FDCC At Work: The *Celotex* Standard Is Not Just For Federal Courts.[1]

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The *Celotex* Trilogy. In a trilogy of cases decided over 30 years ago, the United States Supreme Court adopted a summary judgment standard now known collectively as the *Celotex* standard. This standard provides structure and fairness to dispositive motion practice. These cases are *Celotex Corp. v. Catrett, Anderson v. Liberty Lobby, Inc.*, and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*

Celotex Corp. v. Catrett 477 U.S. 317, 327 (1986), was a products liability lawsuit in which a widow sued over the death of her husband, alleging exposure to asbestos. Discovery followed and Celotex asked the widow the factual basis for her claim. When requested to identify exposure evidence, she could not. Celotex moved for summary judgment. Ultimately, the Supreme Court would enter summary judgment. *Id.* at 319.

The Supreme Court determined that once Celotex met its initial burden of establishing an absence of material fact, the burden then shifted to the widow to

[1] This article is largely taken from an amicus brief filed by FDCC in the Supreme Court of Florida in the case of *Wilsonart, LLC v. Lopez*, SC19-1336. Amicus & Public Policy Committee Vice-Chair Peter Glaessner authored the brief, along with Member Angela Flowers. Amicus & Public Policy Committee Vice-Chair Jamie Jones authored the state survey.

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produce evidence of exposure to the defendant's product, which she failed to meet:

> 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.

477 U.S. at 322-323. *Celotex* "burden-shifting" became the guiding procedural framework of federal summary judgment law.

The second case, *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986), was a libel lawsuit. Plaintiff, the founder of Liberty Lobby, sued Anderson claiming he published defamatory articles. Anderson, a journalist, moved for summary judgment asserting plaintiff could not establish actual malice by clear and convincing evidence. The district court granted summary judgment, but the court of appeals partially reversed, ruling that plaintiff did not need to meet that standard at the summary judgment stage. *Id.* at 246-47.

The Supreme Court reversed, explaining that the materiality of a fact must be determined in the context of the applicable substantive law. Plaintiff needed to prove there was a triable issue of fact as to "actual malice," and further show a factual dispute under the "clear and convincing" evidence standard, not a

preponderance of the evidence. The court equated summary judgment to the "substantive evidentiary standard of proof that would apply at the time of trial on the merits." *Id.* at 247-48.

The third case, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986), was a complex antitrust case. The plaintiffs were American manufacturers who claimed the defendant Japanese electronics firm schemed to sell their products in Japan at artificially high prices in order to sell their products in the United States at artificially low prices. After several years of discovery, the defendants moved for summary judgment. The district court granted summary judgment, but the court of appeals reversed. *Id.* at 579-80.

When the Supreme Court reviewed the matter, it found the scheme alleged was "implausible." *Id.* at 594 n. 19. The Court reasoned that the inability of Japanese manufacturers to wrest away market share sufficient to justify twenty years of below-market pricing belied the American manufacturers' claims of a conspiracy. Properly understood, *Matsushita* did not approve a weighing of competing versions of the facts; rather, it accepted the facts presented, but authorized federal courts to objectively assess the plausibility of the claims asserted based on those facts. *Id.* at 586-88.

Following these decisions, the federal procedure and standard for deciding if a genuine issue of material fact exists aligns with a party's burden of proof at trial. The standard is no different than a motion for nonsuit or directed verdict.

The National Trend. Adopting the *Celotex* trilogy as the framework for deciding summary judgment motions has found widespread support throughout the country. At this time, over 40 states have adopted or expressed approval of the *Celotex* standard. Only a handful of states have not adopted *Celotex*, and even some of these states have not expressly rejected it. An attached chart summarizes the law across the states.

States adopting the *Celotex* burden-shifting standard recognize that the purpose of summary judgment is "to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." *Aguilar v. Atlantic Richfield Company*, 24 P.3d 493 (Cal. 2001). As one court put it:

> Having reexamined the *Celotex* trilogy, *Byrd*, and the majority and dissenting opinions in *Hannan*, as well as the cases that have followed it, we conclude that the standard adopted in *Hannan* is incompatible with the history and text of Tennessee Rule 56 and has functioned in practice to frustrate the purposes for which summary judgment was intended—a rapid and inexpensive means of resolving issues and cases about which there is no genuine issue regarding material facts. *Bowman*, 547 S.W.2d at 529; *Evco Corp.*, 528 S.W.2d at 24. Whether the standard began with *Byrd* or originated in *Hannan*, we conclude that the standard has shifted the balance too far and imposed on parties seeking summary judgment an almost insurmountable burden of production, as the Court of Appeals' decision in this case illustrates.

Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 261 (Tenn. 2015).

Exactly how the *Celotex* burden-shifting operates varies by state. A few states permit summary judgment motions based on the moving party merely asserting that the non-moving party cannot prove its case. Such motions need

not be supported by any evidence. *See First Hawaiian Bank v. Weeks*, 772 P.2d 1187, 1190 (Haw. 1989). However, the majority of states require supporting evidence to demonstrate there is no genuine issue of fact. *See, e.g., Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118, 123 (Ind. 1994).

Those states with a summary judgment statute or rule that is identical or similar to Federal Rule of Civil Procedure 56 require the moving party to present evidence to shift the burden to the non-moving party. *See, e.g., Rye,* 477 S.W.3d at 264 (when the moving party does not bear the burden of proof at trial, the moving party meets its summary judgment burden by either affirmatively negating an essential element of the nonmoving party's claim or defense, or demonstrating that the nonmoving party's evidence is insufficient to establish the claim or defense); *White v. Kent Medical Center,* 810 P.2d 4 (Wash. 1991) (moving party has the burden of showing the absence of an issue of material fact and must generally cite evidence).

Meanwhile, states not following Federal Rule of Civil Procedure 56 have, nevertheless, made statutory or rule changes to achieve a similar burden-shifting. For example, California made statutory changes to its summary judgment statute after *Celotex*, to adopt burden-shifting. The effect of those changes was wholly consistent with *Celotex*. In California, once the moving party meets its initial burden, the non-moving party may not simply rely on its pleadings, but must "set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." *Aguilar*, 24 P.3d at 493 (*citing* Cal. Code Civ. Proc. §437(c)(o)(1)). "There is a triable issue of

material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." *Id.* at 510. A plaintiff bears the burden of persuasion that "each element" of the "cause of action" in question has been "proved," and hence that "there is no defense thereto." Cal. Code Civ. Proc. §437(c)(o)(1). Defendant bears the burden of persuasion that "one or more elements" of the cause in question "cannot be established" or "there is a complete defense." Cal. Code Civ. Proc. §437(c)(o)(2).

Likewise, Louisiana acted through statutory amendments. In 1996, the legislature adopted an article providing that "summary judgment procedure is designed to secure the just, speedy and inexpensive determination of every action … The procedure is favored and shall be construed to accomplish these ends." La. Code Civ. Proc. Ann. art. 966(A)(2). The next year, the Louisiana legislature enacted La. Code Civ. Proc. Ann. art. 966 (C)(2) stating:

> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action or defense but rather to point out to the court there is an absence of factual support. Thereafter, if the adverse party fails to produce the factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

This amendment "closely parallels" the language of *Celotex*. *Anders v. Andrus*, 773 So. 2d 289, 291 (La. Ct. App. 2000).

CONCLUSION

The *Celotex* Standard has become a largely national standard in deciding dispositive motions. It provides an efficient but fair standard that aligns with the party's burden of proof at trial.

State	**Citation**	***Celotex* Status**
Alabama	*Ex parte General Motors Corp.*, 769 So. 2d 903, 909 (Ala. 1999).	Cited with approval.
Alaska	*Moffatt v. Brown*, 751 P.2d 939, 943 (Al. 1988); *Christensen v. Alaska Sales & Serv.*, 335 P.3d 514 (Al. 2014).	Rejected *Anderson* and the Federal Rule changes. *But see Greywolf v. Carroll*, 151 P.3d 1234 (AL. 2007) (citing to *Celotex* with favor).
Arizona	*Orme School v. Reeves*, 802 P.2d 1000, 1009 (Ariz. 1990 (en banc).	Adopted *Celotex.*
Arkansas	*Short v. Little Rock Dodge, Inc.*, 759 S.W.2d 553, 554 (Ark. 1988).	Adopted *Celotex.*
California	*Aguilar v. Atlantic Richfield Co.*, 24 P.3d 493, 512 (Cal. 2001).	Cited with approval.
Colorado	*Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712 (Co. 1987); *State v. 5Star Feedlot, Inc.*, 2019 Colo. App. LEXIS 1589, *20—23, 2019 WL 544307 (Co. App. 2019).	Cited with approval.
Connecticut	*Maltas v. Maltas,* 2 A.3d 902, 913 (Conn. 2010).	Cited with approval.
Delaware	*Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).	Cited with approval.

Florida	Issue pending in: *Wilsonart, LLC v. Lopez*, SC19-1336	FDCC as amicus has urged accepting *Celotex* standard
Georgia	*PNC Bank v. GV Assocs.*, 2014 GA. State LEXIS 958 (Ga. Fulton Cty., 2014) (*Celotex).*	Cited with approval by lower court and no ruling in high court.
Hawaii	*First Hawaiian Bank v. Weeks*, 772 P.2d 1187, 1190 (Hawaii 1989).	Cited with approval.
Idaho	*Dunnick v. Elder*, 882 P.2d 475, 478-79 (Idaho Ct. App. 1994)	Adopted.
Illinois	*Koziol v. Hayden*, 723 N.E.2d 321, 324—25 (Ill. App. 1999).	Cited with approval.
Indiana	*Jarboe v. Landmark Community Newspapers*, 644 N.E.2d 118, 123 (Ind. 1994).	Rejected.
Iowa	*Slaughter v. Des Moines Univ. Coll. Of Osteopathic Med.*, 925 N.W.2d 793, 820 (Ia. 2019).	Stated that it does not follow *Celotex* where the motion for summary judgment is not "adequately supported."
Kansas	*Sharples v. Roberts*, 816 P.2d 395, 395 (Kan. 1991).	Cited with approval.
Kentucky	*Steelvest, Inc. v. Scansteel Service Center, Inc.,* 807 S.W.2d 476, 483	Rejected a change to Kentucky law but recognized that Kentucky law and

	(Ky. 1991) (overruled on other grounds by statute in KRS 411.182).	Federal law overlapped in some respects. The standard was stated to be that summary judgment would be used "to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant."
Louisiana	*Anders v. Andrus*, 773 So.2d 289, 291 (La. Ct. App. 2000).	Cited with approval.
Maine	*Corey v. Norman Hanson & Detroy*, 742 A.2d 933 (Me. 1999).	Cited with approval.
Maryland	*Bond v.Nibco, Inc.,* 96 Md. App. 127, 135 (1993).	Cited with approval.
Massachusetts	*Kourouvacilis v. General Motors Corp.,* 575 N.E.2d 734, 740 (Mass. 1991).	Adopted.
Michigan	*McCart v. J. Walter Thompson USA, Inc.*, 469 N.W.2d 284, 290, n.12 (Mich. 1990).	Cited with approval.
Minnesota	*Rouse v. Dunkley & Bennett, P.A.,* 520	Cited with approval.

	N.W.2d 406, 411 (Minn.1994).	
Mississippi	*Wiliamson v. Keith,* 786 Sp.2d 390, 394 (Miss. 2001).	Cited with approval.
Missouri	*Powel v. Chaminade College Prep., Inc.,*197 S.W.3d 576, fn.7 (Mo. 2006); *ITT Commercial Finance v. Mid-Am Marine*, 854 S.W.2d 371, 379-80 (Mo. 1993).	Cited with approval and stated that the standard in Missouri is "basically the same."(*Powel*)
Montana	*Monroe v. Cogswell Agency,* 234 P.3d 79, 93 (Mt. 2010).	Cited with approval.
Nebraska	*Anderson v. Service Merchandise Co.*, 485 N.W.2d 170, 174 (Neb. 1992).	Cited with approval.
Nevada	*Maine v. Stewart*, 857 P.2d 755, 759 (Nev. 1993).	Cited with approval.
New Hampshire	*Laramie v. Cattell*, 2007 N.H. Super. LEXIS 6, *7 (N.H. Super. 2007)	Cited with approval by lower court and no ruling in high court.
New Jersey	*Brill v. Guardian Life Ins. Co. of Am.,* 142 N.J. 520, 540 (1995).	Adopted.
New Mexico	*Romero v. Phillip Morris, Inc.,* 242 P.3d 280, 287 (N.M. 2010).	Rejecting and defining the standard as follows: once the moving party shows a prima facie entitlement to summary judgment,

		the burden "shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Romero*, 242 P.3d at 288. "A party may not simply argue that such evidentiary facts might exist, nor may it rest upon the allegations of the complaint [but instead] must adduce evidence to justify a trial on the issues." *Id.*
New York	*Cawein v. Flintkote Co.*, 203 A.D2d 105, 106 (1994).	Cited with approval by lower court and no ruling in high court but see concurrence in *Yun Tung Chow v. Reckitt & Colman, Inc.,* 17 N.Y.3d 29, 36 (N.Y. App. 2011) ("If we were writing on a clean slate, I might prefer the Celotex rule to ours, but we are not, and I am not urging a change in our law. I am urging, however, that parties moving

		for summary judgment in the future be alert to the burden that New York places on a moving party.")
North Carolina	*Corum v. Univ. of North Carolina*, 413 S.E. 2d 276, 287 (N.C. 1992).	Cited with approval.
North Dakota	*Estate of Stanton v. Stanton*, 472 N.W. 2d 741, 743 (N.D. 1991).	Cited with approval.
Ohio	*Dresher v. Burt*,662 N.E.2d 264, 268—277 (1996).	Cited with approval.
Oklahoma	*Kating v. City of Pryor*, 977 P.2d 1142, 1144 (Okla. 1999).	Noted that *Celotex* is not specifically applicable and that the standard is as follows: "The court should render summary judgment when there is no substantial controversy as to any material fact, and one of the parties is entitled to judgment as a matter of law. The court must also find that reasonable people could not reach different conclusions on the undisputed facts. All inferences to be

		drawn from the undisputed facts must be viewed in the light most favorable to the party opposing the motion. Nevertheless, the mere contention that facts exists, or might exist, to create a fact question is insufficient."
Oregon	*Jones v. General Motors Corp.*, 939 P.2d 608 (Or. 1997).	*Jones* held that the federal cases were not codified in the 1995 Oregon amendment and that the burden to show entitled to summary judgment falls on the moving party even if the opposing party would have the trial burden.
Pennsylvania	*Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1042 (Pa. 1996).	Adopted.
Rhode Island	*Lavoie v. N.E. Knitting, Inc.*, 918 A.2d 225, 228 (2007).	Quoted with approval.
South Carolina	*Harris v. Rose's Stores, Inc.*, 433 S.E.2d 905, 906 fn 2 (S.C. 1993).	Cited with approval.

South Dakota	*Weiss v. Van Norman*, 562 N.W.2d 113, 116 (S.D. 1997)	Cited with Approval
Tennessee	*Rye v. Women's Care Ctr. Of Memphis, MPLLC*, 477 S.W.3d 235, 264 (2015).	Adopted, stating that the Court "fully embrace[s] the standards articulated in the *Celotex* trilogy."
Texas	*Huckabee v. Time Warner Ent. Co., L.P.*, 19 S.W.3d 413 (Tex. 2000).	Rejected the *Anderson* clear and convincing standard but in practice applied *Celotex* by concluding that because the defendant produce evidence negating a requisite claim and the plaintiff failed to produce controverting evidence raising a fact issue, summary judgment was appropriate.
Utah	*Burns v. Cannondale Bicycle Co.*, 876 P.2d 415, 420 (Utah Ct. App. 1994).	Cited with approval.
Vermont	Brown v. State, 88. A.3d 402, 406 (Vt. 2013).	Cited with approval.
Virginia	*Realtors v. Glenn*, 2001 WL 587489, *5, 2001 VA. Cir. LEXIS 145, *15 (Va. Cir. Ct. 2001)	Cited with approval by lower court and no ruling in high court, *but see Realstar Realtors v. Glenn*, 56 Va. Cir.

		170, 186 (Cir. Ct. 2001) rejecting.
Washington	*White v. Kent Medical Center, Inc.*, 810 P.2d 4, 9 (Wash. 1991).	Cited with approval.
West Virginia	*Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W.Va. 1995).	Cited with approval.
Wisconsin	*Yahnke v. Carson*, 613 N.W.2d 102, 108 (Wis. 2000).	Adopted.
Wyoming	*Bogdanski v. Budzik*, 408 P.3d 1156, fn.12 (Wy. 2018).	Wyoming has neither adopted nor rejected *Celotex* as it has not been properly raised before the Wyoming Supreme Court.