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Should a Scintilla Be Enough - The Proper Standard for Summary Judgment in South Carolina

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SHOULD A SCINTILLA BE ENOUGH? THE PROPER STANDARD FOR SUMMARY JUDGMENT IN SOUTH CAROLINA

I. INTRODUCTION

In *Hancock v. Mid-South Management Co.*,[1] the South Carolina Supreme Court expressed its unique stance on the burden of proof in summary judgment motions. The facts of the case are straightforward: Betty J. Hancock tripped and fell in a parking lot maintained by Mid-South Management and filed suit against Mid-South for negligence, claiming that Mid-South had failed to maintain its parking lot in a safe condition and had failed to warn her of the dangers that caused her injuries.[2] Mid-South moved for summary judgment on the ground that because the elevation changes in the parking lot were open and obvious, Mid-South had no duty to warn Hancock about them.[3] At the summary judgment hearing, the parties provided deposition testimony of both Hancock and another witness, as well as photographs of the area, and the trial court held that the elevation change in the parking lot that caused Hancock's injuries was indeed open and obvious and that Mid-South had no duty to warn Hancock about it.[4] The court of appeals affirmed the decision of the trial court, but the South Carolina Supreme Court reversed, holding that Mid-South could be liable for failing to warn Hancock of an open and obvious danger if Mid-South should have anticipated the risk of harm to invitees despite the openness and obviousness of the danger.[5] The court held that a genuine issue of fact existed as to whether the raised pavement was a dangerous condition that Mid-South should have anticipated and that summary judgment was therefore inappropriate.[6]

Not only did the court reverse the court of appeals on the merits of the case, but it also addressed an admittedly nondispositive issue.[7] Specifically, the court chose to settle a dispute among the lower courts regarding the standard for summary judgment for different types of issues in state court:

> [W]e hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. However, in cases requiring a heightened burden of proof or

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1. 381 S.C. 326, 673 S.E.2d 801 (2009).
2. *Id.* at 329, 673 S.E.2d at 802.
3. *Id.*
4. *Id.*
5. *Id.* at 331, 673 S.E.2d at 803.
6. *Id.* at 332, 673 S.E.2d at 803.
7. *See id.* at 331 n.3, 673 S.E.2d at 803 n.3. In its brief, counsel for Mid-South did not raise the summary judgment standard as a primary issue in the case; instead, counsel simply noted in a footnote that the standard for summary judgment in South Carolina was unclear from the case law. Brief of Respondent at 7 n.1, *Hancock*, 381 S.C. 326, 673 S.E.2d 801 (No. 2004-CP-36-171). Predictably, Mid-South asserted its belief that the higher federal standard was appropriate. *See id.*

> in cases applying federal law, we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment.[8]

Thus, the decision of the court bifurcated the state's summary judgment standard. For state questions where the burden of proof is the preponderance of the evidence, the nonmoving party need demonstrate no more than a mere scintilla of evidence to defeat summary judgment. For a federal question, the nonmoving party presumably must meet the higher standard described by the United States Supreme Court in *Anderson v. Liberty Lobby, Inc.*[9]:

> [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmovant] on the evidence presented. The mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant].[10]

Thus, the difference between South Carolina's standard and the federal standard is ultimately one of degree: federal courts require a plaintiff to bring reasonable evidence to the table to get past a defendant's motion for summary judgment, while South Carolina state courts, when deciding most state law questions, require only that the plaintiff present something to support her position.

This bifurcated standard—with its low threshold for most state questions and its higher threshold for federal questions—is unique among the states and places South Carolina far behind the national trend of abandoning the scintilla standard.[11] Part II of this Essay will examine the history of the scintilla rule from its origins at common law to its near complete abandonment in the twentieth century. Part II will also look at the complicated history of the rule in South Carolina and the conflicting case law from the court of appeals on the issue until the supreme court decided *Hancock* in 2009. Part III will discuss the probable

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8. *Hancock*, 381 S.C. at 330–31, 673 S.E.2d at 803. It is important to recognize that the court used the language of precedent—"we hold"—to begin its description of the summary judgment standard in state court, despite the court's statement that the issue was nondispositive. *See id.* at 331 n.3, 673 S.E.2d at 803 n.3. This author contends, and urges the practitioner to consider, that the court considers its articulation of the standard in *Hancock* to carry the force of law.

9. 477 U.S. 242 (1986). In the federal system, summary judgment motions are made pursuant to Rule 56 of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 56.

10. *Anderson*, 477 U.S. at 252.

11. *See, e.g.*, Edmund M. Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 178 (1944) (stating that, as of the time of the publishing of the article, only Alabama and South Carolina maintained a version of the scintilla standard); 26 R.C.L. *Trial* § 76 (1929) (stating that abandonment of the scintilla doctrine is the majority position). For further discussion of the scintilla standard historically and nationally, see *infra* Part II.A.

effects of the *Hancock* standard, both positive and negative, on the practice of seeking summary judgment in South Carolina state courts. Finally, the end of Part III will offer advice to practitioners operating under this new regime. Ultimately, the effect of the scintilla standard set forth in *Hancock* will be to allow cases to proceed past the summary judgment stage without reasonable evidence, hindering judicial efficiency in South Carolina by allowing legally meritless claims to proceed to trial.

II. HISTORY OF THE SCINTILLA STANDARD

Traditionally, courts have applied the scintilla standard when ruling on motions for judgment as a matter of law (directed verdict) and on renewed motions for judgment as a matter of law (judgment notwithstanding the verdict).[12] The Supreme Court in *Anderson* equated a court's analysis of evidence on these motions with the analysis to be made on a summary judgment motion: "In essence, . . . the inquiry under each [motion] is the same: 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."[13] Accordingly, the cases that follow discuss the scintilla standard in the context of motions for summary judgment, directed verdict, or both[14] and demonstrate the prevailing trend of abrogating the standard.

A. *The Scintilla Standard Historically and Nationally:* Nugent *as the Exemplar of the Changing Times*

Perhaps the most useful discussion of the history of the scintilla standard is the Kentucky Court of Appeals's[15] sweeping treatment of the rule in *Nugent v. Nugent's Executor*.[16] The court, in characterizing the rule as "dead wood" and

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12. *See* Nugent v. Nugent's Ex'r, 135 S.W.2d 877, 881 (Ky. 1940).

13. *Anderson*, 477 U.S. at 251–52.

14. *See, e.g.*, Dutton v. Atl. Coast Line R. Co., 104 S.C. 16, 30–31, 88 S.E. 263, 267 (1916) (citing Howell v. Atl. Coast Line R.R. Co., 99 S.C. 417, 421, 83 S.E. 639, 641 (1914)) (discussing the scintilla rule in either the antiquated nonsuit motion or motion for a directed verdict).

15. The court of appeals was the highest court in Kentucky prior to 1976.

16. 135 S.W.2d 877 (Ky. 1940). For the law in other jurisdictions expressly abandoning the rule, see, for example, ALA. CODE § 12-21-12 (LexisNexis 2005), which abolishes the scintilla rule in any motion in a civil action that tests the sufficiency of the evidence, including motions for summary judgment, directed verdict, and judgment notwithstanding the verdict; *Huffey v. Lea (In re Estate of Olson)*, 479 N.W.2d 610, 615 (Iowa Ct. App. 1991), which states that a summary judgment motion is "functionally akin to a directed verdict" motion and that a mere scintilla of evidence is not sufficient to survive such a motion; *Hamden Lodge No. 517, I.O.O.F. v. Ohio Fuel Gas Co.*, 189 N.E. 246, 251 (Ohio 1934), where the court called for the abandonment of "the use of the term 'scintilla'"; *Proctor v. White*, 155 S.W.3d 438, 442 (Tex. App. 2004), which notes that more than a scintilla of evidence is necessary to overcome a no-evidence motion for summary judgment; and *Chesapeake & O. Ry. Co. v. F. W. Stock & Sons*, 51 S.E. 161, 165 (Va. 1905), which

choosing to abandon it, nevertheless opted to detail the history of the rule and its application at various stages of litigation.[17] In *Nugent*, the trial court had granted a motion for directed verdict in a will dispute, presumably holding that the plaintiffs had failed to produce a scintilla of evidence that the will was invalid.[18] The court of appeals, on the other hand, noted that the testimony of one witness for the plaintiffs "not only constitute[d] a scintilla of evidence, but might be thought to be of such potency as being sufficient to sustain a verdict [for the plaintiffs] were it not arrayed against an abundance of most convincing and . . . overwhelming testimony [on behalf of the defendant]."[19] Because the court was abandoning the scintilla rule in its opinion, it continued through its analysis of all of the evidence in the case and concluded that the evidence overwhelmingly favored the defense and that the granting of the motion for directed verdict should therefore be affirmed.[20]

Ultimately, the court framed the issue as follows: "[S]hall we continue to follow the scintilla rule prevailing in this jurisdiction from the beginning? We have determined that we should not do so and that . . . another step should be taken to bring us into harmony with the well nigh unanimous rule of practice in state and federal courts."[21] As motivation for abandoning the rule, the court considered the history of the scintilla standard dating back to the time of Blackstone and the early common law.[22] Because judges have always been able to set aside verdicts that were not sustained by the evidence, it only made sense that judges should be able to stop a case from going to the jury if they realized that a later verdict may simply be set aside.[23] The *Nugent* court concluded, though, that the judiciary's fear of infringing on the role of the jury led to the development of the scintilla standard.[24] With the imposition of this standard, "logic and reason were abandoned."[25]

Further, the *Nugent* court stated that the precise meaning of "scintilla" is "nebulous and shadowy" but that "[t]he most usual method of reference is that if there is 'any' evidence sustaining the plaintiff's case it must be submitted to the jury."[26] After setting forth this definition, the court noted the phenomenon of trial courts "enlarg[ing] the quantum of evidence necessary to constitute a scintilla" in an effort to deal with injustices done against movants whose evidence was substantially more compelling than the evidence of their

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held that the scintilla rule no longer prevails because it is not "consonant with reason." For more information on the overall abandonment of the scintilla doctrine, see 26 R.C.L. *Trial* § 76 (1929).

17. *See Nugent*, 135 S.W.2d at 881–83.
18. *See id.* at 878.
19. *Id.* at 879.
20. *See id.* at 879–81, 883.
21. *Id.* at 881.
22. *See id.* (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *375).
23. *See id.*
24. *See id.*
25. *Id.*
26. *Id.* at 882.

opponents.[27] In short, courts in Kentucky were paying lip service to the scintilla rule but actually requiring nonmovants to show enough evidence to reasonably support a verdict.[28] *Nugent*'s abandonment of the scintilla rule, then, was simply an official judicial recognition of an existing reality. The scintilla rule was based on dubious origins, had lost favor nationally, and was not actually applied in trial courts in Kentucky regardless of its technical presence in the case law.[29]

Nugent, by its own terms, was consistent with a national trend.[30] Edmund M. Morgan, in his article *Choice of Law Governing Proof*, studied the trend through 1944.[31] According to Morgan, by 1944, "[t]he scintilla rule [applied] only in Alabama and South Carolina."[32] Alabama abandoned the rule by statute in 1987.[33] Further, while Alaska and Hawaii did not figure into Morgan's study because they were not states in 1944, in 2009, neither state observed the rule.[34] Thus, since 1987, South Carolina has been the only state to employ the scintilla rule.[35] Undoubtedly, the South Carolina Supreme Court's reiteration of the rule in *Hancock* goes against the modern, supermajority rule.

B. *The Scintilla Standard in South Carolina: Confusion in the Court of Appeals Before* Hancock

National considerations aside, the scintilla standard, at least in the summary judgment context, has had a long and varied history in the lower courts of South Carolina. The South Carolina Supreme Court defined the standard as early as 1942 in *Young v. Hyman Motors, Inc.*,[36] but that case involved an appeal from an agency determination rather than a motion for summary judgment.[37] There, the court noted that a scintilla is "any material evidence that, if true, would tend to

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27. *Id.* at 882–83. Note that this phenomenon is explicitly present in South Carolina case law. *See* Young v. Hyman Motors, Inc., 199 S.C. 233, 243, 19 S.E.2d 109, 113 (1942) (citing Nat'l Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 5, 174 S.E. 581, 582–83 (1934)); discussion *infra* Parts II.B, III.B.

28. *See Nugent*, 135 S.W.2d at 882–83.

29. *See id.* at 881–83.

30. *See id.* at 881.

31. *See* Morgan, *supra* note 11, at 163 (noting the perplexing situation that arises in choice of law issues when the law of the forum and the law being used apply different standards of proof on an issue before the court).

32. *Id.* at 178.

33. *See* ALA. CODE § 12-21-12 hist. n. (LexisNexis 2005).

34. *See* Beal v. McGuire, 216 P.3d 1154, 1161 (Alaska 2009) (citing Maines v. Kenworth Alaska, Inc., 155 P.3d 318, 323 (Alaska 2007)); Yoneda v. Tom, 133 P.3d 796, 813–14 (Haw. 2006) (citing Springwall, Inc. v. Timeless Bedding, Inc., 207 F. Supp. 2d 410, 416 (M.D.N.C. 2002)).

35. *But see infra* Part II.B (discussing the vacillation of the South Carolina Court of Appeals on this issue).

36. 199 S.C. 233, 19 S.E.2d 109 (1942).

37. *See id.* at 235, 19 S.E.2d at 110.

establish the issue in the mind of a reasonable juror."[38] The court also noted that there was a supplement to the rule, which allowed the judge to take the case from the jury if but one "reasonable inference" was possible from the evidence.[39] *Young* is significant because it incorporates the *Anderson* notion of reasonableness[40] into the scintilla standard, though *Young*'s statements arguably are called into question by the court's decision in *Hancock*.[41]

Apparently, the South Carolina Court of Appeals viewed the standard for overcoming a summary judgment motion as an open question, and from 1991 to 2007, just two years before *Hancock*, it issued a conflicting series of decisions. First, in 1991, in *Dickert v. Metropolitan Life Insurance Co.*,[42] the court of appeals followed the lead of *Anderson* and stated that "the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment."[43]

A year later, however, in *Anders v. South Carolina Farm Bureau Mutual Insurance Co.*,[44] the court of appeals reached a different conclusion: the court noted that "[a]t the summary judgment stage of the proceeding, it was only necessary . . . to submit a scintilla of evidence warranting a determination by the jury."[45] Interestingly, the *Anders* court cites no authority for this proposition.[46] Furthermore, the opinion does not mention *Dickert* at all. As a result, an attorney in 1992 could find valid case law from the court of appeals supporting two contrary propositions: the scintilla rule was valid under *Anders* and invalid under *Dickert*.

From 1992 to 1996, the court of appeals appeared to be abandoning the scintilla standard.[47] The leading case during this time period is *Bravis v. Dunbar*,[48] which quoted *Dickert* in setting aside that standard: "A party opposing a properly supported motion for summary judgment . . . must set forth or point to specific facts showing that there is a genuine issue of material fact. Thus, the

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38. *Id.* at 242–43, 19 S.E.2d at 113 (quoting Turner v. Am. Motorists Ins. Co., 176 S.C. 260, 263, 180 S.E. 55, 57 (1935)) (internal quotation marks omitted).

39. *Id.* at 243, 19 S.E.2d at 113 (quoting Nat'l Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 5, 174 S.E. 581, 582 (1934)).

40. As previously discussed, the United States Supreme Court in *Anderson* set the burden of proof for defeating a summary judgment motion as evidence sufficient to allow a jury to reasonably find for the nonmovant. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

41. *See infra* Part III.B (discussing *Hancock*'s marginalization of *Young*).

42. 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1991), *aff'd in part, rev'd in part*, 311 S.C. 218, 428 S.E.2d 700 (1993).

43. *Id.* at 313, 411 S.E.2d at 673 (citing *Anderson*, 477 U.S. at 252).

44. 307 S.C. 371, 415 S.E.2d 406 (Ct. App. 1992).

45. *Id.* at 375, 415 S.E.2d at 408.

46. *See id.*

47. *See, e.g.*, Pryor v. Nw. Apartments, Ltd., 321 S.C. 524, 526, 469 S.E.2d 630, 632 (Ct. App. 1996) (citing Bravis v. Dunbar, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994)) (stating that a scintilla of evidence is not enough to defeat a motion for summary judgment); *Bravis*, 316 S.C. at 265, 449 S.E.2d at 496 (citing *Dickert*, 306 S.C. at 313, 411 S.E.2d at 673) (same).

48. 316 S.C. 263, 449 S.E.2d 495 (Ct. App. 1994).

existence of a mere scintilla of evidence . . . is not sufficient."[49] For the *Bravis* court, a mere scintilla of evidence did not generate a genuine issue of fact.[50] The court of appeals reiterated the *Bravis* and *Dickert* standard two years later in *Pryor v. Northwest Apartments, Ltd.*[51]

At the end of 1996, Judge Ralph King Anderson, Jr. dissented in *Strother v. Lexington County Recreation Commission*,[52] pointing out the problem created by the court of appeals over the preceding few years:

> Heretofore, the Court of Appeals has issued several opinions resulting in inconsistency. The Court previously held the existence of a mere scintilla of evidence in support of the nonmoving party's position is not sufficient to overcome a motion for summary judgment.
>
> On the other hand, this Court has also stated that at the summary judgment stage of a proceeding, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied.
>
> In order to provide guidance to the Bench and Bar, I would hereby expressly overrule . . . *Anders*.[53]

Judge Anderson further criticized the scintilla rule described in *Anders*, writing that it was "erroneous."[54] Thus, as early as 1996, the inconsistent precedent regarding the scintilla rule in summary judgment cases had been noted by a prominent judge in a published opinion.

In 1998, in *Tanner v. Florence City-County Building Commission*,[55] the court of appeals issued yet another inconsistent opinion affirming the validity of the scintilla standard, apparently retreating from *Bravis*, *Dickert*, and the relative stability of the case law on this subject set forth in the mid-1990s.[56] However, in 2007, in *Shelton v. LS & K, Inc.*,[57] the court of appeals favorably cited *Bravis* once again, stating that a mere scintilla of evidence was not enough to survive summary judgment.[58] In *Hancock*, the South Carolina Supreme Court expressly

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49. *Id.* at 265, 449 S.E.2d at 496 (quoting *Dickert*, 306 S.C. at 313, 411 S.E.2d at 673) (internal quotation marks omitted).

50. *See id.* Obviously, the presence of a nongenuine dispute at trial is undesirable. *See infra* Part III.B (discussing the disadvantages of the *Hancock* decision).

51. 321 S.C. 524, 526, 469 S.E.2d 630, 632 (Ct. App. 1996) (citing *Bravis*, 316 S.C. at 265, 449 S.E.2d at 496).

52. 324 S.C. 611, 479 S.E.2d 822 (Ct. App. 1996).

53. *Id.* at 623, 479 S.E.2d at 829 (Anderson, J., dissenting) (citations omitted).

54. *Id.*

55. 333 S.C. 549, 511 S.E.2d 369 (Ct. App. 1998), *overruled on other grounds by* Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 168 n.8, 580 S.E.2d 440, 444 n.8 (2003).

56. *See id.* at 553, 511 S.E.2d at 371 (citing Anders v. S.C. Farm Bureau Mut. Ins. Co., 307 S.C. 371, 375, 415 S.E.2d 406, 408 (Ct. App. 1992)).

57. 374 S.C. 294, 648 S.E.2d 307 (Ct. App. 2007).

58. *Id.* at 297, 648 S.E.2d at 308 (citing Bravis v. Dunbar, 316 S.C. 263, 265, 449 S.E.2d 495, 496 (Ct. App. 1994)).

noted this inconsistency and chose to favor the *Anders* line of cases,[59] finally putting an end to the back-and-forth nature of the court of appeals's precedent.[60]

III. THE CURRENT STATE OF THE SUMMARY JUDGMENT STANDARD IN SOUTH CAROLINA

In light of South Carolina's unique stance on summary judgment and the supreme court's first truly definitive statement on the issue, it is worthwhile to discuss the likely repercussions of the scintilla rule, both positive and negative.

A. Advantages

Regardless of the extraordinary manner in which the supreme court chose to set forth the summary judgment standard in *Hancock*,[61] the case does provide two advantages to the South Carolina legal community. First, the case is consistent with South Carolina Supreme Court rulings regarding the evidence required to overcome motions for directed verdict and judgment notwithstanding the verdict (JNOV). Specifically, the court in *Rogers v. Norfolk Southern Corp.*[62] reached a very similar conclusion to the one set forth in *Hancock*.[63] There, the court held that when reviewing a JNOV motion on a federal question, South Carolina courts are to utilize the federal reasonableness standard, which requires more than a scintilla of evidence for the plaintiff's claim to proceed to the jury.[64] In contrast, the court noted that where parties are litigating state-law issues, the scintilla standard applied to JNOV motions.[65] As discussed above, because motions for summary judgment and motions for judgment as a matter of law involve the same inquiry, the court's decision to affirm the scintilla standard in *Hancock* is in line with its holding in *Rogers*. Also, *Rogers* shows the court's

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59. *See* Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330 & n.1, 673 S.E.2d 801, 802 & n.1 (2009).

60. Though the summary judgment standard for preponderance-of-the-evidence cases was left to the court of appeals before 2009, the supreme court had reached the issue of the standard in other contexts before then. *See, e.g.*, Whaley v. CSX Transp., Inc., 362 S.C. 456, 479, 609 S.E.2d 286, 298 (2005) (citing Rogers v. Norfolk S. Corp., 356 S.C. 85, 91–92, 588 S.E.2d 87, 90 (2003)) (holding that more than a scintilla of evidence is needed to survive a motion for JNOV in a claim brought under the Federal Employer's Liability Act); Russell v. Wachovia Bank, N.A., 353 S.C. 208, 218, 578 S.E.2d 329, 334 (2003) (citing George v. Fabri, 345 S.C. 440, 453, 548 S.E.2d 868, 874 (2001)) (holding that a heightened summary judgment standard exists when the burden of proof at trial is heightened); Fleming v. Rose, 350 S.C. 488, 495 n.6, 567 S.E.2d 857, 860 n.6 (2002) (stating that in a case requiring clear and convincing proof, more than a mere scintilla is needed to defeat summary judgment).

61. *See Hancock*, 381 S.C. at 331 n.3, 673 S.E.2d at 803 n.3; *supra* notes 7–8 and accompanying text.

62. 356 S.C. 85, 588 S.E.2d 87 (2003).

63. *See id.* at 91–92, 588 S.E.2d at 90.

64. *See id.* (quoting Crinkley v. Holiday Inns, Inc., 844 F.2d 156, 160 (4th Cir. 1988)).

65. *See id.* at 92, 588 S.E.2d at 90.

willingness to let the standard vary with the type of question—state or federal—before a trial court. When viewed in this context, the court's bifurcation of the standard in the summary judgment context in *Hancock* echoes the court's holding in the JNOV context in *Rogers*.

The second advantage provided by the *Hancock* decision is perhaps obvious: with such a low threshold for defeating this pretrial dispositive motion, plaintiffs with little resources will have an easier time getting their claims in front of a jury. Plaintiffs with *any* evidence to support their claims will be able to have their day in court, and, at least theoretically, the likelihood of a plaintiff's meritorious claim being dismissed relatively early in the litigation is reduced. As a result, a typical case in which an individual plaintiff is injured by a larger, well-funded entity—such as a corporation—will proceed longer, potentially increasing the corporation's desire to settle. The plaintiff, then, will achieve recovery through settlement or choose to have his case tried before a jury. In either situation, the plaintiff is in the strong position of being relatively assured his case will not be dismissed by the trial judge,[66] a factor that will no doubt enter into the decision-making strategies of defendants and defense counsel as they formulate their overall litigation posture. While the *Hancock* decision no doubt favors plaintiffs on its face, the ramifications of the low threshold for defeating summary judgment ripple throughout the litigation.

B. Disadvantages

The potential disadvantages of *Hancock* are significant. First, a lower standard for defeating summary judgment will result in more summary judgment motions being denied on claims that would not merit trial in the federal system. With this decision, the South Carolina Supreme Court has largely negated a primary tool for accomplishing judicial efficiency in the disposition of cases.[67]

Second, having two different standards for defeating summary judgment—one standard for certain state issues and another standard for federal issues—may foster confusion in the implementation of both. For example, there exists the possibility of contradictory results in the same lawsuit when a state claim and a federal claim trigger the same factual questions. If the defendant moved for summary judgment based on the shared factual issue, the trial court, operating under *Hancock*, would have to examine the same evidence through different lenses. If the evidence represented a mere scintilla but was insufficient to allow a reasonable jury to return a verdict for the plaintiff, the trial court would have no choice but to deny the motion with respect to the state claim but grant the motion on the federal claim. Undoubtedly, such incongruous results are undesirable in

66. Indeed, such a standard will undoubtedly leave an easier decision for the trial judge because she need not conduct the *Anderson*-style reasonableness analysis of the evidence at hand. *See infra* Part III.C (discussing advice to practitioners).

67. *Cf.* S.C. R. CIV. P. 1 ("[The South Carolina Rules of Civil Procedure] shall be construed to secure the just, speedy, and inexpensive determination of every action.").

any court system, but they are a distinct possibility in a system with a bifurcated standard.

The court also fosters confusion in its failure to provide any guidance for the standard in cases involving state law claims subject to the clear-and-convincing burden of proof.[68] *Hancock* explained that "in cases requiring a heightened burden of proof . . . we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment."[69] But the court failed to clarify what "more than a mere scintilla" means. A trial court could reasonably apply the federal standard to these cases and remain true to the exact wording of the *Hancock* decision. That same wording, on the other hand, leaves open the possibility of some intermediate quantum of evidence between a scintilla and the federal reasonableness test. In an area of law that has already produced so many conflicting holdings from the court of appeals, the supreme court's own indeterminate language does little to guide trial courts as they examine summary judgment motions in clear-and-convincing cases.

The third disadvantage of the scintilla rule is its inherent unreasonableness. In *Hancock*, the court draws a clear distinction between the scintilla standard and the federal test: "The rule followed in the federal court system provides that a mere scintilla of evidence is not sufficient to withstand the challenge. . . . [But] we hold that . . . the non-moving party is only required to submit a mere scintilla of evidence."[70] The federal standard, as stated in *Anderson*, requires enough evidence to allow a "fair-minded jury" reasonably to find for the nonmoving party.[71] The scintilla rule, as envisioned by the court in *Hancock*, therefore, must require something less than what it would take to convince a reasonable juror to find for the nonmovant. The unavoidable result is that South Carolina has crafted a rule that allows cases to progress to trial with an unreasonably small amount of evidence. Further, in light of the virtually complete equation of the summary judgment motion and the motion for judgment notwithstanding the verdict, South Carolina's case law allows unreasonable evidence to support a verdict. Such low evidentiary production standards at all phases of litigation are self-evidently problematic.

Finally, the scintilla standard set forth in *Hancock*, coupled with the bifurcation of the standard between state and federal questions, disallows any flexibility in the summary judgment system that existed under the holding of *Young*. As noted, *Young* affirmed the definition of "scintilla" from *Turner v.*

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68. The clear-and-convincing burden of proof is applied most notably in will disputes. *See* Patton v. Reames (*In re* Estate of Pallister), 363 S.C. 437, 448, 611 S.E.2d 250, 256 (2005) (citing Lowe v. Fickling, 207 S.C. 442, 447, 36 S.E.2d 293, 294–95 (1945); Golini v. Bolton (*In re* Estate of Arant), 326 S.C. 333, 340, 482 S.E.2d 784, 788 (Ct. App. 1997); Carlton v. Mason (*In re* Estate of Mason), 289 S.C. 273, 277, 346 S.E.2d 28, 31 (Ct. App. 1986)).

69. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009).

70. *Id.* at 330–31, 673 S.E.2d at 802–03 (quoting *Rogers*, 356 S.C. at 92, 588 S.E.2d at 90) (internal quotation marks omitted).

71. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

American Motorists Insurance Co.,[72] but the South Carolina Supreme Court did not stop there:

> Whilst adhering to the scintilla rule, this court has recognized a rule supplemental to the scintilla rule . . . more founded upon common sense and reason, to the effect [that] when only one reasonable inference . . . can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.[73]

In short, the court put a reasonableness element into the scintilla standard. According to Morgan, this interpretation "so nearly approaches orthodoxy, that South Carolina cases are likely to raise no new questions of conflicts on adequacy of evidence."[74] Thus, the scintilla rule in South Carolina, when viewed solely through the lens of *Young*, would have been simply another example of courts paying lip service to the rule but not really applying it, such as the Kentucky Court of Appeals described in *Nugent*.[75] Arguably, the supreme court's holding in *Hancock* calls the validity of *Young* into question on this issue, because in *Hancock*, the court expressly stated that there are two standards for summary judgment in South Carolina.[76] By definition, then, there must be some distinguishing feature between the standards in order for courts to apply them appropriately. In an effort to achieve this distinction, it is entirely conceivable that trial courts will have to disregard the much broader language of *Young* in order to effectuate the *Hancock* holding. Whatever discretion was previously given to trial judges under *Young* with respect to the scintilla standard is now gone. Instead, a scintilla is only a scintilla, and at least according to the United States Supreme Court in *Anderson*, such a quantum of evidence is not the most reasonable standard.[77]

*C. Commentary: Flaws in the Standard Outweigh the Advantages and the Standard Should Be Reformed: Advice to Defense Practitioners Working in a Post-*Hancock *System*

In light of the dominant national trend and the aforementioned drawbacks of the rule as compared to the advantages, South Carolina should abandon the

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72. 176 S.C. 260, 180 S.E. 55 (1935).

73. Young v. Hyman Motors, Inc., 199 S.C. 233, 243, 19 S.E.2d 109, 113 (1942) (quoting Nat'l Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 5, 174 S.E. 581, 582–83 (1934)) (internal quotation marks omitted).

74. Morgan, *supra* note 11, at 178. Note the irony in Morgan's proclamation in light of South Carolina's refusal to update the standard officially—contrary to the prevailing rule in other states—in the sixty-five year gap between his article and the *Hancock* decision.

75. *See* Nugent v. Nugent's Ex'r, 135 S.W.2d 877, 882–83 (Ky. 1940).

76. *See* Hancock v. Mid-South Mgmt., Inc., 381 S.C. 326, 330–31, 673 S.E.2d 801, 803 (2009).

77. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986).

scintilla standard altogether in favor of the higher reasonableness standard from *Anderson*. The application of a uniform, higher standard would increase judicial efficiency by increasing summary judgments in cases with no reasonable evidence on one side.[78] Such a scenario conserves judicial resources for more meritorious cases.[79] In the meantime, defense practitioners who seek summary judgment on behalf of their clients must operate under this newly confirmed scintilla regime. Though obtaining summary judgment is now more difficult, several key pieces of advice will allow practicing lawyers to enhance their chances under this system.

First, members of the South Carolina Bar must be conscious of the rule in order to present their motions appropriately before courts. Before *Hancock*, an attorney practicing in the state had colorable arguments on either side of the summary judgment standard debate.[80] Specifically, defense practitioners could cite the *Shelton/Bravis* line of cases to argue that more than a scintilla of evidence was required to defeat a properly supported motion for summary judgment. Even though a plaintiff's attorney could also point to equally valid case law for the opposite conclusion—the *Anders* line of cases—defense counsel had the opportunity to argue the point before the trial judge. Clearly, the *Hancock* decision stops the debate on this issue, and defense attorneys should beware that case law they may have used for several years is no longer valid. Attorneys, however, can adjust their summary judgment strategies accordingly, including aggressively seeking removal to federal court when possible.[81]

A second suggestion for defense attorneys concerns the advice that they give to their clients, particularly out-of-state clients being sued in South Carolina. Because the likelihood of getting summary judgment granted has undoubtedly decreased, counsel should advise clients that the expense of trial might be unavoidable in cases where the opponent has at least some shred of evidence to support its position. Summary judgment, then, is not the route such clients should pursue in seeking to dispose of the case before trial. Rather, such defendants should more actively pursue settlement negotiations if, from the client's perspective, trial must be avoided. Without question, defendants haled into court on factually meritless claims will be frustrated by the virtual unavailability of summary judgment as a viable, relatively inexpensive option for disposing of the case. Defense counsel should thus be up front with the client

78. For an excellent discussion of the purpose and benefits of summary judgment, see generally Robert G. Kerrigan, *Allowing Interlocutory Appeals from Orders Denying Summary Judgment*, FLA. B.J., Oct. 2006, at 42, 42–51, which discusses the impact of pretrial review on institutional efficiency.

79. *See id.* at 42.

80. *See supra* Part II.B.

81. Generally, cases brought in state court that could have also been brought in federal court are removable by the defendant to federal court. *See* 28 U.S.C. § 1441 (2006). In federal court, federal law governs procedural issues such as summary judgment. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 537–38 (1958). Thus, removal to federal court would allow a defendant to avoid the application of the scintilla rule.

from the beginning of the litigation that the law in South Carolina is unique and that the client's experiences with litigation in other states will not hold true under the *Hancock* standard.[82]

From a practice standpoint, if the client or counsel decides to pursue summary judgment, defense counsel should change her approach to the documentary evidence she attaches to her memoranda. It is axiomatic that a defense counselor should look for areas in the plaintiff's characterization of the facts of a case to seek a dearth of proof on a particular element of the cause of action to exploit in the motion for summary judgment.[83] However, it is also common for defense counsel to attach affirmative evidence in support of her client's position. Because trial judges have no authority to conduct the reasonableness analysis set forth in *Anderson* and no choice but to allow a case to proceed past the summary judgment stage if the plaintiff has any evidence, even the defendant's overwhelming evidence vis-à-vis the plaintiff's will not suffice at this stage of the litigation.[84] As a result, the best strategy when seeking a fact-based grant of summary judgment is for defense counsel to seek out issues on which the plaintiff will likely fail to muster any evidentiary support. If a particular piece of the plaintiff's cause of action lacks any evidence, defense counsel should simply point out to the trial judge that there is not even a scintilla of evidence in support of the plaintiff's position[85] or, if possible, introduce affirmative evidence contrary to the plaintiff's allegation. However, defense counsel—and, indeed, defendants themselves—must be prepared to have her

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82. The situation envisioned here is that of the corporate defendant, which is routinely sued in many jurisdictions.

83. Ideally, defense counsel will pore over the allegations of the plaintiff's complaint, looking for deficiencies in order to make a motion to dismiss for failure to state a claim. In light of the South Carolina Supreme Court officially lowering the summary judgment standard, perhaps defense counsel should more aggressively pursue the 12(b)(6) motion in an effort to avoid the factual inquiry of summary judgment altogether. Indeed, South Carolina's pleading standard is more rigorous that that of the federal courts. *Compare* FED. R. CIV. P. 8(a) (stating that a plaintiff in federal court must make "a short and plain statement of the *grounds*" that entitle the plaintiff to relief (emphasis added)), *with* S.C. R. CIV. P. 8(a) (establishing that a plaintiff in South Carolina state court must plead "a short and plain statement of the *facts*" that entitle the plaintiff to relief (emphasis added)).

84. As discussed above in Part II.B., the definition of *scintilla* used in South Carolina comes from the *Turner* case: "A scintilla of evidence is *any material* evidence that, if true, would tend to establish the issue in the mind of a reasonable juror." Turner v. Am. Motorists Ins. Co., 176 S.C. 260, 263, 180 S.E. 55, 57 (1935) (quoting Taylor v. Atl. Coast Line R.R. Co., 78 S.C. 552, 556, 59 S.E. 641, 643 (1907)) (internal quotation marks omitted). A scintilla of evidence, then, needs to be only evidence in favor of a plaintiff's position; it does not have to be evidence such that it could support a verdict for that party. Also, *Hancock* potentially casts doubt on the validity of cases such as *Turner* and *Young*. *See supra* Part III.B (discussing the disadvantages of the *Hancock* decision).

85. The practice described here is analogous to motions made in federal court pursuant to the seminal *Celotex* decision. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986) (referring to the summary judgment standard under Rule 56(c) of the Federal Rules of Civil Procedure). Even a summary judgment motion made in the *Celotex* posture, however, faces a difficult challenge in overcoming the *Hancock* rule.

motion for summary judgment denied if the plaintiff does produce some unforeseen evidence, however small, in support of his claims.

Finally, counselors always have the option of advocating for a change in the law. Such a change could come through either judicial or legislative means. *Young* provides an example of the former type of change. As previously discussed, the South Carolina Supreme Court in that case announced a rule "supplemental" to the scintilla rule that would allow a JNOV if there was only one "reasonable inference" to be drawn from the evidence.[86] Thus, *Young* interpreted the scintilla rule in terms of the higher standard of "reasonableness" used by the federal courts and most other states.[87] However, the supreme court's differentiation of the scintilla standard from the federal "reasonableness" standard in *Hancock* calls *Young*'s supplemental rule into question. In future cases, an attorney practicing before the supreme court could urge the court to reaffirm the validity of the language from *Young*. Because *Young* is still technically good law, perhaps this position would find favor with the court. The logical extension of this argument would be, as Morgan suggests,[88] that South Carolina has a de facto interpretation of the scintilla rule that echoes the majority rule. The next step, then, would be to urge the court to adopt the *Anderson* rule officially and do away with the "dead wood" of the scintilla standard, as the *Nugent* court saw fit to do.[89]

While theoretically possible, a judicial solution to the *Hancock* dilemma is unlikely. Primarily, the strong language the court used in describing the quantum of evidence necessary to defeat a summary judgment motion—the "mere scintilla"[90]—indicates the court intentionally set the standard low, presumably lower than the *Young* court did. Also, the *Hancock* opinion was a unanimous decision.[91] Because judicial change in this area is unlikely, a defense practitioner desiring a change in the law would be better served petitioning the legislature for the abrogation of the scintilla rule. Alabama, identified by Morgan as one of the last two states to hold onto the scintilla standard,[92] abandoned the scintilla standard by statute in 1987.[93] The wording of the statute leaves no doubt as to the effect of the law: "The scintilla rule of evidence is hereby abolished in all civil actions in the courts of the State of Alabama."[94] Instead, the statute adopts the "substantial evidence" test to determine whether an issue of fact should go to

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86. *See* Young v. Hyman Motors, Inc., 199 S.C. 233, 243, 19 S.E.2d 109, 113 (1942) (quoting Nat'l Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 173 S.C. 1, 5, 174 S.E. 581, 582 (1934)).

87. *See* Morgan, *supra* note 11, at 178.

88. *Id.*

89. *See* Nugent v. Nugent's Ex'r, 135 S.W.2d 877, 881 (Ky. 1940).

90. Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

91. *See id.* at 328, 332, 673 S.E.2d at 802–03 (indicating that Justices Waller, Pleicones, and Beatty, and acting Justice Moore concurred in the opinion written by Chief Justice Toal).

92. *See* Morgan, *supra* note 11, at 178.

93. *See* ALA. CODE § 12-21-12 hist. n. (LexisNexis 2005).

94. *Id.* § 12-21-12(b).

the jury and defines the test as follows: "Substantial evidence shall mean evidence of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions as to the existence of the fact sought to be proven."[95] Though not using the same wording as the federal standard from *Anderson*, the inquiry for courts in Alabama is not whether the evidence simply tends to support a party on an issue but whether there is enough evidence for reasonable people to debate the existence of the fact in question. By its terms, this standard decreases the chances that unmeritorious cases will reach Alabama juries. Defense attorneys in South Carolina could lobby the legislature to adopt a new rule, following the *Anderson* language or the Alabama language, in an effort to get the scintilla standard abrogated in this state.

The South Carolina Supreme Court's affirmation of the scintilla as the evidentiary burden that a plaintiff must meet to survive a summary judgment motion is both regressive when compared to the national trend and likely to decrease judicial efficiency in South Carolina. Defense counsel in this state must be conscious that the line of cases from the court of appeals holding otherwise is no longer good law. Further, defense attorneys must adjust their strategies at the summary judgment stage to avoid being blindsided by the now low standard. For the long-term, the legal community must not abandon petitioning the South Carolina Supreme Court, or the legislature, for a change in the standard—a standard that should have been rejected long ago.

Aaron J. Hayes

95. *Id.* § 12-21-12(d).