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WEST VIRGINIA'S VERY OWN *CELOTEX* TRILOGY: A SERIES OF RECENT OPINIONS BY THE SUPREME COURT OF APPEALS OF WEST VIRGINIA REVEALS THAT THE RUMORS OF RULE 56'S DEATH WERE GREATLY EXAGGERATED

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Opinions expressed in this Article are solely the authors'.

I. INTRODUCTION

Conventional wisdom among West Virginia litigators has long held that state circuit judges grant summary judgment only in exceptional circumstances. Like major league baseball's strike zone, which every umpire calls more conservatively than the official rules dictate, Rule 56,[1] as applied in West Virginia's courtrooms, often bears little resemblance to the Rule in text. West Virginia judges typically have taken a fairly harsh view of summary judgment.

Circuit judges' reluctance to grant summary judgment is understandable. Judges who have done so generally have received little support from the Supreme Court of Appeals of West Virginia, which reviews summary judgment orders *de novo*.[2] State appellate decisions have dubbed summary judgment a disfavored mechanism[3], and have instructed that trial judges should view motions for summary judgment with "caution"[4] and "suspicion."[5] Faced with this formidable standard, many state lawyers have surmised that Rule 56 is effectively dead in West Virginia.

But this Article is by no means an epitaph for state-court summary judgment in West Virginia. Three recent decisions by the Supreme Court of Appeals confirm that Rule 56 not only has a pulse, but is quite healthy. In *Painter v. Peavy*,[6] *Williams v. Precision Coil, Inc.*,[7] and *Jividen v. Law*,[8] the court restated and revised the state summary judgment standard, encouraged circuit judges to grant Rule 56 motions in appropriate cases, and demonstrated that it intends to uphold judges' summary judgment orders when they are based on adequate grounds. The decisions expressly adopted and applied United States Supreme

1. Throughout this Article, both W. VA. R. CIV. P. 56 and FED. R. CIV. P. 56 are cited simply as "Rule 56." The state and federal rules are substantively identical.

2. *E.g.*, Painter v. Peavy, 451 S.E.2d 755, 758 (W. Va. 1995).

3. *E.g.*, Andrick v. Town of Buckhannon, 421 S.E.2d 247, 249 (W. Va. 1992).

4. *E.g.*, Chamberlaine & Flowers, Inc. v. McBee, 356 S.E.2d 626, 628 (W. Va. 1987).

5. Logan Bank & Trust v. Letter Shop, Inc., 437 S.E.2d 271, 276 (W. Va. 1993).

6. 451 S.E.2d 755 (W. Va. 1995).

7. 459 S.E.2d 329 (W. Va. 1995).

8. 461 S.E.2d 451 (W. Va. 1995).

Court precedent interpreting Rule 56 and resemble, in both substance and effect, the trilogy of 1986 summary judgment opinions by that Court which liberalized the federal summary judgment standard.[9]

This Article highlights for West Virginia's bar and bench this significant trend in state law. Analysis of the pros and cons of summary judgment is beyond its scope. Included is a historical discussion of the summary judgment standard in West Virginia, a cursory review of the *Celotex* trilogy, a detailed analysis of *Painter*, *Precision Coil*, and *Jividen*, and an examination of state judges' initial impressions of the significance of the court's pronouncements on summary judgment.

II. THE EVOLUTION OF WEST VIRGINIA'S SUMMARY JUDGMENT STANDARD

The Supreme Court of Appeals first addressed the summary judgment standard in *Petros v. Kellas*.[10] The court recognized that West Virginia Rule 56 "is practically identical" to the Federal Rule 56, and cited federal caselaw in support of the proposition that it was:

> [W]ell settled that to resist a motion for summary judgment the party against whom it is made must present some evidence to indicate that the facts are in dispute when the evidence of the moving party shows no disputed facts, and that the mere contention that the issue is disputable is not sufficient.[11]

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9. *See infra* Part III.

10. 122 S.E.2d 177 (W. Va. 1961).

11. *Id.* at 183 (citing Berry v. Atlantic Coast Line R.R., 273 F.2d 572 (4th Cir. 1960); Zoby v. American Fidelity Co., 242 F.2d 76 (4th Cir. 1957)). The quotation was not incorporated into the syllabus of the case, although two context specific syllabus points address summary judgment. Syllabus Point 4 states, "When the material facts are undisputed and only one inference may be drawn from them by reasonable minds the questions of negligence and contributory negligence are questions of law for the court' Point 3, Syllabus, Graham v. Crist, W. Va. [118 S.E.2d 420]." *Petros*, 122 S.E.2d at 178, Syl. Pt. 4. Syllabus Point 6 states:

> When the material facts established by the pleadings and other matters not excluded but considered by the trial court, as disclosed by the record in a civil action based on negligence, are undisputed and only one inference may be drawn from them by reasonable minds the questions of contributory negligence and assumption of risk are questions of law for the court, and if such facts establish contributory negligence or assumption of risk by the plaintiff and there is no genu-

The court, speaking through Judge Haymond, went on making a strong statement opposing utilization of summary judgment:

> Even in cases in which the trial judge is of the opinion that he should direct a verdict for one or the other of the parties on the issues involved, he should nevertheless ordinarily hear evidence and direct a verdict rather than to try the case in advance on a motion for summary judgment.[12]

The court next visited the summary judgment standard in what is easily the most cited authority on the standard in West Virginia jurisprudence, *Aetna Casualty & Surety Co. v. Federal Insurance Co.*[13] Judge Haymond enunciated the following standards as part of the syllabus by the court:

> 3. A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify application of the law.
>
> 4. If there is no genuine issue as to any material fact summary judgment should be granted but such judgment must be denied if there is a genuine issue as to a material fact.
>
> 5. The question to be decided on a motion for summary judgment is whether there is genuine issue of fact and not how that issue should be determined.
>
> 6. A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.[14]
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> . . . .

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ine issue as to any material fact to be tried by a jury, the court should grant a motion of the defendant for summary judgment of dismissal in his favor.

Id. at 178, Syl. Pt. 6.

12. *Id.* at 186 (citing Kirkpatrick v. Consolidated Underwriters, 227 F.2d 228 (4th Cir. 1955)). Although the quotation was not included as part of the syllabus, it later formed the basis for Syllabus Point 1 of Masinter v. WEBCO Co., 262 S.E.2d 433 (W. Va. 1980), which was authored by Justice Miller.

13. 133 S.E.2d 770 (W. Va. 1963).

14. The court later rephrased Syllabus Point 6 of *Aetna* in Wheeling Kitchen Equip. Co. v. R & R Sewing Ctr., Inc., 179 S.E.2d 587, 590 (W. Va. 1971) as follows: "On a motion for summary judgment the court can not summarily try factual issues and may consider only facts which are not disputed or the dispute of which raises no substantial factual issue."

> 9. A motion by each of two parties for summary judgment does not constitute a determination that there is no issue of fact to be tried; and both motions should be denied if there is actually a genuine issue as to a material fact. When both parties move for summary judgment each party concedes only that there is no issue of fact with respect to his particular motion.

To support its enunciation of the foregoing law, the court relied heavily on the federal rules treatise, *Federal Practice and Procedure*,[15] then edited by professors Barron and Holtzoff. As in *Petros*, the court's textual analysis included language which limited summary judgment to only the clearest cases:

> A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party can not prevail under any circumstances. On a motion for summary judgment the court can not summarily try factual issues and may consider only facts which are not disputed or the dispute of which raises no substantial factual issue. A motion for summary judgment must be denied if varying inferences may be drawn from evidence accepted as true.[16]

The court next restricted the usage of summary judgment in negligence cases. In Syllabus Point 5 of *Hatten v. Mason Realty Co.*,[17] it stated:

> Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them.[18]

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15. *Aetna Casualty & Surety Co.*, 133 S.E.2d at 777-78. The court undoubtedly also benefited from the argument presented by two future justices, Honorable Thomas B. Miller and Honorable Arthur M. Recht. Both future justices appeared on behalf of the appellee in *Aetna*. *Id.* at 772.

16. *Id.* at 777 (citing 3 BARRON AND HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1234 (Rules Edition) [hereinafter BARRON AND HOLTZOFF]; Cameron v. Vancouver Plywood Corp., 266 F.2d 535 (9th Cir. 1959)).

17. 135 S.E.2d 236 (W. Va. 1964).

18. The court also strongly defended the right of a party to have a jury, rather than a judge, determine the facts of a case:

In Syllabus Point 4 of *Spangler v. Fisher,*[19] the court continued to speak of summary judgment in restrictive terms, expressing that all doubt regarding the existence of issues of material fact must be resolved in favor of the nonmoving party:

> A party who moves for summary judgment in his favor has the burden of showing that the action involves no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Any doubt as to the existence of such issue is resolved against the movant for such judgment, but the court should grant such motion if it appears that there is no genuine issue of any material fact.[20]

Over the next several years, the court refined the standard enunciated in *Aetna.*[21] In Syllabus Points 3 and 4 of *Haga v. King Coal Chevrolet Co.,*[22] the court stated:

> 3. Upon motion for summary judgment under Rule 56, R.C.P. all exhibits and affidavits and other matters submitted by both parties should be considered by the court, and such motion can be granted only when it is clear that no genuine issue of material fact is involved.[23]

> The province of the jury as the trier of fact is fundamental in our system of jurisprudence. R.C.P.56, relating to summary judgment, does not create a right on the part of the court to invade the province of the jury, but on the contrary, the function of the jury as the trier of fact remains unimpaired by that rule.

Id. at 243.

19. 159 S.E.2d 903 (W. Va. 1968).

20. The language regarding doubt as to the existence of genuine issues of material fact articulated by Judge Calhoun in the syllabus of *Spangler* was taken directly from Beaver v. Hitchcock, 153 S.E.2d 886, 889 (W. Va. 1967) (Caplan, J.). The language was not included in the syllabus of *Beaver.*

21. Although the court enunciated several more syllabus points in regard to the summary judgment standards during the latter half of the 1960s, those syllabus points only restated or rephrased the *Aetna* language in immaterial ways. *See, e.g.,* United States Fidelity and Guaranty Co. v. Eades, 144 S.E.2d 703 (W. Va. 1965) (the court stated:

> If the matters submitted to the trial court outside the pleadings under the provisions of Rule 56 R.C.P. contain an issue of fact which may be material in the disposition of the case, it cannot be disposed of by summary judgment under Rule 56 R.C.P. and a trial on the merits should be held after proper pleadings are timely served under the provisions of Rule 12 R.C.P.).

Id. at 705.

22. 150 S.E.2d 599 (W. Va. 1966).

23. Syllabus Point 4 of *Haga* was restated in Syllabus Point 2 of First Nat'l Bank of Gallipolis v. Marietta Mfg. Co., 153 S.E.2d 172, 174 (W. Va. 1967):

> 4. A motion by both plaintiff and defendant for summary judgment under Rule 56, R.C.P. does not constitute a determination that there is no issue of fact to be tried and if a genuine issue of material fact is involved both motions should be denied.[24]

In *Employer's Liability Assurance Corp. v. Hartford Accident and Indemnity Co.*,[25] the court expounded on the purpose of summary judgment, going so far as to allow a trial court to grant summary judgment against the *moving* party even where no cross motions had been filed. As stated in Syllabus Points 4-6:

> 4. As the purpose of the summary judgment proceeding is to expedite the disposition of the case a summary judgment may be rendered against the party moving for judgment and in favor of the opposing party even though such party has made no motion for judgment.
>
> 5. Upon a hearing on a motion of one of the parties for summary judgment, after due notice, when it is found that there is no genuine issue as to any material fact and that the adverse party is entitled to judgment as a matter of law, the failure of such party to file a motion for summary judgment does not preclude the entry of such judgment in his favor.
>
> 6. When it is found from the pleadings, depositions and admissions on file, and the affidavits of any party, in a summary judgment proceeding under Rule 56 of the West Virginia Rules of Civil Procedure, that a party who has moved for summary judgment in his favor is not entitled to such

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> A motion for summary judgment should be granted if the pleadings, affidavits or other evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Accord Hanks v. Beckley Newspapers Corp., 172 S.E.2d 816 (W. Va. 1970) (syllabus of the court). *See also* Wilkinson v. Searls, 184 S.E.2d 735, 737, Syl. Pt. 5 (W. Va. 1971) ("A motion for summary judgment should be granted if the pleadings, exhibits and discovery depositions upon which the motion is submitted for a decision disclose that the case involves no genuine issue as to any material fact and that the party who made the motion is entitled to judgment as a matter of law."); Anderson v. Turner, 184 S.E.2d 304, 306, Syl. Pt. 6 (W. Va. 1971) ("In considering and deciding questions arising in a civil action upon a motion by the defendant for summary judgment for summary judgment, the court may consider answers made by the plaintiffs to interrogatories propounded to them by the defendant.").

24. The court also restated Syllabus Point 3 of *Aetna* in Syllabus Point 2 of *Haga*, stating:

> 2. If a genuine issue as to any material fact is raised in any action, a summary judgment under the provisions of Rule 56, R.C.P. can not be granted.

150 S.E.2d at 600, Syl. Pt. 2.

25. 158 S.E.2d 212 (W. Va. 1967).

> judgment and that there is no genuine issue as to any material fact, a summary judgment may be rendered against such party in such proceeding.

The court again addressed the purpose of summary judgment in *Hanks v. Beckley Newspapers Corp.*: "Summary Judgment strikes at the heart of a claim. It is a device designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if in essence there is no real dispute as to salient facts or if only a question of law is involved."[26] The court went on to express the burden placed upon the moving party as follows: "A movant is entitled to summary judgment where the facts established show a right to judgment with such clarity as to leave no room for controversy and show affirmatively that the adverse party cannot prevail under any circumstances."[27]

In Syllabus Point 2 of *Howard's Mobile Homes, Inc. v. Patton*,[28] the court explained that motions for summary judgment must be considered on a case-by-case basis:

> Inasmuch as a motion for summary judgment will be refused if the matters before the court reveal that there is a genuine issue as to any material fact, it is essential that each case wherein such motion is made be considered on its own peculiar facts and circumstances.

In 1973, the court took a less restrictive view of summary judgment. In *Brady v. Reiner*,[29] the court affirmed a motion for summary judgment, stating:

> The lower court and this Court on review cannot conjure 'if and maybes' into controverted facts when they are not presented in opposition to a motion for summary judgment. . . . Rule 56(c), *W.Va. R. C. P.* provides for a speedy determination of legal issues when the developed record discloses no genuine issue of material fact. Consonant with the spirit of the

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26. 172 S.E.2d 816, 817 (W. Va. 1970).

27. *Id.* at 818 (citing Employer's Liab. Assurance Corp. v. Hartford Accident and Indem. Co., 158 S.E.2d 212 (W. Va. 1967); Aetna Casualty & Sur. Co. v. Federal Ins. Co., 133 S.E.2d 770 (W. Va. 1963); Petros v. Kellas, 122 S.E.2d 177 (W. Va. 1961); Phoenix Sav. & Loan, Inc. v. Aetna Casualty & Sur. Co., 381 F.2d 245 (4th Cir. 1967); Fred Johnson Cement Block Co. v. Waylite Co., 182 F. Supp. 914 (D. Minn. 1960); 3 BARRON AND HOLTZOFF, *supra* note 16, § 1234, at 132; Lugar and Silverstein, *W.Va. Rules*, p. 436).

28. 195 S.E.2d 156 (W. Va. 1973).

29. 198 S.E.2d 812, 824 (W. Va. 1973).

> rule, this Court has previously held, upon ample supporting authority, that to successfully resist a motion for summary judgment, the party against whom it is made must present some evidence to indicate to the court that facts are in dispute, when the moving party's evidence shows no disputed facts. The mere contention that issues are disputable is not sufficient to deter the trial court from the award of summary judgment.[30]

Brady appears to be the first case to discuss the burden of the non-movant to resist a summary judgment motion. The court again examined the resisting party's burden in Syllabus Point 2, *Guthrie v. The Northwestern Mutual Life Insurance Co.*:

> Under the provisions of Rule 56 of the West Virginia Rules of Civil Procedure, when the moving party presents depositions, interrogatories, affidavits or otherwise indicates there is no genuine issue as to any material fact, the resisting party to avoid summary judgment must present some evidence that the facts are in dispute.[31]

Nonetheless, the court again adopted restrictive language only two years later, denying summary judgment in *Burns v. Cities Service Co.*:[32]

> The burden, of course, was upon . . . the movant, to show no genuine issue of fact, and any doubt as to the existence of such issue would have been resolved against it. . . . Facts favorable to the party against whom the motion is sought must be resolved in his favor and he is entitled to every reasonable inference which can be drawn from the pertinent facts and circumstances.[33]

After the 1976 elections, the membership of the court changed dramatically, and along with that change came a definitively restrictive articulation of the summary judgment standard. For example, in

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30. *Id.* (citing Petros v. Kellas, 122 S.E.2d 177 (W. Va. 1961)). Although the foregoing was not made part of the syllabus of the court, the court essentially adopted the same tone in *Guthrie*, 208 S.E.2d at 61, Syl. Pt. 3, where it stated that "[s]ummary judgment can not be defeated on the basis of factual assertions contained in the brief of the party opposing a motion for such judgment."

31. 208 S.E.2d 60 (W. Va. 1975).

32. 217 S.E.2d 56, 59 (W. Va. 1975).

33. *Id.* (citing Tow v. Miners Memorial Hosp. Ass'n, 199 F. Supp. 926 (S.D. W. Va. 1961), *aff'd*, 305 F.2d 73 (4th Cir. 1962); *Wheeling Kitchen*, 179 S.E.2d at 587; *Aetna Casualty & Sur. Co.*, 133 S.E.2d at 770).

Cremeans v. Maynard, Justice McGraw stressed summary judgment should be granted "[o]nly in those rare cases where the evidence conclusively shows lack of authority and where conflicting inferences cannot be drawn . . . ."[34] In *Masinter v. WEBCO Co.*,[35] Justice Miller took a very restrictive view of summary judgment when he wrote, "we have viewed summary judgment with suspicion and have evolved the rule that, on appeal, the facts must be construed in a light most favorable to the losing party."[36] Moreover, as in cases of negligence, the court limited the use of summary judgment where motive and intent were issues in the case, stating: "summary judgment should not be utilized in complex cases, particularly where issues of motive and intent are present."[37] And in Syllabus Point 3 of *Thomas v. Goodwin*, Justice Caplan wrote, "On a motion for summary judgment the court cannot summarily try factual issues and may consider only facts which are not disputed or the dispute of which raises no substantial factual issue."[38] Justice McHugh continued this line of reasoning in *Lengyel*

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34. 246 S.E.2d 253 (W. Va. 1978).

35. 262 S.E.2d 433, 435 (W. Va. 1980).

36. *Id.* (citing Gavitt v. Swiger, 248 S.E.2d 849 (W. Va. 1978); Johnson v. Junior Pocahontas Coal Co., 234 S.E.2d 309 (W. Va. 1977); Oakes v. Monongahela Power Co., 207 S.E.2d 191 (W. Va. 1974); Hines v. Hoover, 192 S.E.2d 485 (W. Va. 1972); State *ex rel.* Payne v. Mitchell, 164 S.E.2d 201 (W. Va. 1968)). This suspicious view of summary judgment was reiterated by Justice Brotherton in Logan Bank & Trust Co. v. Letter Shop, Inc., 437 S.E.2d 271, 276 (W. Va. 1993).

37. The court went on to explain:

> In complex cases, the tendency on a summary judgment motion is to rely on the facts developed through discovery as constituting all of the relevant facts in the case. This may lead to inaccurate factual assessment. A party may often undertake very little discovery or limit the discovery to certain critical areas with knowledge that he has the requisite proof available without the necessity of any further discovery. Frequently, discovery depositions of the parties or their key witnesses do not reflect all relevant facts. This is because these depositions are taken by adverse counsel and the deponents do not care to volunteer information and, therefore, they give limited answers to the questions. While discovery procedures are useful to develop the facts of a case, there is no requirement that all facts must be developed through discovery, and certainly no grounds for the assumption that they have been developed by discovery.

Masinter, 262 S.E.2d at 436.

38. 266 S.E.2d 792 (W. Va. 1980).

v. Lint,[39] explicitly stating, "Summary judgment is, generally, viewed with caution in this jurisdiction." Justice McHugh went on to explain:

> The question on a motion for summary judgment is not . . . whether the plaintiff has met the burden of proof on material aspects of his claim. It is, rather, whether a material issue of fact exists on the basis of the factual record developed to that date. The burden on a motion for summary judgment is not upon the nonmoving party to show that he has developed facts which would allow him to prevail if his case was submitted to a jury. The burden is on the moving party to show that there is no genuine issue as to any material fact in the case.[40]

Finally, in *Crain v. Lightner*,[41] the court seemed to reject the recent holding of the United States Supreme Court in *Celotex Corp. v. Catrett*.[42] The *Celotex* Court had analyzed Rule 56 and enunciated a summary judgment standard less restrictive than had been applied in West Virginia. Writing for the *Crain* Court, Justice McHugh cited approvingly from the dissent of Justice Brennan in *Celotex*, stating:

> If there is any evidence in the record from any source from which a reasonable inference in the nonmovant's favor may be drawn as to a material fact, the moving party is not entitled to summary judgment. In such a case, there is a "genuine issue" as to material fact.[43]

Most revealing, however, was the wholesale adoption of Justice Brennan's analysis of burden shifting. In footnote 2 of *Crain*, the court referred to the *Celotex* majority's discussion of Rule 56 as "sketchy," and refers to Justice Brennan's dissent as "a cogent and thorough explanation of the respective burdens of the movant and nonmovant under Rule 56."[44] After citing Justice Brennan's dissent with approval,

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39. 280 S.E.2d 66, 70 (W. Va. 1981).

40. *Id.* at 71. The court also explained that "the use of summary judgment is disfavored where development of the facts of a case is desirable so as to clarify the application of the law." *Id.* (citing Consolidated Gas Supply Corp. v. Riley, 247 S.E.2d 712 (W. Va. 1978)).

41. 364 S.E.2d 778 (W. Va. 1987).

42. *See infra* Part III.

43. *Crain*, 364 S.E.2d at 782 (citing *Celotex*, 477 U.S. at 330 n.2).

44. *Id.* at 782 n.2.

the court thoroughly analyzed the summary judgment standard articulated therein as follows:

> [T]he burden is upon the party moving for summary judgment to show the nonexistence of a "genuine issue" as to a material fact. This burden has two distinct components: an initial burden of production, which may shift to the nonmovant, and an ultimate burden of persuasion as to the nonexistence of a "genuine issue," which burden always remains on the movant.
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> If the burden of persuasion on the merits at trial would be on the nonmovant, the movant may satisfy the burden of production under Rule 56 in either of two ways. First, the movant may submit affirmative evidence that negates an essential element of the nonmovant's case. Second, the movant may demonstrate to the trial court that the nonmovant has not mustered evidence to establish an essential element of the nonmovant's case. Where the movant adopts this second option, he or she may not simply make the conclusory assertion that the nonmovant has no evidence by calling the court's attention to supporting evidence already in the record that was overlooked or ignored by the movant. In that event, the movant must attempt to demonstrate the inadequacy of this evidence. Once the movant attacks any record evidence which the nonmovant asserts is supporting, the burden of production shifts to the nonmovant, who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).
>
> Summary judgment should be granted if the nonmovant fails to respond in one or more of these ways, or if, after the nonmovant responds, the court determines that the movant has shouldered his or her ultimate burden of persuading the court that there is no genuine issue of material fact for trial.[45]

The court continued its restrictive approach to motions for summary judgment in *Gunn v. Hope Gas, Inc.*,[46] applying a similar standard of review as that applied to motions for judgment on the pleadings: "the test for whether a motion for summary judgment should be granted is essentially the same as the 'rather restrictive standard' applied when ruling on motions for judgment on the pleadings."[47]

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45. *Id.*

46. 402 S.E.2d 505, 508 (W. Va. 1991).

47. *Id.* (citing Calvert Fire Ins. Co. v. Bauer, 332 S.E.2d 586, 588 (W. Va. 1985)).

The restrictive approach to summary judgment continued through at least the fall of 1993 when Justice Brotherton echoed the suspicious language used by Justice Miller in *Masinter v. WEBCO Co.* in *Logan Bank & Trust Co. v. Letter Shop, Inc.*[48] Thus, until that time the court firmly articulated a summary judgment standard more difficult to overcome than that articulated by a majority of the United States Supreme Court in *Celotex*.

III. THE *CELOTEX* TRILOGY

Until 1986, federal courts generally were as reluctant to grant summary judgment as West Virginia circuit courts. The United States Supreme Court historically had taken a dim view of summary judgment, admonishing trial courts against "trial by affidavits" and frequently reversing summary judgment orders. In 1986, the court decided a trilogy of cases which liberalized the summary judgment standard and encouraged the use of Rule 56 in appropriate circumstances.[49] This so-called *Celotex* trilogy, named after the broadest of the three cases, includes: *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[50] *Celotex Corp. v. Catrett*,[51] and *Anderson v. Liberty Lobby*.[52] Each of the three cases reversed a court of appeals decision overturning a district court's grant of summary judgment.

The United States Supreme Court in the *Celotex* trilogy displayed a novel, favorable attitude toward Rule 56, writing that, "Summary judgment procedure is properly regarded not as a disfavored procedural

48. 437 S.E.2d 271, 276 (W. Va. 1993).

49. The *Celotex* trilogy has been analyzed extensively by several commentators, and is discussed here only in overview. Readers who wish to further examine the *Celotex* trilogy and its impact on federal summary judgment law would be well advised to begin with the excellent survey of the cases by Steven A. Childress. Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987). *See also* Kennedy, *Federal Summary Judgment: Reconciling* Celotex v. Catrett *with* Adickes v. Kress *and the Evidentiary Problems Under Rule 56*, 6 REV. LITIG. 227 (1987); Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOKLYN L. REV. 35 (1988).

50. 475 U.S. 574 (1986).

51. 477 U.S. 317 (1986).

52. 477 U.S. 242 (1986).

shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"[53] "One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose."[54]

For the first time, the United States Supreme Court cast as equal the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried by a jury, and the rights of persons opposing such claims and defenses to demonstrate in the manner provided by Rule 56, prior to trial, that the claims and defenses have no factual basis.[55] The Court began to speak of summary judgment not in terms of disfavor, but rather in terms of the necessity that Rule 56 be employed in appropriate circumstances. Although the Court claimed to be applying settled law in the *Celotex* trilogy,[56] the cases certainly altered the summary judgment standard and the manner of district courts' application of Rule 56, and are now recognized as the cornerstones of modern federal summary judgment law.

The Court began its work on the summary judgment standard in *Matsushita*, a case arising from complex antitrust litigation between American and Japanese television manufacturers involving allegations of price-fixing.[57] Focusing on whether the non-movant had met its burden,[58] the Court held that when the moving party has met its burden under Rule 56(c), "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts."[59] The Court added:

> It follows from these settled principles that if the factual context renders respondents' claim implausible — if the claim is one that simply makes

53. *Celotex*, 477 U.S. at 327 (quoting FED. R. CIV. P. 1).

54. *Id.* at 323-24.

55. *Id.* at 327.

56. *E.g.*, *Matsushita*, 475 U.S. at 587.

57. *Id.* at 577-78.

58. Issues involving the movant's burden had been resolved in the district court, and were not at issue in the Supreme Court. *Id.* at 585 n.10.

59. *Id.* at 586.

> no economic sense — respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.[60]

The *Matsushita* decision made it clear that trial judges considering motions for summary judgment should consider both the "persuasiveness" of evidence before trial, and the "plausibility" of the non-movant's claim; the less reasonable the non-movant's claim, the more persuasive evidence is necessary to preclude summary judgment. This sort of qualitative review of evidence on a motion for summary judgment was new to federal summary judgment law.

In *Celotex*, the Court outlined the parameters of the movant's burden in accordance with the language of Rule 56. The Court had held in 1970 that "[W]here the evidentiary matter in support of the motion [for summary judgment] does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*"[61] But in *Celotex*, the Court held that the moving party on a motion for summary judgment need not make an affirmative evidentiary showing to be entitled to summary judgment. Instead, the movant can simply "point out" to the district court that there is no evidence in the record to support the non-movant's case.[62]

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.[63]

The *Celotex* Court noted that the moving party *does* bear an initial burden of "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

60. *Id.* at 587.
61. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-61 (1970).
62. *Celotex*, 477 U.S. at 325.
63. *Id.* at 322-23.

any,' which it believes demonstrate the absence of a genuine issue of material fact."[64] However, the movant need not "negate" the non-movant's claim.[65]

Finally, in *Anderson*, the Court incorporated into the summary judgment analysis the substantive burdens of proof associated with the particular cause of action at issue. The Court held that only disputes over facts that might affect the outcome of a suit under governing law ("material" facts) can properly preclude summary judgment.[66] Likewise, to preclude summary judgment, a factual dispute must be "genuine" — such that a reasonable jury could return a verdict for the non-moving party.[67] The Court stated:

> [I]n ruling on a motion for summary judgment, the judge must view the evidence through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.[68]

Although the non-movant is entitled to reasonable inferences, the *Anderson* Court held that "merely colorable" evidence which is "not significantly probative" will not preclude summary judgment.[69] A "scintilla of evidence" in support of the non-movant's position will not suffice; to defeat summary judgment, the non-movant must supply evidence on which a jury could reasonably find in his or her favor.[70]

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64. *Id.* at 323 (citations omitted).
65. *Id.*
66. *Anderson*, 477 U.S. at 248.
67. *Id.*
68. *Id.* at 254-55.
69. *Id.* at 249-50.
70. *Id.* at 252.

IV. THE *PRECISION COIL* TRILOGY

Governor Gaston Caperton appointed Justice Franklin D. Cleckley to the Supreme Court of Appeals of West Virginia in 1994 to fill the seat vacated by Justice Thomas B. Miller's retirement from the court. An esteemed practitioner, Arthur B. Hodges Professor of Law at West Virginia University College of Law, and author of authoritative treatises on West Virginia criminal procedure and evidence law, Justice Cleckley appears to have brought to the bench a design to erase the perceived stigma surrounding Rule 56 and move West Virginia's summary judgment jurisprudence into line with federal precedent. Of the three pivotal summary judgment opinions issued by the court since his appointment, Justice Cleckley has written two.

If Justice Cleckley was the catalyst for the court's new attitude toward summary judgment, he has encountered no apparent resistance from the court's other members. The court's decisions in *Painter*, *Precision Coil*, and *Jividen* were all unanimous.[71] Surprisingly, Justice Margaret Workman, who in years past had consistently voted with the majority in decisions which appeared to discourage the use of summary judgment,[72] herself penned the resonant opinion in *Jividen*. Whatever its motivation, the court clearly intended to send a message to West Virginia judges and litigators through these three cases that, contrary to popular belief, Rule 56 has not been judicially erased.

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71. Although she concurred in the court's judgment, Justice Margaret Workman reserved the right to file a separate opinion in *Precision Coil*. As of this writing, she has not done so. While it is impossible to deduce the aspect of the majority's opinion in *Precision Coil* regarding which Justice Workman wished to write further, it is unlikely that she disagreed with the court's explication of the summary judgment standard, given her opinion in *Jividen*. *See infra* Part IV.C.

72. *See, e.g.*, *Logan Bank & Trust*, 437 S.E.2d at 276 (holding that summary judgment is "viewed with suspicion," and that even if the trial judge is of the opinion to direct a verdict, "he should nonetheless ordinarily hear evidence and, upon a trial, direct a verdict rather than to try the case in advance on a motion for summary judgment"); Sartin by and through Sartin v. Evans, 414 S.E.2d 874, 876 (W. Va. 1991) (noting "[w]e have consistently adopted a conservative stance toward summary judgment"); Gunn v. Hope Gas, Inc., 402 S.E.2d 505, 508 (W. Va. 1991) (labeling the test for whether a motion for summary judgment should be granted a "rather restrictive standard").

A. *An Inkling of Innovation:* Painter v. Peavy

The court's more favorable attitude toward summary judgment was first manifested in *Painter v. Peavy*,[73] one of the first published opinions authored by Justice Cleckley. The plaintiff in *Painter* appealed from an order entered by the Circuit Court of Mercer County granting summary judgment in favor of the defendant.[74] The sole issue on appeal was whether summary judgment was appropriate.[75]

The facts of the *Painter* case were uncomplicated. The plaintiff had been injured in an automobile accident and, through her attorney, submitted medical bills totaling $708.60 to the defendant's insurer.[76] The insurer sent the plaintiff a check for $750, conspicuously marked "for full settlement of all claims."[77] The plaintiff cashed the check, but wrote "[d]eposited under protest" beside her endorsement.[78] The circuit court held that despite plaintiff's "ineffectual" notation of protest on the check, the parties had reached an accord and satisfaction when the plaintiff deposited the check.[79] Finding no issue of fact in the case requiring trial by jury, the circuit court granted the defendant's motion for summary judgment.[80]

The Supreme Court of Appeals affirmed, holding that the insurance company's check was clearly an offer for full satisfaction of a disputed claim, and that plaintiff's retention and use of the check constituted an accord and satisfaction.[81] The court articulated unremarkably the proper standard of review applicable to summary judgment motions as it had repeatedly in the past, relying chiefly on the *Celotex* trilogy.

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73. 451 S.E.2d 755 (W. Va. 1994).
74. *Id.* at 757.
75. *Id.* at 758.
76. *Id.* at 757.
77. *Id.*
78. *Id.*
79. *Id.* at 757-58.
80. *Id.* at 758.
81. *Id.* at 759-60.

But *Painter* stands apart from the court's earlier pronouncements on summary judgment because of language the court placed in a footnote, declaring in essence that Rule 56 is still viable in West Virginia:

> Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is "designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial," if in essence there is no real dispute as to salient facts or if only a question of law is involved. *Oakes v. Monongahela Power Co.*, 158 W. Va. 18, 22, 207 S.E.2d 191, 194 (1974). Indeed, it is one of the few safeguards in existence that prevents frivolous lawsuits that have survived a motion to dismiss from being tried. Its principal purpose is to isolate and dispose of meritless litigation. *West Virginia Pride, Inc. v. Wood County*, 811 F. Supp. 1142 (S.D. W. Va. 1993). To the extent that our prior cases have communicated a message that Rule 56 is not to be used, that message is hereby modified. When a motion for summary judgment is mature for consideration and is properly documented with such clarity as to leave no room for controversy, the nonmoving party must take the initiative and by affirmative evidence demonstrate that a genuine issue of fact exists. Otherwise, Rule 56 empowers the trial court to grant the motion.[82]

The undisputed and straightforward facts of the *Painter* case, along with the court's dispositive recent pronouncement of the law of accord and satisfaction,[83] made the case an easy one to resolve on appeal. The propriety of summary judgment in defendant's favor was lucid. Presumably, the court accepted review of *Painter* because the case provided an ideal soap box from which it could broadcast the vitality of Rule 56.

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82. *Id.* at 758 n.5 (citing Hanks v. Beckley Newspapers Corp., 153 W. Va. 834, 172 S.E.2d 816 (1970)).

83. The court's decision in Charleston Urban Renewal Auth. v. Stanley, 346 S.E.2d 740 (W. Va. 1985), in crystalline manner supplied the law applicable in *Painter*. In *Stanley*, the court wrote:

> The creditor of an unliquidated claim must either accept or reject the debtor's offer; he is not free unilaterally to modify the debtor's original offer and then proceed to accept the offer so modified.
>
> If a check is tendered bearing the words "payment in full" or some other words of similar purport, the payee may either accept the check and acknowledge the accord and satisfaction, or return the check to the payor. If the payee chooses the latter course of action he may continue to dispute the underlying claim.

Stanley, 346 S.E.2d at 743.

It is Rule 56's vitality — not its resurrection — which the court proclaimed in *Painter*. In an understated characterization of *Painter*'s significance, the court wrote in *Precision Coil*[84] that the *Painter* opinion was "not an innovation in our jurisprudence but . . . an application of settled principles long recognized in this State."[85] The court is correct that *Painter* did not alter the precise legal standards to be employed by West Virginia trial and appellate judges entertaining or reviewing motions for summary judgment. However, the case did provide the State's judges and litigators with the first indication that the court's prior attitude of suspicion toward summary judgment[86] was softening. The case sounded a signal to the bench and bar that the court had placed summary judgment on its reform agenda. To that extent, *Painter* was indeed an innovative decision.

The court did not speak loudly enough, however, if it intended its *Painter* opinion to send a lasting message. In the second case of the trilogy, the court attempted to make a bit more noise.

B. A More Definite Statement: Williams v. Precision Coil, Inc.

Four months after it decided *Painter*, the court issued a second opinion which echoed broader summary judgment principles in greater detail and at greater volume. In *Williams v. Precision Coil, Inc.*,[87] the court set out to clarify "the misunderstanding that may have been generated by the *Painter* decision," by "spell[ing] out with some specificity" the standards governing summary judgment in West Virginia.[88] Again, Justice Cleckley wrote for the court. The *Precision Coil* opinion is the court's most significant pronouncement on summary judgment in more than 30 years.

Although the court downplayed the significance of *Painter* by describing the decision as no more than "an explication of the basic principles undergirding Rule 56 of the West Virginia Rules of Civil

84. 459 S.E.2d 329 (W. Va. 1995).
85. *Id.* at 335.
86. *E.g., Logan Bank & Trust*, 437 S.E.2d at 276; *Masinter*, 262 S.E.2d at 435.
87. 459 S.E.2d 329 (W. Va. 1995).
88. *Id.* at 335.

Procedure"[89] and characterized the *Precision Coil* holding as "an application of settled principles long recognized in this State,"[90] one sentence in *Precision Coil* provides a glimpse into the court's decision-making process and reveals that the court treated these decisions internally as more than a simple restatement of settled law. Said the court, "We have undertaken a long and extensive reexamination of the *Painter* decision and reaffirm the principles it announced."[91] This lone sentence, which stands without elaboration, does not expose the parameters of the court's "long and extensive reexamination" and does not explain why the reexamination was at all necessary if, as the court says, *Painter* did no more than repeat "settled principles long recognized" in West Virginia. But it does confirm the court's rejuvenated interest in the summary judgment standard and the manner in which West Virginia circuit courts apply Rule 56 in practice.

The court's use of the *Precision Coil* case as a primer on the West Virginia summary judgment standard likely surprised even the parties to the case, who had devoted their briefing wholly to the substantive issues of employment law involved.[92] The case concerned an action by a former employee against his employer alleging that language in the employer's personnel manual had altered his status as an at-will employee and formed an employment contract which the employer then breached by firing him.[93] The circuit court of Harrison County granted summary judgment in favor of the employer, concluding as a matter of law that the employer had made no express contracts of employment in either its job application form or its personnel manual.[94] The Circuit Court held that neither the employer's job ap-

89. *Id.*

90. *Id.*

91. *Id.*

92. *See generally* Brief of Appellant, Brief of Appellee Precision Coil, Inc., Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W. Va. 1995) (No. 22493) (on file with authors).

93. *Precision Coil*, 459 S.E.2d at 334.

94. *Id.* at 334. Williams' initial complaint stated claims for handicap discrimination and breach of an implied covenant of good faith and fair dealing. *Id.* The circuit court struck the latter claim for failing to state a viable cause of action. *Id.* When the employer moved for summary judgment on the handicap discrimination claim, Williams moved to amend his complaint to include the claim for breach of contract. *Id.* The employer opposed the motion to amend, and moved in the alternative for summary judgment on the breach of

plication nor its personnel manual contained the type of "'very definite' promises of employment . . . sufficient to support a cause of action under the 'implied-in-fact' contract theory, and, even if [the materials] did contain such a promise, the disclaimer in the foreward of the employee handbook prevent[ed] any statements from becoming binding upon the defendant."[95] Labeling the propriety of the circuit court's grant of summary judgment the only issue on appeal[96], the Supreme Court held the circuit court had ruled correctly.

The court devoted more than half the length of its *Precision Coil* opinion to a detailed explanation of the summary judgment standard. What the *Painter* decision had said about summary judgment in passing, *Precision Coil* brought to the forefront, literally; the court began its review of the summary judgment standard in *Precision Coil* by reciting verbatim the summary judgment language which it had relegated to a footnote in *Painter*.[97] It then went a step further, stating in plain language the essence of its holding:

> To be clear, there is no need for a circuit court to wait until after evidence has been received at trial when the standard we articulated in *Painter* has been met and summary judgment is warranted. On the other hand, and as suggested by Rule 56(c), this Court will reverse summary judgment if we find, after reviewing the entire record, a genuine issue of material fact exists or the moving party is not entitled to judgment as a matter of law. In cases of *substantial* doubt, the safer course of action is to deny the motion and to proceed to trial.[98]

The court's instruction that circuit courts need not take a legally insufficient case to trial and should deny summary judgment in cases of *substantial* doubt, rather than where *any* doubt exists, departs from the court's earlier holdings on the issue.[99] The court recognized this

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contract claim. *Id.* The circuit court granted the employer's motion for summary judgment on the handicap discrimination claim, holding that plaintiff had failed to prove a *prima facie* case of handicap discrimination. *Id.* The court then granted plaintiff's motion to amend, but awarded summary judgment for the defendant on the breach of contract claim. *Id.*

95. *Id.* at 334-35.

96. *Id.* at 335.

97. *Compare Painter*, 451 S.E.2d at 758 n.5 *with Precision Coil*, 459 S.E.2d at 335.

98. *Precision Coil*, 459 S.E.2d at 335-36 (emphasis added, footnote omitted).

99. *E.g., Aetna Casualty and Surety Co.*, 133 S.E.2d at 772, Syl. Pt. 6 (holding that

disparity, but following the method employed by the United States Supreme Court in the *Celotex* trilogy, the court endeavored to reconcile rather than reverse its earlier holdings. Addressing its previous directive that circuit courts should hear evidence even where the judge is inclined to direct a verdict, the court said, "[T]his recommendation is proper in cases where there is doubt as to the existence of a genuine issue of material fact, but we do not believe it was ever meant to be [sic] override the explicit mandate of Rule 56(e). . . ."[100]

> Unquestionably, the drafters of Rule 56 contemplated that summary judgment would be readily available as a procedural device when used in conjunction with the broad discovery afforded by the West Virginia Rules of Civil Procedure. If the nonmoving party does not controvert the proof offered in support of the motion, and the moving party's affidavits show facts that support a judgment as a matter of law, Rule 56(e) mandates summary judgment be granted. The notion of a "genuine issue of material fact" can refer only to an issue that properly can be submitted to a jury, i.e., a trialworthy issue. If the nonmoving party cannot demonstrate any reasonable chance of avoiding a directed verdict at trial, then there is simply no justification for a trial and the motion for summary judgment should be granted.[101]

As it had in *Painter*, the court in *Precision Coil* relied heavily on federal precedent for support. The court made clear its intention to bring West Virginia summary judgment law into conformity with federal law: "As a result of today's decision, there should be no doubt that our interpretation of Rule 56 is consistent with that of the United States Supreme Court."[102] Drawing from federal precedent, the court

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"any doubt" as to the existence of a genuine issue of fact precludes summary judgment); *accord* Burns v. Cities Serv. Co., 217 S.E.2d 56, 59 (W. Va. 1975); Crain v. Lightner, 364 S.E.2d 778, 782 (W. Va. 1987). *See also Logan Bank & Trust*, 437 S.E.2d at 276; and *Masinter*, 262 S.E.2d at 435, Syl. Pt. 1 (both holding, "Even if the trial judge is of the opinion to direct a verdict, he should nevertheless ordinarily hear evidence and, upon a trial, direct a verdict rather than try the case in advance on a motion for summary judgment.").

100. *Precision Coil*, 459 S.E.2d at 335 n.7.

101. *Id.* at 335-36 n.7.

102. *Id.* at 335 n.6. This being the case, the court overstated the movant's burden on a motion for summary judgment in *Precision Coil*. The court wrote that summary judgment should be granted "[i]f the nonmoving party does not controvert the proof offered in support of the motion, *and the moving party's affidavits show facts that support a judgment as a matter of law*. . . . " *Id.* at 335-36 n.7 (emphasis added). Later, explaining the allocation of

in *Precision Coil* imported into West Virginia law summary judgment principles which had become commonplace in federal decisions since 1986 but had never before been articulated or applied in a West Virginia decision. The court abandoned the wary analysis it had applied consistently to past grants of summary judgment and displayed a wholly new attitude encouraging the use of summary judgment in proper cases.

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burdens on a motion for summary judgment, the court said, "If the moving party makes a properly supported motion for summary judgment *and can show by affirmative evidence that there is no genuine issue of material fact*, the burden of production shifts to the nonmoving party. . . . " *Id.* at 337 (emphasis added). The court later repeated this description of the movant's burden. *Jividen*, 461 S.E.2d at 459.

In *Celotex*, 477 U.S. at 325, the United States Supreme Court held that the moving party on a motion for summary judgment need not make an affirmative evidentiary showing in order to be entitled to summary judgment, but rather can discharge his or her burden by "pointing out" to the district court that there is no evidence to support the non-movant's case. "The import of [Rule 56(a)-(c)] is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323. The moving party does bear an initial burden of "informing the . . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323 (quoting Rule 56(c)). But the moving party need not "negate" the plaintiff's claim in order to prevail. *Id.*

In contrast, Rule 56 requires the non-moving party to "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Rule 56(e)).

This confusion likely results from the court's desire to demonstrate conformity with its prior decisions. The court cites *Crain*, 364 S.E.2d at 782 n.2, which outlined the allocation of burdens under Rule 56, as described by Justice Brennan in his *Celotex* dissent. 477 U.S. at 329-37 (Brennan, J., dissenting). But even in this cited portion of *Crain*, which described the majority's analysis in *Celotex* as "sketchy," the court recognized that a movant could satisfy his/her burden of production on a motion for summary judgment by "affirmatively show[ing] the absence of evidence in the record by reviewing for the court the affidavits, if any, discovery materials, etc." *Id. See also* McCullough Oil, Inc. v. Rezek, 346 S.E.2d 788, Syl. Pt. 5 (W. Va. 1986) (holding that a movant can meet his or her burden of production on a motion for summary judgment by "present[ing] depositions, interrogatories, affidavits *or otherwise* indicat[ing] there is no genuine issue as to any material fact") (emphasis added).

The court's characterization in *Precision Coil* and *Jividen* of the movant's burden on a motion for summary judgment is inconsistent with its stated intention to adopt completely United States Supreme Court summary judgment precedent, and clouds the burden movants must bear to comply with *Precision Coil*'s requirements.

The court spoke in strong, lucid language. It held that where the party opposing a motion for summary judgment fails to make a showing sufficient to establish the existence of an essential element of his or her case on which he or she will bear the burden of proof at trial, "Rule 56(e) *mandates* the entry of a summary judgment. . . ."[103] It noted that although a trial court considering a motion for summary judgment must view inferences from the underlying facts in the light most favorable to the party opposing summary judgment, it should consider only "reasonable inferences:"

> [I]t is the province of the jury to resolve conflicting inferences from circumstantial evidence. Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." We need not credit purely conclusory allegations, indulge in speculation, or draw improbable inferences.[104]

The court negated the ability of the non-movant to create unilaterally a genuine issue of material fact:

> For example, when a party has given clear answers to unambiguous questions during a deposition or in answers to interrogatories, he does not create a trialworthy issue and defeat a motion for summary judgment by filing an affidavit that clearly is contradictory, where the party does not give a satisfactory explanation of why the testimony has changed.[105]

Neither, the court wrote, can the non-movant create a genuine issue of material fact by "mere speculation or the building of one inference upon another,"[106] by making "self-serving assertions without factual support in the record,"[107] or "merely by asserting that the moving party is lying."[108]

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103. *Precision Coil*, 459 S.E.2d at 336 n.9 (emphasis added).

104. *Id.* at 337 n.10 (quoting Ford Motor Co. v. McDavid, 259 F.2d 261, 266 (4th Cir. 1958), *cert. denied*, 358 U.S. 908 (1958)).

105. *Id.* at 337 n.12 (quoting 10A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2726, at 30-31 (2d ed. Supp. 1994)).

106. *Id.* at 338 n.14 (quoting Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985)).

107. *Id.* at 338 n.14 (quoting McCullough Oil, Inc. v. Rezek, 346 S.E.2d 788 (W. Va. 1986)).

108. *Id.* at 338 n.14.

> Rather, Rule 56 requires a nonmoving party to produce specific facts that cast doubt on a moving party's claims or raise significant issues of credibility. The nonmoving party is required to make this showing because he is the only one entitled to the benefit of all *reasonable* and *justifiable* inferences when confronted with a motion for summary judgment. Inferences and opinions must be grounded on more than flights of fancy, speculations, hunches, intuition, or rumors.[109]

If these unusual words favoring the use of Rule 56 were insufficient to cause West Virginia circuit judges to look upon summary judgment with a kinder eye, the court provided one further note of encouragement. In a footnote, the *Precision Coil* Court hinted that on review of summary judgment orders, the court might award more weight to trial judges' decisions than it had in the past. Noting that a trial judge's order granting summary judgment engenders plenary review, giving the court power to examine the entire record, the court wrote, "We may affirm a circuit court's decision on any adequate ground even if it is other than the one on which the circuit court actually relied."[110]

The *Precision Coil* opinion does not clearly delineate the movant's initial burden of production on a motion for summary judgment.[111] However the decision outlines definitively, and in conformance with the language of Rule 56 and the *Celotex* trilogy, the burden borne by the party opposing summary judgment. To defeat summary judgment, the non-movant must offer evidence sufficient for a reasonable jury to find in his or her favor.[112] Although the non-movant is not required to counter a motion for summary judgment with evidence in a form that would be admissible at trial, he or she must demonstrate the ability to produce enough competent evidence at trial to enable a finding in his or her favor.[113] A mere "scintilla of evidence" will not

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109. *Id.*

110. *Id.* at 336 n.8 (citing Parks v. City of Warner Robins, 43 F.2d 709 (11th Cir. 1995); Bolden v. PRC, Inc., 43 F.3d 545 (10th Cir. 1994)).

111. *See supra* note 102.

112. *Precision Coil*, 459 S.E.2d at 337 (citing *Anderson*, 477 U.S. at 252).

113. *Id.* at 337-38 (citing *Celotex*, 477 U.S. at 324; Hoskins v. C&P Telephone Co., 287 S.E.2d 513, 515 (W. Va. 1982)).

suffice,[114] nor will evidence which is "conjectural," "problematic," "merely colorable," or "not significantly probative."[115] Instead, the non-movant's evidence "must contradict the showing of the moving party by pointing to specific facts demonstrating that, indeed, there is a trialworthy issue" — one which involves a "genuine" issue of "material" fact.[116]

Paralleling *Anderson*, the *Precision Coil* decision defined "material fact" as one with the "capacity to sway the outcome of the litigation under the applicable law."[117] The court debunked the misconception that *any* factual dispute in a case precludes summary judgment:

> [T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." The essence of the inquiry the court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.[118]

A trial judge faced with deciding whether a party has met his or her burden on a motion for summary judgment must "view the evidence presented through the prism of the substantive evidentiary burden."[119] In other words, if a plaintiff's burden at trial would require proof of his or her case by clear and convincing evidence, the trial judge must analyze the evidence submitted on a motion for summary judgment in context of that evidentiary standard.

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114. *Id.* at 337.

115. *Id.* at 337-38.

116. *Id.* (quoting *Anderson*, 477 U.S. at 248). Of course, the party opposing summary judgment must have had sufficient opportunity through discovery to gather the evidence necessary to avoid summary judgment, if it exists. The court held that "a continuance of a summary judgment motion is mandatory upon a good faith showing by an affidavit that the continuance is needed to obtain facts essential to justify opposition to the motion." *Id.* at 339; *see* W. VA. R. CIV. P. 56(f) (providing a procedural mechanism for such a continuance). However, the court noted that failure by the non-movant to file an affidavit under Rule 56(f) is sufficient ground to reject a claim that the opportunity for discovery was inadequate. *Id.* (quoting Nguyen v. CNA Corp., 44 F.3d 234, 241-42 (4th Cir. 1995); Paddington Partners v. Bouchard, 34 F.3d 1132, 1137 (2d Cir. 1994)).

117. *Precision Coil*, 459 S.E.2d at 337 n.13. *See Anderson*, 447 U.S. at 248.

118. *Id.* at 338 (quoting *Anderson*, 477 U.S. at 247-48, 251-52) (citation omitted).

119. *Id.* at 339 (quoting *Anderson*, 477 U.S. at 254).

Having confirmed in *Painter* that Rule 56 still has a beating heart, and having repainted the Rule's portrait in *Precision Coil*, the court needed an opportunity to parade Rule 56 in the flesh. It found the appropriate occasion for doing so in the third case of the trilogy.

C. *A Dog and Pony Show:* Jividen v. Law

The final case of the trilogy, *Jividen v. Law*[120] is significant for two reasons. First, it demonstrates proper application of Rule 56 in a case with a host of disputed facts, none of which rise to the requisite level to defeat summary judgment. Second, the decision contains the most explicit statements to date of the court's intent to liberalize the summary judgment standard. The court used *Jividen* to aid trial judges in properly analyzing factual disputes in context of Rule 56 and to illustrate the point it made in *Precision Coil* that "'the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'"[121]

Jividen involved a wrongful death action by the estate of a man who died after allegedly being kicked by a horse.[122] The decedent had purchased three cattle from a former personal care home in Wellsburg, West Virginia.[123] When the decedent visited the home to collect his cattle, he was kicked and fatally injured by an unruly

120. 461 S.E.2d 451 (W. Va. 1995).

121. *Precision Coil*, 459 S.E.2d at 338 (quoting *Anderson*, 477 U.S. at 247-48). In two opinions by Justice Cleckley, decided after the *Precision Coil* trilogy, the court actually seems to be taking this principle a step further. In *Gentry v. Mangum*, the court wrote, "*In general*, summary judgment is proper only if, in the context of the motion and any opposition to it, no genuine issue of material fact exists and the movant demonstrates entitlement to judgment as a matter of law." 466 S.E.2d 171, 178 (W. Va. 1995) (emphasis added). And in Payne v. Weston, the court said, "Where the unresolved issues [in a case] are *primarily* legal rather [than] factual, summary judgment is particularly appropriate." 466 S.E.2d 161, 165 (W. Va. 1995) (emphasis added). It is doubtful the court intended the qualifiers in these sentences to be taken to their logical extreme, which would permit summary judgment in some cases where Rule 56's requirements are not met. Such an interpretation would whisk West Virginia summary judgment law into territory uncharted by any court.

122. *Jividen*, 461 S.E.2d at 455.

123. *Id.* at 454-55.

horse.[124] The horse, named Keno, belonged to the home's business and office manager and was corralled on land used jointly by the home and a couple to whom the home had leased the land for farming.[125] The accident occurred on this joint property.[126] Defendants in the case included the home, its administrator, Keno's owner, and the couple who leased the home's land.[127]

At the conclusion of discovery the defendants moved for summary judgment, pointing to evidence in the record which indicated that Keno had never demonstrated a propensity for violence before kicking the decedent, and arguing that consequently, defendants could not have reasonably foreseen the "uncharacteristic attack."[128] Plaintiff countered by submitting evidence which it contended created a genuine issue of material fact concerning Keno's violent tendencies.

Apparently discounting the quality of the plaintiff's evidence, the circuit court granted summary judgment for defendants, holding that "[n]o evidence . . . was found in the extensive discovery process . . . indicat[ing] that Keno was dangerous, vicious, or had any predisposition toward violent behavior."[129] The plaintiff appealed, arguing the trial judge had ignored or improperly resolved genuine issues of material fact.[130]

Noting that only factual disputes that add up to "trialworthy" issues preclude summary judgment, the Supreme Court of Appeals presented a geometric definition of which issues are "trialworthy," and which can be disregarded:

> Roughly stated, a "genuine issue" is simply one half of a "trialworthy" issue, and a genuine issue does not arise "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that

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124. *Id.* at 455.
125. *Id.*
126. *Id.* at 454-55 n.1.
127. *Id.* at 455. The plaintiff in *Jividen* first sued the lessors of the land where decedent was injured, then later filed a separate, virtually identical complaint against the home, its administrator, and Keno's owner. *Id.*
128. *Id.*
129. *Id.* at 455-56.
130. *Id.* at 456.

> party". . . . Stated another way, "[i]f the evidence favoring the nonmoving party is 'merely colorable . . . or is not significantly probative'" a genuine issue does not arise, and summary judgment is appropriate.
>
> The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. . . . A material fact is one "that has the capacity to sway the outcome of the litigation under the applicable law." . . . As stated in *Anderson*, "Factual disputes that are irrelevant or unnecessary will not be counted." Finally, in reviewing a circuit court's grant of summary judgment, we undertake a *de novo* review and apply the same standard utilized below.[131]

Besides providing workable definitions of the terms "genuine" and "material" as they apply to factual disputes, these passages from *Jividen* seem to mandate that a trial judge considering a motion for summary judgment must examine not only the quantity of evidence presented in opposition to summary judgment, but also the quality of that evidence. Some "colorable" evidence in favor of the non-moving party is insufficient to defeat summary judgment. The judge must analyze whether the evidence presented is significantly probative to be entitled to consideration. This is consistent with *Anderson*, where the United States Supreme Court commented that a trial judge "must bear in mind the actual quantum and quality of proof necessary to support liability," and that to create a genuine issue of fact, opposing affidavits must not be "of insufficient caliber or quantity" to allow a rational jury to decide the issue.[132]

Jividen's definition of "material" fact incorporates the elements of proof of the claim at issue. Only factual disputes which have some bearing on the non-movant's ability to establish his or her claim under the applicable legal standard are capable of precluding summary judgment. A court considering a motion for summary judgment must consider the non-movant's evidence in context of the legal framework at issue and, presumably, in light of the proper allocation of burdens on the claim.[133]

131. *Id.* at 459-60 (citations omitted).
132. *Anderson*, 477 U.S. at 254.
133. *See Anderson*, 477 U.S. at 254-55.

The *Jividen* case was rife with factual disputes. The court disposed of the bulk of them by attacking their materiality. The legal standard applicable to the *Jividen* plaintiff's claims, which sounded in both strict liability and negligence, required proof that Keno's owner or keeper had actual or constructive knowledge of the horse's violent tendencies, or that the owner or keeper could have reasonably and foreseeably anticipated the horse's violent conduct. The court readily dismissed as immaterial all factual disputes unrelated to Keno's violent tendencies or defendants' knowledge of them. Disputes the court cast aside as immaterial included all conflicts between the parties about how the accident occurred and about the chain of events which led up to it.[134] The court wrote:

> Even assuming all of the above versions of facts in favor of the Appellant, they have virtually no bearing on the elements of proof that will impact the outcome of this case. . . . [E]ven taken in the light most favorable to the Appellant, they simply do not have "the capacity to sway the outcome of the litigation under the applicable law." . . . Accordingly, these disputes will "not be counted" for purposes of summary judgment.[135]

Resolution of the remaining factual disputes, which dealt with the alleged knowledge and conflicting statements of some of the defendants concerning Keno's dangerous propensities, required the court to employ a qualitative analysis. These disputes bore directly upon the applicable legal standard the court had articulated and therefore were "material." Evidence plaintiff presented in an effort to establish these factual disputes included:

- Statements by the lessees of the land where the incident occurred that Keno "was a bit frisky[;]"[136]
- A statement from one of the decedent's relatives declaring that one of the lessees had said that Keno was a "rambunctious, wild colt[;]"[137]and
- A statement by one of the lessees that Keno preferred to "run and play" rather than be "penned."[138]

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134. *Jividen,* 461 S.E.2d at 460.
135. *Id.* (citations omitted).
136. *Id.* at 455.
137. *Id.*
138. *Id.*

The court concluded that this evidence merely portrayed Keno as being generally unruly, and was insufficient as a matter of law to impose liability under either a strict liability or negligence standard.[139] It stated:

> [We] conclude that traits like rambunctiousness and friskiness are insufficient to impose strict liability. In our view, given the strict liability standard, the proof cited by the Appellant to avoid summary judgment is "merely colorable" and not "significantly probative." . . . Accordingly, a reasonable jury could not return a strict liability verdict in favor of the Appellant.
>
> We reach the same conclusion in regard to the Appellant's negligence cause of action. While we have been traditionally reluctant to affirm a grant of summary judgment in cases involving negligence, when one coalesces the proof here with the necessary elements of the cause of action, summary judgment was appropriate.[140]

Again assessing the overall weight of the evidence presented by the plaintiff, the court labeled "terribly attenuated" plaintiff's assertion that conflicts in defendants' statements in the record might lead a jury to infer defendants were fabricating details of the incident, and this might impact the weight awarded defendants' testimony by a jury.[141] While it conceded that "serious conflict in a movant's version of events may thwart an otherwise suitable motion for summary judgment," the court compared the conflicting testimony cited by plaintiff with the record as a whole and concluded that the proposed inference "rests more on 'speculation and conjecture' rather than reason."[142]

The court similarly discredited a single-page expert affidavit plaintiff had submitted in opposition to summary judgment.[143] The affidavit simply listed a few of the facts in the case, then stated in conclusory fashion that defendants "ought to have known" of Keno's dangerous tendencies, and had "failed to exercise the reasonable care required" to prevent the horse from injuring others.[144] The affidavit

139. *Id.* at 461.
140. *Id.* (citations omitted).
141. *Id.* at 460 n.13.
142. *Id.* at 460 n.13 (citations omitted).
143. *Id.* at 461-62.
144. *Id.* at 462.

failed to reveal any nexus between the few enumerated facts and the expert's conclusion.[145] Citing federal precedent, the court held that an expert's affidavit that is wholly conclusory and devoid of reasoning is insufficient to defeat a motion for summary judgment.[146] "Given the perfunctory nature of the affidavit and the absence of any reasoned basis for [the expert's] opinion, we cannot conclude that the circuit court improperly disregarded it."[147]

It is significant that one of the claims asserted by the plaintiff in *Jividen* sounded in negligence. The court had held in the past that questions of scienter and ordinary care involve factual determinations requiring jury determination.[148] The *Jividen* Court made clear that no cause of action is uniquely shielded from summary judgment:

> The mere fact that a particular cause of action contains elements which typically raise a factual issue for jury determination . . . does not automatically immunize the case from summary judgment. The plaintiff must still discharge his or her burden under [Rule] 56(c) by demonstrating that a legitimate jury question, i.e. a genuine issue of material fact, is present.[149]

Although reduced to a footnote in the opinion, this statement was clearly significant to the court; it comprises *Jividen*'s first syllabus point.[150]

In its general statements in *Jividen* regarding summary judgment, the court revealed the goal underlying the *Precision Coil* trilogy:

> [W]e clarified our view of summary disposition, in part, to disabuse litigants and circuit courts of the erroneous notion that [Rule] 56 had ceased

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145. *Id.*

146. *Id.* (citing M&M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc., 981 F.2d 160, 165 (4th Cir. 1992) (en banc), *cert. denied*, 113 S. Ct. 2962 (1993)).

147. *Id.*

148. *E.g.*, Dawson v. Woodson, 376 S.E.2d 321 (W. Va. 1988); Butts v. Houston, 86 S.E. 473 (W. Va. 1915).

149. *Jividen*, 461 S.E.2d at 457 n.9.

150. In *Precision Coil*, the court wrote similarly that "[c]ourts take special care when considering summary judgment in employment and discrimination cases because state of mind, intent, and motives may be crucial elements. It does not mean that summary judgment is never appropriate." *Precision Coil*, 459 S.E.2d at 338.

> to exist. . . . Rule 56 was incorporated into West Virginia civil practice for good reason, and circuit courts should not hesitate to summarily dispose of litigation where the requirements of the Rule are satisfied.[151]

Noting the reluctance of federal courts to grant summary judgment prior to the "liberalization of summary judgment practice and procedure" spawned by the *Celotex* trilogy, the court described a warning sign posted by a New Orleans district judge which read, "No Spitting, No Summary Judgments."[152] The court remarked that "[t]he same sign might just as recently have appeared in one of the many county courthouses in West Virginia."[153]

> What some circuit courts have characterized as our disapproval of summary judgment generally may have been communicated by certain of our decisions which have stated, for instance, that "[s]ummary judgment is not favored. . . . " . . . In the future, however, circuit courts should not be influenced by whether or not summary disposition is favored. Rather, the appropriate inquiry is whether Rule 56, as interpreted by cases like *Painter* and [*Precision Coil*] is satisfied. . . . If the requirements of the Rule are met, summary disposition is appropriate.[154]

V. CIRCUIT JUDGES' INITIAL OPINIONS ABOUT THE MEANING AND PRACTICAL IMPACT OF THE *PRECISION COIL* TRILOGY

What the *Precision Coil* trilogy will mean for West Virginia litigators will be decided ultimately by the state's circuit judges. Results of an early, informal survey[155] of circuit judges indicates the bench is

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151. *Jividen*, 461 S.E.2d at 458-59.

152. *Id.* at 459 n.11 (quoting Robert M. Bratton, *Summary Judgment Practice in the 1990s: A New Day Has Begun — Hopefully*, 14 AM. J. TRIAL ADVOC. 441, 455 (1991)).

153. *Id.* at 459 n.11.

154. *Id.* at 459 n.11 (quoting *Andrick*, 421 S.E.2d at 249) (other citations omitted).

155. West Virginia Circuit Judge Survey (summer 1995) (unpublished survey, on file with authors) [hereinafter Survey]. Questionnaires regarding the impact of *Painter*, *Precision* Coil and their progeny were mailed to each of West Virginia's circuit judges. Thirty-one judges responded. The survey was informal and unscientific; the authors do not purport that the results definitively represent circuit judges' opinions about the impact of the *Precision Coil* trilogy. The results do, however, give some initial indication of judges' thoughts about these cases and on summary judgment generally, and provide some insightful commentary on those topics. The survey forms contained five questions, four of which are addressed in the

well aware of the court's new thinking about summary judgment. But judges' comments also evidence a divergence of opinion about the precise nature of the message the court intended to send to State judges and litigators and show some skepticism about whether the court will apply the retooled summary judgment standard across the board. Question one of the survey asked:

1. In your opinion, are *Painter, Precision Coil,* and their progeny:
A. A departure from prior precedent, in that they strongly encourage circuit courts to increase the utilization of summary judgment;
B. Largely consistent with prior precedent and only slightly encourage the increased utilization of summary judgment;
C. Wholly consistent with prior precedent and effecting no appreciable change in the current status of summary judgment jurisprudence; or
D. Other?

The responses were as follows:

A:	26 percent;
B:	55 percent;
C:	0 percent;
D:	16 percent; and
No Opinion:	3 percent.

Not one of the judges responding to this first survey question gave any weight to the court's repeated disclaimers in the *Precision Coil* trilogy that the decisions represent no more than an application of settled law. Rather, a quarter of the judges surveyed recognize the decisions as a departure from prior precedent, and the vast majority of responding judges (81 percent) characterize the decisions as at least slightly encouraging the increased use of summary judgment.

Judges commenting on the first survey question showed some frustration with the court's prior uncharitable view of summary judgment, and provided some insight into their impression of the of the *Precision Coil* cases:

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text. A fifth question asking judges to rank the most significant effects of the *Precision Coil* cases on their dockets yielded incalculable responses. Except for a few notable narrative responses which are included in the text, the authors have disregarded this fifth question.

> This case placed some authority back to trial judges to consider granting summary judgment. While a departure, I'm sure many will wait and see who will be upheld on these decisions.[156]
>
> A return to rationality, providing courts and lawyers with some semblance of consistency in their reliance on the language of the procedural rule.[157]
>
> I do not think the substantive rules have changed to grant summary judgment. Only the procedure to look at the motions without summarily denying the same.[158]

The second question of the survey asked:

> 2. Following *Painter, Precision Coil*, and their progeny, which of the following changes have you experienced, if any, in regard to the filing of Rule 56 motions by the defendant in pending civil cases:
> A. Filing has increased dramatically;
> B. Filing has increased slightly;
> C. Filing has remained unchanged; or
> D. Filing has decreased?

Responses to the second question were as follows:

A:	3 percent;
B:	29 percent;
C:	65 percent;
D:	0 percent; and
No opinion:	3 percent.

Most judges indicate that the *Precision Coil* trilogy has affected summary judgment filings by defendants in civil cases only slightly or not at all. Only one responding judge has noticed a dramatic increase in the filing of summary judgment motions. Several judges indicated that not enough time has elapsed to allow them to evaluate the effect of these cases on summary judgment filings. Another, noting that filings in his or her court have remained unchanged, quipped, "Attorneys are still paid hourly."[159]

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156. Survey, *supra* note 155.
157. *Id.*
158. *Id.*
159. *Id.*

A third question asked:

3. Following *Painter, Precision Coil*, and their progeny, has your utilization of summary judgment as a case management tool or otherwise:
A. Increased dramatically;
B. Increased slightly;
C. Remained unchanged; or
D. Decreased?

The responses to the third question were as follows:

A:	7 percent;
B:	35 percent;
C:	58 percent;
D:	0 percent; and
No opinion:	0 percent.

Although most responding judges have not used Rule 56 more frequently as a result of the *Precision Coil* trilogy, a sizable minority (42 percent) said their use of summary judgment has increased at least slightly since the decisions were handed down.

The final question of the survey asked:

4. Assuming that you view *Painter, Precision Coil*, and their progeny as encouraging a more aggressive utilization of summary judgment, which of the following best describes your opinion of these decisions:
A. Very positive and essentially amounting to a new case management and docket control device;
B. Somewhat positive from a case management standpoint, but could be abused as a docket control device;
C. Very negative and will likely result in misuse of Rule 56 to clear dockets; or
D. Other?

Responses to the final question were as follows:

A:	23 percent;
B:	52 percent;
C:	0 percent;
D:	16 percent; and
No opinion:	9 percent.

Most of the circuit judges who responded to the survey (75 percent) view the *Precision Coil* trilogy as at least somewhat positive.

More than half indicated some concern that the cases could lead to abuse of Rule 56 as a docket control device. No responding judges labeled the decisions a negative development in the law.

One commenting judge rejected the assumption that *Painter*, *Precision Coil*, and their progeny encourage a more aggressive utilization of summary judgment:

> Such an assumption in my opinion would put justice in jeopardy. Courts are created to afford parties a forum to litigate legal and factual matters. If we are to use summary judgment as a means of docket control, what happens to justice?[160]

Others rated the cases favorably:

> A good and much-needed crystallization and clarification of existing law reinforcing in the trial judges trust and confidence that where summary judgment is properly done in trial court, then the Supreme Court will not arbitrarily or capriciously reverse and remand the summary judgment.[161]

> Now if the Court hadn't "rediscovered" an "inchoate right of indemnification" in the *Dunn*[162] case, I might be able to use SETTLEMENT as a "new case management tool!!!"[163]

Several judges penned on the survey forms notable general commentary about the *Precision Coil* cases:

> This case (*Painter*) is being cited in almost all summary judgment motions so it's clear that the Bar is well aware of the Court's new thinking on summary judgment as a litigation tool.[164]

> These decisions go no further than the existing rule, and they, if followed by the Court, will implement the rule. They are good decisions. There is a real danger that a judge will misuse Rule 56 as a docket control device. Docket control should be accomplished by entering a reasonable scheduling order and sticking to it. That is the basis upon which the Supreme Court

160. Survey, *supra* note 155.
161. *Id.*
162. Dunn v. Kanawha County Bd. of Educ., 459 S.E.2d 151 (W. Va. 1995).
163. Survey, *supra* note 155.
164. *Id.*

might be able to distinguish the abuse of Rule 56 as docket control and the legitimate purpose of Rule 56.[165]

I think the most significant aspect will be that courts and counsel will better analyze the case prior to trial — ie. What is material? What are the genuine issues?[166]

Better "justice" in case, and disposition upon the merits of the case quicker and cheaper in appropriate cases.[167]

I don't believe these decisions should have any effect except in cases where summary judgment is warranted. In cases of that nature, summary judgment has always been available. Attorneys constantly file summary judgment motions and have done so for years. I don't believe that these decisions will, or should, have a major impact on the delivery of judicial services or justice.[168]

VI. CONCLUSION

Barring retreat by the court, the *Precision Coil* trilogy has the potential to influence state-court litigation in West Virginia as sweepingly as the *Celotex* trilogy altered Rule 56 practice in federal courts. As the court itself confessed in *Jividen*, the motivation behind the opinions was to proclaim to the State's bench and bar that Rule 56 is still on the books, a matter which had previously been ripe for debate. Whether the decisions alter Rule 56 procedure and practice in West Virginia depends largely on whether circuit judges take to heart the message intended by the court, and whether the court itself follows through by supporting circuit judges who grant summary judgment in appropriate cases.

Despite the court's repeated disclaimers that it was merely applying settled law, the *Precision Coil* trilogy certainly interpreted Rule 56 in a manner novel to West Virginia jurisprudence. The cases introduced into the State a host of summary judgment concepts and standards which, although commonplace in recent federal decisions, had not previously been articulated in any opinions of the Supreme Court

165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*

of Appeals of West Virginia. The court's wholesale adoption of United States Supreme Court summary judgment precedent itself changed the standards applicable in West Virginia cases.

The one notable legal weakness of the cases is their failure to articulate clearly the movant's burden on a motion for summary judgment. Although the court states its intention to hold consistently with the *Celotex* trilogy, it appears nevertheless to preserve the weightier burden on movants which had previously applied in West Virginia. Although the *Precision Coil* cases embrace extended passages from *Celotex* speaking generally in favor of summary judgment, they ignore *Celotex*'s precise holding, which recognizes the movant's burden as exceedingly light. To complete its clarification of the summary judgment standard, the court will have to revisit this issue.

Perhaps more significant than any technical adjustments to the summary judgment standard worked by the *Precision Coil* trilogy is the plain shift in the court's attitude toward summary judgment. The court has transformed its view from one suspicious of Rule 56 to one which recognizes summary judgment's value and *encourages* its use in appropriate cases. It is this new outlook which is probably the most significant aspect of these three cases. Whether West Virginia trial court judges will share the court's revitalized perspective, and place in practice the standards articulated by the court, remains to be seen.