

TWB Architects, Inc. v. Braxton, L.L.C.: The Unchanging Rule for Plaintiffs’ Summary Judgment Motions

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I. INTRODUCTION	1
II. THE FACTUAL SETTING: <i>TWB ARCHITECTS, INC. v. BRAXTON, L.L.C.</i> 3	
A. <i>TWB Architects, Inc. v. Braxton, L.L.C. in the Court of Appeals</i>	4
B. <i>TWB Architects in the Supreme Court: The Initial Opinion</i>	5
C. <i>TWB Architects in the Supreme Court: The Revised Opinion</i>	7
III. <i>RYE, CELOTEX, AND THE BURDEN OF PROOF</i>	8
IV. ASSESSING THE NEED FOR <i>TWB ARCHITECTS: WAS HANNAN’S FOOTNOTE SIX WRONG?</i>	11
V. GOING FORWARD: HOW TO INTERPRET <i>TWB ARCHITECTS?</i>	15
VI. CONCLUSION	17

I. INTRODUCTION

Summary judgment has been a hot topic of discussion in Tennessee over the last decade. Most attorneys know the basic story: the Supreme Court modified the standards governing such motions in

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*Hannan v. Alltel Publishing Co.*¹ in 2008.² The legislature took umbrage and in 2011 adopted a statute, Tennessee Code section 20-16-101, purporting to abrogate *Hannan*.³ The Supreme Court then mooted arguments about the interplay between the statute and *Hannan* by overruling *Hannan* in *Rye v. Women's Care Center of Memphis, M.P.L.L.C.*⁴ in 2015.⁵ Now comes *TWB Architects, Inc. v. Braxton, L.L.C.*,⁶ in which the Court undertook to clarify the scope of *Rye*'s holding in situations where the summary judgment movant bears the burden of proof at trial. Doing so took the Court two attempts, and while the end result gives the bench and bar a simplified citation source for the standard applicable to certain summary judgment motions, the law itself has not actually changed.

This Comment explains how the Supreme Court's restatement of the rules, though helpful, was ultimately unnecessary, as the standard articulated by *TWB Architects* is the same as that in *Hannan*'s footnote six. Part I lays out the factual and procedural context of *TWB Architects*. Part II provides a brief overview of the backdrop to *TWB*

1. 270 S.W.3d 1 (Tenn. 2008).

2. *Id.* at 8–9 (“[A] moving party who seeks to shift the burden of production to the nonmoving party who bears the burden of proof at trial must either: (1) affirmatively negate an essential element of the nonmoving party’s claim; or (2) show that the nonmoving party cannot prove an essential element of the claim at trial.”). The *Hannan* standard operated essentially as a test of logical proof: the defendant movant had to show not just that the evidence of record would not support a verdict for the plaintiff but that it would *preclude* such a verdict even if other, unstated evidence were later produced at trial.

3. See 2011 Tenn. Pub. Ch. 498 § 1.

4. 477 S.W.3d 235 (Tenn. 2015).

5. The full history can be found in an article written in the aftermath of *Rye*. See Judy M. Cornett et al., *Comin’ Through the Rye: A Requiem for the Tennessee Summary Judgment Standard*, 83 TENN. L. REV. 1027 (2016).

6. *TWB Architects, Inc. v. Braxton, L.L.C. (TWB Architects III)*, No. M2017-00423-SC-R11-CV, 2019 WL 3281372, slip op. at 1 (Tenn. July 22, 2019), *superseded by modified opinion* at 578 S.W.3d 879 (Tenn. July 22, 2019) (*TWB Architects IV*). The *TWB Architects III* opinion was removed from Westlaw and the Court’s website upon release of the revised opinion but remains available on the Tennessee Bar Association’s website. See TENN. BAR ASS’N, https://www.tba.org/sites/default/files/twb_architects_072219.pdf?fid=8ecfaccd2e76adc49b04bbe0c225c281bc0f0f33 (last visited Nov. 7, 2020). Therefore, the URL will be appended to every citation of *TWB Architects III* hereafter.

Architects, reviewing *Rye v. Women's Care Center of Memphis, M.P.L.L.C.* and the federal summary judgment cases it adopted. Part III discusses why it was not actually necessary for *TWB Architects* to detour to ensure that *Hannan*, in particular a dictum in footnote six about plaintiffs' summary judgment motions, was "not only merely dead, [but] really most sincerely dead."⁷ Finally, Part IV briefly discusses the use and interpretation of this part of *TWB Architects* going forward.

II. THE FACTUAL SETTING: *TWB ARCHITECTS, INC. v. BRAXTON, L.L.C.*

The *TWB Architects* case facts lend themselves to easy summation: Braxton, L.L.C. hired TWB Architects ("TWB") to design a condo development.⁸ The condo project ran out of money, and TWB's owner agreed to accept a condo unit as payment.⁹ But the construction lender foreclosed a superior lien and wound up owning all the condo units, leaving TWB both unpaid and condo-less.¹⁰

Left empty handed, TWB sued for its fee, and in response, Braxton asserted (primarily but not exclusively) that the agreement to convey the condo unit to TWB's owner constituted a novation of the fee agreement.¹¹ Initially, the trial court agreed and entered summary judgment on that defense, but the court of appeals reversed.¹² TWB moved for summary judgment itself on remand.¹³ The trial court granted that motion as well, both dismissing Braxton's affirmative defenses and entering judgment on TWB's own claims.¹⁴ Braxton appealed.¹⁵

7. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

8. *TWB Architects, Inc. v. Braxton, L.L.C. (TWB Architects I)*, No. M2013-2740-COA-R3-CV, 2014 WL 5502401, at *1–2 (Tenn. Ct. App. Oct. 30, 2014).

9. *Id.*

10. *Id.*

11. *Id.* at *2.

12. *Id.* at *3.

13. *See TWB Architects, Inc. v. Braxton, L.L.C. (TWB Architects II)*, No. M2017-0423, 2018 WL 638251, at *3–4 (Tenn. Ct. App. Jan. 31, 2018).

14. *Id.*

15. *Id.*

A. *TWB Architects, Inc. v. Braxton, L.L.C. in the Court of Appeals*

The court of appeals viewed the key issue as whether Braxton's affirmative defenses survived summary judgment.¹⁶ It correctly recited the standard governing summary judgment motions brought by a party not bearing the burden of proof on the claim or defense targeted by the motion:

A moving party who does not bear the burden of proof at trial "may satisfy its burden of production either (1) by affirmatively negating an essential element of the non-moving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense."¹⁷

Because it framed the essential issue as whether Braxton could establish an affirmative defense to the otherwise-undisputed contract claim, the court of appeals applied that framework to the affirmative defenses it had raised: "Braxton cannot prove novation because there is no evidence that Mr. Burrow intended a novation when he signed the Purchase Agreement."¹⁸

But the court of appeals also included a footnote in its introductory section on the standard of review, stating:

[I]n cases where the moving party bears the burden of proof at trial, the burden-shifting analysis at the summary judgment phase differs from that set out above. Thus, "a plaintiff who files a motion for partial summary judgment on an element of his or her claim shifts the burden

16. *Id.* at *5 ("The overarching issue in this case is whether the trial court erred in granting summary judgment in favor of TWB. That motion was based upon the dismissal of The Braxton's affirmative defenses. . . ."). It was apparently undisputed that, but for Braxton's affirmative defenses, TWB was entitled to judgment on its prima facie case. *Id.*

17. *Id.* at *4 (quoting *Rye v. Women's Care Ctr. of Memphis, M.P.L.L.C.*, 477 S.W.3d 235, 264 (Tenn. 2015)).

18. *Id.* at *7. The court of appeals similarly found no disputed question of material fact on several other affirmative defenses, but the Supreme Court pretermitted these, and they do not appear in and of themselves to bear on the summary judgment standard question.

by alleging undisputed facts that show the existence of that element and entitle the plaintiff to summary judgment as a matter of law.” Although *Rye* overruled *Hannan* “as applied to all cases where the moving party who does *not* bear the burden of proof at trial files the motion,” the *Hannan* summary judgment standard still applies where the plaintiff files the motion for summary judgment. However, BTW’s motion for summary judgment focuses solely upon The Braxton’s defenses, issues for which The Braxton bore the burden of proof at trial. Therefore, the burden-shifting analysis should be that for a party who does not bear the burden of proof at trial, as discussed in *Rye*.¹⁹

As the footnote makes clear, the portion of *Hannan* the court of appeals was regarding as still viable in some contexts is not *Hannan*’s central holding about the initial burden on a defendant’s summary judgment motion but the contents of *Hannan*’s footnote six, a dictum entirely apart from the holding that made *Hannan* so troublesome.²⁰ That point will become relevant.

B. TWB Architects in the Supreme Court: The Initial Opinion

The Supreme Court granted Braxton’s application for permission to appeal.²¹ In its decision, it reversed the trial court and court of appeals, holding that a disputed question of material fact existed as to the novation defense while pretermittting the remaining defenses as

19. *Id.* at *4 n.6 (first citing *Cardinal Health 108, Inc. v. E. Tenn. Hematology–Oncology Assocs., P.C.*, No. E2015–00002–COA–R3–CV, 2016 WL 158090, at *2 (Tenn. Ct. App. Jan. 14, 2016); then quoting *Hannan v. Alltel Publ’g Co.*, 270 S.W.3d 1, 9 n.6 (Tenn. 2008), *overruled by Rye*, 477 S.W.3d at 264; then quoting *Cardinal Health*, 2016 WL 158090, at *2 n.1; and then citing *Rye*, 477 S.W.3d at 264).

20. Professor Cornett and her collaborators argued that *Hannan* was neither as troublesome nor as peculiar as some among the bench and bar made it out to be, blaming what confusion did arise on the supposed misapplication of *Hannan* by the Western Section of the court of appeals. See Cornett et al., *supra* note 5, at 1037–39, 1048.

21. See *TWB Architects v. Braxton, L.L.C. (TWB Architects III)*, No. M2017-00423-SC-R11-CV, 2019 WL 3281372, slip op. at 1 (Tenn. July 22, 2019), https://www.tba.org/sites/default/files/twb_architects_072219.pdf?fid=8ecfaccd2e76adc49b04bbe0c225c281bc0f0f33.

“not at issue.”²² The Court reasoned that “[s]ummary judgment should not be granted when . . . the record contains ‘clear evidence of a witness’s lack of credibility,’” and that the record contained sufficient evidence respecting the two key witnesses to preclude summary judgment.²³ All very well.

Before embarking on that substantive analysis, however, the Court began by responding to the court of appeals’ footnote concerning *Hannan*:

[W]e intended for the summary judgment standard adopted in *Rye* to apply to all parties, no matter which party filed the motion for summary judgment. Here, the court of appeals incorrectly stated that the *Hannan* summary judgment standard, not the *Rye* standard, applies when the plaintiff files a motion for summary judgment.

Confusion about the applicability of the *Rye* standard may have arisen from language in *Rye* based on its procedural posture. In *Rye*, the defendants moved for summary judgment, and we framed our holding as the standard to be applied when the moving party who does not bear the burden of proof at trial (the defendant) moves for summary judgment. But we did not intend to limit the *Rye* summary judgment standard only to cases in which a defendant files for summary judgment. We can only effectuate our *Rye* summary judgment course correction if our holding applies equally to plaintiffs and defendants.

As a result, the *Rye* summary judgment standard applies whether the moving party is a plaintiff or a defendant and

22. *TWB Architects v. Braxton, L.L.C. (TWB Architects IV)*, 578 S.W.3d 879, 886 n.11 (Tenn. July 22, 2019).

23. *TWB Architects III*, slip op. at 18, https://www.tba.org/sites/default/files/twb_architects_072219.pdf?fid=8ecfaccd2e76adc49b04bbe0c225c281bc0f0f33. This concept was not new. See FED. R. CIV. P. 56 advisory committee’s note to 1963 amendment.

without regard to which party has the burden of proof at trial.²⁴

The Court's language purports to be a clarification of the summary judgment standard. But they actually would have done precisely the opposite. These three paragraphs would have planted the seeds of untold confusion for Tennessee summary judgment jurisprudence. Mercifully, the Court would go on to withdraw and revise this portion of its opinion before it worked any mischief.

C. *TWB Architects in the Supreme Court: The Revised Opinion*

In a revised opinion issued August 1, 2019, but dated *nunc pro tunc* to July 22, the Court reworked its discussion of the summary judgment standard. The changes forestalled much of the confusion that would have resulted from the original opinion.

Expanding its discussion in the original opinion, the Supreme Court wrote that in *Rye*, it had intended to adopt the full width and breadth of the federal *Celotex* standard's reasoning:

[I]n a dissenting opinion in *Celotex*^[25] . . . Justice Brennan explained that if the moving party bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if uncontroverted at trial, would entitle it to a directed verdict.

By stating its holding in terms of the burden shifting framework applicable when the nonmoving party does not bear the burden of proof at trial, the Court in *Rye* did not intend to change this burden shifting framework or to exclude from its holding the burden shifting framework

24. *TWB Architects III*, slip op. at 10–11 (footnote omitted) (citing *TWB Architects II*, No. M2017-0423, 2018 WL 638251, at *4 n.6 (Tenn. Ct. App. Jan. 31, 2018); and then citing *Rye*, 477 S.W.3d at 264), https://www.tba.org/sites/default/files/twb_architects_072219.pdf?fid=8ecfaccd2e76adc49b04bbe0c225c281bc0f0f33.

25. It is one of the oddities of United States Supreme Court history that Justice Brennan's dissent has retained such prominence. At the time of publication, Westlaw reflects over 466 judicial citations to the dissent alone. See Westlaw.com (“*Celotex* +6 Brennan”).

described by Justice Brennan when the nonmoving party bears the burden of proof at trial. The emphasis under the *Rye* standard is the evidence *at the summary judgment stage*. Whether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, “[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.” This is the standard Tennessee courts must apply when ruling on summary judgment motions regardless of which party bears the burden of proof at trial.²⁶

The Court continued to maintain, however, that the court of appeals had erred by citing *Hannan*’s footnote six for a summary judgment motion brought by the party with the burden of proof at trial: “the court of appeals incorrectly stated that the *Hannan* summary judgment standard, not the *Rye* standard, applies when the plaintiff files a motion for summary judgment.”²⁷ While the Tennessee Supreme Court’s reference to Justice Brennan’s opinion in *Celotex* makes perfect sense and provides a more expansive and useful reference for motions that arise in that posture, its denigration of *Hannan*’s footnote six and the court of appeals’ reliance on it was unnecessary. To understand why, we must turn back to *Celotex* itself.

III. RYE, CELOTEX, AND THE BURDEN OF PROOF

The Supreme Court decided three summary judgment cases in 1986; the last of these would go on to lend its name to the entire set, which we now know as the “*Celotex* Trilogy.”²⁸ The rules established by the trilogy have become so firmly implanted in federal practice that

26. *TWB Architects IV*, 578 S.W.3d at 888–89 (quoting *Rye*, 477 S.W.3d at 265); see also *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

27. *Id.* at 888.

28. See *Celotex*, 477 U.S. at 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The first judicial use of the phrase “*Celotex* Trilogy” appears to be from Tennessee. See *Baptist Mem’l Hosp. v. Bowen*, No. 85-2587, 1987 WL 108975, at *1 (W.D. Tenn. July 20, 1987).

describing the pivotal role the Trilogy played at the time would require a digression beyond the scope of this Comment. But to simplify the cases drastically, the first, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, made clear that a facially adequate summary judgment motion must be opposed by competent evidence creating a jury question.²⁹ The second, *Anderson v. Liberty Lobby Inc.*, made clear that “material facts” are those that affect the outcome and “genuine” disputes are those that arise where a factfinder could decide for either party.³⁰ The third, *Celotex Corp. v. Catrett*, made clear that a movant without the burden of proof need not support a motion for summary judgment with its own evidence if it could show that the nonmovant’s evidence of record failed to create a genuine issue as to some material fact.³¹

In *TWB Architects*, the Tennessee Supreme Court correctly noted why *Rye*’s statement of the summary judgment standard reads the way it does: because that case, like *Celotex*, came to the Tennessee Supreme Court from a ruling on a motion for summary judgment by a defendant attacking an element of the plaintiff’s prima facie case.³² Under the “*Celotex* trilogy,” which *Rye* re-endorsed as governing summary judgment in Tennessee,³³ all a defendant must do to prevail on summary judgment is show that the evidence of record would not allow the plaintiff’s case to withstand a motion for directed verdict were that evidence, and only that evidence, presented at trial.³⁴

In *Rye*, then, the Tennessee Supreme Court articulated the summary judgment standard:

[W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an

29. *Matsushita Elec. Ind. Co.*, 475 U.S. at 586–87.

30. *Anderson*, 477 U.S. at 248.

31. *Celotex Corp.*, 477 U.S. at 322–23.

32. See *TWB Architects, Inc. v. Braxton, L.L.C (TWB Architects IV)*, 578 S.W.3d 879, 888 (Tenn. July 22, 2019); accord *TWB Architects, Inc. v. Braxton, L.L.C (TWB Architects III)*, No. M2017-00423-SC-R11-CV, 2019 WL 3281372, slip op. at 1 (Tenn. July 22, 2019), https://www.tba.org/sites/default/files/twb_architects_072219.pdf?fid=8ecfaccd2e76adc49b04bbe0c225c281bc0f0f33; see also *Rye v. Women’s Care Ctr. of Memphis, M.P.L.L.C.*, 477 S.W.3d 235, 248 (Tenn. 2015).

33. *Rye*, 477 S.W.3d at 262.

34. See *Anderson*, 477 U.S. at 247–50.

essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense.³⁵

That statement is certainly a correct application of the federal *Celotex* Trilogy rule in *Rye*'s procedural posture. But as the revised *TWB Architects* opinion suggests, that articulation cannot serve, by itself, as the rule for summary judgments sought by a party bearing the burden of proof on the issue in question.³⁶

This is so primarily because a nonmovant without the burden of proof has no "claim" and needs prove no "essential elements." If A sues B and neither introduces any evidence at trial, B wins. Thus, the idea of "affirmatively negating" part of the case of a party without the burden of proof is topsy-turvy. Viewed through the second method of obtaining summary judgment, the result is the same: parties without the burden of proof need not "establish [a] claim or defense"³⁷ through particular evidence, so a movant cannot establish that the evidence of record is insufficient to do so. At the very least, one cannot do that without introducing the evidence concerning the claim or affirmative defense available to the movant and arguing why it is insufficient, a tedious process that inverts the traditional order of such motions.³⁸

The key to understanding summary judgment lies, as the revised *TWB Architects* opinion notes, in treating the summary judgment record as if it were the evidence at trial.³⁹ If the jury would be permitted to return a verdict for either party under that evidence, there can be no summary judgment; if, by contrast, one party or the other would be entitled on that evidence to judgment as a matter of law, that party is

35. *Rye*, 477 S.W.3d at 264.

36. See *TWB Architects IV*, 578 S.W.3d at 888–89.

37. *Rye*, 477 S.W.3d at 264.

38. Also, one of *Rye*'s goals was restoration of the unsupported "pure *Celotex* motion." *Id.* at 265; see also Judy M. Cornett, *Trick or Treat? Summary Judgment in Tennessee After Hannan v. Alltel Publishing Co.*, 77 TENN. L. REV. 305, 306–07 (2010) ("[A] pure *Celotex* motion is unsupported by evidence. . . . [T]he party who makes a pure *Celotex* motion simply dares its opponent to 'put up or shut up.'"). Such motions are inherently impossible where the movant bears the burden of proof.

39. See *TWB Architects IV*, 578 S.W.3d at 888–89 (quoting *Rye*, 477 S.W.3d at 265).

likewise entitled to summary judgment.⁴⁰ Indeed, that analogy to the directed verdict stage is the only thing that makes summary judgment permissible, rather than an unconstitutional impairment of the right to a jury trial.⁴¹

IV. ASSESSING THE NEED FOR *TWB ARCHITECTS*: WAS *HANNAN*'S FOOTNOTE SIX WRONG?

The revised *TWB Architects*' description of summary judgment is, in the main, salutary and helpful. It explains in a readily comprehensible manner the fundamental principles governing summary judgment and provides an easier-to-cite source for the rule about movants who bear the burden of proof than *Hannan*'s footnote six. Oddly though, *Hannan*'s footnote six was manifestly a correct statement of the federal standard embraced in *Rye* and *TWB Architects*. The dictum in the footnote was neither intertwined with *Hannan*'s burden-changing holding nor otherwise incompatible with either the *Celotex* or *Rye* lines of cases. Thus, by purporting to overrule the court of appeals' cases relying on footnote six, the Supreme Court has undone some of the clarity it sought to bring by discussing the topic in *TWB Architects* in the first place.

In footnote six, the *Hannan* court wrote:

[A] plaintiff who files a motion for partial summary judgment on an element of his or her claim shifts the burden by alleging undisputed facts that show the existence of that element and entitle the plaintiff to summary judgment as a matter of law. Similarly, a defendant asserting an affirmative defense, such as laches, shifts the burden of production by alleging undisputed facts that show the existence of the affirmative defense.⁴²

Comparing this statement to the federal standard reveals fundamental congruity between the two. In the words of Wright and Miller,

40. *Id.*

41. A compelling argument exists that not only Rule 56, but indeed the constitutional right to a jury trial, precludes the trial court's resolution of disputed questions of fact on summary judgment. *See, e.g.*, Edward Brunet, *Summary Judgment Is Constitutional*, 93 IOWA L. REV. 1625, 1627–28 (2008).

42. *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 9 n.6 (Tenn. 2008).

“if the movant bears the burden of proof on a claim at trial, then its burden of production is greater [than that of a movant without the burden of proof].”⁴³ In that case, a movant “must lay out the elements of its claim, citing the facts it believes satisfies those elements, and demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing.”⁴⁴ Or, as the Fifth Circuit Court of Appeals put it, “[w]here . . . the *moving party* bears the burden of proof at trial, it must come forward with evidence which would ‘entitle it to a directed verdict if the evidence went uncontroverted at trial.’”⁴⁵

These and footnote six are the same rule. “[A]lleging undisputed facts that show the existence of [an] element [of a claim or affirmative defense]” is, if not precisely, at least in general parlance the same as “rul[ing] out the prospect of the nonmovant prevailing” or showing an entitlement “to a directed verdict if the evidence went uncontroverted.”⁴⁶ This is what judges and lawyers mean by “undisputed facts” or the absence of a genuine dispute as to them: circumstances under which only one version of the events is supported by material evidence.⁴⁷ And while footnote six uses a word—“alleging”—not

43. 10A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2727.1 (4th ed. 2008).

44. *Id.*

45. *Int’l Shortstop, Inc. v. Rally’s Inc.*, 939 F.2d 1257, 1264–65 (5th Cir. 1991); *accord, e.g., Paramount Aviation Corp. v. Agusta*, 178 F.3d 132, 146 (3d Cir. 1999); *Albee Tomato, Inc. v. A.B. Shalom Produce Corp.*, 155 F.3d 612, 617–18 (2d Cir. 1998); *Hotel 71 Mezz Lender L.L.C. v. Nat’l Ret. Fund*, 778 F.3d 593, 601 (7th Cir. 2015); *Leone v. Owsley*, 810 F.3d 1149, 1153 (10th Cir. 2015).

46. *See, e.g., Morton’s Mkt., Inc. v. Gustafson’s Dairy, Inc.*, 198 F.3d 823, 832 (11th Cir. 1999) (“[T]he moving party always bears the initial burden of pointing out the undisputed facts which entitle it to judgment as a matter of law.”); *Estate of Toney v. Cunningham*, No. 02A01-9801-CV-00005, 1999 WL 188291, at *4 (Tenn. Ct. App. Apr. 6, 1999) (“Summary judgment is appropriate only if the party seeking summary judgment demonstrates that there are no genuine issues of material fact and . . . that, under the undisputed facts, the moving party is entitled to a judgment as a matter of law.”). There is technically wiggle room between the statement from footnote six and the others because undisputed facts could support competing inferences precluding summary judgment. *See, e.g., Prescott v. Adams*, 627 S.W.2d 134, 138–39 (Tenn. Ct. App. 1981). But the movant must still demonstrate entitlement to judgment as a matter of law. *See TENN. R. CIV. P. 56.04* (as footnote six itself recites).

47. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *Estate of Parsons v. Palestinian Auth.*, 651 F.3d 118, 123 (D.C. Cir. 2011); *Sigall-Drakulich v. City of Columbus*, 156 F. App’x 791, 800 (6th Cir. 2005); *Cruce v. Memmex Inc.*,

normally part of the summary judgment lexicon, the court of appeals has not read that as departing from Rule 56.06⁴⁸ but, as the nine cases citing footnote six make clear, instead as meaning merely “point to in the record.”⁴⁹

Thus, whatever *Hannan*'s other shortcomings might have been, footnote six was entirely consistent with the federal rule and with the logic of the *Celotex* Trilogy later affirmed in *Rye*. The court of appeals had continued to cite footnote six because it represented the Supreme Court's last word—albeit in dicta—about motions filed from that particular posture.

Why, then, did the Supreme Court go out of its way not only to discuss the summary judgment standards in *TWB Architects* but to purport to overrule the one part of *Hannan* that was not incompatible with *Rye*? Certainly the parties in *TWB Architects* did not ask the Court to

No. W2016-1167-COA-R3-CV, 2017 WL 497035, at *6–7 (Tenn. Ct. App. Feb. 7, 2017).

48. See TENN. R. CIV. P. 56.06.

49. See *Deutsche Bank Nat'l Tr. Co. v. Lee*, No. M2018-1479-COA-R3-CV, 2019 WL 2482423, at *3 (Tenn. Ct. App. June 13, 2019); *Thornley v. U.S. Bank, N.A.*, No. M2014-0813-COA-R3-CV, 2015 WL 3989380, at *3 (Tenn. Ct. App. June 30, 2015) (“As the party with the burden of proof, in order to obtain summary judgment, [plaintiff] was required to set forth undisputed facts that establish each element of her breach of contract claim and that entitle her to judgment as a matter of law.”); *Davidson Pabts, L.L.C. v. Worsham*, No. M2014-01061-COA-R3-CV, 2015 WL 4115174, at *4 (Tenn. Ct. App. May 18, 2015) (“Plaintiff's motion was properly supported by undisputed documents and facts sufficient to establish the elements of Plaintiff's action . . . and entitle Plaintiff to a judgment as a matter of law.”); *Chambers v. Ill. Cent. R.R.*, No. W2013-2671-COA-R3-CV, 2015 WL 2105537, at *4 (Tenn. Ct. App. May 5, 2015) (“[W]e proceed to determine whether [defendant] met its burden to show the absence of an issue of fact that it complied with the federal regulation.”); *Cnty. First Bank & Tr. v. Velligan Family Tr.*, No. M2014-0370-COA-R3-CV, 2015 WL 1955431, at *4–5 (Tenn. Ct. App. May 1, 2015) (“[A]s the party moving for summary judgment, the Bank had the initial burden to demonstrate the elements required to support its claim The . . . affidavits . . . established the [elements].”); *Crowley v. Frame*, No. M2014-0037, 2015 WL 399217, at *3 (Tenn. Ct. App. Jan. 29, 2015) (“To be entitled to a judgment as a matter of law, [plaintiff's] filings must contain sufficient facts to demonstrate the vicarious liability of [defendants] for the conduct of Mr. Troy Frame.”); see generally *Self Help Ventures Fund v. Robilio*, No. W2009-00368-COA-R3-CV, 2010 WL 2176093 (Tenn. Ct. App. June 1, 2010) (making clear, in references scattered throughout the opinion, that the plaintiff obtained summary judgment via affidavits setting out its prima facie case).

address the topic: Braxton's brief does not even cite *Hannan*,⁵⁰ while TWB's refers to it only in passing, noting it was overruled by *Rye*.⁵¹ The closest either party came to raising an issue about the applicable standards was a reference by TWB's attorney during oral argument:

If you write an opinion that says [sic] normally issues of fact on intent will not allow for summary judgment—if you want to extend the whole *Rye* standard to these questions when intent is one of the elements—this might have been a good case to take on that subject. But because we [a]re talking about affirmative defenses that require material issues of fact by both sides, this is not the right case to [sic] reverse summary judgment.⁵²

With all credit and respect to TWB's very capable counsel, his meaning when he refers to "extend[ing] the whole *Rye* standard" is less than clear. *Rye* did not limit its holding to any particular type of factual dispute but spoke in general of the requirements for an initial showing on summary judgment and the requirements to avoid summary judgment when the movant does not have the burden of proof.⁵³ Perhaps the statement—which came in the course of a broader discussion of Rule 56.03's requirements—was meant to refer to *Rye*'s instructions concerning the importance of Rule 56.03 statements.⁵⁴

It may be that the Supreme Court felt that leaving courts and litigants to cite a dictum in a case widely known not for the dictum but instead for a repudiated standard invited confusion. Yet the Supreme Court's discussion failed to distinguish between the part of *Hannan* that

50. See Brief of Appellants at iii, *TWB Architects, Inc. v. Braxton, L.L.C. (TWB Architects IV)*, 578 S.W.3d 879, 886 n.11 (Tenn. July 22, 2019) (No. 17-00423), 2018 WL 4216426, at *ii–vi.

51. See Brief of Appellee at 37, *TWB Architects IV*, 2018 WL 4852399, at *37.

52. Oral Argument at 52:32, *TWB Architects IV*, 578 S.W.3d 879 (No. M2017-0423-SC-R11-CV), <http://www.tncourts.gov/courts/supreme-court/arguments/2019/02/06/twb-architects-inc-v-braxton-llc-et-al>.

53. See *Rye v. Women's Care Ctr. of Memphis, M.P.L.L.C.*, 477 S.W.3d 235, 264–65 (Tenn. 2015).

54. Cf. *Rye*, 477 S.W.3d at 264–65 ("Tennessee Rule 56.03 requires the moving party to support its motion with 'a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial. Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record.'" (quoting TENN. R. CIV. P. 56.03)).

it had overruled and the entirely different dictum that the court of appeals had invoked. Nor does its opinion acknowledge that the court of Appeals had cited only the dictum in *Hannan*'s footnote six, rather than the notorious and discarded holding, although the court of appeals, while only citing footnote six, did speak somewhat unguardedly of "the *Hannan* summary judgment standard."⁵⁵ Certainly, citing *TWB Architects* going forward will be easier for the bench and bar than citing to a footnote in an otherwise-overruled case. But that fact does little to shed light on why the Supreme Court felt compelled to mention the issue in the first place given that neither party had raised it and the entire discussion did not address the posture of the part of the case the Court substantively reviewed. The digression can probably best be viewed as a proactive effort by the Supreme Court to exercise its supervisory authority to prevent confusion.⁵⁶

V. GOING FORWARD: HOW TO INTERPRET *TWB ARCHITECTS*?

To recap, then, in *Hannan*'s footnote six, the Supreme Court inserted, by way of dictum, a reasonably accurate statement of the federal standard governing summary judgment motions by the party bearing the burden of proof, a statement independent of its holding concerning motions by parties without that burden. In *Rye*, the Supreme Court overruled *Hannan*'s holding (concerning motions by defendants, or others not bearing the burden of proof) in favor of a thoroughgoing endorsement of the federal standard for such motions but made no reference to footnote six or its subject. Now, in *TWB Architects*, the Supreme Court has purported to overrule footnote six while instructing that *Rye*'s adopt-the-federal standard rule should apply in its stead. The

55. *TWB Architects, Inc. v. Braxton, L.L.C (TWB Architects II)*, No. M2017-0423, 2018 WL 638251, at *4 n.6 (Tenn. Ct. App. Jan. 31, 2018).

56. *Cf., e.g., State v. Walls*, 537 S.W.3d 892, 904 n.7 (Tenn. 2017) ("Although our decision regarding the appropriate standard of review is not technically necessary to resolve this appeal, our decision to address this issue is not inappropriate either. Rule 11 of the Rules of Appellate Procedure . . . allows this Court to grant permission to appeal if there is a 'need for the exercise of the Supreme Court's supervisory authority.' . . . Clarifying the proper standard of appellate review that applies to a trial court's decision to allow or require late night jury deliberations is an appropriate exercise of our supervisory authority, as clarification of this point, even in dicta, will provide guidance to defense lawyers, prosecutors, trial judges, and members of the Court of Criminal Appeals.").

Supreme Court has thus abrogated a standard in favor of the same standard.

The net effect, then, appears to be negligible in terms of the substance of the law. The cases *TWB Architects* purported to overrule will create KeyCite problems for practitioners, as they had become numerous enough to have been cited in lieu of *Hannan*'s footnote by subsequent panels.⁵⁷ The fact that the Supreme Court overruled them without changing the rule they applied amplifies rather than diminishes that confusion.

All the same, *TWB Architects* gives a useful reminder: the standards for summary judgment can be stated without reference to who bears the burden of proof. "[T]he moving party always bears the initial burden of pointing out the undisputed facts which entitle it to judgment as a matter of law."⁵⁸ A party without the burden of proof on an issue—a defendant with respect to a cause of action or a plaintiff with respect to an affirmative defense—can do this without introducing evidence. A party with the burden of proof, by contrast, must have evidence in the record to support its theory in order to fulfill the basic requirement. In either event, the properly supported motion⁵⁹ shifts a similar burden to the nonmovant: defeat the motion by introducing sufficient evidence to create a jury question on the pertinent material facts.⁶⁰

Read this way, simply as a reminder that summary judgment requires a showing of entitlement to judgment as a matter of law on undisputed material facts, regardless of the posture of the movant and respondent, *TWB Architects* makes perfect sense. That is so even though its chastisement of the court of appeals was, on consideration,

57. See, e.g., *Aurora Loan Servs., L,L,C, v. Woody*, No. W2014-0761, 2014 WL 7463032, at *6 (Tenn. Ct. App. Dec. 30, 2014).

58. *Morton's Mkt., Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 832 (11th Cir. 1999); accord *Brown v. J.C. Penny Life Ins. Co.*, 861 S.W.2d 834, 837–38 (Tenn. Ct. App. 1992) (affirming summary judgment on an affirmative defense).

59. Of course, one can also defeat a supported summary judgment motion by, in effect, showing that it was not properly supported by showing that, despite its claims, it did not establish undisputed facts or that the undisputed facts do not entitle the movant to judgment as a matter of law.

60. See, e.g., *Rye v. Women's Care Ctr. of Memphis, M.P.L.L.C.*, 477 S.W.3d 257 (Tenn. 2015) (quoting *Byrd v. Hall*, 847 S.W.2d 208, 215–16 (Tenn. 1993)).

unnecessary. At least the citations for plaintiffs' motions will be easier in the future. We should all be thankful for that.

VI. CONCLUSION

Regardless of whether it was right or wrong in the first instance, *Hannan* bedeviled Tennessee courts. The Supreme Court's subsequent insistence on exorcising it from Tennessee jurisprudence led first to the clear adoption of the federal summary judgment standard in *Rye*. It then led, more surprisingly, to the court's excoriation of *Hannan*'s footnote six in *TWB Architects*, even though footnote six had nothing to do with *Hannan*'s main holding and even though it sensibly and accurately recited the rule *Rye* and *TWB Architects* itself embraced. Indeed, footnote six referred to the one thing about summary judgment that has not changed in Tennessee over the last decade: if you have the burden of proof on an issue and want summary judgment on it, then or now, you have to bring evidence that would warrant a directed verdict at trial. Everything else has changed—now even the case to cite for the principle—but that has stayed the same.
