Kentucky's Strict Summary Judgment Standard in Light of the Supreme Court's Ruling in Steelvest, Inc. v. Scansteel Service Center

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INTRODUCTION

In 1991, the Kentucky Supreme Court decided the landmark case of Steelvest, Inc. v. Scansteel Service Center, Inc. Writing for a unanimous court, Justice Reynolds reevaluated the summary judgment standard in Kentucky. Interpreting Kentucky Rule of Civil Procedure 56, which defines Kentucky's summary judgment procedure, the court determined that the procedure should be used cautiously and sparingly. In so doing, the Steelvest court adopted a stricter summary judgment standard than that recently endorsed by the United States Supreme Court, despite the fact that Kentucky's Civil Rule 56 not only parallels, but is based upon, Federal Rule of Civil Procedure 56. Therefore, although a comparison of the Federal and Kentucky rules would presumably reveal the same standards for applying summary judgments, the United States Supreme Court and the Kentucky Supreme Court have reached different conclusions as to the meaning of the language in Rule 56.

1 807 S.W.2d 476 (Ky. 1991).
2 Id. at 483 ("[S]ummary judgment is to be cautiously applied and should not be used as a substitute for trial.").
3 See infra notes 61-88 and accompanying text (discussing the Supreme Court's new liberal approach to summary judgment).
4 The relevant provisions of Kentucky Rule of Civil Procedure 56.03 and Federal Rule of Civil Procedure 56(c), which set the standard for summary judgment in each respective jurisdiction, are identical:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

KY. R. CIV. P. 56.03; FED. R. CIV. P. 56(c).
The federal summary judgment standard stems from a series of United States Supreme Court cases, otherwise known as the "trilogy," that were decided in 1986 and that liberalized the application of the summary judgment procedure in the federal court system. In this trilogy, the Supreme Court instructed the lower federal courts not to be as strict in granting summary judgments. While taking notice of the 1986 trilogy, the Kentucky Supreme Court in Steelvest declined to follow the United States Supreme Court's lead in relaxing the summary judgment standard. Instead, the Steelvest court stated that "the new federal standards of summary judgment do have appeal, but we perceive no . . . problems . . . that would require us to adopt a new approach such as the new federal standards. We adhere to the principle that summary judgment is to be cautiously applied . . . ." Hence, even though the wording of the summary judgment rules is identical, the federal courts employ a more liberal approach in granting summary judgments than do the Kentucky courts.

This Note examines the summary judgment standard in Kentucky in light of the Kentucky Supreme Court's ruling in Steelvest. Part I of the Note discusses the Kentucky Supreme Court's decision in Steelvest and its adoption of a new strict standard for summary judgment. Part II illustrates the difference between the Kentucky standard and the federal standard as well as the reasoning behind the different approaches. Part III examines the effect and meaning of Steelvest in terms of the application of the decision by lower courts in Kentucky. The Note concludes that while Steelvest has created a concern that summary judgment in Kentucky is dead, the reality is that summary judgment is still available because of the Kentucky courts' practical application of the Steelvest standard.

I. STEELVEST, INC. V. SCANSTEEL SERVICE CENTER:
A STRICTER APPROACH TO SUMMARY JUDGMENT

Steelvest was a ground breaking case in several respects. The Kentucky Supreme Court not only looked at the standard for granting

\[\text{References:}\]


6 Steven Alan Childress, A New Era For Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 183, 193 (1987) ("[T]he 1986 group on summary judgment obviously is a signal by the Court that pretrial practice must become more liberal—that trial courts should not be reluctant to grant summary judgment where appropriate.").

7 Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 482-83 (Ky. 1991).

8 See infra notes 11-35 and accompanying text.

9 See infra notes 36-137 and accompanying text.

10 See infra notes 138-61 and accompanying text.
summary judgment motions, but also discussed an officer’s fiduciary duty to the corporation with whom he is employed. The supreme court’s ruling on these issues has created quite a stir in the Kentucky legal community. In particular, the summary judgment ruling has caused defense lawyers to cringe and plaintiffs’ lawyers to rejoice.

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Steelvest involved a corporate officer, Thomas Scanlan, who was employed by Steel Suppliers, Inc., a steel distributor and warehouser. Scanlan had been employed by Steel Suppliers for over thirty years, during which time he acted as both director and president of the company. In 1984, Steel Suppliers was acquired by Steelvest, Inc., which requested that Scanlan remain as president and general manager. Scanlan agreed, and also became a director and executive committee member.

Scanlan’s employment with Steelvest lasted only eleven months, during which time he began developing plans to form a steel company of his own. “Toward this end, Scanlan sought the advice of counsel, contacted potential investors, and sought financing, none of which activities he disclosed to any representative of Steelvest.” Scanlan eventually resigned from Steelvest and formed his own company, Scansteel Service Center, Inc. Soon thereafter, Steelvest began having financial difficulties and proceeded to bring suit against Scanlan, claiming that he had breached his fiduciary relationship with Steelvest. While still employed at Steelvest, Scanlan had recruited two of Steelvest’s major

11 Steelvest, 807 S.W.2d at 479. In Steelvest, the court looked at several issues: 1) whether summary judgment should be granted in the case; 2) whether the appellee, Scanlan, breached his fiduciary relationship with Steelvest, Inc.; 3) whether Scanlan’s communications with his attorney were undiscoverable under the attorney-client privilege; and 4) whether tort liability exists when a fiduciary relationship is breached. See id. at 476-78.

12 This comment is based on numerous discussions that the author has had with lawyers in Kentucky’s two largest cities, Lexington and Louisville, who have been affected by the holding in Steelvest. See, e.g., Wallace v. Scott, 844 S.W.2d 439, 442 (Ky. Ct. App. 1992) (“Since the rendering of Steelvest, Inc. v. Scansteel Service Center, Inc., Ky. 807 S.W.2d 476 (1991), we believe some comment to be appropriate concerning the summary judgment concept. Although Steelvest made it more difficult to gain a summary judgment, it did not exclude it from our trial procedures.”).

13 As a practical matter, post-Steelvest plaintiffs appear to have less of a burden to satisfy in order to get their case before a jury. The new ruling allows plaintiffs to proceed to trial based on a “scintilla” of evidence. See infra notes 31-34 and accompanying text (discussing the summary judgment standard as adopted in Steelvest). This “scintilla” standard also constituted the federal standard before the 1986 United States Supreme Court trilogy. See infra notes 45-52 and accompanying text (discussing the history of the summary judgment standard in the federal system).

14 Steelvest, 807 S.W.2d at 478.

15 Id. at 479.
clients to be investors in his company. In addition, nine office and supervisory employees left Steelvest in order to accept positions at Scanlan's new company. Thus, Steelvest based its complaint on the fact that Scanlan had not disclosed any of his intentions to form Scansteel Service Center, Inc.\textsuperscript{16}

After extensive discovery, Scanlan and the other party defendants\textsuperscript{17} filed summary judgment motions claiming that there was insufficient evidence to show that a fiduciary duty had been breached. The trial court granted the summary judgment motions, and, on appeal, the court of appeals affirmed.\textsuperscript{18} In granting discretionary review, the Kentucky Supreme Court noted that "the central question raised by appellants is whether there was sufficient evidence that Scanlan breached any fiduciary duties to appellants by planning and organizing a directly competitive business."\textsuperscript{19} The Kentucky Supreme Court then used this issue as a vehicle to redirect the state courts on the appropriate standard to be applied in a summary judgment case.\textsuperscript{20}

The Kentucky Supreme Court quickly stated its intention to reexamine the summary judgment standard, "This case presents an opportunity to restate our position on summary judgment and dispel any ambiguity that may exist in Kentucky law on this matter."\textsuperscript{21} In setting forth the proper standard, the court briefly discussed the impact of the three 1986 United States Supreme

\textsuperscript{16} Id.
\textsuperscript{17} The defendants in this case were Scanlan, Scansteel Service Center, the First National Bank of Louisville, H & M Investors, Roger Lynn Huncilman and J. William Manning, Sr., and their respective companies, Bert R. Huncilman & Son, Inc., Manning Equipment, Inc., and Manning Truck Modification, Inc. Id. at 476.
\textsuperscript{18} Id. at 478.
\textsuperscript{19} Id. at 479. The court noted that this issue was central to all the other issues and claims. "It is clear that all other issues and claims respecting the other appellees are dependent upon the resolution of this issue of Scanlan's alleged fiduciary breach." Id.
\textsuperscript{20} See id. The supreme court reversed and remanded the case to the Jefferson Circuit Court for further proceedings. Id. at 488. The Jefferson Circuit Court, upon rehearing, tried the case without a jury. Judge Ken Corey found that the issues in the case were too difficult and intricate for a jury to intelligently rule. Although Judge Corey dismissed with prejudice the complaint against Bert R. Huncilman & Son, Inc., H & M Investors, Manning Equipment, Manning Truck Modification, Inc., J. William Manning, Sr., and Roger Lynn Huncilman, the court ultimately ruled for Steelvest against Scanlan. The judge ruled that Scanlan had in fact breached his fiduciary duties to Steelvest, Inc. Due to this finding, the judge awarded $50,000 in punitive damages to Steelvest, but concluded that compensatory damages were too speculative to award with any degree of certainty. See generally Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., No. 86-CI-04607, at 12-14 (Jefferson Cir. Ct. Sept. 10, 1993).
\textsuperscript{21} Steelvest, 807 S.W.2d at 480. Interestingly, neither of the parties' briefs focused on the summary judgment motion. Instead, it seems as though the court took it upon itself to clarify and redefine the summary judgment standard in Kentucky. See Appellants' and Appellees' Briefs (on file with the author).
Court cases. Writing for the court, Justice Reynolds noted that with the advent of these three cases, summary judgment would be easier to obtain in the federal system. Prior to the 1986 trilogy, "federal courts were generally reluctant to grant motions for summary judgment and in most instances denied them if there was even the slightest doubt as to an issue of fact." Reynolds continued, stating that the United States Supreme Court's issuance of the three opinions "had a profound effect on summary judgment practice in the federal courts and [has] encouraged greater use of summary judgment to dispose of litigation." Such an effect, however, did not trickle down to the Kentucky Supreme Court. The Kentucky court consciously refused to adopt the United States Supreme Court's standard, noting that state courts are not required to follow the federal courts' guidelines.

Turning to the issue at hand, Justice Reynolds noted that *Paintsville Hospital v. Rose*, an earlier decision by the Kentucky Supreme Court, had set forth the standard that most of the lower courts had been following. *Paintsville Hospital* "determined that summary judgment is proper only where the movant shows that the adverse party cannot prevail under any circumstances." *Paintsville Hospital* also established that the proper function of the summary judgment motion "is to terminate litigation when . . . it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." Thus, relying on *Paintsville Hospital*, the *Steelvest* court emphasized that summary judgment was not to be used as a substitute for trial. In doing so, the Kentucky Supreme Court affirmed its holding in *Paintsville Hospital* and clarified the procedures that must be followed in granting summary judgment.

A movant must satisfy a two-pronged test in order for a Kentucky court to grant a summary judgment motion. First, the movant must demonstrate that

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22 *Steelvest*, 807 S.W.2d at 480-81.
23 *Id.* at 480.
24 *Id.* at 481.
25 *Id.* at 482 ("The federal rules of procedure, e.g., F. R. Civ. P. 56, are applicable to the proceedings in federal courts and are not to be applied to practice or procedure in state courts." (emphasis added)).
28 *Steelvest*, 807 S.W.2d at 479.
29 *Id.* at 480 (referring to *Paintsville Hospital* as the "benchmark" case and applying its holding to the case at hand).
30 *Id.*
there is no genuine issue of material fact. Second, the movant must show his right to judgment "with such clarity that there is no room left for controversy." In other words, "[o]nly when it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted." It is this part of the test that has created the stir in the legal community. The "such clarity" and "impossibility" factors create such an extremely strict standard that a movant will have a difficult time proving that summary judgment should be granted.

In concluding its discussion of the appropriate approach to be used when faced with a summary judgment motion, the court restated that the *Paintsville Hospital* decision put forth a mandate as to the proper standard for summary judgment, reaffirmed that mandate, and emphasized the "impossibility" factor:

"[Summary judgment] should only 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." It is vital that we not sever litigants from their right of trial, if they do in fact have valid issues to try, just for the sake of efficiency and expediency." Hence, the Kentucky Supreme Court believes that summary judgment is a procedural tool to be wielded sparingly.

II. **Historical Analysis of the Summary Judgment Standard**

A. **Federal Standard**

The summary judgment motion has its origins in English law, where it was used to facilitate a ruling on the merits in bills of exchange and promissory note collections when plaintiffs were able to provide enough

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31 *Id.* at 482.
32 *Id.*
33 *Id.*
34 *Id.* at 483 (quoting *Paintsville Hospital*).
35 *See id.* "[T]his court has . . . repeatedly admonished that the rule is to be cautiously applied. . . . It is clearly not the purpose of the summary judgment rule, as we have often declared, to cut litigants off from their right of trial if they have issues to try." *Id.* at 480.
documentary evidence. English law then expanded the availability of the procedure in 1873 "to actions involving liquidated money demands" in order to "reduce delay and expense resulting from frivolous defenses."

United States courts first adopted this English-based procedure in the late 1800s and used it only sparingly. The procedure was limited only to plaintiffs and transactions susceptible to documentary proof. For example, in Smoot v. Rittenhouse, the first recorded federal case in which a plaintiff invoked the procedure, the United States Supreme Court upheld the 75th rule of the District of Columbia Supreme Court, which allowed a plaintiff to obtain a judgment based upon a showing by affidavits unless the defendant could show by its plea and by affidavit grounds for a defense in precise terms.

In 1902, the Supreme Court again ruled upon the validity of the 75th rule in Fidelity & Deposit Co. v. United States. In Fidelity, the defendant claimed that the rule deprived him of the right to trial. The Supreme Court rejected this claim and noted that the summary procedure essentially prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the [75th] rule is to preserve the court from frivolous defences and to defeat attempts to use formal pleading as means to delay the recovery of just demands.

Thus, from the summary judgment procedure's early history, one can see the tension between a party's right to have his or her claim proceed to trial and a court's determination that no material element exists to justify bringing the case forth to trial. This tension became more prevalent once the Federal Rules of Civil Procedure officially established the summary judgment procedure in the U.S. federal court system in 1938.

Federal Rule of Civil Procedure 56 states that, based on the pleadings and the basic elements of discovery—answers to interrogatories, depositions, admissions on file, and affidavits—summary judgment is to be granted if

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37 Id.
38 Id.
39 Id.
40 Id. (citing Smoot v. Rittenhouse, 27 Wash. L. Rep. 741 (1876)).
41 Id.
42 187 U.S. 315 (1902).
43 Id. at 320.
"there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."45 In fact, "Rule 56 established a summary judgment procedure far more advanced than the one approved by the [United States] Supreme Court in Fidelity."46 Federal Rule 56 allows defendants, as well as plaintiffs, to seek judgment by requiring the party opposing the motion to rely on more than just the pleadings or sworn statements.47 This requirement on the nonmoving party was emphasized in the 1963 amendment to Rule 56(e). The "1963 amendment to Rule 56(e) made explicit that a party opposing a motion could not rest on the pleadings but had to come forward by affidavit or otherwise with specific facts showing that there was a genuine issue for trial."48 Thus, by 1963, the summary judgment procedure had progressed significantly from its origins in the 75th rule and English practice less than a hundred years earlier.49

Federal Rule of Civil Procedure 56 progressed from a procedure used solely by plaintiffs seeking a quick ruling on the enforcement of certain debt instruments to a procedure used by both parties in order to identify "claimants who lack evidence sufficient to reach the jury and who will therefore probably suffer a directed verdict or its equivalent at trial."50 Yet, even though the summary judgment rule had evolved into a procedure available to both parties, summary judgment continued to be used sparingly. This hesitation in using the new rule of civil procedure became evident within five years of the federal rule's original enactment. The courts became concerned that the procedure took away the parties' right to go before a jury.51 Moreover, "Rule 56's internal vagueness may . . . have played a role in limiting its use."52

45 Id. at 56(e). The pertinent part of the rule states:
The motion shall be served at least 10 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Id.

46 Schwarzer et al., supra note 36, at 447.

47 See FED. R. CIV. P. 56(e).

48 Schwarzer et al., supra note 36, at 447.

49 Id.


51 Id.

52 Schwarzer et al., supra note 36, at 449.
The lower federal courts varied in their application of Federal Rule 56. Most courts had adopted a strict, cautious approach to using summary judgment. For example, "[t]he Second Circuit ha[d] frequently though inconsistently, recited a general test that require[d] the trial judge to deny a summary judgment motion if there [wa]s 'the slightest doubt' as to its propriety, and many other circuits . . . applied such a strict measure from time to time." 53 Similarly, the Fifth Circuit showed a general distaste for the summary judgment motion.54 The First Circuit, on the other hand, alternated in its approach, applying a more stringent standard in the 1960s and then adopting a more liberal use of summary judgment in 1984,55 whereas the Eighth Circuit had consistently applied a liberal approach to the procedure's use.56 In the 1980s, however, as a result of the litigation explosion, the federal courts appeared to take a new approach towards summary judgment.57 It was in this context that the United States Supreme Court decided its trilogy of cases.

Two reasons provided an impetus for the United States Supreme Court's trilogy of cases dealing with summary judgment. First, the Court saw a need to help the lower federal courts by stating more definitively

53 Childress, supra note 6, at 183; see, e.g., Avrick v. Rockmont Envelope Co., 155 F.2d 568, 571 (10th Cir. 1946) (holding that summary judgment should be used temperately and cautiously); Devex Corp. v. Houdaille Indus., Inc., 382 F.2d 17, 18 (7th Cir. 1967) (stating that caution is to be exercised in granting summary judgment); Dawn v. Sterling Drug, Inc., 319 F. Supp. 358 (C.D. Ca. 1970) (holding that summary judgment should be used sparingly and upholding the "scintilla" rule).

54 Childress, supra note 6, at 183 ("The Fifth Circuit has traditionally been seen as so quick to reverse grants that one district judge in New Orleans posted the sign, 'No Spitting, No Summary Judgments'."). It should be noted, however, that in 1940 the Fifth Circuit stated in Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940) that "[s]ummary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of trial, it is a liberal measure, liberally designed for arriving at the truth." Vairo, supra note 50, at *1564. Thus, the different reactions to, and the continual evolution of, summary judgments are evident even within the same circuit.

55 Compare General Elec. Co. v. United States Dynamics Inc., 403 F.2d 933, 934 (1st Cir. 1968) (summary judgment only available when factual disputes are completely nonexistent) with Taylor v. Gallagher, 737 F.2d 134, 137 (1st Cir. 1984) (adopting a more liberal approach to summary judgment).

56 See, e.g., Roberts v. Browning, 610 F.2d 528, 529 (8th Cir. 1979) (equating summary judgment with a directed verdict and rejecting the "scintilla" rule).

57 As one commentator noted, some of the advantages of summary judgment are the reduction of court congestion, the avoidance of expensive trials, and the disposition of frivolous cases at an early stage. Sheila A. Leute, The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards, 40 BAYLOR L. REV. 617, 620 (1988). Hence, in a time in which litigation has exploded, courts have recognized the advantages of applying the summary judgment in a less strict manner.
the appropriate approach to summary judgment motions.\(^5^8\) Second, the Court perceived a need to stop the excess litigation arising in the federal court system.\(^5^9\) Hence, the trilogy came at a time "when the federal courts ha[d] taken other rather stringent steps to correct perceived abuses of the judicial system."\(^6^0\)

The first case in the trilogy was *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*\(^6^1\) In *Matsushita*, the Court reviewed a Third Circuit decision that had granted summary judgment to over twenty defendants whom the plaintiffs claimed had illegally conspired to fix the prices of television sets.\(^6^2\) Because it dealt specifically with federal antitrust issues, *Matsushita* is the least significant of the three summary judgment cases. Nonetheless, the holding in *Matsushita* signalled the new direction that the courts were to take with this procedure and helped the "Supreme Court [place] summary judgment on a pedestal."\(^6^3\)

The Court's decision in *Matsushita* made it clear that in order to obtain a summary judgment, the movant must establish that there is no genuine issue of material fact.\(^6^4\) The Court noted that there is no genuine issue of material fact for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party."\(^6^5\) Moreover, the Court held that the standard for summary judgment is the same as that for a directed

\(^{5^8}\) See Schwarzer et al., *supra* note 36, at 450-51 ("Perceived judicial hostility to summary judgment motions and the onerous proof imposed on a moving party discouraged use of the summary judgment procedure, even in cases in which it might have been appropriate. . . . As Rule 56 approached its fiftieth anniversary, it was encumbered by ambiguities, an overlay of restrictive interpretations, and considerable judicial aversion . . . . It was in this context that the Supreme Court in 1986 decided three cases that addressed the critical issues under Rule 56. . . . This trilogy of cases clarified the summary judgment procedure and increased its utility."). See also Joe S. Cecil, *Summary Judgment Practice in Three District Courts*, Fed. Jud. Ctr. (1987) available in WESTLAW, 1987 WL 123660 (FJC), at *2 (noting that both the bench and bar had misconceptions regarding how summary judgment should be used. Thus, in this context the Supreme Court "clarified the standards for summary judgment" by the trilogy, creating a "greater receptivity toward its use.").

\(^{5^9}\) "Whether this trilogy represents a radical departure from past summary judgment practice under Federal Rule of Civil Procedure 56 ("Rule 56") is a subject for debate. Practically, however, the decisions clearly advocate more liberal use of summary judgment and thus provide a more hospitable climate for bringing summary judgment motions." Vairo, *supra* note 50, at *1559.

\(^{6^0}\) *Id.*

\(^{6^1}\) 475 U.S. 574 (1986).

\(^{6^2}\) *Id.* at 582.

\(^{6^3}\) Vairo, *supra* note 50, at *1587.

\(^{6^4}\) *Matsushita*, 475 U.S. at 585-86.

\(^{6^5}\) *Id.* at 588 (citations omitted).
verdict.66 Lastly, the Court "indicate[d] that the underlying substantive law will be implicated in determining [the] reasonableness of inferences drawn from summary judgment proof, and that a certain degree of qualitative review will be allowed in deciding the motion, especially in regard to the persuasiveness and plausibility of those inferences."67

The second case in the trilogy, Anderson v. Liberty Lobby, Inc.,68 dealt with a libel suit and addressed the standard of proof required in order to go forward on a summary judgment motion.69 In Anderson, the Court reaffirmed its determination from Matsushita that the standard for summary judgment parallels the standard for a directed verdict.70 The Court also announced that, in determining whether or not to grant the motion, the court must use the substantive evidentiary standard that would guide a jury:

[W]e conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case. This is true at both the directed verdict and summary judgment stages. Consequently, where the . . . "clear and convincing" evidence requirement applies, the trial judge’s summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant.71

Finally, the Court noted that in weighing the evidence, a court must view it in a light most favorable to the nonmovant72 and that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.73

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66 Id.
67 Leute, supra note 57, at 623.
69 The Court stated the question as “whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which New York Times applies.” Id. at 244. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), a libel suit brought by a public official, the Court held that the First Amendment requires the plaintiff to show that the defendant acted with actual malice in publishing the defamatory statement. Id. at 279-80. The Court in New York Times further held that such actual malice must be shown with “convincing clarity.” Id. at 285-86.
70 Anderson, 477 U.S. at 251-52.
71 Id. at 255.
72 Schwarzer et al., supra note 36, at 451.
73 Anderson, 477 U.S. at 248.
The last and most significant case of the trilogy is *Celotex Corp. v. Catrett.* In *Celotex,* Myrtle Catrett alleged that her husband had been exposed to the defendant's asbestos and died as a result of such exposure. Catrett brought a wrongful death action against Celotex Corporation, the manufacturer/distributor of the asbestos products to which Catrett alleged that her husband had been exposed. Celotex moved for summary judgment, claiming that Catrett had failed to put forth evidence to support her pleadings. Catrett countered Celotex's motion by presenting documents in support of her claim. Celotex objected, claiming that because the documents were inadmissible, they could not be considered in determining whether summary judgment was proper. The trial court granted summary judgment for Celotex, but the court of appeals reversed on the basis that Celotex had not supported its motion with evidence negating Catrett's claim. Hence, because of a conflict in the circuits over whether the movant must support his motion with evidence tending to negate the nonmovant's claim, the Supreme Court granted certiorari to determine the factors that the federal courts must consider and the standard that they must use when presented with a summary judgment motion. Consequently, *Celotex* was the trilogy case that made the greatest impact in liberalizing the summary judgment standard.

The *Celotex* court held that the evidence that the movant or nonmovant must present in order to obtain a favorable ruling on summary judgment depends upon who has the burden of proof. The movant always has the initial responsibility of showing that there is not a factual dispute that would require the claim to go forward. The movant who bears the burden of proof at trial does not, however, actually have to disprove the adverse party's claim or even present affidavits to support his motion. Similarly, if the movant does not bear the burden in the case,
the movant need only show that the adverse party has failed to "make a sufficient showing on an essential element of [her] case with respect to which [she has] the burden of proof." The nonmovant, on the other hand, is required 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.'" The Court noted that for the nonmoving party to be successful in rebutting the movant's claim that no genuine factual dispute exists, affidavits are important, but not mandatory. Lastly, the Court explained that evidence used to oppose a summary judgment motion need not be in a form admissible at trial. In other words, "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c) except the mere pleadings themselves."

Matsushita, Anderson, and Celotex, hence, clarified for the federal courts the appropriate analysis for summary judgment and indicated a new attitude by the United States Supreme Court. In fact, through this trilogy,

[summary judgment has become recognized not only as a procedure for avoiding unnecessary trials on insufficient claims or defenses but also as an effective case management device to identify and narrow issues. . . . Properly used, summary judgment helps strip away the underbrush and lay bare the heart of the controversy between the parties.]

The lower federal courts, recognizing the Supreme Court's new attitude that summary judgment is not a tool to be sparingly and cautiously applied, are no longer as hesitant to grant summary judgment is "clearly removed" by the language of the Rule itself. Id. 83 The Court later explained that the movant can meet his burden merely by demonstrating a lack of evidence in support of the nonmovant's position and that the movant does not have "to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof." Id. at 325.

84 Id. at 324 (quoting FED. R. CIV. P. 56(e)).

85 Id.

86 Id.

87 Schwarzer et al., supra note 36, at 451.

88 "This trilogy of cases clarified the summary judgment procedure and increased its utility. . . . The Supreme Court had it right almost ninety years ago when it said summary judgment 'prescribes the means of making an issue.' . . . It can offer a fast track to a decision or at least substantially shorten the track." Id. at 451-52 (citations omitted).
motions. In fact, the Supreme Court's decision in *Celotex* established an "even-handed approach to summary judgment." Indeed, "summary judgment is given significant procedural strength, and is raised as a bulwark against claims based on speculation and inference." In fact, a study involving summary judgment practice, conducted in three federal district courts (located in Pennsylvania, California, and Maryland) prior to the trilogy, examined the recent shift in the summary judgment standard by the United States Supreme Court and noted that "it is possible that a broad shift in practice favoring summary judgment is taking place across all federal district courts." Similarly, another study states that "the early returns on these Supreme Court cases show that lower courts are getting the message.

The Supreme Court's trilogy not only has made an impact in the lower federal courts, but also has had an influence on state courts as well. Some states have remained firm in not allowing the trilogy to persuade them, while other states have scrutinized their current standards in light of the new liberal federal approach. For example, Texas, like Kentucky, has rejected

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89 Leute, *supra* note 57, at 618. For example, a United States District Court in Kansas that took the more liberal approach and granted summary judgment to the third-party defendant specifically cited to the holdings in *Anderson* and *Celotex* in order to grant the summary judgment motion. See *Ennis v. United of Omaha Life Ins. Co.*, 825 F. Supp. 962, 963, 966 (D. Kan. 1993). The United States District Court sitting in the Western District of Kentucky specifically utilized the *Anderson* decision; the court applied the substantive evidentiary law when determining whether to grant a summary judgment motion. Employing *Anderson's* "clear and convincing" standard, the court ruled that the defendant should be granted his motion for summary judgment. See *Agnew Truck Serv., Inc. v. Ranger Nationwide, Inc.*, No. 90-00340(j), 1992 WL 437629, at *6 (W.D. Ky. 1992).


91 *Id.*

92 Cecil, *supra* note 58, at *2.

93 *Childress, supra* note 6, at 193. For example, in *Raynor v. Richardson-Merrell, Inc.*, 643 F. Supp. 238 (D.D.C. 1986), the court stated that in light of *Celotex*, "it is questionable whether courts may continue to conduct a policy-oriented resolution of summary judgment motions." *Id.* at 245.

94 See Eric K. Yamamoto et al., *Summary Judgment at the Crossroads: The Impact of the Celotex Trilogy*, 12 U. HAW. L. REV. 1, 1 n.3 ("A LEXIS search has revealed over 3000 citations to *Celotex* in published state and federal court opinions as of March 1990.").

95 See, e.g., *Steelvest, Inc. v. Scansteel Serv. Ctr.*, Inc., 807 S.W.2d 476, 480-83 (Ky. 1991); *CKB & Assoc., Inc. v. Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653, 655 (Tex. 1987) (discussing summary judgment standards and insisting that a defendant moving for summary judgment firmly prove each element of his defense).

96 See, e.g., *Orme Sch. v. Reeves*, 802 P.2d 1000, 1005-09 (Ariz. 1990) (discussing each member of the trilogy and adopting the federal approach).
the United States Supreme Court's approach. "In Texas, the standards for granting summary judgment do not reflect any of the recent changes in the federal system." 7 Texas still applies a strict standard to granting summary judgment motions. The Texas Supreme Court announced that the purpose of summary judgment is to cut through "patently unmeritorious claims or untenable defenses," but not to do so at the risk of depriving a litigant of his/her right to trial. 8 Interestingly, as with Kentucky's summary judgment rule, the Texas rule differs little from the federal rule in its language. 9 The difference in standards, once again, results from the interpretations of the courts. 10

Unlike Kentucky and Texas, Hawaii's courts have been influenced by the United States Supreme Court's rulings. "Several recent Hawaii cases use language indicating allegiance to some aspects of the reformulated federal summary judgment standards ...." 11 The Hawaii experience is significant because, like Texas and Kentucky, Hawaii courts have traditionally tended to disfavor summary judgments and have granted them with extraordinary reluctance. 12 Similarly, Massachusetts has demonstrated more deference to the new federal approach:

By adopting the Celotex standard, the Supreme Judicial Court of Massachusetts eliminated the disparity between the Massachusetts and federal standards regarding a movant's burden to prevail on summary judgment and refocused attention on Rule 56 as a beneficial mechanism for disposing of frivolous claims. Following the federal summary judgment standard, the court has enabled a party to more easily secure summary judgment motions. 13

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97 Leute, supra note 57, at 619.
98 Id. at 631.
99 Id.
100 Id. at 617 n.1.
101 Id. at 635. ("Although the Texas courts and those of the federal system currently interpret their respective summary judgment rules differently, the two rules are very similar.").
103 Yamamoto et al., supra note 94, at 12.
Hence, the effect of the trilogy can be seen not only in the federal court system, but in the state systems as well.

B. Kentucky Standard

In Steelvest, the Kentucky Supreme Court declined to adopt the federal summary judgment approach, which liberalized the standard and sought to lessen the hesitance that federal courts had displayed in granting summary judgment motions. The Kentucky Supreme Court, in fact, went in the opposite direction. The high court decided to maintain the substantial burden placed on parties requesting summary judgment by holding the lower state courts to a more stringent approach. The Kentucky approach limits the use of summary judgments to only exceedingly clear cases showing no material factual disputes. The Kentucky Supreme Court basically adopted the traditional federal "scintilla" of evidence approach. The landmark case of Steelvest thus reaffirmed and reestablished a stricter summary judgment approach in Kentucky.

Even before Steelvest, Kentucky case law reflected a cautious approach to granting summary judgments. For a summary judgment to be granted, the movant had to establish that no genuine issue of material fact existed within the case. If the court believed that there was even a "scintilla" of evidence in support of the case, then the case had to proceed on to trial. Moreover, Kentucky law stated:

"All doubts are to be resolved in favor of the party opposing the motion. The movant should not succeed unless a right to judgment is shown with such clarity that there is no room left for the controversy and it is established that the adverse party cannot prevail under any circumstances."

Thus, the above Kentucky standard is similar to the approach that the federal courts took before the trilogy.

105 See generally Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480-83 (Ky. 1991) (comparing summary judgment practice in Kentucky and the federal court system and choosing to remain with a more restrictive view of summary judgment).

106 See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986) ("Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury. . . .").

107 See Steelvest, 807 S.W.2d at 482.

108 Isaacs v. Cox, 431 S.W.2d 494, 496 (Ky. 1968).

109 Id. (quoting 7 CLAY, KENTUCKY PRACTICE, at 164).
The Kentucky Supreme Court reemphasized this strict approach for granting summary judgments in its decision in *Paintsville Hospital Co. v. Rose.*110 In *Paintsville Hospital,* the Kentucky Supreme Court created a more exact approach. The court reiterated that the movant must show with clarity that no genuine factual disputes exist and must demonstrate that the adverse party cannot prevail "under any circumstances."111 Such an approach would seem to be strict enough to guarantee that the summary judgment procedure would be used sparingly and cautiously. Yet, the Kentucky Supreme Court apparently felt compelled to provide further clarification. Consequently, the court solidified this strict approach by creating an "impossibility" factor: "The proper function for a summary judgment in a case of this nature is 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."112 The court noted that even if the nonmovant were unable to show that a genuine issue of material fact existed, summary judgment would still be improper if the movant had not shown the absence of a genuine, material factual dispute.113 Finally, the *Paintsville Hospital* court explained that the standard for summary judgment in Kentucky is not to be equated to the directed verdict standard.114

In *Paintsville Hospital,* which was decided in the year prior to the 1986 trilogy decisions, the Kentucky Supreme Court clearly sought to prevent the liberal use of the summary judgment procedure. The court instead reestablished a standard similar to the federal system's pre-1986 "scintilla" standard, actually exacting a higher standard. By establishing the term "impossible" as the standard of measurement to use when considering whether the respondent would be able to produce evidence at trial to warrant a favorable judgment, the court placed a heavy burden on the movant; thus, it restricted the use of summary judgment.

The cases decided after *Paintsville Hospital* and prior to *Steelvest* generally show a deference to the Kentucky Supreme Court's strict interpretation of the correct standard for the summary judgment procedure.115 Some of the lower courts did proceed to grant summary judgments.

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110 683 S.W.2d 255 (Ky. 1985).
111 Id. at 256.
112 Id. (quoting Roberson v. Lampton, 516 S.W.2d 838, 840 (Ky. 1974)) (emphasis added).
113 Id.
114 Id.
115 See MCI Mining Corp. v. Stacy, 785 S.W.2d 491, 495-96 (Ky. Ct. App. 1989)
judgment motions, however, by looking towards the United States Supreme Court's rulings in Matsushita, Anderson, and Celotex for guidance and by balancing the federal approach with that of the Kentucky Supreme Court in Paintsville Hospital. For instance, in Smith v. Food Concepts, Inc., Food Concepts sought and was granted a summary judgment by the trial court against the plaintiffs, Daniel and Patricia Smith. The Smiths appealed, arguing that the case should proceed to trial because a genuine issue of material fact was still present. The Smith court of appeals acknowledged that in Paintsville Hospital the Kentucky Supreme Court had encouraged the lower courts “to be extremely parsimonious when presented with motions under CR 56.” Yet, the Smith court, in deciding whether the summary judgment was proper, stated that “the analysis of Federal Rule of Civil Procedure 56(c) (which corresponds to our CR 56.03) by the Supreme Court of the United States in Celotex Corp. v. Catrett is helpful.” Consequently, the court affirmed the trial court’s granting of a summary judgment to Food Concepts, agreeing with the United States Supreme Court’s reasoning in Celotex and stating that “in a case such as the one before us, a summary judgment is particularly appropriate.”

(stating that summary judgment was improper because of a remaining factual dispute and citing Isaacs v. Cox, 431 S.W.2d 494 (Ky. 1968)); Montgomery v. Midkiff, 770 S.W.2d 689, 691 (Ky. Ct. App. 1989) (quoting Paintsville Hospital and holding that summary judgment was improvidently granted); Gill v. Warren, 751 S.W.2d 33, 35 (Ky. Ct. App. 1988) (treating motion to dismiss as one for summary judgment because information extraneous to the motion was considered and holding that summary judgment was improper because material facts were still in dispute).

116 See Moore v. Ford Motor Credit Co., 778 S.W.2d 657, 658 (Ky. Ct. App. 1989) (citing to Gill, 751 S.W.2d 33 and Paintsville Hospital, 683 S.W.2d 255, in sustaining the grant of a summary judgment motion as to liability); Smith v. Food Concepts, Inc., 758 S.W.2d 437, 438-39 (Ky. Ct. App. 1988) (citing to both Celotex and Paintsville Hospital in permitting summary judgment and noting that while trial courts have been admonished by the Paintsville Hospital decision to be parsimonious with granting the motion, Celotex and other recent cases represent the original goal of the summary judgment procedure); Blue Cross & Blue Shield, Inc. v. Baxter, 713 S.W.2d 478, 479-80 (Ky. Ct. App. 1986) (citing to neither Paintsville Hospital nor Celotex in affirming a summary judgment motion, but discussing summary judgment standards).

The lower courts are not the only courts that have attempted to reconcile the trilogy with the Kentucky standard. See Humana of Kentucky, Inc. v. Seitz, 796 S.W.2d 1, 3-4 (Ky. 1990) (upholding summary judgment and citing to Anderson).

117 758 S.W.2d 437 (Ky. Ct. App. 1988).

118 Id. at 438.

119 Id.

120 Id. at 439.

121 Id. at 438-39.

122 Id. at 439.
fore, in the years leading up to the Steelvest decision, the rationale and
analysis contained in the U.S. Supreme Court’s trilogy did trickle down
to Kentucky state courts and made a small impact on decisions as to
when to grant the summary judgment motion.

In 1991, the Kentucky Supreme Court made a conscious effort
through Steelvest to put forth a clear and unambiguous standard for the
lower state courts to follow in deciding whether to grant summary
judgments.\textsuperscript{123} The court reaffirmed the strict standard that it had
adopted in its 1985 decision in Paintsville Hospital and described the
differences between Kentucky’s summary judgment standard and the new
federal standard under the 1986 trilogy decisions.\textsuperscript{124} The high court of
Kentucky made it clear that it would not be swayed by the United States
Supreme Court’s 1986 rulings and would adhere to the belief that
summary judgment should be applied cautiously in Kentucky in order to
ensure that a litigant with a valid claim or defense has his day in
court.\textsuperscript{125}

In deciding to reiterate the standard announced in Paintsville
Hospital, the Kentucky Supreme Court engaged in an in-depth
comparison of summary judgment practice in Kentucky courts and in
federal courts. The Steelvest court found both similarities and major
differences in the treatment of summary judgment motions in the two
court systems.\textsuperscript{126} First, the court noted that under both court systems the
movant has the initial burden of showing the trial court the absence of a
genuine dispute regarding material facts.\textsuperscript{127} However, the specific
requirements for satisfying the initial burden that the two court systems
place on the movant differs. In the federal system, the movant must only
show that the adverse party has insufficient evidence regarding an
essential element of her claim, whereas in the Kentucky system, the
movant is required to establish through a production of evidence, that a
genuine issue of material fact does not exist.\textsuperscript{128} Hence, in Kentucky, the
movant must essentially negate the existence of an issue, a standard
which the United States Supreme Court expressly rejected in Celotex as
being too strict.\textsuperscript{129}

\textsuperscript{123} Steelvest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 482 (Ky. 1991).
\textsuperscript{124} \textit{Id.} at 480-83.
\textsuperscript{125} \textit{Id.} at 482-83.
\textsuperscript{126} \textit{Id.} at 481-82.
\textsuperscript{127} \textit{Id.} at 482.
\textsuperscript{128} \textit{Id.}
Second, the Steelvest Court explained that the two court systems view the relationship between the directed verdict and the summary judgment standards differently. The federal courts apply the same test for both summary judgment and directed verdict. In the Kentucky court system, however, the court stated that because summary judgment takes the case away from the trier of fact before any of the evidence is actually heard, the summary judgment inquiry "requires a greater judicial determination and discretion."  

Third, the Steelvest Court admitted that in both systems the nonmovant cannot defeat a properly supported motion without presenting "at least some affirmative evidence showing that there is a genuine issue of material fact for trial." However, the amount of evidence that is required to defeat a summary judgment motion differs in each system. In the federal court system, even if the party opposing a properly supported summary judgment motion presents a "scintilla" of evidence, a summary judgment will be granted. To defeat a summary judgment motion, the nonmovant's evidence must rise to the level of that "on which a jury could reasonably return a verdict in the respondent's favor," which requires more than a "scintilla" of evidence. Thus, the federal system has discarded its scintilla of evidence approach for an approach that focuses on whether there exists a genuine, material factual dispute. The Kentucky system, on the other hand, has basically adopted and strengthened the traditional federal scintilla of evidence approach. In Kentucky, a movant cannot succeed on a summary judgment motion unless the movant can demonstrate "his right to judgment... with such clarity that there is no room left for controversy." This can occur "[o]nly where it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor.

The factors of "such clarity" and "impossibility" are the aspects of the summary judgment standard that have made the Steelvest decision so controversial. These two factors made an already strict standard, but not an impossible one under Paintsville Hospital, an unattainable standard to meet in the eyes of many.

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130 Steelvest, 807 S.W.2d at 482.
131 Id.
132 Id. (citations omitted).
133 Id.
134 Id.
135 Id. (citation omitted).
136 Id. (citations omitted).
137 This standard has caused an outcry by mainly defense lawyers, who typically rely
III. SUMMARY JUDGMENT IN KENTUCKY AFTER 1991: APPLICATION OF STEELVEST, INC. v. SCANSTEEL SERVICE CENTER BY KENTUCKY COURTS

Because Steelvest is a Kentucky Supreme Court case, the lower state courts addressing the issue of summary judgment are required to apply its holdings. In deciding whether to grant a summary judgment motion, the lower courts have focused on the two main factors first put forth in Paintsville Hospital and later reaffirmed in Steelvest:

The standards which govern the grant of summary judgment have recently been revisited by the Kentucky Supreme Court in Steelvest. First, the movant must show that no genuine issue of fact exists, that is[,] it must convince the court, by the evidence of record, of the nonexistence of an issue of material fact. Second, the movant must demonstrate its "right to judgment . . . with such clarity that there is no room left for controversy." "Only when it appears impossible for the non-moving party to produce evidence at trial warranting a judgment in [its] favor should the motion for summary judgment be granted."

The "such clarity" and "impossibility" factors raised questions concerning whether a Kentucky state court would ever grant another summary judgment. In fact, based on the reaction that the case caused in the legal community, one would think that a summary judgment motion would not be granted in this state again. Despite the harsh language of Steelvest, however, summary judgments have indeed been granted by Kentucky courts in a number of cases since the Steelvest ruling.

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139 See supra notes 12-13 and accompanying text (discussing the author's observations regarding the Steelvest standard as perceived by local attorneys).

140 See Coppage v. Ohio County Bd. of Educ., 860 S.W.2d 779, 784 (Ky. Ct. App. 1992) ("In the instant case, the circuit court correctly applied the above standards of law [of Paintsville Hospital and Steelvest] in entering a summary judgment for the appellees."); Farmer v. Heard, 844 S.W.2d 425, 427 (Ky. Ct. App. 1992) ("The standard for granting summary judgment is set forth in Steelvest . . . . Viewing the evidence in the strongest possible light in favor of the appellant, Farmer, we conclude that there is no genuine issue as to any material fact and that the trial court's summary judgment was correct."); Huddleston ex rel. Lynch v. Hughes, 843 S.W.2d 901, 904 (Ky. Ct. App. 1992)
For example, citing to the *Steelvest* decision, the court of appeals in *Fryxell v. Clark* noted that "[t]he facts are undisputed, and the only issues are the ones of law, which we may freely review." The court of appeals then proceeded to affirm the granting of a summary judgment by the trial court. Moreover, in at least one case the court of appeals went so far as to grant summary judgment for the adverse party. In contrast, several courts, citing to the stringent standards put forth under *Steelvest*, have rejected a movant's request for summary judgment. Regardless of whether or not the courts have granted the motion, most cases that have turned upon the issuance or nonissuance of the motion have addressed the strict "impossibility" and "such clarity" factors in their analysis of the summary judgment issue.

For example, in *Estep v. B.F. Saul Real Estate Investment Trust*, the plaintiff, Ann Estep, brought a negligence action against a shopping center after she had slipped and fallen on an ice-covered sidewalk. The *Estep* Court, considering all of the evidence and applying the *Steelvest* court's test, reversed the trial court's grant of summary judgment for the defendants. In denying the defendant's summary judgment motion, the court of appeals stated that "our Supreme Court [in *Steelvest*] adhered to the principle that summary judgment should be cautiously

(holding that summary judgment for the defendant was proper); Laurel Run Resources, Inc. v. Commonwealth, 853 S.W.2d 905, 906-07 (Ky. Ct. App. 1992) (stating that summary judgment is appropriate even considering *Paintsville Hospital* and *Steelvest*); Lee & Mason Int'l Agency, Inc. v. Daugherty, 828 S.W.2d 677, 678-79 (Ky. Ct. App. 1992) (affirming summary judgment for the defendants); Mayo v. Century 21 Action Realtors, Inc., 823 S.W.2d 466, 470 (Ky. Ct. App. 1992) (reversing summary judgment for one party, but remanding with directions to grant it for the other party); Jones v. Hanna, 814 S.W.2d 287, 290 (Ky. Ct. App. 1991) (affirming summary judgment on terms of a rental agreement between the parties); Middletown Eng'g Co. v. Climate Control Conditioning Co., 810 S.W.2d 57, 60 (Ky. Ct. App. 1991) (affirming summary judgment); *Ward*, 814 S.W.2d at 589, 592 (affirming summary judgment regarding environmental violations).

141 Fryxell v. Clark, 856 S.W.2d 892, 893 (Ky. Ct. App. 1993).
142 Id. at 892, 895.
143 See Mayo, 823 S.W.2d at 470.
145 Estep, 843 S.W.2d at 912-13.
146 Id. at 912-15.
applied and not used as a substitute for trial."  The court then went on to apply the oft-quoted "impossibility" language used in Steelvest and Paintsville Hospital.

In Huddleston ex rel. Lynch v. Hughes, however, the court of appeals affirmed the granting of summary judgment to the defendant. The plaintiff, Steven Huddleston, brought a personal injury action through his mother based on the theories of attractive nuisance and premises liability against the landowner/defendant, Bishop William Hughes. The trial court determined that, based on the evidence brought forth, no genuine dispute of material fact existed. The court of appeals affirmed this finding, stating:

Although it is a close call, even under the stringent standard established in Steelvest we must hold that summary judgment for the defendant was appropriate on this issue. Given the evidence that Huddleston managed to adduce, no jury could reasonably determine that the Covington School did not know and condone the public's making recreational use of its property.

Thus, these cases exemplify the differing results by the state courts in dealing with summary judgment motions, even after the supposedly "clear and unambiguous" standard put forth by the Kentucky Supreme Court in Steelvest.

That lower courts adhering to the "such clarity" and "impossibility" factors of Steelvest have continued to grant summary judgments indicates that the courts, in applying these standards, have taken a practical approach in lieu of a technical or literal approach to the Kentucky Supreme Court's ruling. In fact, the Kentucky Supreme Court itself made a statement in its Perkins v. Hausladen opinion, seemingly backing away from the harsh terminology employed in the Steelvest case: "In Steelvest, we reaffirmed our strict standard for granting summary judgment, rejecting the turn to a more liberal approach found in recent legal cases."

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147 Id. at 913.
148 Id.
150 Id. at 902-03.
151 Id. at 904.
152 See, e.g., Wallace v. Scott, 844 S.W.2d 439, 442 (Ky. Ct. App. 1992) (noting that "[a]lthough Steelvest made it more difficult to gain a summary judgment, it did not exclude it from our trial procedures").
153 828 S.W.2d 652 (Ky. 1992).
Federal cases. We accept that 'impossible' is used in a \textit{practical sense, not in an absolute sense.}\textsuperscript{154}

Notably, since the \textit{Steelvest} decision, the Kentucky Supreme Court has upheld the granting of a summary judgment motion in at least four reported cases\textsuperscript{155} and has denied discretionary review to at least four court of appeals' cases in which the award of summary judgment was upheld.\textsuperscript{156} These actions by the Kentucky Supreme Court have demonstrated to the legal community that summary judgment will continue to be granted, even under the exacting standard set forth in \textit{Steelvest}. Of course, the Kentucky Supreme Court has also continued to reject the application of summary judgment in particular cases.\textsuperscript{157} The message to be taken from these post-\textit{Steelvest} rulings, however, is that although the legal community feared that the summary judgment procedure was dead after \textit{Steelvest}'s resounding reaffirmance of \textit{Paintsville Hospital}, the procedure is still alive and well, albeit exacting a heavier toll on those movants trying to obtain summary judgment.

In Kentucky, trial courts seeking to deny a summary judgment motion have a powerful tool available. Most appellate decisions evaluating the use of the summary judgment procedure have referred to the "impossibility" language used in \textit{Paintsville Hospital} and in \textit{Steelvest}.\textsuperscript{158} More-
over, the Kentucky Supreme Court, after its opinion in *Perkins v. Hausladen*, continues to apply the "impossibility" and "such clarity" factors in judging whether summary judgment motions should have been granted. Thus, although *Steelvest* has consistently been hailed by the lower courts as announcing the authoritative standard for summary judgment, its application has not been consistent: some courts have taken a more literal approach to the Kentucky Supreme Court’s language, while other courts have taken a more practical approach.

**CONCLUSION**

The summary judgment procedure has been the subject of much debate in past years. In the 1986 United States Supreme Court trilogy of cases, the Court reestablished summary judgment as a viable pretrial tool available for weeding out unfounded litigation in the federal system. In turn, many state courts reexamined their approaches to the motion in light of the trilogy decisions. Throughout this process, the procedure has been scrutinized and reinterpreted. In 1991, the Kentucky Supreme Court used *Steelvest, Inc. v. Scansteel Service Center, Inc.* to reestablish a strict approach to summary judgment, embracing the standards articulated in *Paintsville Hospital Co. v. Rose* "as providing the authoritative standard for assessing summary judgment motions. *Steelvest* thereby establishes a *rigorous burden* that must be met by a party endeavoring to secure a summary judgment . . . ." In opting for a stringent standard, the Kentucky Supreme Court distinguished the Kentucky standard from that now used in the federal system. The court emphatically noted that although the new federal standard is not devoid of merit, Kentucky will not follow the United States Supreme Court’s lead in encouraging a more liberal use of the summary judgment procedure.

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159 828 S.W.2d 652 (Ky. 1992). *See supra* notes 153-54 and accompanying text (discussing the *Perkins* decision).

160 *See* Conrad Chevrolet, Inc. v. Rood, 862 S.W.2d 312, 314 (Ky. 1993) (citing both *Paintsville Hospital* and *Steelvest*).

161 The Supreme Court itself seems to be wavering at the strict, almost unmanageable language of the *Steelvest* opinion. *See supra* text accompanying note 154.


163 *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480-83 (Ky. 1991). The court stated that the new liberal approach was especially attractive because it would provide for the quicker disposition of many of the multitude of cases which bog down the federal system. Nevertheless, the court rejected this approach because it did not see a
By maintaining such a high standard, the Kentucky Supreme Court has generated a great deal of controversy as to what summary judgment now means in Kentucky courts. Some members of the legal community seem to believe that adherence to such a strict standard has eliminated almost any hope that defendants may have had in obtaining summary judgment. Yet, in looking at the actual practice over the past few years, the courts have continued to grant summary judgment motions, albeit making counsel for the movants work harder at showing that no genuine issue of material fact exists. The Kentucky Supreme Court has also apparently backed away from the harshness of its terminology in the Steelvest decision by explaining that the “impossibility” factor should be considered in a practical sense, not a literal one. Hence, if the courts continue to move toward a practical approach in applying the standard set forth in Steelvest, the summary judgment procedure will remain alive and well in Kentucky.

However, as with the federal rule before the revolutionary trilogy of Matsushita, Anderson, and Celotex, this seemingly inflexible standard has created confusion within the Kentucky legal community and court system. In order to alleviate the discomfort that the courts have been experiencing in interpreting the Steelvest ruling, the Kentucky Supreme Court should reevaluate and clarify its position once again in light of the trilogy and in light of the true purpose of the summary judgment procedure. The Kentucky Supreme Court’s reasoning that the summary judgment procedure should be used cautiously because it prohibits claims from proceeding on to trial is sound. The court need not make the procedure unworkable, however, by putting forth such a harsh and exacting test. In today’s flood of litigation the summary judgment tool can be an effective one in the administration of justice, if wielded appropriately. Because summary judgment forecloses a party’s day in court, the tool should only be used in order to avoid needless discovery and litigation of issues that are frivolous. The federal courts first adopted the summary judgment procedure in order to eliminate meaningless claims. The Kentucky Supreme Court must remember this original purpose before requiring similar problem within the Kentucky court system: “[T]he new federal standards do have appeal, but we perceive no oppressive or unmanageable case backlog or problems with unmeritorious or frivolous litigation in the state’s courts that would require us to adopt a new approach such as the new federal standards.” Id. at 482-83.

164 See supra notes 138-61 and accompanying text (summarizing summary judgment practice in Kentucky since the Steelvest decision).

165 See supra notes 153-57 and accompanying text (summarizing the Kentucky Supreme Court’s view since Steelvest).
application of a standard so harsh that movants will never be granted the motion. Such a standard could render the rule, and obviously the purpose of the rule, moot.

By retreating from its "impossibility" language, however, the Kentucky Supreme Court has prevented the summary judgment procedure from becoming moot. Yet, because the court has in one breath made a harsh and exacting standard and in the next breath undermined this standard by stating that courts should apply the "impossibility" and "such clarity" factors in a practical sense, the court has created a bastion of mixed interpretations and confusion, similar to that which existed in the federal system before the United States Supreme Court's trilogy. Thus, the hope is that the Kentucky Supreme Court will realize that it can require a strict standard for the procedure, similar to the traditional federal standard, without exacting such an "impossible" standard for movants to meet and, subsequently, revise the summary judgment standard in order to preserve the original purpose of the rule.

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