amount of time for discovery before facing an unfavorable summary judgment ruling.⁷¹ The Tennessee Supreme Court, however, failed to specify what constitutes an “adequate time for discovery” under Tennessee’s discovery rules, which do not require courts to set strict discovery deadlines.⁷²

IV. THE PROBLEM WITH *RYE*

After specifically criticizing the chaotic and confusing summary judgment standard established in *Byrd v. Hall*,⁷³ the *Rye* court proceeded to repeat the *Byrd* court’s mistakes by creating an unclear, disjointed summary judgment standard likely to result in unpredictable summary judgment rulings in Tennessee trial courts. First, the *Rye*

68. *Id.* at 261.

69. *Id.*

70. *Id.* at 262 (citing TENN. R. CIV. P. 56.07).

71. *Id.*

72. See Judy Cornett, *Trick or Treat? Summary Judgment in Tennessee After Hannan v. Alltel Publishing Co.*, 77 TENN. L. REV. 305, 338 (2010) (“Although in Tennessee the formal discovery devices can be used much earlier in the case . . . the absence of initial disclosures and formal discovery plans means that discovery is more haphazard in Tennessee state courts than in federal courts.”). Compare FED. R. CIV. P. 16(b)(3)(A) (requiring federal district courts to issue a scheduling order that establishes a deadline for parties to complete discovery), with TENN. R. CIV. P. 16.01 (allowing, but not requiring, judges to establish a discovery completion date).

73. *Rye*, 477 S.W.3d at 256–59.

court's analysis and application of the *Celotex* trilogy is, at best, confusing and asserts a paradoxical procedure: while a movant is permitted to assert that summary judgment is proper by simply noting the nonmovant's lack of evidence, the movant is *also* forbidden from submitting "conclusory assertions" that summary judgment is proper. Relying on its analysis of *Celotex* for support, the *Rye* court held that a movant is not required to submit affidavits in support of its summary judgment motion and then further specified that a movant must cite to the record to establish "statements of undisputed facts" supporting its claim that the nonmovant failed to establish a viable claim.⁷⁴

This determination parallels the interpretation most federal appellate courts have adopted: *Celotex* stands for the proposition that a movant's burden of production in a motion for summary judgment is nonexistent.⁷⁵ If the *Rye* court had stopped its analysis and ruling here, it would have effectively adopted the federal standard. But, when discussing its review of *Celotex*, the *Rye* court arbitrarily added the specification that a movant may not submit "conclusory assertions" attacking the nonmoving party's evidence to support its summary judgment motion.⁷⁶ This analysis mischaracterized Justice White's concurrence in *Celotex* as an emphasis of the plurality.⁷⁷ In actuality, the plurality

74. *Id.* at 261.

75. *See supra* note 30.

76. *Rye*, 477 S.W.3d at 264 ("We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis."). Notably, Chief Justice Clark (who authored the *Rye* decision) and Justice Wade (who authored the sole dissent in *Rye*) both served on the Tennessee Supreme Court when the *Hannan* decision was issued. *See Rye*, 477 S.W.3d at 237; *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 1 (Tenn. 2008), *overruled by Rye*, 477 S.W.3d 235. Additionally, both justices joined the majority ruling in *Hannan*. *See Hannan*, 270 S.W.3d at 2. Justice Wade's dissent from the *Rye* majority highlights that the *Hannan* standard provided a clearer definition of "conclusory assertion" than the *Rye* standard. *See Rye*, 477 S.W.3d at 278–79. The *Hannan* court explicitly declared a movant's summary judgment motion must do more than "allege that the nonmoving party cannot prove the element at trial." *Hannan*, 279 S.W.3d at 10 (citation omitted). Instead of adding the "adequate time for discovery" requirement to the *Hannan* standard, which would have created a viable burden for movants that does not overburden the movant or permit conclusory assertions that the nonmovant's claim fails, the *Rye* court overhauled Tennessee's summary judgment standard and created another unclear summary judgment standard.

77. *See Rye*, 477 S.W.3d at 254–55.

opinion and Justice White's concurrence conflict.⁷⁸ If a movant is permitted to assert—via nothing more than record citations—that a non-movant failed to establish a claim for relief, what is considered a “conclusory assertion”? While the *Rye* court purported to clarify a movant's burden of production and promote uniformity, the court's failure to specify what constitutes a “conclusory assertion” creates a disjointed summary judgment standard that relies on a trial judge's guesswork to establish what comprises an adequate amount of support for a summary judgment motion.

Second, though the *Rye* court paralleled the *Celotex* mandate that an “adequate time for discovery” must elapse before a trial judge grants or denies a motion for summary judgment,⁷⁹ neither *Rye* nor Tennessee's Rules of Civil Procedure provide parties with any guidance for determining what is considered an adequate amount of time for parties to complete discovery.⁸⁰ Unlike the Federal Rules of Civil Procedure, Tennessee's rules governing civil discovery procedures do not specify a clear timeline for discovery completion.⁸¹ In the federal system, a district court judge *must* issue a scheduling order⁸² that specifies deadlines for parties to complete discovery and file motions.⁸³ Additionally, “a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.”⁸⁴ Thus, in the federal court system, when a movant files for summary judgment after the deadlines for discovery have passed, the movant can presume that an “adequate time for discovery” has elapsed. In Tennessee, however, the rules governing pretrial matters and discovery procedures are much more relaxed than the rules governing federal courts. Parties in Tennessee courts are not required to submit initial disclosures, conduct

78. Issacharoff & Lowenstein, *supra* note 2, at 81 (describing *Celotex* as a plurality and noting that *Celotex* established three distinct summary judgment standards).

79. *Rye*, 477 S.W.3d at 262 (referencing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

80. Compare FED. R. CIV. P. 16(b)(3)(A) (requiring federal district courts issue a scheduling order that establishes a deadline for parties to complete discovery) with TENN. R. CIV. P. 16.01 (allowing, but not requiring, judges to establish a discovery completion date).

81. See TENN. R. CIV. P. 16.01.

82. FED. R. CIV. P. 16(b)(1).

83. FED. R. CIV. P. 16(b)(3)(A).

84. FED. R. CIV. P. 56(b).

discovery conferences, or create a scheduling plan.⁸⁵ This lack of discovery deadlines prevents a movant from determining when an “adequate time for discovery” has elapsed and inhibits a movant’s ability to file a timely motion for summary judgment.

The *Rye* court acknowledged the argument that Tennessee’s discovery rules are incompatible with the federal summary judgment standard,⁸⁶ and, instead of proposing a solution to the incongruence, it encouraged trial judges to repeatedly grant continuances permitting additional discovery time until “adequate time for discovery” has *theoretically* passed.⁸⁷ Hypothetically, this method negates the possibility that a lack of discovery deadlines could result in a grant of summary judgment against a plaintiff who has not finished gathering evidence. In actuality, this ideology *perpetuates* the inefficient summary judgment procedure admonished by the *Rye* court,⁸⁸ while hindering a movant’s ability to file a timely motion for summary judgment. Essentially, the *Rye* court’s attempt to protect a plaintiff from a grant of summary judgment prior to its completion of discovery effectively encourages plaintiffs to avoid agreeing to a voluntary scheduling order and to persistently request more time for discovery, prolonging the litigation process for all parties involved.

Finally, the *Rye* decision encourages a defendant to file a summary judgment motion in every civil suit, regardless of the motion’s merits, while forcing a responding plaintiff to undergo the equivalent of a bench trial before it can access a jury trial. As long as the movant satisfies the mysterious “conclusory assertion” standard,⁸⁹ its burden of production is satisfied and summary judgment procedure continues. In response, the plaintiff must prove to a judge, by a preponderance of the evidence,⁹⁰ that the plaintiff’s case is viable. As *Anderson* establishes, a “mere scintilla of evidence” suggesting the plaintiff’s case

85. See TENN. R. CIV. P. 16.01–16.06.

86. *Rye*, 477 S.W.3d at 261.

87. *Id.* at 262.

88. *Id.* at 261 (characterizing the purpose of summary judgment: “a rapid and inexpensive means of resolving issues and cases about which there is no genuine issue regarding material facts”).

89. See *supra* note 76 and accompanying text.

90. Typically, a plaintiff is bound by the “preponderance of the evidence” burden of proof standard in a civil suit; if there is a heightened burden of proof, however, the plaintiff must convince a judge that it can meet that heightened burden of proof at trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

could succeed on the merits does not warrant a denial of summary judgment; rather, the plaintiff must prove that “reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict.”⁹¹

Although *Anderson*—which *Rye* purports to adopt—defines a relatively clear division of power between a jury and a judge, *Rye*'s summary judgment procedure muddles that division.⁹² In its decision to overrule *Hannan*, the *Rye* court specified that a plaintiff “must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in [the nonmovant's] favor.”⁹³ This forces a plaintiff to convince a judge that its evidence establishes a valid prima facie case in accordance with the burden of persuasion required at trial.⁹⁴ By requiring a trial judge to evaluate the merits of a plaintiff's case and predict the claim's viability as if it were presented at trial, this procedure creates a merits-based summary judgment standard of review.⁹⁵ A plaintiff who aims to reach a jury is effectively forced to agree to a bench trial because surviving a motion for summary judgment requires the plaintiff to reveal the totality of its evidence and come up with a strategy that convinces a judge the case will succeed at trial.⁹⁶ Although it is unclear what a movant must provide to support its summary judgment motion, it is clear that a movant is no longer required to present any evidence *negating* a nonmovant's claim.⁹⁷ Therefore, a defendant is advantaged by filing a summary judgment motion and encumbering the litigation process, regardless of the judge's ruling on the motion. If the case proceeds to litigation, then the defendant has been privy to the plaintiff's trial strategy. If the court grants the defendant's summary judgment motion, the defendant avoids further litigation altogether.

91. *Id.*

92. *See id.* at 255 (“Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.”).

93. *See Rye*, 477 S.W.3d at 265.

94. *See id.* at 251.

95. *See* Bert I. Huang, *Trial by Preview*, 113 COLUM. L. REV. 1323, 1325 n.6 (2013) (noting that the *Celotex* trilogy creates a “merits-like analysis of the evidence at summary judgment.”).

96. *Rye*, 477 S.W.3d at 293 (Wade, J., dissenting).

97. *See id.* at 262–63 (majority opinion).

V. CONCLUSION

The Tennessee Supreme Court created a fragmented version of the federal summary judgment standard that formed unclear burdens of production for all parties involved in a motion for summary judgment. Although the *Rye* court declared its adoption of the federal standard,⁹⁸ its analysis of the *Celotex* trilogy provided little clarity for courts attempting to comply with Tennessee's new summary judgment standard. Though the *Rye* court professes that "conclusory assertions" are not a sufficient basis for granting a summary judgment motion, it contradicts this declaration by permitting a movant to merely point to gaps in a nonmovant's case to satisfy its burden.⁹⁹ Further, the *Rye* court's failure to establish boundaries regarding an "adequate time for discovery" hinders a movant's ability to determine when to file a timely motion for summary judgment and impedes the litigation process. Finally, as Justice Brennan warned, Tennessee's decision to allow a movant to submit a conclusory assertion that the nonmovant possesses no evidence to support its claim "permit[s] summary judgment . . . to be converted into a tool for harassment."¹⁰⁰ Not only does *Rye*'s paradigm fail to define the boundaries of summary judgment in Tennessee, but it also "frustrate[s] the purposes for which summary judgment was intended—a rapid and inexpensive means of resolving issues and cases about which there is no genuine issue regarding material facts."¹⁰¹

98. *Id.* at 264.

99. *See id.*

100. *Id.*

101. *Rye*, 477 S.W.3d at 261.