

**Pound Civil Justice Institute
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Summary Judgment on the Rise: Is Justice Falling?

**DEFENDING AGAINST SUMMARY JUSTICE:
THE ROLE OF THE APPELLATE COURTS**

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Executive Summary

Professor Vairo begins her paper with a look at the vocabulary of the conversation about summary judgment, with its emphasis on values of justice and efficiency and its background of liberal approaches to pleading, discovery, and admissibility of evidence. She continues with a discussion, in Part II, of the legal context for summary judgment, in which many judges have evolved from positions of hostility to summary judgment motions to more receptive stances. Judges now widely view summary judgment as an integral part of civil procedure, to be employed in the overall program of giving justice.

In Part III, Professor Vairo considers arguments on the constitutionality vel non of summary judgment practice. Professor Suja Thomas argues, primarily on historical grounds, that summary judgment is inconsistent with the United States Constitution's guarantees of trial by jury. Other academics, some of whom oppose the use of summary judgment and some of whom do not, have responded that Professor Thomas may or may not be correct, but that it is unlikely that constitutional arguments will bring down the present summary judgment regime.

Professor Vairo continues, in Part IV, with an examination of the U.S. Supreme Court's 1986 summary judgment "Trilogy"—the Celotex, Anderson, and Matsushita decisions. In liberalizing summary judgment practice the Court employed language that appears to invite trial court judges to consider matters previously considered inappropriate as grounds for non-trial disposition. Among them are the parties' burdens of proof, the quantum and quality of the non-movant's evidence, differences in the substantive law of the case, and the "plausibility" of the non-movant's legal theory.

In Part V, Professor Vairo examines the Supreme Court's second important "Trilogy" of cases that, between 1993 and 1999, informed the present stance of the federal courts on appellate review of summary judgment rulings. The Daubert and Kumho decisions interpreted the Federal Rules of Evidence to authorize federal district court judges to carry out a "gatekeeper" function with regard to all forms of the expert testimony on which most serious civil litigation depends. In its third decision, Joiner, the Court rejected the notion that the Seventh Amendment right to jury trial justified a "hard look" by appellate courts at trial court decisions to exclude expert testimony, which, in turn, often virtually dictate grants of summary judgment.

In Part VI, Professor Vairo considers what state appellate courts might do in future summary judgment cases in the exercise of their independent duty to give justice to the litigants before them. She notes that most state courts now employ a summary judgment regime that is close to the liberal approach of the U.S. Supreme Court's 1986 Trilogy. In addition, there are ever-present docket pressures, legislatures have made state legal systems more defendant-friendly, and there are national and local campaigns to make summary judgments even easier to obtain—as well as to harden pleading requirements and to make it more difficult for litigants to avoid dismissal before discovery can even begin. Yet the state courts have not marched in lock-step behind the Supreme Court in the area of expert evidence, and there is still ample room for them to reexamine their summary judgment regimes with an eye to protecting the right to jury trial. To assist in that endeavor, Professor Vairo offers a concise list of options open to state courts. There is much that state appellate judges can do to ensure the fair administration of justice.

In sixty years summary judgment has grown from a wobbly infant to an aggressive gatekeeper to access to trial—by jury or otherwise. We need to ensure it does not exceed whatever role we want it to play, and to carefully define that role.¹

I. Introduction.

Summary: Performed speedily and without ceremony: *summary justice; a summary rejection.*²

Judgment: Law. A determination of a court of law; a judicial decision. A court act creating or affirming an obligation, such as a debt. A writ in witness of such an act. A misfortune believed to be sent by God as punishment for sin.³

Justice: 1. The quality of being just; conformity to the principles of righteousness and rectitude in all things; strict performance of moral obligations; practical conformity to human or divine law; integrity in the dealings of men with each other; rectitude; equity; uprightness. *Justice and judgment are the habitation of thy throne. —Psalms 89:14.*

2. Conformity to truth and reality in expressing opinions and in conduct; fair representation of facts respecting merit or demerit; honesty; fidelity; impartiality; as, the justice of a description or of a judgment; historical justice. 3. The rendering to every one his due or right; just treatment; requital of desert; merited reward or punishment; that which is due to one's conduct or motives.⁴

¹ Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1945 (1998) (“Wald”).

² THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE: FOURTH EDITION (2000).

³ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE: FOURTH EDITION (2000).

⁴ WEBSTER'S REVISED UNABRIDGED DICTIONARY (1996).

Prism: . . . 2. A transparent body of this form, often of glass and usually with triangular ends, used for separating white light passed through it into a spectrum or for reflecting beams of light. . . . 5. A medium that misrepresents whatever is seen through it.⁵ *For example, light passing through a prism is bent when it enters the prism and again when it leaves the prism.*⁶ On a motion for summary judgment, the trial judge “must view the evidence presented through the *prism* of the substantive evidentiary burden.”⁷

Penumbra: An area in which something exists to a lesser or uncertain degree. “*The First Amendment has a penumbra where privacy is protected from governmental intrusion*” (Joseph A. Califano, Jr.).⁸

Words matter. Words courts use govern our everyday lives. Words appellate courts use matter more because they guide trial courts in the everyday application of the law. Someone has to win and someone has to lose in a court of law. The words appellate courts use signal how trial courts ought to bend when making close calls. Although the word “justice” seems to have a uniform positive meaning, other words, like “judgment” and “summary” can sometimes send ambiguous or mixed messages. Combining the word “summary” with the word “justice,” as in the first usage example above, even connotes a negative meaning.

Another hot-button issue, forum shopping, serves as an analogy for a discussion about the procedure known as summary judgment: Is it really forum shopping? Or, is it forum selection? “Selection” is good; “shopping” is bad. To those litigating where they do not wish to be litigating, it is forum shopping. To plaintiffs who have researched the availability of the best venue for their clients, and sued there, or to defendants who take advantage of rules allowing them to remove a state court case to federal court or to transfer to a different court, it is forum selection.⁹

Similarly, is it summary judgment? Or, is it summary *justice*? Again, depending on one’s perspective, having rules like Federal Rule of Civil Procedure 56¹⁰ and analogous state rules, which provide the opportunity to shortcut a lawsuit to resolution without trial, may be a good or bad thing. Since the United States Supreme Court decided its summary judgment Trilogy in 1986,¹¹ and then a Trilogy of expert evidence cases in the 1990’s,¹² summary judgment has received increased attention in federal and state courts, and has become the source of controversy.¹³ Although recent scholarship has focused on whether summary judgment is

⁵ *Id.*

⁶ THE AMERICAN HERITAGE BOOK OF ENGLISH USAGE (1996).

⁷ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis added).

⁸ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE: FOURTH EDITION (2000).

⁹ *See generally*, Georgene M. Vairo, *Through The Prism: Summary Judgment After The Trilogy*, Vol. 1 CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS (ALI-ABA July 2007) (“Vairo SJ”).

¹⁰ The current text of Rule 56 is set out in its entirety in Appendix I.

¹¹ *Celotex Corp. v. Catrett*, 106 S.Ct. 2505 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986).

¹² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

¹³ *See, e.g.*, Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592 (2004) (“Burbank”). In discussing the Supreme

unconstitutional or counterproductive,¹⁴ it is difficult to argue that summary judgment has no role to play in the fair resolution of appropriate cases. Indeed, it is one of three legs of the modern civil procedure stool—notice pleading, followed by expansive discovery, followed by summary judgment motions to resolve the case if it involves pure issues of law, or, more controversially, to test whether a claimant (typically the plaintiff) has garnered enough evidence during the discovery process to get to a jury.¹⁵

But who is to test whether the plaintiff has “enough” evidence? The story we tell is that it is the province of the jury to find the facts, and the job of the trial judge to find the law. Then, it is the job of the appellate courts to apply an appropriate level of review to correct mistakes that need to be corrected to prevent a miscarriage of justice. How does this story play out in the real world? We tend to want to believe that our procedural systems are value-neutral or “trans-substantive,”¹⁶ but of course, as considerable academic literature and our own common sense tells us, the administration of justice is not absolutely value-neutral. It has been 100 years since Oliver Wendell Holmes and Benjamin Cardozo told us that judging is a subjective enterprise.¹⁷

Procedural systems have evolved over time.¹⁸ States led the way in achieving modern procedural reform.¹⁹ New York’s Field Code led the way and the federal system followed with

Court’s summary judgment Trilogy, Professor Redish recently stated that these “[c]hanges in the law of summary judgment quite probably explain at least a large part of the dramatic reduction in federal trials.” Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005) (“Redish SJ”); cf. Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 82, 86–88, 143–44 (2006) (“Steinman SJ”) (presenting data that demonstrates that federal courts cite the Trilogy of cases on summary judgment more often than any other cases). *But see* Burbank, *supra*, at 620–21 (arguing that the effect of summary judgment on the decline of trials did not begin with the Trilogy but rather in the 1970s); Joe S. Cecil, Rebecca N. Eyre, Dean Miletich, & David Rindskopf, “A Quarter Century of Summary Judgment Practice in Six Federal District Courts” (June 2, 2007) (Paper Prepared for First Annual Conference on Empirical Legal Studies, University of Texas, June 2, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=914147 (“Cecil”) (discussing empirical evidence that shows the Trilogy has not increased the grant of summary judgment to the extent scholars have previously stated). “In the fiscal year ending two months before the Federal Rules of Civil Procedure took effect in 1938, 19.9% of cases terminated by trial. In 1952, the trial rate for all civil cases was 12.1%. In 2003, only 1.7% of civil terminations occurred during or after trial.” Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1258–59 (2005) (footnote omitted). These figures include trials before both judges and juries. *See id.*; cf. Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004) (discussing competing explanations of the decline in trials). *But see* Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgment Grants from Eight District Courts*, 2007 WISC. L. REV. 107 (2007) (arguing that the data used in empirical studies of summary judgment have significant inadequacies and urging more study with better data).

¹⁴ See Part III.

¹⁵ See EDWARD J. BRUNET & MARTIN H. REDISH, *SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE* 2 (3d ed. 2006) (“Brunet & Redish”); Redish SJ, *supra* n. 12, at 1339.

¹⁶ See, e.g., Paul D. Carrington, *Symposium, The Reporters Speak: Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068 (1989).

¹⁷ Robert Benson, *THE INTERPRETATION GAME: HOW JUDGES AND LAWYERS MAKE THE LAW* 30 (2008) (“The Old Story got it wrong”).

¹⁸ See generally Jeffrey W. Stempel, *Symposium: New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOKLYN L. REV. 659 (1993).

¹⁹ See Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311 (1988).

the enactment of the Federal Rules of Civil Procedure in 1938. These developments led to modern procedural systems that relied on notice pleading and liberal discovery to facilitate easy access to courts and to evidence in the hands of the adversary. For some time, there has been movement away from this liberal notice pleading and discovery regime because of the increasingly greater costs to defendants and courts as the time for resolving cases increased. Part II of this paper thus puts the summary judgment debate into this larger procedural context.²⁰

Part III then discusses constitutional and policy arguments against the use of summary judgment that recently have commanded increasing attention in the academic literature, as well as in some courts. The purpose of Part III is to review the viability of these arguments in a real world context. This Part concludes that these arguments, while not entirely persuasive, ought to be considered by appellate courts when they are shaping their summary judgment jurisprudence. Summary judgment, if properly applied, is constitutional and productive. That is a big “if”, however. Although not unconstitutional on its face, summary judgment can encroach on the right to jury trial and skew the fair resolution of disputes. Accordingly, the appellate courts must review grants of summary judgment carefully to ensure that the penumbra of rights encompassed by the right to jury trial and due process are protected.

A key to unlocking how state appellate courts ought to approach the review of summary judgment decisions is the *Joiner* case,²¹ in which the United States Supreme Court ruled that an appellate court may not take a “hard look” at the grant of summary judgment based on the exclusion of expert testimony. Accordingly, Parts IV and V of this paper will discuss the United States Supreme Court cases that set the ground rules for summary judgment practice in federal courts. Part IV reviews the 1986 summary judgment Trilogy. It begins by setting forth the typical facts arising in the controversial type of summary judgment case. It then reviews the 1986 Trilogy to look at the elements of a summary judgment motion at each stage in the trial court to mine the points of concern for appellate courts to note when reviewing grants of summary judgment.

Part V then turns to the second Trilogy of Supreme Court cases that discuss the role of expert evidence in summary judgment cases, focusing most intensively on *Joiner*. Much has been written about what the standards for granting summary judgment by trial courts are, and most states have adopted the federal “Trilogy” standards. But, commentators have not examined the role that state appellate judges should play in fairly administering summary judgment practice and protecting litigants’ rights to due process and trial by jury. The purpose of Part IV is to pinpoint problem areas that arise in the trial court that the appellate courts ought to be looking for, and then, in Part V, urging state appellate judges to reject the *Joiner* approach to reviewing admissibility of expert evidence and summary judgment decisions at the trial level.

Part VI discusses the role that state appellate courts can play in achieving the fair administration of summary judgment practice. It summarizes the points of concern and an appropriate standard of review. The article concludes that trial courts need appellate courts to provide them with a signal about how to decide summary judgment motions in close cases. Just as the original Trilogy shifted the pendulum toward granting summary judgment, viewing grants

²⁰ Vairo SJ, *supra* n. 9, at 1389-1391.

²¹ *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

of summary judgment through the prism of the constitutional and policy arguments against summary judgment ought to restore a sense of balance to summary judgment practice overall.

II. The Legal Context

It is appropriate to place the summary judgment debate into the larger legal climate. The Supreme Court's 1986 summary judgment Trilogy came at a time when the federal courts took other stringent steps to correct perceived abuses of the judicial system. In 1983, amendments to Federal Rules of Civil Procedure 11, 16 and 26 became effective. These amended rules attempted to clarify the kind of litigation practice that would no longer be tolerated and required the imposition of sanctions when a court found abuses of the new standards.²²

Most judges in district courts and courts of appeal enthusiastically embraced these amended rules.²³ A new era of federal practice was born in which "anything goes" in terms of liberal notice pleading that ushered plaintiffs into the discovery phase in which they could go on "fishing expeditions,"²⁴ hoping to find the evidence needed to prove up their claims, was no longer the rule. Filing a complaint that met the notice pleading requirements of Federal Rule of Civil Procedure 8 in the hopes that discovery would turn up the evidence necessary to sustain the claim and the opportunity to reach a jury, or to obtain a favorable settlement from a defendant who feared being subjected to lengthy discovery or the apparent whims of a jury, were no longer the paradigms of federal litigation.²⁵ Rather, under Rule 11, attorneys were required to "think twice" before filing pleadings, motions, discovery requests or answers, or any other litigation papers, and make sure that the legal and factual bases for the papers were well-founded to avoid the imposition of sanctions. And, this trend has continued. On the federal level, Congress has taken steps to divert state claim cases to federal court. For example, in 2005, Congress enacted the Class Action Fairness Act ("CAFA"). CAFA provides for original federal jurisdiction or removal jurisdiction over state class action claims.²⁶ More recently, in the last year, the U.S. Supreme Court has issued a number of pleading decisions, most notably *Twombly*,²⁷ in which it has largely abandoned the liberal approach to pleading as well.

Summary judgment must be viewed in this context. A key function of Rule 11 is to help the courts weed out frivolous pleadings.²⁸ Nevertheless, it is not so easy to dispose of frivolous

²² See Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988); see also GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW PERSPECTIVES AND PREVENTIVE MEASURES* 3-4 (3d ed. 2003) (Vairo, Rule 11).

²³ *Id.*

²⁴ *Hickman v. Taylor*, 329 U.S. 495, 507; 67 S. Ct. 385, 392; 91 L. Ed. 450, 460 (1947) ("We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case.").

²⁵ See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

²⁶ See generally GEORGENE M. VAIRO, *CLASS ACTION FAIRNESS ACT: WITH COMMENTARY AND ANALYSIS* (LexisNexis 2005).

²⁷ *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1969 (2007) (opining that the famous "no set of facts" language of *Conley v. Gibson*, 355 U.S. 41, 45, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1959), which made it difficult to dismiss a case for failure to state a claim, has "earned its retirement").

²⁸ See generally Vairo, Rule 11, *supra* n. 21, at 3-4. See, e.g., *Eastway Construction Corp. v. City of New York*, 762 F.2d 243 (2d Cir. 1985); *Van Berkel v. Fox Farm and Road Machinery*, 581 F. Supp. 1248 (D. Minn. 1984).

cases, or ones which may have some merit, but in which the plaintiff will be unable to develop necessary proof. For example, a motion to dismiss will be denied if the plaintiff states facts showing a claim to relief.²⁹ Theoretically, a motion for summary judgment can complement this scheme. If, after a sufficient time for taking discovery has passed, the plaintiff still cannot provide evidence in support of a prima facie case, then the court is in a better position to dispose of the plaintiff's claim fairly. A defendant can move for summary judgment, the court can evaluate the materials presented in support of and in opposition to the motion, and can then determine whether there is a need for trial. This approach theoretically balances the goals of providing injured persons meaningful access to the judicial system with the need to protect the courts and defendants from unnecessary, expensive litigation.

The problem with this theoretical scheme had been judicial reluctance to grant summary judgment when there is the "slightest doubt" as to whether the plaintiff might at some time obtain the necessary evidence to prove a claim.³⁰ One court became so used to having summary judgments reversed that it put up a "No Spitting, No Summary Judgments" sign outside its courtroom door to discourage litigants from even filing such motions.³¹ That is why the 1986 Trilogy of Supreme Court cases was so important. The decisions sent a message to the lower federal courts that they should not be so wary about granting summary judgment. Indeed, Justice Rehnquist's opinion in *Celotex* was an ode to summary judgment. He wrote that summary judgment should not be viewed "as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"³² And federal courts got the message: as one federal court put it recently, summary judgment "is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events."³³

This paper puts aside the issue whether the summary judgment and expert evidence Trilogies, as an empirical fact, have increased grants of summary judgment at the trial level to the detriment of plaintiffs.³⁴ Although there is considerable support for the notion that the Trilogies have increased the use of summary judgment, which, in turn, has contributed to the "Vanishing Trial"³⁵ phenomenon, there are also studies that show that the increase in summary judgment

²⁹ See generally Vairo, Rule 11, *supra* n. 21, at 3-4. See, e.g., *Kamen v. American Telephone & Telegraph*, 791 F.2d 1006 (2d Cir. 1986).

³⁰ Vairo SJ, *supra* n. 9, quoting *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

³¹ *Id.* ("One district court judge in the District of Louisiana summed up pre-trilogy court of appeals' attitudes about summary judgment by posting a sign in his chambers: "No Spitting, No Summary Judgments." Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987). A prominent New York City litigator complained: "There is none in this Circuit . . . it takes a touch of Pollyanna for any of us to even consider the motion any longer." Report of the Proceedings of the Annual Judicial Conference, Second Judicial Circuit of the United States 56 (1977) (remarks of Arthur Liman, Esq.), quoted in Hon. Lawrence W. Pierce, *Summary Judgment: A Favored Means of Summarily Resolving Disputes*, 53 BROOKLYN L. REV. 279 (1987).")

³² 106 S. Ct. at 2555.

³³ *Springer v. Durflinger*, 518 F.3d 479, 484 (7th Cir. 2008), quoting *Steen v. Myers*, 486 F.3d 1017, 1022 (7th Cir. 2007) (quoting *Hamel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)).

³⁴ See *supra*, n. 12.

³⁵ Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) ("Miller Pretrial Rush"); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Non-trial Adjudications and*

motions has generally been overstated, or limited to certain types of cases.³⁶ Rather than delve in to that debate, this paper will examine the role that appellate judges should play when reviewing trial court summary judgment orders. Because judging at all levels is at least in part influenced by values, this paper will present the case that the penumbra of rights protecting due process and the jury trial, as well as the value of promoting efficiency, should provide the prism through which state appellate judges should review summary judgment decisions.

III. Is Summary Judgment Constitutional?

A. Professor Thomas's Seventh Amendment Case Against Summary Judgment

Professor Suja Thomas wrote a provocative essay in 2007 arguing that the summary judgment procedure is unconstitutional.³⁷ She is among the many scholars who believe that one reason for the decline in jury trials is the increased use of summary judgment.³⁸ However, she is alone in taking the self-described “heretical” position that, despite its long-standing use in federal courts, summary judgment is unconstitutional. She details relevant Seventh Amendment decisions by the Supreme Court and argues that the Court has not ruled that the procedure is constitutional.³⁹ She then sails on an interesting historical voyage through pre-1791 common law procedures in an attempt to show that there were no procedures like summary judgment at that time, and, accordingly, that such procedures therefore could not have been imported into a post-1791 procedural scheme.

A summary of her argument follows: She claims that the Supreme Court has definitively stated that the “common law” referenced in the Seventh Amendment is the English common law

Statistical Artifacts in the Changing Disposition of Federal Civil Cases, __ J. EMPIRICAL LEGAL STUDIES __ (Forthcoming) (Available at SSRN: <http://ssrn.com/abstract=574144>) (discussing data that suggest that fewer cases are resolved by trial, but noting need for better data; “If trials have been vanishing from the federal courts in the past few decades, it matters, from a normative perspective, whether this trend reflects an increase in private settlements (as many assume) or an increase in public non-trial adjudication. . . . Comparing this corrected data to the raw 1970 data would lead to the surprising conclusions that a smaller percentage of cases were disposed of through settlement in 2000 than was the case in 1970, that vanishing trials have been replaced not by settlements but by non-trial adjudication, and that it is the bench, not jury trial, that has been transformed in this way.”).

³⁶ Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (May 28, 2008) (Cornell Legal Studies Research Paper Series Available at SSRN: <http://ssrn.com/abstract=1138373>) (“Prior research on summary judgment hypothesizes a substantial increase in summary judgment rates after a trilogy of Supreme Court cases in 1986 and a disproportionate adverse effect of summary judgment on civil rights cases. . . . The pattern [of summary judgment rate increase] was inconsistent across case categories. For contract, tort, and a residual category of other noncivil rights cases, there was no evidence of a significant increase in summary judgment rates over time. Interdistrict differences were not dramatic in these three areas except that NDGA [Northern District of Georgia] had a higher rate of summary judgment in tort and contract cases than did EDPA [Eastern District of Pennsylvania]. The most striking effect was the approximate doubling—to almost 25%—of the NDGA summary judgment rate in employment discrimination cases and a substantial increase in the NDGA summary judgment rate in other civil rights cases. Subject to the limitation that both time periods studied are removed in time from the Supreme Court’s 1986 summary judgment trilogy, the only strong evidence in this study of a post-trilogy increase is in NDGA employment discrimination cases. Civil rights cases had consistently higher summary judgment rates than noncivil rights cases and summary judgment rates were modest in noncivil rights cases.”).

³⁷ Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (“Thomas I”).

³⁸ See *id.* at 140-141, citing extensive academic literature.

³⁹ *Id.* at 142.

in 1791, when the Amendment was adopted, and accordingly that any new procedure would be constitutional under the Seventh Amendment only if the procedure satisfies the substance of the English common law jury trial as it existed in 1791. Unfortunately, according to Prof. Thomas, the Court has never described what constitutes a common law jury *trial*. Rather, it has compared various common law *procedures* individually with new procedures. She then notes that the Court has upheld every new procedure that it has considered.⁴⁰

Her examination of the governing English common law, however, suggests that a jury would have decided issues that are being decided by judges today, including cases dismissed by judges upon summary judgment. For example, she argues that a jury would decide every case in which there was any evidence, however improbable, unless the moving party admitted the facts and conclusions of the nonmoving party, including those improbable facts, inferences, and conclusions. In contrast, when a court grants summary judgment, it decides whether a “genuine issue as to any material fact” exists⁴¹ or, as the Supreme Court has interpreted this provision in one of its Trilogy cases, a court may deny a motion for summary judgment only if “a *reasonable* jury could return a verdict for the nonmoving party.”⁴² She argues:

Under this standard, in contrast to under the common law, the court decides whether factual inferences from the evidence are reasonable, applies the law to any “reasonable” factual inferences, and as a result makes the determination as to whether a claim could exist. In other words, the court decides whether the case should be dismissed before a jury hears the case. Under the common law, a court would never engage in this determination. Cases that would have been decided by a jury under the common law are now dismissed by a judge under summary judgment.⁴³

Next, Professor Thomas rejects the common assumption that the Supreme Court has decided that summary judgment is constitutional under the Seventh Amendment. Historically, the Court and scholars cited *Fidelity & Deposit Co. v. United States*,⁴⁴ for that proposition. She argues, however, the procedure held constitutional in *Fidelity*, was not similar to summary judgment, as it is known today. Rather, under the procedure in *Fidelity*, the court accepted the facts alleged by the nonmoving party as true. Under summary judgment, in contrast, the court instead determines whether the evidence of the nonmoving party is sufficient.

Professor Thomas reasons that there are legal and institutional considerations that supported the idea that summary judgment is constitutional. Moreover, she argues that the Court’s Seventh Amendment jurisprudence has led to a change in the role of the jury as decision-maker under the common law to the judge as decision-maker under summary judgment. Additionally, she cites the notion that there is a perception that courts cannot function effectively without a summary judgment procedure. To the contrary, she argues that the necessity of summary judgment has

⁴⁰ See Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 695–702 (2004).

⁴¹ Fed. R. Civ. P. 56(c).

⁴² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis added).

⁴³ Thomas I, *supra* n. 36, at 143.

⁴⁴ 187 U.S. 315 (1902).

been overstated; and that summary judgment motions themselves impose a significant burden on the courts.

B. Reactions to Professor Thomas's Argument

Professor Thomas's argument has received considerable attention. Indeed, it is the focal point for a forthcoming University of Iowa Law Review Symposium on Civil Justice. In her submission to the Symposium, she reiterates the arguments set forth in the preceding subsection, and details the reaction to her thesis.⁴⁵ The overwhelming response of academics is that, although she is wrong that summary judgment is unconstitutional under the Seventh Amendment, her argument highlights the real issue: summary judgment must be viewed in the context of the Seventh Amendment issues it raises, and there are problems with the administration of summary judgment.⁴⁶

Professors Edward Brunet⁴⁷ and William Nelson⁴⁸ responded to Professor Thomas's essay and thesis in the Iowa Symposium. Professor Brunet commended Professor Thomas for making her constitutional argument. He agreed that the plain meaning of the text of the Seventh Amendment requires some sort of historical connection to the common-law that existed in 1791 at the time of the Seventh Amendment's adoption.⁴⁹ And, he noted that Professor Thomas's constitutional argument is especially timely because summary judgment is under attack.⁵⁰ Nonetheless, he argued that Professor Thomas's bold argument that summary judgment is always unconstitutional is overbroad. Of course, when a judge improperly decides factual issues, summary judgment *is* unconstitutional, at least as it is applied in that case. However, he argues, "judges may constitutionally grant summary judgment based upon either legal principles or finding obvious facts because they have been doing so for several centuries."⁵¹

Professor Brunet then parsed the common law procedures analyzed by Professor Thomas. He found that, while there was no procedure exactly like summary judgment, pre-1791 judges used a pre-trial procedure to decide obvious facts in a manner analogous to a motion for summary judgment. This common-law procedure, "trial-by-inspection," according to Professor Brunet, is a

⁴⁵ Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 IOWA LAW REVIEW ____ (forthcoming 2008) (Iowa Law Review Symposium on Procedural Justice) ("Thomas II") (link to electronic copy available at: <http://ssrn.com/abstract=1117629>) (noting blog and other reactions to her thesis).

⁴⁶ See, e.g., Brunet & Redish, *supra* n. 14, at 14; Miller Pretrial Rush, *supra* n. 34, at 1074–1132.

⁴⁷ Edward Brunet, *Summary Judgment Is Constitutional*, 93 IOWA L.J. ____ (Forthcoming 2008) ("Brunet") (link to electronic copy available at <http://ssrn.com/abstract=1117603>).

⁴⁸ William E. Nelson, *Summary Judgment and The Progressive Constitution*, 93 IOWA L.J. ____ (Forthcoming 2008) ("Nelson") (link to electronic copy available at: <http://ssrn.com/abstract=1117642>).

⁴⁹ See, Martin Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 486 (1975) (discussing the historical interpretation of the Seventh Amendment); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 640-641 (1973) (citation omitted) (asserting that a link to a procedure used in 1791 is necessary under historical test to "preserve" a right to a jury).

⁵⁰ See, e.g., John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007) ("Bronsteen") (summarizing Thomas's arguments and arguing that, whether constitutional or not, the device is counterproductive); Miller Pretrial Rush, *supra* n. 34 (questioning increased use of summary judgment); Wald, *supra* n. 1 (emphasizing impact of wide use of summary judgment).

⁵¹ Brunet, *supra* n. 12, at 4.

“comfortable antecedent to modern summary judgment.” And, he contends, Professor Thomas’s argument against summary judgment depends on an overly rigid interpretation of the Seventh Amendment. Rather, courts should use a more pragmatic Seventh Amendment approach, as the United States Supreme Court has done in its jurisprudence, which “eschews a mirror image between a common-law procedure and its descendant.”⁵² Instead, the proper interpretation is consistent with summary judgment as long as it differs from its historical antecedent in only incidental ways. This pragmatic approach to the Seventh Amendment is itself comparable to the common law itself, which was flexible and utilitarian in nature.⁵³ He concedes that although summary judgment is different than trial by inspection or demurrer to the evidence, “it differs in only incidental ways and, therefore, is constitutional.”⁵⁴

Professor Brunet’s argument is persuasive. Summary judgment is constitutional on its face. However, summary judgment can be applied unconstitutionally. For example, he and his co-author Martin Redish wrote in their summary judgment treatise that summary judgment rests on a “tenuous constitutional foundation.”⁵⁵ Indeed, whenever an appellate court reverses a grant of summary judgment on the basis that the trial court decided a genuine issue of material fact, it essentially finds the decision of the trial court to be unconstitutional.

Similarly, Professor Nelson argues in the Iowa Symposium that Professor Thomas wrongly argued that summary judgment is unconstitutional, but agreed that summary judgment is problematic. He essentially turned her historical argument on its head. His principal argument is that:

America is and must be governed by a progressive constitution that changes in response to changing societal needs, not by black letter rules adopted one or two centuries ago and anachronistically applied without regard to today’s conditions. At least since the founding in 1787-1791, Americans have always had hope that their lives and their country would get better; we have not, until recently, perhaps, been a culture that looks back to a past golden age, strives to preserve its essence, and fears that we have entered an era of decline. Faith in progress—faith that we can make our world better—is part of what it has meant and must continue to mean to be American. And faith in progress cannot meaningfully exist under a constitution that is mired in the past and that therefore makes progress impossible.⁵⁶

⁵² *Id.* at 1.

⁵³ See, e.g., J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 40-41 (4th ed. 2002) (“Baker”) (referring to a “struggle for business between the common-law courts”); Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1179 (2007) (concluding that the common law courts competed for business and changed procedures to make them less expensive and more efficient); Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1581-1621-1615 (2003) (noting that innovative changes led to competition among courts that, in turn, led to innovative changes to legal rules). Professor Brunet cites numerous examples: the expansion of special merchant juries, the development of evidence rules to bar confusing evidence from the jury, and the common-law courts’ borrowing procedures used by equity courts, which demonstrate that common-law courts modified their procedures for utilitarian reasons.

⁵⁴ Brunet, *supra* n. 12, at 2.

⁵⁵ Brunet & Redish, *supra* n. 14, at 16.

⁵⁶ Nelson at 1-2.

Accordingly, he criticizes both Professor Thomas and Brunet. Professor Nelson agrees with Professor Thomas that a twenty-first-century judge committed to interpreting the Seventh Amendment as its drafters would have in 1791 should deem summary judgment, as well as a *Twombly* motion to dismiss, to be unconstitutional. However, he argues that this simplistic solution of freezing the law in 1791 makes no sense. In his view, “the Constitution created a society and economy that has catapulted forward since that date, and to separate the law from that society and economy and to have the law function at cross purposes risks wreckage.”⁵⁷

Other commentators have recently discussed the problems with summary judgment but understand that it is highly unlikely that summary judgment will be declared unconstitutional on its face. For example, Professor John Bronsteen, although sympathetic to Professor Thomas’s argument, has written that it is too late in the day to make the argument.⁵⁸ Rather, summary judgment should be deemphasized because it is inefficient and postpones settlement of cases. Additionally, Professor Stephen Burbank has underscored the need to base arguments regarding summary judgment upon empirical data.⁵⁹ Recent empirical studies paint a mixed picture of both increased use of summary judgment and a summary judgment filing rate of 17-21%, not a number that suggests a crisis.⁶⁰

Only one published decision has discussed Professor Thomas’ argument that summary judgment is unconstitutional. In *Cook v. McPherson*,⁶¹ the United States Court of Appeals for the Sixth Circuit described her historical examination as “interesting.”⁶² But, it stated that the Supreme Court has held that summary judgment is constitutional.⁶³ Accordingly, “it would be inappropriate for us to hold that the summary judgment standard is unconstitutional.”⁶⁴ However, the court also noted that the plaintiff failed to apply Professor Thomas’s argument to show that summary judgment was applied unconstitutionally in his case. The bottom line is that Professor Thomas is likely to remain the lonesome heretic as far as summary judgment being unconstitutional on its face. Nonetheless, the debate she initiated has something to offer state appellate judges. Even though most of the literature focuses on the federal rules, the arguments apply with similar force to state court summary judgment practice. The lesson appears to be that, while summary judgment is constitutional on its face, a judge who wishes to apply it

⁵⁷ *Id.* at 12.

⁵⁸ Bronsteen, *supra* n. 49 (summarizing Thomas’s arguments, and arguing that, whether constitutional or not, the summary judgment procedure is counterproductive).

⁵⁹ Burbank, *supra* n. 12 (stressing the need to base arguments on empirical evidence).

⁶⁰ See Cecil, *supra* n. 12, at 887, 896 (showing that rate of summary judgment motion filings and case terminations by summary judgment have increased but, detailing a filing rate in a six district 25 year study of 21% in 2000); and Joe Cecil & George Cort, *Estimates of Summary Judgment Activity in Fiscal Year 2006* (unpublished June 15, 2007, Federal Judicial Center study in memorandum form indicating that in 2006 approximately 17 motions for summary judgment were filed for every 100 cases that were terminated) (on file with author).

⁶¹ 2008 U.S. App. LEXIS 7705, 8-9 (6th Cir. 2008).

⁶² *Id.* at 8.

⁶³ *Id.* at 9, citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979) (citing *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-21, 23 S. Ct. 120, 47 L. Ed. 194, for support of the proposition that summary judgment does not violate the Seventh Amendment). The Sixth Circuit also noted that the Court has continued to apply the Rule 56 summary judgment standard. See, e.g., *Beard v. Banks*, 548 U.S. 521, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006).

⁶⁴ *Id.*

constitutionally must keep the right to jury trial in mind.⁶⁵ And, state appellate judges have the means to ensure that there are no unconstitutional applications of summary judgment. The next part discusses the issues that may result in the kinds of error that state appellate judges are in a position to redress.

IV. The 1986 Supreme Court Summary Judgment Trilogy: Identifying Appellate Issues

There can be little question that, before the United States Supreme Court decided its 1986 Trilogy of summary judgment cases, there was at the least a perception that summary judgment was a disfavored procedural tool.⁶⁶ It was never controversial to use summary judgment in certain kinds of cases involving pure questions of law. Take, for example, a case in which there is no dispute that protestors burned an American flag in a public place. The only dispute is whether a local ordinance banning such flag-burning is constitutional. Because no facts are in dispute, there is no need for a trier of fact, and therefore no need for a jury trial.

But, it was controversial to use summary judgment in cases in which the plaintiff alleges facts that the defendant will not admit. In the controversial case, a plaintiff initiates the case by filing and serving claims against the defendant. After a period of time for discovery, the defendant moves for summary judgment, arguing that the plaintiff has failed to adduce evidence to support one or more essential elements of the plaintiff's claim or claims. The plaintiff is then required to demonstrate to the trial court that such evidence exists in admissible form. In many cases, the key evidence presented by the plaintiff is expert witness testimony.

The trial court is then called upon to decide whether the standard for granting summary judgment has been met. Has the plaintiff shown sufficient evidence indicating that there is a genuine issue of material fact? Is the expert testimony admissible? If not, then the court will grant summary judgment. The theory is that there is no point in calling in a jury to resolve issues of fact when no such issues exist. Theoretically, there is no Seventh Amendment problem because there is, in fact, no reason to empanel a jury if the plaintiff lacks the evidence she will need to prove essential elements of a claim. A trial will be a waste of time if the trial judge will have to grant judgment as a matter of law after the plaintiff rests her case.

The problem, of course, is that a busy trial judge has an efficiency interest in granting summary judgment in close cases — the judge will be spared the time it would take to try the case. Of course, there are several reasons why a trial judge may be reluctant to grant summary judgment in close cases. First, it takes time to read the summary judgment submissions, and then prepare a summary judgment opinion. On the other hand, if the decision is upheld, or the plaintiff lacks the resources to appeal, the judge's decision to grant the motion will spare the court the necessity of conducting a trial. Second, although some commentators argue that cases are more likely to settle if summary judgment is *not* granted,⁶⁷ reality teaches, and other commentators have shown, that the summary judgment decision itself is the prime mover of settlement. Third, trial judges prefer not to get reversed on appeal. On the other hand, if, as in the

⁶⁵ See, e.g., MOORE'S FEDERAL PRACTICE § 56.12 (arguing that summary judgment is constitutional but can be applied unconstitutionally).

⁶⁶ See *supra* nn. 29-32, and accompanying text.

⁶⁷ See Bronsteen, *supra* n. 49, at 527-536.

current climate, trial judges believe that they will be upheld in close cases, they may be more inclined to err on the side of granting summary judgment.

It continues to be important, therefore, to carefully parse the doctrine set forth in the 1986 Trilogy. For example, Professor Adam Steinman seeks to use traditional doctrinal analysis to advance an appropriate use of summary judgment.⁶⁸ This section takes a similar approach. Rather than discuss the cases in chronological order, it will analyze them in the order of the summary judgment issues they present. The three cases roughly correspond to the three analytical stages of a motion for summary judgment. First, what are the components of a proper motion for summary judgment; i.e., when is a motion “properly made?” That question is addressed in *Celotex Corp. v. Catrett*.⁶⁹ Second, assuming the motion is properly made, what is the opposing party’s burden; and what evidence must an opposing party adduce? That question is partly answered by *Celotex* and partly by *Anderson v. Liberty Lobby, Inc.*,⁷⁰ and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*⁷¹ Third, what is the standard for granting summary judgment? *Anderson* and *Matsushita* both address that issue. The purpose here is to identify the appellate issues raised by summary judgment motions.

A. *Celotex*—Procedural Issues

1. Paying Attention to Shifting Burdens of Proof

From a purely procedural perspective, *Celotex Corp. v. Catrett*,⁷² is the most important of the three summary judgment cases. It involved an issue, causation, which generally precluded summary judgment in product liability actions. The plaintiff had brought a wrongful death action alleging that exposure to asbestos caused her husband’s death. She named 15 manufacturers and distributors of asbestos as defendants. A year after the lawsuit commenced, defendant Celotex moved for summary judgment because the plaintiff had “failed to produce any evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged.”⁷³ Specifically, Celotex argued there was no genuine issue as to causation because the plaintiff had failed to identify any witness who could testify about the decedent’s exposure to Celotex products when requested to do so by Celotex’s interrogatories.

The plaintiff responded by producing three documents: a transcript of the decedent’s deposition, a letter from one of the decedent’s employers who would have been a trial witness, and a letter from an insurance company to the plaintiff’s attorney, “all tending to establish that the decedent had been exposed” Celotex’s product.”⁷⁴ Celotex argued that the court should not consider these documents because they were inadmissible hearsay.

⁶⁸ See Steinman, *supra* n. 12, at 85-86.

⁶⁹ 106 S.Ct. 2548 (1986).

⁷⁰ *Celotex Corp. v. Catrett*, 106 S.Ct. 2505 (1986).

⁷¹ 106 S.Ct. 1348 (1986).

⁷² 106 S.Ct. 2548 (1986).

⁷³ *Id.* at 2551.

⁷⁴ *Id.*

The district court granted the motion, explaining that “there [was] no showing that the plaintiff was exposed to the defendant Celotex’s product.”⁷⁵

Relying on *Adickes v. S.H. Kress & Co.*,⁷⁶ in a 2-1 decision, the Court of Appeals for the District of Columbia reversed. It held that Celotex’s motion was “fatally defective” because it “made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion.”⁷⁷

At first glance, the court of appeals appears to be correct. *Adickes* was a civil rights action in which the plaintiff alleged a conspiracy by the defendant company and the local police to deny her service in a restaurant located in the defendant’s store. A key fact issue alleged in the complaint was whether a police officer was in the store. When the defendant moved for summary judgment, the plaintiff was not required to come forward with her evidence showing that a police officer was in the store because the defendant failed to come forward with any evidence that a police officer was *not* in the store. The plaintiff in *Celotex* was arguably in the same position procedurally. Her complaint alleged causation. In its motion, the defendant failed to submit any evidence that its product did not cause the claimed injuries; thus, the plaintiff had no duty to come forward with any evidence.

The Supreme Court disagreed and reversed. Quoting the language of Rule 56(c), summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”⁷⁸ Parsing that language, the Supreme Court ruled that the movant “bears the initial responsibility” of identifying the parts of the record that demonstrate the absence of issues of material fact.⁷⁹ However, this does not mean that the movant must “support its motion with affidavits or other similar materials *negating* the opponent’s claim.”⁸⁰ Rather, Rules 56(a) and (b) provide that a motion may be made “*with or without supporting affidavits.*”⁸¹

Once the movant has shown that the party bearing the burden of proof lacks evidence on an element essential to that party’s claim, the burden of production on the motion for summary judgment shifts to that party. In cases like *Celotex*, where the nonmoving party would bear the burden of proof at trial on a dispositive issue, a summary judgment motion could properly be made in reliance solely on the “pleadings, depositions, answers to interrogatories, and admissions on file.” Such a motion, in turn requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the “depositions, answers to interrogatories, and admissions on file,” designate “specific facts showing that there is a genuine issue for trial.”⁸² The evidence need not be in a form that would be admissible at trial. For example, the

⁷⁵ *Id.* (quoting district court).

⁷⁶ 398 U.S. 144 (1970)

⁷⁷ *Id.* (quoting 756 F.2d 181, 184 (4th Cir. 1985)).

⁷⁸ *Id.* at 2552.

⁷⁹ *Id.* at 2553.

⁸⁰ *Id.*

⁸¹ *Id.* (quoting Rule 56 (emphasis added by the Court)).

⁸² *Id.*

nonmoving party need not depose her own witnesses; she may produce an affidavit or any other kind of evidentiary material listed in Rule 56(c) “except for the mere pleadings themselves.”⁸³

Applying these standards, the Court noted that the parties had conducted discovery, and that “no serious claim can be made that [plaintiff] was in any sense ‘railroaded’ by a premature motion for summary judgment.”⁸⁴ If the defendant had made a premature motion, the court had the power under Rule 56(f) to permit discovery or make any other such order. The Court decided that the defendant’s motion was properly made because it identified the parts of the record that demonstrated that the plaintiff lacked evidence on the issue of causation.

2. The Letter of Summary Judgment or the Spirit of the Seventh Amendment

Celotex did not overrule the letter of *Adickes*. There is little doubt, however, that it overruled its spirit. The problem with the Court’s decision, as the dissent points out, is that it provides little guidance on exactly what the movant must show in order to shift the burden of production to the non-movant. The Court’s decision was fractured: Four Justices joined in a plurality opinion; Justice White concurred with the need to remand, three Justices joined Justice Brennan’s dissent, in which he agreed with the Court’s legal analysis, but disagreed that *Celotex* had met its initial burden of production, and Justice Stevens filed a separate dissent. Justice White, though concurring, seemed to agree with Justice Brennan that the movant need do more than simply shout that “the plaintiff has no evidence to prove his case.”⁸⁵

Justice Brennan agreed that the movant need not negate or disprove the existence of an essential element of the non-movant’s case and agreed with the Court that *Adickes* did not require as much. He wrote that in cases in which the movant also has the ultimate burden of proof, or where the movant seeks to discharge its Rule 56 burdens by adducing affirmative evidence, the analysis is relatively simple. When, however, a movant seeks summary judgment on the ground that a nonmoving party who bears the burden of proof has no evidence in support of an essential element, the mechanics of discharging the burden of production under Rule 56 “are somewhat trickier.”⁸⁶ “Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. Such a ‘burden’ of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment.”⁸⁷

In Justice Brennan’s view, *Celotex* had merely stated conclusorily that the plaintiff had no evidence, and therefore had not made a proper motion triggering the plaintiff’s duty to respond. When *Celotex* moved for summary judgment, it should have known that the plaintiff had at least one witness to support her claim of causation. Because *Celotex* failed to attack the adequacy of the evidence in its motion, it failed to discharge its initial burden of production. Thus, as in *Adickes*, because the plaintiff in *Celotex* was able to draw the Court’s attention to evidence in the

⁸³ *Id.* at 2553-54.

⁸⁴ *Id.* at 2554.

⁸⁵ *Id.* at 2555.

⁸⁶ *Id.* at 2557.

⁸⁷ *Id.*

record in support of her claim, summary judgment should have been denied on the ground that the motion was improperly made.

In the final analysis, the disagreement between Justice Brennan and Justice Rehnquist is more philosophical than procedural. Both obviously recognize the value of improving the utility of summary judgment to prevent trials in cases that do not warrant them. Justice Rehnquist's approach, while not analytically different from Justice Brennan's, represents the "full speed ahead" philosophy that values protecting the integrity of the system by improving its efficiency. Justice Brennan's approach represents the vestiges of the values underlying the "slightest doubt" approach previously articulated by the lower federal courts so that meritorious claims would not inadvertently be cut off and the right to jury trial subverted.⁸⁸ Justice Brennan knew that the legal climate was perfect for fine-tuning a rule like Rule 56 and that the forces of procedural reform would march inexorably forward. His opinion should be viewed as the conscience of summary judgment practice.

3. The Role of the Appellate Courts

Demonstrating the role that appellate courts can play, however, there was a re-play in the Court of Appeals. On remand, the court, in a 2-1 opinion, found that the plaintiff's submission was sufficient.⁸⁹ Judge Bork dissented because he determined that the plaintiff's causation evidence would not have been admissible.

Most states have adopted the Trilogy, or some version of it, particularly the burden-shifting doctrine of *Celotex*. State appellate courts have a choice between adhering to Justice Rehnquist's efficiency approach or Justice Brennan's (and White's) approach, which would require a defendant to do considerably more than simply state that the plaintiff will be unable to prove essential elements of its claims. As the Court of Appeals on remand did, state appellate courts can adhere to the Brennan view, by giving the plaintiff the benefit of the doubt on the admissibility of evidence submitted to show a genuine issue of material fact.

Additional nuts-and-bolts issues raised by *Celotex* include whether the plaintiff had, in fact, been railroaded with insufficient time for discovery. In *Celotex*, the plaintiff had a year to take discovery. Although in some cases, including complex products liability cases, it may take a plaintiff longer than a year to garner the evidence necessary to show a genuine issue of material fact, the adequacy of time for discovery was not an issue in *Celotex*. Had the defendant moved prematurely, however, the plaintiff could have responded to the motion by citing a violation of Rule 56(f). The Supreme Court in *Celotex* wrote that summary judgment may not be used to "railroad" a claimant,⁹⁰ noting that problems "with premature motions for summary judgment can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the non-moving party has not had an opportunity to make full discovery."⁹¹

⁸⁸ *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

⁸⁹ *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 1028 (1988).

⁹⁰ 106 S. Ct. at 2554-55.

⁹¹ *Id.* See Fed. R. Civ. P. 56(f).

Federal courts have made it clear, however, that a plaintiff seeking to use Rule 56(f) to avoid summary judgment needs to be specific about the evidence that they would obtain if more time were allowed for discovery.⁹² If a plaintiff has detailed what evidence it would have adduced had sufficient time been granted, and the trial judge, nonetheless, denies a request for discovery, an appellate court ought to reverse a grant of summary judgment.⁹³

Finally, there is an open question in the federal courts that state appellate judges can resolve as it relates to their state court systems: Did, or should, the trial judge search the record? There is some variation in practice between most federal courts and state courts. It is a rare federal court that does unless the federal district court has adopted a local rule requiring the trial judge to search the record.⁹⁴

For example, in *Carmen v. San Francisco Unified Sch. Dist.*,⁹⁵ the Ninth Circuit held that evidence on record but not referred to in a response to a Rule 56 motion need not be weighed by the district court. Indicating that four other circuits adopted a similar outlook, the court thought that this approach was “vastly more practical.”⁹⁶ Having supporting evidence on file is necessary, but not sufficient. The court went on to explain that requiring the trial court to search the record for relevant evidence was a waste of judicial resources.⁹⁷ Specificity in the response, with plenty of references and citations to the relevant facts on record, is crucial to defeating a summary judgment motion, in federal courts.

How strictly should state courts implement Justice Rehnquist’s admonition that it be the plaintiff who sets forth the evidence showing a genuine issue of material fact? In contrast to the majority of federal courts, some state courts require the trial judge to search the record.⁹⁸ For example, the Kansas Supreme Court, recognizing that the right to jury trial is at stake noted: “The trial court must search the record to determine whether issues of material fact do exist. A

⁹² See, e.g., *Sitts v. United States*, 811 F.2d 737 (2d Cir. 1987) (district court did not abuse its discretion in refusing to grant plaintiff in malpractice case additional time to find an expert); *Union Barge Line, Inc. v. Union Carbide Corp.*, 823 F.2d 129 n.21 (5th Cir. 1987) (Rule 56(f) application denied because non-movant made vague assertions as to need and because ample time and opportunities for discovery had already passed); *Froid v. Berner*, 649 F. Supp. 1418 (D.N.J. 1986) (same). Additionally, the non-movant must make a timely application for more discovery. For example, in *Ned Chartering & Trading v. Republic of Pakistan*, 294 F.3d 148, 149-152 (D.C. Cir. 2002), the D.C. Circuit affirmed the district court’s denial of an extension for discovery where the non-movant failed to take relevant discovery over an 18 month period of time.

⁹³ See, e.g., *McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 800 F.2d 1208 (D.C. Cir. 1986); *Marsann Co. v. Brammall, Inc.*, 788 F.2d 611 (9th Cir. 1986).

⁹⁴ *Brunet & Martin*, *supra* n. 14, at § 4.4. Many federal courts have adopted local rules that negate any obligation on the part of trial judges to search the record. *Id.*

⁹⁵ 237 F.3d 1026 (9th Cir. 2001).

⁹⁶ *Id.* at 1030.

⁹⁷ *Id.* at 1031. See also *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1167 n.6 (10th Cir. 2000) (court granted summary judgment and refused to sift through 2000 pages of material when summary judgment appellant cited generally to various documents but “[did not provide] this court any indication of where in this voluminous record we may be able to find these documents”).

⁹⁸ See, e.g., *Beck v. Kansas Adult Authority*, 241 Kan. 13, 25-26 (1987); *Wilkinson v. Skinner*, 34 N.Y.2d 53, 56 (1974) (“The legal weakness and sparsity of facts presented to the court in the pleadings and affidavits of both parties were so infirm as to virtually invite summary judgment. However, before granting this relief, a court must search the record to determine if any facts are alleged which do state a cause of action.”).

mere surmise or belief by the trial court, no matter how reasonably entertained, that a party cannot prevail upon trial, will not justify refusing that party his day in court.”

B. *Anderson*

1. On to Substance: How Should a Court Rule on the Motion?

Anderson v. Liberty Lobby, Inc.,⁹⁹ is significant because it describes how the district court should evaluate the evidence submitted by both parties on a motion for summary judgment.

Anderson was a libel action. Following discovery, the defendants moved for summary judgment, arguing that the evidence did not demonstrate the “actual malice” required under the Supreme Court’s First Amendment jurisprudence.¹⁰⁰ The district court granted the motion, finding that the author’s “thorough investigation and reliance on numerous sources precluded a finding of actual malice.”¹⁰¹ The court of appeals reversed, ruling that it was irrelevant on a motion for summary judgment that the standard for proving actual malice was clear and convincing evidence, rather than a preponderance of evidence. The Supreme Court reversed, holding that the clear and convincing standard of proof must be considered.

Writing for the majority, Justice White noted that, on a motion for summary judgment, the issue is whether the dispute about the material fact of actual malice was “genuine.” A dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”¹⁰² In other words, the trial judge is not to weigh the evidence but must “determine whether there is an issue for trial.”¹⁰³ It follows therefore that the summary judgment standard mirrors the standard for a directed verdict.¹⁰⁴ Although summary judgment motions are made before trial and motions for directed verdicts are decided on the evidence admitted, “the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”¹⁰⁵ Thus, the trial judge “must view the evidence presented through the *prism* of the substantive evidentiary burden.”¹⁰⁶

2. Taking Language Seriously

Language the Court uses provides a basis for careful appellate review as well as the potential for an unconstitutional abuse of summary judgment. When examining a trial court decision granting summary judgment, the appellate court ought to determine the extent to which the trial court relied on questionable language used by the Supreme Court.

⁹⁹ 106 S. Ct. 2505 (1986).

¹⁰⁰ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

¹⁰¹ *Anderson* at 2509.

¹⁰² *Id.* at 2510 .

¹⁰³ *Id.* at 2511.

¹⁰⁴ *Id.* at 2511-12.

¹⁰⁵ *Id.* at 2512.

¹⁰⁶ *Id.* at 2513 (emphasis added).

The Court tried to fend off criticism of its approach by reminding us that its holding “does not denigrate the role of the jury” because “[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge The evidence of a non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”¹⁰⁷ The Court doth protest too much, however. On the same page of its opinion, the Court admonishes the judge to “bear in mind the actual *quantum and quality of proof* necessary to support liability For example, there is no genuine issue if the evidence presented in the opposing affidavits is *of insufficient caliber or quality* to allow a rational finder of fact to find actual malice by clear and convincing evidence.”¹⁰⁸ Should not the jurors be the ones who will decide whether the evidence is of sufficient “caliber and quality”? An appellate court must carefully scrutinize trial court opinions to ensure that the court did not encroach on the role of the jury.

In dissent, Justice Brennan worried that the opinion sends conflicting messages to the trial courts because it fails to explain how a judge is to assess “how one-sided evidence is, or what a ‘fair-minded’ jury could ‘reasonably’ decide.”¹⁰⁹ He surveys the Court’s “boilerplate language” that trial courts are not to weigh evidence when deciding summary judgment motions and contrasts that with “language which could surely be understood—if not an instruction—to trial courts to assess and weigh evidence much as a juror would.”¹¹⁰ He concludes:

I simply cannot square the direction that the judge ‘is not himself to weigh the evidence’ with the direction that the judge also bear in mind the ‘quantum’ of proof required and consider whether the evidence is of sufficient ‘caliber or quality’ to meet that ‘quantum.’ I would have thought that a determination of the ‘caliber and quality,’ *i.e.*, the importance and value, of the evidence in light of the ‘quantum,’ *i.e.*, amount required could *only* be performed by weighing the evidence.¹¹¹

Justice Brennan was correctly concerned that the Court’s standard may transform the expedited summary judgment procedure into a “full blown paper trial on the merits.”¹¹² Attorneys who are aware that the trial judge will be assessing the ‘quantum’ of the evidence presented can not afford to risk coming forward with less than all of the evidence they can muster in support of a client’s case. Justice Brennan, together with Justice Rehnquist, predicts that the Court’s opinion will lead to confusing and inconsistent results. In Justice Brennan’s view, all the non-movant must show to avoid summary judgment are facts sufficient to make out a *prima facie* case. “In other words, whether evidence is ‘clear and convincing,’ or proves a point by a mere preponderance, is for the fact finder to determine.”¹¹³ To hold otherwise would “erode the constitutionally enshrined role of the jury.”¹¹⁴

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (emphasis added).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2519.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

Justice Rehnquist's dissenting opinion also takes the Court to task for failing to show how to apply its new standard:

Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now.¹¹⁵

Justice Rehnquist also reminds us that even in cases involving documentary proof, the Court's decision in *Anderson v. Bessemer City*,¹¹⁶ teaches that, under Federal Rule of Civil Procedure 52(a), inferences from documentary evidence are as much the prerogative of the finder of fact as inferences as to the credibility of witnesses.¹¹⁷ The differentiated burdens of proof to be applied in different cases are vague and impressionistic. According to Justice Rehnquist, they do make some difference to the trier of fact in the weighing of the facts. "Yet it is not a logical or analytical message that the terms convey, but instead almost a state of mind."¹¹⁸ He therefore predicted that the decision "to engraft the standard of proof applicable to a fact-finder onto the law governing the procedural motion for summary judgment (a motion that has always been regarded as raising a question of law rather than a question of fact) will do great mischief with little corresponding benefit."¹¹⁹ His prediction has resulted in the current debate about the validity and efficacy of summary judgment outlined in Part III.

3. The Role of the Appellate Courts: Making *Celotex* Work

The admonitions of Justices Brennan and Rehnquist must be kept in mind by appellate judges. Indeed, while *Celotex* may be viewed as relatively benign, at least on its face, *Anderson* creates a possible constitutional problem. Indeed, in light of the Court's decision in *Anderson*, it may be that *Celotex* presents a terrible trap for the unwary. The Court in *Celotex* teaches that the non-movant can defeat summary judgment by pointing to evidence, even inadmissible evidence, in support of the essential elements of its case. *Anderson*, if Justice Brennan is correct, requires the court to evaluate the evidence put forth by the parties in light of the relevant burden of proof. While this sounds relatively innocuous at first glance, it means that the party with the burden of proof must be sure to put forward more than an iota of evidence in responding to a motion for summary judgment. The penalty for failing to do so may be a grant of summary judgment.

The party with the burden of proof may be committing legal suicide by opposing a motion for summary judgment by resting on affidavits. Thus, *Anderson* augurs more than trial by affidavit. It may require total development of all evidence of a claimant's case prior to trial. This is counterproductive. Why require a plaintiff to take needless depositions of friendly witnesses when the witness could be called at trial? This expense is avoidable. Yet, an attorney would be bordering on malpractice, in light of *Anderson*, if he or she failed to muster all the evidence in support of the essential elements of the client's case on the motion for summary judgment. A

¹¹⁵ *Id.* at 2521.

¹¹⁶ 105 S. Ct. 1504 (1985).

¹¹⁷ *Id.* at 2522.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2522-23.

prima facie case may not convince the court that the “quantum or quality” of proof necessary to reach the jury exists.

Appellate courts should determine whether the trial judge failed to credit plaintiff’s submission because it was in inadmissible form. The issue is whether there is evidence, not the form in which it is presented. If there is evidence, the appellate court ought to reverse a grant of summary judgment, because there is a genuine issue of material fact. When a plaintiff in a state court case rests on affidavits and other inadmissible forms of proof, yet the trial court grants summary judgment, appellate courts need to be especially sensitive to the admonitions in the *Anderson* dissent that the trial court not weigh the evidence and not require a plaintiff to submit all its evidence in admissible form. In other words, state appellate judges need to send a message to trial judges that summary judgment ought not be turned into a paper trial.

C. *Matsushita*—Plausibility and Complex Cases

Matsushita Electric Industrial Co. v. Zenith Radio Corp.,¹²⁰ another 5-4 decision, dealt with a similar problem. However, the Court posed the issue more specifically: “the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case.”¹²¹ Although the standard announced by the Court was designed for antitrust cases, it has had a far reaching effect. First of all, it arguably led to the Trilogy of expert witness cases that will be discussed below that have had an important impact on summary judgment practice. Second, the “plausibility” language used by the Court has been adopted outside of the antitrust context.

After many years of discovery and procedural wrangling, the defendants in the massive Japanese price-fixing conspiracy case moved for summary judgment. The district court had directed the parties to file final pretrial statements listing all the documentary evidence they would offer at trial. The defendants moved *in limine* to challenge the admissibility of the plaintiffs’ evidence. After finding that the bulk of the plaintiffs’ evidence was inadmissible, the court granted summary judgment, finding that the admissible evidence did not raise a genuine issue of material fact as to the existence of a conspiracy. It found that it would be unreasonable for the jury to infer a conspiracy because “evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that [defendants] were cutting prices to compete in the American market and not to monopolize it.”¹²²

The Third Circuit reversed. First, it found that much of the evidence deemed inadmissible was in fact admissible. Second, looking at the enlarged record, it found that there was direct and circumstantial evidence from which a jury could infer the existence of a conspiracy. The court of appeals did not consider whether it was more plausible to conclude that the defendant’s price-cutting was independent and non-conspiratorial.¹²³

1. More Confusing Language

¹²⁰ *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986).

¹²¹ *Id.* at 1351.

¹²² *Id.* at 1352.

¹²³ *Id.* at 1353-54.

The Supreme Court examined whether the plaintiffs adduced sufficient evidence in support of the conspiracy theory to survive summary judgment. The majority opinion, written by Justice Powell, began by stating that Rule 56(c) requires the nonmoving party to come forward with facts showing a genuine issue for trial. It “then follows from these settled principles that if the factual context renders [plaintiffs’] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claim than otherwise would be necessary.”¹²⁴

Throwing a bone to its critics from the pro-jury-trial realm, the Court, as in *Anderson*, concedes that on a motion for summary judgment all inferences must be viewed in the light most favorable to the opposing party. However, it points out that antitrust law, unlike most other areas of the law, limits the range of inferences that may be made from ambiguous evidence. Therefore, to survive summary judgment, the opposing party must do more than show that there are two inferences that might be drawn. Rather, it “must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed” the plaintiffs.¹²⁵

Justice White, joined by Justices Brennan, Blackmun and Stevens, complained that the Court’s opinion “only muddies the waters.”¹²⁶ For example, the majority finds that “‘courts should not permit fact-finders to infer conspiracies when such inferences are implausible’”¹²⁷ This language, however, invites the trial judge to “go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff.”¹²⁸

2. The Role of Expert Evidence

The dissent also castigates the Court for ignoring plaintiffs’ expert’s report that supported their theory of conspiracy. That report alone was enough, in the dissent’s view, to raise a triable issue of fact. “No doubt the Court prefers its own economic theorizing to [the expert’s], but that is not a reason to deny the factfinder an opportunity to consider [the expert’s] views on how [defendants’] alleged collusion harmed [plaintiffs].”¹²⁹ The dissent considers the problem of experts and chides the Court for essentially reversing the Third Circuit merely because it was not sufficiently skeptical of the plaintiffs’ expert’s theory. According to Justice White, “the Third Circuit is not required to engage in academic discussions of predation; it is required to decide whether [plaintiffs’] evidence creates a genuine issue of material fact.”¹³⁰ Again, the dissent says that the expert’s report was sufficient to create a triable issue, but that the Court tried “to whittle away at this conclusion by suggesting that the ‘expert opinion evidence . . . has little probative value in comparison with the economic factors . . . that suggest that such conduct is

¹²⁴ *Id.* at 1356.

¹²⁵ *Id.* at 1357.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1363 (quoting *Id.* at 1360).

¹²⁸ *Id.*

¹²⁹ *Id.* at 1365.

¹³⁰ *Id.* at 1366.

irrational.’¹³¹ This was wrong, the dissenters argued, because “the question is not whether the Court finds [plaintiffs’] experts persuasive, or prefers the District Court’s analysis; it is whether, viewing the evidence in the light most favorable to [plaintiffs], a jury or other fact-finder could reasonably conclude that [defendants] engaged in long-term below-cost sales.”¹³² In other words, any criticisms of the expert’s report or methods are arguments that the fact-finder should consider, not the trial judge.

3. The Role of the Appellate Courts

The Court’s opinion and the dissent’s criticism of it enflamed the already smoldering question of the degree to which expert evidence can be used on motions for summary judgment, and how appellate courts ought to review trial court summary judgment decisions. This issue came before the Supreme Court in its Expert Evidence Trilogy, whose decisions are discussed in Section IV below. In any event, as in *Anderson*, the standard adopted by the Court in *Matsushita* seems to require the trial judge to weigh the evidence, not merely to determine whether the plaintiff-non-movant has a prima facie case. The majority, of course, denies that it is inviting the trial court to weigh the evidence. It is probably true, however, that the Court intended to be somewhat fuzzy. There can be little doubt, in light of Justice Rehnquist’s rhapsodic praise of summary judgment in *Celotex*, that the Court’s summary judgment Trilogy is designed to remove whatever chill existed on the aggressive use of Rule 56.

In a close case, the liberal philosophy underlying the majority opinions in the Trilogy can tip the balance toward granting summary judgment. It is at this juncture that state appellate courts can assert their philosophy: how should they tip the balance in their states? We know that all judging is inherently subjective. What language will state appellate courts use to guide the trial courts to protect the right to jury trial? There is no quarrel here with summary judgment when applied constitutionally. It makes no sense to allow a hopeless case to occupy the court’s precious trial time. Indeed, it is preferable to use summary judgment, after the parties have had an opportunity to take ample discovery, to flush out those claims that are without merit. It is hoped, however, that the restraint called for by the dissents in the summary judgment Trilogy will curb the zeal of some courts that otherwise may invade the province of the jury and use the opportunity to prematurely terminate meritorious claims. State appellate judges need to guide their trial courts to ensure that does not happen.

V. Expert Evidence and Review of Summary Judgment: Developing a Proper Standard of Review

The 1986 Trilogy is not the beginning and end of the summary judgment discussion. As motions for summary judgment increasingly confronted courts, the process itself became a work in progress. Our discussion now turns to the refinement of the summary judgment process in the 1990s. Specifically, the “Expert Witness Trilogy” of *Daubert*,¹³³ *Joiner*,¹³⁴ and *Kumho*,¹³⁵ is

¹³¹ *Id.* (quoting *Id.* at 1360 n.19).

¹³² *Id.*

¹³³ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

¹³⁴ *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

¹³⁵ *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

important—especially *Joiner*, because of its impact on the most controversial uses of summary judgment.

A. *Daubert*—Admissibility of Expert Evidence and Summary Judgment

When a motion for summary judgment is made, the movant often will point to the lack of admissible evidence supporting the non-movant’s prima facie case. In *Frye v. United States*,¹³⁶ the Court of Appeals for the District of Columbia held that “general acceptance” of the expert’s theory by the relevant scientific community was the proper standard for admissibility. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹³⁷ the Supreme Court assessed the role expert evidence should play in the context of summary judgment.¹³⁸ The Court there addressed whether the *Frye* standard held up in the face of Federal Rules of Evidence, enacted after *Frye*. As a result of *Daubert*, the role of expert evidence in summary judgment hearings became crucial.

Plaintiffs were minor children born with serious birth defects who sued in state court in California, alleging that Bendectin, a prescription anti-nausea drug manufactured by defendant Merrell Dow Pharmaceuticals, caused the birth defects. Merrell Dow removed the case to federal court on diversity grounds and moved for summary judgment after extensive discovery. The motion was supported by expert testimony by Dr. Steven Lamm, a respected expert on risks of exposure to various chemicals, that no study indicated a link between Bendectin and birth defects.¹³⁹ Plaintiffs responded to the motion with testimony by eight experts, also well-credentialed and respected, that Bendectin did cause plaintiffs’ birth defects.

The plaintiffs’ experts based these conclusions on studies done in test tubes, on live animals, on the chemical structure of the drug, and upon re-analysis of previous epidemiological studies.¹⁴⁰ The findings of these experts were not published. As a result, the District Court granted summary judgment, holding petitioner’s evidence inadmissible because it was not “generally accepted,” as it had not been published or subjected to peer review in the relevant scientific community.¹⁴¹ The Court of Appeals for the Ninth Circuit affirmed, citing *Frye*’s “general acceptance” standard, which requires peer review or “verification and scrutiny by others in the field” prior to being admissible.¹⁴² The Supreme Court granted certiorari to determine the standard for the admissibility of expert evidence.

¹³⁶ 54 App. D.C. 46, 293 F. 1013, 34 A.L.R. 145 (1923).

¹³⁷ 509 U.S. 579 (1993).

¹³⁸ The Supreme Court has decided a number of other important summary judgment cases since its original trilogy. For example, in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), the Court revisited *Matsushita* and revealed that summary judgment in antitrust cases does have limitations. Also, the growing use of summary judgment in patent and employment cases was discussed in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996) and *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). The unique application of summary judgment to qualified immunity cases is addressed in several cases exploring the contours of the doctrine as articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), most recently in *Scott v. Harris*, 127 S.Ct. 1769 (2007). For discussion of *Scott*, see David Kessler, *Recent Development: Justices in the Jury Box: Video Evidence and Summary Judgment in Scott v. Harris*, 31 HARV. J.L. & PUB. POL’Y 423 (2008). See generally Vairo SJ, *supra* n. 9 at 24-36.

¹³⁹ *Daubert*, 509 U.S. at 583.

¹⁴⁰ *Id.* at 583.

¹⁴¹ *Id.* at 584 (citing 727 F. Supp. 570, 575 (S.D. Cal. 1989)).

¹⁴² *Id.* (quoting 951 F.2d 1128, 1129-1130 (9th Cir. 1991)).

The Supreme Court's *Daubert* opinion accomplished two things: First, the Court held that the Federal Rules of Evidence superseded the "general acceptance" test.¹⁴³ Under a key rule of the Federal Rules of Evidence, all "relevant evidence" should be admitted unless otherwise indicated by contrary rules.¹⁴⁴ Theoretically, this standard points to a more liberal test than the "general acceptance" test. Under the federal expert evidence rule, information that assists the trier of fact in resolving a disputed issue of fact may be allowed, even if the "general acceptance" standard is not met.¹⁴⁵ In other words, "general acceptance" by the relevant scientific community is no longer a mandatory prerequisite to admissibility in federal court.¹⁴⁶

At the same time, however, the Court looked to the Federal Rules of Evidence pertaining to expert evidence, and it created a judicial role for screening expert evidence for relevance and reliability before admitting it.¹⁴⁷ Thus, the expert rules serve as a limiter on the general relevance rule. A trial court may admit the evidence only if the evidence is relevant and the "scientific . . . knowledge will assist the trier of fact."¹⁴⁸ The term "scientific" involves "a grounding in the methods and procedures of science, whereas 'the word 'knowledge' connotes more than subjective belief or unsupported speculation."¹⁴⁹ The term "scientific evidence," as interpreted in *Daubert*, established the standard of evidentiary reliability, and, thus, its admissibility. For evidence to be reliable, it must initially "assist the trier of fact to understand the evidence or to determine a fact in issue."¹⁵⁰

The Court also sets out some "general observations" on admissibility, cautioning that the opinion does not contain a definitive list of elements. First, judges should look to whether the theory can be tested, and the results upon which the theory is based replicated. Second, publication and peer review are relevant factors in determining scientific validity, though not dispositive as in *Frye*. Third, the known or potential rate of error should be ascertained. Finally, "general acceptance" by the relevant scientific community is a relevant factor, though not the starting and finishing point as before.¹⁵¹

Most importantly, the Court emphasized the flexible nature of Federal Rule of Evidence 702. The Court voiced its desire that the primary concern in determining scientific validity should be the underlying principle that testimonial conclusions are based on. Therefore, the "focus . . . must be solely on principles and methodology, not on the conclusions they generate."¹⁵² In a final admonition, the Court referred to other relevant Federal Rules of Evidence that judges should consider when determining admissibility of expert testimony. They included the ability of an expert to rely on hearsay if it is typically used to form opinion in that field, per Rule 703; the ability of courts to appoint their own experts pursuant to Rule 706; and balancing the probative

¹⁴³ *Id.* at 587.

¹⁴⁴ Fed. R. Evid. 402.

¹⁴⁵ *Id.* at 587. *See* Fed. R. Evid. 702.

¹⁴⁶ *Id.* at 588.

¹⁴⁷ *Id.* at 589.

¹⁴⁸ Fed. R. Evid. 702.

¹⁴⁹ 509 U.S. at 590.

¹⁵⁰ Fed. R. Evid. 702.

¹⁵¹ *Id.* at 593-94.

¹⁵² *Id.* at 595.

value of any evidence against the danger of unfair prejudice, issue confusion, or misleading the jury as prescribed by Rule 403.¹⁵³

1. The Real Issue—Junk Science or Repressive Scientific Orthodoxy?

Of course, the subtext of the *Daubert* opinion is the admissibility of “junk science.”¹⁵⁴ Defendants expressed concern about abandoning the “general acceptance” standard. Specifically, they feared too much permissiveness in admitting expert testimony and the potential for jury confusion resulting from irrational assertions with a tenuous scientific basis. The Court responded by pointing to traditional means for undermining evidence. Vigorous cross-examination, presenting contrary expert evidence, and precise jury instructions are all tools in the arsenal of parties fighting dubious expert testimony.¹⁵⁵ Additionally, the Court reminded defendants that when the evidence offered cannot support the expert’s theory, the trial court may grant judgment as a matter of law under Rule 50(a)¹⁵⁶ or summary judgment per Rule 56.¹⁵⁷ This appears to be a restatement of some principles of the first Trilogy. So long as the non-movant provides enough evidence to raise a genuine issue and support his claim, it is up to the movant to undermine the evidence directly or by providing the jury with more persuasive evidence at trial.

On the other hand, the plaintiffs feared how the screening role for trial judges would be employed. They saw the writing on the wall, and understood that it was likely that the trial

¹⁵³ *Id.*

¹⁵⁴ “Junk science is a term used in U.S. political and legal disputes that brands an advocate’s claims about scientific data, research, analyses as spurious. The term conveys a pejorative connotation that the advocate is driven by political, ideological, financial, and other unscientific motives.” http://en.wikipedia.org/wiki/Junk_science. See generally PETER W. HUBER, *GALILEO’S REVENGE: JUNK SCIENCE IN THE COURTROOM* (1991). Huber argued that numerous product liability and toxic tort verdicts were unjustly made on the basis of junk science. According to him, juries are not competent to recognize flaws in scientific testimony, especially toxic tort or product liability suits, where decisions on causation often rest on complex scientific issues. He further maintained that the introduction of junk science evidence results in jury awards that deter manufacturers from introducing worthwhile products into the marketplace out of fear of unwarranted tort liability for injuries their products have not caused. A 1985 United States Department of Justice report by the Tort Policy Working Group noted: “The use of such invalid scientific evidence (commonly referred to as “junk science”) has resulted in findings of causation which simply cannot be justified or understood from the standpoint of the current state of credible scientific or medical knowledge.” *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (Rep. No. 027-000-01251-5) (1986, February).

It should be noted that, although *GALILEO’S REVENGE* is often cited in discussions of “junk science,” Huber and his methodology have received scathing criticism from major academics, including Marc Galanter, who dismissed Huber as a “publicist.” Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 *DENV. L. REV.* 77, 83 (1993). See also Kenneth J. Chesebro, *Galileo’s Retort: Peter Huber’s Junk Scholarship*, 42 *AM. U. L. REV.* 1637, 1641-42 (1993) (arguing that *GALILEO’S REVENGE* is not “a serious work of legal research or thought”). Moreover, others argue that the term “junk science” is used to deride scientific findings that stand in the way of short-term corporate profits, and that various industries have launched multi-million-dollar campaigns to position certain theories as “junk science” in the popular mind, often failing to employ the scientific method themselves. See John Stauber & Sheldon Rampton, *TRUST US, WE’RE EXPERTS* (2001). See also Paul D. Thacker, *Smoked Out: Pundit for Hire*, *THE NEW REPUBLIC* (February 6, 2006) (reporting that that non-profit organizations operated by Fox News “Junk Science” commentator Steven Milloy had received money from ExxonMobil while Milloy attacked research on global warming, and that Milloy was receiving almost \$100,000 a year in consulting fees from Philip Morris while criticizing evidence regarding the hazards of second-hand smoke as “junk science”).

¹⁵⁵ *Id.* at 596.

¹⁵⁶ Federal Rule of Civil Procedure 50(a).

¹⁵⁷ *Id.*

court's screening function would result in exclusion of expert evidence that "will sanction a stifling and repressive scientific orthodoxy and will be inimical to the search for truth."¹⁵⁸ The Court responded by noting that scientific theories are subject to perpetual revision, and stated that truth is best arrived at by assessing a great number of hypotheses.¹⁵⁹ However, and this is the basis for plaintiffs' concern, the Supreme Court found that trial courts must fashion rules that resolve legal disputes quickly and with finality.¹⁶⁰ It also stated that the balance struck by the Federal Rules of Evidence favors the expedient resolution of legal issues over an all-encompassing search for "truth" in its purest sense.¹⁶¹

It is important here to make the point that the majority's articulation of the gatekeeping function for the trial judge provides an opportunity for the judge to determine the "caliber and quality" of evidence, as envisioned by the Court in *Anderson*. Indeed, a study by the Rand Institute for Civil Justice has concluded that *Daubert* has become increasingly fatal to cases.¹⁶² And, in *Kumho Tire Co., Ltd. v. Carmichael*,¹⁶³ the Supreme Court clarified an issue left open in *Daubert*—whether the new standard applied only to scientific evidence or to all expert evidence. It also showed how the original summary judgment Trilogy meshes with the expert witness Trilogy. Before discussing *Kumho*, however, it is necessary to discuss *Joiner*,¹⁶⁴ the second case of the expert Trilogy.

B. *Joiner*—Summary Judgment and the Appellate Standard of Review—The “Hard Look” v. Abuse of Discretion Standards

Following the 1986 summary judgment Trilogy, the courts of appeals diverged regarding the proper standard of review for a district court's exclusion of expert evidence. The Supreme Court tackled the issue in *General Electric Co. v. Joiner*.¹⁶⁵ Although *Joiner* provides some overarching principles about the standard of review in general, it is of particular importance to this discussion because the exclusion at the district court level occurred pursuant to a motion for summary judgment.

Plaintiff *Joiner* was diagnosed with small-cell lung cancer, and sued General Electric in state court in Georgia. *Joiner* alleged that his workplace exposure to several chemicals (PCBs, furans, and dioxins) "promoted" the cancer. As in the typical case, General Electric removed the case to federal court and moved for summary judgment claiming that: (1) there was no evidence that

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 597.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Lloyd Dixon and Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision* 53 (RAND MR-1439-ICJ, 2001) ("RAND Daubert Study") ("after *Daubert*, parties challenging expert evidence more frequently requested summary judgment on some or all of the issues in a case, and summary judgment was more frequently granted. Although these increases may reflect other trends in litigation practices that have little to do with *Daubert*—such as judges' incentives to resolve cases more quickly and at lower cost—the authors believe it is likely that the more rigorous standards for evaluating expert evidence encouraged more challengers to expand the scope of their challenges and, in so doing, effectively undermined the entire basis of the opposing party's contention.").

¹⁶³ 526 U.S. 137 (1999).

¹⁶⁴ *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

¹⁶⁵ 522 U.S. 136 (1997).

Joiner suffered significant exposure to PCBs, furans, or dioxins, and (2) that no admissible scientific evidence linked PCBs to the “promotion” of Joiner’s cancer.¹⁶⁶ Accordingly, General Electric argued that because no genuine issue of material fact existed on the issue of exposure or causation, judgment as a matter of law ought to be granted. The plaintiff responded by citing numerous factual issues that, he alleged, required jury resolution, relying primarily on expert testimony, as also is typical, that linked PCBs, furans, and dioxins with the promotion of Joiner’s cancer.

The district court granted General Electric’s motion although it acknowledged that there was an issue of material fact regarding whether Joiner was exposed to PCBs. Nonetheless, it granted summary judgment, holding that (1) there was no genuine issue regarding Joiner’s exposure to furans or dioxins, and (2) although Joiner’s exposure to PCBs was still at issue, the expert testimony proffered by Joiner did not demonstrate a link between PCB exposure and Joiner’s form of cancer. Because it found no genuine issue of material fact on the essential elements of the plaintiff’s claims, it granted summary judgment.¹⁶⁷

The Eleventh Circuit reversed, stating that, “[b]ecause the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge’s exclusion of expert testimony.”¹⁶⁸

It is important to focus on the procedure involved in *Joiner* and similar cases where expert evidence is the key to proving a claim. To show the absence of a genuine issue of material fact for summary judgment purposes in such cases, a defendant will have to persuade the trial court that the expert evidence that it knows the plaintiff will use to demonstrate the existence of a material fact should not be admitted. Accordingly, the defendant will move to exclude that evidence as unreliable under *Daubert*. If the trial court grants the motion to exclude, it follows that summary judgment will be granted.

Now, it is time for the appellate court to review what the trial court did. It will begin, as the Eleventh Circuit did, by noting that a grant of summary judgment is reviewed *de novo*,¹⁶⁹ and that the moving party bears the burden of showing that there is no issue of material fact.¹⁷⁰ The Eleventh Circuit stated that a trial court’s ruling on the admissibility of evidence is reviewed for abuse of discretion. However, the Court modified this deferential standard by invoking the Federal Rules of Evidence’s preference for admissibility of expert testimony. Accordingly, it determined that it would take a “hard look” at the trial judge’s exclusion of expert testimony. Moreover, because the trial court’s ruling turns on an interpretation of a Federal Rule of Evidence, its review is plenary.¹⁷¹

The essential message the Eleventh Circuit is sending trial judges is that they should take a closer look at grants of summary judgment than they do at denials of summary judgment, when

¹⁶⁶ *Id.* at 140.

¹⁶⁷ *Id.* (citing 864 F. Supp. 1310, 1326 (N.D. Ga. 1994)).

¹⁶⁸ 78 F.3d 524, 529 (11th Cir. 1996).

¹⁶⁹ *See, e.g.,* Fane v. Edenfield, 945 F.2d 1514, 1516 (11th Cir. 1991), *aff’d*, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993).

¹⁷⁰ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553-54, 91 L. Ed. 2d 265 (1986).

¹⁷¹ *Joiner*, 78 F.3d at 749.

the summary judgment motion is predicated on the exclusion of expert evidence. Based on this “hard look” standard, the Eleventh Circuit held that the trial court improperly excluded the expert testimony, and by extension, erred in granting summary judgment. The Supreme Court granted certiorari to resolve the issue of appellate review standards regarding expert evidence.

1. Rejection of the “Hard Look” Approach to Appellate Review

The Supreme Court firmly rejected the Eleventh Circuit’s approach. It looked back to 1897 when the Court had held that a trial court ruling must be “manifestly erroneous” to warrant reversal by a Court of Appeals.¹⁷² Accordingly, it was inappropriate for the appellate court to distinguish between grants and denials of summary judgment based on the exclusion of expert testimony. Rather, the “abuse of discretion” standard is the only proper standard that is consistent with its ruling in *Daubert*.

Thus, the Court in *Joiner* upheld the *trial judge’s* role as gatekeeper in all circumstances, stating that,

while the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than did pre-existing law, they leave in place the “gatekeeper” role of the trial judge in screening such evidence to ensure that it is not only relevant, but reliable. A court of appeals applying “abuse of discretion” review to such rulings may not categorically distinguish between rulings allowing expert testimony and rulings which disallow it.¹⁷³

Daubert, as discussed above, does not allow wholesale admission of expert testimony. Though issues of fact in any motion for summary judgment are resolved in favor of the non-movant, the issue of admissibility of expert testimony is not fact-bound, according to the Court, and is reviewed under the abuse of discretion standard. Unfortunately for *Joiner*, and many plaintiffs, such exclusion inexorably generally leads to the grant of a defendant’s motion for summary judgment, which, under the abuse of discretion standard on the evidentiary issue, will rarely be reversed. A Rand Institute for Civil Justice Study demonstrates empirically that *Daubert* and *Joiner* have made a difference.¹⁷⁴ The study shows that, in the wake of *Daubert*, district court judges excluded more evidence as unreliable.¹⁷⁵ Unquestionably, the impact of these cases tilts the balance towards exclusion of evidence and grants of summary judgment.

In this author’s view, *Joiner* tips the summary judgment balance too far. Application of a “hard look” standard could go a long way to restoring the proper balance because it would allow appellate courts to guard against the use of summary judgment as a docket control device. Moreover, the “hard look” standard is critical because the appellate courts are the last guarantors of the right to jury trial. An examination of *Joiner* helps demonstrate approaches the state appellate courts can take to protect these rights.

¹⁷² *Id.* at 141 (citing *Spring Co. v. Edgar*, 99 U.S. 645, 658 (1879)).

¹⁷³ *Id.* at 142.

¹⁷⁴ RAND *Daubert* Study, *supra* n. 161, at xiii.

¹⁷⁵ *Id.*

2. A “Hard Look” at *Joiner*: Methodology Versus Conclusion

Joiner had responded to the motion for summary judgment by submitting expert depositions, asserting that, “more likely than not,” a link between PCBs and small cell cancer existed.¹⁷⁶ The experts relied on animal studies and four epidemiological studies in forming their opinions. The Court focused on the issue of “whether these experts’ opinions were sufficiently supported by the animal studies on which they rely,”¹⁷⁷ finding that they fell short of showing a link between PCBs and cancer. For example, one study involved exposure to mineral oil rather than PCBs.¹⁷⁸ Joiner attempted to invoke *Daubert*’s focus “on [the] principles and methodology [of the studies], not on the conclusions that they generate.”¹⁷⁹ However, the *Joiner* majority held that “conclusions and methodology are not entirely distinct from each other.”¹⁸⁰ Though experts may extrapolate opinions from existing data, when the “analytical gap” between the data and the opinion makes the testimony little more than the *ipse dixit* of the expert, the district court may exercise discretion and exclude such testimony.¹⁸¹

3. The Role of the Appellate Courts

a. One Approach: A “Hard Look” at the Trial Court Level

In his concurrence in *Joiner*, Justice Breyer asked whether judges can adequately make “subtle and sophisticated determinations” about methodology.¹⁸² He was concerned about areas where the science itself was “tentative or uncertain, or when testimony about general risk levels in human beings or animals is offered to prove individual causation.”¹⁸³ He also was concerned that “judges are not scientists and do not have the scientific training that can facilitate the making of [decisions regarding scientific methodology].”¹⁸⁴ In essence, he calls for a “hard look” at the trial court level. In pure matters of law such as relevance, ability to assist the trier of fact, and whether the testimony has any probative value, a judge’s determination can suffice.¹⁸⁵ However, when “law and science intersect,” he urges that special care be exercised.¹⁸⁶

Accordingly, he calls for greater use of pretrial conferences to narrow scientific issues in dispute, more pretrial hearings to examine potential experts, and appointment of special masters or specially trained law clerks.¹⁸⁷ He specifically urges courts to invoke Federal Rule of Evidence 706, which allows the court to appoint experts. Justice Breyer insists that enlisting the help and cooperation of the scientific community enables courts to fulfill the basic objectives of the Federal Rules of Evidence: the just determination of proceedings and the ascertainment of

¹⁷⁶ *Id.* at 143.

¹⁷⁷ *Id.* at 144.

¹⁷⁸ *Id.* at 145.

¹⁷⁹ *Id.* at 146 (quoting *Daubert*, 509 U.S. at 595).

¹⁸⁰ *Joiner*, 522 U.S. at 146.

¹⁸¹ *Id.*

¹⁸² *Id.* at 147.

¹⁸³ *Id.* at 147-48.

¹⁸⁴ *Id.* at 148.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 149.

truth.¹⁸⁸ Of course, these methods will result in greater costs to courts and litigants. But not employing these methods could entail a different cost: trial judges making decisions about scientific fact issues that encroach on the role of the jury.

b. Retaining the Method/Conclusion Distinction

Justice Stevens, in dissent in *Joiner*, takes issue with the Court's application of the standard it articulates, rather than the standard itself. The Court granted certiorari, he said, to determine whether the Court of Appeals applied the proper standard of review. Having answered that question, the Court should have remanded the case to the Eleventh Circuit. Moreover, he questions whether the district court properly applied the *Daubert* standard regarding methodology. In this case, *Joiner*'s experts relied on the "weight of the evidence" methodology.¹⁸⁹ *Joiner*'s experts did not argue that each study individually provided adequate support for the conclusions reached. Instead, all the studies taken together provided a sound basis for their opinions.¹⁹⁰ Justice Stevens pointed out that the district court addressed each study individually in concluding that the expert testimony was inadmissible, rather than evaluating the actual methodology used by *Joiner*'s experts.

Courts should focus on methodology not conclusions. Moreover, it is "not intrinsically 'unscientific' for experienced professionals to arrive at a conclusion by weighing all available scientific evidence."¹⁹¹ The plaintiff had demonstrated that the Environmental Protection Agency used the same methodology the plaintiff's expert had used to assess risks of exposure to PCBs. Thus, the conclusions reached by *Joiner*'s experts should be assessed by a jury.

C. *Kumho*—Meshing the Summary Judgment and Expert Evidence Trilogies

In *Kumho*, the Court concluded that *Daubert*'s general holding, setting forth the parameters of the trial judge's gatekeeping function, "applies not only to 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."¹⁹² The Court made clear that the *Daubert* standard remained flexible and that the trial judge had "considerable leeway" to determine which factors should be used in the gatekeeping function, including factors not specifically mentioned in the *Daubert* opinion.¹⁹³ In other words, the *Daubert* factors are neither a sine qua non nor the "be-all-end-all" where reliability factors are concerned. Just as "general acceptance" is no longer the only test, à la *Frye*, the *Daubert* factors are not exclusive.

The facts of *Kumho* shed some light on the proper application of the "flexible" *Daubert* test. The case involved a claim that a tire made by the defendant company was defective and failed while in use, causing injuries. Proof of causation hinged on the testimony of a tire-failure expert.

¹⁸⁸ *Id.* at 150.

¹⁸⁹ *Id.* at 152.

¹⁹⁰ *Id.* at 153.

¹⁹¹ *Id.*

¹⁹² *Id.* at 141.

¹⁹³ *Id.* at 150-52.

The Court noted that the district court found that the expert was well-qualified.¹⁹⁴ However, the district court excluded the testimony because it found that the expert's method of analyzing the tire's failure "fell outside the range where experts might reasonably differ."¹⁹⁵ The Court identified two factors that the lower court considered: (1) that no other experts in the industry used plaintiff's expert's methodology, and (2) lack of any independent scholarship validating that expert's methods.¹⁹⁶ In essence, the testimony relied almost exclusively on the expert's own assertions that his methodology was accurate. This established, the Court reviewed the trial court's decision to exclude according to *Joiner's* "abuse of discretion" standard and upheld the ruling. Thus, *Kumho* extended the *Daubert* gatekeeping inquiry, though not necessarily all the *Daubert* factors themselves, to all forms of expert testimony offered under Rule 702. Although the Court upheld the ruling, its emphasis on the flexible nature of *Daubert* ought to be embraced by state appellate judges.

VI. The Role State Appellate Courts Can Play in Ensuring a Constitutional Application of Summary Judgment

Many states have adopted the 1986 Trilogy approach to the grant of summary judgment,¹⁹⁷ although there are variations with some states being far less strict,¹⁹⁸ and others have waffled.¹⁹⁹ The extent to which the *Daubert-Joiner-Kumho* Trilogy²⁰⁰ has been adopted by the states is discussed in a 2004 *Jurimetrics Journal* article.²⁰¹ There, the authors note that the new rules for the admissibility of expert testimony in federal court have not been readily adopted by the states, noting that the "situation in state courts is far more unsettled."

A significant number of state courts continue to adhere to the tests they used before *Daubert*, generally either the *Frye* general acceptance test or some other test. Some states have adopted *Daubert*, but its applications in those states have not been uniform. Only a few states have adopted the *Daubert* Trilogy in its entirety. Some states have adopted *Daubert*, but have not yet adopted *Kumho* or *Joiner*, while others have adopted *Daubert* and *Kumho*, but not *Joiner*, or have adopted only part of *Joiner*. Finally, other states view the *Daubert* Trilogy as only instructive, or as consistent with their own traditional state tests but not binding. The article

¹⁹⁴ *Id.* at 153 (explaining that the expert had a mechanical engineering degree and worked at Michelin America for about ten years).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 157.

¹⁹⁷ *See, e.g.,* *Brill v. Guardian Life Insurance Company of America*, 142 N.J. 520 (1995); *Cuzze v. Univ. & Cmty. College Sys.*, 172 P.3d 131 (Nev. 2007).

¹⁹⁸ *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826 (2001) (purporting to adopt trilogy but also adopting Justice Brennan's view that summary judgment law requires a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess or cannot obtain, needed evidence). Texas appears to have retained a more liberal "scintilla of evidence" rule. *Ford Motor Co. v. Ridgeway*, 135 S.W.3d 598, 600 (Tex. 2004). New Mexico also appears to be less strict than the federal courts. *See* Christopher David Lee, *Summary Judgment In New Mexico Following Bartlett v. Mirabal*, 33 N.M.L. Rev. 503 (2003).

¹⁹⁹ Amy M. Pepke, *Prove It*, 43 TENN. BAR J. 1 (July 2007) (discussing summary judgment practice shifts in Tennessee and Alabama).

²⁰⁰ The *Daubert* holdings were codified in amendments to the Federal Rule of Evidence 702 in 2000. *See* Notes of Advisory Committee on 2000 Amendments to Federal Rule of Evidence 702.

²⁰¹ David E. Bernstein and Jeffrey D. Jackson, *The Daubert Trilogy in the States*, 44 JURIMETRICS J. 351-366 (2004).

concludes by finding that, contrary to the prevailing impression, the *Daubert* Trilogy is not yet the majority standard even among the states that have rejected *Frye*.

State courts will also have to contend with a 2007 amendment to Federal Rule of Civil Procedure 56 and further possible amendments to the rule that are causing a controversy. When the Federal Rules of Civil Procedure were “restyled” in 2007,²⁰² a change was made to Rule 56 that arguably provides trial judges with discretion to deny a motion for summary judgment even if there arguably are no genuine issues of material fact. The prior version of Rule 56 stated that summary judgment “shall be rendered” if the standards of Rule 56 are met. However, the version adopted in 2007 as part of the restyle project uses the word “should” instead of “shall.”²⁰³ The Advisory Committee Note makes clear that the change to “should” acknowledges that federal case law allows trial courts discretion to deny motions, but that such discretion is rarely exercised.²⁰⁴ The federal courts’ rulemaking committees are currently considering further revisions to Rule 56, and many are arguing that the word “should” be amended to the word “must.”²⁰⁵ Indeed, words do matter.

There is a perception that state courts are more plaintiff-friendly than federal courts. However, even before CAFA was enacted, many of the so-called “judicial hellholes” began to enact legislation or shift their case law in a more defendant-friendly direction.²⁰⁶ Moreover, recent empirical studies suggest that state courts are not as plaintiff-friendly as they are thought to be.²⁰⁷ Nonetheless, looking at how state courts have treated both the 1986 summary judgment Trilogy and the *Daubert* line of cases shows that there is ample room for state courts to reexamine their approaches to summary judgment, and to adopt a summary judgment standard of review, as well as a flexible method for evaluating expert evidence, that will prevent trial judges from encroaching on the role of the jury.²⁰⁸

As Judge Patricia Wald admonished in the quote at the beginning of this article, state courts need to think hard about the role summary judgment should play. To the extent that states generally react in some way to federal practice, summary judgment is only the beginning. States

²⁰² See REVISION OF THE FEDERAL RULES OF CIVIL PROCEDURE: INCLUDING STYLE AMENDMENTS TO RULES 1-83 AND NEW RULE 5.2, MOORE’S FEDERAL PRACTICE MONOGRAPH (2007).

²⁰³ *Id.* at 179; 181.

²⁰⁴ *Id.* at 181.

²⁰⁵ See Proposed Amendment to the Federal Rules of Civil Procedure, Rule 56. Summary Judgment, Proposed Rule 56(a) (maintaining the word “should”) and n. 1 (discussing controversy) (Letter From Hon. Mark R. Kravitz, Chair of the Advisory Committee on Federal Rules of Civil Procedure to Hon. Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure (Dec. 17, 2007), available at <http://www.uscourts.gov/rules/Reports/CV12-2007.pdf>).

²⁰⁶ See, e.g., Lonny S. Hoffman, *The Trilogy of 2003: Venue, Forum Non Conveniens & Multidistrict Litigation*, 24 THE ADVOCATE 76 (Fall 2003) (describing 2003 amendments to Texas procedural rules). See also Robert A. Sedler, *The Michigan Supreme Court Diminishes the Right to Trial by Jury in Civil Cases* (April 10, 2008) (Electronic copy available at SSRN: <http://ssrn.com/abstract=1118807>).

²⁰⁷ Theodore Eisenberg and Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 38 J. Legal Studies ____ (forthcoming 2008) (On file with author) (Reversal rate for trials appealed by plaintiffs is 21.5% compared to 41.5% for trial outcomes appealed by defendants; reversal rate for jury trials is 33.7% compared to 27.5% for bench trials.)

²⁰⁸ See generally Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. ____ (forthcoming 2009) (Electronic copy available at SSRN: <http://ssrn.com/abstract=1139864>) (arguing for greater use of plenary appellate review).

will soon have to decide the extent to which they will adopt the *Twombly*²⁰⁹ pleading standard, which makes it easier for courts to grant motions to dismiss for failure to state a claim. This development is even more dangerous from the perspective of the right to jury trial because plaintiffs will not have had the opportunity to take discovery before they face a motion to dismiss.²¹⁰

Following is a summary of the points that state appellate courts ought to consider:

- Take a “Hard Look” when reviewing grants of summary judgment.
- Apply an abuse of discretion standard when reviewing denials of motions for summary judgment.
- Adopt the federal approach providing discretion to trial judges to deny summary judgment
- Adopt the proposed federal amendment to Rule 56 that requires the trial judge to state reasons for granting summary judgment.²¹¹
- Adopt the proposed federal amendment to Rule 56 that states that trial judges “should” state reasons for a denial of summary judgment.²¹²
- Consider whether the plaintiff was afforded sufficient time to take discovery, and enforce provisions like Rule 56(f) to prevent premature grants of summary judgment.
- Require the trial court to engage in a search of evidence on file.
- Require the movant to detail the evidence in the record to affirmatively demonstrate that there are no genuine issues of material fact.
- Determine whether the trial judge improperly failed to credit admissible evidence because it was submitted by the nonmoving party in an inadmissible form to prevent summary judgment motions from becoming a paper trial.
- Ensure that the trial judge did not engage in improper weighing of the evidence.
- Reject the “plausibility” approach that provides the movant with an advantage.
- Apply the letter of the *Daubert* decision and its emphasis on flexibility.
- Require trial courts to employ independent experts in complex cases.

VI. Conclusion

The Justices in *Joiner* quarrel less about the standard of review and more about its proper application. The majority favors wide discretion, with a deferential assessment of the “abuse of discretion” standard. Justice Breyer agrees, but would enlist the help of more qualified, court appointed experts in fulfilling the role of gatekeeper. He also favors using available procedural tools to narrow the scientific issues at hand. Justice Stevens insists that the appellate courts need to carefully examine district court grants of summary judgment to prevent judges from becoming triers of fact. The majority approach is consistent with the general trend favoring summary judgment that began with Justice Rehnquist’s ode to summary judgment in *Celotex*. According to that approach, unless a judge’s decision or ruling leading to summary judgment is egregiously

²⁰⁹ *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007).

²¹⁰ See Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments* (U. of Chicago Law & Economics, Olin Working Paper No. 403, April 2008) (Electronic copy available at <http://ssrn.com/abstract=1126359>).

²¹¹ See Proposed Federal R. Civ. P. 56(a).

²¹² See *id.*

wrong, appellate courts must uphold them. State appellate courts ought to reject that approach and embrace those of Justices Breyer or Stevens. Either approach will result in determinations that are closer to the truth and will minimize the impact of both Trilogies that implicitly invite the trial judge to become the trier of fact.

Professor Brunet is correct that Professor Thomas should be commended for arguing that summary judgment is unconstitutional. Nonetheless, it is unlikely that courts will find summary judgment to be unconstitutional on its face. Properly applied, if there truly is no genuine issue of material fact, there is no reason for a jury trial. The problem is in how we determine whether there is a material issue of fact. The Supreme Court in *Anderson* and *Matsushita* did open the door to inappropriate trial court second-guessing of the plaintiff's submission. Telling trial judges to look at the "quantum" or "quality" of the plaintiff's evidentiary submission, or the "plausibility" of the plaintiff's theories, invites trial judges to invade the province of the jury. And, in *Joiner*, the Supreme Court limited the opportunity for federal appellate courts to repair the damage. State appellate courts ought not make the same mistake. Rather, they should carefully examine any grant of summary judgment by taking a "hard look" at the moving party's submission to ensure that it has met its burden of showing an absence of material fact, remembering that there is a preference for admissibility of the non-movant's expert evidence.

State appellate judges ought to adopt some version of a "hard look" approach to grants of summary judgment. When taking such a look, state appellate courts ought to carefully review the issues presented by the summary judgment Trilogy that were identified in Part IV. Specifically, appellate courts have the power to search the record to ensure that there really are no genuine issues of material fact. Using traditional doctrinal analysis to advance an appropriate use of summary judgment, as opposed to finding summary judgment unconstitutional on its face, is more compatible with reality and can, together with the "hard look" approach, better advance the goal of an appropriate balancing between the needs for an efficient judicial system and the desire for a fair administration of justice. Such an approach gives due weight to the constitutional right to trial by jury while preserving the utility of summary judgment as a tool to weed out cases that genuinely present no issues of material fact.

The "bloom is off the rose of federal procedural rulemaking" according to some.²¹³ Thus, there is an important role for state appellate courts to play in ensuring a fair administration of justice. The dream that states might take the lead in a second "Golden Age" of procedural reform to achieve simplicity and uniformity is probably impossible.²¹⁴ Achieving simplicity or uniformity is somewhat naïve. But, the fact is that state courts can play a leading role in summary judgment practice. Value choices inform any procedural system, whether that notion is consistent with the story we tell ourselves about the law or not.²¹⁵ And, there are many values at stake when considering summary judgment – values of accuracy of outcome, efficiency, and dignified participation by litigants – but such values often clash. State appellate courts need to

²¹³ Richard Marcus, *Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform*, 35 WESTERN ST. L. REV. 103 (2007) ("Marcus").

²¹⁴ *Id.*, discussing Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167 (2005).

²¹⁵ See *supra* nn. 15-16 and accompanying text. See also Marcus, *supra* n. 201, at 105.

take the lead in ensuring that these values are balanced through the prism of the right to trial by jury.

APPENDIX 1

FEDERAL RULE OF CIVIL PROCEDURE 56

Rule 56. Summary Judgment

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

- (1) 20 days have passed from commencement of the action; or
- (2) the opposing party serves a motion for summary judgment.

(b) By a Defending Party. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings. The motion must be served at least 10 days before the day set for the hearing. An opposing party may serve opposing affidavits before the hearing day. The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

(d) Case Not Fully Adjudicated on the Motion.

(1) *Establishing Facts.* If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts--including items of damages or other relief--are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) *Establishing Liability.* An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) *In General.* A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) *Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must--by affidavits or as otherwise provided in this rule--set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) deny the motion;
- (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
- (3) issue any other just order.

(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt.