

The Use and Misuse of Expert Testimony in Summary Judgment

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INTRODUCTION

At first glance, the increasing use of expert testimony in the summary judgment process¹ seems illogical and impossible. After all, summary judgments are only proper when no factual disputes exist,² and the stock-in-trade of the expert witness is venturing opinions on issues of fact. The very presence of an expert implies that issues of fact exist. Instinctively, bilateral expert participation in summary judgment affidavits should doom a motion for summary judgment by creating conflicting evidence on issues of "material fact." Such participation should make the use of the expert affidavit an expensive rarity. Moreover, the "opinion" nature of standard expert testimony seems strangely out of place either supporting or opposing a motion for summary judgment. Summary judgment focuses on the existence or nonexistence of particular facts. Accordingly, a well-crafted affidavit supporting or opposing

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¹ See, e.g., *Moeller v. Ionetics, Inc.*, 794 F.2d 653 (Fed. Cir. 1986) (stating that trial court abused discretion by disallowing expert affidavit); *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1318 (9th Cir. 1986) (finding that trial court erred by excluding "opinion" affidavit); *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980) (denying summary judgment based on expert affidavit); *Kendall v. State*, 692 P.2d 953 (Alaska 1984) (affirming summary judgment for defendants when plaintiff failed to present expert evidence of negligence claims to rebut defendants' motion supported by expert evidence); *Montana Deaconess Hosp. v. Gratton*, 169 Mont. 185, 545 P.2d 670 (1976) (imposing duty on plaintiff to present expert evidence of negligence to defeat defendant's motion for summary judgment); *Tiedemann v. Radiation Therapy Consultants*, 299 Or. 239, 701 P.2d 440 (1985) (finding summary judgment for defendant proper when plaintiff fails to file expert response following defendant's motion for summary judgment supported by expert affidavit).

² See FED. R. CIV. P. 56(c) (allowing summary judgment only when "no genuine issue as to any material fact" exists).

summary judgment will avoid abstract opinions. Indeed, summary judgment affidavits must be "made on personal knowledge."³ This requirement presumably prevents the expert from introducing opinion into the summary judgment process; "opinion" seems the opposite of "personal knowledge."

Despite such logic, use of the expert witness in motions for summary judgment is growing. Many recent federal and state cases permit and facilitate expert witness participation in summary judgment motions.⁴ The use of the summary judgment expert affidavit is close to commonplace in medical malpractice litigation.⁵ To some extent the trend toward accepting the expert may be part of an easing of the formerly difficult-to-satisfy standard for obtaining summary judgment.⁶ Today's courts, facing more complex cases and an increasing caseload, are simply more receptive to docket clearing devices such as summary judgment.⁷ Yet, some recent cases provide explicit reasons for favoring early

³ *Id.* 56(e).

⁴ See cases cited *supra* note 1.

⁵ See, e.g., *Maxwell v. Women's Clinic, P.A.*, 102 Idaho 53, 625 P.2d 407 (1981); *Allen v. Kaiser Found. Hosp.*, 76 Or. App. 5, 707 P.2d 1289 (1985); Dean, *Summary Judgment Motions in Medical Malpractice Actions*, 18 GA. ST. B.J. 44 (1981) (advocating summary judgment and expert affidavits in malpractice litigation); Note, *As a Matter of Law: Summary Judgment in Medical Malpractice Litigation in Tennessee*, 15 MEM. ST. U.L. REV. 55, 85 (1984) (describing "a mechanical and often unjust application" of summary judgment in Tennessee malpractice litigation).

⁶ See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (stating that moving party for summary judgment not bearing burden of proof on an issue need not affirmatively present evidence eliminating issues); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (finding that test for summary judgment is whether proof exists "such that a reasonable jury could return a verdict for the non-moving party"); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (allowing summary judgment despite intent issue when plaintiff's predatory pricing theory "implausible" and giant 40-volume record would not lead trier of fact to find for nonmoving party); *Knight v. United States Fire Ins. Co.*, 804 F.2d 9 (2d Cir. 1986) (attacking "misconception" of antagonism toward summary judgment), *cert. denied*, 107 S. Ct. 1570 (1987); *Valentine v. Joliet Township High School Dist. No. 204*, 802 F.2d 981 (7th Cir. 1986).

⁷ See, e.g., *Knight*, 804 F.2d at 9; *Professional Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis*, 799 F.2d 218, 222 (5th Cir. 1986) ("Rule 56 is a means of disposing of meretricious disputes."); *Raynor v. Richardson-Merrell, Inc.*, 643 F. Supp. 238, 245 (D.D.C. 1986) (summary judgment "is raised as a bulwark against claims based on speculation and inference"); Miner, *Federal Courts at the Crossroads*, 4 CONST. COMMENTARY 251, 255 (1987) ("[C]ourts are beginning to relax the standards for summary judgment, and I do not believe that this development is unrelated to the caseload crunch."); Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 Nw. U.L. REV. 774 (1983); Comment, *Federal*

participation of the expert in the trial process. Summary judgment is a trial in which the normal rules of admission of evidence would seemingly apply.⁸ The Federal Rules of Civil Procedure incorporate the Federal Rules of Evidence into the summary judgment process by requiring that affidavit testimony “set forth such facts as would be admissible in evidence.”⁹ Correspondingly, expert witness input, clearly allowable and desirable at trial, must be possible during the trial-like summary judgment phase of litigation. Furthermore, the written nature of much summary judgment evidence is an appropriate format for expert testimony. Expert testimony can take the form of written testimony.¹⁰

Against this background of apparent contradiction, this Article will explore the problematic but growing use of expert evidence in motions for summary judgment. Part I examines the inconsistent and vacillating decisions rejecting and favoring expert participation. Part II eschews doctrine and, instead, focuses on those policies favoring and opposing expert testimony in the pretrial process. Part II traces and attempts to reconcile two contradictory ideas: Modern policies encourage the use of experts in adjudication, but the focus of summary judgment seems directed toward objective facts and away from subjective opinion. The conclusion proposes that courts scrutinize expert affidavits rigorously to ensure that the proffered expert input is really helpful to the trier of fact.

Summary Judgment: The “New” Workhorse for an Overburdened Federal System, 20 U.C. DAVIS L. REV. 955 (1987).

⁸ See, e.g., *Nadler v. Baybank Merrimack Valley, N.A.*, 733 F.2d 182 (1st Cir. 1984) (disregarding affidavit contents as hearsay and not based on personal knowledge); *Pension Benefit Guar. Corp. v. Heppenstall Co.*, 633 F.2d 293 (3d Cir. 1980) (excluding unsigned affidavit); *Jefferson Constr. Co. v. United States*, 283 F.2d 265 (1st Cir. 1960) (disregarding affidavit setting forth conversations with unnamed employees), *cert. denied*, 365 U.S. 835 (1961); 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2738, at 467 (2d ed. 1983) (characterizing as “mandatory” the requirement that affidavit set forth facts that would be admissible in evidence).

⁹ FED. R. CIV. P. 56(e).

¹⁰ See *infra* text accompanying notes 216-20.

I. THE AMBIGUOUS CASE LAW LANDSCAPE SUPPORTING AND OPPOSING EXPERT TESTIMONY IN SUMMARY JUDGMENT

A. *Supreme Court Ambivalence*

Only a few decisions of the United States Supreme Court have involved the use of expert witnesses in the summary judgment context. These holdings fail to produce much doctrinal clarity on the propriety of expert witness participation opposing or supporting a motion for summary judgment.

*Sartor v. Arkansas Natural Gas Corp.*¹¹ is illustrative. In *Sartor* the plaintiff lessors sued to collect contract royalties allegedly owed by the defendant under the terms of a natural gas development lease. The lease called for a payment of one-eighth of the market price and added a minimum payment of "three cents per thousand cubic feet."¹² Much of the royalty dispute centered around the exact market price of natural gas with the plaintiffs contending that the defendant had failed to compensate them at an appropriate level. After the Court of Appeals reversed and remanded a jury verdict for the plaintiffs,¹³ the trial court granted defendant's motion for summary judgment. The defendant introduced eight affidavits supporting its view of the market value of the natural gas at issue. The affiants supporting the defendant included a natural gas lessee, officers, and accountants of pipeline firms that owned gas leases and produced gas, and officers of gas producing firms in active competition with defendant. The Supreme Court characterized these affidavits as the "opinion testimony of experts."¹⁴

In reversing the Court of Appeals' decision affirming summary judgment, the Supreme Court reasoned that "the defendant failed to show that it is entitled to judgment as [a] matter of law."¹⁵ Justice Jackson's majority opinion stressed that the record showed some evidence supportive of the plaintiffs' case and that the defendant's experts were interested in the outcome of the litigation.¹⁶ The Jackson *Sartor* opinion

¹¹ 321 U.S. 620 (1944).

¹² *Id.* at 621.

¹³ *Sartor v. Arkansas Natural Gas Corp.*, 98 F.2d 527 (5th Cir. 1938).

¹⁴ *Sartor*, 321 U.S. at 624, 626-27.

¹⁵ *Id.* at 628.

¹⁶ *Id.* at 624-25 ("[I]t would hardly seem that a conclusion based on so complicated and indefinite a calculation, should be accepted from an employee of a corporation with an interest in the market price of gas similar to the defendant's without opportunity to cross-examine."). For discussion of the proposition that evidence of interested witnesses should not be considered in evaluating a motion for summary judgment, see Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 *YALE L.J.* 745, 749

seemed skeptical of using opinion affidavits of experts to determine litigation.¹⁷ Jackson emphasized the role of the jury in evaluating opinion evidence and pointed out the value of a trial “cross-examination, the best method yet devised for testing the trustworthiness of testimony.”¹⁸ Nonetheless, the majority refused to condemn outright the practice of admitting an expert’s affidavit into the rule 56 process and, in fact, fully considered the expert affidavits submitted. Faced with the opportunity to prohibit unequivocally the expert opinion affidavit, the *Sartor* decision avoided the difficult issue of the appropriateness of the expert affidavit. In so doing, the Court created an environment in which the expert affidavit may be permissible.¹⁹

Recent Supreme Court cases do not specifically reach the issue but do analyze expert affidavits in summary judgments. In *Edwards v. Aguillard*²⁰ the Court affirmed summary judgment invalidating Louisiana’s creationism legislation because the statute violated the first amendment establishment clause. Louisiana legislation had mandated the teaching of creation science if public schools taught evolution theory.²¹ To a large degree, the case hinged on the legislative motive supporting the Creationism Act.²² To prove a secular motive and to defeat a motion for summary judgment to hold the law unconstitutional, the state introduced the affidavits of five expert witnesses: two scientists, two theologians, and an educational administrator. Justice Brennan’s majority opinion shed little light on the Supreme Court’s receptivity toward the expert affidavit. On the one hand, the *Aguillard* majority found these affidavits of “outside experts . . . of little use in determin-

(1974) (stating that summary judgment “should be denied if the credibility of a witness is inherently suspect because he is interested in the outcome of the case”); Sonenshein, *supra* note 7, at 802 (“Evidence from an interested or otherwise impeachable witness cannot support a motion for summary judgment, because questions of credibility are for the jury.”).

¹⁷ See, e.g., *Webster v. Offshore Food Serv., Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970) (“[S]ummary judgment is often inappropriate where the evidence bearing on crucial issues of fact is in the form of expert opinion testimony.” (citing *Sartor*, 321 U.S. at 620)), *cert. denied*, 404 U.S. 823 (1971).

¹⁸ *Sartor*, 321 U.S. at 628.

¹⁹ See, e.g., *Webster*, 434 F.2d at 1194 (affirming summary judgment on motion supported by expert affidavit of physician; acknowledging *Sartor*’s emphasis on the need for trial to resolve crucial issues of fact).

²⁰ 107 S. Ct. 2573 (1987).

²¹ LA. REV. STAT. ANN. §§ 17:286.1-.7 (West 1982).

²² See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (emphasizing proof of a secular legislative purpose as primary determinant of legislation’s validity under establishment of religion clause).

ing the Louisiana legislature's purpose in enacting this statute."²³ Justice Brennan's opinion clearly preferred more static and settled sources to evaluate legislative motive: "A court's finding of improper purpose behind a statute is appropriately determined by the statute on its face, its legislative history, or its interpretation by a responsible administrative agency."²⁴ Yet, the Brennan *Aguillard* opinion did not rule out the use of expert input in summary judgment generally. The *Aguillard* majority merely refused to give any weight to the proffered expert affidavits since they did not show legislative motive. Justice Brennan approved of summary judgment despite expert affidavits containing contrary evidence because a "Monday-morning 'battle of the experts' over possible technical meanings of terms in the statute would not illuminate the contemporaneous purpose of the Louisiana legislature when it made the law."²⁵

Nonetheless, it is important to emphasize that the *Aguillard* majority did not altogether rule out use of the expert affidavit. *Aguillard* is ambivalent on the appropriate role of the expert affidavit. Like *Sartor*, the *Aguillard* decision refused to use the expert evidence, but contained such a coherent reason for rejecting the affidavits that one wonders if such evidence would not be proper in a different factual context.

Like *Aguillard*, the 1986 *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*²⁶ decision discussed expert participation in summary judgment, but failed to clarify the appropriate pretrial role for the expert. In *Matsushita* the Court affirmed summary judgment in favor of the defendant Japanese television manufacturers. The complaint alleged that the defendants conspired to sell televisions in Japan at artificially set high prices and to maintain artificially set low prices in the United States geographic market.

The *Matsushita* decision is important to both antitrust²⁷ and proce-

²³ *Aguillard*, 107 S. Ct. at 2583-84.

²⁴ *Id.* at 2583 (citing *Wallace v. Jaffree*, 472 U.S. 38, 56-61 (1985), *Stone v. Graham*, 449 U.S. 39, 41-42 (1980), and *Epperson v. Arkansas*, 393 U.S. 97, 103-09 (1968)).

²⁵ *Id.* at 2584.

²⁶ 475 U.S. 574 (1986).

²⁷ The substantive antitrust significance of *Matsushita* is its rejection of the plaintiff's predatory pricing theory as implausible and economically unsound. *Id.* at 593-98; see also Liebler, *Whither Predatory Pricing? From Areeda and Turner to Matsushita*, 61 NOTRE DAME L. REV. 1052, 1053 (1986) (*Matsushita* "reminded us that predatory pricing is quite implausible"). In the words of the Court, the defendants "had no rational economic motive to conspire . . ." 475 U.S. at 597. The five Justice *Matsushita* majority showed little enthusiasm for cases alleging predation and signaled that courts should view such cases with extreme skepticism. The *Matsushita* Court held that the

ture doctrine. Intertwined with *Matsushita*'s antitrust substance was its emphasis on procedure. Like many antitrust cases, *Matsushita* involved a giant record that offered a tantalizing possibility of streamlining by pretrial disposition of all or a portion of the massive case. The Supreme Court's approval of the trial court summary judgment grant equated summary judgment and direct verdict standards. In addition, *Matsushita* clarified that a nonmovant advancing an antitrust conspiracy theory must come forward with evidence "that tends to exclude the possibility"²⁸ that the alleged conspirator defendants were acting unilaterally.

When the *Matsushita* trial court granted the defendants' predictable motion for summary judgment, it ruled inadmissible "a large portion of the expert testimony that the [plaintiffs] proposed to introduce,"²⁹ reasoning that the expert study was illogical and inconsistent with other evidence in the record.³⁰ The expert study opined that the defendants sold their product in the United States at significant losses. The Court of Appeals reversal concluded that there was sufficient evidence in the record to find the alleged conspiracy among the defendants to eliminate United States competitors by maintaining high prices in Japan and low prices in the United States. The Third Circuit reversal noted the expert evidence ruled inadmissible by the trial court and mentioned that it did support the alleged conspiracy.³¹

The Supreme Court's opinion restoring summary judgment contained a brief but interesting treatment of the expert proof proffered by the plaintiff in an attempt to defeat summary judgment. The Court was critical of the expert evidence and found that the evidence was "not

plaintiff's theory was legally insufficient because it was "implausible" as a matter of law. *Id.* at 588-90, 594 n.19; Gerla, *A Micro-Microeconomic Approach to Antitrust Law: Games Managers Play*, 86 MICH. L. REV. 892, 893 (1988). The Court relied heavily on commentary suggesting the general implausibility of a predatory pricing legal theory. See 475 U.S. at 589 (citing R. BORK, *THE ANTITRUST PARADOX* 145, 149-55 (1978), Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981), McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. LAW & ECON. 137 (1958), and McGee, *Predatory Pricing Revisited*, 23 J. LAW & ECON. 289 (1980)).

²⁸ *Matsushita*, 475 U.S. at 588 (citing *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

²⁹ *Id.* at 578 n.2 (citing *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1313, 1379-80 (E.D. Pa. 1981)).

³⁰ *Matsushita*, 505 F. Supp. at 1356-63.

³¹ Justice Powell's *Matsushita* opinion correctly observed that the Third Circuit did not "place particularly heavy reliance on this aspect of the expert evidence." 475 U.S. at 581 n.5.

based upon actual cost data” but, instead, consisted “of expert opinion based upon a mathematical construction that in turn rests upon assumptions about [the defendants’] costs.”³² The Powell majority opinion specifically termed the trial court’s rejection of this expert evidence “persuasive” and regarded the evidence of “little probative value in comparison with the economic factors . . . that suggest such conduct is irrational.”³³

Matsushita, then, could be considered a Supreme Court rejection of expert input as appropriate summary judgment evidence. Yet it would be incorrect to read such a broad meaning into the case. It is clear that *Matsushita*’s prime importance is to substantive antitrust law, not procedure. When the Supreme Court approved the trial court’s grant of summary judgment, it was within that portion of rule 56(c) in which the ruling turned on an issue of law, not fact; as a “matter of law” predatory pricing claims are clearly disfavored. *Matsushita* illustrates a basic truth of summary judgment: judges can convert what appear to be issues of fact into issues of law with lightning-like speed, and, in so doing, avoid deciding difficult “issues of fact” by the process of recharacterizing factual issues as questions of law. The process of courts labeling some issues as “legal” and others as “factual” is mysterious and illustrates the tremendous power judges have to decide the perimeters of their own duties.

Although the Supreme Court has never clarified the appropriate role of expert proof supporting or opposing summary judgment, it has provided some guidance. Rule 56 provides that affidavit content “set forth such facts as would be admissible in evidence.”³⁴ The Supreme Court has confirmed that evidence standards apply to summary judgment evidence. In *Adickes v. S.H. Kress & Co.*³⁵ the Court supported this rule 56(e) requirement by pointing out that the plaintiff opposing summary judgment had not offered admissible proof of conspiracy.³⁶ Similarly, in *Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc.*³⁷ the Court characterized an affidavit supporting a motion for summary judgment made on “information and belief” as not in accord with rule 56(e) and refused to consider it.³⁸

³² *Id.* at 594 n.19.

³³ *Id.* at 594.

³⁴ FED. R. CIV. P. 56(e).

³⁵ 398 U.S. 144 (1970).

³⁶ The *Adickes* decision identified two unsworn statements proffered by the nonmoving plaintiff. *See id.* at 157 n.16, 159 n.19.

³⁷ 339 U.S. 827 (1950).

³⁸ *Id.* at 831.

B. The Cautionary Decisions: Lower Court Case Law Rejecting or Limiting Use of Expert Affidavits

A few decisions squarely prohibit the use of expert affidavits in summary judgment motions. Review of these decisions, however, reveals little in the way of a careful or balanced analysis.

Some decisions reject summary judgment affidavits of experts because they contain opinion evidence. *Mapco, Inc. v. Carter*³⁹ illustrates this reasoning. *Carter* involved an oil producer's challenge to the Energy Policy and Conservation Act⁴⁰ as violating the ninth and fifth amendments. The plaintiff contended that the legislation violated due process because it lacked a relationship to the legislative object — the control of inflation. The plaintiff's motion for summary judgment appended the affidavit of an economist. In rejecting the due process argument, the Court of Appeals' refusal to consider the expert affidavit was unequivocal but without much reasoning. The affidavit could not support a summary judgment motion "because it contain[ed] conclusionary, speculative, [and] inadmissible evidence, which . . . [was] also irrelevant."⁴¹ In short, *Carter* took the firm position that an expert's affidavit containing speculation or conclusory opinion is improper.

A variant on the *Carter* approach can be found in many decisions rejecting the expert affidavit containing only opinion without accompanying supporting facts.⁴² These decisions do not rest on a blanket prohibition of expert affidavits. Rather, they evaluate the expert affidavits for particular facts and freely reject affidavits containing only opinion. As a group, these holdings seem open to an expert affidavit only when the affiant supplies the "specific facts" required by rule 56(e).

*United States v. Various Slot Machines on Guam*⁴³ is representative. The trial court granted the government's motion for summary judgment in a suit for forfeiture of nine gambling machines. The government filed two affidavits of FBI agents; each described the physical charac-

³⁹ 573 F.2d 1268 (Temp. Emer. Ct. App.), *cert. denied*, 437 U.S. 904 (1978).

⁴⁰ 15 U.S.C. §§ 757-760(h), 2001-2012 (1982); 42 U.S.C. §§ 6201-6422 (1982).

⁴¹ *Carter*, 573 F.2d at 1283.

⁴² *See, e.g.*, *Evers v. General Motors Corp.*, 770 F.2d 984 (11th Cir. 1985) (affirming summary judgment in spite of opposing parties' expert affidavit "that fail[ed] to provide specific facts from the record to support its conclusionary allegations"); *United States v. Various Slot Machs. on Guam*, 658 F.2d 697 (9th Cir. 1981); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977) (Wright, J.); *Kern v. Tri-State Ins. Co.*, 386 F.2d 754, 756 (8th Cir. 1968) (rejecting affiant's assertions as "not a matter of personal knowledge"); *Lynch v. Athey Prod. Corp.*, 505 A.2d 42 (Del. Super. Ct. 1985).

⁴³ 658 F.2d 697 (9th Cir. 1981).

teristics and operations of the machines. The opposing party filed two affidavits that the Court of Appeals was willing to characterize as “expert.” These affidavits, by individuals with fifteen and twenty years experience in the coin-operated machine business, characterized the alleged gambling machines as “electric point maker machines” and concluded that the seized devices were not gambling machines.⁴⁴ Judge Duniway’s opinion rejected the notion that the pro-expert testimony policies underlying the Federal Rules of Evidence⁴⁵ allowed generalized expert conclusions in the face of the rule 56(e) requirement that a party opposing summary judgment “set forth specific facts showing that there is a genuine issue for trial”:⁴⁶

To begin with, we have difficulty with the notion that to state an opinion is to set forth specific facts. Be that as it may, we also think that, in the context of a motion for summary judgment, an expert must back up his opinion with specific facts. This was obviously Judge Duenas’ view when he asked counsel “where in the affidavits do they present facts?” As we have seen, counsel admitted that they weren’t in the affidavits. Moreover, he made no offer to come forward with such facts by way of supplemental affidavit or otherwise.⁴⁷

Judge Duniway’s position in *Various Slot Machines on Guam* views as airtight the rule 56(e) requirement of affidavits setting forth “specific facts.” Judge J. Skelly Wright reasoned similarly in *Merit Motors, Inc. v. Chrysler Corp.*⁴⁸ The *Merit Motors* decision affirmed a lower court summary judgment in favor of defendant Chrysler. The plaintiffs, who alleged that the defendant’s fleet sales program violated antitrust laws, responded to the summary judgment motion by proffering the affidavit of their expert economist. The plaintiffs’ expert asserted that the defendant’s payment of a rebate to fleet buyers of new cars injured the plaintiff dealers by increasing the volume of available used cars, by preventing Chrysler from also lowering prices to dealers, and by allowing fleet buyers to retail cars in competition with the plaintiffs.⁴⁹ Chrysler rebutted this affidavit by introducing nonexpert evidence

⁴⁴ *Id.* at 699-700.

⁴⁵ See FED. R. EVID. 702 (allowing expert opinion testimony); *id.* 703 (allowing expert to base opinion on data or facts not in evidence and known to the expert before the testimony); *id.* 704 (allowing expert testimony on the “ultimate issue” of a case); *id.* 705 (permitting expert opinion without disclosing the underlying facts leading to an opinion).

⁴⁶ *Various Slot Machs. on Guam*, 658 F.2d at 700 (quoting FED. R. CIV. P. 56(e)).

⁴⁷ *Id.*

⁴⁸ 569 F.2d 666 (D.C. Cir. 1977).

⁴⁹ *Id.* at 671.

showing that the economic impact of fleet sales was ambiguous.⁵⁰ The trial court's grant of summary judgment rejected the expert affidavit as "opinion . . . based solely on speculations and hypotheses and . . . unsubstantiated by any evidence in the record."⁵¹ Judge Wright's opinion affirming summary judgment refused to concede that Federal Rule of Evidence 703 made "summary judgment impossible whenever a party has produced an expert to support its position."⁵² Judge Wright's analysis criticized expert affidavits that emphasize opinion over fact. He viewed the plaintiffs' expert as making "unsupported assumptions about the elasticities of demand in various markets and . . . ignor[ing] the impact of the dominant forces in the automobile market: General Motors and Ford."⁵³ Wright attacked an expansive reading of evidence policies to allow an expert affidavit to easily defeat a summary judgment motion. Such a position "would seriously undermine policies of Rule 56" and greatly limit the "power of a court to grant summary judgment."⁵⁴

Taken together, these cautionary decisions express a judicial attitude hostile to the expert affidavit. While they do not fashion a firm rule rejecting the use of an expert affidavit, they do find an inconsistency between the evidence process used in evaluating motions for summary judgment and the *raison d'être* of expert testimony — opinion.

C. The Confident Decisions: Lower Court Case Law Approving Use of Expert Affidavits

A growing number of holdings approve expert participation in the summary judgment process. Some rely on the policies supporting increased use of expert testimony reflected in the Federal Rules of Evidence.⁵⁵ Others support the expert affidavit based on the idea that summary judgment is a trial-like procedure in which expert participation

⁵⁰ *Id.* at 672.

⁵¹ *Merit Motors, Inc. v. Chrysler Corp.*, 417 F. Supp. 263, 272 (D.D.C. 1976), *aff'd*, 569 F.2d 666 (D.C. Cir. 1977). Judicial reluctance to allow the summary judgment expert affiant to base an opinion on matter not in the record appears in other cases. *See, e.g.*, *Kern v. Tri-State Ins. Co.*, 386 F.2d 754 (8th Cir. 1967) (affirming summary judgment and criticizing hearsay and opinion in nonmovant's affidavit).

⁵² *Merit Motors*, 569 F.2d at 673.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *See, e.g., id.*; *see also* *Bulthuis v. Rexall Corp.*, 789 F.2d 1315 (9th Cir. 1985); *Controlled Atmosphere, Inc. v. Branom Instrument*, 50 Wash. App. 343, 353-55, 748 P.2d 686, 692-93 (1988).

should be encouraged.⁵⁶ A third and growing group of cases validates routine use of expert witness affidavits in medical malpractice litigation.⁵⁷

1. The Expert Affidavit in Medical Malpractice Litigation

The increasing number of medical malpractice actions⁵⁸ has prompted vigorous defenses. One tactic that seems commonplace is the defendant's motion for summary judgment accompanied by the supporting expert affidavit.⁵⁹ While isolation of a particular cause of action ordinarily provides little analytic insight into summary judgment policy — after all, rule 56 is transsubstantive and was not written to govern different claims differently⁶⁰ — examining the judicial treatment of summary judgment in these malpractice claims has particular utility. Medical malpractice summary judgment motions present a host of issues relevant to contemporary procedural problems: the shibboleth that courts should be reluctant to use summary judgment in negligence cases,⁶¹ the trend toward using experts to prove the existence of negli-

⁵⁶ See, e.g., *Webster v. Offshore Food Serv., Inc.*, 434 F.2d 1191 (5th Cir. 1970) (trier of fact weighs credibility and value of expert and grants summary judgment largely on basis of expert affidavit), *cert. denied*, 404 U.S. 823 (1971); *Howard v. Walker*, 242 Ga. 406, 249 S.E.2d 45 (1978); *Tiedemann v. Radiation Therapy Consultants*, 299 Or. 238, 701 P.2d 440 (1985).

⁵⁷ See, e.g., *Reinke v. O'Connell*, 790 F.2d 850 (5th Cir. 1986); *Jones v. Wike*, 654 F.2d 1129 (5th Cir. Unit B Sept. 1981); *Kendall v. State*, 692 P.2d 953 (Alaska 1984).

⁵⁸ See Mecham, *Annual Rep. of the Director of the Admin. Off. of the United States Courts* 178, reprinted in *REPORTS OF THE PROC. OF THE JUD. CONFERENCE OF THE UNITED STATES* (1986) (showing annual increases in filings of federal medical malpractice cases, doubling between 1982 and 1986).

⁵⁹ See Bower, *Defending Motions for Summary Judgment in Malpractice*, *TRIAL LAW Q.*, 1985 No. 1, at 30 (1985) (“[P]laintiffs’ attorneys have received a wave of motions for summary judgment seeking to dismiss the [plaintiffs’ cases] on the merits.”); Dean, *Summary Judgment Motions in Medical Malpractice Actions*, 18 *GA. ST. B.J.* 44, 46 (1981) (“The defendant should call the plaintiff’s bluff by filing a motion for summary judgment as soon as possible.”).

⁶⁰ For discussion of the transsubstantive purpose of rule 56, see Clark, *The Summary Judgment*, 36 *MINN. L. REV.* 567, 569 (1952) (stating that summary judgment “is available in any civil action”). For discussion of the transsubstantive nature of the Federal Rules of Civil Procedure, see Burbank, *The Costs of Complexity*, 85 *MICH. L. REV.* 1463, 1473-76 (1987) (discussing transsubstantive rules and cataloging interest in moving away from the past norm of transsubstantive procedural rules); see also Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 *YALE L.J.* 718 (1975); Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 *U. CHI. L. REV.* 494 (1986).

⁶¹ See, e.g., *Hughes v. American Jawa, Ltd.*, 529 F.2d 21, 26 (8th Cir. 1975) (stating

gence,⁶² and the tendency to apply litigation management devices such as summary judgment in response to perceived docket increases.

*Jones v. Wike*⁶³ is representative and illustrates modern receptivity to the expert affidavit. The plaintiff alleged that his physician negligently treated him during hernia surgery. The defendant's motion for summary judgment was first denied on the ground that a question of fact existed regarding potentially negligent post-operative care. The defendant then submitted the affidavits of three expert physicians "to the effect [that] the post-operative care was proper and in accordance with reasonable standards of medical care."⁶⁴ The trial court granted summary judgment after the plaintiff relied solely on the affidavit of a registered nurse and filed no opposing expert affidavits. The Court of Appeals for the Fifth Circuit affirmed, reasoning that "the affidavits served to resolve the disputed issues forming the basis for the earlier denial."⁶⁵ The *Wike* decision ignored the obvious "opinion" nature of the movant's expert proof. Instead, *Wike* relied on the Georgia substantive rule that required a plaintiff asserting a medical malpractice claim to present expert medical proof to defeat a presumption of a physician's care.⁶⁶ Prior Georgia case law had approved summary judgment when a plaintiff opposing the motion failed to introduce an expert affidavit to rebut a defendant's expert affidavit.⁶⁷ *Wike* stressed but did not rely solely on the plaintiff's failure to produce contrary expert affidavits; the decision also rested on the failure of the plaintiff's nonexpert affidavit to raise requisite issues of material fact.

Like *Wike*, many other medical malpractice decisions authorize and

that policy favoring plenary trials prevents disposing of negligence actions through rule 56 motions); *Croley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970) (stating that "circumstances" in which summary judgments should be granted in negligence actions "are rare"); C. WRIGHT, *FEDERAL COURTS* § 99, at 665 (4th ed. 1983) ("[S]ummary judgment will not usually be as feasible in negligence cases, where the standard of the reasonable man must be applied to conflicting testimony."); Bogart, *Summary Judgment: A Comparative and Critical Analysis*, 19 OSGOOD HALL L.J. 552, 578-79 (1981) (finding summary judgment rarely appropriate in negligence cases).

⁶² See cases cited *infra* note 70.

⁶³ 654 F.2d 1129 (5th Cir. Unit B Sept. 1981).

⁶⁴ *Id.* at 1130.

⁶⁵ *Id.*

⁶⁶ *Id.* (citing *Starr v. Fregosi*, 370 F.2d 15 (5th Cir. 1966)); accord *Ellis v. Neurological Assocs. of Tucson, P.C.*, 118 Ariz. 18, 574 P.2d 486 (1978) (expert testimony needed to prove physician negligent).

⁶⁷ See *Parker v. Knight*, 245 Ga. 782, 267 S.E.2d 222 (1980); *Howard v. Walker*, 242 Ga. 406, 408, 249 S.E.2d 45, 46-47 (1978).

analyze the expert affidavit.⁶⁸ Some decisions allow summary judgment largely because of the plaintiff's failure to respond with an expert affidavit rebutting the expert proof submitted by the moving party defendant.⁶⁹ These cases derive partially from the notion that expert testimony proof normally is needed to show a breach of a physician's professional duty.⁷⁰

Courts can grant summary judgment with dispatch following a plaintiff's failure to counter the malpractice defendant's motion for summary judgment. The chain of reasoning leading to dismissal of the plaintiff's summary judgment motion is seductively simple: (a) the plaintiff must prove malpractice through the expert testimony; (b) defendant's motion for summary judgment supported by expert evidence places a corresponding duty on plaintiff to respond with a contrary expert opinion; and (c) the nonmovant plaintiff's failure to respond with expert testimony requires the court to grant summary judgment because no genuine issue of material fact requires trial. Using exactly this mechanistic reasoning some malpractice decisions grant summary judgment in succinct opinions.⁷¹

This reasoning might seem terse and inflexible; it certainly places a considerable burden on the nonmovant to counter the defendant's expert proof with contrary expert evidence.⁷² Nonetheless, in 1986 the

⁶⁸ See, e.g., *Ellis*, 118 Ariz. at 18, 574 P.2d at 486; *Kendall v. State*, 692 P.2d 953 (Alaska 1984).

⁶⁹ See, e.g., *Castleberry v. Collierville Medical Assocs., Inc.*, 92 F.R.D. 492 (W.D. Tenn. 1981); *Kendall*, 692 P.2d at 953; *Maxwell v. Women's Clinic, P.A.*, 102 Idaho 53, 625 P.2d 407 (1981); *Tiedemann v. Radiation Therapy Consultants*, 299 Or. 238, 701 P.2d 440 (1985).

⁷⁰ E.g., *Kendall*, 692 P.2d at 953; *Ellis*, 118 Ariz. at 18, 574 P.2d at 486; *Berman v. Rubin*, 138 Ga. App. 849, 853, 227 S.E.2d 802, 806 (1976); *Walker v. Distler*, 78 Idaho 38, 47, 296 P.2d 452, 457-58 (1956) ("[N]egligence in malpractice cases must be established by expert medical testimony."); *Jarboe v. Harting*, 397 S.W.2d 775 (Ky. 1965); *Baldwin v. Knight*, 569 S.W.2d 450 (Tenn. 1978). An exception to the rule requiring expert testimony arises when the plaintiff's allegations of negligence describe obvious carelessness within the ken of the layman. *German v. Nichopoulos*, 577 S.W.2d 197 (Tenn. Ct. App. 1978).

⁷¹ See, e.g., *Howard*, 242 Ga. at 408, 249 S.E.2d at 46-47 ("[I]n those cases where the plaintiff must produce an expert's opinion in order to prevail at trial, when the defendant produces an expert's opinion . . . and the plaintiff fails to produce a contrary expert opinion . . . , then there is no genuine issue to be tried by the jury."); *Winegrad v. N.Y.U. Medical Center*, 104 A.D.2d 748, 480 N.Y.S.2d 472 (1984), *rev'd*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); *Bowman v. Henard*, 547 S.W.2d 527 (Tenn. 1977); *Moncrief v. Fuqua*, 610 S.W.2d 720 (Tenn. Ct. App. 1979).

⁷² See Note, *As a Matter of Law: Summary Judgment in Medical Malpractice Liti-*

Supreme Court appears to have confirmed unequivocally the duty of the nonmovant to show factual issues. *Celotex Corp. v. Catrett* clarified that a nonmoving party who bears the burden of proof on an issue must present evidence showing "the existence of an element essential to that party's case."⁷³ *Celotex* also limited the moving party's burden to merely identifying that the nonmovant "had failed in the discovery record to produce admissible evidence of exposure."⁷⁴ Application of *Celotex* to the typical defendant's motion for summary judgment in a medical malpractice claim shows that *Celotex* is likely to prove invaluable to the summary judgment movant. Because medical malpractice is simply a variety of negligence litigation, the burden of proving the defendant physician's breach of the duty of care rests squarely on the plaintiff.⁷⁵ Accordingly, one can foresee routine defendant's motions for summary judgment accompanied by expert affidavits, forcing the plaintiff to respond with satisfactory counter-affidavit proof.⁷⁶

The conclusion that *Celotex* supports grants of summary judgment for defendants in medical malpractice litigation is invulnerable to an attack emphasizing that rule 56 only authorizes summary judgment following the nonmovant's failure to respond "if appropriate."⁷⁷ *Adickes v. S.H. Kress Co.*⁷⁸ had construed the "if appropriate" language narrowly to require the moving party to present evidence showing that no "material issues of genuine fact"⁷⁹ exist. Justice Harlan's *Adickes* opinion based this reasoning on an advisory committee note to rule 56: "[W]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be de-

gation in Tennessee, 15 MEM. ST. U.L. REV. 55, 66 (1984) ("[T]he burden of proof shifts to the nonmoving party.").

⁷³ 477 U.S. 317, 322 (1986).

⁷⁴ Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett with Adickes v. Kress and the Evidentiary Problems Under Rule 56*, 6 REV. OF LITIG. 227, 229 (1987).

⁷⁵ See, e.g., *Sanchez v. Rodriguez*, 226 Cal. App. 2d 439, 445, 38 Cal. Rptr. 110, 113 (1964) (stating that the "negligence of a physician or surgeon will not be assumed but must be affirmatively proved by plaintiff unless the doctrine [of *res ipsa loquitur*] is applicable"); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* § 38 (5th ed. 1984) ("The burden of proof of the defendant's negligence is quite uniformly upon the plaintiff.").

⁷⁶ Of course, the defendant physician's motion for summary judgment will not be granted if opposing expert affidavits raise "genuine issues of material fact." FED. R. CIV. P. 56(c); see *infra* text accompanying note 185.

⁷⁷ FED. R. CIV. P. 56(e).

⁷⁸ 398 U.S. 144 (1970).

⁷⁹ FED. R. CIV. P. 56(c).

nied *even if no opposing evidentiary matter is presented.*"⁸⁰

The *Celotex* decision ignored Justice Harlan's *Adickes* emphasis on "if appropriate." True, the *Celotex* majority opinion by Chief Justice Rehnquist and the dissent by Justice Brennan each took great pains to preserve *Adickes* as good law. Despite these efforts to keep a venerable decision intact, *Celotex* and *Adickes* are worlds apart in judicial philosophy. *Adickes* represents a cautionary decision skeptical of summary judgment; *Celotex* advances a pro-efficiency philosophy that embraces summary judgment as a fashionable and pre-eminent tool to dispose of cases not meriting trial. The greatest distinction between *Adickes* and *Celotex* is that of spirit — *Celotex* "signal[s] a significant change in attitude toward grants of summary judgment."⁸¹ Of course, the more recent 1986 *Celotex* decision controls the conflicting *Adickes* decision. The fact that *Celotex* is a construction of the Federal Rules of Civil Procedure does not detract from its overall significance; most states have a summary judgment procedure similar to the federal rules,⁸² and pre-*Celotex* commentary had predicted that summary judgment proof requirements would be coordinated "with the allocation of the burden of proof at trial."⁸³

Not every decision involving a defendant's summary judgment attack on a medical malpractice claim results in a routine, nonanalytical blessing of the expert affidavit procedure. Judges sometimes carefully scrutinize the movant's expert proof and find it wanting. Similarly, nonmovant plaintiffs sometimes counter with contrary expert proof of their own that is capable of establishing "genuine issues of material fact" for a later trial.

A court should closely examine the expert affidavit of the party moving for summary judgment. After all, the moving party must make a *prima facie* showing that summary judgment should be granted.⁸⁴

⁸⁰ *Adickes*, 398 U.S. at 160 (emphasis in original) (quoting FED. R. CIV. P. 56 advisory committee's note on 1963 amendment). Commentators have not been kind to Justice Harlan's *Adickes* opinion. See, e.g., Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72, 76-78 (1977) (*Adickes* requirement that moving party show the impossibility of genuine issues is "strained"); Sonenshein, *supra* note 7, at 783 (*Adickes* reasoning "seemed to muddle the understanding of the nature of the movant's initial burden").

⁸¹ Kennedy, *supra* note 74, at 230.

⁸² See Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

⁸³ Louis, *supra* note 16, at 748; accord Currie, *supra* note 80, at 79 (stating that party opposing summary judgment matter has "burden of proof of producing evidence sufficient to sustain a favorable verdict").

⁸⁴ See 10A C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 2727. The nature

*Winegrad v. New York University Medical Center*⁸⁵ illustrates such an analytic and nonmechanical approach to scrutinize the movant's affidavits. In *Winegrad*, the defendants moved for summary judgment following an allegation that the defendants were careless in their plastic surgery reconstruction of the plaintiff's eyelid. Each defendant physician presented an affidavit containing this statement: "I now state with a reasonable degree of medical certainty that I did not deviate from good and accepted medical practices in my treatment of the plaintiff, nor did anything I do [sic] or allegedly failed to do proximately cause the plaintiff's alleged injuries."⁸⁶ The New York Court of Appeals reversed an intermediate appellate decision affirming summary judgment because of the plaintiff's failure to respond with evidence countering these expert affidavits. The court focused critically on the nature of the evidence presented by the moving party defendants, characterizing the expert affidavits as "bare conclusory assertions."⁸⁷ Presumably these affidavits were deficient because they included no hard, specific facts detailing why defendants were not careless.

Winegrad-like scrutiny of the expert affidavit for hard facts is analytically identical to decisions refusing to consider expert affidavits that contain only opinion and lack specific facts.⁸⁸ Careful review of expert affidavit proof is common, even in medical malpractice cases. *Rodriguez v. Jackson*⁸⁹ and *Witt v. Agin*⁹⁰ are illustrative. In *Rodriguez* the court disregarded the proof of four different medical experts — a physiologist, a medical school dean specializing in physiology, a registered nurse, and a nursing school dean. Each of these experts for the plaintiff opposing summary judgment submitted affidavits attempting to establish an issue of fact concerning the defendant's alleged careless treatment, diagnosis, and administration of drugs. The court refused to consider the expert proof because it failed to present competent expert facts that the defendant physicians were negligent. The court relied on a general proposition that only physicians were competent experts to prove physician negligence. Similarly, the *Witt* de-

of this showing is governed by *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

⁸⁵ 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985).

⁸⁶ *Id.* at 852, 476 N.E.2d at 643, 487 N.Y.S.2d at 317.

⁸⁷ *Id.* at 853, 476 N.E.2d at 644, 487 N.Y.S.2d at 318.

⁸⁸ *See, e.g.*, *United States v. Various Slot Machs. on Guam*, 658 F.2d 697, 700 (9th Cir. 1981) ("In the context of a motion for summary judgment, an expert must back up his opinion with specific facts.").

⁸⁹ 118 Ariz. 13, 574 P.2d 481 (Ct. App. 1977).

⁹⁰ 112 A.D.2d 64, 490 N.Y.S.2d 778 (1985), *aff'd*, 67 N.Y.2d 919, 492 N.E.2d 1231, 501 N.Y.S.2d 816 (1986).

cision refused to consider a critical assertion in the rebuttal affidavit of the nonmovant plaintiff's expert. The plaintiff sued eleven physicians and two hospitals alleging malpractice in failing to diagnose a brain tumor. A defendant psychiatrist moved for summary judgment with supporting proof that he had counseled plaintiff on only emotional problems. In rebuttal, the plaintiff's physician expert affiant testified that the psychiatrist's "failure . . . to do a work-up in his opinion, to a reasonable degree of medical certainty, departed from standards of generally accepted care and treatment in the community."⁹¹ The appellate court overturned a trial court denial of the psychiatrist's motion for summary judgment, characterizing the plaintiff's affiant as providing only a "bare, conclusory assertion" that "fails to establish a meritorious cause of action."⁹²

2. Using Evidence Rules to Measure the Expert Affidavit

A group of decisions uses evidence rules to authorize use of the expert affidavit and to decide the propriety of summary judgment. These decisions are, in a sense, not surprising since summary judgment represents a trial-like process.⁹³ Indeed, rule 56(e) directs the summary judgment process into a trial-like setting by requiring affidavits to "set forth such facts as would be admissible in evidence."⁹⁴ These cases show that policies deriving from the law of evidence merit consideration in deciding the appropriate role of the expert affidavit.

The clear modern evidentiary trend is to encourage the use of expert testimony.⁹⁵ In that light, the Federal Rules of Evidence grant the court "a broadly discretionary set of guides"⁹⁶ to assess expert testimony. The rules facilitate the use of the expert by: (1) allowing the expert to testify on the "ultimate issue" in litigation;⁹⁷ (2) permitting the expert to base an opinion on facts not admissible in evidence if the data is "of a

⁹¹ *Witt*, 112 A.D.2d at 65, 490 N.Y.S.2d at 779.

⁹² *Id.* at 66, 490 N.Y.S.2d at 780.

⁹³ See FED. R. CIV. P. 56(e) (affidavits used in summary judgment "shall set forth such facts as would be admissible in evidence"); J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 9.2, at 437 (1985) ("[O]nly material that would be admissible under the rules of evidence at trial will be considered.").

⁹⁴ FED. R. CIV. P. 56(e).

⁹⁵ See Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 578 (1986) ("What these [modern] experts have to say may be based on material that is far different than it would have been fifteen or twenty years ago.").

⁹⁶ Weinstein, *Improving Expert Testimony*, 20 U. RICH. L. REV. 473, 477 (1986).

⁹⁷ FED. R. EVID. 704.

type reasonably relied upon by experts in the particular field;”⁹⁸ and (3) letting the expert testify on direct examination, “without prior disclosure of the underlying facts or data.”⁹⁹ This trend of the modern evidence rules reflects a philosophy encouraging expert witness input to “assist the trier of fact to understand the evidence”¹⁰⁰ and has resulted in “an enormous loosening up of the restrictions on the admission of expert testimony.”¹⁰¹

*Tiedemann v. Radiation Therapy Consultants*¹⁰² illustrates the modern trend toward using evidence norms in summary judgment. In *Tiedemann* the Oregon Supreme Court reinstated a summary judgment for the defendant physicians alleged to have negligently treated the plaintiff’s cervical cancer. The defendants supported their motion for summary judgment primarily by the expert affidavit of one of the defendant physicians. After setting forth the qualifications and personal knowledge of the affiant, the affidavit continued:

The treatment rendered by the individuals comprising the Radiation Therapy Consultants, P.C., including the description of the treatment and its possible effects, the testing performed prior to therapy and the irradiation therapy, was consistent with the degree of care, skill and diligence which is used by ordinary careful physicians performing the specialty of radiotherapy in a same [or] similar circumstance in the state of Oregon. In my expert opinion, the treatment of Mrs. Tiedemann was not negligent.¹⁰³

Faced with this bare bones affidavit, the Oregon Supreme Court reversed a decision of the Oregon Court of Appeals that had found the above affidavit insufficient as a matter of law, lacking in detail, and “the functional equivalent of a general denial embellished by a notary’s seal and accompanied by a representation of expertise.”¹⁰⁴

The *Tiedemann* decision upheld summary judgment largely by applying Oregon’s version of the Federal Rules of Evidence.¹⁰⁵ The defendant physician’s affidavit qualified her to testify as an expert under rule 702. The defendant expert’s reference to “personal knowledge” of the affidavit’s contents was “admissible under OEC 703, which pro-

⁹⁸ *Id.* 703.

⁹⁹ *Id.* 705.

¹⁰⁰ *Id.* 702; Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 586 (1987) (stating that the “[e]xpert’s role in litigation has been solely to assist the finder of fact”).

¹⁰¹ Weinstein, *supra* note 96, at 482.

¹⁰² 299 Or. 238, 701 P.2d 440 (1985).

¹⁰³ *Id.* at 241, 701 P.2d at 443.

¹⁰⁴ *Tiedemann v. Radiation Therapy Consultants*, 71 Or. App. 668, 671 n.1, 693 P.2d 1346, 1348 n.1 (1985).

¹⁰⁵ See OR. EVID. CODE, OR. REV. STAT. §§ 40.010-585 (1988).

vides that the facts or data in a particular case upon which an expert bases an opinion may be those perceived by the expert at or before the hearing."¹⁰⁶ The Oregon Supreme Court also validated the consideration of the affiant's perception that her treatment "was consistent with the degree of care, skill and diligence"¹⁰⁷ similarly situated medical specialists normally use. Oregon Rule of Evidence 705 allowed opinion testimony unaccompanied by underlying factual data, and Oregon Rule of Evidence 704 permitted the affiant to express an opinion regarding the ultimate issue of fact — negligence. The court, however, refused to consider the affiant's bald assertion that her treatment of the plaintiff "was not negligent"; the statement was "pure opinion" and inconsistent with the purpose of Oregon Rule of Evidence 704 since it would "merely tell the jury what result to reach."¹⁰⁸

Employing the evidence norms, the *Tiedemann* decision concluded that the defendant had presented admissible expert evidence that merited a response by the nonmoving plaintiff. The court took the position that "[u]ncontroverted expert testimony is sufficient to indicate that no factual issue exists."¹⁰⁹ The court buttressed its conclusion by articulating a pragmatic impression of summary judgment as "designed to cut off litigation at an early stage, without subjecting the parties to months or years of extensive and expensive litigation."¹¹⁰ *Tiedemann's* enthusiasm for summary judgment may explain its failure to identify the "interested" nature of the defendant physician's expert affidavit. The affiant's credibility may itself be an issue of material fact when the only evidence supporting summary judgment is from an interested party.

Judicial evaluation of the expert affidavit under modern evidence

¹⁰⁶ *Tiedemann*, 299 Or. at 243, 701 P.2d at 444 (footnote omitted).

¹⁰⁷ *Id.* (citing OR. R. EVID. 704-705).

¹⁰⁸ *Id.* at 243-44, 701 P.2d at 444 (paraphrasing and quoting OR. R. EVID. 705 commentary).

¹⁰⁹ *Id.* at 244, 701 P.2d at 445. Two factors buttressed this conclusion: (1) Oregon's version of Federal Rule 56(c) requires, like the original, that the party responding to a summary judgment motion set forth facts showing a genuine issue as to a material fact exists; and (2) Oregon has a liberal procedure allowing the nonmovant to satisfy this duty merely by an affidavit of the nonmovant's attorney "stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact." *Id.* at 246, 701 P.2d at 445-46 (citing OR. R. Civ. P. 47E). Many cases grant motions for summary judgment when the respondent does not file an expert affidavit countering the movant's expert affidavit. *See, e.g.*, *Luby v. Carnival Cruise Lines*, 633 F. Supp. 40 (S.D. Fla.), *aff'd mem.*, 808 F.2d 60 (11th Cir. 1986); *Castelberry v. Collierville Medical Assocs.*, 92 F.R.D. 492 (W.D. Tenn. 1981); *Bowman v. Hernard*, 547 S.W.2d 527 (Tenn. 1977).

¹¹⁰ *Tiedemann*, 299 Or. at 245, 701 P.2d at 445.

rules need not always result in summary judgment for the moving party defendant. *Bulthuis v. Rexall Corp.*¹¹¹ is illustrative. The court of appeals reversed a summary judgment dismissing strict liability, negligence, and breach of warranty claims brought by a woman who alleged injuries caused by her mother's ingestion of diethylstilbestrol (DES)¹¹² during pregnancy to prevent a miscarriage. The moving party defendant drug manufacturers did not rely on expert affidavits but, instead, produced deposition testimony showing evidence that the plaintiff's mother took progesterone, not DES, during her pregnancy. In attempting to rebut this proof, the nonmovant plaintiff put forward the expert affidavits of two physicians involved in the treatment of plaintiff for cervical cancer. Dr. Sack's affidavit described his noticing " 'changes' in the tissue of [plaintiff's] vaginal area which, in [his] opinion, were caused by her mother's ingestion of the drug"¹¹³ DES. Dr. Townsend's affidavit stated that his examination of the plaintiff "showed changes that are commonly seen in DES exposed offspring and rarely seen in non-DES exposed individuals."¹¹⁴ The trial court viewed these affidavits as insufficient to defeat summary judgment because they presented expert opinion without factual support.

The Court of Appeals reversed, relying partially on Federal Rule of Evidence 705's express approval of "opinion or inference . . . without prior disclosure of the underlying facts or data." Also, the appellate court noted that the rule permits the trial judge to request the expert's "underlying facts or data" and reasoned that "it would be unfair to grant summary judgment against plaintiff without affording an opportunity to supply"¹¹⁵ supporting facts. The Court of Appeals' opinion struck a proper accommodation between the clear Federal Rule of Civil Procedure 56(e) duty of the nonmovant to respond showing a factual issue and Federal Rule of Evidence 705:

Expert opinion is admissible and may defeat summary judgment if it appears the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit, even though the underlying factual details and reasoning upon which the opinion is based are not. If further facts are desired, the movant may request and the district court may require their disclosure.¹¹⁶

¹¹¹ 789 F.2d 1315 (9th Cir. 1985) (per curiam).

¹¹² DES is "a potent estrogen in medicine . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 629 (3d ed. 1986).

¹¹³ *Bulthuis*, 789 F.2d at 1319.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1317.

¹¹⁶ *Id.* at 1318. The Ninth Circuit closely followed *Bulthuis'* reasoning in *R.C. Dick*

This process of using the liberal Federal Rule of Evidence 705, together with the normal summary judgment principle requiring inferences to be drawn in favor of the nonmovant,¹¹⁷ may create an environment in which the party opposing summary judgment may get to trial through the use of strategic and carefully drawn expert affidavits.

Great potential conflict exists between summary judgment policies and the modern trend toward greater and more liberal use of the expert. Summary judgment, of course, evinces a need to test the veracity of the pleadings to determine if a party has real facts supportive of those few facts required to be set forth by a lenient notice pleading system.¹¹⁸ Federal Rule of Evidence 703 allows expert testimony based on the expert's perception or observation or if the facts on which the expert forms an opinion are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."¹¹⁹ Given the rule, it is not difficult for the party opposing summary judgment to produce a short expert affidavit advancing, without much elaboration or showing of scientific authority, an "ultimate"¹²⁰ opinion directly contrary to the thrust of the moving party's proof. Under these circumstances one can imagine decisions denying summary judgment because a "genuine issue of material fact" exists.

Fortunately, courts have struck a pragmatic balance between the evidence rules and the efficiency purpose underlying rule 56. In *Merit Motors, Inc. v. Chrysler Corp.*,¹²¹ the trial court rebuffed the plaintiff's effort to use an expert economist's affidavit to defeat a summary judgment motion. The expert's affidavit contained what the court termed "opinion" unsupported by the record.¹²² The plaintiff's argument against summary judgment relied on Federal Rule of Evidence 703 in urging that an expert economist's affidavit sufficed to establish factual

Geothermal Corp. v. Thermogenics, Inc., 827 F.2d 407 (9th Cir. 1987), *reh'g granted*, 841 F.2d 1010 (9th Cir. 1988).

¹¹⁷ The Court of Appeals viewed Dr. Townsend's statement that the changes in plaintiff's tissue were "commonly seen in DES exposed offspring and rarely seen in non-DES exposed individuals" as creating a "reasonable inference" that the plaintiff's mother had ingested DES. *Bulthuis*, 789 F.2d at 1317.

¹¹⁸ See *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (stating that complaint must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"); F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 3.8, at 142 (3d ed. 1985) (finding *Conley* so lenient that it allows the pleader to state little more than that the defendant has wronged her).

¹¹⁹ FED. R. EVID. 703.

¹²⁰ *Id.* 704.

¹²¹ 569 F.2d 666 (D.C. Cir. 1977) (Wright, J.).

¹²² *Id.* at 672; see *supra* text accompanying notes 48-54.

issues for trial. Judge J. Skelly Wright acknowledged that the rule “was intended to broaden the acceptable bases of expert opinion, but it was not intended . . . to make summary judgment impossible.”¹²³ Wright’s *Merit Motors* opinion focused on the rule’s requirement that the facts or data relied on by the expert be “a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”¹²⁴ Wright also characterized the expert’s attempts to show competitive injury as making assumptions about demand elasticity and ignoring the dominant competitive presence of Ford and General Motors against the defendant Chrysler. In essence, Judge Wright asserted that the rule could not prevent a court from granting a summary judgment; the liberality of the rule had to give way to the “power of a court to grant summary judgment.”¹²⁵

Judge Wright’s seminal *Merit Motors* decision represents an especially important contribution to the management of antitrust litigation. In antitrust litigation, expert opinion is usually the foundation of the central item of proof — competitive injury. Moreover, it is particularly easy to obtain an expert economist to testify that an alleged restraint was or was not anticompetitive.¹²⁶ Therefore, antitrust litigators should have little trouble obtaining expert affidavits to counter those of an opposing party who has moved for summary judgment. *Merit Motors*’ significance for antitrust litigation management was its refusal to accept automatically an expert economist’s affidavit and its firm requirement that proffered expert testimony be properly anchored in the customary standards of rule 703. It is not surprising that *Merit Motors* has influenced later antitrust courts to scrutinize economist’s affidavits rigorously under rule 703.¹²⁷

¹²³ *Merit Motors*, 569 F.2d at 673.

¹²⁴ *Id.* (citing FED. R. EVID. 703).

¹²⁵ *Id.*

¹²⁶ See Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 815 (1987) (“[P]laintiffs can almost invariably find an economist who will testify that in his opinion their claim is correct.”).

¹²⁷ See, e.g., *Pennsylvania Dental Ass’n v. Medical Serv. Ass’n of Pa.*, 745 F.2d 248, 261-62 n.7 (3d Cir. 1984) (affirming trial court rejection of expert opinion in affidavit because it lacked factual support in the record (citing *Merit Motors*)), *cert. denied*, 471 U.S. 1016 (1985); *Package Shop, Inc. v. Anheuser-Busch, Inc.*, 675 F. Supp. 894, 945-46 (D.N.J. 1987) (granting summary judgment for moving party defendants when affidavits of plaintiffs premised on extra-record assumptions (citing rule 703 and *Merit Motors*)); *Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 663 F. Supp. 1360, 1480 (D. Kan. 1987) (rejecting affidavit of economist as “oblivious to the record as a whole” and requiring “an expert’s opinions to be rooted *in fact* before they will be considered in opposition to a motion for summary judgment” (citing *Merit Motors*)).

*In re "Agent Orange" Product Liability Litigation*¹²⁸ represents another good example of a decision reaching a pragmatic, businesslike balance between the heightened liberality of the Federal Rules of Evidence toward expert testimony and the basic policy underlying Federal Rule of Civil Procedure 56 to eliminate unwarranted trial. In *Agent Orange*, the court granted summary judgment in favor of seven defendant chemical herbicide manufacturers and against those Vietnam veteran plaintiffs who had opted out of a certified class. The court's reasoning represents a blending of the Federal Rules of Evidence and summary judgment norms. The essence of the defendants' summary judgment motion was that plaintiffs had no proof that Agent Orange had in fact caused their alleged injuries. Plaintiffs responded to defendants' motion by relying on several expert affidavits and depositions. Some of the plaintiffs' expert material consisted of opinions of experts connecting Agent Orange to plaintiffs' injuries. However, much of this evidence appeared speculative.¹²⁹ Plaintiffs also relied on medical expert affidavits appending hundreds of affidavits completed by individual plaintiffs; the latter consisted of form checklists on which the Vietnam veteran plaintiffs checked symptoms such as memory loss, fatigue, skin ailments, and psychological problems traceable to their exposure to Agent Orange.

Judge Weinstein's thorough opinion refused to consider plaintiffs' expert epidemiological¹³⁰ proof since it supplied "no basis for an inference of causation," lacked "other reliable data," and, accordingly, was not admissible evidence.¹³¹ The court acknowledged that Federal Rule of Evidence 703 allows an expert to rely on hearsay and that Federal

(emphasis in original)); *see also* *Allen v. Cook*, 668 F. Supp. 1460, 1466 (W.D. Okla. 1987) (rejecting expert's affidavit since "there is nothing to indicate the grounds relied on by plaintiff's expert in making such a statement, nor is there any factual support in the record" (citing *Merit Motors*)).

¹²⁸ 611 F. Supp. 1223 (E.D.N.Y. 1985) (Weinstein, J.), *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2898 (1988).

¹²⁹ *See id.* at 1234-35. One expert stated that "I think there is an association [between exposure to Agent Orange and lymphoma]." *Id.* at 1234 (emphasis in original). Another expert asserted that "Lymphocitic lymphoma *** could be related to exposure *** to Agent Orange," and a third expert opined that "there may be a causal association." *Id.* at 1235 (emphasis in original).

¹³⁰ Epidemiological research focuses on "statistical methods to detect abnormally high incidences of disease in a study population and to associate these incidences with unusual exposures to suspect environmental factors." Dore, *A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-in-Fact*, 7 HARV. ENVTL. L. REV. 429, 431 (1983).

¹³¹ *Agent Orange*, 611 F. Supp. at 1234.

Rule of Evidence 702 assumes that an expert possesses the skill needed to evaluate hearsay.¹³² Yet, Judge Weinstein, relying on Federal Rules of Evidence 104(a), 401, and 402, retained the responsibility of deciding whether the hearsay met "minimum standards of reliability." He found the experts' data so "lacking in probative force and reliability that no reasonable expert could base an opinion on them."¹³³ Judge Weinstein also used Federal Rule of Evidence 403 to exclude plaintiffs' expert evidence as likely to mislead the jury.¹³⁴

The *Agent Orange* summary judgment was predicated largely on the inadmissibility of critical causation evidence. Judge Weinstein exhibited a microscopic, hands-on attitude toward the plaintiff's expert proof.¹³⁵ At the same time, *Agent Orange* is also significant for its summary judgment teachings. The court found the plaintiffs' expert proof on causation to be "wholly conclusory and unfounded in fact."¹³⁶ This analysis is similar to Judge Wright's *Merit Motors* opinion. Judge Weinstein's view of summary judgment seems compatible with the evidence rules. The evidentiary policy requiring a reliable and reasonable basis or foundation for an "expert opinion"¹³⁷ approximates the summary judgment norm preventing consideration of conclusory affidavits lacking a factual basis. Each policy relies on a factual basis, and each is wary of speculative proof.

Similarly, *Evers v. General Motors Corp.*¹³⁸ refused to allow the liberality of the Federal Rules of Evidence to negate the firm Federal Rule of Civil Procedure 56(e) requirement that the nonmovant set forth specific facts. In *Evers* the plaintiff alleged that an automobile manufacturer had built an unsafe passenger restraint system by failing to install air bags. Defendant General Motors moved for summary judgment and argued that the plaintiff had no evidence showing any design defect. The plaintiff then put forward the affidavit of an automotive

¹³² *Id.* at 1245.

¹³³ *Id.*

¹³⁴ *Id.* at 1255-56.

¹³⁵ For a more complete treatment of Judge Weinstein's work in the *Agent Orange* litigation, see P. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986); Marcus, *Apocalypse Now?*, 85 MICH. L. REV. 1267, 1289-95 (1987); Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337 (1986).

¹³⁶ *Agent Orange*, 611 F. Supp. at 1259.

¹³⁷ See Carlson, *supra* note 95, at 578-81 (summarizing the test of the admissibility of expert proof as one "concerning the trustworthiness of the background data relied upon by an expert").

¹³⁸ 770 F.2d 984 (11th Cir. 1985).

design engineer who swore that an air bag restraint system “would probably have reduced the severity of, or prevented [plaintiff’s] injuries.” The affidavit also stated that the “failure to incorporate an ‘air bag system’ constituted a defect in the design of the automobile.”¹³⁹ The trial court ruled that this affidavit created an issue of fact regarding the alleged design defect. The court granted summary judgment for the defendant, rejecting the substantive legal theory underlying plaintiff’s strict products liability claim. The Court of Appeals affirmed summary judgment, but rejected the trial court’s view of the expert’s affidavit. The *Evers* court found the affidavit at issue to be without probative value because it failed “to provide any specific facts to support appellant’s claim” and consisted solely of “conclusionary allegations.”¹⁴⁰ The *Evers* decision specifically rejected plaintiff’s argument that Federal Rules of Evidence 703 through 705 permitted consideration of expert opinion proof. In the court’s view, expert witness evidence rules “do not alter the requirement of [Federal Rule of Civil Procedure] 56(e) that an affidavit must set forth specific facts in order to have any probative value.”¹⁴¹

Courts can use provisions of the Federal Rules of Evidence to *exclude* consideration of an expert’s affidavit testimony. In *American Key Corp. v. Cole National Corp.*¹⁴² the plaintiff, a retailer of keys, brought an antitrust suit alleging a conspiracy between various defendants to keep it from leasing space in shopping malls. A critical element of the plaintiff’s case was market definition. Plaintiff alleged that it competed “in high traffic areas in enclosed regional malls having 500,000 or more square feet and at least two major anchor tenants.”¹⁴³ When the defendant moved for summary judgment attacking the plaintiff’s market definition, the plaintiff responded by filing affidavits of an expert economist and of the plaintiff’s president. The latter affidavit “attempted to construct a relevant economic market based upon” the plaintiff’s alleged ideal product market. The former expert affidavit opined that the

¹³⁹ *Id.* at 985.

¹⁴⁰ *Id.* at 986. After setting forth his qualifications and his review of the available evidence, affiant Thelin, a former senior design engineer for defendant General Motors, testified that “it is my opinion that an ‘air bag’ occupant restraint system would probably have reduced the severity of, or prevented, the injury sustained by Marcia Evers in this collision” and that “the failure . . . to incorporate an ‘air bag’ system of automatic crash protection for the occupants of this automobile constituted a defect in the design of the automobile.” *Id.*

¹⁴¹ *Id.*

¹⁴² 762 F.2d 1569 (11th Cir. 1985).

¹⁴³ *Id.* at 1578.

plaintiff's market definition was correct. While the expert affidavit contained reference to facts, these facts were based on a statement of facts presented to him by the president of the plaintiff firm. The Court of Appeals affirmed summary judgment, relying on Federal Rule of Evidence 703 to reject the expert's proof.

The court asserted that expert opinion must be premised "upon 'facts or data . . . of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'"¹⁴⁴ In effect, the court condemned the expert for basing his opinion on the opinions of others. According to this line of reasoning "an expert's opinion that lacks any credible support does not create an issue of fact."¹⁴⁵

The Court of Appeals for the Fifth Circuit's recent opinion in *Viterbo v. Dow Chemical Co.*¹⁴⁶ illustrates the exclusion of expert testimony entirely by focus on the Federal Rules of Evidence and typifies an antagonistic attitude of federal courts toward unsupported expert opinion. *Viterbo* affirmed a summary judgment for the defendant Dow Chemical in an action to recover damages for the alleged toxic impact on the plaintiff of Dow's chemical herbicide Tordon 10K. After discovery, the defendant moved for summary judgment based on the plaintiff's inability to prove that his symptoms of depression, allergies, and hypertension were caused by Tordon 10K. The trial court and the Fifth Circuit agreed with Dow that the plaintiff's expert medical testimony opposing summary judgment was inadmissible under Federal Rule of Evidence 703. The expert's opinion that Tordon 10K caused plaintiff Viterbo's symptoms was based on Viterbo's "oral history," test results on Viterbo that showed hypertension and renal failure, and a study concluding that rats exposed to large doses of picloram, a Tordon 10K ingredient, developed cancerous tumors. In rejecting the opinion as unlikely to assist the jury because it "lacks the foundation and reliability necessary to support expert testimony,"¹⁴⁷ the Fifth Circuit used the same careful, "hands-on" style of evaluating proffered expert input pioneered by Judge Wright in *Merit Motors* and used by Judge Weinstein in *Agent Orange*.¹⁴⁸ The court faulted use of the oral history as incomplete since it failed to disclose a family history of depression and hypertension, criticized the expert's failure to explain test results showing a

¹⁴⁴ *Id.* at 1580 (citing FED. R. EVID. 703).

¹⁴⁵ *Id.* (citing *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 673 n.27 (D.C. Cir. 1977)).

¹⁴⁶ 826 F.2d 420 (5th Cir. 1987).

¹⁴⁷ *Id.* at 424.

¹⁴⁸ *See supra* notes 121-37 and accompanying text.

high level of a different chemical unrelated to Tordon 10K, dieldrin, capable of causing depression, and dismissed the study linking picloram dosage with cancer in rats as unrelated to the dosages or symptoms of the plaintiff.

The *Viterbo* court carefully reviewed the evidence to assure that the “broad discretion” of the trial court in assessing expert opinion evidence was not “manifestly erroneous.”¹⁴⁹ *Viterbo* employed a relatively narrow scope of review and allowed the trial court a high degree of discretion to assess proffered expert testimony for reliability and jury helpfulness. In so doing, the court cited not only Federal Rule of Evidence 703 but also rule 403. The court’s method called for determining whether the evidence was so lacking in reliability as to be “more prejudicial than probative, making it inadmissible under [Federal Rule of Evidence] 403.”¹⁵⁰

II. A POLICY ASSESSMENT OF EXPERT PARTICIPATION IN SUMMARY JUDGMENT

In contrast to the doctrinal focus of Part I, Part II is policy based. Part II isolates the important policies relevant to using expert participation in the summary judgment process and discusses whether the growing judicial acceptance of the expert affidavit advances these policies.

A. *Relevant Summary Judgment Policies*

1. Evaluating the “Put-Up or Shut-Up” Nature of Summary Judgment

Summary judgment lore carries the baggage of many formulas and policies that have been repeated often enough to become vacuous incantations. For example, courts and commentators frequently recite that summary judgment exists to pierce “sham pleadings.”¹⁵¹ Similarly, one

¹⁴⁹ *Viterbo*, 826 F.2d at 422.

¹⁵⁰ *Id.* (requiring evidence concluded to be admissible under rule 703 also to pass muster under rule 403’s requirement excluding evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury” (citing *Barrel of Fun, Inc. v. State Farm Fire & Casualty Co.*, 739 F.2d 1028, 1033 (5th Cir. 1984)); *accord* *Washington v. Armstrong World Indus., Inc.*, 839 F.2d 1121, 1123-24 (5th Cir. 1988).

¹⁵¹ *See, e.g.*, *Pacific Far E. Line v. United States*, 513 F.2d 1355, 1359 (Ct. Cl. 1975) (quoting *Hartwig v. United States*, 485 F.2d 615, 620 (Ct. Cl. 1973)); *Weather-Rite Sportswear Co. v. United States*, 298 F. Supp. 508, 510-11 (Cust. Ct. 1969) (stating that summary judgment is “designed to discern between real issues deserving trial

sometimes hears that summary judgment is a device to test “paper issues”¹⁵² set forth in the pleadings or to eliminate “frivolous”¹⁵³ cases.

The verbal formulations underlying summary judgment are murky. It is clear, however, that a motion for summary judgment puts the opposing party in a “put-up or shut-up” position. When a pleading creates issues incompatible with potential evidence, a party’s motion for summary judgment requires some proof of the “reality” of the “paper” issues pleaded.¹⁵⁴ Accordingly, the summary judgment process requires the opponent to “put-up,” or come forward with proof that a “genuine issue as to any material fact”¹⁵⁵ does exist. The nonmovant who fails to “put-up” such proof demonstrating the reality of evidence must “shut-up” without a trial; the court, under these circumstances, must grant a motion for summary judgment.

The role of the expert affidavit seems compatible with the “put-up” underpinnings of summary judgment. Expert evidence plays a dominant or major role in an increasing variety of lawsuits.¹⁵⁶ As a result of the growing importance of expert testimony, specific areas of substantive law now require expert evidence to prove particular claims satisfactorily.¹⁵⁷ Since a claimant must eventually put forward expert testimony at trial, it does not seem onerous simply to transfer that same task to the pretrial phase of the motion for summary judgment. Stated conversely, litigants that are unwilling to “put up” some pretrial evidence showing that a full plenary trial is really needed should not receive scarce judicial resources. Courts are reluctant to afford a trial to a nonmovant who is unable to provide a rebuttal expert affidavit coun-

and feigned issues which merely delay the entry of judgment.”); J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 93, § 9.1, at 433; 10 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 2712, at 579.

¹⁵² See F. JAMES & G. HAZARD, *supra* note 118, § 5.19, at 271.

¹⁵³ See *id.*; see also, e.g., *Marshall v. City of Cape Coral*, 797 F.2d 1555, 1562 (11th Cir. 1986); *Blackhawk Heating & Plumbing Co. v. Driver*, 433 F.2d 1137, 1141 (D.C. Cir. 1970); *New Home Appliance Center v. Thompson*, 250 F.2d 881, 883 (10th Cir. 1957).

¹⁵⁴ See FED. R. CIV. P. 56(e) (requiring respondent to “set forth specific facts showing that there is a genuine issue for trial”).

¹⁵⁵ *Id.* 56(c); see also *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 800 F.2d 1208, 1212 (D.C. Cir. 1986) (characterizing nonmovant’s burden as “the time . . . to put up or shut up”).

¹⁵⁶ See *Carlson*, *supra* note 95, at 577 (stating that “technical witnesses have revolutionized” modern litigation).

¹⁵⁷ For example, various states now require expert testimony to support plaintiff’s claims of medical malpractice. E.g., *Starr v. Fregosi*, 370 F.2d 15 (5th Cir. 1966); *Ellis v. Neurological Assocs. of Tucson, P.C.*, 118 Ariz. 18, 574 P.2d 486 (1978).

tering the movant's expert testimony.¹⁵⁸

Advancing expert participation from plenary trial to a pretrial motion for summary judgment appears consistent with the role of summary judgment in the context of the Federal Rules of Civil Procedure. The summary judgment motion represents the prime procedural mechanism available to avoid a trial on the merits. A brief review of the relatively weak alternative devices used to avoid trial shows why summary judgment predominates.

Rule 8(a)(2) notice pleading enables the plaintiff to commence a "paper case" easily and summarily. While various cases and commentators seem to challenge the universality of notice pleading,¹⁵⁹ federal courts apply liberal notice pleading rules to most federal cases.¹⁶⁰ Lenient notice pleading standards ease the start of the litigation process by making it very simple to begin suit.

The rule 12(b)(6) motion to dismiss for failure to state a claim is a relatively poor device to dispose of cases compared to a summary judgment motion. *Conley v. Gibson*¹⁶¹ interpreted notice pleading so broadly that a party moving to dismiss under rule 12(b)(6) has an almost impossible task. According to the liberal *Conley* test, a motion to dismiss will not be granted unless it is clear beyond doubt that the opposing pleader cannot prove any set of facts to support her claim that will entitle her to relief.¹⁶² This burden is so difficult that commentators

¹⁵⁸ See, e.g., *Webster v. Offshore Food Serv., Inc.*, 434 F.2d 1191 (5th Cir. 1970); *Luby v. Carnival Cruise Lines*, 633 F. Supp. 40 (S.D. Fla.), *aff'd mem.*, 808 F.2d 60 (11th Cir. 1986); *Howard v. Walker*, 242 Ga. 406, 249 S.E.2d 45 (1978); *Tiedemann v. Radiation Therapy Consultants*, 299 Or. 238, 701 P.2d 440 (1985).

¹⁵⁹ See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985) (requiring careful pleading of RICO elements); *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 545 (1983) (holding sketchy allegations of antitrust injury "insufficient as a matter of law" and affirming judgment of dismissal); *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (stating that complaint must allege "specific concrete facts demonstrating . . . harm"); Brunet & Sweeney, *Integrating Antitrust Procedure and Substance After Northwest Wholesale Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts*, 72 VA. L. REV. 1015, 1063-74 (1986) (collecting authority supporting the emerging trend of a fact specific complaint in complex litigation); Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

¹⁶⁰ See, e.g., *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986); *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985) (vacating dismissal of securities law class action); *Homestead Mobile Homes, Inc. v. Foremost Corp. of Am.*, 603 F. Supp. 767, 769-70 (N.D. Tex. 1985) (antitrust litigation governed by generous rules of notice pleading).

¹⁶¹ 355 U.S. 41 (1957).

¹⁶² *Id.* at 45-46.

have criticized *Conley* as overly generous to the inartful pleader.¹⁶³

Even rule 11, amended in 1983 in an effort to deter unnecessary processing of claims easily filed in satisfaction of rule 8(a)(2) and rule 12(b)(6),¹⁶⁴ cannot compete with the motion for summary judgment as a dispositive procedural device. Unquestionably, amended rule 11 has the potential to deter frivolous claims and to “check abuses”¹⁶⁵ in the filing of groundless pleadings. Nonetheless, the yardstick for attorney satisfaction of rule 11 — that of a prefiling inquiry that is reasonable under the circumstances¹⁶⁶ — is sufficiently moderate to prevent rule 11 from becoming a major force in disposing of much litigation. Moreover, recent decisions may be interpreting rule 11 narrowly to stem a large quantity of motions to obtain rule 11 sanctions.¹⁶⁷ These factors yield a rule 11 certification requirement that, although significant, is no substitute for the entirely separate device of summary judgment.

Accordingly, the rivals of summary judgment do not really wield much clout as docket clearing devices. Instead, summary judgment remains *the* procedural mechanism to evaluate whether lawsuits merit a full trial. The prevailing attitude of the Supreme Court toward summary judgment is that of “celebration.”¹⁶⁸ Viewed in this pragmatic

¹⁶³ See, e.g., F. JAMES & G. HAZARD, *supra* note 118, § 3.11, at 153 (*Conley* allows the pleader to “allege her claim in very general terms, so that it cannot clearly be discerned what she thinks the facts might be”); Roberts, *Fact Pleading, Notice Pleading and Standing*, 65 CORNELL L. REV. 390, 420 (1980) (*Conley* “overstates the nature of notice pleading and cannot be taken literally”); cf. A. MILLER, *THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* 8 (revision of remarks at a Federal Judicial Center Workshop, January 20, 1984) (stating that a rule 12(b)(6) motion to dismiss is “a wonderful tool on paper, but have you ever looked at the batting average of Rule 12(b)(6) motions? I think it was last effectively used during the McKinley [A]dministration”).

¹⁶⁴ See Nelkin, *Sanctions Under Amended Federal Rule 11 — Some “Chilling” Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1313 (1986).

¹⁶⁵ FED. R. CIV. P. 11 advisory committee notes (1983 amendment); S. KASSIN, *AN EMPIRICAL STUDY OF RULE 11 SANCTIONS* (1985).

¹⁶⁶ S. KASSIN, *supra* note 165, at 2 (citing *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass’n*, 365 F. Supp. 975 (E.D. Pa. 1973)).

¹⁶⁷ See, e.g., *Golden Eagle Distrib. Corp. v. Burroughs Corp.* 801 F.2d 1531 (9th Cir. 1986) (reversing trial court award of sanctions as outside normal concept of rule 11); *Chipanno v. Champion Int’l Corp.*, 702 F.2d 827, 831 (9th Cir. 1983) (finding rule 11 “not a discovery choice”); Note, *Plausible Pleadings: Developing Standards For Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987).

¹⁶⁸ See Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1114-15 (1986)

light, the existing case law requiring a plaintiff to respond with expert proof does not seem either overly taxing or philosophically antagonistic to plaintiffs. The line of medical malpractice cases dismissing the claims of plaintiffs who fail to file expert witness counter-proof to a motion for summary judgment supported by properly evaluated expert affidavit¹⁶⁹ seems entirely in tune with the “put up or shut up” underpinning of rule 56. Given the high cost of defending medical malpractice claims, requiring the plaintiff to come forward at the pretrial phase with proof that would be required at a full trial is efficient.

Of course, courts should be wary of summary judgment motions filed particularly early in litigation, before a plaintiff has had the chance to obtain an expert.¹⁷⁰ In this situation, the court should be open to a rule 56(f) motion to give the responding party extra time to obtain an expert affidavit. Professor Kennedy is correct in counseling that “[g]ood practice . . . requires the plaintiff to request an express continuance on an affidavit of specific facts under rule 56(f).”¹⁷¹ Given that this responding expert proof is crucial, trial courts should interpret rule 56(f) broadly. This construction should not be difficult since the text of rule 56(f) liberally allows judicial discretion to “order a continuance to permit affidavits to be obtained”¹⁷² and the Advisory Committee has urged that “summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.”¹⁷³ Yet, rule 56(f) awards trial courts a considerable quantum of discretion. A trial court judge under pressure for speedy case disposition may be intolerant of rule 56(f) motions that will slow litigation.¹⁷⁴ Such intolerance will likely be difficult

(Supreme Court’s 1986 “celebration of summary judgment may be more important than any reformulation of standards”); Kennedy, *supra* note 74, at 251-52 (*Celotex* marks a change of “attitude” favoring summary judgment).

¹⁶⁹ See *supra* notes 63-70 and accompanying text.

¹⁷⁰ For the view that a diligent and well-prepared plaintiff should obtain an expert before the filing of a complaint, see 1 D. LOUISELL & H. WILLIAMS, *MEDICAL MALPRACTICE* § 11.34, at 11-105-06 (1986) (“Counsel for the plaintiffs should have retained a willing expert witness on liability and causation before accepting the case or, at least, before filing the complaint.”).

¹⁷¹ Kennedy, *supra* note 74, at 256.

¹⁷² FED. R. CIV. P. 56(f); *Mid-S. Grizzlies v. National Football League*, 720 F.2d 772, 779-80 (3d Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

¹⁷³ FED. R. CIV. P. 56 advisory committee’s note (1963 amendments).

¹⁷⁴ See *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir. 1986) (affirming trial court refusal to grant nonmovant a continuance of summary judgment motion); Kennedy, *supra* note 74, at 254 (“[I]f the trial judge may have no patience or tolerance, and summarily proceeds to enter the summary judgment . . . it then becomes extremely

to identify on appellate review in the broad web of trial court "discretion."

2. Evaluating the "Docket Clearing" Nature of Summary Judgment

A contemporary purpose of summary judgment is to eliminate needless, unnecessary trials from "crowded" court dockets.¹⁷⁵ In today's concept of judicial administration, summary judgment occupies a centerpiece role as a voguish route to clearing dockets. Perhaps the most significant aspect of the 1986 *Celotex* decision was not its holding but the Court's broad, favorable dictum describing summary judgment as "not a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"¹⁷⁶ In that vein, Judge Schwarzer has described summary judgment as the major response to the "[p]ublic demand for greater [court] efficiency and economy, which is served by early disposition of baseless claims and defenses."¹⁷⁷

The present enthusiasm for summary judgment manifests itself in various ways. Courts now use rule 56 to dispose of specific types of cases formerly thought to be particularly inappropriate for rule 56

difficult for the plaintiff to obtain a second chance by moving to set aside the summary judgment.").

¹⁷⁵ See, e.g., *Fontenot*, 780 F.2d at 1197 (emphasizing docket clearing nature of summary judgment); *Minnesota Mining & Mfg. Co. v. United States Rubber Co.*, 279 F.2d 409, 415 (4th Cir. 1960) (finding rule 56 "a salutatory and efficient instrumentality for the expedition of the business of the courts"); *Bros, Inc. v. W.E. Grace Mfg. Co.*, 261 F.2d 428, 432 (5th Cir. 1958) ("Summary judgment is a marvelous instrument in expediting the administration of justice."); 10 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 2712, at 563 ("[S]ome of the pressure on court dockets may be alleviated."). A major question is whether, in fact, court dockets are "crowded." For the view that we are in the midst of a litigation explosion, see Barton, *Beyond the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977). For a contrary view, see NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 173 (1984) (finding "no evidence to support . . . 'litigation explosion' in the state trial courts"); Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).

¹⁷⁶ *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986) (quoting FED. R. CIV. P. 1).

¹⁷⁷ Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984).

treatment. The renaissance of summary judgment in antitrust litigation has been remarkable. The *Poller v. Columbia Broadcasting System, Inc.*¹⁷⁸ dictum that “summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles”¹⁷⁹ seems out of favor and old-fashioned. The Supreme Court has replaced the 1960’s *Poller* dictum with “ready consideration of summary judgment records”¹⁸⁰ in three major 1980’s cases: *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,¹⁸¹ *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,¹⁸² and *Arizona v. Maricopa County Medical Society*.¹⁸³ These recent cases have created an atmosphere in which courts are receptive to antitrust summary judgment motions. They have also created a flurry of summary judgments dismissing antitrust cases.¹⁸⁴

¹⁷⁸ 368 U.S. 464 (1962).

¹⁷⁹ *Id.* at 473.

¹⁸⁰ Brunet & Sweeney, *supra* note 159, at 1055.

¹⁸¹ 475 U.S. 574 (1986).

¹⁸² 472 U.S. 284 (1985).

¹⁸³ 457 U.S. 332 (1982). One is tempted to add *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (per curiam) to the list of Supreme Court cases favoring antitrust summary judgment because *Catalano* used a “threshold” competitive impact examination. See Brunet, *Streamlining Antitrust Litigation By “Facial Examination” of Restraints: The Burger Court and the Per Se Rule of Reason Distinction*, 60 WASH. L. REV. 1, 18 (1984).

¹⁸⁴ See, e.g., *Tunis Bros. Co. v. Ford Motor Co.*, 823 F.2d 49 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1013 (1988); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir. 1987); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626 (9th Cir. 1987); *In re Japanese Elec. Prods. Antitrust Litig.*, 807 F.2d 44 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1955 (1987); *49er Chevrolet, Inc. v. General Motors Corp.*, 803 F.2d 1463 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1606 (1987); *Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 479 U.S. 1033 (1987); *Terry’s Floor Fashions, Inc. v. Burlington Indus., Inc.*, 763 F.2d 604 (4th Cir. 1985) (summary judgment “remains . . . an appropriate procedure in antitrust litigation”); *Amev, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986); *ECOS Elecs. Corp. v. Underwriters Laboratories*, 743 F.2d 498 (7th Cir. 1984), *cert. denied*, 469 U.S. 1210 (1985); *Royal Serv., Inc.*, 13 Trade Reg. Rep. (CCH) ¶ 67,910 (E.D. Cal. 1987); see also Popofsky & Goodwin, *The “Hard-Boiled” Rule of Reason Revisited*, 56 ANTITRUST L.J. 195, 209 (1987) (“[L]ower courts have taken the hint . . . and increasingly upheld grants of summary judgment or directed verdicts for antitrust defendants.”); Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213, 222 (1987) (“Antitrust cases present the paradigm for the use of summary judgment in complex litigation.”); Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 814 (1987) (declaring that “it is important that the bases for summary judgment be expanded” in antitrust actions).

The growth of expert participation in summary judgment, however, may not advance the docket clearing function of rule 56. It is true that facilitating expert participation in support of a motion for summary judgment will dispose of some cases, particularly those in which the party opposing summary judgment has little or no proof to support its claim. Yet, whether expert participation will increase the caseload disposition rate is problematic.

First, courts will have to deny many motions for summary judgment even when expert proof supports the motions. A review of the existing case law regarding experts and summary judgment shows that the failure of the nonmovant to respond with an expert affidavit often results in summary judgment when the moving party has supported the motion with a properly admissible expert affidavit. The recipe to avoid summary judgment is for the nonmovant to obtain an expert and to file a properly admissible counter-affidavit creating "genuine issues of material fact" requiring a conventional trial.¹⁸⁵ While this cookbook approach will not be possible in every case, the easy availability of expert witnesses to testify on a variety of subjects should enable an astute lawyer to produce appropriate countering expert proof. Judicial analysis of conflicting expert affidavits supporting and opposing summary judgment will often result in a denial of summary judgment because an issue of fact has arisen.

Second, whether the modern summary judgment motion can have a great "docket clearing" force is a real question. Past empirical studies of motions for summary judgment confirm that the motion "is used in a small percentage of cases, but find that, when summary judgment is sought, movants enjoy healthy success rates."¹⁸⁶ McLauchlan's seminal study examined all cases filed in the Northern District of Illinois in fiscal year 1970. The study found a surprisingly low incidence of summary judgment; summary judgment motions were filed in only 4% of

¹⁸⁵ See, e.g., *Ethyl Corp. v. Borden, Inc.*, 427 F.2d 206 (3d Cir. 1970) (reversing summary judgment because of conflicting affidavits of qualified expert witnesses); *Kollsman Instrument Corp. v. Astek Instrument Corp.*, 225 F. Supp. 534 (S.D.N.Y. 1964) (denying summary judgment on issue of patent infringement when experts in disagreement); *Bucky v. Sebo*, 97 F. Supp. 277 (S.D.N.Y. 1951) (denying motion for summary judgment in infringement suit after reviewing conflicting expert affidavits and concluding that live cross-examination essential).

¹⁸⁶ Calkins, *supra* note 168, at 1113; Guiher, *Summary Judgments — Tactical Problems of the Trial Lawyer*, 48 VA. L. REV. 1263 (1962); McDonald, *The Effective Use of Summary Judgment*, 15 SW. L.J. 365 (1961); McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. LEGAL STUD. 427 (1977).

litigation and granted in 2.3% of all cases.¹⁸⁷ Although the tone of *Celotex*, *Anderson*, and *Matsushita* has certainly created a climate conducive to summary judgment motions, the McLauchlan study shows that the motion for summary judgment is unlikely to be a major procedural force in resolving a real or perceived litigation explosion.

The modest use of summary judgment found by the McLauchlan study was recently confirmed by a Federal Judicial Center examination of summary judgment in three federal trial courts: the Eastern District of Pennsylvania, the Central District of California, and the District of Maryland.¹⁸⁸ This study of 600 randomly selected cases terminated between July 1, 1985, and June 30, 1986, compared summary judgment activity in 1975. The study found that the rate of summary judgment motions filed, 16%, was unchanged between 1975 and 1986.¹⁸⁹ The study found that the percentage of cases terminating in summary judgment had decreased by about 50% since 1975.¹⁹⁰ Appellate reversal rates of summary judgment grants were similar to the overall reversal rate.¹⁹¹

The Federal Judicial Center study predated the 1986 Supreme Court clarification of summary judgment standards in *Celotex*, *Anderson*,¹⁹² and *Matsushita*.¹⁹³ These decisions may likely signal litigants and trial courts to increase the rate of motions for, and grants of, summary judgment. Although no comprehensive study confirms this expectation, recent studies of summary judgment activity in New York, Arizona, Texas, and the District of Columbia federal district courts show high rates of summary judgments.¹⁹⁴

¹⁸⁷ McLauchlan, *supra* note 186, at 449-57. The study found that defendants' motions for summary judgment were granted much more frequently than plaintiffs' motions. Courts granted defendants' motions in 62.1% of the cases studied and plaintiffs' motions in 24% of the cases studied. *Id.* at 451. The overall incidence of summary judgment is actually higher because McLauchlan's sample used both trial and appellate cases. But appellate cases review only *grants* of summary judgment; *denials* of motions for summary judgment are not reviewable because they are not final judgments. *Id.* at 436.

¹⁸⁸ See J. CECIL & C. DOUGLAS, SUMMARY JUDGMENT PRACTICE IN THREE DISTRICT COURTS (1987).

¹⁸⁹ This figure represents the percentage of cases with at least one summary judgment motion. *Id.* at 11. Defendants filed most of these motions. *Id.* at 2.

¹⁹⁰ *Id.* at 2, 11.

¹⁹¹ *Id.* at 2, 9. Appeals from summary judgment grants "occur in 13 to 17 percent of eligible cases." *Id.* at 2.

¹⁹² 477 U.S. 242 (1986).

¹⁹³ 475 U.S. 574 (1986).

¹⁹⁴ A study of 82 rule 56 motions decided by the Southern and Eastern Districts of

B. The Role of Evidence Policy: An Independent and Discretionary Task for a Trial Court Confronted with the Expert Supported Motion for Summary Judgment

At first glance the role of evidence policy in assessing the appropriate role for the expert affidavit in summary judgment appears illogical. Instinctively, summary judgment policies would seem to predominate resolution of summary judgment motions. In contrast, the overall theme of the evidence rules is merely to regulate questions of admissibility that, although obviously important, deal only with issues of whether to allow particular evidence.

Nonetheless, expert testimony rules and policies play a significant role in considering the proper scope of the expert affidavit. Summary judgment is, after all, a trial-like procedure requiring evidence rules to govern the assessment of proof. Accordingly, rule 56(e) specifically brings evidence policies into play by calling for summary judgment affidavits to "set forth such facts as would be admissible in evidence."¹⁹⁵ Hence, questions of admissibility frequently arise in the summary judgment process. Moreover, the expert affidavit is a specialized type of evidence encountered in most summary judgment motions. Accordingly, careful consideration and evaluation of the evidence policies underlying the expert affidavit is essential.

The thrust of modern evidence policy regarding experts has been to admit whatever evidence will assist the trier of fact. The drafters of the Federal Rules of Evidence took a hospitable view of the expert witness as "[a] common source of . . . knowledge"¹⁹⁶ to assist the trier of fact in forming "an intelligent evaluation of facts."¹⁹⁷ The general standard of aiding the trier of fact is premised in a common sense¹⁹⁸ assessment that

New York between October 1, 1986, and December 31, 1986, found that 71% of motions for summary judgment were granted. J. CECIL & C. DOUGLAS, *supra* note 188, at 12. Similar studies of summary judgment motions in the District of Arizona, the District of the District of Columbia, and the Western District of Texas produced summary judgment rates of 69%, 88%, and 63%, respectively. *Id.* at 12.

¹⁹⁵ FED. R. CIV. P. 56(e).

¹⁹⁶ FED. R. EVID. 702 advisory committee note.

¹⁹⁷ FED. R. EVID. 702.

¹⁹⁸ See Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952). Ladd states:

There is no more certain test for determining when experts may be used than the *common sense inquiry* whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

Id. (emphasis added).

the testimony of the expert will be helpful.¹⁹⁹ The increasingly liberal rules on the admission of expert testimony should be viewed in this light. While the provisions of the Federal Rules of Evidence relating to expert testimony expand the boundaries of expert input,²⁰⁰ the rules grant the trial judge significant discretion in admitting expert proof.

The evidence policy that an expert assist the trier of fact has its foundation in a crucial "process value"²⁰¹ of adjudication — accuracy. The value of accuracy is essential to a just resolution of disputes.²⁰² Most evidence rules focus on the process of ascertaining truth or decisional accuracy.²⁰³ This policy is so central to evidence norms that Federal Evidence Rule 102 provides specifically that "[t]hese rules shall be construed . . . to the end that the *truth* may be ascertained and proceedings justly determined."²⁰⁴ Correspondingly, evidence policy also gives trial courts the ability to exclude evidence that, although relevant, will be likely to confuse the trier of fact.²⁰⁵

The value of judicial discretion in assessing proffered expert testimony for overall assistance and trustworthiness can be illustrated

¹⁹⁹ See 7 J. WIGMORE, EVIDENCE § 1923, at 9 (J. Chadbourne rev. ed. 1978).

²⁰⁰ See *supra* text accompanying notes 95-101.

²⁰¹ See generally Summers, *Evaluating and Improving Legal Processes — A Plea for "Process Values,"* 60 CORNELL L. REV. 1 (1974). Professor Summers urges focusing on "process values," "standards of value by which we may judge a legal process to be good as a process, apart from any 'good result efficacy' it may have." *Id.* at 3 (emphasis in original). Professor Summers calls for clear distinction between values supporting "process efficacy" and "result efficacy." *Id.* at 1-3, 11-44; see also Kadish, *Methodology and Criteria in Due Process Adjudication — A Survey and Criticism,* 66 YALE L.J. 319, 346-49 (1957) (exploring range of rational decision making in procedural due process).

²⁰² See J. RAWLS, A THEORY OF JUSTICE 239 (1971) (stating that legal rules require "a process reasonably designed to ascertain the truth"); Brunet, *Questioning the Quality of Alternate Dispute Resolution,* 62 TUL. L. REV. 1, 34 (1987) ("Quality dispute resolution needs procedures that facilitate 'accurate' results.").

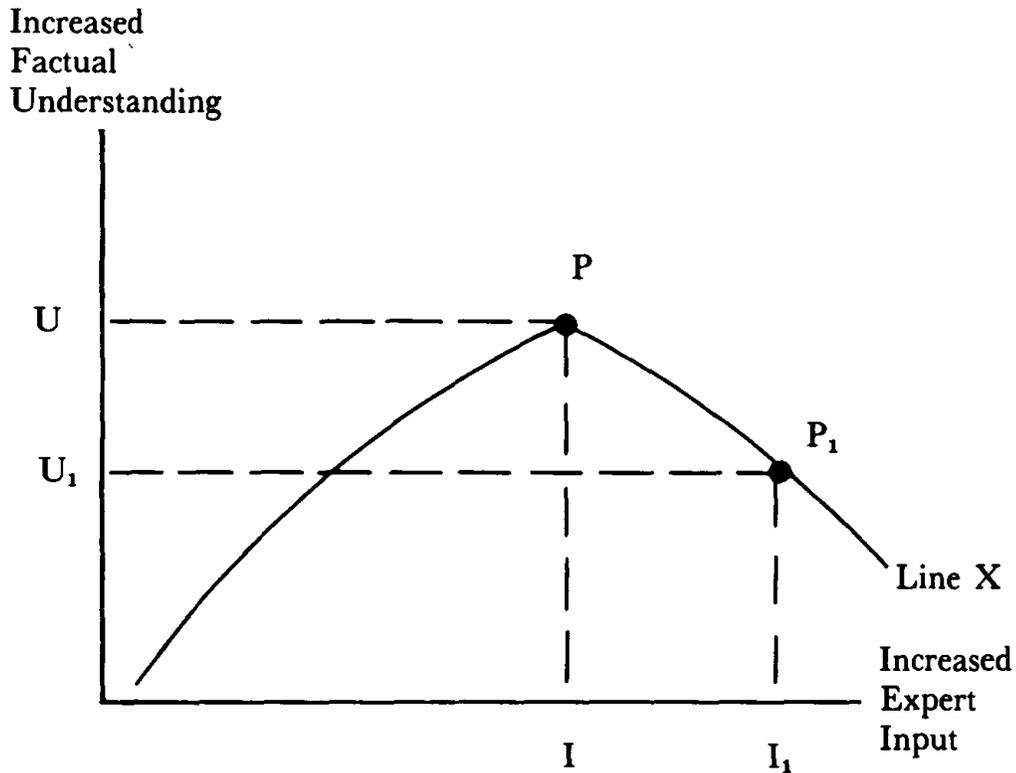
²⁰³ See Brunet, *supra* note 202, at 36 (stating that "truth is a major goal" of evidence rules); Note, *The Hearsay Rule and Epistemological Suicide,* 74 GEO. L.J. 1301, 1301 (1986) (finding that evidence rules "facilitate the search for truth"). Some rules of evidence do not have the goal of decisional accuracy. For example, the privilege rules exclude evidence that might facilitate truth; instead, the privilege rules advance specific confidentiality policies.

²⁰⁴ FED. R. EVID. 102 (emphasis added).

²⁰⁵ See *United States v. Scop,* 846 F.2d 135, 140 (2d Cir. 1988) ("Rule 403 provides for exclusion of evidence which wastes time.") (Winter, J.); FED. R. EVID. 403 (allowing court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury").

graphically. Figure A illustrates the varying quality of factual understanding or accuracy that expert testimony can provide.

Figure A
Assistance to the Trier of Fact
Provided by Increased Expert Input



Line X first shows a steady increase in factual understanding produced by helpful expert input. The value of expert input in a particular case may, however, eventually decrease. The fall of Line X after point P shows a drop in decisional accuracy or factual understanding despite increased expert witness input. At point P the trier of fact has received the optimal amount of expert input from a witness or witnesses. I units of expert witness input yield U units of factual understanding. Although additional expert input has been admitted at point P₁, the quantum of factual understanding or accuracy has decreased; at P₁, an increased quantity of expert input, I₁, has produced a decreased quantity of understanding, U₁. Figure A shows that judges controlling the receipt of expert input, whether through affidavit or ordinary live trial testimony, must be vigilant to assure that they do not receive input that

will be counterproductive and decrease factual understanding. Therefore, courts should refuse to admit evidentiary input beyond point *P* explicitly because further input fails to assist the trier of fact.

Different judges are likely to have different points of optimality, or *P*. The realization that point *P* is different for each judge justifies a strong measure of judicial discretion or independence when assessing proffered expert testimony. Without this discretion some judges may be forced to admit expert input that will be more likely to confuse than to assist the quest for decisional accuracy. The discretion here advocated is unique to each judge. Discretion is not a unitary phenomenon; its proper use requires case by case assessment by different, individual judges.

It is probably true that counsel can easily obtain an expert to testify. In antitrust actions, for example, each party can readily enlist an expert economist to evaluate alleged anticompetitive impact.²⁰⁶ However, recent commentary and decisions seem to advance the notion of judicial independence to assess trial expert evidence for overall “trustworthiness” by using the general test that the expert must assist the trier of fact.²⁰⁷ Courts do have a “broad discretion to exclude expert evidence.”²⁰⁸ Such judicial discretion in carefully assessing the admissibility of proposed expert proof is crucial when the expert affidavit appears in summary judgment settings. In his *Agent Orange* opinion Judge Weinstein was clearly reluctant to give free rein to expert testimony. The judge expressed this reluctance by requiring that hearsay underlying

²⁰⁶ See Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 333 (1985) (“[A] Ph.D. can be found to swear to almost any ‘expert’ proposition, no matter how false or foolish.”); Turner, *supra* note 184, at 815 (“[P]laintiffs can almost invariably find an economist who will testify that in his opinion their claim is correct.”).

²⁰⁷ See Carlson, *supra* note 95, at 588. Carlson cites and discusses *Barrel of Fun v. State Farm Fire & Casualty Co.*, 739 F.2d 1028 (5th Cir. 1984) (rejecting as untrustworthy expert testimony regarding so-called “psychological stress evaluation” voice measurement); see also *American Key Corp. v. Cole Nat’l Corp.*, 762 F.2d 1569 (11th Cir. 1985) (rejecting expert economist’s affidavit testimony since contents based on mere opinion of other witness); *Shatkin v. McDonnell Douglas Corp.*, 727 F.2d 202 (2d Cir. 1984) (excluding expert input based on unrealistic assumptions); *KN Energy, Inc. v. Great W. Sugar Co.*, 698 P.2d 769 (Colo. 1985) (excluding trial testimony of expert as based on hypothetical facts contrary to undisputed evidence and, accordingly, unhelpful to trier of fact).

²⁰⁸ *United States v. Lopez*, 543 F.2d 1156, 1158 (5th Cir. 1976) (stating that “great deference is given to the discretionary ruling” of courts ruling on admissibility of expert testimony), *cert. denied*, 429 U.S. 1111 (1977); 3 J. WEINSTEIN & M. BERGER, *WEINSTEIN’S EVIDENCE* ¶ 702[02], at 702-22 (1988).

ing the expert's opinion satisfy "minimum standards of reliability." The opinion concluded boldly that the expert data advanced by the respondent plaintiffs was "lacking in probative force and reliability."²⁰⁹ Judge Schwarzer has similarly urged that federal courts should use the pretrial conference to assess expert evidence. He asserted that "[e]xpert testimony which does not draw on specialized knowledge but merely presents the arguments of a party dressed up as an opinion should be excluded."²¹⁰ Judge Wright's *Merit Motors* opinion refused to subordinate summary judgment policies to the increased hospitality toward expert input inherent in the Federal Rules of Evidence.²¹¹

The significant degree of judicial discretion to reject particular expert input generally makes great sense. Such discretion is particularly significant when evaluating expert proof within the summary judgment process. Courts should be able to appraise proffered expert testimony supporting or opposing summary judgment and reject any input unlikely to assist the trier of fact. The overall evidentiary standard trial courts should apply is simply an assessment of whether the expert input is reliable or trustworthy. This standard appears in Federal Rule of Evidence 702's limitation on expert proof to that which "will assist the trier of fact to understand the evidence or determine a fact in issue."²¹² Existing evidence doctrine permits the court to reject expert evidence that is likely to be "overly confusing to the jury, more prejudicial than probative, or needlessly time-consuming."²¹³ Judicial discretion is

²⁰⁹ See *In re "Agent Orange" Prod. Liability Litig.*, 611 F. Supp. 1223, 1245 (E.D.N.Y. 1985) (Weinstein, J.), *aff'd*, 818 F.2d 187 (3d Cir.), *cert. denied*, 108 S. Ct. 2898 (1988); see also *supra* text accompanying notes 128-36.

²¹⁰ W. SCHWARZER, *MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION* 117 (1982).

²¹¹ See *supra* text accompanying notes 121-25.

²¹² FED. R. EVID. 702.

²¹³ J. WEINSTEIN & M. BERGER, *supra* note 208, at 702-11; FED. R. EVID. 423 (stating that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"). For judicial recognition that potentially confusing expert testimony should be rejected, see, for example, *United States v. Serna*, 799 F.2d 842, 850 (2d Cir. 1986) (affirming trial court refusal to admit expert testimony when it would "muddy the waters" and confuse trier of fact), *cert. denied*, 107 S. Ct. 1887 (1987); *El-Meswari v. Washington Gas Light Co.*, 785 F.2d 483 (4th Cir. 1986) (refusing to allow expert testimony by physician on mother's emotional reaction to the death of her child because jury could assess her grief without expert help); *United States v. DeLuna*, 763 F.2d 897, 912 (8th Cir.) (affirming trial court refusal to allow an expert to testify on so-called "discourse analysis," the systematic study of a conversation having the goal of identifying the speaker(s) with the ability to control or direct the conversation, because the proffered testimony would confuse the trier of fact), *cert. denied*, 474 U.S. 980

essential to weigh the dangers of confusion and prejudice.

A healthy dose of judicial discretion in evaluating the expert affidavit is crucial because summary judgment offers fewer protections against unhelpful expert testimony than conventional trial. At trial, the power and immediacy of cross-examination colors and tempers the expert's testimony. This check on the influence of the expert may be lacking in summary judgment procedure. True, summary judgment does offer the analogy of supplementary affidavits. Rule 56(e) provides a mechanism similar to cross-examination by allowing courts discretion to "permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or further affidavits."²¹⁴ This procedure could allow an opponent to depose an expert who has offered an affidavit meriting specific questions. It would also provide a trial-like opportunity for opposing experts or counsel to "evaluate and criticize the expert testimony of his or her expert opponent."²¹⁵

However, it is unlikely that the rule 56(e) procedure will be as effective as a real cross-examination to flesh out unreliable expert evidence. In contrast to immediate cross-examination at trial, the rule 56(e) supplementation mechanism allows the expert days to respond. Moreover, the oral nature of real cross-examination represents a direct and efficient way to point out inadequacies in expert proof. The supplementary affidavit is a cumbersome and awkward counterpart to regular cross-examination. The written response lacks some of the potential to confront instantly and to correct an expert. The substantial lapse in time between the filing of the expert's affidavit and a written expert supplementary affidavit may enable the expert to evade a question that could have been effective in regular cross-examination. Although the "live" questioning of an expert at an oral deposition is preferable to a written supplementary affidavit, the expert's oral deposition is not the equivalent of trial cross-examination.

Moreover, written expert affidavits supporting or opposing summary judgment are likely to be even easier to obtain than expert "live" trial testimony. Some experts are likely to be more willing to take a written position than to face an oral, public grilling following live testimony.

(1985); *Upshur v. Shephard*, 538 F. Supp. 1176 (E.D. Pa. 1982) (rejecting expert testimony of laws of motion in negligence case involving an automobile collision since jury would not have been assisted), *aff'd mem.*, 707 F.2d 1396 (3d Cir. 1983); *Zachery v. Wheeler*, 511 F. Supp. 591 (E.D. Tenn. 1981) (rejecting proffered testimony of "accidentologists" to reconstruct accident because trier of fact would not be aided).

²¹⁴ FED. R. CIV. P. 56(e).

²¹⁵ Brunet, *supra* note 183, at 31.

The potential ease of obtaining the written expert affidavit justifies a degree of judicial independence that calls for real judgment to admit only reliable and useful expert input.

This Article defends rigorous judicial evaluation of expert witness affidavits accompanying motions for summary judgment. Nonetheless, written input by the expert witness has a place. The written statement or testimony of an expert is a common feature of administrative agency adjudications, particularly in complex disputes. For example, the hearing rules of both the Federal Energy Regulatory Commission (FERC) and the Food and Drug Administration (FDA) mandate that adjudication testimony normally be filed in written form.²¹⁶ This is not surprising since much of the testimony in typical FDA adjudications and in FERC rate disputes comes from expert witnesses and is highly complex. Other agencies also encourage written testimony in complex adjudications. The Environmental Protection Agency specifically allows hearing testimony in the form of verified written statements.²¹⁷ Such testimony often comes from expert witnesses. The Interstate Commerce Commission adjudication rules facilitate written testimony.²¹⁸ The justification supporting written expert input before agencies lies in the expertise of the hearing officers, the complexity of the subject matter at issue, and the desire to streamline disputes. However, even these expert agencies often require the opportunity for oral cross-examination of witnesses whose direct testimony is written. The FERC hearing rules require that “any witness submitting written testimony must be available for cross-examination.”²¹⁹ The FERC hearing rules allow oral cross-examination when it “is the most effective and efficient means to clarify the matters at issue.”²²⁰

²¹⁶ See Federal Energy Regulatory Commission Rule of Practice and Procedure 506, 18 C.F.R. § 385.506(a) (1988) (“Unless the presiding officer orders such testimony to be presented orally, direct and rebuttal testimony of a witness in a hearing must be prepared and submitted in written form.”); Food and Drug Administration Rules for Formal Evidentiary Public Hearings, 21 C.F.R. § 12.87(b) (1988) (requiring that “the evidence at a hearing is to be developed to the maximum extent through written submissions, including written direct testimony”).

²¹⁷ See Environmental Protection Agency Rules of Practice, 40 C.F.R. § 22.22(c) (1987) (allowing administrative law judge to admit into evidence, “in lieu of oral testimony, statements of fact or opinion prepared by a witness”).

²¹⁸ Interstate Commerce Commission Oral Hearing Procedures, 49 C.F.R. § 1113.9 (1987) (allowing written prepared statements of witnesses).

²¹⁹ Federal Energy Regulatory Commission Rule of Practice and Procedure 506, 18 C.F.R. § 385.506(a) (1988).

²²⁰ Food and Drug Administration Rules for Formal Evidentiary Public Hearings, 21 C.F.R. § 12.87(b)(1)(ii) (1988).

Of course, the central distinction between these agency rules encouraging written expert input and the more demanding federal case law described in this Article is that of timing and the nature of complex agency adjudications. The agency rules customarily apply at a full plenary trial and expert testimony is the norm within the complex dispute. Under such circumstances one should not be surprised to see rules facilitating written direct testimony by experts, particularly when such rules encouraging written expert input are accompanied by the safeguard of live cross-examination.

The relationship between this desirable quantum of judicial discretion in scrutinizing expert input and the scope of appellate review warrants attention. The high level of independent discretion trial courts need to evaluate the reliability of expert affidavits accompanying a motion for summary judgment requires a correspondingly narrow scope of appellate review. The trial court examines the expert's evidence first hand. Therefore, appellate courts must limit their role to determining if trial courts have abused their discretion. The attitude of the *Viterbo* decision, that "in rulings on the admissibility of expert opinion evidence the trial court has broad discretion,"²²¹ is entirely appropriate and other courts should adopt it.²²²

The hard-edged attitudes that the courts display toward the expert affidavit are encouraging. Influential judges such as Judge J. Skelly Wright and Judge Jack Weinstein rejected expert affidavits in their respective *Merit Motors* and *Agent Orange* opinions. Each opinion exhibited a desirable quantum of judicial discretion to evaluate the expert input for overall reliability and trustworthiness. Many cases seem willing to reject an expert affidavit that advances opinion without providing accompanying factual foundation. The Ninth Circuit's *Various Slot*

²²¹ *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987). The *Viterbo* court went on to announce that trial court evidence rulings regarding experts "must be sustained unless manifestly erroneous." *Id.* (citing *Rodriguez v. Olin Corp.*, 780 F.2d 491, 494 (5th Cir. 1986) and *Crawford v. Worth*, 447 F.2d 738, 740-41 (5th Cir. 1971)).

²²² One might argue that since the summary judgment motion normally requires written expert input, the appellate court might be in a position equivalent to the trial court and, accordingly, to exercise a greater scope of review. Such a position has merit and might be appropriate when the nature of the expert's written proof is very clear. Nonetheless, the Federal Rules of Evidence themselves confer a healthy measure of discretion on the trial courts and call for a degree of appellate restraint. Similarly, the Supreme Court's decision in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), requiring appellate deference to trial court findings based on documentary evidence, suggests that appellate courts should be conservative in reviewing tasks given initially to trial judges.

Machines on Guam and the New York Court of Appeal's *Winegrad* decisions exemplify cases requiring a clear and factual basis for opinion testimony otherwise admissible under evidentiary standards.

CONCLUSION

Unguided by any clear Supreme Court precedent, lower courts are increasingly encountering affidavits of expert witnesses supporting and opposing motions for summary judgment. Some decisions have summarily rejected slim expert affidavits containing almost exclusively opinion. These holdings seem compatible with the "personal knowledge" requirement of Federal Rule of Civil Procedure 56(e). At the same time, increasing numbers of medical malpractice defendants move for summary judgment supported by expert affidavits. When a plaintiff does not counter expert affidavits filed by moving defendants, some courts grant a motion for summary judgment with minimal or no real analysis of the expert affidavit.

The explanation for such apparent enthusiasm for the expert affidavit may lie in post-*Celotex* judicial receptivity toward the motion for summary judgment. Summary judgment following failure to respond to the moving party's expert affidavit can also be explained by an attitude that some type of expert response must be provided to justify plenary trial. The "put up or shut up" nature of summary judgment meshes well with *Celotex* and the contemporary judicial attitude against a litigation explosion.

Nonetheless, some courts have analyzed the expert affidavit with extreme caution. Such careful analysis of the expert affidavit seems to be "neutral." Some decisions evaluate the affidavit carefully whether filed by the moving or the responding party.

A careful and painstaking judicial examination of any expert material accompanying a rule 56 motion is both wise policy and good law. Rule 56(e) only justifies grants of summary judgment "if appropriate." Although the drafters of rule 56 required a nonmovant to respond following the filing of an affidavit by the moving party, they refused to write a blanket rule requiring summary judgment if the nonmovant failed to respond.

Proper construction of rule 56 requires careful judicial scrutiny of the moving party's expert affidavit. Correspondingly, the *Celotex* rule requires symmetrical scrutiny of any expert affidavits filed by a nonmovant who bears the burden of proof.

The Federal Rules of Evidence create a hospitable receptivity toward expert input. Yet, these evidence rules correctly require that expert evi-

dence be helpful to the trier of fact. Accordingly, courts can and will reject expert input likely to be confusing or unhelpful.

Leading decisions such as *Agent Orange* and *Merit Motors* have shown remarkable discretion and independence in evaluating the expert affidavit. This use of judicial discretion is consonant with Federal Evidence Rule 702's norm that proffered expert evidence assist the trier of fact. Judicial independence to reject the use of potentially unhelpful expert affidavits contributes to decisional accuracy by assuring that the trier of fact is not confused. Moreover, such judicial independence should deter unnecessary expert affidavits and prevent the expert affidavit from becoming a regular and persistent feature of civil litigation. Used properly and with proper caution, the expert affidavit can facilitate "appropriate" disposition of motions for summary judgment. If a court improperly uses an expert affidavit, giving its contents little scrutiny, the expert affidavit is potentially dangerous. Misuse of an expert affidavit can result in inaccurate summary judgment dispositions or, when conflicting expert affidavits collide, wasteful exercises in futility.