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The proper role of summary judgment in the federal courts remains somewhat uncertain and undefined today despite the fact that, except for technical, clarifying amendments,[1] its embodiment in Federal Rule 56 has not been altered since the adoption of the Federal Rules of Civil Procedure in 1938.

On the one hand, a number of judges have shown a marked aversion to the early resolution of a case whenever the pleadings appear to confirm the existence of a genuine issue of material fact. Summary judgment has been described by one judge as "an extreme and treacherous remedy;"[2] as will be discussed below, some Supreme Court Justices have gone out of their way to cripple its use.[3] On the opposite side, however, are others who extol its virtues. According to Mr. Justice Rehnquist, "[i]t is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' "[4]

The disagreement is part and parcel of a larger, fundamental controversy over the extent of the requirement of the right to a jury trial under the seventh amendment to the Constitution and the various "procedural" methods of limiting or circumventing that right. Thus the debate over the role of summary judgment is directly related to the dispute involving the propriety and scope of the motions for directed verdict and judgment notwithstanding the verdict[5] and, though not as directly, to the

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1 The substance of Rule 56 has been amended twice, once in 1948 and again in 1963. The 1948 amendments permitted a plaintiff to move for summary judgment prior to the filing of an answer by defendant and made clear that a summary judgment motion could encompass the issue of damages and could be granted as to liability even though an issue as to damages remained. *See* FED. R. CIV. P. 56 Advisory Committee's Note to the Proposed 1948 Amendments, *reprinted in* 5 F.R.D. 474-75 (1946). The 1968 amendments provided that answers to interrogatories could be used to support or oppose a motion and made it clear that an opposing party could not merely rely on its pleadings in response to affidavits or other material introduced by the moving party. *See* FED. R. CIV. P. 56 Advisory Committee's Note to the Proposed 1963 Amendments, *reprinted in* 31 F.R.D. 648 (1962). *See generally* 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2711, at 558-63 (2d ed. 1983).

2 Croxen v. United States Chemical Corp., 558 F. Supp. 6, 7 (N.D. Iowa 1983). *See* Childress, *A New Era For Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987).

3 *See infra* note 16 and accompanying text.

4 Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). *See* Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213 (1987).

5 *See* Galloway v. United States, 319 U.S. 372 (1943), *reh'g denied*, 320 U.S. 214 (1943); Hackett, *Has a Trial Judge of A United States Court the Right to Direct a Verdict*, 24 YALE L.J. 127 (1914).

historical arguments concerning when trial by jury is required when a party joins related legal and equitable claims in a single complaint.[6]

The overall debate has had no clear winner, though, until recently, those who disapprove of summary judgment have managed to keep somewhat ahead through constitutional argument and procedural interpretation. That is why three recent Supreme Court decisions regarding summary judgment, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[7] *Celotex Corp. v. Catrett*,[8] and *Anderson v. Liberty Lobby, Inc.*[9] are of special interest because they appear to signal somewhat of a turn toward greater approval of summary dispositions. However, their ultimate effect is uncertain and could prove to be limited, in part because a number of the Justices dissented in each of these cases,[10] and in part because the Court has somewhat of a history of deciding one summary judgment case one way, only to return later with an opinion leaning the other way.[11] Nevertheless, in view of the 1986 decisions and the heightened interest they have engendered,[12] this seems a good time to take a broad range view of the theoretical problems and policy considerations that have stood in the way of the widespread use of summary judgment. It is important to see, whether, in an era of increasing litigation costs and the consequent maneuverings by parties which are more related to their assets than to the strength of their legal arguments, the legal system gives too little credence to a procedural device that has the potential for providing just results in many cases and which could leave judicial resources free to concentrate on those actions for which a trial is required.

I. Constitutional Considerations—The Right to Trial By Jury

To what extent is a court free to grant summary judgment and thus terminate an action without trial and without running afoul of the Federal Constitution? At the outset there is the obvious limitation provided by the requirements of the due process clause. A court, whether in the guise of summary judgment or some other procedural device, cannot decide cases, and thus deprive a person of "property" rights, without affording the individual an opportunity to make a case. Arbitrary action will not be upheld. This is true whether or not a right to trial by jury

6 *See* J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 11.5, 487-97 (1985).

7 475 U.S. 574 (1986).

8 477 U.S. 317 (1986).

9 477 U.S. 242 (1986).

10 In *Matsushita,* the vote was five to four. In *Celotex,* there was no majority opinion. Justice Rehnquist wrote the opinion of the Court in which three other Justices concurred; Justice White wrote a separate concurring opinion; Justice Brennan wrote a dissenting opinion for himself and two others; and Justice Stevens wrote a separate dissent. In *Anderson v. Liberty Lobby,* the vote was six to three. Justice Brennan wrote one dissent and Justice Rehnquist wrote another for himself and one other Justice.

11 *E.g.*, *compare* Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962) *with* First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253 (1968), *reh'g denied,* 393 U.S. 901 (1968).

12 The decisions have sparked a number of articles, all indicating that it should now be somewhat easier to obtain summary judgment. *See* Bertelsman, *Views from the Federal Bench — Significant Developments in the Law of Summary Judgment,* 51 KY. BENCH & BAR, No. 1, Winter 1987, at 19; Childress, *supra* note 2; Collins, *Summary Judgment and Circumstantial Evidence,* 40 STAN. L. REV. 491 (1988); Schwarzer, *supra* note 4; *The Supreme Court, 1985 Term,* 100 HARV. L. REV. 1, 250-58 (1986).

exists and has been claimed. But, assuming the procedure to be "fair" in the sense of providing the requisite chance to argue and convince a court on the law and the facts of a case, the basic constitutional constraint is the right to trial by jury.

There is no need to "reinvent the wheel" by investigating the question whether summary judgment should never be granted, regardless of the circumstances, in a case in which the right to a jury trial exists. That fundamental matter has long been decided in the context of the directed verdict.[13] If there is a situation in which no person could rationally argue that a fact material to the claim or defense exists, it is clear that the court is free to determine the matter on its own without submitting the matter to the jury.[14]

For purposes of the immediate inquiry, it is useful to begin an analysis of possible limitations imposed by the seventh amendment in the context of an action in which the party who moves for summary judgment is not the party who would have the burden of producing evidence at trial. In this posture, the right to trial by jury would appear to require nothing of the moving party and would never seem to preclude a grant of the motion. Thus if the responding party, who must carry the burden of producing evidence at trial, is unable to come up with any evidence to sustain its burden, it can fairly be said that there would be no case for a jury to try. If the matter were allowed to go to the jury, any verdict other than one for the moving party would be arbitrary and would have to be set aside. Strictly speaking, there would be no constitutional prohibition of a procedure that would require a party with the burden of proof, in every case before the court, to make a pretrial showing that it could support its case with some evidence. Failure to do so could result in a summary judgment sua sponte.[15] Whether or not we would want to inaugurate such a "put up or shut up" procedure, either by rule for all actions or upon motion, is therefore solely a matter of procedural policy which will be discussed below.

It seems clear, however, that some judges do not understand, or do not want to understand, this point. From time to time they have concocted an Alice-in-Wonderland type argument: a moving party has an obligation under Federal Rule 56 to come forward with some information that will justify the granting of summary judgment; to the extent that this information contains potential testimony of witnesses, it gives rise to a constitutional right to cross-examine those witnesses before a jury; because the moving party's witnesses could not only be disbelieved, but indeed, might actually reveal information that would give respondent enough evidence to carry its burden of proof, therefore, summary judgment must be denied.

Justice Black adopted this view in his concurrence in *Adickes v. S.H. Kress & Co.*,[16] stating, "[plaintiff] may have had to prove her case by im-

13 *See* Galloway v. United States, 319 U.S. 372 (1943), *reh'g denied,* 320 U.S. 214 (1943).

14 *Id.*; Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209 (1931).

15 *See* Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986); Page v. DeLaune, 837 F.2d 233, 238 (5th Cir. 1988).

16 398 U.S. 144 (1970).

peaching the . . . [defendant's] witnesses . . . . The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment . . . ."[17]

Acceptance of such a position would make summary judgment impossible except in an infinitesimal number of cases where the responding party conceded the existence of all facts that would otherwise have to be established by the testimony of witnesses, including facts which establish the authenticity of documents that, if genuine, would justify summary judgment.

The Supreme Court has never adopted this position although it could be argued that it impliedly did so in its decision in *Poller v. Columbia Broadcasting System*.[18] *Poller* was an antitrust case in which the plaintiff alleged that defendant's actions, otherwise clearly proper, had been done with an improper motive to restrain trade and to monopolize the relevant industry. Defendant moved for summary judgment on the basis of affidavits of its managers and employees who had all sworn that they had not acted with the alleged improper intent. Plaintiff had no direct evidence to counter these affidavits. The Court wrote a vague opinion setting out in detail all of the facts of the case but did not discuss the application of the seventh amendment. The Court concluded by stating:

> [W]e cannot say on this record that 'it is quite clear what the truth is.'. . . We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.[19]

Writing in dissent for himself and three others, Justice Harlan bore in on this point:

> The possibility that the jury might disbelieve the respondents' assertions of innocence is not enough to forestall the entry of summary judgment in their favor. . . . [Plaintiffs] should not be permitted to proceed to trial just on the hope that in the formal atmosphere of the courtroom witnesses will revise their testimony or that a clever trial tactic will produce helpful evidence. Courts do not exist to afford opportunities for such litigating gambles.[20]

Some six years later, in *First National Bank of Arizona v. Cities Service Co.*,[21] another antitrust case involving a similar issue of motive, Mr. Justice Marshall, writing for the Court, adopted Justice Harlan's dissenting view in *Poller* without specifically overruling that case. The dissent in *Cities Service* decried the fact that *Poller* had, in fact, been overturned.[22]

Based on these cases, and Justice Black's opinion in *Adickes*, it cannot be said with certainty that the argument that the seventh amendment re-

17 *Id.* at 176
18 368 U.S. 464 (1962).
19 *Id.* at 472-73.
20 *Id.* at 480 (citations omitted).
21 391 U.S. 253 (1968).
22 *Id.* at 303.

stricts a grant of summary judgment in favor of the party who does not have the burden of proof at trial is dead, even though such an argument is contrived and cannot be justified.

An interesting contrast is presented by an analysis of those cases in which the party who seeks summary judgment would have to bear the burden of proof if the case were to get to trial. One would expect summary judgment to be denied in nearly every action at least theoretically because a jury could disbelieve all of the moving party's witnesses solely on their courtroom demeanor and that would be sufficient to find for the responding party, regardless of whether or not the latter had produced any evidence on its own behalf. Only if the respondent had admitted the truth of all relevant evidence, so that the veracity of any witness was not in question, would a summary judgment for the party with the burden of persuasion be permitted. It is somewhat surprising then to learn that this does not seem to be the case and that if the moving party presents evidence, usually in the form of affidavits involving the statements of witnesses, lower courts have held that summary judgment is appropriate unless the responding party can refute the statements directly, or otherwise show that there are valid reasons in the record not to believe the witnesses.[23] In addition, no less an enemy of summary judgment than Justice Brennan[24] has gone out of his way, in dictum that added nothing to an understanding of the issues in the case before him, to approve the granting of summary judgment in such a situation:

> If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial. Such an affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery.[25]

From a policy point of view, there are a number of grounds to support such a result, but it is much more difficult to uphold it in the face of the seventh amendment right to trial by jury.

The upshot of all this is interesting. Litigants who have the burden of proof at trial, but who can obtain untainted, consistent, unrefuted affidavits that support their cases, can win on summary judgment even though they might have lost had the case gone to trial. For example, consider an action based solely on the testimony of two independent eye witnesses, who were the only witnesses to the acts relevant to the case. If they present straightforward, uncontradicted affidavits supporting the moving party's case, summary judgment would be granted. Let us sup-

23 *See, e.g.*, Lundeen v. Cordner, 354 F.2d 401 (8th Cir. 1966); Federal Deposit Ins. Corp. v. Spann, 30 Fed. R. Serv. 2d (Callaghan) 601, 602 & n.6 (S.D. Ala. 1980); *cf.* United States v. Underwood, 344 F. Supp. 486 (M.D. Fla. 1972).

24 Justice Brennan voted against the granting of summary judgment in *Matsushita*, *Celotex*, *Anderson*, *Adickes*, *Cities Service*, and *Poller*.

25 Celotex Corp. v. Catrett, 477 U.S. 317, 331 (1986) (Brennan, J., dissenting) (emphasis in original) (citation omitted).

pose, however, that no request for summary judgment is made and the case goes to trial. The two witnesses take the stand and, insofar as the words spoken, give testimony identical to that in the affidavits. However, while on the stand they clearly establish their unreliability by winking at jurors or making obscene gestures at the same time that they are testifying to the most important aspects of the case. Despite the fact that the bare record would reveal the testimony in favorable, one-sided terms, neither the judge nor the jurors would believe it, and the court could then refuse to grant a directed verdict, noting its reasons,[26] and permit the jury to find for the opposing party on the ground that the necessary burden of proof was not met.

In conclusion, it seems fair to say that in suits in which the moving party would not have the burden of proof at trial, courts have sometimes gone out of their way to try to find a seventh amendment limitation when none logically exists. But, when the moving party would have the burden of persuasion at trial, the courts have taken an entirely different position, and have strained to permit the granting of the motion by interpreting the amendment not to include a strict submission of matters of credibility to the jury, a questionable determination.

II. Policy Considerations

A. *Analyzing the Moving Party's Burden*

Why do we place any obligation on a moving party who would not have the burden of proof at trial to come forward with any information as a prerequisite to summary judgment? Why should not *every* party who must carry the burden of production be required to make some pretrial showing that the burden will be met in order to avoid summary judgment *on motion of the court*?[27] A short answer might be that Federal Rule 56(c) specifically requires an initial showing by the moving party:

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

Interestingly enough, neither this language nor any language in Rule 56 states when a court *cannot* grant summary judgment. Thus the rule does not, at least on its face, specifically preclude summary judgment even though its terms are not met. For example, Rule 56 would not specifically preclude a summary judgment granted pursuant to a local court rule providing for entry of summary judgment against every plaintiff who fails to make a timely pretrial showing of ability to meet its burden of producing evidence at trial.

26 The failure of a court to note its reasons on the record could result in a reversal of its decision not to grant a directed verdict. *See* Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209 (1931).

27 It appears undisputed that a federal court can grant summary judgment sua sponte. Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986).

The precise language of the rule, however, is beside the point. What policy justification is there for requiring anything from a moving party who does not have the burden of producing evidence at trial? Why should not an unsupported demand requiring the responding party "to put up or shut up" be sufficient? If the language of Rule 56 precludes that procedure, why should the rule not be amended? The procedure generally followed under Rule 56, at least prior to the 1986 decision in *Celotex Corp. v. Catrett*,[28] placed substantial emphasis on the question of whether the moving party had sufficiently established the non-existence of any material fact. The moving party had been obligated to come forward with some information, in most cases affidavits containing testimony that would be presented at trial. The responding party was then permitted to avoid summary judgment without showing that he or she could meet the burden of production at trial, merely by attacking the veracity of the moving party's affiants or the form of the moving party's supporting papers.

Sometimes federal courts, including the Supreme Court,[29] have held that an affidavit must be disregarded simply because it has been rendered by the moving party or one of its employees and is therefore unreliable, a position that is, to say the least, difficult to justify when the movant does not bear the burden of proof at trial.[30] What all this does, of course, is shift the entire inquiry from the fundamental question of whether the responding party could possibly meet its burden of proof at trial to the technical, irrelevant question of whether the moving party has met a contrived burden for summary judgment. This naturally plays into the hands of those who do not favor the summary judgment procedure. Not only can it result in the denial of motions that should be granted, and raise the potential costs of such motions to a point where they might not be made, but it tends to exacerbate, rather than ameliorate, the problems of crowded dockets and overworked court personnel.

There would appear to be two reasons for placing some requirements on a moving party who does not have the burden of production at trial. First, there are many cases, undoubtedly the vast majority, in which the litigants are fully aware that the party with the burden of production is able to call witnesses on its behalf who will carry its burden of producing evidence. Any "automatic" rule requiring all such parties to make a showing would be extremely wasteful. If one party could, merely by filing an unsupported motion, force an opponent to make a substantial showing, there would be a strong incentive to make such a filing, if for no other reason than to harass the other party and raise its costs of litigation.[31] The purpose of summary judgment is to save the courts and the

28 477 U.S. 317 (1986).

29 *See, e.g.*, Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, *reh'g denied*, 322 U.S. 767 (1944).

30 There are several excellent articles that cite the relevant authorities and explore this matter in detail. *See, e.g.*, Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 753-59 (1974); Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U.L. REV. 774, 780-810 (1983).

31 *See* Celotex Corp. v. Catrett, 477 U.S. 317, 332 (1986) (Brennan J., dissenting) (citing Louis, *supra* note 30, at 750-51).

litigants from the burdens of trying cases where no genuine dispute exists, not to raise the stakes by meaningless procedural devices. Second, there are a number of actions in which the party with the burden of proof can only establish its case through circumstantial evidence — a painstaking, item-by-item, process. It would be costly and unfair to require the responding party to go through that process at the pretrial stage, by taking numerous depositions of reluctant witnesses, obtaining affidavits from a large number of cooperating witnesses, and preparing documents for admission into evidence,[32] unless there is some sound reason to doubt that the respondent will be able to establish such a case at trial.

The necessity of placing some obligation on the moving party does not, however, signal a need for retaining a system whereby a court may spend more time listening to arguments on whether the movant has shown that no genuine fact issue exists than to arguments as to whether or not a trial would be a waste of time because the party who has the burden of production cannot possibly meet it.

In *Celotex Corp. v. Catrett*,[33] the Supreme Court dealt directly with the question at hand. The trial court had granted summary judgment in favor of defendant on the ground that plaintiff, who would have the burden of producing evidence at trial, had failed to produce any valid evidentiary material to show that it could possibly meet that burden if the case were to go forward. On appeal, plaintiff argued that under Federal Rule 56 it did not have to produce anything unless and until defendant came forward with proof that no genuine issue of fact existed. What defendant had produced were plaintiff's answers to interrogatories that had failed, on specific request, to identify any witnesses who could testify for plaintiff. The court of appeals reversed, holding that defendant was required to present affidavits and other materials specifically negating the factual allegations in plaintiff's complaint. The Supreme Court overturned the latter decision on the ground that defendant could carry its burden merely by establishing that plaintiff could not support her case and did not have to go further to show that plaintiff's allegations were incorrect. Although a five to four vote decided the case, without a majority opinion, at least eight of the Justices appear to have agreed with the above interpretation as to the defendant's obligation.

The issue that evenly divided eight of the Justices, not including Justice Stevens who dissented on an entirely different ground,[34] had to do with three items of evidence that had allegedly appeared in the record prior to the defendant's motion. Plaintiff contended that these three items sufficiently supported her case. Defendant contended that all three items consisted of inadmissible hearsay and therefore should be ignored. The trial court apparently agreed. The court of appeals, having taken the position that a plaintiff is under no obligation to come forward with anything, did not reach the question.

32 *See id.* at 328 (White, J., concurring).

33 477 U.S. 317 (1986).

34 *Id.* at 337.

Justice Rehnquist, writing for himself and three others, determined that the case should be remanded to determine whether the three items in question could be utilized to oppose defendant's motion, and, if so, whether they were sufficient to establish that plaintiff would be able to meet its burden of production at trial. Justice White, who provided the essential fifth vote for the majority, wrote a separate opinion, agreeing that the case should be remanded. He appears to differ from Justice Rehnquist on the ground that if the court, on remand, determined that the record did reveal that plaintiff had potential evidence that allegedly would support her case, defendant would have had an obligation specifically to establish that such evidence would not raise a genuine issue of material fact, and its failure to do so must result in a denial of the motion. In so deciding, Justice White was in harmony with Justice Brennan's dissent. The difference was that Justice Brennan believed that the record clearly established that there was at least one named potential witness to support plaintiff's case plus some other possible evidence in her behalf. Therefore, defendant had an affirmative obligation to establish that this potential evidence could not raise a genuine issue of material fact. Defendant had failed to meet this obligation and therefore summary judgment should have been denied; remand was unnecessary.

Celotex does clarify one aspect of the nature of a moving party's burden, making it relatively easy to obtain summary judgment when the responding party, who would have the burden of production at trial, cannot point to any evidence whatsoever to support its case. On the other hand, the hair-splitting differences among the Justices when the record contains something that might conceivably result in valid evidence in support of respondent's case are confusing to say the least. Note that under the White-Brennan position, the moving party must recognize the existence of such information and affirmatively show that it cannot support respondent's case. A movant cannot wait for the respondent to raise the matter; failure of movant to deal with the information is itself a ground for denying the motion before any obligation on the part of respondent arises. To be fair, it should be noted that the *Celotex* defendant had been made aware of the existence of the three items of potential evidence in the course of a prior motion. But that does not answer the nagging question of what happens in a case in which some suggestion of potential evidence to support a respondent's case is hidden in the files.

Must the moving party comb through all the material available to see if there is *something* to be refuted even though the responding party has never mentioned it in answers to interrogatories requesting relevant evidence? Suppose the movant's attorney has merely heard a rumor as to the existence of a witness who will support the respondent's case. Must the matter be investigated and refuted before summary judgment can be granted? Such an obligation is at least implied in *Adickes v. S. H. Kress & Co.*,[35] in which the Court held that summary judgment was precluded by the failure of the moving party to provide depositions or affidavits of

35 398 U.S. 144 (1970).

every possible material witness which showed that no one of them could testify on the respondent's behalf even though there was not the slightest indication in the record that any of them would do so.

Adickes involved a suit brought by a white teacher who was refused service at defendant's restaurant facilities because she was accompanied by her black students. The complaint alleged that defendant had acted under state law and therefore plaintiff could sue under federal civil rights law. Because defendant was a private, non-governmental entity, it was incumbent on plaintiff to establish that defendant had conspired with state police officials in order to recover. Defendant moved for summary judgment on the basis of affidavits stating that there had been no such conspiracy. Plaintiff did not offer any counter evidence but argued successfully that summary judgment had to be denied because defendant had not produced affidavits or other testimony from several police officers and a waitress who had been in the restaurant. Taken at face value, the *Adickes* opinion would severely, and unnecessarily cripple the use of summary judgment. However, *Adickes* can be explained in that it was an important civil rights case that the Court did not want to dispose of without trial. The discussion of summary judgment was simply a means of masking a difficult substantive issue.

In summary, it seems clear that from a strictly theoretical point of view a party who moves for summary judgment, unless he or she must bear the burden of proof at trial, should need to do no more than demand that the opposing party establish that it can meet its burden of production if the case is permitted to go to trial. As has been noted, however, this would leave open a gaping opportunity for motions made primarily for the purpose of harassment. On the other hand, the elaborate rules that have emerged in some courts, requiring the moving party to put on evidence to negate the responding party's allegations or to comb the record to establish that the responding party has no evidence to present at trial, tend to discourage summary judgment motions and, when they are brought, to embroil parties in the question of whether the summary judgment motion is properly supported rather than whether there is a true dispute that needs to be tried.

One possible solution would permit a court sua sponte or possibly on party request to order a party with the burden of proof at trial to establish the existence of a case, or of a specific factual issue in a case.[36] The standard for granting such an order would be a reasonable belief by the court that the party so charged will be unable to sustain its burden of production should the case get to trial. But there would be no formal obligations as now must be met by a party seeking summary judgment. In situations similar to those in *Celotex*, there seems little reason why respondent should not have been required to establish, through deposition

36 *See* Sutton v. United States, 819 F.2d 1289, 1299 (5th Cir. 1987), in which the court suggested that the trial judge should have ordered the parties initially to argue the defense of governmental immunity through summary judgment. The court noted that immunity was not only a defense to liability but was also designed to protect government agents from the costs of litigation; thus it was important at the very outset to determine whether there was any factual dispute concerning the existence of immunity.

or affidavit, the existence of available potential evidence to support its factual allegations, regardless of whether the movant has failed to meet technical requirements in making or supporting its motion for summary judgment. By putting the onus on the court, and providing it the opportunity to issue the order sua sponte, much of the danger of undue harassment can be eliminated. It is assumed that many of the orders would be issued only after or in connection with formal summary judgment proceedings. Any provision allowing such an order to be entered should permit the trial judge unfettered discretion in denying the order. It should be explicit that an order should not be granted unless the cost of compliance would not be burdensome or at least far less than the cost of proof at trial. To the extent that a party is permitted to request that the court enter such an order, and such request is granted, it should be clear that by making the request, the party opens the way for the court, in its discretion, to charge the moving party for the costs the opponent reasonably incurs in successfully establishing that it can, indeed, carry its burden of production at trial.

B. *Analyzing the Responding Party's Burden*

For purposes of exploring the nature and extent of the obligations of a litigant in response to a motion for summary judgment, it is useful to assume that the moving party has met its burden. Given that assumption, what is it that the respondent should be required to do to avoid losing the case? How much and what kind of information must it present?

1. The General Duty to Respond

Surely summary judgment should normally be granted if the responding party can produce nothing on its behalf, or so little that, if it were all that was presented at trial, a directed verdict would be in order.[37] Although it is generally stated that the standards for summary judgment and directed verdict are identical, in practice "many courts persist in denying summary judgment in cases in which a directed verdict might well be granted, merely on the basis of the ill-conceived belief that justice always is better served by permitting the litigant a day in court."[38] Naturally, before its response is required, a party must be given ample opportunity to seek and obtain the information needed, through formal discovery and otherwise.[39]

37 *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986); Sonenshein, *supra* note 30, at 784.

38 Sonenshein, *supra* note 30, at 784-85.

39 Federal Rule of Civil Procedure 56(f) specifically provides for such opportunities:

> Should it appear from affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

See Garrett v. San Francisco, 818 F.2d 1515 (9th Cir. 1987), holding that the trial court erred in granting summary judgment without ruling on pending motions for discovery which, if granted, could have led to evidence in support of the party opposing the motion. Note that courts have often

There are two reasons why a responding party who fails to produce information sufficient to avoid a directed verdict at trial might nevertheless be permitted to proceed to trial. First, there are rare cases in which the cost of meeting a motion for summary judgment would be too high to justify normal operation of the rule. If the price is very high and if it would be just as efficient to go through with the trial itself, the motion ought to be denied. The courts should not accept such an excuse unless the responding party can demonstrate forcefully that denial of the motion would clearly be in the interest of justice. Second, there are some actions in which the denial of summary judgment is, in reality, based upon a hidden substantive determination regarding the particular cause of action involved. As has already been noted above,[40] this could explain the Supreme Court's decision in *Adickes v. S. H. Kress & Co.*, and it can perhaps explain the decisions in *Poller v. Columbia Broadcasting System*[41] and other similar decisions in complex antitrust cases.[42] It would be preferable, of course, if the courts could decide such cases on their merits without the need for twisted procedural interpretations.

2. The Sufficiency of a Response

Whenever one party moves for summary judgment with sufficient supporting materials, the opposing party will always be able to defeat the motion by putting in direct evidentiary material supporting its side of the case. Thus if a defendant, who is charged with negligently driving into the plaintiff, moves on the basis of an affidavit that he was not driving at the time in question, plaintiff can defeat the motion with his own affidavit that he saw defendant operating the car when the accident occurred. Even if the responding party cannot produce evidence directly in support of its case, it may still defeat summary judgment by producing sufficient circumstantial evidence for a trier of fact to find in respondent's favor. It makes no difference in either situation how strong a case the defendant presents. The court must assume, for purposes of the motion, that a trier of fact would not believe any of the moving party's witnesses.

When respondent's evidence is circumstantial, there is always a lurking question of whether such evidence is sufficient to avoid summary judgment. Courts have found it awkward to articulate a specific positive standard for sufficiency. What they have done is to provide verbal guidelines as to what evidence should be considered and when that evidence is not, rather than when it is, enough to avoid summary judgment. Thus it has been consistently held that a court, in making its determination, must look to the evidence in the light most favorable to the respondent, ac-

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been quite strict in requiring parties to move with dispatch under Rule 56(f) and to present the required affidavit setting forth the nature of the information they expect to obtain through discovery. The failure to do so has frequently led appellate courts to uphold trial courts' decisions granting summary judgment. *See, e.g.*, Barona Group of the Capitan Grande Band of Mission Indians v. American Management & Amusement, Inc., 824 F.2d 710 (9th Cir. 1987); Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828 (10th Cir. 1986).

40 *See supra* note 35 and accompanying text.

41 *See supra* text accompanying notes 18-20 for the facts of the *Poller* case.

42 *See* 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2732.1, at 322-23 (2d ed. 1983).

cepting all justifiable inferences in respondent's behalf and rejecting any contrary evidence and inferences.[43] If the evidence so viewed provides no more than a "scintilla" of support for respondent's case,[44] or a mere "metaphysical" argument on respondent's behalf,[45] courts have held it to be deficient. As one would expect, judges find it much easier to analyze the matter on the basis of the evidentiary material before them, rather than to speak in abstract terms of where to draw the line. Nevertheless, there is a technically correct theoretical position that must be used as a baseline for the analysis of the evidentiary material in any case. To be sufficient to defeat a motion for summary judgment, a trier of fact must be able to find that the evidence meets the requisite burden of persuasion applicable to the issues in the case. In the ordinary suit, therefore, were it to go to trial, a jury would have to be able to find that it was more probable than not that respondent's factual contentions were correct. If the evidence is insufficient to allow a jury to make such a determination, then the jury would be bound to find for the opposing party. Hence, summary judgment for the latter party should be granted.

The obvious reason that courts tend to shy away from articulating the standard in terms of the required burden of proof is that a decision made on that basis is, at its core, a matter of judgment.[46] There is no magic formula to be applied. Nor can the courts legitimately pretend that there is, or can be, but one "correct" result. Certainly in close cases the decision may well turn on the judge's personal experiences and views of the surrounding world.[47] This is not a unique situation. For example, a question of whether a proffered item of evidence is relevant, i.e. whether it can assist the trier of fact in making its decision, raises identical problems.[48] Fortunately, in the vast majority of cases involving circumstantial evidence, the issue of sufficiency is not a close one and different judges would not be likely to come to different conclusions.

Nevertheless, once it is conceded that the determination of sufficiency will depend not only on the evidence itself but also on the background and perceptions of the judge who happens to hear the case, there is a dilemma. On the one hand, one may ask why all judgments as to the value of evidence are not within the exclusive province of the trier of fact. Indeed, what sense does it make to allow such a determination to be appealed? Will it not be true that the only *correct* decision will, by definition, be the *last* decision, and will depend on factors unique to the judge or judges who make it? On the other hand, if we simply concede that the

43 *Id.* § 2727, at 124-28. *See also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

44 *Anderson*, 477 U.S. at 251.

45 *See* Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

46 The very fact that the courts must make such judgments has led Justice Brennan to argue that summary judgment should not be discussed in terms of the burden of proof. Instead he would require only that the responding party establish a "prima facie" case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 263-68 (Brennan, J., dissenting). *See* the discussion of *Anderson, infra* text accompanying notes 50-53.

47 *See* Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 956-60 (1971).

48 *See* J. FRIEDENTHAL & M. SINGER, THE LAW OF EVIDENCE 7 (1985).

determination of sufficiency is for the trier of fact, do we not effectively eliminate summary judgment except in the rarest of cases?

Resolution of this matter is not trivial. Ultimately it rests on the often unarticulated determination that decisions concerning the sufficiency of evidence to get to a trier of fact, even when based on human judgment, are of a different quality than decisions by the trier of fact on evidence that it receives, and that the former falls outside the scope of the right to trial by jury. As we have already noted,[49] it was decided long ago that the jury did not have unfettered power to make all decisions of fact. The need to limit the jury by directed verdict, and hence by summary judgment, has long been recognized. Courts are called upon every day to make judgments of "law" that are based on factual determinations; appellate courts can and do disagree with those determinations and reverse on that basis. Judges cannot be timid, and therefore improperly turn a case over to a jury, merely because other judges might disagree. One would hope that in the context of summary judgment, appellate courts would give due deference to the trial judge's ruling, thus helping to stem the flow of "automatic appeals" by litigants against whom such a ruling has been made.

The power to grant summary judgment can seriously be undercut, however, unless courts are willing to recognize the appropriate standard for testing sufficiency. That is why the Supreme Court's 1986 decision in *Anderson v. Liberty Lobby, Inc.*[50] is of substantial importance for it makes clear that the technically correct theoretical standard for determining the sufficiency of evidence must be applied. *Anderson* involved a suit for defamation in which plaintiff, at trial, would be required to establish the key factual issue in the case, the existence of defendant's malice, by clear and convincing evidence rather than by a preponderance of the evidence. The court of appeals had refused to apply the higher standard in ruling upon the defendant's motion for summary judgment. The Supreme Court reversed and remanded so that the proper standard could be applied.

Justice Brennan dissented on the ground that the basis for granting a motion for summary judgment under Federal Rule 56 is whether a genuine issue of material fact exists and not whether the evidence is such that a trier of fact could find for the responding party at trial. Somehow the Justice failed to see any relationship between the two; yet the heart of his opinion is based on a requirement that respondent had to have presented a "prima facie" case.[51] If he means that on the evidence a reasonable jury could have found that there was clear and convincing evidence of malice, and that is what he seems to say,[52] then he should have agreed with the majority as to the standard to be applied and merely argued that it was not followed. If he means that summary judgment must be denied whenever respondent has presented some evidence, even

49 *See supra* notes 13-14 and accompanying text.
50 477 U.S. 242 (1986).
51 *Id.* at 267-68.
52 *Id.*

though it is not enough to prevail at trial, then he should have simply denounced the current standard for summary judgment as a means for deciding cases.

Justice Rehnquist dissented in a separate opinion for himself and Chief Justice Burger.[53] They objected primarily on the ground that in few if any cases will the application of the higher standard of proof make any difference. If a court holds that the evidence is sufficient to go to a trier of fact under a "more-probable-than-not" standard, it will in almost every case hold that the evidence is also sufficient under a "clear-and-convincing" standard. Therefore, the Court's decision, based solely on abstract theory without application to any particular set of facts, is likely to result in erratic and inconsistent lower court decisions.

It may be that the Court should have expanded its opinion, noting that the standard it articulated would rarely make a difference in similar cases, and giving examples of when it would have an impact. But the failure to do so does not justify an opposite decision, ignoring an important principle. Perhaps Justice Rehnquist could have made his points better if his opinion had been in the form of an objection to the granting of certiorari instead of a dissent.

3. The Problem of Equal Inferences

The question of whether a responding party's evidentiary material is sufficient to defeat summary judgment involves a peculiar twist when such evidence appears to permit competing inferences, one that would support respondent's case and one that would defeat it. The conventional view,[54] developed largely in cases brought under the Federal Employers Liability Act (FELA)[55] and the Jones Act,[56] and involving the propriety of directed verdicts or judgments notwithstanding the verdict,[57] is that the trier of fact must be permitted to choose between such competing inferences, even if they seem equally plausible to the trial judge. Otherwise, it is said, the court would infringe "upon the jury's power to weigh the evidence and the inferences and then make the ultimate findings of fact."[58]

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[59] a complex antitrust case, the Supreme Court appears to have taken a different position. The question was whether the defendants had entered into a conspiracy to monopolize the United States market for consumer electronic products. It was alleged that defendants had, over two decades, sold

53 *Id.* at 268.

54 A debate exists over whether the FELA and Jones Act cases are to be confined to actions under those statutes or whether they are generally applicable to all civil cases in the federal courts. A very large majority of the suits involving the issue that have been decided by the United States Supreme Court have involved the two statutes. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2526 (1971).

55 45 U.S.C. §§ 51-60 (1983).

56 46 U.S.C. § 688 (1983).

57 For an excellent analysis, see Cooper, *supra* note 47, at 956-60. *See also* Collins, *supra* note 12, at 502-03.

58 Collins, *supra* note 12, at 503-04.

59 475 U.S. 574 (1986).

their goods in the United States at artificially low prices in order to drive out their competitors. The evidence was clear, however, that if such a conspiracy existed, it had been woefully unsuccessful. The defendants' market share, although it had grown, was by no means large enough to permit them to charge monopoly profits. The Court concluded that defendants had no motive to conspire to depress their prices over so long a period of time without any showing that an attempt to monopolize would be successful. Therefore, one could reasonably infer that there was no conspiracy and that defendants had acted independently or without any intention to monopolize. The Court went on as follows:

> [T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a "genuine issue for trial" exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.[60]

In a footnote the Court reinforced the point by stating, "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy."[61]

Should the opinion be subject to attack on the ground that it is the result of the improper weighing of the various implications of the basic evidence, which weighing should be left to the jury? To answer one must return to the basic standard for deciding when evidentiary material is sufficient to defeat a motion for summary judgment, i.e., whether a reasonable jury could find that it was more probable than not that defendants had entered into a conspiracy to monopolize the American market. It should not be enough to say that if the evidence can give rise to competing inferences, it is up to the jury to decide the case, for it is not clear just what is meant by the term "competing inferences" in this context.

It is only when a trier of fact could reasonably choose between inferences that summary judgment should be denied. In some situations it is clear without question that no rational choice is possible. For example, consider a case in which two cars enter an intersection at right angles and strike one another killing both drivers and all passengers. There are no eyewitnesses to the accident. The only evidence available is that there was a working traffic light; thus one of the drivers, but only one, had to go through a red light. It could be said that the evidence leads to competing inferences that each of the drivers had violated the traffic signal. Since there is no way that a reasonable jury could choose between the inferences, summary judgment should be granted in favor of the party who does not have the burden of establishing fault. One could argue that this is not a case of competing inferences at all; it is really a situation in which there can be no inference. The latter view would seem to be consistent with the language quoted above from the opinion in *Matsu-*

60 *Id.* at 596-97.

61 *Id.* at 597 n.21.

shita in which the Court says that if the explanations are equally plausible *no inference* of conspiracy can be drawn.

There are situations in which, arguably, undisputed evidence can give rise to different inferences and when a reasonable choice between them can be made. Suppose, for example, *X* must take a certain pill once a day to remain alive. The pill is highly toxic. To take two within 24 hours is fatal. *X* is found dead in his bedroom and the evidence is clear that he took two pills that day. If *X* died by accident, his estate will receive a large sum of insurance money; if he committed suicide, the amount will be substantially reduced. The uncontradicted evidence shows that several hours before his death, *X* made out a new will, substantially different from the one previously in force. It also shows that at about the same time, *X* made plans to accompany several friends on a fishing trip on the following day. In these circumstances reasonable people could differ as to which of the possible inferences, suicide or accident, is the most plausible and the matter should be decided by a trier of fact.

There are cases that fall between the two above, in which there is a close question whether a trier of fact has a reasonable basis to select among different inferences. Such a determination must be made by the judge. Prior to *Matsushita*, courts had sometimes invoked the conventional view that the decision between competing inferences was always for the jury, without closely analyzing the facts to see whether there were grounds by which a reasonable person could select between them.[62] Such a mechanical approach left to the jury cases that seemingly should have been determined by the court. This was especially true in FELA cases in which the conventional view was developed. In a number of the FELA cases, it is difficult if not impossible to ascertain any rational basis by which a trier of fact could determine what actually occurred, yet the cases were submitted to a jury for decision.[63] It is important to recognize, however, that FELA cases are atypical; there are special substantive reasons why the courts do not want to decide such cases without trial.[64] If the opinion in *Matsushita* causes federal courts to recognize that there is no justification for a special rule regarding competing inferences, it

62 *See, e.g.*, Schulz v. Pennsylvania Ry. Co., 350 U.S. 523 (1956). In Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35, *reh'g denied*, 321 U.S. 802 (1944), the Court, in reversing a determination by a federal court of appeals that a directed verdict should have been granted by the trial judge, stated:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . . The very essence of its [the jury's] function is to select among conflicting inferences and conclusions that which it considers most reasonable. . . .
>
> Upon an examination of the record we cannot say that the inference drawn by this jury . . . is without support in the evidence.

63 *E.g.*, Schulz v. Pennsylvania Ry. Co., 350 U.S. 523 (1956); Harris v. Pennsylvania Ry. Co., 361 U.S. 15 (1959) (per curiam decision; facts supplied in Justice Harlan's dissenting opinion); *cf.* Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521 (1957) (note Justice Harlan's dissenting opinion covering this and three different cases).

64 *See* Cooper, *supra* note 47, at 926-27.

will greatly assist courts to properly dispose of cases without need for a costly trial.

III. Conclusion

On the whole, courts in the past have been reluctant to analyze sensitive aspects of summary judgment to determine when the granting of a motion is or is not appropriate. The result, in general, has been to deny summary judgment in cases where it should have been granted. The Supreme Court in its opinions in *Anderson* and *Matsushita*, as well as in *Celotex*, has refocussed attention on summary judgment and has made a start on providing a logical framework for deciding how and when it can be used. Unfortunately, none of the decisions are as clear and precise as one would hope; nevertheless, the net effect should be the more widespread granting of summary judgment in those cases in which it is justified.