

# Federal Summary Judgment: The “New” Workhorse For An Overburdened Federal Court System

*Recently the Supreme Court, in Celotex Corp. v. Catrett and Anderson v. Liberty Lobby, Inc., changed the appropriate burdens of proof that apply to federal summary judgment motions. These decisions heighten the nonmoving party's burden of proof at the summary judgment level while decreasing the moving party's burden of proof. This Comment examines the Court's decisions and the lower federal courts' application of the new standards. The Comment concludes by suggesting procedural safeguards to ensure adequate discovery and notice at the summary judgment level.*

Since its inception in 1938, confusion and uncertainty have plagued summary judgment under Rule 56 of the Federal Rules of Civil Procedure.<sup>1</sup> Commentators attribute this confusion to the Rule's poor draftsmanship<sup>2</sup> and the courts' inability to define clearly what is a “genuine

---

<sup>1</sup> Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 465 (1984); see also Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 72 (1977) (the summary judgment procedure is “surrounded by unnecessary confusion”); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974). Louis observes that:

Few [summary judgment cases] . . . set forth a useful rationale for deciding whether to grant the motion. Most simply draw from the available clichés, which are selected in classic cut-and-paste style to support whatever result the court feels is proper. In reality most judges are simply muddling through and denying the motion whenever they are in doubt.

Id. at 746; see Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U.L. REV. 774, 775 (1983) (summary judgment has failed to realize its potential due to uncertain application).

<sup>2</sup> See Schwarzer, *Summary Judgment: A Proposed Revision of Rule 56*, 110 F.R.D. 213, 213 (1986) (“Experience under the rule demonstrates that it contains ambiguities and contradictions that at times hamper the effectiveness of the rule in avoiding unnecessary trials.”); *The Supreme Court, 1985 Term, Leading Cases — Summary Judgment*, 100 HARV. L. REV. 250, 250 (1986) [hereafter *The Supreme Court, 1985 Term*] (“the vague language of rule 56 has confused courts and led to inconsistent applications

issue of material fact.”<sup>3</sup> Uncertainty over the burdens of proof in a summary judgment motion also perplexes federal courts.<sup>4</sup> Additionally, some courts exhibit hostility towards summary judgment due to lawyers’ abuse,<sup>5</sup> a perceived high rate of reversal,<sup>6</sup> and concern with preserving a claimant’s right to a jury trial.<sup>7</sup>

In two recent decisions, *Celotex Corp. v. Catrett*<sup>8</sup> and *Anderson v. Liberty Lobby, Inc.*,<sup>9</sup> the United States Supreme Court addressed sev-

---

of summary judgment”).

<sup>3</sup> Schwarzer, *supra* note 1, at 465; see Sonenshein, *supra* note 1, at 776 (courts are uncertain “about what showing is required to demonstrate the lack of a genuine issue of material fact”); see also Pyle, *An Appraisal of Summary Judgment Practice Under Rule 56 Federal Rule of Civil Procedure*, 31 Miss. L.J. 147, 151 (1960) (courts and commentators disagree on what constitutes a genuine issue of material fact).

<sup>4</sup> Louis, *supra* note 1, at 746. Louis points out that courts often fail to distinguish between moving parties who will bear the burden of proof at trial and those who will not. *Id.* at 769; see also Schwarzer, *supra* note 2, at 216 (confusion over whether movant has satisfied its burden arises from Rule’s failure to explain what “support” is necessary to meet that burden).

<sup>5</sup> See Schwarzer, *supra* note 1, at 465; see also *Professional Mgrs., Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 221-22 (5th Cir. 1986) (“Summary judgment has often been used improperly: as a discovery device; to educate the trial judge; in the hope, however faint, of a quick victory; and in the expectation, frequently realized, of retarding the progress of a suit and making litigation more expensive.”).

<sup>6</sup> See Schwarzer, *supra* note 1, at 467. Schwarzer notes that reported decisions present a “distorted picture” that reinforces the perception that summary judgment suffers from a high reversal rate. *Id.* This distortion exists because reported decisions are more likely to result in reversals than unpublished opinions. *Id.* For example, of 1,098 summary judgment orders appealed to the Ninth Circuit between 1979 and 1983, 78% of the unpublished opinions were affirmed while only 52% of the published decisions were affirmed. *Id.* at 467 n.9. See generally McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. LEGAL STUD. 427, 449 (1977) (affirmance in only 51.4% of 215 summary judgment decisions appealed to the Circuit Courts); Sonenshein, *supra* note 1, at 775 n.5 (listing studies of affirmance rates of summary judgment motions on appeal in California, Florida, and Texas). However, a recent decision reveals judges’ continued concern with the reversal rate of summary judgment orders. *Jensen v. Times-Mirror*, 647 F. Supp. 1525, 1527 (D. Conn. 1986) (“When any judge finds that a case presents, or fails to present, a jury question, the decision will always be subject to appellate review and, potentially, a contrary finding.”).

<sup>7</sup> See, e.g., *Tippens v. Celotex Corp.*, 805 F.2d 949, 952-53 (11th Cir. 1986), *reh’g denied*, 815 F.2d 66 (11th Cir. 1987) (“Summary judgment is such a lethal weapon, depriving a litigant of a trial on the issue, caution must be used to ensure that only those cases devoid of any need for factual determinations are disposed of by summary judgment.”); *Greenberg v. Food & Drug Admin.*, 803 F.2d 1213, 1216 (D.C. Cir. 1986) (“[B]ecause summary judgment is a drastic remedy, courts should grant it with caution so that no person will be deprived of his or her day in court.”).

<sup>8</sup> 106 S. Ct. 2548 (1986).

<sup>9</sup> 106 S. Ct. 2505 (1986).

eral problems surrounding the summary judgment procedure. In these cases the Court attempted to provide "a more coherent analytical framework"<sup>10</sup> for deciding summary judgment motions.

This Comment examines the Court's recent decisions and their effect on the burdens and standards of proof at the summary judgment level. Part I briefly describes the summary judgment procedure under Rule 56.<sup>11</sup> Part II analyzes *Celotex* and *Anderson* and discusses the Court's view of the appropriate summary judgment standards. Part III examines the lower courts' interpretations and applications of *Celotex* and *Anderson*. Part III also highlights several qualifications that lower courts have placed on the standards to prevent premature or inadequately supported summary judgment motions. Part IV proposes modifications to clarify the appropriate summary judgment standards. This part also examines the problems of proper notice and adequate discovery that arise from the *Celotex* and *Anderson* decisions. The Comment concludes by suggesting several procedural safeguards courts can utilize to prevent these problems.

### I. AN OVERVIEW OF RULE 56

The purpose of summary judgment is to eliminate, at a pretrial level, issues and claims inappropriate for trial.<sup>12</sup> Properly used, summary judgment achieves the Federal Rules' fundamental goal of "secur[ing] the just, speedy, and inexpensive determination of every action."<sup>13</sup>

Under Rule 56, either party to an action may move for summary judgment on the whole action or any issue within it.<sup>14</sup> The moving

---

<sup>10</sup> *The Supreme Court, 1985 Term, supra* note 2, at 250. See generally Schwarzer, *supra* note 2.

<sup>11</sup> For an in-depth analysis of the summary judgment procedure see 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶¶ 56.01 - .27 (2d ed. 1985); 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE §§ 2719 - 2750 (2d ed. 1983) [hereafter C. WRIGHT].

<sup>12</sup> See *Louis, supra* note 1, at 769 ("The primary function of summary judgment is to intercept factually deficient claims and defenses in advance of trial."). The Advisory Committee to the Federal Rules states that "the very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." FED. R. CIV. P. 56 Advisory Committee's Note.

<sup>13</sup> FED. R. CIV. P. 1; Schwarzer, *supra* note 1, at 465 ("Summary adjudication of claims or defenses is one means for implementing the fundamental policy of the Federal Rules state in Rule 1").

<sup>14</sup> FED. R. CIV. P. 56(a), (b) provide:

(a) For Claimant. A party seeking to recover under a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after

party may make the motion with or without supporting affidavits,<sup>15</sup> and the nonmoving party may submit affidavits in opposition to that motion.<sup>16</sup> The parties must base their affidavits on "personal knowledge" and "set forth such facts as would be admissible in evidence."<sup>17</sup> Although the affidavits and other evidence<sup>18</sup> need not be in a form that is admissible in court,<sup>19</sup> this material must contain admissible facts.<sup>20</sup>

Rule 56(c) mandates the entry of summary judgment when the evidence in the record shows the lack of a genuine issue of material fact.<sup>21</sup> A factual dispute does not always render summary judgment inappropriate.<sup>22</sup> The dispute must be both "material" and "genuine."<sup>23</sup> A material fact is one that constitutes an "essential element" of the claim or defense.<sup>24</sup> A genuine issue exists if the evidence could cause "reasonable

---

service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* 56(c) provides, in part, that:

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.

<sup>17</sup> *See id.* 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.").

<sup>18</sup> For an exhaustive listing of other evidence and material with which a party may support a summary judgment motion see J. MOORE, *supra* note 11, ¶ 56.11, at 197-300. This material includes oral testimony, judicial notice, presumptions, stipulations, transcripts of a court, administrative records, or other exhibits identified by affidavits. *See id.*

<sup>19</sup> *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1986).

<sup>20</sup> J. MOORE, *supra* note 11, ¶ 56.11, at 204; C. WRIGHT, *supra* note 11, § 2721, at 40-46.

<sup>21</sup> *See* FED. R. CIV. P. 56(c).

<sup>22</sup> *Louis*, *supra* note 1, at 748; *Schwarzer*, *supra* note 1, at 481; *see, e.g., Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *Russell v. Salve Regina College*, 649 F. Supp. 391, 395 (D.R.I. 1986) ("[T]he mechanism of Rule 56 does not require that there be no unresolved questions of fact; it is sufficient if there are no genuine issues remaining as to any material facts.").

<sup>23</sup> *Professional Mgrs., Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 222 (5th Cir. 1986); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978).

<sup>24</sup> *Louis*, *supra* note 1, at 747. For a detailed discussion of what constitutes a "material" fact, see *Schwarzer*, *supra* note 1, at 469-81. *Schwarzer* concludes that a fact is

persons to disagree.”<sup>25</sup>

Under Rule 56(e),<sup>26</sup> after the movant makes a properly supported motion<sup>27</sup> the nonmoving party must go beyond the pleadings and present specific facts that justify a trial.<sup>28</sup> If the nonmoving party does not respond adequately, the court may enter summary judgment for the moving party if appropriate.<sup>29</sup> The “if appropriate” standard gives federal courts discretion to deny a summary judgment motion although insufficiently opposed by the nonmoving party.<sup>30</sup> Finally, under Rule 56(f),<sup>31</sup> the opposing party may submit an affidavit requesting a continuance to allow for further discovery to respond to a summary judgment motion.<sup>32</sup>

---

material only if its resolution is necessary to the action’s outcome. *Id.* at 480; *see, e.g.*, *Angel v. Seattle First Nat’l. Bank*, 653 F.2d 1293 (9th Cir. 1981).

<sup>25</sup> Schwarzer, *supra* note 1, at 481. When considering evidence in a motion for summary judgment, the court must draw all reasonable inferences in favor of the nonmoving party. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1969) (movant’s material “must be viewed in the light most favorable to the opposing party”); *Louis*, *supra* note 1, at 747. For an in-depth discussion of what constitutes a “genuine” dispute, *see* Schwarzer, *supra* note 1, at 481-89.

<sup>26</sup> FED. R. CIV. P. 56(e) provides, in part, that:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

<sup>27</sup> A court determines whether a movant has supported its motion by looking to Rule 56(c), which requires that the movant “show that there is no genuine issue as to any material fact.” *Id.* 56(c).

<sup>28</sup> *Id.* 56(e).

<sup>29</sup> *Id.*

<sup>30</sup> J. MOORE, *supra* note 11, ¶ 56.15[6], at 601-15. Judges should have discretion to deny summary judgment if the court has doubts about terminating the litigation. *See* C. WRIGHT, *supra* note 11, § 2728, at 188. This is especially true when the opposing party is a pro se litigant or the party’s noncompliance is merely technical. *E.g.*, *Murrell v. Bennett*, 615 F.2d 306 (5th Cir. 1980). However, Wright warns that “too frequent exercise of discretion to deny summary judgment by the courts could vitiate the utility of the procedure.” C. WRIGHT, *supra* note 11, § 2728, at 188.

<sup>31</sup> FED. R. CIV. P. 56(f) states that:

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

<sup>32</sup> Generally, courts liberally, but not automatically, grant continuances. *See* Schwarzer, *supra* note 2, at 215. A court may deny a Rule 56(f) motion when the

Although the summary judgment procedure is neither new nor complex, the Rule's vague language has prevented courts from developing a consistent analytical approach to deciding motions.<sup>33</sup> Rather, courts tend to review each case on its own particular facts.<sup>34</sup> Consequently, an "ad hoc jurisprudence" has arisen, frustrating the Rule's intent to provide for the efficient disposition of cases in federal courts.<sup>35</sup>

## II. THE SUPREME COURT'S ENUNCIATION OF THE BURDENS AND STANDARDS OF PROOF IN A SUMMARY JUDGMENT MOTION

The confusion over the proper standards of proof to apply to a summary judgment motion has led courts to apply Rule 56 inconsistently.<sup>36</sup> The courts' varied approaches to Rule 56 has created uncertainty and hampered the effectiveness of the summary judgment procedure.<sup>37</sup> The Supreme Court, in *Celotex Corp. v. Catrett*<sup>38</sup> and *Anderson v. Liberty Lobby, Inc.*,<sup>39</sup> attempted to correct these problems by delineating the proper burdens and standards of proof that apply in a summary judgment motion.

---

party has had adequate time for discovery, *e.g.*, *Gierginger v. Silverman*, 731 F.2d 1272 (7th Cir. 1984), fails to comply with the Rule's requirements, *e.g.*, *Herbert v. Wicklund*, 744 F.2d 218 (1st Cir. 1984), or when allowing the party further discovery would be immaterial, *e.g.*, *Taylor v. Gallagher*, 737 F.2d 134 (1st Cir. 1984).

<sup>33</sup> See *supra* note 2 and accompanying text.

<sup>34</sup> Schwarzer, *supra* note 1, at 466.

<sup>35</sup> *Id.* at 466-67.

<sup>36</sup> See Sonenshein, *supra* note 1, at 777. Sonenshein describes three different standards articulated by federal courts. *Id.* Some courts apply a "slightest doubt" test. *Id.* These courts deny summary judgment whenever the "slightest doubt exists regarding whether the movant is entitled to a judgment." *E.g.*, *Bankers Trust Co. v. Transamerica Title Ins. Co.*, 594 F.2d 231 (10th Cir. 1979); *Clark v. West Chem. Prods., Inc.*, 557 F.2d 1155 (5th Cir. 1977); *Ferguson v. Omnimedia, Inc.*, 469 F.2d 194 (1st Cir. 1972); *Dolgow v. Anderson*, 438 F.2d 825 (2d Cir. 1970). A second group of courts deny summary judgment only when the nonmoving party produces "specific facts" that establish a genuine issue of material fact. Sonenshein, *supra* note 1, at 777-78; *e.g.*, *Willets v. Ford Motor Co.*, 583 F.2d 852 (6th Cir. 1978). Finally, other courts grant summary judgment when the movant is entitled to a directed verdict at trial. Sonenshein, *supra* note 1, at 778; see, *e.g.*, *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341 (9th Cir. 1978); *Ralph C. Wilson Indus. v. American Broadcasting Cos.*, 598 F. Supp. 694 (D.C. Cal. 1984).

<sup>37</sup> See Sonenshein, *supra* note 1, at 775.

<sup>38</sup> 106 S. Ct. 2548 (1986).

<sup>39</sup> 106 S. Ct. 2505 (1986).

A. *The Moving Party's Burden of Going Forward in a Summary Judgment Motion*

The plaintiff in *Celotex* brought a wrongful death action alleging that exposure to the defendant's asbestos products caused her husband's death.<sup>40</sup> After a year of discovery, the defendant Celotex moved for summary judgment.<sup>41</sup> Celotex's motion asserted that the plaintiff's evidence did not demonstrate that the decedent was exposed to their asbestos products.<sup>42</sup> The plaintiff opposed the motion by producing several documents that purported to demonstrate a genuine issue of material fact.<sup>43</sup> The district court ruled that the plaintiff's evidence was inadmissible, and granted Celotex's motion.<sup>44</sup> In a divided opinion, the Circuit Court of Appeals for the District of Columbia reversed.<sup>45</sup> The majority held that Celotex's motion was "patently defective" because Celotex simply attacked the plaintiff's evidence, without presenting "any evidence, in the form of affidavits or otherwise, to support its motion."<sup>46</sup>

The Supreme Court, in a five to four decision, with Justice White concurring, reversed the court of appeals.<sup>47</sup> Writing for the majority, Justice Rehnquist stated that Rule 56(c) mandates summary judgment

---

<sup>40</sup> *Celotex*, 106 S.Ct. at 2551. In her complaint the plaintiff named fourteen defendant corporations in addition to Celotex. *Id.*

<sup>41</sup> *Id.* Two of the fourteen other defendants moved for dismissal for lack of personal jurisdiction. *Id.* The rest moved for summary judgment. *Id.*

<sup>42</sup> Celotex asserted that, in response to interrogatories, the plaintiff failed to name any witnesses who would testify at trial regarding the decedent's exposure to Celotex's products. *Id.*

<sup>43</sup> These documents included the decedent's deposition and letters from the decedent's former supervisor and an insurance representative. *Id.* These documents "all tend[ed] to establish that the decedent had been exposed to petitioner's asbestos products." *Id.*

<sup>44</sup> The district court ruled that "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." *Id.*

<sup>45</sup> *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181 (D.C. Cir. 1985).

<sup>46</sup> *Id.* at 184 (emphasis deleted). In dissent, Judge Bork argued that Rule 56 does not require a defendant to negate a plaintiff's claim. *Id.* at 190 (Bork, J., dissenting). Rather, a movant can prevail by merely persuading the court that no "triable, factual dispute" exists. *Id.*

<sup>47</sup> Justice Rehnquist was joined by Justices Marshall, Powell, White, and O'Connor. *see Celotex*, 106 S. Ct. at 2548. Justice Brennan, in a dissent joined by Chief Justice Burger and Justice Blackmun, stated that he did not "disagree with the Court's legal analysis" but concluded that Celotex had not met its initial burden of production. *Id.* at 2556 (Brennan, J., dissenting). Justice Stevens dissented on the narrow grounds that the plaintiff made an adequate showing of exposure to Celotex's asbestos products in Illinois. *Id.* at 2561 (Stevens, J., dissenting).

against a nonmoving party<sup>48</sup> who fails to establish an essential element of her claim.<sup>49</sup> Failure to prove an essential element “necessarily renders all other facts immaterial.”<sup>50</sup> Therefore, no “genuine issue as to any material fact” exists.<sup>51</sup>

The Court stated that a moving party who will not bear the burden of proof at trial may easily satisfy her initial burden of going forward.<sup>52</sup> A movant need not support her motion with affidavits.<sup>53</sup> Instead, a movant may base her motion merely on “the pleadings, depositions, answers to interrogatories, and admissions on file.”<sup>54</sup> Additionally, the moving party need not negate the nonmoving party’s claim but can “discharge” her burden by simply “pointing out to the District Court . . . an absence of evidence to support the nonmoving party’s case.”<sup>55</sup>

Justice White, concurring, explained that the movant cannot support her motion by merely asserting that the plaintiff has failed to produce sufficient evidence.<sup>56</sup> Rather, the movant has a duty to negate, if possible, the plaintiff’s claim.<sup>57</sup> In dissent, Justice Brennan agreed with the majority’s legal analysis, but further clarified the movant’s initial burden.<sup>58</sup> He stated that the movant must affirmatively demonstrate the absence of evidence in the record to support the nonmoving party’s

---

<sup>48</sup> Unless otherwise noted, this Comment will refer to the party bearing the burden of proof at trial as either the nonmoving party or plaintiff. Correspondingly, the moving party or defendant, unless noted otherwise, will be the party who does not bear the burden of proof at trial.

<sup>49</sup> *Celotex*, 106 S. Ct. at 2552-53.

<sup>50</sup> *Id.* at 2553.

<sup>51</sup> *Id.*

<sup>52</sup> The Court characterized the moving party’s burden as follows:

[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” which it believes demonstrates the absence of a genuine issue of material fact.

*Id.* at 2553 (quoting FED. R. CIV. P. 56(c)).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2554.

<sup>56</sup> *Id.* at 2555 (White, J., concurring).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2557 (Brennan, J., dissenting). Brennan stated that a movant can satisfy its initial burden in one of two ways: “First, the moving party may submit affirmative evidence that negates an essential element of the nonmoving party’s claim. Second, the moving party may demonstrate to the Court that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim.” *Id.*

claim.<sup>59</sup>

When the plaintiff is the moving party a different standard of proof applies.<sup>60</sup> A plaintiff-movant must present credible evidence entitling her to a directed verdict at trial.<sup>61</sup> To defeat a plaintiff's motion, the defendant must present evidence demonstrating the existence of a "genuine issue" for trial.<sup>62</sup>

### B. *The Nonmoving Party's Burden of Proof in a Summary Judgment Motion*

In *Anderson v. Liberty Lobby, Inc.*,<sup>63</sup> the companion case to *Celotex*, the Supreme Court held that a court should consider the evidentiary standard of proof applicable at trial when ruling on a summary judgment motion. In *Anderson*, the plaintiffs brought a libel action against *The Investigator* magazine and its publisher, Jack Anderson, alleging that statements made in three of the magazine's articles were defamatory.<sup>64</sup> In moving for summary judgment, the defendants asserted that the plaintiffs were "public figures" and thus had to meet the "actual malice" standard established in *New York Times Co. v. Sullivan*.<sup>65</sup> The defendants supported their motion with an affidavit of the articles' author describing his extensive research and belief that his facts were ac-

---

<sup>59</sup> *Id.* at 2557 (Brennan, J., dissenting). Brennan suggests that a moving party may satisfy his burden by:

[D]epos[ing] the nonmoving party's witnesses or . . . establish[ing] the inadequacy of documentary evidence . . . by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record . . . [which] affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.

*Id.* at 2557-58.

<sup>60</sup> See C. WRIGHT, *supra* note 11, §2727.

<sup>61</sup> *Id.*; see also *Celotex*, 106 S. Ct. at 2557 (Brennan, J., dissenting).

<sup>62</sup> *Celotex*, 106 S. Ct. at 2557 (Brennan, J., dissenting).

<sup>63</sup> 106 S. Ct. 2505 (1986).

<sup>64</sup> The plaintiff alleged that these articles "portrayed [them] as neo-Nazi, anti-Semitic, racist, and fascist." *Id.* at 2508.

<sup>65</sup> 376 U.S. 254 (1964). Under the *New York Times* test, a public figure plaintiff who brings a defamation action must establish by "clear and convincing evidence" that the defendant acted with "actual malice." *Id.* at 285-86. Actual malice is action "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. For an analysis of *New York Times*, see Berney, *Libel and the First Amendment — A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965). For a discussion of the use of summary judgment in "actual malice" cases, see Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707 (1984).

curate.<sup>66</sup> The plaintiffs argued that the articles were full of inaccuracies and that the author's use of unreliable sources created an issue of actual malice.<sup>67</sup>

The district court granted the defendants' motion, holding that the plaintiffs had failed to establish by clear and convincing evidence that the defendants acted with actual malice.<sup>68</sup> The court of appeals reversed on the grounds that the application of the "clear and convincing" standard<sup>69</sup> was "incompatible with the preliminary nature of the summary judgment inquiry."<sup>70</sup>

The Supreme Court reversed,<sup>71</sup> holding that the court of appeals erred in not applying the clear and convincing standard.<sup>72</sup> As in *Celotex*, the Court turned to Rule 56(c)'s phrase, "genuine issue as to any

---

<sup>66</sup> *Anderson*, 106 S. Ct. at 2508-09.

<sup>67</sup> *Id.* at 2509.

<sup>68</sup> The district judge determined that the plaintiffs were "limited-purpose public figures," and thus had "to prove actual malice by 'clear and convincing proof.'" *Liberty Lobby, Inc. v. Anderson*, 562 F. Supp. 201, 208 (D.D.C. 1983). The judge held that the author's thorough research and investigation of the article precluded a finding of actual malice. *Id.* at 209. For a definition of a "limited-purpose public figure," see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (holding that New York Times standard applies to an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.").

<sup>69</sup> Three evidentiary standards apply to civil or criminal cases. The easiest standard to satisfy is the "preponderance of the evidence" test. See James, *Burdens of Proof*, 47 VA. L. REV. 51, 53 (1961). The intermediate standard is proof by "clear and convincing evidence." *Id.* The highest standard, reserved for criminal cases, is the "proof beyond a reasonable doubt" test. *Id.* at 54. However, the Supreme Court has observed that differentiating between the standards is often difficult, if not impossible. See *Addington v. Texas*, 441 U.S. 418, 424-25 (1979) ("efforts to analyze . . . the differences among these three tests . . . may well be largely an academic exercise"); see also *Anderson*, 106 S. Ct. at 2522 (Rehnquist, J., dissenting) (the differentiated burdens of proof are not "logical or analytical" terms, "but instead almost a state of mind").

<sup>70</sup> *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1571 (D.C. Cir. 1984). Judge (now Justice) Scalia provided several reasons for not applying the clear and convincing standard to a summary judgment motion. First, it would transform the motion from "a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of the facts." *Id.* at 1570. Second, it would result in paper trials forcing plaintiffs to present all their supporting evidence. *Id.* Third, because courts would have to allow litigants to present more evidence, "summary judgment would rarely be the relatively quick process it is supposed to be." *Id.*

<sup>71</sup> As in *Celotex*, the Court lacked unanimity. In a six to three decision, Justice White wrote for the majority, joined by Justices Marshall, Blackmun, Powell, Stevens, and O'Connor. See *Anderson*, 106 S. Ct. at 2505. Justice Brennan and Justice Rehnquist, joined by Chief Justice Burger, each wrote a dissenting opinion. See *id.*

<sup>72</sup> See *id.* at 2508.

material fact."<sup>73</sup> The Court applied a two-fold analysis. First, the Court asked whether any disputed facts were material, and second, whether the dispute over these material facts was genuine.<sup>74</sup>

Writing for the Court, Justice White stated that a disputed fact is material only if it might affect the suit's outcome.<sup>75</sup> Observing that the substantive law would determine factual materiality,<sup>76</sup> he then focused on the problem of defining "genuineness." Justice White concluded that a genuine dispute over a material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."<sup>77</sup>

The Court noted that Rule 56(e) requires the nonmoving party, in responding to a properly supported motion,<sup>78</sup> to present specific facts demonstrating a genuine issue for trial.<sup>79</sup> This requirement imposes a preliminary inquiry into whether a trial is necessary.<sup>80</sup> The Court viewed this preliminary inquiry as analogous to the inquiry made on a motion for a directed verdict.<sup>81</sup> Justice White stated that the genuine issue summary judgment standard is similar to the reasonable jury di-

---

<sup>73</sup> *Id.* at 2510.

<sup>74</sup> *See id.*; *see also The Supreme Court, 1985 Term, supra* note 2, at 253.

<sup>75</sup> *See Anderson*, 106 S. Ct. at 2510; *see also C. WRIGHT, supra* note 11, § 2725, at 93-95.

<sup>76</sup> *See Anderson*, 106 S. Ct. at 2510.

<sup>77</sup> *Id.*

<sup>78</sup> The court assumed that the defendants had met their initial burden of production. *Id.* at 2511 n.4.

<sup>79</sup> *Id.* at 2511. Justice White observed that Rule 56(f) qualifies this requirement by allowing courts to deny summary judgment when the nonmoving party has not had an opportunity to conduct discovery. *Id.* at 2511 n.5; *see supra* notes 31-32 and accompanying text.

<sup>80</sup> *Id.* at 2511.

<sup>81</sup> *Id.* A directed verdict motion may be made pursuant to Rule 50(a), which provides:

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all the parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

FED. R. CIV. P. 50(a). For an analysis of directed verdict motions in federal courts, *see* 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 2521-2536 (1971); Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555 (1950); Currie, *supra* note 1.

rected verdict standard.<sup>82</sup> The only difference is their procedural posture. While documentary evidence determines a summary judgment motion, evidence admitted at trial determines a directed verdict motion.<sup>83</sup>

Relying on *United States v. Taylor*,<sup>84</sup> the Court noted that, in determining whether to submit a case to the jury or grant a directed verdict, the judge must consider the substantive evidentiary burden.<sup>85</sup> Therefore, since the summary judgment standard "mirrors" the directed verdict standard, the trial judge should consider the appropriate evidentiary burden when deciding a summary judgment motion.<sup>86</sup>

Justice White asserted that applying the directed verdict standard to summary judgment does not denigrate the jury's role or "authoriz[e] [a] trial on affidavits."<sup>87</sup> Questions of credibility and the weighing of evidence remain jury functions, and judges should "act . . . with caution" in granting summary judgment motions.<sup>88</sup>

The dissenting justices questioned the Court's rationale.<sup>89</sup> Justice Brennan echoed many of the concerns raised by the court of appeals' opinion.<sup>90</sup> He argued that the Court's holding will require judges to weigh the evidence, thus intruding on the jury function.<sup>91</sup> Additionally, Justice Brennan feared that applying the trial burden in summary

---

<sup>82</sup> *Anderson*, 106 S. Ct. at 2512. Justice White observed that "in essence the inquiry under each is the same . . . [that is] whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> 464 F.2d 240 (2d Cir. 1972). In *Taylor*, the court overturned *United States v. Feinberg*, 140 F.2d 592 (2d Cir. 1944), which held that the evidentiary standard necessary to submit a case to the jury is identical in both civil and criminal cases. Judge Friendly, writing for the *Taylor* court, held that the judge must "consider the applicable [evidentiary] burden when deciding whether to send a case to the jury." *Taylor*, 464 F.2d at 243.

<sup>85</sup> See *Anderson*, 106 S. Ct. at 2513.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 2513-14.

<sup>89</sup> Justice Brennan stated that "the Court's analysis is deeply flawed, and rests on a shaky foundation of unconnected and unsupported observations, assertions and conclusions." *Id.* at 2515 (Brennan, J., dissenting). Justice Rehnquist, in a lighter mood, observed that the majority's "opinion sounds like a treatise about cooking by someone who has never cooked before and has no intention of starting now." *Id.* at 2521 (Rehnquist, J., dissenting).

<sup>90</sup> See *supra* note 70.

<sup>91</sup> See *Anderson*, 106 S. Ct. at 2520 (Brennan, J., dissenting).

judgment inquiries will result in paper trials.<sup>92</sup>

*Celotex* and *Anderson* reflect a desire to encourage the use of summary judgment to reduce the federal courts' heavy caseload.<sup>93</sup> To promote the use of summary judgment, the Court increased the likelihood of successful motions.<sup>94</sup> The Court achieved this by changing the parties' "quantum of proof" at the summary judgment level.<sup>95</sup>

In *Celotex*, the Court reduced the initial burden of going forward to the moving party who will not have the burden of proof at trial. A movant satisfies her initial burden of going forward by either affirmatively negating the nonmoving party's claim, or demonstrating to the court that the nonmoving party is unable to prove an essential element of her claim.<sup>96</sup> In *Anderson*, the Court increased the nonmoving party's burden of going forward by requiring the nonmoving party to produce evidence sufficient to withstand a directed verdict motion.<sup>97</sup> The Court's lessening of the moving party's burden while heightening the nonmoving party's burden will result in more frequent entries of summary

---

<sup>92</sup> *Id.* at 2519 (Brennan, J., dissenting). Brennan stated that "I am fearful that this new rule — for this surely would be a brand new procedure — will transform what is meant to provide an expediated "summary" procedure into a full blown paper trial on the merits." *Id.* Justice Rehnquist, in his dissent, viewed the Court's "substantive standard" as "a procedural requirement engrafted onto Rule 56." *Id.* at 2520 (Rehnquist, J., dissenting). He warned that the Court's holding "will do great mischief with little corresponding benefit." *Id.* at 2522.

<sup>93</sup> Justice Rehnquist stated that prior to the advent of "notice pleading," motions to dismiss or to strike a defense were the primary means of disposing of claims before trial. *Celotex*, 106 S. Ct. at 2555. However, with the shift to "notice pleading," "motions to dismiss seldom fulfill this function any more, and its place has been taken by the motion for summary judgment." *Id.* For a discussion of the relationship between pleadings under Rule 8 and summary judgment, see Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

The *Celotex* court summarized its new balanced approach as follows:

Rule 56 must be considered with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

*Id.*

<sup>94</sup> See *The Supreme Court, 1985 Term, supra* note 2, at 258 ("*Celotex* and *Anderson* should allow federal trial courts to use summary judgment to slash high litigation costs and trim overcrowded court dockets.>").

<sup>95</sup> See *supra* notes 52-59 & 78-86 and accompanying text.

<sup>96</sup> See *supra* note 58 and accompanying text.

<sup>97</sup> See *supra* notes 78-86 and accompanying text.

judgment.

### III. THEORY IN PRACTICE: THE LOWER FEDERAL COURTS' INTERPRETATIONS OF *Celotex* and *Anderson*

Although the Court expounded the methods for reviewing a summary judgment motion in *Celotex* and *Anderson*, it did not apply these methods to the facts of each case.<sup>98</sup> Instead, the Court remanded both cases for application of the new standards.<sup>99</sup> The dissenters criticized this failure to apply theory to fact and warned that the Court's decisions could cause trial and appellate level confusion.<sup>100</sup> Therefore, an unclear issue is whether the lower courts are correctly interpreting the *Celotex* and *Anderson* standards.

#### A. *The Movant's Initial Burden of Proof*

The frequent use of summary judgment motions has resulted in widespread and varied application of the *Celotex* and *Anderson* standards. While some lower federal courts have embraced these two cases,<sup>101</sup> others have paid them only lipservice<sup>102</sup> or completely ignored

---

<sup>98</sup> See *Anderson*, 106 S. Ct. at 2515; *Celotex*, 106 S. Ct. at 2555.

<sup>99</sup> In *Anderson*, the Court vacated the court of appeals' decision and remanded the case for application of the correct standard of review. *Anderson*, 106 S. Ct. at 2515. In *Celotex*, the Court reversed the lower court's decision and remanded the case "for further proceedings consistent with this opinion." *Celotex*, 106 S. Ct. at 2555. In dissent, Justice Brennan stated that it is "unclear" what the court of appeals should do on remand. *Id.* at 2556 (Brennan, J., dissenting). The decision to reverse rather than to vacate implies that the Court determined that *Celotex* met its initial burden of proof. *Id.* However, Justice White's concurrence suggests that the court of appeals should reexamine whether the movant met its initial burden of proof. See *id.* at 2556 (White, J., concurring).

<sup>100</sup> See *Celotex*, 106 S. Ct. at 2556 (the Court's "lack of clarity is unfortunate: district courts must routinely decide summary judgment motions and the Court's opinion will very likely create confusion") (Brennan, J., dissenting); *Anderson*, 106 S. Ct. at 2522 ("The Court affords that [sic] lower courts no guidance whatsoever as to what, if any, difference the abstract standards that it propounds would make in a particular case.") (Rehnquist, J., dissenting).

<sup>101</sup> See, e.g., *Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp.*, 805 F.2d 342 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1570 (1987); *Valentine v. Joliet Township High School Dist. No. 204*, 802 F.2d 981 (7th Cir. 1986); *Professional Mgrs., Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218 (5th Cir. 1986); *Cook v. Pan Am World Airways, Inc.*, 647 F. Supp. 516 (S.D.N.Y. 1986); *Raynor v. Richardson-Merrell, Inc.*, 643 F. Supp. 238 (D.D.C. 1986); *Apex Oil Co. v. DiMauro*, 641 F. Supp. 1246 (S.D.N.Y. 1986).

<sup>102</sup> See, e.g., *Tippens v. Celotex Corp.*, 805 F.2d 949 (11th Cir. 1986), *reh'g denied*,

the decisions.<sup>103</sup>

The effect of *Celotex* and *Anderson* is most noticeable in the Second Circuit. Previously, lawyers and commentators perceived the Second Circuit as hostile to summary judgment motions,<sup>104</sup> and criticized its "slightest doubt" test.<sup>105</sup> Under this test, courts may deny a defendant's summary judgment motion when the "slightest doubt" exists regarding whether the defendant will prevail at trial.<sup>106</sup> In *Knight v. U.S. Fire Insurance Co.*,<sup>107</sup> the Second Circuit attempted to dispel these perceptions.<sup>108</sup>

The *Knight* court discussed the *Celotex* and *Anderson* standards and reported the results of a study indicating the high affirmance rate of summary judgment motions on appeal in the Circuit.<sup>109</sup> The court "hoped" that its discussion would encourage litigants to make "justifiable motions for summary judgment."<sup>110</sup> The court then affirmed summary judgment against a plaintiff who presented only "speculative" evidence to support his claim.<sup>111</sup> *Celotex* and *Anderson* instructed courts

815 F.2d 66 (11th Cir. 1987); *Source Servs. Corp. v. Chicagoland Jobservice, Inc.*, 643 F. Supp. 1523 (N.D. Ill. 1986); *Grove School v. Guardianship & Advocacy Comm'n*, 642 F. Supp. 1043 (N.D. Ill. 1986).

<sup>103</sup> See, e.g., *Umpleby v. United States*, 806 F.2d 812 (8th Cir. 1986) (applying state standard to determining summary judgment motion); *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111 (5th Cir. 1986); *Gatoil (U.S.A.), Inc. v. Washington Metro. Area Transit*, 801 F.2d 451 (D.C. Cir. 1986); *Adam v. Joy Mfg. Co.*, 651 F. Supp. 1301 (D.N.H. 1987) (applying "slightest doubt" test).

<sup>104</sup> See Brachtel, *Has Summary Judgment Been Eliminated in the Second Circuit?*, 46 BROOKLYN L. REV. 1 (1980).

<sup>105</sup> See Louis, *supra* note 1, at 760-62. Louis warns that adopting this test would result in "the virtual emasculation of the summary judgment procedure." *Id.* at 762.

<sup>106</sup> *Id.* at 760.

<sup>107</sup> 804 F.2d 9 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1570 (1987).

<sup>108</sup> The court pointed out:

It appears that in this circuit some litigants are reluctant to make full use of the summary judgment process because of their perception that this court is unsympathetic to such motions and frequently reverses grants of summary judgment. Whatever may have been the accuracy of this view in years gone by, it is decidedly inaccurate at the present time.

*Id.* at 12.

<sup>109</sup> *Id.*; see FINAL REPORT OF THE SECOND CIRCUIT COMMITTEE ON THE PRE-TRIAL PHASE OF CIVIL LITIGATION 16-17 (June 1986) (finding that court affirmed 79% of orders granting summary judgment on appeal as compared to 84% affirmance rate for civil case appeals in general).

<sup>110</sup> *Knight*, 804 F.2d at 12.

<sup>111</sup> *Id.* at 15 ("the speculative assertions on which [plaintiff] relies do not establish a genuine issue"). *Knight* was followed in *Cook v. Pan Am World Airways*, 647 F. Supp. 816 (S.D.N.Y. 1986). In *Cook*, the issue was whether the defendant acted with

to consider the trial burden of proof at the summary judgment level.<sup>112</sup> Thus, the Second Circuit's acceptance of these standards casts uncertainty over the slightest doubt test's continued vitality.

Other circuit courts also have addressed the issue of the movant's initial burden of going forward. In *Windon Third Oil and Gas Drilling Partnership v. Federal Deposit Insurance Corp.*,<sup>113</sup> the Tenth Circuit applied the *Celotex* standard in an investor's suit against an accounting firm for violation of federal securities law. The court stated that "[t]he moving party's burden cannot be enhanced to require his proof of a negative."<sup>114</sup> Rather, *Celotex* requires only that the moving party show the absence of evidence to support the nonmoving party's claim.<sup>115</sup>

The Fifth Circuit adopted a similar view in *St. Amant v. Benoit*.<sup>116</sup> The *St. Amant* court stated that a movant must either negate an essential element of the plaintiff's claim or demonstrate the insufficiency of the plaintiff's evidence.<sup>117</sup> However, the court has been unreceptive to defendants who attempt to further reduce their initial burden of going forward. In *Fano v. O'Neill*,<sup>118</sup> the Fifth Circuit denied a defendant's

---

"discriminatory intent" in adopting a new seniority system. *Id.* at 822. The district judge granted summary judgment against the plaintiff for failing to present any direct evidence showing that the defendant acted with "discriminatory intent." *Id.* at 822. Quoting *Knight*, the court stated: "A party cannot defeat a motion for summary judgment by relying on 'mere speculation or conjecture as to the true nature of the facts,' even when it is alleged that evidence to support a claim lies within the exclusive control of the defendants." *Id.*

<sup>112</sup> Under the "slightest doubt" standard, a plaintiff can delay having to establish the essential elements of her claim until trial. *Louis*, *supra* note 1, at 760. However, *Anderson* mandates that the plaintiff make this showing at the summary judgment level. *See Anderson*, 106 S. Ct. at 2514 ("the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment"). Therefore, the Second Circuit's express adoption of the *Anderson* directed verdict standard seemingly renders the "slightest doubt" test impotent. *But see Adams v. Joy Mfg. Co.*, 651 F. Supp. 1301, 1308 (D.N.H. 1987) ("when there remains the 'slightest doubt' as to any material fact summary judgment is inappropriate").

<sup>113</sup> 805 F.2d 342 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 1605 (1987).

<sup>114</sup> *Id.* at 346.

<sup>115</sup> *Id.* at 345. The court then affirmed summary judgment against the plaintiffs for failing to establish an essential element of their claim. *Id.* at 347. This essential element was the existence of a fiduciary relationship between the parties. *Id.* *See generally* *Chiarella v. United States*, 445 U. S. 222 (1980).

<sup>116</sup> 806 F.2d 1294 (5th Cir. 1987).

<sup>117</sup> *Id.* at 1297 (citing *Celotex*, 106 S. Ct. at 2557 (Brennan, J., dissenting)). The court affirmed summary judgment against the plaintiff's § 1983 claim because the statute of limitations had run. *Id.* at 1298.

<sup>118</sup> 806 F.2d 1262 (5th Cir. 1986).

summary judgment motion that merely asserted that the plaintiff failed to produce evidence to support its claim.

In *Fano*, the plaintiff brought suit against the Immigration and Naturalization Service (INS) claiming that the INS violated its procedures and willfully delayed his application for permanent resident status.<sup>119</sup> Soon after the suit commenced both parties moved for summary judgment.<sup>120</sup> The defendant's motion alleged that the plaintiff failed to state a cause of action and lacked evidence to prove his claim.<sup>121</sup>

In reversing a judgment for the defendants, the Fifth Circuit held that the government failed to satisfy its initial burden of going forward.<sup>122</sup> The court stated that *Celotex* did not alter the "settled rule" that a defendant cannot support a summary judgment motion with conclusory assertions that the plaintiff's evidence is insufficient.<sup>123</sup> Rather, the defendant must present affirmative evidence demonstrating the absence of a genuine dispute over a material fact.<sup>124</sup> Additionally, since neither party conducted any discovery, the court held that the motions were premature.<sup>125</sup>

The *Fano* decision limits, in two ways, a movant's ability to support a summary judgment motion by claiming the nonmoving party lacks evidence to support its claim. First, the movant must make an affirma-

---

<sup>119</sup> *Id.* at 1263. The plaintiff was a minor when he filed for his application in conjunction with the rest of his family. *Id.* Thus, he was eligible for permanent residence status on a derivative basis. See 8 U.S.C. § 1153(a)(8) (West Supp. 1987).

<sup>120</sup> The plaintiff sought to estop the INS from relying on the fact that he was over age 21 and, therefore, ineligible to obtain permanent residence status. *Fano*, 806 F.2d at 1263.

<sup>121</sup> *Id.* at 1266. To prevail on his claim, the plaintiff had to prove "affirmative misconduct" by the defendant and not just "mere negligence." *Id.* at 1265.

<sup>122</sup> See *id.* The court concluded that "the government has done nothing more . . . than to say in its motion that Fano failed to state a claim and lacks evidence to prove the claim. This plainly is insufficient to support summary judgment in its favor." *Id.*

<sup>123</sup> See *id.* (citing *Celotex*, 106 S. Ct. at 2555 (White, J., concurring)).

<sup>124</sup> *Id.* at 1266.

<sup>125</sup> See *id.* The language of Rule 56 does not support the court's view that the motions were premature. See FED. R. CIV. P. 56. Rule 56(a) provides that a claimant may move for summary judgment "any time after the expiration of 20 days from the commencement of the action." *Id.* 56(a). Rule 56(b) provides that a defendant "may, at any time, move . . . for a summary judgment." *Id.* 56(b). Additionally, the nonmoving party can seek a continuance under Rule 56(f) to conduct discovery to oppose a movant's motion. *Id.* 56(f). Thus, the *Fano* court should have accepted the parties' choice to forego discovery and decided the case on the record. *But see* Schwarzer, *supra* note 2, at 218-19 (trial judge has discretion to deny summary judgment when record is insufficient).

tive evidentiary showing, not merely conclusory assertions.<sup>126</sup> When a movant simply makes conclusory assertions courts may treat these assertions as a motion to dismiss rather than a summary judgment motion.<sup>127</sup> Second, an adequate record must exist before a movant may assert the absence of evidence supporting the nonmoving party's claim.<sup>128</sup>

The Fifth Circuit has recently imposed another requirement on a party moving for summary judgment. To support its motion, the movant must direct the court to evidence in the record that defeats the plaintiff's claim.<sup>129</sup> A court need not search the record independently to determine the absence of evidence supporting the plaintiff's claim.<sup>130</sup>

*Celotex* has encouraged litigants to move for summary judgment with only a minimal evidentiary showing. However, courts are unwilling to extend *Celotex* to permit motions based on an inadequate record or con-

---

<sup>126</sup> *Fano*, 806 F.2d at 1266; *see also* *Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp.*, 805 F.2d 342, 345 n.7 (10th Cir. 1986) ("conclusory assertions to aver the absence of evidence remains insufficient to meet [the defendant's initial] burden").

<sup>127</sup> *See, e.g.*, *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d 111, 113-14 (5th Cir. 1986) (court reviews defendant's unsupported motion as dismissal for failure to state a cause of action); *Green v. American Broadcasting Cos.*, 647 F. Supp. 1359, 1362 (D.D.C. 1986) (defendant's conclusory assertions "amount to a motion to dismiss for failure to state a claim, not a summary judgment motion"); *Ferens v. Deere & Co.*, 639 F. Supp. 1484, 1485-86 (W.D. Pa. 1986) (court reviews summary judgment motion made without supporting affidavits as a motion for judgment on the pleadings); J. MOORE, *supra* note 11, ¶ 56.02[3], at 26 (summary judgment motion made solely on pleadings is functionally same as motion to dismiss under Rule 12(b)(6)). By converting a summary judgment to a dismissal motion a court can impose the more stringent burden of proof necessary to prevail on a 12(b)(6) motion. *See* 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 1355-1357 (1969).

<sup>128</sup> The court pointed out that since the parties moved for summary judgment prior to discovery, the defendant "at this point cannot legitimately claim that the pleadings and other papers in the record show the absence of a material issue of fact." *Fano*, 806 F.2d at 1266.

<sup>129</sup> *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 860 (5th Cir. 1986); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986).

<sup>130</sup> The *Slaughter* court observed:

Although our earlier jurisprudence required the district judge to search the record for a genuine dispute about a material fact, *Celotex* . . . makes clear that the moving party must point out to the court the absence of evidence showing a genuine dispute — though the moving party need not always present actual evidence negating a dispute.

*Slaughter*, 803 F.2d at 860; *see Alizadeh*, 802 F.2d at 113 (summary judgment reversed because defendant failed to present any evidence rebutting plaintiff's allegations).

sisting solely of conclusory assertions.<sup>131</sup> Rather, courts require movants to present affirmative evidence that defeats the nonmoving party's claim.<sup>132</sup>

### B. *The Nonmoving Party's Burden of Proof*

As with *Celotex*, the lower courts also have scrutinized the *Anderson* directed verdict standard.<sup>133</sup> Although several courts have utilized it to derail insufficiently supported claims,<sup>134</sup> other courts have limited the standard's use.<sup>135</sup>

The *Anderson* standard<sup>136</sup> is a nearly insurmountable hurdle for claimants with a heightened evidentiary burden.<sup>137</sup> Courts applying *Anderson* have granted summary judgment against a variety of plaintiffs' claims including invasion of privacy,<sup>138</sup> conspiracy,<sup>139</sup> fraud,<sup>140</sup> libel,<sup>141</sup>

---

<sup>131</sup> *Fano*, 806 F.2d at 1266; *Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Co.*, 805 F.2d 342, 345 n.7 (10th Cir. 1986); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1195 (5th Cir. 1986); *Green*, 647 F. Supp. at 1364.

<sup>132</sup> *Fano*, 806 F.2d at 1266.

<sup>133</sup> See *supra* notes 77-88 and accompanying text.

<sup>134</sup> See *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1986) (plaintiff must present "specific facts" such that a reasonable jury could return a verdict in her favor); *Valentine v. Joliet Township High School Dist. No. 204*, 802 F.2d 981, 989 (7th Cir. 1986) (plaintiff must produce affirmative evidence that would support jury verdict in her favor to defeat properly supported motion for summary judgment); *Professional Mgrs., Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 223 (5th Cir. 1986) (plaintiff can defeat summary judgment only if her evidence can withstand directed verdict or judgment n.o.v. motion).

<sup>135</sup> See *Davis v. Bryan*, 810 F.2d 42 (2d Cir. 1987) (reversing summary judgment because plaintiff did not have notice of conversion of 12(b)(6) motion to dismiss to summary judgment motion); *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 800 F.2d 1208 (D.C. Cir. 1986) (summary judgment for defendant reversed because plaintiff not on notice to produce evidence to withstand directed verdict); *McDonald v. Doe*, 650 F. Supp. 858 (S.D.N.Y. 1986) (unfair to grant summary judgment at this time against pro se litigant who is "unschooled in procedural niceties"); *Fogarty v. Campbell 66 Express, Inc.*, 640 F. Supp. 953 (D. Kan. 1986) (denying summary judgment on issue of defendant's wanton behavior although observing that directed verdict possible at trial).

<sup>136</sup> See *supra* note 69-80 and accompanying text.

<sup>137</sup> See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 768 (1985) (White, J., concurring) (clear and convincing evidentiary burden is "exceedingly difficult to satisfy and can be discharged only by expensive litigation").

<sup>138</sup> See *Ashby v. Hustler Magazine, Inc.*, 802 F.2d 856 (6th Cir. 1986).

<sup>139</sup> See *Drum v. Nasuti*, 648 F. Supp. 888 (E.D. Pa. 1986) (finding plaintiff failed to set forth facts from which jury could infer that defendants had "meeting of minds"). Recent decisions in the antitrust field have imposed an additional requirement on a plaintiff's claim alleging a conspiracy to unlawfully restrain trade. See *Matsushita Elec.*

and punitive damages.<sup>142</sup> However, other courts have denied summary judgment when the plaintiff had to establish that the defendant acted with "reckless disregard."<sup>143</sup> These courts hold that determining whether the defendant acted in a reckless or merely negligent manner is a jury function.<sup>144</sup> In one case, the court allowed a plaintiff's libel claim, which required proof by a mere preponderance of the evidence, to go to trial.<sup>145</sup> However, the court granted summary judgment against the plaintiff's invasion of privacy claim, which required proof by "clear and convincing" evidence.<sup>146</sup>

---

*Indus. Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). At the summary judgment level, courts require plaintiffs to "present evidence 'that tend to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 106 S. Ct. at 1357 (quoting *Monsanto*, 465 U.S. at 764); accord *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractor Ass'n*, 809 F.2d 626, 632 (9th Cir. 1987) (holding plaintiff must present evidence "capable of sustaining a rational inference of conspiracy and that tend to exclude the possibility that the defendants acted independently").

<sup>140</sup> See *Meadow LTD Partnership v. Heritage Sav. and Loan Assoc.*, 639 F. Supp. 643, 651 n.9 (E.D. Va. 1986) ("All of these claims have some scienter requirement, and the plaintiffs have failed to establish any factual dispute concerning the defendant's 'evil' motives.").

<sup>141</sup> See *Tannenbaum v. Foerster*, 648 F. Supp. 1300, 1303 (E.D. Wis. 1986) (holding plaintiff failed to produce any evidence showing that defendant acted with "malice" in making allegedly defamatory statements).

<sup>142</sup> See *Western Fire Ins. Co. v. Copeland*, 651 F. Supp. 1051 (S.D. Miss. 1987) (holding proof of mere negligence insufficient to warrant granting of punitive damages); *Raynor v. Richardson-Merrell, Inc.*, 643 F. Supp. 238, 245 (D.D.C. 1986) (plaintiff's failure to demonstrate that defendant's conduct was "outrageous" renders her evidence insufficient to obtain punitive damages).

<sup>143</sup> *Umpleby v. United States*, 806 F.2d 812, 816 (8th Cir. 1986) ("[T]he district court erred in concluding at this stage of the proceedings that the [defendant's] conduct . . . did not constitute a willful or malicious failure to guard or warn."); *Jensen v. Times-Mirror*, 647 F. Supp. 1525, 1528 (D. Conn. 1986) (court's doubts regarding whether plaintiff's evidence of malice meets clear and convincing standard are not sufficient to take case away from jury); *Fogarty v. Campbell 66 Express, Inc.*, 640 F. Supp. 953, 956 (D. Kan. 1986) (holding that although issue whether defendant's wanton behavior reserved for trial, directed verdict for defendants appropriate if plaintiff fails to satisfy her burden of proof).

<sup>144</sup> See, e.g., *Umpleby*, 806 F.2d at 815 (8th Cir. 1986) (issue of whether defendant's failure to guard or warn was willful is jury question); *Jensen*, 647 F. Supp. at 1528 (jury's role to determine whether plaintiff's evidence satisfies clear and convincing evidentiary standard).

<sup>145</sup> *Ashby v. Hustler Magazine, Inc.*, 802 F.2d 856 (6th Cir. 1986).

<sup>146</sup> *Id.* at 860. The *Ashby* holding seemingly rebuts Justice Brennan's dissenting comment in *Anderson* that:

[I] cannot imagine a case in which a judge might plausibly hold that the

Courts also have applied the *Anderson* standard in two situations that present problems at the summary judgment level. Namely, cases that involve either questions of a party's motive or intent, or the credibility of a party or witness.<sup>147</sup> In the past, courts were reluctant to grant summary judgment when questions of intent or credibility were at issue.<sup>148</sup> *Anderson* has not dispelled this reluctance.<sup>149</sup>

Courts take two different approaches to the "intent" at summary judgment level issue. To defeat a summary judgment motion, a few courts merely require a plaintiff to assert a dispute over the defendant's motivations.<sup>150</sup> Other courts ask whether the plaintiff's allegations concerning the defendant's motivations are "reasonable."<sup>151</sup> Thus, the court must determine whether a reasonable jury could agree with the plaintiff's interpretation of the defendant's intent.<sup>152</sup> This latter approach is

---

evidence on a motion for summary judgment was sufficient to enable a plaintiff bearing a mere preponderance burden to get to the jury . . . but insufficient for a plaintiff bearing a clear and convincing burden to withstand a defendant's summary judgment motion.

*Anderson*, 106 S. Ct. at 2520 (Brennan, J., dissenting). However, the *Ashby* court did not explain why the plaintiff's evidence satisfied the mere preponderance standard but not the clear and convincing standard.

<sup>147</sup> See Sonenshein, *supra* note 1, at 780.

<sup>148</sup> See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (observing that when defendant's state of mind is in issue, the suit does not "readily lend itself to summary disposition"); *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 n.12 (1976) (stating that reasonable person standard in negligence cases ordinarily precludes summary judgment); *Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 473 (1962) (stating that summary judgment disfavored in complex antitrust cases involving issues of motive and intent); C. WRIGHT, *supra* note 11, § 2726, at 113-15; Louis, *supra* note 1, at 749 n.19.

<sup>149</sup> See, e.g., *Gatoil (U.S.A.), Inc. v. Washington Metro. Area Transit Auth.*, 801 F.2d 451, 456 (D.C. Cir. 1986) ("[D]isputes as to parties' subjective mental states are notoriously difficult to resolve on motion of summary judgment."); *Forstmann v. Culp*, 648 F. Supp. 1379, 1387 (M.D.N.C. 1986) (determining the meaning of representations made by party charged with fraud is factual issue for jury to resolve); *Hall v. Board of Educ.*, 639 F. Supp. 501, 509 (N.D. Ill. 1986) (summary judgment inappropriate when questions of motive or intent are present).

<sup>150</sup> See, e.g., *Forstmann*, 648 F. Supp. 1379; *Schroeder v. Woodhaven School Dist.*, 647 F. Supp. 902, 905 (E.D. Mich. 1986) (presence of intent issue renders summary judgment inappropriate); *Hall*, 639 F. Supp. 501.

<sup>151</sup> See, e.g., *Cook v. Pan Am. World Airways, Inc.*, 647 F. Supp. 816 (S.D.N.Y. 1986); *Spannaus v. Federal Election Comm'n*, 641 F. Supp. 1520 (S.D.N.Y. 1986), *aff'd*, 816 F.2d 670 (2d Cir. 1987); *Apex Oil Co. v. Dimauero*, 641 F. Supp. 1246 (S.D.N.Y. 1986).

<sup>152</sup> See, e.g., *Lewis v. First Nat'l Bank of Stuart*, 645 F. Supp. 1499 (W.D. Va. 1986); *Maze v. City of Fond Du Lac*, 643 F. Supp. 1108, 1117 (E.D. Wis. 1986) (summary judgment appropriate when plaintiff's evidence is so incredible that no rea-

consistent with *Anderson*. In *Anderson*, the Court stated that a plaintiff cannot simply allege a dispute over the defendant's intent to defeat a summary judgment motion.<sup>153</sup> Rather, the plaintiff must present "concrete evidence from which a reasonable juror could return a verdict in his favor."<sup>154</sup>

Post-*Anderson* decisions adopt a similar view toward the credibility issue. Most courts agree that a plaintiff can not defeat a summary judgment motion by merely asserting that a jury may disbelieve the defendant.<sup>155</sup> Instead, the plaintiff must make a prima facie case establishing the essential elements of her claim.<sup>156</sup> However, some courts take a less restrictive approach. These courts allow a plaintiff who fails to present a prima facie case to proceed to trial if she raises a legitimate question concerning credibility.<sup>157</sup> One court reasoned that "[i]ssues concerning the credibility of witnesses . . . are questions of fact which require resolution by the trier of fact."<sup>158</sup> However, this approach fails to ask whether the disputed testimony is "material" to the suit's outcome.<sup>159</sup> Only a question of credibility relating to a material fact may defeat a summary judgment motion.<sup>160</sup>

In applying the directed verdict standard at the summary judgment level, several recent decisions have addressed the question of adequate notice. The notice inquiry focuses on whether the plaintiff has adequate notice to present evidence sufficient to withstand a summary judgment

---

sonable jury could believe it); *Spannaus*, 641 F. Supp. at 1526 (summary judgment appropriate although intent question present if movant demonstrates that nonmoving party's factual interpretation is unreasonable).

<sup>153</sup> See *Anderson*, 106 S. Ct. at 2514.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* (stating that plaintiff's assertions that jury may disbelieve defendant's testimony is insufficient to defeat summary judgment motion); *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1570 (1987); *Professional Mgrs., Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218 (5th Cir. 1986).

<sup>156</sup> *Sonenshein*, *supra* note 1, at 796-97. *Sonenshein* argues that "the question of whether credibility alone can be an issue of material fact sufficient to defeat a motion for summary judgment should arise only when the movant is a burdened party." *Id.* at 797.

<sup>157</sup> See, e.g., *Lane v. Celotex Corp.*, 782 F.2d 1526 (11th Cir. 1986); *Federal Ins. Co. v. Summers*, 403 F.2d 971 (1st Cir. 1968).

<sup>158</sup> *Tippens v. Celotex Corp.*, 805 F.2d 949, 954 (11th Cir. 1986), *reh'g denied*, 815 F.2d 66 (11th Cir. 1987).

<sup>159</sup> See *supra* notes 23-25 and accompanying text.

<sup>160</sup> *Sonenshein*, *supra* note 1, at 797; FED. R. CIV. P. 56(e) Advisory Committee's Notes ("Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate.").

motion.<sup>161</sup> The District of Columbia Circuit addressed this issue in *McBride v. Merrell Dow & Pharmaceuticals, Inc.*<sup>162</sup>

In *McBride*, the plaintiff, an expert on birth defects who had testified in several lawsuits, brought a libel suit against *Science* magazine and several other defendants.<sup>163</sup> The plaintiff alleged that *Science* published an article that defamed him by implying that his testimony was “for sale.”<sup>164</sup>

The district court limited discovery to the issues of whether McBride was a public figure and the amount of his witness fees.<sup>165</sup> The court refused to allow McBride to obtain discovery relating to Merrell Dow’s expert witness fees.<sup>166</sup> The defendants moved for summary judgment on the grounds that the statements in the article were true.<sup>167</sup> The district court granted the motion, holding that McBride was a public figure, and that the defendants lacked actual malice in making the statements.<sup>168</sup>

The court of appeals reversed, holding that McBride received no notice that he had to present evidence establishing a triable issue regarding defendants’ actual malice.<sup>169</sup> Additionally, the court found that the scope of discovery was too narrow and prevented McBride from obtaining evidence to support his claim.<sup>170</sup> Thus, *McBride* illustrates that courts must give a plaintiff adequate notice to produce all his evidence and sufficient opportunities to conduct discovery.<sup>171</sup>

---

<sup>161</sup> See *Celotex*, 106 S. Ct. at 2554 (“[D]istrict courts . . . possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence.”).

<sup>162</sup> 800 F.2d 1208 ( D.C. Cir. 1986).

<sup>163</sup> See *id.* at 1209.

<sup>164</sup> *Id.* at 1209-10. The article stated “these expert witnesses . . . includ[ed] William McBride . . . who was paid \$5,000 a day to testify in Orlando. In contrast, [Merrell Dow] pays witnesses \$250 to \$500 a day, and the most it has ever paid is \$1,000 a day.” *Id.*

<sup>165</sup> *Id.* at 1210.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> See *id.* at 1212.

<sup>170</sup> See *id.*

<sup>171</sup> See also *John Deere Co. v. American Nat’l Bank*, 809 F.2d 1190 (5th Cir. 1987) (defendant failed to raise issue sufficient to put plaintiff on notice that failure to present damages evidence could be grounds for summary judgment). *But see* *Banks v. Chesapeake & Potomac Tel. Co.*, 802 F.2d 1416 (D.C. Cir. 1986). In *Banks*, the plaintiff responded only to defendant’s summary judgment motion that asserted a statute of limitations defense. Although determining that plaintiff timely filed her suit, the court affirmed summary judgment for the defendant because the plaintiff failed to produce

In applying the *Celotex* and *Anderson* standards, courts have qualified the new "even-handed" approach to summary judgment.<sup>172</sup> To prevent litigants from abusing the procedure, courts require movants to present specific, affirmative evidence in an adequately supported record.<sup>173</sup> Additionally, to protect unwary claimants, courts require that the nonmoving party have sufficient opportunities for discovery, and receive notice of their duty to come forward with all their evidence.<sup>174</sup> These requirements enable courts to ensure the proper use, and not abuse, of the summary judgment procedure.<sup>175</sup>

#### IV. A PROPOSED MODIFICATION OF THE STANDARDS AND BURDENS OF PROOF AT THE SUMMARY JUDGMENT LEVEL

Considering the high litigation costs<sup>176</sup> and crowded dockets in federal courts today,<sup>177</sup> the future of summary judgment seems secure. Although some commentators argue that the Court's belief that summary judgment slashes court dockets and reduces litigation costs is un-

---

evidence to support her claim. *Id.* at 1431. In rejecting plaintiff's assertion that she had no notice to produce all her evidence, the court stated "it was incumbent upon [the plaintiff] to rebut the defendant's claim that it was entitled to summary judgment and to proffer evidence to the court sufficient to support the allegations of the complaint." *Id.* at 1431 n.25; *accord* HGN Corp. v. Chamberlain, Hrdlicka, White, Johnson & Williams, 642 F. Supp. 1443, 1445 n.3 (N.D. Ill. 1986) ("Rule 56 motions are supposed to be substitutes for trial when no material facts are in dispute . . . that is why litigants can not 'hold back' on summary judgment motions.").

<sup>172</sup> See *Raynor v. Richardson-Merrell, Inc.*, 643 F. Supp. 238, 243 (D.D.C. 1986) ("courts must approach summary judgment motions with an even hand").

<sup>173</sup> See *Fano*, 806 F.2d 1262; *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857 (5th Cir. 1987); *Bullard v. Serstel Const. Co.*, 648 F. Supp. 811 (N.D. Ind. 1986); *Ferens v. Deere & Co.*, 639 F. Supp. 1484 (W.D. Pa. 1986).

<sup>174</sup> See *John Deere Co. v. American Nat'l Bank*, 809 F.2d 1190 (5th Cir. 1987) (lack of notice); *McBride*, 800 F.2d 1208 (insufficient notice and discovery); *Stanford v. Kuwait Airways Corp.*, 647 F. Supp. 1164 (S.D.N.Y. 1987) (inadequate discovery opportunity). *But see* *Banks v. Chesapeake & Potomac Tel. Co.*, 802 F.2d 1416, 1431 n.25 (D.C. Cir. 1986) (plaintiff must come forward with all her evidence despite defendant's limit of defense to statute of limitations issue); *HGN Corp. v. Chamberlain, Hrdlicka, White, Johnson & Williams*, 642 F. Supp. 1443, 1445 n.3 (N.D. Ill. 1986) (litigants cannot "hold back" on summary judgment motions).

<sup>175</sup> See, e.g., *Davis v. Bryan*, 810 F.2d 42, 45 (2d Cir. 1987) (reversing summary judgment when plaintiff unaware of statute of limitations issue and given no opportunity to contest the issue).

<sup>176</sup> See generally J. KAKALIK & R. ROSS, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR VARIOUS TYPES OF CIVIL CASES (RAND Institute for Civil Justice 1983).

<sup>177</sup> See Schwarzer, *supra* note 2, at 218.

founded,<sup>178</sup> these factors encouraged the Court to make the summary judgment procedure more viable.<sup>179</sup>

However, several elements in the summary judgment procedure still need strengthening. Although *Celotex* and *Anderson* clarified the standards of proof applicable to the summary judgment level, further refinement is necessary.<sup>180</sup> This Comment proposes changes consistent with both the Court's intent and Rule 56.<sup>181</sup> Additionally, this Comment articulates the proper role these standards of proof play in deciding a summary judgment motion.<sup>182</sup> Finally, it suggests procedural safeguards courts can utilize to insure that litigants properly use the summary judgment procedure.<sup>183</sup>

### A. *The Moving Party's Initial Burden of Going Forward*

Under *Celotex*, a movant satisfies its initial burden of going forward by either affirmatively negating the nonmoving party's claim or pointing out to the court an absence of evidence to support the nonmoving party's case.<sup>184</sup> The proposed test requires a movant to either present evidence that negates an essential element of the nonmoving party's claim, or affirmatively demonstrate the absence of any evidence in the record to support an essential element of the nonmoving party's claim.

This test differs in several respects from the *Celotex* standard. First, it requires a movant to demonstrate that the nonmoving party cannot establish an essential element of her claim.<sup>185</sup> The "essential elements" of a claim are those elements that a plaintiff must establish at trial

---

<sup>178</sup> See Biegel, *Abolish Summary Judgment Motions*, 1 THE COMPLETE LAW 31 (1984) ("we ought not assume that any procedure that avoids trial necessarily saves the litigants time and money"); McLauchlan, *supra* note 6, at 454-57 (concluding that summary judgment saves little time and is a "weak reed" for decreasing the federal courts' caseload).

<sup>179</sup> See *Celotex*, 106 S. Ct. at 2555 ("summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules").

<sup>180</sup> See *infra* notes 184-206 and accompanying text.

<sup>181</sup> See *infra* notes 194-97 & 201-06 and accompanying text.

<sup>182</sup> See *infra* notes 207-11 and accompanying text.

<sup>183</sup> See *infra* notes 214-27 and accompanying text.

<sup>184</sup> *Celotex*, 106 S. Ct. at 2554-55.

<sup>185</sup> In *Celotex*, the Court did not hold that a defendant must demonstrate that the plaintiff cannot establish an essential element of her claim. See *id.* at 2554 (moving party need only point out "an absence of evidence to support the nonmoving party's case"). However, Justice Brennan interpreted the Court's analysis as requiring the movant to defeat an essential element of the nonmoving party's claim. *Id.* at 2557 (Brennan, J., dissenting).

before reaching a jury.<sup>186</sup> Since the purpose of summary judgment is to determine whether a genuine need for a trial exists,<sup>187</sup> a defendant should only prevail by proving that a trial is unnecessary. In showing that the plaintiff can not establish the essential elements of her claim, the defendant satisfies her burden.<sup>188</sup>

The *Celotex* standard is unclear regarding whether a movant must present affirmative evidence to prevail on a summary judgment motion.<sup>189</sup> This proposed test would require a movant to make an affirmative evidentiary showing. A movant can satisfy her burden by presenting some form of affirmative evidence. This evidence may include affidavits, depositions, answers to interrogatories, admissions on file, or other evidence developed through discovery.<sup>190</sup> The complaint, answer, and mere conclusory statements made in a motion for summary judgment, should not alone be sufficient "affirmative evidence."<sup>191</sup> These items may, however, complement the affirmative evidence.

In *Celotex*, the Court did not describe the extent to which a movant must show the court the absence of evidence supporting the nonmoving party's claim.<sup>192</sup> The revised standard requires that a movant demonstrate an absence of evidence in the entire record. Thus, the movant can prevail only by showing the court that all the evidence in the record illustrates a lack of proof concerning an essential element of the plaintiff's claim.<sup>193</sup>

The rationale for these revisions is two-fold. First, if courts did not require an affirmative evidentiary showing, defendants could move for summary judgment merely on the basis of denials in their answer or conclusory assertions. This reduced burden would amount to practically

---

<sup>186</sup> See Schwarzer, *supra* note 1, at 481.

<sup>187</sup> See *supra* note 12 and accompanying text.

<sup>188</sup> See *Celotex*, 106 S. Ct. at 2557 (Brennan, J., dissenting).

<sup>189</sup> Justice White, concurring in *Celotex*, suggested that the defendant should make an affirmative evidentiary showing. *Id.* at 2555 (White, J., concurring). In his dissent, Justice Brennan agreed with this view. *Id.* at 2557 (Brennan, J., dissenting).

<sup>190</sup> See *id.* at 2557 (Brennan, J., dissenting).

<sup>191</sup> By "mere conclusory assertions," this Comment does not imply that courts should ignore all assertions made in a motion or brief. Rather, courts should deem insufficient only those unsupported assertions.

<sup>192</sup> See *Celotex*, 106 S. Ct. at 2554-55.

<sup>193</sup> See *Celotex*, 106 S. Ct. at 2557 (Brennan, J., dissenting); Schwarzer, *supra* note 2, at 223-24 (judge's ruling is based on "whether the moving party . . . has demonstrated the absence of a triable issue"). Schwarzer also argues that judges need not review the entire record to determine the existence of a jury issue. *Id.* at 223. Instead, judges should base their decisions on the evidence presented by the parties. *Id.*

“no burden at all.”<sup>194</sup> Second, because courts are not required to review the record on their own,<sup>195</sup> the movant should have the burden of showing the absence of evidence in the entire record.<sup>196</sup> This prevents litigants from selectively ignoring evidence that may give rise to a genuine issue rendering summary judgment inappropriate.<sup>197</sup>

### B. *The Nonmoving Party's Burden of Going Forward*

In *Anderson*, the Court held that the summary judgment standard “mirrors” the directed verdict standard.<sup>198</sup> However, the Court did not explain what type of showing a plaintiff must make to overcome the directed verdict analysis.<sup>199</sup> Instead, the Court simply relied on the language of 56(e), which requires a plaintiff to present “specific facts showing that there is a genuine issue for trial.”<sup>200</sup>

The nonmoving party's burden of going forward can be characterized as follows: After the movant has made a properly supported motion for summary judgment, the plaintiff must present sufficient evidence to support the essential elements of her claim to justify a trial. This standard comports with the standard set forth in *Anderson*.<sup>201</sup> However, it eliminates the confusing and often misused “genuine issue of material fact” language.<sup>202</sup> Eliminating the “genuine issue” language<sup>203</sup> will encourage courts to focus on the proper role of summary judgment, which is to determine the sufficiency of the parties' evidence.<sup>204</sup> In deciding the

---

<sup>194</sup> *Celotex*, 106 S. Ct. at 2557 (Brennan, J., dissenting); *Louis*, *supra* note 1, at 749-50. *Louis* argues that to allow a movant a “more lenient” burden “would permit him to harass the opposing party too easily.” *Id.* at 750.

<sup>195</sup> See *supra* notes 129-30 and accompanying text.

<sup>196</sup> See Schwarzer, *supra* note 2, at 224.

<sup>197</sup> See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (summary judgment reversed because defendant's motion failed to address material fact in issue).

<sup>198</sup> See *Anderson*, 106 S. Ct. at 2511.

<sup>199</sup> See *id.*

<sup>200</sup> See *id.* at 2514 (quoting FED. R. CIV. P. 56(e)).

<sup>201</sup> See *supra* notes 77-86 and accompanying text.

<sup>202</sup> See Schwarzer, *supra* note 2, at 213.

<sup>203</sup> Additionally, this proposal omits the Rule 56(e) requirement that the opposing party “must set forth specific facts.” The rationale for requiring a plaintiff to present “specific facts” is that under Rule 8 the plaintiff's complaint need only put a defendant on “notice” of his claim, and does not require “fact” pleading. See FED. R. CIV. P. 8. Thus, the “specific facts” language requires that the plaintiff go beyond the complaint and present sufficient evidence to support the claim. See generally Marcus, *supra* note 93.

<sup>204</sup> In determining the sufficiency of the evidence, the court should examine all of the parties' evidence. See Currie, *supra* note 1, at 76 (in ruling on directed verdict or

issue of sufficiency, the trial judge must consider the evidence's form and whether the evidence establishes the essential elements of the asserted claim or defense.<sup>205</sup> Additionally, to justify a trial the plaintiff's evidence must satisfy the evidentiary burden applicable at trial.<sup>206</sup>

### C. *Application of the Appropriate Burdens of Proof to a Summary Judgment Motion*

To correctly use Rule 56, courts and litigants must understand the proper role the burdens of proof play in the summary judgment analysis. In ruling on a motion for summary judgment, courts must use a two-step analysis. First, the court must determine whether the movant has met her initial burden of going forward. Second, if the movant met her burden, the court must consider whether the nonmoving party has met her burden of proof.<sup>207</sup>

Summary judgment is a procedural device. Thus, when ruling on a summary judgment motion, courts should avoid basing their decisions on policy grounds.<sup>208</sup> Asking whether a particular cause of action is appropriate for summary judgment is the wrong approach.<sup>209</sup> Rather, the proper analysis at the summary judgment level is to determine

---

summary judgment motion court should consider all evidence). However, courts should still draw all reasonable inferences from the evidence in favor of the nonmoving party. *See Anderson*, 106 S. Ct. at 2513; *Adickes v. S.H. Kress & Co.*, 398 U.S. 140, 158-59 (1970). *But see* *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626 (9th Cir. 1987). In *T.W. Elec. Serv.*, the court held that in determining the sufficiency of the evidence, the court only examines the nonmoving party's evidence. *Id.* at 631 n.3. The court argued that:

Were we to construe the [*Anderson*] Court's statements as requiring a court to ask whether a jury could find in favor of the nonmoving party viewing all of the evidence — both that presented by the nonmoving party and that presented by the moving party — such a construction would contradict the clear instruction that a court may not weigh the evidence or assess its credibility.

*Id.*

<sup>205</sup> *See supra* notes 49-51 and accompanying text.

<sup>206</sup> *See supra* notes 78-86 and accompanying text.

<sup>207</sup> *See* FED. R. CIV. P. 56(e); *see also Adickes*, 398 U.S. at 160 (plaintiff not required to come forward with evidence until defendant satisfies its initial burden imposed by Rule 56(c)).

<sup>208</sup> *See* *Raynor v. Richardson-Merrell, Inc.*, 643 F. Supp. 238, 245 (D.D.C. 1986) (“in light of the even handed approach to summary judgment . . . mandated in *Celotex* . . . it is questionable whether courts may continue to conduct a policy-orientated resolution of summary judgment motions.”).

<sup>209</sup> *See id.*

whether the parties' evidence warrants a trial.<sup>210</sup> Courts can make this analysis only by examining the parties' evidence in relation to their respective burdens of proof.<sup>211</sup>

#### D. Procedural Safeguards

The standards of proof enunciated in *Celotex* and *Anderson* should facilitate more effective use of summary judgment. However, two areas of possible abuse exist that may adversely affect the proper use of the summary judgment procedure. These areas of concern are discovery and notice.

Under *Celotex*, a defendant need not negate the plaintiff's claim, but need only point out an absence of evidence supporting the plaintiff's claim.<sup>212</sup> Additionally, the *Anderson* standard requires a plaintiff to present evidence sufficient to overcome a directed verdict.<sup>213</sup> Therefore, defendants will likely seek to limit both the time and scope of discovery.

Courts can use several procedural devices to insure that the scope and duration of discovery is sufficient. The primary method of insuring adequate discovery is Rule 56(f).<sup>214</sup> Courts should liberally grant Rule 56(f) motions when a plaintiff has had insufficient time to conduct discovery.<sup>215</sup> A judge can also convene a pretrial conference pursuant to Rule 16 to establish the time and scope of discovery.<sup>216</sup> Finally, courts have discretion under Rule 56(e)<sup>217</sup> to deny summary judgment if the movant attempts a "quick kill"<sup>218</sup> or otherwise prevents the plaintiff from conducting discovery.<sup>219</sup>

The second problem area is notice. In response to a defendant's motion for summary judgment, the plaintiff often attacks the sufficiency of

---

<sup>210</sup> See *supra* note 12 and accompanying text.

<sup>211</sup> See Schwarzer, *supra* note 2, at 216-17.

<sup>212</sup> See *supra* notes 53-55 and accompanying text.

<sup>213</sup> See *supra* notes 78-86 and accompanying text.

<sup>214</sup> See *Celotex*, 106 S. Ct. at 2554 (Rule 56(f) can "adequately" deal with "any problems" arising from premature motions made prior to a plaintiff completing discovery); *supra* notes 31-32 and accompanying text.

<sup>215</sup> See Schwarzer, *supra* note 2, at 221.

<sup>216</sup> See FED. R. CIV. P. 16(a), (b); Schwarzer, *supra* note 2, at 221-22 (discovery should be subject to judicial control and "limited to issues material to disposition of the motion").

<sup>217</sup> See *supra* notes 29-30 and accompanying text.

<sup>218</sup> See *Professional Mgrs., Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 222 (5th Cir. 1986).

<sup>219</sup> See, e.g., *Stanford v. Kuwait Airways Corp.*, 648 F. Supp. 1164, 1165 ("The fact that plaintiffs were denied an adequate opportunity for discovery before [defendant's] motion was filed could[,] in itself, be a reason to deny [the] motion.").

the motion without producing evidence to satisfy her own burden of proof.<sup>220</sup> Therefore, courts must develop procedures for insuring that plaintiffs have notice to come forward with all their evidence.

The court and the moving party share the responsibility of providing the plaintiff with adequate notice.<sup>221</sup> A movant's motion must give the plaintiff notice to present evidence to defeat summary judgment.<sup>222</sup> When a motion provides inadequate notice, courts may deny summary judgment.<sup>223</sup> Additionally, courts themselves should not raise issues that defeat a plaintiff's claim when the plaintiff had no notice of, or opportunity to respond to, the issues.<sup>224</sup>

Courts can also provide notice through procedural means. A judge may hold a pretrial conference to notify the parties about what evidence they must produce.<sup>225</sup> Alternatively, courts may order a hearing pursuant to Rule 43(e),<sup>226</sup> to provide the parties an opportunity to present their evidence.<sup>227</sup>

In addition to Rule 56(f), courts should make greater use of Rule 16 conferences and Rule 43(e) hearings at the summary judgment level. These procedures can ensure adequate discovery and proper notice

---

<sup>220</sup> See, e.g., *John Deere Co. v. American Nat'l Bank*, 809 F.2d 1190 (5th Cir. 1987) (motions limited to *res judicata* defense); *Banks v. Chesapeake & Potomac Tel. Co.*, 802 F.2d 1416 (D.C. Cir. 1986) (motions limited to statute of limitations defense).

<sup>221</sup> See *John Deere*, 809 F.2d at 1191 (defendant's motion did not raise issue in manner sufficient to put plaintiff on notice to present evidence regarding issue).

<sup>222</sup> See *id.*

<sup>223</sup> *Id.*; see also *Davis v. Bryan*, 810 F.2d 42 (2d Cir. 1987) (plaintiff not on notice of conversion of 12(b)(6) motion to dismiss to summary judgment motion).

<sup>224</sup> See *Davis*, 810 F.2d at 45 (summary judgment reversed because plaintiff had no opportunity to refute a statute of limitations defense); *John Deere*, 809 F.2d at 1192 ("district courts may not grant summary judgment *sua sponte* on grounds not requested by the moving party").

<sup>225</sup> See FED. R. CIV. P. 16(a); *Marshall v. Celotex Corp.*, 651 F. Supp. 389 (E.D. Mich. 1987).

<sup>226</sup> Rule 43(e) provides:

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

FED. R. CIV. P. 43(e).

<sup>227</sup> See, e.g., *Davis v. Costa-Gavras*, 650 F. Supp. 153, 156 (S.D.N.Y. 1986) (ordering a Rule 43(e) hearing to "focus on and flush out" the "essential elements" plaintiff needs to produce to warrant a trial). Subsequently, in *Davis v. Costa-Gavras*, 654 F. Supp. 653 (S.D.N.Y. 1987), the court held that the plaintiff failed to produce sufficient evidence at the Rule 43(e) hearing. *Id.* at 655. Therefore, the court granted summary judgment for the defendant. *Id.*

without significantly adding to the cost or length of litigation.

#### CONCLUSION

The Supreme Court's decision in *Celotex* and *Anderson* should help reduce the confusion and uncertainty surrounding the summary judgment procedure. Lower courts, in applying the *Celotex* and *Anderson* standards, should adopt a two-step approach. First, the court must provide for adequate discovery and insure that the parties are on notice as to the standards of proof they must satisfy. Additionally, courts must consider the evidence presented in relation to the parties' appropriate burdens and standards of proof.

Properly used, the summary judgment procedure provides a fair and effective method of eliminating meritless suits before trial while preserving the claimant's legitimate right to a day in court.

*Robert K. Smits*

