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INTRODUCTION

What must a defendant do to be granted summary judgment in Tennessee? This question has given rise to a long, hotly contested battle over the proper role of summary judgment and, ultimately, who should bear the burden of producing evidence and when. The evolution of Tennessee's summary judgment standard—from the adoption of the Tennessee Rules of Civil Procedure in 1971 to the Tennessee Supreme Court's most recent interpretation of Rule 56 in 2015—is a story of competing visions of the benefits and burdens associated with civil litigation. How much time should an aggrieved

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party have to marshal evidence in support of its claim? How much time and money should an oppressed defendant have to expend in resisting a suit that may ultimately prove unfounded? Answers to these questions have shaped the competing visions of summary judgment in Tennessee.

This Article examines the development of Tennessee summary judgment law from its inception in 1971 to the present. It then focuses on the most recent summary judgment standard, adopted by the Tennessee Supreme Court in *Rye v. Women's Care Center of Memphis*.[1] Section I recounts the history of summary judgment in Tennessee including the scholarly debate over whether Tennessee did—or should—adopt the federal *Celotex* standard.[2] Section II then examines *Rye* in detail. Section III discusses the aftermath of *Rye*, and suggests issues this case will likely raise for Tennessee courts in the future.

I. A BRIEF HISTORY OF SUMMARY JUDGMENT IN TENNESSEE

> "[T]here are essentially three kinds of history: what actually happened, what we are told happened, and what we finally come to believe happened."[3]

Summary judgment likewise has three histories. "What actually happened" is lost, to the extent that it consisted of the thoughts, beliefs, and intentions of the actors involved. Those thoughts, beliefs, and intentions are imperfectly recorded in decided opinions, advisory committee comments, and treatises contemporaneous with that history. Various speakers have since recounted their interpretations of "what actually happened," but, not surprisingly, those accounts diverge in significant ways. It is from these often contradictory accounts that "we [might] finally come to believe [what] happened." But is it possible to reconcile these multifarious accounts with one another to reach a single belief about what happened? Can we actually settle on a shared belief about what happened in the history of summary judgment in Tennessee?

The history of summary judgment in Tennessee can be divided into four phases: (1) the period predating our state's adoption of the

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1. Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235 (Tenn. 2015).

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

3. JOHN EGERTON, SPEAK NOW AGAINST THE DAY: THE GENERATION BEFORE THE CIVIL RIGHTS MOVEMENT IN THE SOUTH 11 (Alfred A. Knopf ed., 1994).

Tennessee Rules of Civil Procedure in 1971; (2) the period from adoption of the Rules to the Tennessee Supreme Court's 1993 decision in *Byrd v. Hall*;[4] (3) the period between *Byrd* and *Hannan v. Alltel Publishing Co.*;[5] and (4) the post-*Hannan* period. This Section will examine each phase, concluding that we have largely settled on a shared belief about what happened up until *Byrd*. The period from *Byrd* on, however, is still subject to debate.

A. Origins of the Standard

Summary judgment existed in Tennessee well before the adoption of the Tennessee Rules of Civil Procedure in 1971. The Advisory Committee Comments to Rule 56 specifically mention a summary statutory proceeding against public officials.[6] Pre-Rule practice also included a "speaking demurrer"—a variation of the typical demurrer—which was used to attack the sufficiency of the opponent's pleadings.[7] As every first-year law student knows, the demurrer was the predecessor to the modern motion to dismiss for failure to state a claim.[8] Because demurrers were designed to attack the pleadings alone, they could not properly include matters outside the pleadings.[9] However, a practice developed whereby lawyers attached evidentiary material to demurrers to provide support for dismissal. These "speaking demurrers" were viewed with disfavor by Tennessee courts.[10] Even when a movant presented evidence that would resolve a case on its merits, strict pleading rules prevented

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4. Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993).

5. Hannan v. Alltel Publ'g Co., 270 S.W.3d 1 (Tenn. 2008).

6. "Previously, the term 'Summary Judgment' was known in Tennessee procedure only in connection with the provisions of Tenn. Code Ann. § 25-3-101 et seq., dealing with summary remedies against certain public officers and with actions by sureties." Tenn. R. Civ. P. 56 advisory commission's comment to 1971 enactment. *See generally* Judy M. Cornett, *Trick or Treat? Summary Judgment in Tennessee After Hannan v. Alltel Publishing Co.*, 77 TENN. L. REV. 305, 307-10 (2010) (discussing the early history of summary judgment in Tennessee).

7. *See Demurrer*, BARRON'S LAW DICTIONARY (6th ed. 2010).

8. *See* FED. R. CIV. P. 12(b)(6); *see also* TENN. R. CIV. P. 12.02(6).

9. *See* 1 HENRY R. GIBSON, GIBSON'S SUITS IN CHANCERY § 314 (5th ed. 1955) (a speaking demurrer "introduces a new fact").

10. *See* Brewer v. Norman, 228 S.W.2d 81, 83 (Tenn. 1950); Robertson v. Davies, 90 S.W.2d 746, 751 (Tenn. 1936); Standard Loan & Accident Ins. Co. v. Thornton, 40 S.W. 136, 139-40 (Tenn. 1896). *But cf.* 1 LAWRENCE A. PIVNICK, TENNESSEE CIRCUIT COURT PRACTICE § 10:3 (2016) ("The Tennessee Rules authorize speaking motions. Speaking motions are those that allege facts to show a predicate for the relief sought.").

the court from considering facts not reflected in the pleadings.[11]

Indeed, common law procedure did not include a mechanism for developing evidence prior to trial. Although affidavits were available in both law and equity courts, only in courts of equity could depositions be taken.[12] Thus, the parties to a suit in a court of law had no way to bring facts outside the pleadings to the court's attention; only at trial could the court receive evidence.[13] The inclusion of discovery devices like depositions and interrogatories in the Federal Rules of Civil Procedure, and later in the Tennessee rules, enabled the parties to develop facts outside the pleadings prior to trial. Additionally, summary judgment enabled the parties to present those facts to the court.

When Tennessee adopted the Rules of Civil Procedure in 1971, summary judgment was enshrined in Rule 56, which provided:

> A party seeking to recover upon a claim, counterclaim, or any cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
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> A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
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> . . . the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[14]

Against this background, it is easy to see why the Advisory Committee Comments to Tennessee Rule 56 praised summary

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11. *See Standard Loan & Accident Ins. Co.*, 40 S.W. at 139-40.

12. *See* Steven N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PENN. L. REV. 909 (1987).

13. *Id.* at 937.

14. TENN. R. CIV. P. 56.01-.04 (1972).

judgment:

> The Committee deems the adoption of the provisions of this Rule to be one of the most important and desirable additions to Tennessee procedure contained in the Rules of Civil Procedure. Previously there has been no procedure for disposition of a case in the trial courts without an actual trial on the merits if the case could not be disposed of on demurrer or plea in abatement. A majority of the states have adopted procedures similar to those contained in this Rule, which follows the Federal Rule. The Committee considers this Rule to be a substantial step forward to the end that litigation may be accelerated, insubstantial issues removed, and trial confined only to genuine issues.[15]

*B. The Pre-*Byrd *Period*

From adoption of the Tennessee Rules of Civil Procedure up until the Tennessee Supreme Court's holding in *Byrd,* summary judgment enjoyed something of a Golden Age in Tennessee. During this 14-year period, the Tennessee Supreme Court decided 297 cases in which the phrase "summary judgment" appeared.[16] Of these 297 cases, 65 are irrelevant for our purposes.[17] Interestingly, of the remaining 232 cases, there are more affirmances of summary judgment (122) than reversals (93).[18] Of the 93 reversals, 18 were reversals of trial court awards of summary judgment to defendants in workers' compensation cases—these reversals are not surprising since the Tennessee Supreme Court was traditionally very solicitous of workers' compensation plaintiffs of this era.[19] More surprising are the 17 affirmances for defendants in workers' compensation claims during this period. Also included in the 122 affirmances are 10 cases

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15. TENN. R. CIV. P. 56 advisory commission's comment to 1971 enactment.

16. The search was conducted in the Westlaw "Tennessee state cases" database using the search: "summary judgment" & da(after 1971 & before 1993).

17. Irrelevant cases included those involving the timing of the hearing and the timing of the appeal, including a large number—toward the end of the search results sorted by "relevance"—in which the term "summary judgment" was simply part of a quotation or otherwise mentioned in passing.

18. In eight cases, the Tennessee Supreme Court affirmed in part and reversed in part.

19. These cases represent appeals directly from the trial court to the Tennessee Supreme Court authorized by Tenn. Code Ann. §§ 27-3-108 through -118, *repealed by* 1981 Tenn. Pub. Acts, ch. 449, § 1(10).

in which cross-motions for summary judgment were filed; in these cases, the Tennessee Supreme Court reversed the trial court and rendered summary judgment for the cross-movant.

The clear majority of the 232 relevant summary judgment cases involve the standard's second prong—whether the moving party is entitled to judgment as a matter of law—including several cases in which the Tennessee Supreme Court announced new law. For example, in *Baker v. Promark Products West, Inc.*, the trial court granted summary judgment to a lessor of a stump grinder that injured its user.[20] The Tennessee Supreme Court reversed, holding that the lessor of a defective product is subject to suit on the theory of breach of implied warranty.[21] In *Davis v. Davis*, in which a wife sued her husband for personal injury, the trial court granted summary judgment to the husband on grounds of interspousal immunity.[22] Reversing the summary judgment, the Tennessee Supreme Court abolished the doctrine of interspousal tort immunity.[23] In *McCroskey v. Bryant Air Conditioning Co.*, one of the earliest reversals of a summary judgment, the trial court reluctantly granted the defendants' motions for summary judgment in a products liability suit resulting from a defective gas heater.[24] The defendants argued, on the basis of a Tennessee statute, that the one-year statute of limitations had run prior to the plaintiff's injury because the statute provided that the limitations period ran from the date of the purchase of the product, not from the date it caused injury.[25] The Tennessee Supreme Court reversed the grant of summary judgment, explicitly overruling two of its prior cases interpreting the statute and holding that the statute of limitations did not begin to run until the plaintiff discovered, or, in the exercise of reasonable care, should have discovered her injury.[26] Cases like these lie at the core of summary judgment practice, fulfilling the intent of the drafters of Rule 56 that cases involving purely legal issues should be decided prior to trial.

But a small portion of the 232 pre-*Byrd* cases involve the first prong of Rule 56, in which a genuine issue of material fact prohibits the entry of summary judgment. For example, in *Lindsey v. Miami*

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20. Baker v. Promark Prods. W., Inc., 692 S.W.2d 844, 849 (Tenn. 1985).
21. *Id.*
22. 657 S.W.2d 753, 758-59 (Tenn. 1983).
23. *Id.* at 759.
24. 524 S.W.2d 487, 488 (Tenn. 1975).
25. *Id.*
26. *Id.* at 491-92.

Development Corp., a woman attended a political fundraiser, became intoxicated, and jumped off a second-floor balcony after the host urged her not to.[27] The woman died later that night in a hospital, and the decedent's executor sued the owner of the home and the tenant who hosted the party for negligent failure to render aid.[28] In depositions, other guests testified that the host had urged them to "wait a while" before calling an ambulance.[29] In his deposition, the host denied having urged the others to delay calling the ambulance, testifying that he told the witnesses to call an ambulance right away. The trial court granted summary judgment to both defendants, but the Supreme Court reversed as to the host.[30] The court held that there was a genuine issue of material fact that precluded summary judgment because the direct conflict in testimony regarding the host's reaction was material to the host's liability for negligence and could be resolved only by a factfinder.[31]

The more modern iteration of summary judgment, in which the focus is on the sufficiency of the respective party's motion or response, is barely represented in these pre-*Byrd* cases. Indeed, only a handful of these 232 cases involved a summary judgment motion that was completely unsupported by evidentiary material. However, several cases involved the sufficiency of the nonmovant's response. For example, in *Bowman v. Henard*, the plaintiff sued the defendant for medical malpractice. The defendant moved for summary judgment, attaching an affidavit from a medical expert.[32] The plaintiff responded with an affidavit from her attorney.[33] The Supreme Court affirmed the trial court's grant of summary judgment, holding:

> In this case the only response made by petitioner was the affidavit of one of her attorneys, not shown to have any expertise in the field of medicine, based upon an asserted, but not demonstrated, experience in the specialty area of medical malpractice, to the effect that in his opinion "a case of negligence can be made out"; that his "substantial medical research" convinced him the diagnosis was incorrect; and

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27. Lindsey v. Miami Dev. Corp., 689 S.W.2d 856, 858 (Tenn. 1985).
28. *Id.* at 857.
29. *Id.*
30. *Id.* at 863
31. *Id.*
32. Bowman v. Henard, 547 S.W.2d 527, 529 (Tenn. 1977).
33. *Id.*

> that "a jury will likely conclude the defendants were guilty of negligence."
>
> The affidavit of an attorney stands precisely on the same plane with all other affidavits. Accordingly, it must rest upon his personal knowledge in an area in which he is competent to testify. The affidavit of the attorney in this case was totally ineffectual as a response.[34]

Similarly, in *Empress Health & Beauty Spa, Inc. v. Turner*, the plaintiff sued the defendant for injuries suffered when the belt on an exercise machine broke.[35] The defendant moved for summary judgment, relying on the plaintiff's acknowledgment during her deposition that she signed a contract containing an exculpatory clause.[36] The plaintiff failed to respond to the motion, and the Supreme Court affirmed the grant of summary judgment.[37]

In these cases, the Supreme Court took a traditional approach to summary judgment: if the facts were undisputed, the court analyzed whether, as a matter of law, the movant was entitled to prevail. If so, the court granted summary judgment. In at least four cases, the court used the summary judgment decision to change Tennessee law.[38] If the evidentiary materials supporting the motion and response revealed a genuine issue of material fact, the court denied summary judgment.

C. Celotex *and* Byrd

In fact, these pre-*Byrd* summary judgment cases seem so logical that it is difficult to understand the Tennessee Supreme Court's angst in *Byrd*.[39] However, a possible explanation emerges from a

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34. *Id.* at 531.

35. Empress Health & Beauty Spa, Inc. v. Turner, 503 S.W.2d 188, 189 (Tenn. 1973).

36. *Id.*

37. *Id.* at 191.

38. Baker v. Promark Prods. W., Inc., 692 S.W.2d 844, 849 (Tenn. 1985); Davis v. Davis, 657 S.W.2d 753, 759 (Tenn. 1983); Chedester v. Phillips, 640 S.W.2d 207, 209 (Tenn. 1982); Ameraccount Club, Inc. v. Hill, 617 S.W.2d 876, 878-79 (Tenn. 1981).

39. *See* Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping About Summary Judgment in Tennessee*, 69 TENN. L. REV. 175, 181, 187 (2001). By "embrac[ing]" *Celotex* while also "putt[ing] a finer point" on the Court's holding, and by indicating that summary judgment was both granted too frequently and not granted often

pattern observed in the 232 relevant pre-*Byrd* summary judgment cases. In 31 of those cases, the Tennessee Supreme Court reinstated the trial court's grant of summary judgment after the Tennessee Court of Appeals had reversed it. This pattern suggests that the Tennessee Supreme Court already viewed summary judgment as a useful device, when properly used, before it confronted the *Celotex* trilogy.

In a trio of 1986 cases, known as the *Celotex* trilogy, the U.S. Supreme Court made it easier for defendants to receive summary judgment.[40] In the trilogy's most far-reaching case, *Celotex Corp. v. Catrett*, the Court held that a court could grant summary judgment to a party that showed, or demonstrated, that the opposing party lacked evidence to prove an essential element of its case.[41] The *Celotex* Court further held that this showing could be made without attaching affidavits or other evidentiary material to the motion, but the showing must consist of more than a "conclusory assertion" that the nonmovant cannot prove its case.[42] As Justice White, the fifth member of the *Celotex* majority, put it in his concurring opinion, "It is the defendant's task to negate, if he can, the claimed basis for the suit."[43] However, these "finer points" articulated by Justice White were frequently ignored in later descriptions of the *Celotex* standard, which was said to require the nonmovant to "put up or shut up."[44]

Although the Tennessee Court of Appeals had begun citing *Celotex* as early as 1986,[45] the Tennessee Supreme Court did not address *Celotex* until 1993, in *Byrd v. Hall*.[46] This puzzling case, which has been extensively analyzed elsewhere,[47] launched two distinct histories of summary judgment in Tennessee. In one of these narratives, which emphasized the court's "embrace" of *Celotex*, *Byrd* initiated adherence to the federal *Celotex* standard for summary

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enough, the Tennessee Supreme Court's decision in *Byrd* was confusing at best and internally contradictory at worst. *Id.*

40. *See* John E. Kennedy, *Federal Summary Judgment: Reconciling* Celotex v. Catrett *with* Adickes v. Kress *and the Evidentiary Problem Under Rule 56*, 6 REV. LITIG. 227, 227 (1987) (the *Celotex* trilogy "generally favor[s] summary judgment for defendants").

41. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

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

43. *Id.*

44. *Byrd*, 847 S.W.2d at 213.

45. *See* Moman v. Walden, 719 S.W.2d 531, 533 (Tenn. Ct. App. 1986).

46. *Byrd*, 847 S.W.2d at 212.

47. Cornett, *supra* note 39, at 176.

judgment.[48] In the other story, *Byrd* gave rise to a unique state standard for summary judgment, requiring the moving party to negate an essential element of the nonmovant's case.[49] This latter story had its genesis in the *Byrd* court's adoption of the "finer points" put on the summary judgment standard by Justice White in his *Celotex* concurrence.[50] Furthermore, in a series of cases from 1998 to 2004, the Tennessee Supreme Court reaffirmed its rejection of the *Celotex* "put up or shut up" standard.[51] The court continued to insist that a movant must do more than allege that the nonmovant could not prove its case, lending further credence to *Byrd*'s alternative history.

D. The Turmoil Caused by Hannan

Although *Byrd* and its progeny had rejected the *Celotex* standard, the full implications of Tennessee's negation requirement were not fully realized until 2008, when the Tennessee Supreme Court decided *Hannan v. Alltel Telephone Co.*[52] In *Hannan*, the plaintiffs testified at their depositions that they could not quantify their damages, and neither could anyone else.[53] Using this deposition testimony to demonstrate to the trial court that the plaintiffs could not prove an essential element of their case—damages—the defendant moved for summary judgment.[54] The plaintiffs responded by saying that they would prove their damages

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48. Reply Brief of Appellant at 9-12, Hannan v. Alltell Publ'g Co., 270 S.W.3d 1 (Tenn. 2008) (No. E-2006-01353-SC-R11-CV); Andree Sophia Blumstein, *Bye, Bye Byrd? Summary Judgment After Hannan and Martin: Which Way to Go?*, 45 TENN. B.J. 23, 24 (Feb. 2009); Amy M. Pepke, *Prove It: Finding the Middle Ground in Tennessee's Evolving Summary Judgment Standard*, 43 TENN. B.J. 12, 13 (July 2007).

49. Cornett, *supra* note 39, at 189; Cornett, *supra* note 6, at 320; Judy M. Cornett, *Byrd Still Has Wings*, DICTA: THE JOURNAL OF THE KNOXVILLE BAR ASSOCIATION 11, 12 (2009). This negation requirement obviously echoed Justice White's view in his concurrence in *Celotex*. *Celotex Corp.*, 477 U.S. at 327.

50. *Byrd*, 847 S.W.3d at 213.

51. *See* Blair v. W. Town Mall, 130 S.W.3d 761 (Tenn. 2004); Staples v. CBL & Assocs., Inc., 15 S.W.3d 83 (Tenn. 2000); McCarley v. W. Quality Food Serv., 960 S.W.2d 585 (Tenn. 1998). *But see* Denton v. Hahn, No. M2003-00342-COA-R3-CV, 2004 WL 2083711, at *1 (Tenn. Ct. App. Sept. 16, 2004) (incorrectly stating that the *Byrd* court adopted the *Celotex* standard).

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

53. *Id.* at 4.

54. *Id.*

at trial.[55] Clearly, application of the *Celotex* standard in this situation would have dictated summary judgment for the defendant. However, the Tennessee Supreme Court held that the defendant was not entitled to summary judgment because it had not negated an essential element of the plaintiff's case, as it had not submitted evidence that the plaintiffs had suffered no damages.[56] In doing so, the court in *Hannan* also adopted a new alternative to negation: a movant could have summary judgment by demonstrating that the nonmovant could not prove an essential element of its case at *trial*—not at the summary judgment stage as the *Celotex* Court had held.[57]

The *Hannan* case caused an uproar in the defense bar.[58] Most commentators viewed it as a revolutionary departure from prior summary judgment law.[59] Only a few commentators recognized that *Hannan* was merely a logical extension of *Byrd*'s rejection of the *Celotex* standard.[60] It is still puzzling why the Tennessee Supreme Court granted permission to appeal in *Hannan*,[61] as the facts of the case were terrible. It is not often that plaintiffs testify that their damages cannot be quantified, nor is it often that a defendant fails to submit evidence that negates an element of the nonmovant's case. Finally, it is not often that the nonmovant fails to present some kind of evidence in response to a summary judgment motion, no matter how little support the motion has.[62] Application of the negation

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55. *Id.*

56. *Id.* at 11.

57. *Id.*

58. *See* Cornett, *supra* note 6.

59. *See supra* note 48 and accompanying text. *See also* David E. Long, *"I Understand TRCP 56": The Evolving Tennessee Summary Judgment Standard,* DICTA: THE JOURNAL OF THE KNOXVILLE BAR ASSOCIATION (Nov. 2010), at 14.

60. Judy M. Cornett & Matthew R. Lyon, *Redefining Summary Judgment by Statute: The Legislative History of Tennessee Code Annotated Section 20-16-101,* 8 TENN. J. L & POL'Y 100, 110 (2012).

61. One possible explanation is that the Tennessee Supreme Court was urged to take the case by the author of the Tennessee Court of Appeals' opinion: "[b]ecause of the conflict between our decision in this case and the *Denton* majority, we encourage the Tennessee Supreme Court to address (1) the issue of exactly what is meant by "negating" an element of a plaintiff's claim, and (2) whether Tennessee follows the Sixth Circuit's "put up or shut up" interpretation of *Celotex.* Hannan v. Alltel Publ'g Co., No. E2006–01353–COA–R3–CV, 2007 WL 208430, at *8 (Tenn. Ct. App. Jan. 26, 2007), *aff'd,* 270 S.W.3d 1 (Tenn. 2008) (citing J. Cornett, *The Legacy of Byrd v. Hall: Gossiping About Summary Judgment in Tennessee,* 69 TENN. L. REV. 175 (2001)).

62. In fact, this is what happened in *Byrd v. Hall,* where the movant filed an unsupported motion, while the nonmovant responded with an affidavit. *Byrd,* 847 S.W.3d at 208.

principle on these extreme facts led to a result that seemed absurd to most practitioners and judges, as evidenced by a trial judge's response to a *Tennessee Law Review* article on *Hannan*:[63]

> Dealing with domestic relations cases, and all the administrative tasks involved in managing a trial docket seems to consume my professional energy. I don't have a lot of energy for engaging in the "elegant burden-shifting procedure" of Tennessee law. My desire to engage in the "elegant burden-shifting" analysis is further undermined by our Supreme Court's preference that cases not be disposed of summarily.
>
> I think most of the trial judges are now more hesitant to grant summary judgments because of the much greater likelihood of reversal on appeal. Denying a motion for summary judgment and requiring a case to proceed to trial presents less appellate "exposure" for a trial judge.
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> . . . The vast majority of cases I preside over that could possibly lend themselves to motions for summary judgment are car wrecks. The issue is almost always fault and/or damages. I do not see any way in which the defendant can negate fault in the vast majority of car wreck cases . . .. I understand how the defense could have possibly shifted the burden in *Hannan* on the damages issue but in a personal injury case it is doubtful that anyone can negate a plaintiff's alleged pain and suffering except the plaintiff.[64]

Like this trial judge, Tennessee's General Assembly expressed frustration with the *Hannan* standard, attempting to legislatively overrule *Hannan*.[65] Tennessee Code Annotated section 20-16-101 purported "to overrule the summary judgment standard for parties who do not bear the burden of proof at trial set forth in *Hannan*, [],

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63. *See* Cornett, *supra* note 6.

64. Letter from Tom Wright, Circuit Judge, Third Judicial Circuit, Part II, to Judy M. Cornett, University of Tennessee College of Law Distinguished Professor of Law (June 1, 2012) (on file with author).

65. TENN. CODE ANN. § 20-16-101 (Supp. 2015). *See generally* Judy M. Cornett & Matthew R. Lyon, *Contested Elections as Secret Weapon: Legislative Control Over Judicial Decision-Making*, 75 ALB. L. REV. 2091 (2011-12).

its progeny, and the cases relied on in *Hannan*."[66] However, because the statute applied only to cases filed on or after July 1, 2011, there existed a robust body of case law decided between 2008 and even beyond 2011 that applied the *Hannan* standard. Appellate cases in the Tennessee Court of Appeals' Middle and Eastern Sections gave little hint of the turmoil *Hannan* caused in the trial courts, probably because the negation requirement was generally observed and few summary judgment motions were filed that would be decided differently regardless of whether *Hannan* or *Celotex* applied. However, there was a trend in the Western Section Court of Appeals to overstate *Hannan*'s impact and misinterpret the *Hannan* test, requiring more from the movant than the Tennessee Supreme Court intended. For example, the Western Section referred to the negation requirement as "high indeed"[67] and characterized the *Hannan* standard as "stringent."[68] The court even went so far as to assert—incorrectly—that *Hannan* required the movant to "prove a negative."[69] Indicating its misunderstanding of *Byrd* and its progeny, the court also asserted that Tennessee Code Annotated section 20-16-101 was "intended to *reinstate* the 'put up or shut up' standard of summary judgment,"[70] even though, as we have seen, Tennessee never adopted the federal *Celotex* standard.[71] The court also erroneously conflated the two prongs of *Hannan* by refusing to find that the movant had shifted the burden by negation unless the movant also showed that the nonmovant could not prove an essential element of its case at trial.[72]

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66. Act of May 20, 2011, ch. 498, 2011 Tenn. Pub. Acts (legislative findings).

67. Smith v. UHS of Lakeside, Inc., No. W2011-02405-COA-R3-CV, 2013 WL 210250, at *15 (Tenn. Ct. App. Jan. 18, 2013) (quoting Skaan v. Fed. Express Corp., No. W2012-01807-COA-R3CV, 2012 WL 6212891, at *5 (Tenn. Ct. App. Dec. 12, 2012)).

68. Mann v. Alpha Tau Omega Fraternity, Inc., No. W2012-00972-COA-R3-CV, 2013 WL 1188954, at *7 (Tenn. Ct. App. Mar. 22, 2013).

69. Thomas v. Pointer, No. W2011-01595-COA-R3-CV, 2012 WL 2499590, at *5 (Tenn. Ct. App. June 29, 2012); Moore v. Butler, No. W2010-02374-COA-R3-CV, 2011 WL 6004010, at *6 (Tenn. Ct. App. Dec. 1, 2011); *accord Skaan*, 2012 WL 6212891, at *5.

70. Biles v. Purcell, No. M2014-01226-COA-R3-CV, 2015 WL 1275407, at *2 n.1 (Tenn. Ct. App. Mar. 17, 2015) (emphasis added).

71. *See* White v. Target Corp., No. W2010-02372-COA-R3-CV, 2012 WL 6599814, at *9 (Tenn. Ct. App. Dec. 18, 2012) (stating incorrectly that the motion "might have carried the day" under *Byrd* but was insufficient under *Hannan*).

72. *See* King v. Foht, No. W2013-00518-COA-R3-CV, 2013 WL 5310436 (Tenn. Ct. App. Sept. 20, 2013); Ellington v. Jackson Bowling & Family Fun Ctr., LLC, No. W2012-00272-COA-R3-CV, 2013 WL 614502 (Tenn. Ct. App. Feb. 19, 2013); White v.

E. Responding with Rye

When the Supreme Court granted the application for permission to appeal in *Rye v. Women's Care Center of Memphis*,[73] three competing standards for summary judgment existed in Tennessee: the judicially enunciated *Hannan* standard, which required that the moving party who does not carry the burden of proof at trial either negate an essential element of the nonmoving party's claim or demonstrate that the nonmoving party cannot prove an essential element of its case at trial; the Western Section Court of Appeals' misinterpretation of the *Hannan* standard; and the statutory standard, which purported to adopt the *Celotex* standard requiring only that the moving party who does not carry the burden of proof at trial "demonstrate" or "show" that the nonmoving party lacks evidence at the summary judgment stage to prove an essential element of its case.[74] Often lost in the many retellings of *Hannan* is the fact that the vast majority of summary judgment motions filed in Tennessee courts already adhered to the *Byrd* standard, which required that the movant negate an essential element of the nonmovant's claim.[75] The prong of *Hannan* that caused such angst—the requirement that a movant relying solely on the nonmovant's lack of evidence must show that the nonmovant would lack evidence at trial, not just at the summary judgment stage—was relevant in only a handful of cases decided by the courts of appeals in the period between *Hannan* and *Rye*.[76]

When the application for permission to appeal in *Rye* made it to the Tennessee Supreme Court, only two Justices from the *Hannan* court, Justices Gary Wade and Connie Clark, remained.[77] The other three *Hannan* Justices, Janice Holder (the author), William "Mickey" Barker, and William Koch (the lone dissenter), had left the court. The Justices who replaced them, Justices Holly Kirby and Jeffrey Bivins, were both appointed by Tennessee's Republican governor, Bill Haslam.[78] The fifth member of the *Rye* court, Chief

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Target Corp., No. W2010-02372-COA-R3-CV, 2012 WL 6599814, at *7 (Tenn. Ct. App. Dec. 18, 2012).

73. Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235 (Tenn. 2015).

74. *See supra* notes 52 through 72 and accompanying text.

75. *See supra* notes 52 through 62 and accompanying text.

76. *See Rye*, 477 S.W.3d at 276-81 (Wade, J., concurring).

77. *See* Tennessee Supreme Court, https://ballotpedia.org/Tennessee_Supreme_Court (last visited Sept. 25, 2016).

78. *Id.*

Justice Sharon Lee, had not yet taken the bench when *Hannan* was decided, although she later indicated that she would have voted with the majority.[79] The appellants in *Rye* did not raise any issue regarding the viability of the *Hannan* standard, but in granting the application for permission to appeal, the Tennessee Supreme Court itself rewrote the issue on appeal to read as follows:

> In addition to other issues raised in the application for permission to appeal, the Court is particularly interested in briefing and argument of the question of whether the Court should reconsider the summary judgment standard previously articulated by the Court in *Hannan v. Alltel Publishing Co.*[80]

As evidenced by its framing of the issue, the Tennessee Supreme Court, like many lawyers and judges throughout the state, had come to believe the story told by the defense bar that *Hannan* had put a stop to summary judgment in the trial courts. Thus, the newly constituted court signaled its intention to overrule *Hannan* in favor of the more defendant-friendly *Celotex* standard.

II. THE *RYE* DECISION

A. Facts and Procedural History

On October 26, 2015, approximately thirteen months after its ominous order granting permission to appeal, the Tennessee Supreme Court released its decision in *Rye*.[81] As with *Hannan*, *Rye* presented a peculiar set of facts that seemed largely antithetical to the court's intended result.[82] The plaintiffs, Michelle and Ronald Rye, were expecting their third child in early 2008.[83] During the pregnancy, Mrs. Rye discovered that she had Rh-negative blood and planned to receive a RhoGAM injection early in her third trimester to avoid potential complications in any future pregnancies.[84]

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79. *Rye*, 477 S.W.3d at 274 (Lee, C.J., concurring).

80. *Id.* at 235 (discretionary appeal dated Sept. 19, 2014). The order granting permission to appeal is viewable here: https://tncourts.gov/sites/default/files/discretionary_appeals_-_sc_corrected_25sept2014.pdf.

81. *Id.*

82. Cornett, *supra* note 6, at 331 (stating that "[t]he bad facts of *Hannan* certainly presented an ideal case in which [to adopt *Celotex*]").

83. *Rye*, 477 S.W.3d at 238.

84. *Id.*

Unfortunately, Mrs. Rye never received the injection and, as a result, became "Rh-sensitized."[85] Rh-sensitivity is an irreversible blood condition that causes the host to develop certain antibodies that may cross the placenta and attack the red blood cells of an Rh-positive fetus.[86] This exposes the fetus to a number of risks, some of which can be fatal.[87]

Until Mrs. Rye's Rh-sensitization, the Ryes planned to have additional children.[88] Concerned with the potential complications, however, the Ryes began "taking steps to prevent future pregnancies."[89] However, the Ryes are "practicing Roman Catholics" and are therefore prohibited from using "traditional" means of birth control, leaving the couple "in a state of emotional distress."[90] Based on these events, the Ryes filed suit against Mrs. Rye's medical providers, asserting claims for health care liability,[91] negligent infliction of emotional distress, and disruption of family planning.[92]

In their Answer, the defendants admitted that their failure to administer the RhoGAM injection during Mrs. Rye's third trimester constituted a violation of the applicable standard of care and that their breach of the standard of care proximately caused Mrs. Rye's Rh-sensitization.[93] The defendants denied, however, that their actions resulted in any damage or injury to Mrs. Rye or her husband.[94]

After the parties' discovery depositions were taken, the

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85. *Id.*

86. *Id.* at 238-39.

87. *Id.*

88. *Id.* at 239.

89. *Id.*

90. *Id.*

91. *See* Tennessee Civil Justice Act of 2011, ch. 510, 2011 Tenn. Pub Acts 1505 (codified at TENN. CODE ANN. §§ 29-26-101 et seq. (Supp. 2011)) (replacing all references in Tennessee's Code to "medical malpractice" with the more neutral "health care liability").

92. *Rye*, 477 S.W.3d at 239.

93. *See id.*; *see also* TENN. CODE ANN. § 29-26-115(a)(1), (2) (requiring plaintiffs to prove through competent expert testimony that the defendant/provider deviated from "the recognized standard of acceptable professional practice").

94. *Rye*, 477 S.W.3d at 239. Interestingly, the issue of damages was also the sticking point between the parties in *Hannan*. *Compare Hannan*, 270 S.W.3d at 10 ("Alltel contends that summary judgment is appropriate because the Hannans cannot prove within a reasonable degree of certainty that they suffered damages."), *with Rye*, 477 S.W.3d at 266 ("[T]he dispositive question is whether genuine issues of material fact exist as to . . . whether Mrs. Rye is reasonably certain to sustain damages for future medical expenses as a result of her Rh-sensitization.").

defendants moved to dismiss the Ryes' complaint or, in the alternative, for summary judgment.[95] In their statement of undisputed material facts, the defendants relied heavily on Mrs. Rye's testimony that she had sought no treatment whatsoever for her Rh-sensitization or associated emotional distress.[96] The defendants also submitted an affidavit from their retained expert, obstetrician Thomas G. Stovall, M.D., who opined that Mrs. Rye sustained no injury as a result of the defendants' failure to administer the RhoGAM injection.[97] Dr. Stovall also expressed his belief that any risk of harm to Mrs. Rye or her future fetuses as a result of her Rh-sensitivity was "so remote that it cannot be stated with any reasonable degree of medical certainty that [any] injuries would in fact occur."[98]

In opposition to the defendants' motion, the Ryes submitted an affidavit of their own expert, perinatologist Joseph Bruner, M.D.[99] Unlike Dr. Stovall, Dr. Bruner believed that Mrs. Rye's Rh-sensitivity was, in fact, a physical injury because she "[b]iologically . . . is not the same person she was before she became Rh-sensitized."[100] Based on this biological change, Dr. Bruner opined that (1) Mrs. Rye may experience future difficulties with obtaining blood transfusions and (2) her unborn children "more probabl[y] than not . . . will experience complications" and will require repeated blood sampling in the third trimester, which also increases the risk of complications and premature birth.[101]

In a subsequent deposition, Dr. Bruner testified as follows:

> Q: Okay. And what is the basis for your statement that [Mrs. Rye] . . . more likely than not [will] become pregnant again with a child that will have blood not compatible with her R[h] [negative] status?
>
> A: Because of her religious beliefs, she's not allowed to practice contraception, so she and her husband are still

95. *Rye*, 477 S.W.3d at 239.

96. *Id.* at 239-40; *see* TENN. R. CIV. P. 56.03 (requiring the moving party at summary judgment to provide "a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial").

97. *Id.* at 240.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 240, 242-47.

having unprotected intercourse.

. . . .

Q: And she's—more likely than not, it's going to be a child whose blood is not compatible with her R[h] sensitized status. You're saying that's more likely than not, more than a 50% chance of that?

A: That's correct.

. . . .

Q: So more likely than not, she will become pregnant again, because she's already become pregnant three times, having unprotected intercourse. More likely than not, the fetus will be affected in at least one or more future pregnancies because of the simple fact that R[h-]positive men, 40[%] are homozygous, 60[%] are heterozygous. Overall, there's a 70% chance her pregnancy will be affected . . . .

. . . .

A: Okay. So it's more likely than not, she'll become pregnant. It's more likely than not, the baby will be incompatible. It's more likely than not, the disease will be moderate to severe, which means that more likely than not, invasive procedures will begin in the late second trimester, between 24 and 28 weeks, and these invasive procedures will occur every seven to ten days, more or less, for the remainder of the pregnancy, each of those events with a one-to-two percent risk."[102]

Sometime after Dr. Bruner's deposition, defense expert Dr. Stovall also testified by deposition, doubling down on his opinion that Mrs. Rye's Rh-sensitization "more likely than not like overwhelmingly—overwhelmingly, more likely than not [sic], [Mrs. Rye] would not have any complications" in future pregnancies.[103] He also reiterated that, in his view, Mrs. Rye's Rh-sensitization caused

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102. *Id.* at 246-47.
103. *Id.* at 247.

her no physical injury or damage.[104]

Against this backdrop of competing expert testimony, the trial court granted the defendants' motion "as to all claims for future damages . . . arising from blood transfusions or future pregnancies," finding that those claims were "too speculative."[105] The trial court denied the motion for summary judgment, however, as to the Ryes' emotional distress claims.[106]

Two weeks before trial and well after all discovery deadlines under the trial court's scheduling order had passed, the defendants renewed their motion for summary judgment.[107] On the morning of trial, the trial court granted the defendants' motion as to Mr. Rye's stand-alone claim for negligent infliction of emotional distress (NIED) and the Ryes' claim for disruption of family planning.[108] However, the court denied summary judgment as to Mrs. Rye's physical injury claim because "there ha[d] been a change in her blood."[109] Following its rulings, the trial court permitted the parties leave to seek interlocutory appeal with the court of appeals,[110] which the court of appeals subsequently granted.[111]

After reciting the basic precepts of *Hannan*, the court of appeals engaged in a claim-by-claim analysis, affirming in part and reversing in part the trial court's judgment.[112] Specifically, the court affirmed the trial court's denial of summary judgment as to Mrs. Rye's physical injury claim, stating that Dr. Bruner's testimony created a genuine issue of material fact as to whether Mrs. Rye's Rh-sensitivity was a "bodily injury."[113] However, the court reversed the trial court's grant of summary judgment with regard to Mrs. Rye's claim for future medical expenses and Mr. Rye's stand-alone NIED claim.[114] In reaching this result, the court acknowledged the speculative nature of Mrs. Rye's future medical expenses and the dearth of evidence to support Mr. Rye's NIED claim; nevertheless, the court reasoned that the "high burden of the *Hannan* standard"

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104. *Id.*
105. *Id.* at 247, 249.
106. *Id.* at 247.
107. *Id.* at 248.
108. *Id.*
109. Rye v. Women's Care Ctr. of Memphis, MPLLC, No. W2013-00804-COA-R9-CV, 2014 WL 903142 (Tenn. Ct. App. Mar. 10, 2014).
110. *See* TENN. R. APP. P. 9.
111. *Rye*, 477 S.W.3d at 248; *see* TENN. R. APP. P. 9.
112. *Rye*, 2014 WL 903142, at *4-5 (alterations and internal citations omitted).
113. *Id.* at *9.
114. *Id.* at *11.

necessitated reversal.[115] For further support, the court cited to the following language from another Western Section opinion, *White v. Target Corp.*, authored by then-Judge Holly Kirby:

> Under *Hannan*, as we perceive the ruling in that case, it is not enough to rely on the nonmoving party's lack of proof even where, as here, the trial court entered a scheduling order and ruled on the summary judgment motion after the deadline for discovery had passed. Under *Hannan,* we are required to assume that the nonmoving party may still, by the time of trial, somehow come up with evidence to support her claim.[116]

This strained interpretation of *Hannan's* alternative burden shifting mechanism—i.e. "show[ing] that the nonmoving party cannot prove an essential element of the claim at trial"—had become a theme in the Western Section by the time *Rye* was decided.[117] Just as with *Denton* in the post-*McCarley* days, the Western Section's peculiar view of *Hannan* provided the perfect opportunity for Tennessee Supreme Court intervention.[118] On the one hand, the court could finally set straight what it intended to accomplish with *Hannan's* clarification of *Byrd* and *McCarley*, putting to rest the misapprehension and angst engendered in the bench and bar since *Hannan's* release.[119] Alternatively, with *Hannan's* author no longer on the court and the substitution of two new Republican appointees on the Court (including the architect of the Western Section's divergent interpretation of *Hannan*, Justice Holly Kirby), perhaps the time had to come for the Court to reconsider the divergent path it had chosen all those years ago in *Byrd*.

As with *Hannan*, however, the question becomes: "Why take *this* case?" First, with the Tennessee General Assembly's attempt to legislatively overrule *Hannan* in 2011, the fleeting number of cases

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115. *Rye*, 477 S.W.3d at 249-50; *Rye*, 2014 WL 903142, at *11.

116. No. W2010–02372–COA–R3–CV, 2012 WL 6599814, at *7 n.3 (Tenn. Ct. App. Dec. 18, 2012).

117. *See, e.g.*, Thomas, 2012 WL 2499590, at *5; Moore, 2011 WL 6004010, at *6; *accord* Skaan, 2012 WL 6212891, at *5.

118. *See* Cornett, *supra* note 6 at 330–31.

119. See, e.g., Wright, *supra* note 64; Blumstein, *supra* note 48, at 23 ("While *Hannan* still views summary judgment as a useful tool to weed out frivolous claims, it has made that tool less sharp and more difficult to wield. Summary judgments will be harder to come by in state court.") (footnote, internal quotation, and citations omitted).

governed by *Hannan* hardly militated in favor of Rule 11 review.[120] . If *Hannan* were to remain the law of the land, should not the court have waited until a challenge to the summary judgment statute were before it? Conversely, if the court intended to overrule *Hannan*, were there no better cases in which to do so? Again, *Rye* was a classic "battle of the experts" with largely disputed facts and no clear-cut legal issue requiring resolution by the supreme court.[121]

B. The Majority Opinion

The Tennessee Supreme Court began its analysis in *Rye* with an overview of the "history" of summary judgment in Tennessee, starting with the adoption of the Rules of Civil Procedure and ending with the "aftermath" of *Hannan*.[122] In its discussion, the court did its best to (1) prop up the federal standard as promoting the expeditious disposition of "frivolous cases" and (2) highlight the consistency between the federal standard and the standard embraced by Tennessee's courts before *Byrd*.[123] From there, the court expended a great deal of effort explaining the confusion that *Byrd* incited with its dueling embrace of *Celotex* and subsequent "observations" as to how a moving party at summary judgment may shift the burden of production to its adversary. Based solely on a review of the court's edited "history," one could easily see that *Hannan's* execution was imminent.

Indeed, after finishing its review of *Celotex*, *Byrd*, and *Hannan*, the court heaved a series of slurs at *Hannan*, describing it as "unworkable," "incompatible with the history and text of Tennessee Rule 56," "frustrat[ing] the purposes for which summary judgment

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120. After enactment of the statute, *Hannan* only applied only to cases filed before July 1, 2011. *See* 2011 Tenn. Pub. Acts 498; *see also* Matthew R. Lyon & Judy M. Cornett, *Hannan, The "Zombie Case": Will the Tennessee Supreme Court Drive a Stake Through Its Heart?*, DICTA: THE JOURNAL OF THE KNOXVILLE BAR ASSOCIATION 13, 13 (2014) (recognizing that *Hannan* was "already on its way out" when the supreme court granted review in *Rye*).

121. *See* Rye, 477 S.W.3d at 235.

122. *Id.* at 250-61.

123. *Id.* at 256–259; Byrd v. Hall, 847 S.W.2d 208, 215 n.5 (Tenn. 1993). Much like Justice Koch's dissent in *Hannan*, however, the Court's focus on *Byrd* resulted in its brushing aside the important role that *McCarley*, *Blair*, and *Staples* played in the development of Tennessee's summary judgment jurisprudence. *Rye*, 477 S.W.3d at 258 61 (relegating those cases to parentheticals and a single footnote with no real discussion or analysis).

was intended," and having "shifted the balance too far."[124] Thus, the court determined that the time had come "to correct course, overrule *Hannan*, and fully embrace the standards articulated in the *Celotex* trilogy."[125] Curiously absent from the court's opinion, however, is any real evidence or data to substantiate its view that *Hannan* negatively impacted the availability of summary judgment in Tennessee.[126] Instead, the court simply relied on a misinterpretation of *Hannan* espoused by the Western Section—i.e., that the second prong of *Hannan* required reviewing courts to turn a blind eye to scheduling orders and pretend that a nonmoving party could "somehow," some way pull the magical rabbit from its evidentiary hat at trial.[127]

Turning to the facts of *Rye*, the court concluded that summary judgment should have been granted as to the Ryes' remaining claims. First, the court reviewed the evidence presented as to Mrs. Rye's future medical expenses, concluding that "even assuming Mrs. Rye's Rh-sensitization is considered a presently existing physical injury, the undisputed facts demonstrate that [she] has not sustained any damages related to this injury and that no such damages are reasonably certain to occur."[128] In reaching this conclusion, the court reviewed the testimony of the parties' experts and acknowledged that they disagreed as to the probability and extent of any future harm to Mrs. Rye and any children she might

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124. *Rye*, 477 S.W.3d at 261, 264.

125. *Id.* at 264.

126. In fact, the only "evidence" to support the court's conclusion as to the impact of *Hannan* appears in Justice Jeffrey Bivins's concurring opinion, in which he makes anecdotal references to a set of summary judgment motions before him as a trial court judge the day after *Hannan's* release. *See id.* at 273 (Bivins, J., concurring).

127. *Id.* at 261 (majority opinion) (citing Boals v. Murphy, No. W2013-00310-COA-R3-CV, 2013 WL 5872225, at *15 (Tenn. Ct. App. Oct. 30, 2013) and White v. Target Corp., No. W2010-02372-COA-R3-CV, 2012 WL 6599814, at *7 n.3 (Tenn. Ct. App. Dec. 18, 2012).

128. *Id.* at 265. As the dissent points out, however, the court's treatment of future medical expenses as the *only* measure of damages is unorthodox at best and ignores the inherent value attached to any tangible, physical injury, including, for example, a change in a person's blood. *See id.* at 283 n.13 (Wade, J., concurring and dissenting) (stating in part that "[n]owhere in the majority's analysis, however, is there a discussion of presently existing damages in the form of an altered bodily status or a decreased ability to bear children. Instead, the majority focuses solely on 'whether Mrs. Rye is reasonably certain to sustain damages for future medical expenses as a result of her Rh-sensitization.'") (emphasis omitted).

bear in the future.[129] Relying in large part on Mrs. Rye's age—39—and the fact that six years had passed since the filing of this suit without Mrs. Rye's becoming pregnant, the court concluded that "Mrs. Rye's evidence is insufficient as a matter of law to demonstrate that future medical expenses are reasonably certain to occur . . . [because any such damages] depend entirely upon contingencies that have not . . . and may never occur."[130]

Moving to the Ryes' separate claims for negligent infliction of emotional distress, the court again concluded that summary judgment was appropriate.[131] As to Mr. Rye's stand-alone claim, the court concluded that Mr. Rye had failed to provide expert proof of a severe emotional injury, which was required by well-established Tennessee case law.[132] Similarly, the court concluded that Mrs. Rye had also failed to meet her burden of producing evidence sufficient to create a genuine issue of material fact as to her severe mental injury.[133] In support, the court referenced Mrs. Rye's testimony that she had not sought any medical or psychological treatment and that her parenting and daily routines remained the same since becoming Rh-sensitized.[134] For these reasons, the majority remanded the case to the trial court "for entry of summary judgment on these claims and any further necessary proceedings . . . ."[135]

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129. *Id.* at 266–68 (majority opinion). In a scathing footnote written in response to the dissent's claim that the majority had weighed the evidence in its assessment of the experts' respective testimony, the court claimed that the dissent had "harvested from the record only those facts supporting its favored result." *Id.* at 269 n.15.

130. *Id.* at 268.

131. *Id.* at 269–72.

132. *Id.* at 271. *See* Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996) (requiring expert medical or scientific proof of a severe mental or emotional injury to maintain a stand-alone claim for negligent infliction of emotional distress).

133. *Rye*, 477 S.W.3d at 272.

134. *Id.*

135. *Id.* at 273. It remains unclear from the majority's opinion exactly what "further proceedings" are actually necessary on remand. Although the court was asked to address only the proof of future medical expenses, the court's opinion suggests that Mrs. Rye's inability to establish future medical expenses bars her claim for health care liability. As the dissent recognizes, however, by focusing on Mrs. Rye's ability to establish future medical expenses, the majority overlooked the inherent value that flows from the change in Mrs. Rye's physiology due to the defendants' admitted negligence. *Id.* at 282–83, 285 n.15 (Wade, J., dissenting). Indeed, future medical expenses are not required to maintain a claim for health care liability. *See* TENN. CODE ANN. § 29-26-115(a) (2012) (requiring health care liability plaintiffs to prove (1) the applicable standard of care; (2) the defendant's breach of that standard; and (3) proximate cause).

C. Dissenting Opinion

In a no-holds-barred dissent, now-retired Justice Gary R. Wade took the majority to task for what he perceived as the court's capitulation to the legislature, which waged war on the judiciary beginning in 2011 when it attempted to legislatively overrule *Hannan*.[136] In his attempt to explain the granting of permission to appeal in a run-of-the-mill summary judgment case, Justice Wade wrote:

> By granting Rule 11 review in a case which pre-dated the passage of a statute purporting to set a new standard for summary judgment, by rejecting the well-established doctrine of stare decisis, and by acquiescing to the standard proposed by the General Assembly, my colleagues have preempted the future consideration of an important constitutional issue—whether the General Assembly, by its enactment of Tennessee Code Annotated section 20-16-101 (Supp. 2014), has violated the separation-of-powers doctrine.[137]

Rising to the defense of her colleagues in the majority, Chief Justice Sharon Lee responded to the dissent's assertion that the court had surreptitiously skirted the separation of powers issue by stating:

> I am unwilling to saddle litigants with a summary judgment standard that is unworkable simply to set the stage for a showdown with the Legislature over its authority to enact a summary judgment standard. The dissent references this as a "game of chicken" between the General Assembly and the Tennessee Supreme Court. I call it fulfilling my oath of office and maintaining the independence and integrity of the judiciary.[138]

In his concurring opinion, Justice Bivins similarly took issue with the dissent's separation of powers concerns, calling the dissent's

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136. *Rye*, 477 S.W.3d at 275 (Wade, J., concurring and dissenting); Cornett & Lyon, *supra* note 65.

137. *Rye*, 477 S.W.3d at 275 (Wade, J., concurring and dissenting).

138. *Id.* (Lee, C.J., concurring).

position "baffling, at best."[139] In Justice Bivins's view, if the court were truly kowtowing to the legislature, "would not it have been much easier to avoid this case and simply affirm the constitutionality of Tennessee Code Annotated section 20-16-101 in an ultimate constitutional challenge to that statutory provision?"[140] This too caught sharp criticism from Justice Wade, who called Justice Bivins's assessment of the separation of powers issue "troubling" and "indicative of the belief that th[e] Court can reach whatever result it desires in any given case . . . ."[141]

This sharp rhetoric between the members of the majority and the dissent is rarely seen in Tennessee's highest court and is arguably emblematic of an ideological change that has occurred in the court in the seven years between *Hannan* and *Rye*. When *Hannan* was decided, Democrats held control—albeit narrowly—over both houses of the Tennessee General Assembly (the "General Assembly"). Likewise, Tennessee's governor at the time, Phil Bredesen, was also a Democrat and had appointed three of the five justices on the *Hannan* court. By the time of *Rye*, however, the political landscape in Tennessee was vastly different: Republicans had a supermajority in both houses of the legislature; Republican Bill Haslam was in his second term as governor; and the two newest members of the court were Republican appointees with conservative leanings. Further, the incumbent members of the court, Chief Justice Sharon Lee and Justices Cornelia Clark and Gary Wade, had just escaped an unprecedented political shootout led by Tennessee's Lieutenant Governor Ron Ramsey, which brought the tensions between those two branches of government to a head in the 2014 election cycle.

Whatever role politics may have played in the court's decision to depart from *Hannan*, it is clear that the history upon which the majority relied had little grounding in the actual language of *Hannan*. Again, *White* and its progeny provided the principal backing for the court's conclusion that *Hannan* imposed an "insurmountable burden" on moving parties at summary judgment who did not bear the burden of proof at trial.[142] With the ascension of Justice Kirby to the Tennessee Supreme Court, these intermediate appellate decisions suddenly became authoritative law. Whether it was intentional or inadvertent, "the unfortunate footnote" from *White* proved to be the end of *Hannan* and

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139. *Id.* at 274 (Bivins, J., concurring).

140. *Id.*

141. *Id.* at 290 n.18 (Wade, J., concurring and dissenting).

142. *Id.* at 261 (majority opinion).

Tennessee's unique approach to summary judgment.[143]

III. IMPLICATIONS OF *RYE* FOR THE FUTURE

The Tennessee Supreme Court's sweeping decision in *Rye* obviously has implications for the future of civil litigation in Tennessee. It is important for lawyers and the clients they serve to understand these immediate effects. To end our analysis here, however, would be to miss the forest for the trees. *Rye* is actually indicative of a broader trend in Tennessee to "federalize" elements of the state constitution and state court system. This movement to conform state to federal law rolls back decades of judicial decisions in Tennessee recognizing essential distinctions between the federal and state constitutions. It is unclear whether this trend actually illustrates changing preferences in favor of the federal system or is simply reflective of the state's current political climate.

Indeed, any analysis of *Rye* must include a discussion of the "elephant" in the room: the General Assembly's concerted attack on the state judiciary. This challenge reached its zenith in 2014, following both a contested retention election involving three state supreme court justices that was spearheaded by the lieutenant governor and the adoption of Amendment Two, which changed the state constitution to reform the method by which appellate judges are selected. The pressure from conservative political forces, both inside and outside the state, to remake the judicial branch of government as "red to the roots" in order to mirror the executive and legislative branches,[144] has little to do with the technicalities of the burden-shifting standard on summary judgment motions. It would be naïve, however, not to acknowledge that *Rye* may be one of the first fruits of these efforts.

A. "Micro"-Effects of Rye

Before considering the broader issues surrounding the *Rye* decision, it is important to look at its direct impacts on civil litigants in Tennessee. One basic question to be answered is: given the enactment of the statute in 2011 establishing a new summary judgment standard in Tennessee,[145] what exactly is the standard for

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143. *Id.* at 280 n.10 (Wade, J., concurring and dissenting).

144. *See* Category: Red to the Roots, TENNESSEE REPUBLICAN PARTY, http://tngop.org/category/red-to-the-roots/ (last visited July 9, 2016).

145. *See* discussion *supra* Part II.

litigants to follow going forward? Is it *Rye* or the statute, or is this a distinction without a difference? In addition, although *Rye* impacts all civil cases, it will have particularized effects depending on the cause of action. By way of example, this section addresses *Rye*'s implications for employment discrimination cases in Tennessee.

The *Rye* majority was clear that its decision should be applied retroactively. Specifically, the court characterized its decision as a "proper exercise of [its] authority to reconsider, and when appropriate, abandon rules of law previously articulated in judicial decisions," and further stated that "[i]n civil cases, judicial decisions overruling prior cases generally *are applied retrospectively*."[146] However, because the decision was to overrule *Hannan* and apply the *Celotex* burden-shifting test to summary judgment motions, the new *Rye* standard should arguably apply only to those cases to which *Hannan* applied: cases filed prior to July 1, 2011. The 2011 statute purporting to legislatively overrule *Hannan* applies to cases filed on or after that date,[147] and the court stated that "[the] statute [was] irrelevant to [the Ryes'] appeal."[148] Moreover, Justice Bivins's concurrence makes clear that the statute was not at issue in *Rye*, positing that the court "may yet face a challenge to this constitutionally-suspect statute because of the specific language of that provision to determine if the two approaches are consistent."[149]

All of these statements by the court (not to mention long-established principles of judicial review) notwithstanding, a subsequent decision of the court suggests that it believes *Rye* abrogated the 2011 statute by implication. In *American Heritage Apartments, Inc. v. Hamilton County Water and Wastewater Treatment Authority*, a not-for-profit corporation operating a low-income housing complex sued a local utility, claiming that the utility had exceeded its statutory authority by levying a charge on its

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146. *Rye*, 477 S.W.3d at 263 n.9 (emphasis in original) (citing Hill v. City of Germantown, 31 S.W.3d 234, 239 (Tenn. 2000)).

147. TENN. CODE ANN. § 20-16-101 (2016).

148. *Rye*, 477 S.W.3d at 263 n.9.

149. *Id.* at 274 (Bivins, J., concurring). Justice Clark's majority opinion also concedes that by passing the statute, the legislature "has arguably invaded the province of the judiciary." *Id.* at 264 n.10 (majority opinion). One observer noted in response to this statement that "the Court's decision to not specifically address this constitutional issue may *arguably* encourage similar legislative invasion in the future." C.E. Hunter Brush, *Will the Tennessee General Assembly Continue to Tell the Judiciary to Put Up or Shut Up?*, BIZLITNEWS BLOG (Nov. 19, 2015), http://www.butlersnow.com/2015/11/will-the-tennessee-general-assembly-continue-to-tell-the-judiciary-to-put-up-or-shut-up/ (emphasis in original).

customers.[150] The utility filed a motion for summary judgment, arguing that the administrative procedures that applied to it under the Utility District Law of 1937 had yet to be exhausted. Because the lawsuit was filed in October 2011—after the July 1, 2011 effective date of Tennessee Code Annotated section 20-16-101—the trial court correctly applied the statute.[151] Noting that it had decided *Rye* in the interim, however, the supreme court stated that "[i]n the wake of *Rye*, we apply the summary judgment standard set forth in that case . . . ."[152] Thus, *American Heritage Apartments* indicates that *Rye* sets forth the burden-shifting standard on summary judgment for not only those cases filed prior to July 1, 2011 (i.e., those to which *Hannan* applied), but also all subsequent cases.[153]

In his *Rye* dissent, Justice Wade characterized and criticized the majority's decision to overrule *Hannan* as an attempt to deliberately avoid the constitutional conflict that would arise if it passed judgment on the 2011 statute.[154] The majority responded that Justice Wade's suggestion was "unfathomable" and "lack[ed] legal or factual foundation,"[155] that "[the] statute [was] irrelevant to [the Ryes'] appeal,"[156] and that the court's decision to overrule *Hannan* was "independent of and unrelated to legislative action."[157] In his concurring opinion, Justice Bivins derided Justice Wade's assertion as "rather baffling, at best" and opined that the court "may yet face a challenge to this constitutionally-suspect statute . . . ."[158] Yet barely

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150. 494 S.W.3d 31, 35 (Tenn. 2016).

151. *Id.* at 39.

152. *Id.* at 40.

153. *American Heritage Apartments* resolved a dispute that had arisen in the Eastern Section of the Tennessee Court of Appeals regarding the retroactivity of *Rye*. In two post-*Rye* opinions for cases filed after July 1, 2011, the majority applied the statute. Judge D. Michael Swiney concurred in the judgments but argued that when the *Rye* majority stated that its opinion should be applied retrospectively, *Rye* became the controlling standard even in cases that would otherwise be controlled by the statute. Rogers v. Blount Mem'l Hosp., No. E2015-00136-COA-R3-CV, 2016 WL 787308, at *7 (Tenn. Ct. App. Feb. 29, 2016) (Swiney, J., concurring); Thomas v. Standard Fire Ins. Co., No. E2015-01224-COA-R3-CV, 2016 WL 638559, at *7 (Tenn. Ct. App. Feb. 17, 2016) (Swiney, J., concurring). *American Heritage Apartments* confirmed that the majority of the court agrees with Judge Swiney's analysis.

154. Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 293 (Tenn. 2015) (Wade, J., concurring and dissenting). *See also supra* Part II.C (discussing Justice Wade's dissent).

155. *Id.* at 264 n.10 (majority opinion).

156. *Id.* at 263 n.9.

157. *Id.* at 264 n.10.

158. *Id.* at 274 (Bivins, J., concurring).

six months after *Rye*, the court stated in *American Heritage Apartments*, without any accompanying analysis, that the *Rye* standard applies even in those cases in which Tennessee Code Annotated section 20-16-101 should otherwise apply. Although the statute appears to no longer be applicable in any case, we cannot say that court has invalidated it because the court has not actually addressed the statute at all. Perhaps the court has implicitly invalidated the statute, the effect of which will be to pretermit any challenge to the statute because no litigant will ever need to raise one. In other words, the court has avoided a constitutional conflict with the legislature by quietly rendering the statute a dead letter. This outcome makes Justice Wade's concerns in his *Rye* dissent not "baffling" or "unfathomable," but prescient.

One might argue that the court's decision to replace the statute with the *Rye* standard does not matter. After all, the two standards both purport to overrule *Hannan* and adopt the federal *Celotex* standard for burden-shifting on a summary judgment motion where the nonmoving party will bear the burden of proof at trial. However, the language of the statute *is* different from the standard adopted in *Rye*. Under *Rye*, as under Justice Rehnquist's plurality opinion in *Celotex*, if the party moving for summary judgment who does not bear the burden of proof at trial points to a lack of evidence by the nonmoving party at the summary judgment stage, the burden shifts to the nonmoving party to present evidence showing a genuine issue of material fact in order to survive summary judgment.[159] By contrast, under the statute, if the party moving for summary judgment who does not bear the burden of proof at trial points to a lack of evidence by the nonmoving party at the summary judgment stage, then the moving party "shall prevail on its motion for summary judgment."[160] "Read literally, this enactment provides no opportunity for the nonmovant to respond to the movant's showing."[161] One might write this conflict off as simply inartful drafting by the General Assembly, but the difference in the language is stark. Perhaps the General Assembly will not concern itself with having its five-year-old standard implicitly invalidated by the court,

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159. *Id.* at 264 (majority opinion).

160. TENN. CODE ANN. § 20-16-101 (2016).

161. Cornett & Lyon, *supra* note 65, at 2130. It also conflicts with the plain language of Rule 56.03, which unambiguously ~~states~~ requires that the moving party at summary judgment provide "a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial." TENN. R. CIV. P. 56.03.

since it essentially achieved the goal it sought in 2011 by having the state summary judgment standard match the federal standard. While it would be wise for litigants in Tennessee, given the court's statement in *American Heritage Apartments*, to cite *Rye* as the standard for burden-shifting on a summary judgment motion in Tennessee, the court's implicit abrogation of a duly enacted statute that remains a part of the Tennessee Code is perplexing.

Another open question after *Rye* is its effect on particular areas of the law that developed under the *Hannan* standard. One such example is the standard of review for summary judgment in employment discrimination cases. In two cases decided in 2010, *Gossett v. Tractor Supply Co.* and *Kinsler v. Berkline, LLC*, the Tennessee Supreme Court abandoned the well-known burden-shifting test used in employment discrimination cases from *McDonnell Douglas Corp. v. Green*[162] as incompatible with the *Hannan* standard.[163] Specifically, the court stated that, "when applied at the summary judgment stage, the shifting burdens of the *McDonnell Douglas* framework obfuscate the trial court's summary judgment analysis," and that "the inquiries required by the *McDonnell Douglas* framework may result in trial courts disposing of factual questions on summary judgment."[164] *Gossett* and *Kinsler* were authored by Justice Holder, who also authored the *Hannan* opinion. Although she concurred in *Hannan*, Justice Clark (joined by Justice Koch) dissented in *Gossett* and *Kinsler*, arguing that the *Hannan* standard (which she would deem "unworkable" five years later in *Rye*) was compatible with the *McDonnell Douglas* burden-shifting standard in employment discrimination cases.[165]

The decisions in *Gossett* and *Kinsler* were nearly as controversial as the *Hannan* decision they followed. In the same year the General Assembly passed the statute purporting to overrule *Hannan*, it enacted another law to overrule *Gossett* and *Kinsler* and reestablish the *McDonnell Douglas* burden shifting framework as the standard in Tennessee.[166] Indeed, in his *Rye* concurrence, Justice Bivins referred to *Gossett* and *Kinsler* as "open hydrant[s]" that

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162. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

163. *See* Gossett v. Tractor Supply Co., 320 S.W.3d 777 (Tenn. 2010); Kinsler v. Berkline, LLC, 320 S.W.3d 796 (Tenn. 2010).

164. *Gossett*, 320 S.W.3d at 783.

165. *Id.* at 789 (Clark, J., concurring and dissenting); *Kinsler*, 320 S.W.3d at 802.

166. TENN. CODE ANN. § 50-1-304(f), (g) (2011); *see* Todd v. Shelby Cty., 407 S.W.3d 212, 220 (Tenn. Ct. App. 2012) (observing that *Gossett* was abrogated by the statute effective June 10, 2011).

extinguished "any remaining flicker in the flame of hope that *Hannan* merely represented a 'refinement' of *Byrd*."[167] However, the *Rye* majority declined to address those opinions directly while at the same time acknowledging that *Rye* "calls into question the continued viability of *Gossett* and *Kinsler*."[168] Even without further statement by the Tennessee Supreme Court on this issue, given the 2011 statutes seeking to abrogate *Gossett* and *Kinsler* and *Hannan*'s relegation to the history books, employment lawyers in Tennessee should assume that *Gossett* and *Kinsler* are not good law even though they have not formally been overruled. This is particularly the case in the Western Section, where the Tennessee Court of Appeals anticipated the inevitable and concluded, based upon *Rye*, "that the *McDonnell Douglas* framework once again applies in Tennessee to analyze discrimination claims at the summary judgment stage."[169]

B. "Macro"-Impacts of Rye

The *Rye* decision concerns summary judgment, but its impacts are being felt well beyond the civil realm. It was written in an era of political tension between the judicial and legislative branches in Tennessee, the end result of which may be a new Republican supreme court majority undoing much of the work of a court that has had a majority of Democratic appointees for the entire modern era. It may also be indicative of an apparent movement away from a period of state supreme court independence towards an era of conformity with federal law and standards.

1. The Events of 2014

In 2014, unprecedented attention was placed on the Tennessee appellate court system. Under the merit selection system that had existed in Tennessee since the early 1970s, appellate court judges were nominated and evaluated by statutory commissions and appointed by the governor. They then stood for state-wide retention

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167. Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 273 (Tenn. 2015) (Bivins, J., concurring). Justice Bivins concluded that "*Gossett* and *Kinsler* fully confirmed that *Hannan*, indeed, constituted a radical departure from prior summary judgment jurisprudence." *Id.* at 273–74.

168. *Id.* at 264 n.11 (majority opinion).

169. Yount v. FedEx Express, No. W2015-00389-COA-R3-CV, 2016 WL 1056958, at *7 (Tenn. Ct. App. Mar. 17, 2016).

elections every eight years. This system, known as the "Tennessee Plan," existed in relative peace for decades, with only one Tennessee Supreme Court justice losing a retention election during that time.[170] However, beginning in 2010, when Republicans achieved unprecedented electoral success and won both the governor's mansion and majorities in both houses of the legislature for the first time since Reconstruction, leaders of the conservative movement began to set their sights on the one branch of state government their party did not control. Deep conservative unrest bubbled to the surface regarding a system of selecting judges that many Republicans believed simply reinforced the longtime Democratic dominance of the Tennessee Supreme Court (and, of lesser prominence politically, the state's two intermediate appellate courts).[171] The details regarding the evolution of the Tennessee Plan and the GOP's opposition to it have been discussed extensively elsewhere.[172] Ultimately, it culminated in two seismic events in 2014 that would affect the composition and direction of the Tennessee Supreme Court in both the short-term and long-term.

First, in August 2014, the members of the Tennessee Supreme Court faced their octennial retention election, in which the state's voters were presented with a simple question as to each justice or judge: "Shall (Name of Candidate) be retained or replaced in office as a Judge of the (Name of Court)?"[173] Two of the five supreme court justices (Justice Janice Holder, a Republican appointee, and Justice William Koch, a Democratic appointee) were retiring and not standing for retention. Their replacements, Jeffrey Bivins and Holly Kirby, already had been named by the Republican governor, Bill Haslam, but would not assume their places on the bench until September 1, 2014 and thus would not stand for retention until

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170. Justice Penny White was not retained in 1995 after a spirited campaign, which was led by the Tennessee Conservative Union and based upon her perceived opposition to the death penalty. Cornett & Lyon, *supra* note 65, at 2121 (citing Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decision?*, 72 N.Y.U. L. REV. 308, 310 (1997)).

171. *See* Cornett & Lyon, *supra* note 65, at 2121 n.205 (observing that between 1886 and 1998, 61 of 63 justices who served on the Tennessee Supreme Court, or 97%, were Democrats).

172. *See, e.g., id.* at 2091–95, 2118–22; Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501 (2007–2008); Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473 (2007–2008).

173. TENN. CODE ANN. § 17-4-115(b)(1) (2009), *repealed by* 2016 Pub. Acts, ch. 528, § 15 (effective Jan. 28, 2016).

August 2016. Therefore, only three of the five state supreme court justices (Chief Justice Gary Wade and Justices Connie Clark and Sharon Lee) were standing for retention, and all three of the justices had been appointed by Democratic governor Phil Bredesen. This ostensibly left the "swing" vote on the court hanging in the balance; if only one of the three justices were not retained by the voters, then Governor Haslam would have the opportunity to appoint his or her replacement, and a majority of the court would be made up of Republican appointees for the first time in modern history.

This shift would not only affect the court's long-term decision-making, but also have the immediate impact of changing the state's attorney general. The Tennessee Supreme Court's power to appoint the attorney general is unique among all state supreme courts, and the new court was to exert that power in September 2014, immediately following the retention election.[174] A majority Republican court would presumably appoint a Republican attorney general.[175] At least one of the targeted justices, Sharon Lee, sought to blunt the impact of this issue by telling one of the largest newspapers in the state several weeks before the election that she was not on the supreme court in 2006 when Democrat Bob Cooper was selected as attorney general. She believed it was traditional for state attorneys general to serve only one term, and she would work with the two new Republican appointees to "select the best applicant" for the attorney general position.[176]

This "low-hanging fruit" of three Democratically-appointed supreme court justices, which previously had seemed "forbidden,"

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174. TENN. CONST. art. VI, § 5 ("An Attorney General and Reporter for the State, shall be appointed by the Judges of the Supreme Court and shall hold his office for a term of eight years.").

175. Lieutenant Governor Ron Ramsey, who became the public face of the "Replace" campaign, told the crowd at a Nashville Republican fundraiser "[f]olks, it's time that we had a Republican attorney general in the state of Tennessee." Dahlia Lithwick, *How to Take Out a Supreme Court Justice,* SLATE (June 13, 2014, 5:01 PM), www.slate.com/articles/news_and_politics/jurisprudence/2014/06/tennessee_supreme_court_justices_gary_wade_cornelia_clark_and_sharon_lee.html. *See* Victor Ashe, *The Supreme Court Battle,* SHOPPER NEWS (Apr. 22, 2014), http://shoppernewsnow.com/victor-ashe/the-supreme-court-battle/ (observing months before the election that the primary reason for the retention challenge was appointment of the attorney general and noting the irony "that this process, which was designed to remove the attorney general selection from politics, has forced these three justices into a political fight statewide for their survival on the court.").

176. Tom Humphrey, *Supremes Say They'll Pick Next AG in "Non-Partisan Manner"; Collect $100K at First of Several Campaign Fundraisers,* KNOXVILLE NEWS SENTINEL, May 20, 2014, *available at* 2014 WLNR 26835004.

was too tempting for some Republicans to resist. A vigorous "Vote Replace" campaign was led, both financially and in spirit, by Lieutenant Governor and Speaker of the Senate Ron Ramsey (R-Blountville).[177] Over $2.4 million was spent on both sides to contest what previously had been a sleepy summer election, including $1.13 million by the judges themselves and groups supporting them.[178] The campaign was, on its face at least, unsuccessful, as Justices Wade and Lee were retained by fifty-seven percent of voters and Justice Clark was retained by fifty-six percent.[179] The leader of the "Replace" effort, Senator Ramsey, was unperturbed, congratulating the justices and, implicitly, himself, for a "real election for the Supreme Court" that required the justices to travel the state stumping for votes (or, in his words, "meeting Tennesseans and learning things about our state that you can't find in any law book").[180] Despite the outcome of the election, the message from Senator Ramsey and those supporting his efforts, which two of the authors clairvoyantly identified in a 2011 article as *"[d]on't go too far to the left, or we will institute contested elections and spend millions to defeat you,"*[181] appeared to have some immediate impact. The court did in fact appoint a Republican attorney general in the person of Herbert Slatery, a prominent Knoxville attorney who served as

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177. The primary arguments made by the groups opposing the justices were that they were "soft on crime," "anti-business," and, bizarrely, supportive of the Affordable Care and Patient Protection Act, a federal law about which the state supreme court would never be asked to sit in judgment. *Id.*; *see also* Brian Haas, *TN Supreme Court Battle Brings National Money, Scrutiny*, THE TENNESSEAN (Aug. 5, 2014), http://www.tennessean.com/story/news/politics/2014/08/04 /tn-supreme-court-battle-brings-national-money-scrutiny/13550987/.

178. Mark Joseph Stern, *An Unexpected Triumph for Justice*, SLATE (Nov. 7, 2014), http://www. slate.com/articles/news_and_politics/jurisprudence/2014/11/state_judicial_elections_2014_conservatives_failed_to_stack_supreme_courts.html.

179. Niraj Chokshi, *Three Tennessee Supreme Court Justices Survive High-Stakes Campaign to Keep Seats*, WASHINGTON POST (Aug. 8, 2014), https://www.washingtonpost.com/blogs/govbeat /wp/2014/08/08/3-tennessee-supreme-court-justices-survive-a-high-stakes-campaign-to-keep-their-seats/.

180. Brian Haas, *Tennesseans Vote to Retain Supreme Court Justices*, THE TENNESSEAN (Aug. 7, 2014), http://www.tennessean.com/story/news/politics /2014/08/07/tennesseans-vote-retain-supreme-court-justices/13756359/.
Some observers agreed with this sentiment. *See* Brian T. Fitzpatrick, *Lessons from Tennessee Supreme Court Retention Election*, THE TENNESSEAN (Aug. 20, 2014), http://www.tennessean.com/story/opinion/2014/08/21/lessons-tennessee-supreme-court-retention-election/14352389/ ("Although I am sure the justices did not enjoy going through a tough vote, it was good for them — and for our system of justice.").

181. Cornett & Lyon, *supra* note 65, at 2121.

Governor Haslam's chief legal counsel for several years.[182] Shortly thereafter, it immediately sought out a summary judgment case to use as a vehicle to overturn *Hannan*.[183] Given the timing of events, it is impossible to separate *Rye* from its political environment.

The other landmark event in 2014 affecting Tennessee's judicial branch was the adoption of a constitutional amendment changing how Tennessee selects its appellate court judges. Prior to the amendment, the Tennessee Constitution unambiguously stated that "[j]udges of the Supreme Court shall be elected by the qualified voters of the State."[184] The Tennessee Plan, with its system of nomination by committee, gubernatorial appointment, independent evaluation, and popular retention election, was a legislative solution designed to comply with the state constitution, yet avoid costly, contested, state-wide elections and ensure that the emphasis would be on the merits of judicial candidates rather than their political skill or ideology. The Tennessee Plan had its critics, but it survived numerous constitutional challenges over the years, most recently in 2014.[185] As Tennessee's political climate shifted and more of those critics began to populate the legislature that created the system, it became increasingly clear that the Tennessee Plan's days were numbered. Some clamored for popular election of Tennessee Supreme Court justices; despite the obvious problems with this approach, it had the benefit of both remaining true to the language of the state constitution and ensuring that the judicial branch maintain its independence from the legislature. However, popular elections were opposed by a coalition of bar associations; business interests; Republican leaders such as the governor, speaker of the

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182. Richard Locker, *Tennessee Supreme Court Appoints Slatery as Attorney General*, KNOXVILLE NEWS SENTINEL (Sept. 15, 2014), http://www.knoxnews.com /news/local/tennessee-supreme-court-appoints-slatery-as-state-attorney-general-ep-615431514-354266801.html. After the retention election, Justice Lee, who was elected by the court to a term as chief justice beginning September 1, 2014, clarified her earlier comments regarding selection of the attorney general as "simply mean[ing] she would respect the thoughts of all four colleagues equally, including the two newest members of the Supreme Court bench." Tom Humphrey, *On Supreme Decision Making in Selection of a TN Attorney General*, KNOXNEWS.COM (Sept. 1, 2014), http:// knoxblogs.com/humphreyhill/2014/09/01/supreme-decision-making-selection-tn-attorney-general/.

183. *See supra* discussion in Part I.E.

184. TENN. CONST. art. VI, § 3 (amended Nov. 4, 2014).

185. Hooker v. Haslam, 437 S.W.3d 409 (Tenn. 2014). This unanimous opinion was reached by five special justices, who were appointed after all of the sitting justices recused themselves from the matter.

house, and speaker of the senate; and many other Republican and Democratic legislators.[186] Thus, a compromise was reached in the form of a constitutional amendment that would institutionalize the appointment of judges by the governor but also give the legislature a role in the process.[187] The constitutional amendment states, in relevant part:

> Judges of the Supreme Court or any intermediate appellate court shall be appointed for a full term or to fill a vacancy by and at the discretion of the governor; shall be confirmed by the Legislature; and thereafter, shall be elected in a retention election by the qualified voters of the state. Confirmation by default occurs if the Legislature fails to reject an appointee within sixty calendar days of either the date of appointment, if made during the annual legislative session, or the convening date of the next annual legislative session, if made out of session. The Legislature is authorized to prescribe such provisions as may be necessary to carry out Sections two and three of this article.

Under Tennessee's constitutional amendment process, the amendment was passed by both houses of the General Assembly in successive sessions before appearing on the ballot in November 2014 as the second of four proposed constitutional amendments. The "Yes" campaign for Amendment Two was led by a bipartisan group of prominent Tennessee politicians including Governor Bill Haslam, former Governor Phil Bredesen, and former U.S. Senator Fred Thompson and was vocally supported by Chief Justice Sharon Lee and lawyers' groups throughout the state, including the Tennessee Bar Association.[188] Although some commentators expressed

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186. Cornett & Lyon, *supra* note 65, at 2091–93, 2118–21.

187. In a debate on Amendment Two held in October 2014 at the University of Tennessee College of Law with long-time opponent of the Tennessee Plan John Jay Hooker, the Chair of the Senate Judiciary Committee, Brian Kelsey (R-Germantown), referred to Amendment Two as the "Founding Fathers Plus Plan" and stated that the amendment was "hatched at a Memphis meeting of the Federalist Society." Frank Daniels III, *John Jay Hooker, Brian Kelsey Debate on Amendment 2 a Draw*, THE TENNESSEAN (Nov. 28, 2014), http://www.tennessean.com/story/ opinion /columnists/frank-daniels/2014/10/24/john-jay-hooker-brian-kelsey-debate-amendment-draw/17852017/.

188. Amendment 2 to the Tennessee Constitution, Tennessee Bar Association, http://www.tba.org/info/amendment-2-to-the-tennessee-constitution, (last visited Aug. 18, 2016).

skepticism regarding Amendment Two,[189] no organized opposition to the amendment ever emerged, and it passed easily with over sixty percent of the vote and more than half of the number of votes required in the governor's election,[190] as required by the state constitution's amendment provisions.[191] In early 2016, after the summer 2015 retirement of Justice Gary Wade, Roger Page became the first Tennessee Supreme Court justice to be appointed and confirmed under the new process.[192] Justice Page, along with 2014 appointees Justice Bivins and Justice Kirby, were all easily retained by the voters in August 2016.[193]

As a result of Amendment Two's passage, Tennesseans will not be subjected to partisan judicial elections. The price for this is a system that ensures that the executive and legislative branches—not the people of Tennessee—will select the members of the state's highest court and intermediate appellate courts. Moreover, nothing prevents those same politicians from seeking to oust those same judges every eight years if they stray ideologically in their decisions on the bench. Indeed, the "Replace" campaign led by Senate Speaker Ron Ramsey and his allies in 2014 suggests that even a perceived lack of ideological purity based on the party of the appointing governor may leave a jurist exposed. Given this context, it would not be surprising that *Rye* and other recent decisions might reflect the political realities the justices are facing.

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189. Frank Cagle, then a columnist in the now-defunct Knoxville alt-weekly newspaper *Metropulse*, "penned a blistering critique" of the proposed Amendment 2 several weeks prior to the election. Tom Humphrey, *Columnist: Amendment 2 Would Make Judges "Lackeys and Lapdogs" of the Legislature,* KNOXNEWS.COM (July 26, 2014), http://knoxblogs.com/humphrey hill/2014/07/26/columnist-amendment-2-make-judges-lackeys-lapdogs-legislature/. Cagle posed this choice to prospective voters: "If you vote Yes on Amendment Two, you are giving up your right to vote and turning control of the courts over to the Governor and the Legislature. If you vote No there is at least a chance that the independence of the state judiciary will be restored." *Id.*

190. Dave Boucher, *Amendment 2 to Change Judicial Selection Passes,* THE TENNESSEAN (Nov. 4, 2014), http://www.tennessean.com/story/news/politics /2014/11/05/amendment-change-judicial-selection-leads/18499123/.

191. TENN. CONST. art. XI, § 3.

192. Joel Ebert, *Lawmakers Confirm Roger Page to Tennessee Supreme Court,* THE TENNESSEAN (Feb. 22, 2016), http://www.tennessean.com/story/news /politics/2016/02/22/lawmakers-confirm-roger-page-tennessee-supreme-court/80775744/.

193. August 4, 2016 Unofficial Election Results, http://elections.tn.gov/ results.php?ByOffice=Sup reme%20Court (last visited Aug. 18, 2016).

2. A Loss of State Court "Independence"

Thirty-five years ago, a student comment in this journal asserted that the Tennessee Supreme Court was "an avid proponent of [a] recent national trend toward independence in the state courts."[194] That article outlined the history of state constitutional interpretation throughout the life of our Republic and concluded that the states, and particularly Tennessee, were in a federalist period in which they were inclined to find independent and adequate bases for constitutional decisions that were grounded in the state constitution rather than the federal constitution.[195] Basing a decision on language or rights contained in the state constitution allows a state supreme court to evade review by the U.S. Supreme Court and adopt a more expansive view of civil rights and liberties, even where the language of the federal and state constitutional provisions are identical or very similar.[196] Indeed, Tennessee has a long history of judicial "independence," rejecting U.S. Supreme Court constitutional interpretations in favor of more protective doctrines based on state constitutional provisions, which sometimes are worded differently but other times are indistinguishable in their text from federal provisions.[197] The article makes a persuasive argument that the pendulum had swung back toward use of the independent and adequate state-ground doctrine in Tennessee. However, a review of recent decisions by the Tennessee Supreme Court suggests that those days are over and we have entered an era of conformity with federal standards and provisions. Although *Rye* involves conforming a state rule to a federal rule where they are worded similarly, rather

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194. Carolyn Jourdan, Comment, *Tennessee Judicial Activism: Renaissance of Federalism*, 49 TENN. L. REV. 135, 135 (1981–82).

195. *Id.* at 138–39.

196. *Id.* at 140. While state courts of last resort are welcome to adopt a more expansive and protective interpretation of language in the state constitution, they may not do the opposite and take a more restrictive view of a state constitutional right than exists for that same right under the federal constitution. By way of analogy to the civil procedure realm, the U.S. Supreme Court determines the extent to which the Due Process Clause protects an out-of-state defendant from being subject to personal jurisdiction in the courts of another state; states, correspondingly, may adopt long-arm statutes that provide greater protection to out-of-state defendants, but may not exercise jurisdiction over an out-of-state defendant where the U.S. Constitution, as interpreted by the U.S. Supreme Court in its personal jurisdiction jurisprudence, would not permit it. A. BENJAMIN SPENCER, CIVIL PROCEDURE: A CONTEMPORARY APPROACH 45–47 (4th ed. 2016).

197. *See generally* Jourdan, *supra* note 194; State v. Moats, 403 S.W.3d 170, 187 n.8 (Tenn. 2013).

than a constitutional issue, it is illustrative of this trend to conform Tennessee standards to federal standards. It is striking that this is occurring in a conservative political environment with a General Assembly that has pushed back against what it deems to be encroachments by a federal executive branch that was led by a Democratic president from 2009 to 2017. This begs the question of the real reason for this "federalization of Tennessee law."

One area in which Tennessee has a long history of developing its own protections based upon the state constitution is criminal procedure. While civil litigants may focus on changes to the summary judgment standard, the post-2014 court has been even more proactive in the area of constitutional criminal procedure, limiting rights that had previously existed under the state constitution to bring Tennessee in line with federal cases.

In *State v. McCormick*,[198] the court reconsidered whether it should adopt a community caretaking exception to the warrant requirement. That exception permits a warrantless search of an automobile and seizure of evidence found in that search where it "was undertaken pursuant to the officer's 'community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'"[199] Since the U.S. Supreme Court's 1973 decision originating the community caretaking doctrine,[200] the vast majority of lower federal courts and states have adopted it as an exception to the warrant requirement.[201] Tennessee, however, was one of a small minority of states declining to adopt community caretaking as an exception to the warrant requirement for searches and seizures. Instead, the Tennessee Supreme Court had "limited the community caretaking doctrine to third-tier 'consensual police-citizen encounters that do not require probable cause or reasonable suspicion . . . .'"[202] In fact, the supreme court addressed the issue directly in 2013 and, in a 3–2 decision, declined to adopt a more expansive view of the community caretaking function. In so doing, the majority stated:

> [T]his Court has for decades interpreted article I, section 7 of

198. State v. McCormick, 494 S.W.3d 673, 675 (Tenn. 2016).

199. *Id.* at 681 (quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1973)).

200. Cady v. Dombrowski, 413 U.S. 433 (1973).

201. *McCormick*, 494 S.W.3d at 682; *Moats*, 403 S.W.3d at 191 (Clark & Koch, JJ., dissenting).

202. *McCormick*, 494 S.W.3d at 683 (quoting *Moats*, 403 S.W.3d at 182).

> the Tennessee Constitution[203] as imposing stronger protections than those of the federal constitution, which, under stare decisis, we are not prepared to dismissively brush aside. Particularly in the area of search and seizure law, we have often rejected the standards adopted by the United States Supreme Court in favor of more protective doctrines, tests, and rules.[204]

Of course, the court's makeup was very different in 2016 than it was in 2013. The author of *Moats*, Justice Gary Wade, had retired, as had one of the other justices constituting the slim majority. One of the dissenters in *Moats*, Justice Connie Clark, became the author of the court's unanimous decision in *McCormick*. In adopting community caretaking as an exception to the warrant requirement, the *McCormick* court criticized "[t]he *Moats* majority [for] ground[ing] this limitation [of the community caretaking doctrine] in the Tennessee Constitution, even though the defendant had neither relied upon the state constitution nor argued that it provided greater protection than the Fourth Amendment, and even though this Court had 'long held' that article I, section 7 'is identical in intent and purpose to the Fourth Amendment.'"[205] As for overruling a decision that was only thirty-one months old, the court stressed that *Moats* was out of line with the majority of federal courts and other states and cited *Rye* (among other cases) for the proposition that the principle of *stare decisis* does not compel the court to adhere to erroneous or "unworkable" precedent.[206]

The Tennessee Supreme Court also recently decided *State v. Reynolds*.[207] The U.S. Supreme Court adopted a good-faith exception to the exclusionary rule over thirty years ago, which permits the use

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203. "That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted." Article I, section 7 is the Tennessee eConstitution's equivalent to the United States Constitution's Fourth Amendment. TENN. CONST. art. I, § 7.

204. *Moats*, 403 S.W.3d at 187 n.8.

205. *McCormick*, 494 S.W.3d at 683–84 (quoting State v. Williams, 185 S.W.3d 311, 315 (Tenn. 2006)) (internal citations omitted).

206. *Id.*

207. State v. Reynolds, __ S.W.3d __, No. E2013-02309- SC-R11-CD, 2016 WL 6525840567 (Tenn. Nov. 3, 2016).

of evidence at trial so long as officers acted in good faith and reasonably in obtaining it, even if that evidence later turns out to be inadmissible.[208] The Tennessee Supreme Court had never directly addressed the issue of whether a good-faith exception to the warrant requirement exists under the Tennessee Constitution.[209] In *Reynolds*, the court adopted a limited good-faith exception to the warrant requirement that "applies only when the law enforcement officers' action is in objectively reasonable good faith reliance on 'binding appellate precedent' that 'specifically *authorizes* a particular police practice.'"[210] Citing *McCormick*, the court stated that it had "long recognized that article I, section 7 [of the Tennessee Constitution] is identical in intent and purpose to the Fourth Amendment [to the U.S. Constitution]."[211] Moreover, the court had recognized other exceptions to the warrant requirement, and adopting the good-faith exception did not require it "to overrule 'a settled development of state constitutional law.'"[212]

Finally, the court recently granted review in another criminal procedure case indicating that it is reconsidering long-held Tennessee precedent interpreting the state constitution as providing greater rights than the federal constitution provides. The supreme court held in 1989[213] that the two-pronged *Aguilar-Spinelli* test[214] for measuring probable cause was more consistent with the Tennessee Constitution's requirement that a search warrant not be issued "without evidence of the fact committed"[215] than was the "totality of the circumstances" test subsequently adopted by the U.S. Supreme Court in *Illinois v. Gates*.[216] The court has not reconsidered

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208. United States v. Leon, 468 U.S. 897 (1984); *see also* Stacey Barchenger, *Justices Weigh "Good Faith" Intentions of Police*, THE TENNESSEEAN (Oct. 1, 2015), http://www.tennessean.com/story/news/2015/09/30/justices-weigh-good-faith-exception/73039504/.

209. However, it is notable that the Tennessee Court of Criminal Appeals, after extensive analysis, concluded that "adopting a good faith exception under the Tennessee Constitution would unduly reduce the protections contemplated for our citizens by the Tennessee Constitution, the legislature, and the Tennessee Supreme Court." State v. Huskey, 177 S.W.3d 868, 890 (Tenn. Crim. App. 2005).

210. *Reynolds*, 2016 WL 6525856, at *20 (quoting Davis v. United States, 564 U.S. 229, 241 (2011)).

204. *Id.* (citing *McCormick*, 494 S.W.3d at 683–84).

212. *Id.* (quoting State v. Vineyard, 958 S.W.2d 730, 733-34 (Tenn. 1997)).

213. State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989).

214. Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

215. TENN. CONST. art. I, § 7.

216. Illinois v. Gates, 462 U.S. 213 (1983).

that decision until now. Recently, the court issued an order granting the State permission to appeal in the case of *State v. Tuttle*.[217] In the order, the court stated that it "is interested in briefing and argument of the question whether this Court should revisit the continuing vitality of *State v. Jacumin* . . . ,"[218] an issue that was not addressed in the State's Rule 11 application or by the courts below. This, of course, was the same language the court used in its order granting Rule 11 review in *Rye*, only with regard to *Jacumin* instead of *Hannan*.[219]

The Tennessee Supreme Court in the post-2014 world is made up of three Republican appointees and two Democratic appointees who faced a difficult retention election. All of the justices face another retention election in six years. All indications thus far show that the court will be an activist in favor of defense interests in civil cases and the state's interests in criminal cases, with *stare decisis* giving faint opposition to the court's objectives.[220] Perhaps this new era of the Tennessee Supreme Court can be defined less by conforming to federal law and more by conforming to political expectations.

CONCLUSION

Tennessee's summary judgment law inscribes an arc from its Edenic origin in 1971 through its development of the plaintiff-friendly negation requirement to its current defendant-friendly adoption of the federal *Celotex* standard. The rise and fall of the negation requirement reflects the changing composition of the

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217. State v. Tuttle, No. M2014-00566-CCA-R3-CD, 2015 WL 5251990 (Tenn. Crim. App. Sept. 8, 2015), *perm. app. granted* (Tenn. Feb. 18, 2016).

218. Order Granting Permission to Appeal, No. M2014-00566-SC-R11-CD, 2016 Tenn. LEXIS 100 (Tenn. February 18, 2016).

219. One commentator stated: "[R]egardless of the specific question involved, the Tennessee Supreme Court's new philosophy is clear: no prior precedent bolstering the rights of the accused under Tennessee law—no matter how recent or long-established—stands on firm footing any longer." Daniel Horwitz, *Tennessee Supreme Court Restricts Coram Nobis Relief, Overturning Recent Precedent Yet Again*, SCOTBLOG.ORG (July 21, 2016), http://scotblog.org/ 2016/07/tennessee-supreme-court-restricts-coram-nobis-relief-overturning-recent-precedent-yet-again/.

220. Indeed, in one recent opinion the court overturned its own interpretation of the state's *error coram nobis* statute from four years earlier. Frazier v. State, No. M2014-02374-SC-R11-ECN, 2016 WL 3668035 (Tenn. July 7, 2016) (overruling Wlodarz v. State, 361 S.W.3d 490 (Tenn. 2012)). Chief Justice Lee, who of course concurred in both *Rye* and *McCormick*, dissented, taking objection with the majority's disregard of *stare decisis* in overruling *Wlodarz*. *Id.* at *8 (Lee, C.J., dissenting).

Tennessee Supreme Court and the current court's preference for a tight screening mechanism for claims. Only those claims for which parties can obtain solid evidence through discovery should proceed to trial. Claims for which proponents have no evidence at the summary judgment stage—and those for which evidence is more difficult to obtain, or for which the supporting evidence is viewed as weak—are dismissed prior to trial. The court's adoption of the *Celotex* standard for summary judgment is consistent with the "front-loading" of civil litigation in the federal courts in recent years. Screening out cases earlier and earlier in the litigation process inevitably means that fewer meritorious cases will get to the trial stage, a result the current Tennessee Supreme Court is willing to tolerate.