Fordham Law Review

Volume 83 *Volume 83*
Issue 6 *Volume 83,Issue 6*

Article 16

2015

# Snap Judgment: Recognizing the Propriety and Pitfalls of Direct Judicial Review of Audiovisual Evidence at Summary Judgment

Denise K. Barry
*Fordham University School of Law*

# NOTES

# SNAP JUDGMENT: RECOGNIZING THE PROPRIETY AND PITFALLS OF DIRECT JUDICIAL REVIEW OF AUDIOVISUAL EVIDENCE AT SUMMARY JUDGMENT

*Denise K. Barry**

*Conflicting results in two recent police excessive force decisions by the U.S. Supreme Court—*Tolan v. Cotton *and* Plumhoff v. Rickard*—have sown confusion about the standards for summary judgment. This Note shows how the two decisions are consistent with each other and with longstanding summary judgment precedents. The key insight is that since the Second Circuit's iconic 1946 decision in* Arnstein v. Porter*, appellate judges, including Supreme Court Justices, have listened to audio recordings, scrutinized artwork, and—as in the case of* Plumhoff*—watched video footage in order to decide for themselves whether there is a genuine issue of material fact for trial. These "objective" components of the record are considered vitally important to the decisions. When no objective evidence is available, appellate judges are left with "he said, she said" testimonial evidence in which demeanor evidence looms larger and are therefore more likely to allow the cases to proceed to trial. The presumed propriety of appellate judicial review of audiovisual evidence not only explains the different results in* Tolan *(no audiovisual evidence of police shooting and vacating the lower court's finding for the defendant officer) and* Plumhoff *(video evidence of a police car chase resulting in the Court finding for the officer), but it also will have greater significance in current police excessive force cases given the omnipresence of smartphones and police recordings. At the same time, it is worth questioning whether appellate judges should continue to exercise limitless, de novo review of present-day audiovisual evidence, which may require as much understanding of context as traditional demeanor evidence.*

---

* J.D. Candidate, 2016, Fordham University School of Law; B.A., 2002, University of Pennsylvania. I would like to thank Professor Thomas H. Lee for his guidance and advice during the writing process. I would like to thank my family for their love and encouragement, and especially John, for his support through everything, law school and beyond.

## INTRODUCTION

In May 2014, the U.S. Supreme Court handed down two decisions involving complaints of excessive force by police officers where the officers had moved for summary judgment[1] on the basis of qualified immunity.[2] *Tolan v. Cotton*[3] and *Plumhoff v. Rickard*[4] both had tragic facts and circumstances, and the confrontations between the plaintiffs and the police ended in permanent disability in *Tolan*[5] and in two deaths in *Plumhoff*.[6] In *Tolan*, the Court vacated the lower court's grant of summary judgment in favor of the defendant police officer.[7] Because it was the first time in ten years that the Court had ruled against an officer in a case involving summary judgment on qualified immunity grounds, civil rights advocates celebrated *Tolan* as a small but notable victory.[8] By contrast, in *Plumhoff*, the Court reversed the lower courts, which had both denied summary judgment to the defendant officer on qualified immunity grounds.[9]

This Note proposes that the key to understanding these two seemingly inconsistent cases is the importance of audiovisual evidence and the presumptive right of appellate judges, including U.S. Supreme Court

---

1. Summary judgment is "granted on a claim or defense about which there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law. . . . This procedural device allows the speedy disposition of a controversy without the need for trial." BLACK'S LAW DICTIONARY 1664 (10th ed. 2014).

2. Qualified immunity is a "judicially-created doctrine that often protects public officials from damages actions for the violation of constitutional rights." Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 229 (2006). The test for qualified immunity is two pronged, and inquires first "whether the facts, '[t]aken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a [federal] right.'" Tolan v. Cotton, 134 S. Ct. 1861, 1865 (2013) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). The second prong asks "whether the right in question was 'clearly established' at the time of the violation." *Id.* at 1866 (quoting Hope v. Pelzer, 536 U.S. 730, 739 (2002)).

3. 134 S. Ct. 1861 (2014).

4. 134 S. Ct. 2012 (2014).

5. *See Tolan*, 134 S. Ct. at 1864.

6. *See Plumhoff*, 134 S. Ct. at 2018.

7. *See Tolan*, 134 S. Ct. at 1868.

8. *See* Will Baude, Tolan v. Cotton—*When Should the Supreme Court Interfere in 'Factbound' Cases?*, WASH. POST (May 7, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/07/tolan-v-cotton-when-should-the-supreme-court-interfere-in-factbound-cases; Garrett Epps, *Supreme Court: Police Can't Brutalize Your Elderly Mother*, ATLANTIC (May 8, 2014, 2:17 PM), http://www.theatlantic.com/national/archive/2014/05/supreme-court-police-cant-brutalize-your-elderly-mother-or-shoot-you-when-youre-unarmed/361934/; Maxwell S. Kennerly, *The Supreme Court's Results-Oriented Summary Judgment Precedent*, LITIGATION&TRIAL.COM (June 6, 2014), http://www.litigationandtrial.com/2014/06/articles/attorney/civil-rights-1/results-oriented-summary-judgment/.

9. *See Plumhoff*, 134 S. Ct. at 2024; Estate of Allen v. City of W. Memphis, 509 F. App'x 388, 392 (6th Cir. 2012), *rev'd sub nom. Plumhoff*, 134 S. Ct. 2012; Estate of Allen v. City of W. Memphis, Nos. 05-2489, 05-2585, 2011 WL 197426, at *9–10 (W.D. Tenn. Jan. 20, 2011), *aff'd*, 509 F. App'x 388 (6th Cir. 2012), *rev'd sub nom. Plumhoff*, 134 S. Ct. 2012.

Justices, to review such evidence de novo[10] when reviewing a trial court's grant or denial of summary judgment. In *Tolan*, the record on appellate review was completely testimonial, while in *Plumhoff*, the record included video recordings of the confrontation between the plaintiff and the police. In cases where the record includes audiovisual evidence pertaining to disputed factual or mixed factual issues (e.g., whether the use of force by police is reasonable under the circumstances), appellate judges have consistently gone to the record and decided for themselves whether there is a genuine issue of material fact that makes the case trial worthy. When the record is purely testimonial—the "he said, she said" kinds of cases—appellate judges are more likely to view the facts in the plaintiff's favor and to allow the case to proceed.

Two iconic decisions set the foundation for this key distinction between testimonial and audiovisual evidence at summary judgment. The key precedent for the *Tolan* decision is the U.S. Supreme Court's 1970 decision *Adickes v. S.H. Kress*,[11] the quintessential "he said, she said" summary judgment case.[12] *Plumhoff*'s antecedent is the 1946 decision of a distinguished panel of Second Circuit judges in *Arnstein v. Porter*.[13] The majority in *Arnstein*, over the objection of Judge Charles E. Clark, the former dean of Yale Law School and the principal architect of the Federal Rules of Civil Procedure,[14] held that there was a genuine issue of material fact for trial in a copyright infringement case after listening to the musical recordings in dispute.[15] *Tolan*, like *Adickes*, was remanded for trial because it was a testimonial case. *Plumhoff* was summarily decided by the Justices after they independently assessed the video evidence in the case, just as the *Arnstein* court had listened to the audio evidence (albeit to a different result).

This Note explores the contours of the longstanding appellate practice of evaluating "objective" audiovisual evidence on summary judgment motions and argues that this practice—and the Justices' questionable confidence in their own powers of perception—led to opposing results in *Tolan* and *Plumhoff*. Part I explores the modern history and development of summary judgment and, using landmark summary judgment cases, examines courts' routine assessment of audiovisual evidence in rendering summary judgment decisions. Part II examines the *Tolan* and *Plumhoff* decisions in detail and briefly reviews their effects on lower court cases. Part III continues this analysis by illustrating how *Tolan* and *Plumhoff* can be reconciled by

10. De novo translates to "anew," and means that an appellate court will review the record and any evidence without deference to the trial court's decision. *See* BLACK'S LAW DICTIONARY 528, 976 (10th ed. 2014).

11. 398 U.S. 144 (1970).

12. The record in *Adickes* consisted entirely of witness testimony. *See id.* at 153–58.

13. 154 F.2d 464 (2d Cir. 1946).

14. *See* Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 YALE. L.J. 914, 915 (1976); *see also* Fred Rodell, *For Charles E. Clark: A Brief and Belated But Fond Farewell*, 65 COLUM. L. REV. 1323, 1323 (1965) (noting that as dean, Clark revolutionized legal education).

15. *See Arnstein*, 154 F.2d at 469, 473.

acknowledging the Court's dispositive resort to audiovisual evidence in the *Plumhoff* record. Part III concludes by urging judges reviewing a record to recognize the limits of their own powers of cognition in assessing deceptively objective audiovisual evidence.

## I. THE HISTORY AND DEVELOPMENT OF SUMMARY JUDGMENT

Part I of this Note examines the history and development of summary judgment. Part I.A addresses the origin and purpose of the Federal Rules of Civil Procedure, particularly the purpose and function of Rule 56, which governs summary judgment in federal courts. Part I.B examines the "slightest doubt" standard employed by courts prior to 1986 and looks to two landmark cases, noting the courts' treatment of the record in their decisions. Part I.C goes on to examine the summary judgment "trilogy" of 1986—important Supreme Court opinions that changed the standard by which courts analyze summary judgment motions. Part I.D looks at three post-trilogy decisions, two copyright infringement cases in which courts based their decisions on the objective record, and then *Scott v. Harris*,[16] a summary judgment qualified immunity decision where video played a starring role in the Supreme Court's opinion. Part I.E concludes with a survey of the responses to the summary judgment trilogy and the use of visual images or audiovisual recordings in courts' decisions.

### *A. Federal Rules of Civil Procedure: Enactment and Purpose*

In 1938, the Supreme Court adopted the Federal Rules of Civil Procedure ("the Rules"), Rule 56 of which governs summary judgment.[17] As stated by the Rules Committee, "[T]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."[18] When a party moves for summary judgment, it asserts that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[19]

16. 550 U.S. 372 (2007).

17. Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 68 WASH. & LEE L. REV. 81, 88 (2006). Summary judgment has its roots in the common law and was first used in England in 1855. *Id.* Several states in the United States adopted summary judgment by the end of the nineteenth century, and plaintiffs used it on a very limited basis to eliminate "frivolous or fictitious Defences." *Id.* Summary judgment was not considered a defendant's tool. *Id.*

18. *See id.* at 91 (quoting FED. R. CIV. P. 56 advisory committee's note (1963 amendment)). The text of the current Rule states:

> A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

FED. R. CIV. P. 56(a).

19. FED. R. CIV. P. 56(a).

The goal of Rule 56, and of the Rules as a whole, is "the just, speedy, and inexpensive determination of every action and proceeding."[20]

Rule 56 itself provides no specific guidance on how courts should determine "if the movant shows that there is no genuine dispute as to any material fact," and instead relies on courts to develop these details.[21] Because of this lack of direction, judicial interpretation of Rule 56 has played an extremely important role in its development.[22] As one commentator explains, "The Rule 56 text has endured because its seemingly indeterminate standard is problematic only if the text is viewed apart from the common-law system in which it operates."[23] The common law, anchored by the "iconic rule text," emerges slowly over time through cases on a variety of subject matters, and works to rein in "unguided judicial discretion . . . . It is that combination that makes Rule 56 . . . endure and function across a variety of subject matters and of factual patterns within the same subject matter."[24]

Although Rule 56 has been amended multiple times since its adoption, including substantive textual changes, commentators note that all of the changes "were designed to bring the rule in line with reality, to permit the text to reflect the manner that summary judgment actually operates."[25] Because Rule 56's intentionally protean standard left so much room for judicial interpretation, a close parsing of the case law is the best way to understand the evolution of the summary judgment standard.[26]

### *B. The "Slightest Doubt" Standard on Summary Judgment Motions*

In the years immediately after the adoption of the Rules, courts were hesitant to grant summary judgment to defendants, opting instead to send a case to the jury if there was the "slightest doubt" about material facts.[27] The standard originated in the Second Circuit's 1945 decision in *Doehler Metal Furniture Co. v. United States*.[28] The Second Circuit explained "that

20. *Id.* 1.

21. Steinman, *supra* note 17, at 89.

22. Lee H. Rosenthal, *The Summary Judgment Changes That Weren't*, 43 LOY. U. CHI. L.J. 471, 495–96 (2012).

23. *Id.* at 495.

24. *Id.* at 495–96.

25. EDWARD J. BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE xiii (Supp. 2012). Specifically, the 1963 amendment added answers to interrogatories as items courts can consider in granting a summary judgment motion. *See* Steinman, *supra* note 17, at 89 n.48. In 2007, Rule 56 received a "stylistic overhaul," in line with the stylistic changes that all of the Rules received, without substantive changes. *See* BRUNET & REDISH, *supra*, at xiii. The 2009 and 2010 amendments included reordering Rule 56 so that the "no genuine dispute as to any material fact" language begins the Rule, rather than coming after the timing requirements; incorporating into the text the procedures of partial summary judgment and sua sponte summary judgment; and codifying that a court should set forth its reasons for granting or denying summary judgment in an opinion. *See id.* at xxi–xxiii.

26. *See* Rosenthal, *supra* note 22, at 498.

27. EDWARD J. BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 6:3, at 127–28 (3d ed. 2006 & Supp. 2012).

28. 149 F.2d 130 (2d Cir. 1945).

trial judges should exercise great care in granting motions for summary judgment," and that "[a] litigant has a right to a trial where there is the *slightest doubt* as to the facts."[29] The court cautioned that although summary judgment could be "a praiseworthy time-saving device, . . . prompt despatch of judicial business" is "neither the sole nor the primary purpose for which courts have been established."[30] The court concluded that "[d]enial of a trial on disputed facts is worse than delay."[31]

The Second Circuit coined the term "slightest doubt" after relying on the Supreme Court's analysis in *Sartor v. Arkansas Natural Gas Corp.*,[32] which held that Rule 56 only allowed summary judgment "where it is quite clear what the truth is."[33] The Supreme Court further stated that "the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."[34] The "slightest doubt" standard was viewed as a sensible restraint given the overhang of the constitutional right to a jury in a civil trial and general enthusiasm about the democratic advantages of a jury trial, even in the civil context.[35]

1. *Arnstein v. Porter*: An Early Examination of the Audio Record

The landmark case exemplifying the "slightest doubt" standard is the Second Circuit's 1946 decision in *Arnstein v. Porter*, decided by an esteemed panel consisting of Judges Learned Hand, Jerome Frank, and Charles E. Clark.[36] In *Arnstein*, the plaintiff, a musical composer, appealed from the lower court's grant of summary judgment to the famous composer Cole Porter, whom Arnstein had sued for copyright infringement for copying his music.[37] The action consisted of two elements: (1) that Porter had copied the work and, (2) assuming that the work had been copied, that the copying went so far as to be an improper appropriation of Arnstein's copyrighted work.[38] The court explained that in order to prove the first element, there must be evidence of copying, either in the form of an admission by the defendant, or by a finding of (1) a similarity between the

29. *Id.* at 135 (emphasis added).
30. *Id.*
31. *Id.*
32. 321 U.S. 620 (1944).
33. *Id.* at 627.
34. *Id.*
35. *See* BRUNET & REDISH, *supra* note 27, § 6:3, at 136–37.
36. *See id.* § 6:3, at 128 (citing Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946)); Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 63 (1997) (explaining that federal courts have relied on the "oft-cited" case of *Arnstein*, which held that even if the nonmoving party has no evidence to rebut the moving party's evidence, summary judgment may not be granted if there exists the "slightest doubt" that there is a genuine dispute of material fact). For additional examples of the general hostility toward summary judgment in federal courts at this time, see Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 77–78 (1990).
37. *Arnstein*, 154 F.2d at 468.
38. *Id.*

copyrighted material and the alleged copy and (2) evidence that the defendant had access to the copyrighted material.[39]

If the plaintiff established the copying element, then the court would test the improper appropriation element by using the standard of an "ordinary lay hearer."[40] The court was clear that "[e]ach of these two issues—copying and improper appropriation—is an issue of fact. If there is a trial, the conclusions on those issues [are for] the trier of the facts."[41] Nevertheless, in order to determine whether the fact-finder should be permitted to make these findings, the judges listened to the recordings themselves, holding that the similarities between the recordings, standing alone, were not so dispositively compelling as to permit the inference of copying.[42] However, the court did hold that the similarities were sufficient enough to the judges' ears that the case should go to trial, assuming there was sufficient evidence of Porter's access to Arnstein's compositions.[43] Therefore, Porter's summary judgment motion was dependent on Arnstein's evidence that Porter had access to Arnstein's compositions.[44] The court held that summary judgment should only be granted if it was clear that Porter absolutely did not have access to the compositions at issue.[45]

Reviewing the record before it, the Second Circuit noted that the district court had depositions from Arnstein and Porter regarding the access Porter may or may not have had to Arnstein's compositions.[46] The Second Circuit stated that issues of credibility must always be left to the jury, recognizing that if, after listening to the testimony of both parties, the jury did not believe Porter's denials, it could "reasonably infer access . . . . It follows that, as credibility is unavoidably involved, a genuine issue of material fact presents itself."[47] The court further explained that cross-examination at trial in front of the fact-finder was an important tool for determining credibility, for which depositions were a poor substitute.[48] On this issue, the court held that summary judgment should not be granted.[49]

The court went on to examine the second element of the action, whether to the "ears of lay listeners," Porter appropriated something that belonged to Arnstein.[50] Stating that this was a question of fact properly suited for the jury, the court listened to the compositions and held that it did not find the similarities in the pieces so "trifling" as to find for the defendant Porter.[51] Based on its own assessment of the audio evidence and acknowledging that

39. *Id.*
40. *Id.*
41. *Id.* at 469.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 469–70.
49. *Id.*
50. *Id.* at 472–73.
51. *Id.* at 473. The court in dicta went so far as to suggest that in the case of a bench trial, the judge should employ an "advisory jury" to help determine this issue. *Id.*

Arnstein's testimony might be convincing to a jury, the court held that it could not grant summary judgment for Porter.[52]

The Second Circuit judges therefore independently evaluated the compositions for their similarities—a question for the fact-finder—while also advocating that testimonial disputes are for the jury's determination.[53]

Judge Clark's dissent is notable not only for its disapproval of the majority's "dislike of the summary-judgment rule,"[54] but also for its position that the court was mistaken in deciding the issue of improper copying using "the judicial eardrum [that] may be peculiarly insensitive."[55] Clark declared that the majority's rejection of expert testimony as "utterly immaterial" in determining whether the songs were copied constituted "final proof of the anti-intellectual and book-burning nature of [the majority's] decision."[56] Judge Clark, advocating for the use of expert witnesses to determine copying in musical copyright infringement cases, was equally skeptical of the lay jury's role as a fact-finder, thinking they lacked competence.[57] He concluded that if judges and juries were to listen to musical compositions themselves to determine plagiarism, judicial and musical "chaos" would result.[58]

### 2. *Adickes v. S.H. Kress & Co.*: Establishing Burdens with Testimonial Evidence

In the seminal 1970 civil rights case of *Adickes v. S.H. Kress & Co.*, the Supreme Court denied the defendant summary judgment because he had "the burden of showing the absence of a genuine issue as to any of material fact."[59] Further, according to the Court, the defendant had failed to foreclose the possibility that the jury could find for the plaintiff.[60] Because *Adickes* placed a high burden on the moving party, the case can be seen as reaffirming the Supreme Court's approval of the "slightest doubt" test and exhibiting a preference for jury trial over summary judgment. Some commentators have opined that this may have been due to the civil rights context of the case.[61]

---

52. *Id.*
53. *See generally id.*
54. *Id.* at 479 (Clark, J., dissenting).
55. *Id.* at 476.
56. *Id.* at 478.
57. *Id.* at 478–79.
58. *Id.* at 480.
59. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). In addition to its significance as a civil rights case, *Adickes* is widely regarded as a landmark summary judgment opinion. *See* John E. Kennedy, *Federal Summary Judgment: Reconciling* Celotex v. Catrett *with* Adickes v. Kress *and the Evidentiary Problems Under Rule 56*, 6 REV. LITIG. 227, 229 (1987) (describing the "landmark" case); Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL. ADVOC. 433, 439 (1987) (calling *Adickes* one of the Supreme Court's most important cases on summary judgment).
60. *Adickes*, 398 U.S. at 158.
61. *See* 10B Charles Alan WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2739, at 393 (3d ed. 1998) ("[T]here may be some question whether *Adickes* would have been decided the same way if it had been a routine tort or

In *Adickes*, a white school teacher brought a claim against Kress, the owner of a restaurant in Hattiesburg, Mississippi, to recover damages under 42 U.S.C. § 1983 for violation of her constitutional rights.[62] Adickes went to Kress's restaurant with six African American students; the restaurant served the students but refused to serve Adickes.[63] Upon leaving the restaurant, the Hattiesburg police arrested Adickes for vagrancy.[64]

Adickes alleged that Kress and the police had conspired to deprive her of her right to equal treatment and to cause her arrest for the false charge of vagrancy.[65] According to Adickes's complaint, a police officer came into the restaurant and observed her being refused service, and then he and another officer later arrested her on the street once she left the restaurant.[66] Adickes argued that, although she had no knowledge of an agreement between a restaurant employee and the police, "the sequence of events created a substantial enough possibility of a conspiracy to allow her to proceed to trial."[67] The crux of the claim was that the police officer had been in the restaurant and that his mere presence was enough for a reasonable fact-finder to infer a conspiracy between restaurant staff and the police.[68]

In his motion for summary judgment, Kress argued that the facts established that there was no agreement between himself and the police.[69] In support of this assertion, Kress submitted a deposition from the store manager stating that he had not communicated with the police and that he had ordered the waitress to refuse Adickes service for fear of starting a riot if Adickes was served.[70] Kress also submitted affidavits from the Hattiesburg chief of police and the two arresting officers, all denying that anyone in the restaurant had requested that Adickes be arrested.[71]

Adickes's opposing evidence consisted of an unsworn statement by a cashier at the restaurant that the cashier had seen the police officer in the

---

contract case, rather than a civil-rights suit . . . ."); *see also* Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 779 (1988) ("*Adickes* can be explained in that it was an important civil rights case that the Court did not want to dispose of without trial. The discussion of summary judgment was simply a means of masking a difficult substantive issue.").

62. *Adickes*, 398 U.S. at 146. Title 42 U.S.C. § 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1970).

63. *Adickes*, 398 U.S. at 146–47.

64. *Id.* at 146.

65. *Id.*

66. *Id.* at 156–57.

67. *Id.* at 157.

68. *See* Kennedy, *supra* note 59, at 235.

69. *Adickes*, 398 U.S. at 153.

70. *Id.* at 153–54.

71. *Id.* at 154–55.

restaurant while Adickes and her students were there,[72] as well as Adickes's assertions in her complaint and deposition that the officer was at the restaurant while she and her students were there.[73] Adickes stated that although she had not personally seen the police officer, two of her students had, and both had testified to this at an earlier trial.[74] Despite this (inadmissible) evidence, Adickes pointed out that Kress had failed to dispute that the police officer had been in the restaurant.[75] The Court found this failure to dispute the police officer's presence fatal to Kress's motion because, as the moving party, Kress had the burden of showing the absence of a genuine issue as to any material fact, and, viewing the record in the light most favorable to the nonmoving party, it was possible that the police officer had been in the restaurant and party to a conspiracy.[76] Although not quoting the phrase "slightest doubt," the Court's language implied a "fairly high burden on parties *moving* for summary judgment."[77]

*Adickes* also underscores the differences between the burdens of the parties in a motion for summary judgment as opposed to a motion for a directed verdict.[78] A directed verdict is "[a] ruling by a trial judge taking a case from the jury because the evidence will permit only one reasonable verdict."[79] If this dispute had occurred during the trial instead of during the pretrial stage, Adickes would have the burden of production,[80] which is the "duty to introduce enough evidence on an issue to have the issue decided by the fact-finder."[81] The significance of these burdens is that if the case had gone to trial, Kress would have been granted a directed verdict without producing any evidence of his own, provided that Adickes failed to meet her burden of production.[82] Instead, although Adickes had not met the burden of production, Kress's motion for summary judgment was denied because Kress had failed to disclose the possibility that Adickes could meet that burden.[83]

---

72. *Id.* at 156 n.14.

73. *Id.* at 156.

74. *Id.* at 156 n.13. Adickes had brought two § 1983 claims against Kress: the conspiracy claim, which was disposed of pretrial on a motion for summary judgment, and a claim that she had been deprived of service because of "discriminatory custom." *Id.* at 147–48. The latter claim went to trial and was held for Kress on a directed verdict. *Id.* One commentator notes that the trial on the discriminatory custom claim put the Supreme Court in an awkward position, and could possibly influence how *Adickes* should be understood, because at the trial Adickes had presented evidence sufficient to support the conspiracy count. Kennedy, *supra* note 59, at 234 n.22. Therefore, if the Court granted summary judgment for Kress, it would be holding Adickes' evidence insufficient, which had already been admitted at trial. *Id.*

75. *Adickes*, 398 U.S. at 156.

76. *See id.* at 157.

77. Chen, *supra* note 36, at 58 (emphasis added).

78. *See* BRUNET & REDISH, *supra* note 27, § 5:3, at 94.

79. BLACK'S LAW DICTIONARY 1791 (10th ed. 2014).

80. *See* BRUNET & REDISH, *supra* note 27, § 5:3, at 94.

81. BLACK'S LAW DICTIONARY 236 (10th ed. 2014).

82. *See* BRUNET & REDISH, *supra* note 27, § 5:3, at 94.

83. *See id.*; Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1342–43 (2005) (explaining that "[f]or all practical purposes," although Adickes would have the burden of production at

In sum, *Adickes* held that Kress, the moving party, had the initial burden of demonstrating that there was no genuine dispute of material fact.[84] Additionally, when reviewing the arguments set forth by the movant, all facts and inferences must be viewed in the light most favorable to the nonmoving party.[85] Because Kress "failed to show conclusively that a fact alleged by [Adickes] was 'not susceptible' of an interpretation that might give rise to an inference of conspiracy," the burden of producing evidence never shifted to Adickes.[86]

### *C. The Summary Judgment Trilogy and the Emergence of a New Standard*

Sixteen years later, in 1986, the Supreme Court decided three summary judgment cases—known as the trilogy—which are widely regarded as effecting a sea change in summary judgment doctrine.[87] The result was a purposeful retreat from the anti-summary judgment approach so clear in *Arnstein* and *Adickes*.[88]

#### 1. *Celotex Corp. v. Catrett*: Lightening the Movant's Burden

The Supreme Court's decision in *Celotex Corp. v. Catrett*[89] altered the evidentiary burdens on the respective parties on a motion for summary judgment from those that the Court had earlier endorsed in *Adickes*.[90] In this wrongful death case, the Supreme Court addressed the purpose of the summary judgment motion, noting that courts should not regard summary judgment as a "disfavored procedural shortcut" and must uphold the rights of defendants to avoid an unnecessary trial where the case is devoid of any factual basis.[91]

The Court explained that *Adickes* should not "be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of

---

the trial, she could produce "absolutely no evidence that a jury could ever see to support that allegation" at the summary judgment stage, and further noting that, at trial, Kress could point out Adickes's lack of evidence and be granted a directed verdict).

84. Mullenix, *supra* note 59, at 441.

85. Adickes v. S.H. Kress, 398 U.S. 144, 158–59 (1970).

86. *See* Mullenix, *supra* note 59, at 445 (quoting *Adickes*, 398 U.S. at 160 n.22).

87. *See, e.g.*, Chen, *supra* note 36, at 58; Friedenthal, *supra* note 61, at 771; Issacharoff & Loewenstein, *supra* note 36, at 73.

88. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1028 (2003) (noting that "the 1986 Supreme Court trilogy is striking because of the strong pro-summary judgment language found throughout the Court's three opinions"). Miller goes on to propose that "the mere fact that the Court discussed the motion in depth in three cases during the same Term makes the trilogy significant, suggesting that the subject may well have been on the agenda of some of the Justices," and concludes that "there is no doubt that the decisions break with the Court's prior attitude in . . . *Adickes*." *Id.* at 1028–29.

89. 477 U.S. 317 (1986).

90. *See* Issacaroff & Loewenstein, *supra* note 36, at 79.

91. *Celotex*, 477 U.S. at 327.

proof."[92] Instead, after adequate time for discovery, a motion for summary judgment should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[93] Further, the moving party does not have to support its motions with evidence; it is sufficient for the moving party to inform a court of the basis for its motion in the record, including the nonmoving party's lack of evidence.[94]

In sum, because under *Celotex* the movant must simply point to the nonmovant's lack of evidence in the record, the burden on the movant is generally accepted as "light," as compared to the movant's burden under *Adickes*.[95]

### 2. *Anderson v. Liberty Lobby, Inc.*: Equating Summary Judgment to Judgment As a Matter of Law

*Anderson v. Liberty Lobby, Inc.*[96] equated the summary judgment standard to the standard for a judgment as a matter of law (formerly called a directed verdict).[97] Additionally, *Anderson* held that a court must evaluate the issue of the genuine dispute of material fact in light of the evidentiary burden that the party would carry as established by the substantive law.[98]

In *Anderson*, the plaintiff claimed that the defendant magazine libeled him, and the issue for the Court was whether the heightened evidentiary standard required by the substantive libel law—clear and convincing evidence[99] of actual malice—should affect a judge's weighing of a motion for summary judgment.[100] Framed another way, the question was whether a movant should get a bonus at the summary judgment stage because the nonmovant faced a tougher standard at trial.[101] The Court affirmatively stated that a trial judge must "bear in mind the actual quantum and quality of proof necessary to support liability" and consider a heightened

92. *Id.* at 325.
93. *Id.* at 322.
94. *Id.* at 323.
95. *See* BRUNET & REDISH, *supra* note 27, § 5:8, at 118.
96. 477 U.S. 242 (1986).
97. *See* BRUNET & REDISH, *supra* note 27, § 6:4, at 147–48; Chen, *supra* note 36, at 64.
98. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).
99. "Clear and convincing evidence" is defined as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." BLACK'S LAW DICTIONARY 674 (10th ed. 2014).
100. *See Anderson*, 477 U.S. at 247.
101. *See id.* at 266–67 (Brennan, J., dissenting) ("I am fearful that this new rule . . . will transform what is meant to provide an expedited 'summary' procedure into a full-blown paper trial on the merits."). Justice Brennan goes on to state the burden that the plaintiff will bear at the pretrial stage because of this heightened evidentiary standard:

> It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the "quantum" of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with *all* of the evidence he can muster in support of his client's case.

*Id.* at 267.

evidentiary standard when ruling on a motion for summary judgment.[102] In doing so, the Court was equating the summary judgment motion to that of a directed verdict.[103]

By equating the evidentiary standard at summary judgment to that of judgment as a matter of law, the Court held that a nonmoving party must "shoulder[] a trial evidentiary standard" at the pretrial stage.[104] The Court stated that the difference between the two motions was merely a "procedural" timing issue, because summary judgment motions are made before trial and decided on documentary evidence, while judgments as a matter of law are made at trial and decided on admitted evidence.[105] Although some commentators have noted the significant differences between the quality and completeness of the record at the pretrial and trial phases with disapproval, others have embraced the equated standards as true to the purpose and function of summary judgment.[106]

### 3. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*: No Doubt Left—The "Slightest Doubt" Standard Extinguished

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[107] the final case of the trilogy, Zenith Radio Corporation, an American corporation producing televisions sets, brought an antitrust action against the Japanese company Matsushita.[108] Zenith alleged that Matsushita had entered into a scheme to sell its televisions at an expensive price in Japan while selling its televisions at a low, fixed price in the United States in an effort to drive Zenith out of the American market.[109]

The issue for the Supreme Court was whether Zenith had established a genuine issue of material fact as to whether Matsushita had entered into a conspiracy.[110] The Court reaffirmed that the dispute must be genuine and that the nonmoving party "must do more than simply show that there is

102. *Id.* at 254 (majority opinion).
103. *Id.* at 250.
104. Mullenix, *supra* note 59, at 451.
105. *Id.* (quoting *Anderson*, 477 U.S. at 251).
106. *Compare* Kennedy, *supra* note 59, at 232–34 (arguing that there are significant differences between prejudging the evidence at the summary judgment stage and at trial), *and* D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 37–39 (1998) (positing that summary judgment creates a "special problem" for judges because the record is not finalized and the judge must make a determination of what the record would look like at trial and then apply the sufficiency standard, and also that the Court disregarded significance of the cost of preparing this evidentiary record pretrial), *with* BRUNET & REDISH, *supra* note 27, § 6:4, at 148 (arguing that the "fundamental . . . purpose of summary judgment is to avoid an unnecessary trial" and that "[t]he motion would hardly be performing its intended function if courts were to show greater leniency toward the nonmovant in ruling on a summary judgment motion than in ruling against a party who moves for a directed verdict").
107. 475 U.S. 574 (1986).
108. *See id.* at 576–78.
109. *See id.* at 577–78.
110. *See id.* at 585–86.

*some metaphysical doubt* as to the material facts," thereby rejecting the "slightest doubt" standard.[111]

Evaluating the record, the Court held that the court of appeals erred and that summary judgment should have been granted for Matsushita because a predatory pricing conspiracy would be "unlikely to occur" and was irrational.[112] The Court reasoned that "in light of the absence of any rational motive to conspire, neither [defendants'] pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a 'genuine issue for trial.'"[113]

Along with putting to rest the "slightest doubt" standard, the *Matsushita* decision affirmed the Court's willingness to use summary judgment.[114] The net intent and effect of the 1986 trilogy was to send the message to the lower courts that they should be much more comfortable about granting summary judgment than they had been under the *Adickes* precedent and the "slightest doubt" regime.

### *D. Post-Trilogy Summary Judgment Decisions*

This section discusses three important post-trilogy summary judgment decisions where appellate courts assessed de novo audiovisual evidence—musical recordings, works of art, and videotape, all considered part of the objective record—in deciding summary judgment motions.

#### 1. *Campbell v. Acuff-Rose Music, Inc.*: The Court Listens to Rap Music

*Campbell v. Acuff-Rose Music, Inc.*,[115] a landmark case regarding copyright infringement, is recognized for its revitalization of the copyright law doctrine of "fair use."[116] However, it is also notable for the Court's

111. *See id.* at 586 (emphasis added).

112. *Id.* at 590.

113. *Id.* at 597.

114. BRUNET & REDISH, *supra* note 27, § 6:4, at 140. *Matsushita* is also notable because the Court evaluated Zenith's expert's testimony and found it unpersuasive, a role traditionally reserved for the fact-finder. *See id.* § 6:4, at 141 ("[T]he question is not whether the Court finds [plaintiffs'] experts persuasive . . . ; 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." (quoting *Matsushita*, 475 U.S. at 606) (White, J., dissenting)); *see also* Mullenix, *supra* note 59, at 459 ("Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff." (quoting *Matsushita*, 475 U.S. at 600) (White, J., dissenting)). For further reading on the role of expert testimony in summary judgment, see Bobak Razavi, *Admissible Expert Testimony and Summary Judgment: Reconciling* Celotex *and* Daubert *after* Kochert, 29 J. LEGAL MED. 307 (2008).

115. 510 U.S. 569 (1994).

116. *See* Pierre N. Leval, Campbell v. Acuff-Rose*: Justice Souter's Rescue of Fair Use*, 13 CARDOZO ARTS & ENT. L.J. 19, 19 (1994); Robert P. Merges, *Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305, 305 (1993). The fair use doctrine states that certain copyrighted materials can be used without infringing upon the author's rights. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105 (1990). The idea was first articulated by Justice

heavy reliance on the record in deciding a motion for summary judgment, including direct analysis of music and rap lyrics by the Supreme Court.[117]

In 1989, rap group "2 Live Crew" released a rap version of Roy Orbison's 1964 hit song "Oh, Pretty Woman."[118] Acuff-Rose, who owned the copyright to the original song, brought an action against the group for copyright infringement.[119] 2 Live Crew had asked Acuff-Rose for permission to parody the song; Acuff-Rose refused permission, but 2 Live Crew recorded and released the song anyway.[120] Acuff-Rose alleged that "2 Live Crew's music was substantially similar in melody to 'Oh, Pretty Woman' and the lyrics of the first verse are substantially similar to that of the original version," and in response, Campbell moved for summary judgment.[121] The district court noted that before evaluating the claim on its merits, it must decide whether the case was appropriate for summary judgment, and although Acuff-Rose contended that issues of material fact made summary judgment inappropriate, the court held that it had sufficient facts to decide the issue as a matter of law because the evidence included "copies of the songs, correspondence and affidavits."[122]

In order to decide the case on the merits of the substantive law, the district court listened to and compared the two songs, including the lyrics, musical devices such as drum beat and base riff, and the musical key of the song.[123] Evaluating the song for these and other factors, the court granted summary judgment for the defendant, holding that 2 Live Crew's song was a parody constituting permissible fair use.[124]

However, the Sixth Circuit reversed the trial court's decision.[125] The intellectual property doctrinal issue was simple: 2 Live Crew claimed that their song was more than a mere imitation of the Roy Orbison song, and that both the words and music of the composition were "classic parodies."[126] Acuff-Rose asserted that 2 Live Crew's version was only a copy of the original, and that "even a listener without musical training would readily discern" that 2 Live Crew's song was modeled after the original.[127] The court of appeals held that although it could view the song

---

Story in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), and later codified in 17 U.S.C. § 107. *Id.* at 1105–06. Essentially, the fair use doctrine limits the power of copyright protection as long as a court finds that the copyrighted material is being used for "generally educational or illuminating purposes," which includes criticism and commentary, and which a court determines on a case-by-case basis. *Id.* at 1110–11.

117. *See Campbell*, 510 U.S. at 583.

118. *Id.* at 572.

119. Acuff-Rose Music, Inc. v. Campbell, 754 F. Supp. 1150, 1151–52 (M.D. Tenn. 1991), *rev'd sub nom*. Campbell v. Acuff-Rose Music, Inc. 972 F.2d 1429 (6th Cir. 1992), *rev'd*, 510 U.S. 569.

120. *Id.* at 1152.

121. *Id.* Acuff-Rose also claimed that 2 Live Crew's version of "Oh, Pretty Woman" was inconsistent with good taste and would lessen the value of the copyrighted original. *Id.*

122. *Id.* at 1153.

123. *Id.*

124. *Id.* at 1158–59.

125. *Acuff-Rose Music, Inc.*, 972 F.2d at 1439, *rev'd*, 510 U.S. 569.

126. *Id.* at 1433.

127. *Id.*

as a parody of "white-centered popular music," its imitation of the original song was too substantial to be justified as a parody.[128] The court therefore concluded that 2 Live Crew's song was outside of the protection of the parody defense and denied summary judgment.[129]

The Supreme Court granted certiorari to determine if 2 Live Crew's song was a parody and therefore protected as fair use under the 1976 Copyright Statute.[130] Holding that the court of appeals gave "insufficient consideration . . . to the nature of parody in weighing the degree of copying," the Supreme Court reversed.[131] Noting that no bright-line rule existed in determining parody and that the doctrine called for a case-by-case analysis, the Court examined the pertinent factors.[132] This examination required the Court to compare the two audio recordings and lyrics in order to determine the "purpose and character of the use" and "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[133] The Court stated that it must evaluate 2 Live Crew's "Pretty Woman" for "whether a parodic character may reasonably be perceived."[134] Comparing the two works, the Court held that 2 Live Crew's song "reasonably could be perceived as commenting on the original or criticizing it."[135]

In support of this assertion, the Court included the lyrics of both songs in the appendices to its opinion.[136] As to the amount and substantiality of the portion copied, the Court held that 2 Live Crew's song "departed markedly" from the original and produced "otherwise distinctive sounds."[137] Ultimately, the Court remanded the case because of an infirmity in the record.[138] Nevertheless, the Court clearly based its findings regarding the

---

128. *Id.* at 1435 n.8.

129. *Id.* at 1439.

130. *Campbell*, 510 U.S. at 574–75. The statute provides that when analyzing fair use, the factors to be considered shall include:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

*Id.* at 576–77 (quoting 17 U.S.C. § 107 (1988 & Supp. IV)).

131. *Id.* at 572.

132. *Id.* at 577–78.

133. *Id.*

134. *Id.* at 582.

135. *Id.* at 583.

136. *See id.* at 594–96.

137. *Id.* at 589.

138. *Id.* at 590–94. The Court held that 2 Live Crew failed to adequately address the fourth factor of the fair use inquiry—"the effect of the use upon the potential market for or value of the copyrighted work," which it was instructed to do upon remand. *Id.* at 590 (quoting 17 U.S.C. § 107 (4) (1988 & Supp. IV)).

substance of the songs on its own direct understanding and interpretation of the songs after listening to them.[139]

### 2. *Rogers v. Koons*: Art Critics Sitting on the Second Circuit

*Rogers v. Koons*,[140] a 1992 Second Circuit case decided on cross-motions for summary judgment, is another fairly recent example of appellate judges' willingness to evaluate the record directly, in this instance with respect to contemporary art.[141] In *Rogers*, a commercial photographer brought an action against famed artist Jeff Koons for copyright infringement.[142] Rogers had taken a photograph of a client with his wife and eight German shepherd puppies.[143] "Puppies" became part of Rogers's catalog, and he exhibited the piece a number of times.[144] Rogers eventually licensed "Puppies" to a company that produced notecards and postcards, and the company produced approximately 10,000 notecard prints of "Puppies."[145]

Koons created his sculpture, "String of Puppies," based off of a "Puppies" notecard as part of a gallery exhibit called the "Banality Show."[146] Koons instructed sculptors in Italy to copy the photograph when creating the sculpture.[147] The puppies of the sculpture were painted various shades of blue, their noses bulbously enlarged, and flowers were added to the hair of the human figures.[148]

Koons admitted that he had based his large sculpture on a photograph taken by Rogers, used without permission, but he claimed that it was a work of parody, protected under the fair use exception to copyright infringement[149] (and later validated by the Supreme Court in *Campbell*).[150] The Second Circuit found that there was no dispute of material fact

---

139. *See id.* at 593–94. It is interesting to note that the Court's analysis of the record by direct interpretation, specifically the meaning and intent of rap lyrics, is not limited to civil cases (as examined in this Note) but has been extended to criminal cases. *See* Adam Liptak, *Chief Justice Samples Eminem in Online Threats Case*, N.Y. TIMES, Dec. 2, 2014, at A14. The Court recently heard oral arguments for *Elonis v. United States*, 134 S. Ct. 2819 (2014), addressing the question of whether prosecutors had proven the defendant's intent through his lyrics, and if his lyrics could constitute "true threats," outside of First Amendment protection. *Id.* Chief Justice Roberts quoted lyrics from Eminem in which Eminem seems to threaten to drown his wife, and then the Chief Justice asked the government lawyer if Eminem could be prosecuted for them. Transcript of Oral Argument at 47–48, *Elonis*, 134 S. Ct. 2819 (No. 13983).

140. 960 F.2d 301 (2d Cir. 1992).

141. *Id.* at 303–06. This foray into art criticism by the legal system did not go unnoticed by the art world, and the issues of the case could be seen as echoing the controversy surrounding Koons generally: Is he a genius or a commercially driven imposter? *See* Constance L. Hays, *A Picture, a Sculpture and a Lawsuit*, N.Y. TIMES, Sept. 19, 1991, at B1.

142. *Rogers*, 960 F.2d at 303–04.

143. *Id.* at 304.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 304–05.

148. *Id.* at 305, 308.

149. *Id.* at 308–12.

150. *See supra* note 116 and accompanying text.

regarding the fair use exception.[151] The court based this holding on the record before it, which included postcard-sized black and white photographs of both works.[152] Central to this holding was the question of "the amount and substantiality of the work used," which Koons claimed did not exceed the level permitted by the fair use doctrine.[153] The court declared that "[h]ere, the essence of Rogers' photograph was copied nearly *in toto*, much more than would have been necessary even if the sculpture had been a parody of plaintiff's work."[154] The court concluded that "it is not really the parody flag that appellants are sailing under, but rather the flag of piracy."[155] Accordingly, the Second Circuit granted summary judgment in favor of Rogers.[156]

### 3. *Scott v. Harris*: The Videotape Wrinkle

In 2007, the Supreme Court decided *Scott v. Harris* relying on a police chase videotape in the trial record as a basis for granting summary judgment.[157] In *Scott*, Victor Harris alleged an excessive force violation when Deputy Timothy Scott, pursuing Harris's vehicle, hit the rear of Harris's car in an effort to end a high-speed car chase.[158] When Scott hit Harris's car, Harris lost control of his car and was flipped off the road, rendering him a quadriplegic.[159]

To determine whether Scott used excessive force, the district court first examined the question of "whether the officer['s] actions are 'objectively reasonable' in light of the facts and circumstances confronting [him], without regard to [his] underlying intent or motivation."[160] After analyzing the facts in the light most favorable to Harris, the district court held that given the nature of Harris's offense, among other factors, a reasonable fact-finder could determine that it was unreasonable for Scott to believe that Harris posed a threat to others and that it was unreasonable for Scott to pursue Harris in a high-speed chase and eventually to bump him.[161]

---

151. *Rogers*, 960 F.2d. at 309.

152. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 721 (2012).

153. *Rogers*, 960 F.2d at 310–11.

154. *Id.* at 311.

155. *Id.*

156. *Id.* at 314. Later commentators contended that the works were substantially different and that Koons's sculpture should be considered a parody. *See* Tushnet, *supra* note 152, at 721 (commenting that the photograph was the size of a postcard, and the sculpture was "larger than life and garishly colored"); *see also* Hays, *supra* note 141 (explaining the debate around Koons's creation, including details added to the sculpture, and the ongoing divisiveness of Koons's work).

157. Scott v. Harris, 550 U.S. 372, 380–81 (2007).

158. *Id.* at 375.

159. *Id.*

160. Harris v. Coweta Cnty., No. CIVA 3:01CV148 WBH, 2003 WL 25419527, at *4 (N.D. Ga. Sept. 25, 2003) (quoting Graham v. Connor, 490 U.S. 386, 397 (1989)), *aff'd*, 433 F.3d 807 (11th Cir. 2005), *rev'd sub nom. Scott*, 550 U.S 372.

161. *Id.* at *4–5. The district court considered it a "central fact that guide[d]" this case that Harris's crime precipitating the chase was driving seventy-three miles per hour in a fifty-five miles per hour zone. *Id.* at *5. Similarly, Scott relied heavily on an earlier crash

Having established excessive force in violation of the U.S. Constitution, the court moved on to evaluate Deputy Scott's assertion of qualified immunity, the pertinent question being "whether Harris's rights were clearly established—that is, whether it would have been clear to a reasonable officer that Scott's conduct was unlawful."[162] The court recognized that the law clearly established that the level of force appropriate to employ when pursuing a fleeing suspect depended on the underlying crime the suspect was believed to have committed.[163] Because Scott did not know the underlying charge against Harris when he pursued him, and because the court must view the evidence in Harris's favor, the court held that there were sufficient differences of material fact precluding summary judgment, necessitating a trial by jury.[164] The Eleventh Circuit affirmed this decision, holding that a jury could reasonably believe that Scott hitting Harris's vehicle was a case of excessive force and that the law regarding the use of deadly force was sufficiently established to preclude qualified immunity for Scott.[165]

The Supreme Court disagreed.[166] The Court framed the question on appeal as "[c]an an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?"[167] Writing for an eight-to-one majority, Justice Scalia noted that when a defendant moves for summary judgment on the grounds of qualified immunity, the first question a court must answer is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?"[168] Beginning this inquiry, the Court noted that Harris's and Scott's versions of the facts differed substantially, which would normally compel the Court to "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion,'" that is, Harris.[169]

However, in this case, a "wrinkle" in the form of a videotape of the chase trumped this requirement.[170] The Court stated that there was no "contention that what [the videotape] depicts differs from what actually

---

between him and Harris in a parking lot during the pursuit to support the position that the chase was objectively reasonable. *Id.* Regarding this crash, the court found that if viewing the facts in Harris's favor, as required in the summary judgment analysis, the inference is that the crash was either an accident or that Scott hit Harris, as Harris had asserted, rather than Harris hitting Scott, as was Scott's version of the events. *Id.* Because the court credited Harris's assertions as the nonmoving party, the court did not infer that Harris was driving aggressively. *See id.*

162. *Id.* at *6 (citing Saucier v. Katz, 533 U.S. 194, 201–02 (2001)).

163. *Id.* (citing Tennessee v. Garner, 471 U.S. 1, 11–12 (1985)).

164. *Id.*

165. Harris v. Coweta Cnty., 433 F.3d 807, 814–15, 820–21 (11th Cir. 2005), *rev'd sub nom. Scott*, 550 U.S. 372.

166. *Scott*, 550 U.S. at 386.

167. *Id.* at 374.

168. *Id.* at 377 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

169. *Id.* at 378 (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

170. *Id.*

happened," and that the video "clearly contradicts" Harris's story.[171] The Court described the videotape as showing Harris's car "racing" down the road in "the dead of night," driving "shockingly fast" and resembling "a Hollywood-style car chase of the most frightening sort."[172] Based on the Court's viewing of the videotape, the Court held that Harris's version of the events was "blatantly contradicted by the record," so much so that no reasonable jury could believe him.[173] The Court held that Harris's version of the facts was "utterly discredited" and that the facts should be viewed in "the light depicted by the videotape."[174] Therefore, it was no longer appropriate to adopt Harris's version of the facts, despite the usual summary judgment procedure.[175]

Addressing the question of the objective reasonableness[176] of Scott's actions as required by the Fourth Amendment analysis, the Court held that "it is clear from the videotape that [Harris] posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase."[177] The Court concluded that Scott's actions were reasonable, holding that, as a rule, a "police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."[178] The Court held that Scott was entitled to summary judgment and reversed the court of appeals' decision.[179] Notably, the Court included a link to the videotape in a footnote to its opinion, stating that the Court was "happy to allow the videotape to speak for itself."[180]

Justice Stevens alone dissented, noting that he did not view the videotape in the same light that the majority did and neither did the judges on the district court and court of appeals. Based on these disparate views of the facts, Justice Stevens believed that the videotape was best viewed by the jurors.[181]

### *E. Commentary on Summary Judgment Through* Scott v. Harris

Commentary on the cases discussed above is helpful in understanding the impact of these decisions on the current summary judgment jurisprudence, particularly the 2013 cases that are discussed in Part II. This section discusses some of the legal commentary available.

---

171. *Id.*
172. *Id.* at 379–80.
173. *Id.* at 380.
174. *Id.* at 380–81.
175. *Id.* at 380.
176. Once a court determines relevant facts and inferences—drawn in favor of the nonmoving party—the objective reasonableness of an officer's conduct is strictly a matter of law, to be decided by a court, not a jury. *Id.* at 381 n.8.
177. *Id.* at 383–84.
178. *Id.* at 385–86.
179. *Id.* at 386.
180. *Id.* at 378 n.5.
181. *See id.* at 389–97 (Stevens, J., dissenting).

1. Thoughts on the State of Summary Judgment

Commentators have agreed that the trilogy encouraged the use of summary judgment as a method of resolving claims and that the elucidation of the standard made it easier for defendants to win the motion.[182] Some legal scholars have criticized this change, most notably Arthur R. Miller[183] and Suja A. Thomas.[184] Professor Miller notes that the summary judgment motion "has taken on an Armageddon-like significance; it has become both the centerpiece and end-point for many (perhaps too many) federal civil cases."[185] Miller fears that the scope of what judges consider to be a "genuine dispute as to any material fact" has been reduced, and that cases that should go to trial and be submitted to a jury are being dismissed.[186] On the other hand, courts have expanded what can be decided "as a matter of law."[187] In sum,

> a motion designed simply for *identifying* trial-worthy issues has become, on occasion, a vehicle for *resolving* trial-worthy issues. . . . The effect is to compromise the due process underpinnings of the day-in-court principle and the constitutional jury trial right without any empirical basis for believing that systemic benefits are realized that offset these consequences.[188]

Similarly, Professor Thomas has argued extensively that summary judgment is unconstitutional because of the Seventh Amendment right to a jury trial for civil litigants.[189] Thomas further contends that summary judgment violates the core principles of the common law: (1) "the jury or the parties determine the facts;"[190] (2) "a court would determine whether the evidence was sufficient to support the jury verdict only after the parties

182. *See* Chen, *supra* note 36, at 58 ("These cases reflect the Court's desire to enhance judges' use of summary judgment in eliminating claims before trial, and have arguably led to a greater capacity for resolving cases in this manner."); Issacaroff & Loewenstein, *supra* note 36, at 73–74 (calling the trilogy a "weapon to the arsenal designed to check the spread of litigation" and stating that the Court "significantly expanded the applicability of summary judgment"). *But see* Friedenthal, *supra* note 61, at 787 (commenting that none of the decisions have been overly "clear and precise"). Friedenthal also notes that although the trilogy should generally encourage summary judgment, their effect could be limited because of the dissents to each opinion and the history of the Court "deciding one summary judgment case one way, only to return later with an opinion leaning the other way." *Id.* at 771.

183. *See generally* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Miller, *supra* note 88.

184. *See generally* Suja A. Thomas, *Summary Judgment and the Reasonable Jury Standard: A Proxy for a Judge's Own View of the Sufficiency of the Evidence?*, 97 JUDICATURE 222 (2014) [hereinafter Thomas, *Reasonable Jury*]; Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) [hereinafter Thomas, *Unconstitutional*].

185. Miller, *supra* note 183, at 311.

186. *Id.* at 311–12.

187. *Id.* at 312.

188. *Id.*

189. Thomas, *Unconstitutional*, *supra* note 184, at 140.

190. *Id.* at 159–60.

presented evidence at trial, and only after a jury rendered a verdict;"[191] and (3) "a jury, not a court, decided a case that had any evidence, however improbable, unless the moving party admitted all facts and conclusions of the nonmoving party, including the improbable facts and conclusions."[192]

### 2. Viewing the "Objective Record": Specific Concerns About Images, Audiovisual Evidence, and Judicial Interpretation

The use of photographic or other pictorial evidence has also attracted attention from commentators.[193] Hampton Dellinger argues against their inclusion in Supreme Court opinions, cautioning that pictures are especially dangerous because of their assumed neutrality and accuracy.[194] Dellinger asserts that written opinions are subjected to analysis and skepticism that purportedly objective visual evidence in the record is not.[195] Even if an image is not purposely manipulated in any way, visual images have an immediate impact on a viewer, oftentimes affecting subjective emotions.[196] Dellinger argues that "[p]ut simply, a visual attachment, like the words that precede it, should be viewed as an opinion."[197] Quoting Justice Holmes, he warns that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations."[198]

Professor Nancy Marder objects to Dellinger's proposition that images should not be included in Court opinions, contending that images can be especially helpful to readers when the Justices explain (1) why they selected the included images and (2) how they interpret what the images depict.[199] Weighing the advantages and harms of using pictures in opinions, Marder concludes that on balance the practice should continue (as she assumes it will), but that "[t]he use of images should convey information that words alone cannot convey. The point is to foster discussion and debate, not to obscure it."[200] While Dellinger fears that the Justices (like the readers of their opinions) will be led astray by their visceral reactions to images,[201]

---

191. *Id.* at 160.

192. *Id.*

193. *See generally* Hampton Dellinger, *Words Are Enough: The Troublesome Use of Photographs, Maps, and Other Images in Supreme Court Opinions*, 110 HARV. L. REV 1704 (1997); Nancy S. Marder, *The Court and the Visual: Images and Artifacts in U.S. Supreme Court Opinions*, 88 CHI.-KENT L. REV. 331 (2013).

194. Dellinger, *supra* note 193, at 1707.

195. *Id.*

196. *Id.* at 1708.

197. *Id.* at 1710.

198. *Id.* (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903)).

199. *See* Marder, *supra* note 193, at 332.

200. *Id.*

201. Dellinger, *supra* note 193, at 1707 (noting that the "manipulable properties of attachments—including color, angle, size, and perspective, as well as the inevitable exclusion of critical context—can individually or in combination result in a particularly subjective version of the 'facts'"). Dellinger goes on to suggest that "[t]he Court's reliance on these atypical depictions may contribute, in turn, to the formulation of questionable legal arguments and conclusions." *Id.*

Marder implicitly approves of the Justices using them to inform their "understanding of the case, just as the briefs and oral argument did."[202]

The 2007 *Scott* decision has also received extensive treatment in the legal community.[203] Professors Kahan, Hoffman, and Braman's article in response to *Scott* sought to find what the video really says when allowed to "speak for itself" by showing it to 1350 viewers of various backgrounds.[204] Although a substantial majority agreed with the way the Court viewed the tape, many viewers did not, and by categorically considering those views "unreasonable,"[205] the authors argue that the Court (1) denied those citizens the opportunity to sit on a jury and possibly change the views of fellow jurors, (2) delegitimized the Court's own holding to the subcommunity who perceived the facts differently than the Court did, and (3) pushed the "unreasonable" viewers to the position of "defeated outsiders."[206]

Kahan and his coauthors further argue that social sciences teach us that while we are aware of other people's cognitive biases, "our power to perceive it in ourselves tends to be quite poor. We thus simultaneously experience overconfidence in the unassailable correctness of the factual perceptions we hold in common with our confederates and unwarranted contempt for the perceptions associated with our opposites."[207]

The authors hypothesized that the theoretical grounds on which the viewers would "see" the tape differently were the culpable control model of blame, the theory of identity-protective cognition, and cultural cognition of risk.[208] The culpable control model of blame theory asserts that people attribute blame to others when their actions are viewed as voluntary and result in harm to another.[209] However, people tend to perceive "voluntariness" when someone is acting outside of social norms and that there is "a subconscious desire to form blame attributions that accord with moral evaluations of the agent's character or lifestyle."[210] Similarly, identity-protective cognition theory proposes that individuals belong to self-defining groups, therefore adhering to the factual beliefs widespread within the group, and, as a means of "psychological self-defense, . . . [individuals] process information in a selective fashion that bolsters beliefs dominant within their self-defining groups."[211] Likewise, cultural cognition of risk theory posits that people shape their factual beliefs about risk to conform to

202. *See* Marder, *supra* note 193, at 358.

203. *See generally* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009); Thomas, *Reasonable Jury*, *supra* note 184; Howard M. Wasserman, *Video Evidence and Summary Judgment: The Procedure of* Scott v. Harris, 91 JUDICATURE 180 (2008).

204. *See* Kahan et al., *supra* note 203, at 841.

205. *See* Scott v. Harris, 550 U.S. 372, 308 (2007) ("Respondent's version of events is so utterly discredited by the record that *no reasonable jury* could have believed him." (emphasis added)).

206. Kahan et al., *supra* note 203, at 841–42.

207. *Id.* at 842–43.

208. *See id.* at 851–52.

209. *See id.*

210. *Id.* at 852.

211. *Id.*

their "cultural evaluations of putatively dangerous behavior," which results in people "believ[ing] that behavior they find noble is also socially beneficial (or at least benign) and behavior they find base is also socially harmful."[212]

The survey supported these theories of group cognition of how various viewers would see the tapes, and although the majority of the viewers agreed with the Court's holding that the police were reasonable in using deadly force in *Scott*, it is significant that the minority who disagreed were not statistical outliers, but rather "connected by a core of identity-defining characteristics," as were those who "formed a view of the facts most unequivocally in line with those of the *Scott* majority."[213]

Ultimately, the authors recommend that a judge engage in a "mental double check" when ruling on a motion for summary judgment and imagine the juror that would disagree with the judge's conclusion that there was no genuine dispute of material fact.[214] If no specific juror comes to mind, it is probably fair to decide the motion in the view of Kahan and his coauthors.[215] In cases where the judge can picture the dissenting jurors with "identity-defining characteristics," such as "demographic, cultural, political, or otherwise[, the judge] should stop and think hard. Due humility obliges [the judge] to consider whether privileging her own view of the facts risks conveying a denigrating and exclusionary message to members of such subcommunities. If it does, she should choose a different path."[216]

Professor Naomi Mezey builds upon the cognitive shortcomings of viewers recognized in the Kahan study and argues that "courts and legal actors lack a critical vocabulary of the visual, and without visual literacy, they are more likely to be unduly credulous in the face of images."[217] Critical of the view that the video "speaks for itself," Mezey offers a telling counterexample to *Scott* of how visual literacy on the part of attorneys can overcome a viewer's initial response to a powerful video.[218] She does this by using the Rodney King case, in which a video of white officers beating King, an African American man, was broadcast widely.[219] Most viewers believed that the video spoke for itself, and in the subsequent criminal case against the officers, the prosecutors presented the video as central evidence in their case.[220] In response, the defense attorneys presented a counter narrative of the event by showing parts of the video in slow motion and still

212. *Id.*
213. *Id.* at 879.
214. *Id.* at 898.
215. *Id.*
216. *Id.* at 898–99. Professor Thomas presents a similar argument, suggesting that judges may not adequately be able to determine what a reasonable jury may find, and that the rules committee should further study this issue. *See* Thomas, *Reasonable Jury*, *supra* note 184, at 227.
217. Naomi Mezey, *The Image Cannot Speak for Itself: Film, Summary Judgment, and Visual Literacy*, 48 VAL. U. L. REV. 1, 3 (2014).
218. *See id.* at 18–21.
219. *See id.*
220. *See id.* at 18–19.

images.[221] By presenting these visual details not seen in the real time video, the defense was able to imply that the whole video was misleading.[222] This technique reframed what the "truth" of the image was—like an instant replay in a sports game—and presented the narrative of the truth as the defense wanted it told.[223] Mezey concludes that "[t]he jury acquitted the officers involved in the Rodney King beating because the defense employed a more sophisticated visual literacy," and, although this manipulation of the images "did not make them right, . . . it made them better lawyers."[224]

Regardless of the literacy of those using and viewing video, video will only become more predominant in the legal context given modern technological trends. As noted by Professor Howard Wasserman, the ubiquity of video recording devices could be a powerful tool for all litigants in civil rights enforcement, potentially allowing the public to hold the government accountable for officer misconduct.[225] Recognizing that recorded evidence is important both at the "front end"—the public's recording of police activity—and at the "back end"—the recordings' evidentiary use—Wasserman proposes that the right of individuals to videotape police actions should be protected under the First Amendment, and that recordings should be used as proof in civil rights litigation with an understanding of video's probative and prejudicial value.[226]

## II. CONFLICT IN THE SUPREME COURT'S 2013 TERM

Having explored the use of summary judgment in the courts to date, Part II examines two notable cases decided during the Supreme Court's 2013 Term, *Tolan v. Cotton* and *Plumhoff v. Rickard*, and the subsequent federal cases that have relied heavily on them. Both cases were decided on summary judgment in the lower courts and subsequently vacated or reversed by the Supreme Court.[227] Both cases were brought by plaintiffs alleging excessive force by police officers in violation of the Fourth Amendment where the officers moved for summary judgment based on the doctrine of qualified immunity.[228] Commentators have noted that the judgments appear irreconcilable because in *Tolan*, the Court ruled against a police officer in a qualified immunity case for the first time in ten years,[229] "arguably signal[ing] a major change in attitude."[230] In *Plumhoff*, however,

221. *See id.* at 19.
222. *See id.* at 20.
223. *See id.*
224. *Id.*
225. Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 611 (2009).
226. *See id.* at 661.
227. Tolan v. Cotton, 134 S. Ct. 1861, 1865, 1868 (2014); Plumhoff v. Rickard, 134 S. Ct. 2012, 2016–17 (2014).
228. *Tolan*, 134 S. Ct. at 1865, 1868; *Plumhoff*, 134 S. Ct. at 2016–17.
229. *See* Baude, *supra* note 8.
230. Ed Brunet & John Parry, *Guest Post: Brunet and Parry on* Tolan v. Cotton, CIV. PROC. & FED. CTS. BLOG (May 8, 2014), http://lawprofessors.typepad.com/civpro/2014/05/

the Court overruled the lower courts and upheld the officer's qualified immunity and, "to put it simply, . . . gave the plaintiff no quarter."[231]

The Court's analysis in *Tolan* was particularly noteworthy because after both lower courts had concluded that there was no genuine dispute of material fact and that the case could be decided on summary judgment, the Court remanded the case with the (not so gentle) reminder that when deciding a summary judgment motion based on qualified immunity, it is the summary judgment requirement that the evidence be viewed "in the light most favorable to the [nonmoving] party" that guides the qualified immunity query.[232] The Court held that it was imperative that courts import facts into their analysis viewed in the appropriate manner and that they must not conduct the qualified immunity inquiry using facts crediting the defendant officer's position.[233] In this case, the lower courts had done just that, according to the *Tolan* Court.[234] When the Court correctly viewed the facts in the light most favorable to Tolan, it held that there were disputes, therefore making the case inappropriate for dismissal at the pretrial stage.[235]

In contrast, both the district court and court of appeals in *Plumhoff* had held that the genuine dispute of material facts surrounding the circumstances of the *Plumhoff* car chase precluded summary judgment, but the Supreme Court analyzed the facts of the case in three paragraphs, finding no dispute that would merit a trial.[236] The Court did not acknowledge the plaintiff's assertions of factual disputes, seemingly in contrast to the direction it gave in *Tolan*.[237]

Part II.A looks at the Court's opinion in *Tolan* and its application of summary judgment, and Part II.B examines *Plumhoff*. Finally, Part II.C briefly discusses subsequent federal cases that have relied heavily on *Tolan* or *Plumhoff*, making note of the effect that video (or the lack thereof) had on the courts' analyses.

### *A.* Tolan v. Cotton*: Testimonial Disputes*

Robbie Tolan brought an action against police sergeant Jeffrey Cotton for excessive force in violation of the Fourth Amendment.[238] Cotton shot

guest-post-brunet-and-parry-on-tolan-v-cotton.html; *see also* Kennerly, *supra* note 8 ("Frankly, I don't think there's a way to reconcile *Tolan* with *Plumhoff* on the legal principles involved. Both cases presented multiple factual issues that should have been resolved by a jury, and thus summary judgment should not have been granted in either."); Howard M. Wasserman, *Mixed Signals on Summary Judgment*, 2014 MICH. ST. L. REV. (forthcoming 2015) (asserting that the Court's handling of *Tolan* and *Plumhoff* was "procedurally confounded").

231. Kennerly, *supra* note 8.

232. *See Tolan*, 134 S. Ct. at 1866 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970)).

233. *See id.*

234. *See id.*

235. *See id.* at 1866–67.

236. *See* Plumhoff v. Rickard, 134 S. Ct. 2012, 2016–17, 2024 (2014).

237. *See id.* at 2021–24.

238. *Tolan*, 134 S. Ct. at 1863.

Tolan three times, and one bullet punctured Tolan's lung and lodged in his liver.[239] Cotton moved for summary judgment based on qualified immunity.[240] The Supreme Court related the facts of the case, based on testimonial accounts, as follows.

At approximately 2 a.m. on December 31, 2008, police officer Edwards was patrolling Bellaire, Texas.[241] Edwards observed a sport utility vehicle turn quickly down a residential street and park in front of the home belonging to Bobby and Marian Tolan, Robbie Tolan's parents.[242] Edwards entered the license plate number of the SUV into a computer in his squad car, but he entered an incorrect digit, which coincided with that of a stolen vehicle.[243] This led Edwards, as well as the rest of the police units that had been automatically notified by the squad car computer, to believe that Edwards had identified a stolen vehicle.[244]

Meanwhile, Tolan and his cousin Anthony Cooper had exited the car and were heading toward the Tolans' residence, where Tolan lived with his parents.[245] Edwards exited his car and drew his pistol, accused Tolan and Cooper of stealing the car, and ordered them to the ground.[246] Tolan protested, explaining that it was his car but did lie down on the front porch of his home.[247] At this point, Tolan's parents came out to the front yard in their pajamas.[248] Tolan's father told Tolan and Cooper to comply with Edwards's orders and to be quiet, and they did.[249]

Tolan's parents then explained to Edwards that Tolan was their son, that Cooper was their nephew, and that this was their home and car.[250] With Tolan and Cooper on the ground, Cotton arrived at the scene and drew his pistol, and Edwards informed Cotton that Tolan and Cooper were the suspects.[251] Tolan's mother told Cotton that this was her home and that the car belonged to her and her husband.[252] Cotton then told Mrs. Tolan to stand against the garage door, to which she responded, "[A]re you kidding

239. *Id.* at 1864; Ed Lavandera, *Questions Surround Shooting of Baseballer's Son*, CNN.COM (Jan. 8, 2009, 2:21 PM), http://www.cnn.com/2009/CRIME/01/08/baseballer.shot/index.html.

240. *Tolan*, 134 S. Ct. at 1863.

241. *Id.*

242. *Id.* The lower court record includes the names of Tolan's parents, Marian and Bobby Tolan, as well as his cousin, Anthony Cooper. *See* Tolan v. Cotton, 854 F. Supp. 2d 444, 449 (S.D. Tex. 2012), *aff'd*, 713 F.3d 299 (5th Cir. 2013), *vacated*, 134 S. Ct. 1861.

243. *Tolan*, 134 S. Ct. at 1863.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.* "Tolan's father explained, with his hands in the air, '[T]his is my nephew. This is my son. We live here. This is my house.' Tolan's mother similarly offered, '[S]ir this is a big mistake. This car is not stolen. . . . That's our car.'" *Id.* (quoting Record at 2059, 2075, *Tolan*, 134 S. Ct. 1861).

251. *Id.* at 1863–64.

252. *Id.* at 1864.

me? We've lived her[e] 15 years. We've never had anything like this happen before."[253]

Mrs. Tolan and Cooper testified that, at this point, Cotton grabbed Mrs. Tolan and slammed her against the garage, causing her to fall, and leaving bruises on her arms and back for days.[254] Tolan also testified that Cotton pushed his mother.[255] According to Cotton's testimony, he escorted Tolan's mother to the garage door, and she told him not to touch her.[256]

Tolan testified that when he saw his mother pushed, he rose to his knees.[257] Cotton and Edwards testified that Tolan rose to his feet.[258] There is no dispute that at this point Tolan exclaimed, from about fifteen to twenty feet away, "[G]et your fucking hands off my mom."[259] Cotton then fired three shots at Tolan with no verbal warning.[260]

The district court granted summary judgment for Cotton, holding that "although there are disputes about details and interpretations of the facts, there are no disputes of material fact."[261] Further, the court found that, given the facts of the situation, Cotton's actions were objectively reasonable and therefore not in violation of the Fourth Amendment.[262] The Fifth Circuit affirmed, holding that Tolan did not meet his burden to establish that a genuine dispute of material fact existed as to whether an objectively reasonable officer in Cotton's situation would believe that deadly force was necessary.[263] Therefore, the court held that Cotton did not violate a clearly established right.[264]

Tolan appealed from the judgment and the Supreme Court granted certiorari and reviewed the record.[265] In its opinion, the Court announced that "[i]n articulating the factual context of the case, the Fifth Circuit failed to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'"[266] The Court went on to state that this rule is "not a rule specific to qualified immunity; it is simply an application of the more general rule that a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'"[267] In making the determination of whether there is no genuine dispute of any material

253. *Id.* (quoting Record at 2077, 1465, *Tolan*, 134 S. Ct. 1861).
254. *Id.* Mrs. Tolan supplied photographic evidence of the bruises. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.* (quoting Record at 1928, *Tolan*, 134 S. Ct. 1861).
260. *Id.*
261. Tolan v. Cotton, 854 F. Supp. 2d 444, 451 (S.D. Tex. 2012), *aff'd*, 713 F.3d 299 (5th Cir. 2013), *vacated*, 134 S. Ct. 1861.
262. *Id.* at 477.
263. *Tolan*, 713 F.3d at 305–06.
264. *Id.*
265. *Tolan*, 134 S. Ct. at 1863.
266. *Id.* (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).
267. *Id.* at 1866 (quoting *Anderson*, 477 U.S. at 249).

fact, a court must view the evidence "in the light most favorable to the opposing party."[268] Because the context of the situation is very important in determining a qualified immunity case, the Court pointed out that courts must be careful not to import genuinely disputed facts as part of the case's "context."[269]

The Court identified four facts that the appellate court had imported into their analysis in favor of the moving party.[270] First, the Fifth Circuit credited Cotton's testimony that the shooting scene was dimly lit and that the front porch light was decorative, rather than illuminative, contrary to Tolan's father's testimony.[271] Further, the court also failed to consider the two flood lights from the police cruisers and the motion-activated front lights that Cotton had testified were lit, as well as Tolan's testimony that he was not in darkness when he was shot.[272] Second, the Fifth Circuit held that Mrs. Tolan was agitated and out of control and did not credit her testimony that although she repeatedly asserted to the officers that a mistake had been made, she was not agitated or aggravated.[273] Third, the Fifth Circuit concluded that Tolan was "shouting" and "verbally threatening" Cotton when Tolan said, "[G]et your fucking hands off of my mom," despite Tolan's testimony that he was not screaming and that his words were not a threat.[274] Fourth, the Fifth Circuit inferred that Tolan was moving to intervene and credited Cotton's testimony that Tolan was on his feet, crouching, rather than on his knees, as Tolan testified, at the time he was shot.[275] In sum, the Fifth Circuit credited the evidence of the party seeking summary judgment and failed to credit key evidence presented by Tolan.[276]

The Court concluded:

> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.[277]

The Court vacated the decision and remanded it to the Fifth Circuit.[278] Revisiting the case, the Fifth Circuit denied Cotton's motion for summary

268. *Id.* (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970)).
269. *Id.*
270. *Id.* at 1866–68.
271. *Id.* at 1866–67.
272. *Id.* at 1867.
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* at 1867–68.
277. *Id.* at 1868.
278. *Id.*

judgment on the basis that there was a genuine dispute of material fact and remanded the case to the district court.[279]

*Tolan* shows that, despite the shifting of standards resulting from the 1986 trilogy, courts are still required to credit the nonmoving party's testimony and deny summary judgment when a reasonable jury may find in the plaintiff's favor. A case such as *Tolan*, in which all evidence is based on the testimonial accounts of witnesses to the event, is reminiscent of *Adickes* (which, perhaps not coincidentally, the *Tolan* Court cited for the proposition that a court must view the evidence "in the light most favorable to the opposing party").[280] *Tolan* exemplifies an instance where adherence to the summary judgment procedure laid down by well-settled case law is pivotal to the determination of the action.

### *B.* Plumhoff v. Rickard*: Video in the Record*

About three weeks later, the Court issued its decision in *Plumhoff v. Rickard*,[281] seemingly in direct conflict with *Tolan*. In *Plumhoff*, the Court held that defendant Vance Plumhoff was entitled to summary judgment based on qualified immunity, reversing the lower courts' holdings.[282] *Plumhoff*, like *Scott*, involved a car chase where Officer Plumhoff pursued Donald Rickard; the record included video footage of the incident.[283] After a traffic stop for a broken headlight, Rickard attempted to evade the police by fleeing in his car.[284] Rickard was eventually cornered by the police in a parking lot, and police shot into the car fifteen times to prevent Rickard's further escape, resulting in Rickard's and his passenger's deaths.[285] In its very brief discussion of the facts of the case, the Supreme Court did not refer to the video footage directly, but the lower courts discussed its evidentiary value, and the parties referred to it extensively in oral arguments.[286]

The district court had denied Plumhoff's motion for summary judgment, holding that the officer's conduct was not objectively reasonable in the

279. Tolan v. Cotton, 573 F. App'x 330, 330 (5th Cir. 2014). The case is currently set to go to trial on September 14, 2015. *Robbie Tolan Case Against City of Bellaire Set for September 2015*, KHOU.COM (Aug. 27, 2014, 4:26 PM), http://www.khou.com/story/news/local/2014/08/27/robbie-tolan-case-against-city-of-bellaire-set-for-sept-2015/14692155/.

280. *See supra* Part I.B.2; *see also supra* note 268 and accompanying text.

281. 134 S. Ct. 2012 (2014).

282. *Id.* at 2017.

283. *See* Estate of Allen v. City of W. Memphis, Nos. 05-2489, 05-2585, 2011 WL 197426 (W.D. Tenn. Jan. 20, 2011), *aff'd*, 509 F. App'x 388 (6th Cir. 2012), *rev'd sub nom. Plumhoff*, 134 S. Ct. 2012; Transcript of Oral Argument at 12, 19, 21–22, 28, 30, 34, 36–38, 45, 51, 55, *Plumhoff*, 134 S. Ct. 2012 (No. 12-1117).

284. *See Plumhoff*, 134 S. Ct. at 2017.

285. *See id.* at 2017–18.

286. *See generally Plumhoff*, 134 S. Ct. 2012; *Estate of Allen*, 2011 WL 197426; *Estate of Allen*, 509 F. App'x at 393, *rev'd sub nom. Plumhoff*, 134 S. Ct. 2012; Transcript of Oral Argument at 12, 19, 21–22, 28, 30, 34, 36–38, 45, 51, 55, *Plumhoff*, 134 S. Ct. 2012 (No. 12-1117).

context, and finding disputed material facts regarding the circumstances.[287] Specifically, the lower court found four facts in dispute. First, Plumhoff asserted that Rickard had tried to hit him with his car, and Rickard's estate contended that he never made such an attempt.[288] The district court noted that no evidence of Rickard hitting Plumhoff's cruiser or another cruiser was captured in the video footage.[289] Second, after this alleged incident, the police officers could be heard on the videos saying that Rickard was then guilty of aggravated assault, a felony.[290] Rickard's estate disputed whether there were felony charges at this time, and no evidence of the aggravated assault was on the video.[291] Third, as the chase continued, Rickard made a right turn and contact occurred between Rickard's vehicle and a police cruiser, causing Rickard's vehicle to spin into a parking lot.[292] After this, Plumhoff asserted that Rickard turned his vehicle directly toward Plumhoff's car and hit it head-on.[293] Rickard's estate disputed this and argued that his vehicle was still propelled by the momentum of the crash when this contact occurred and that the momentum caused this collision.[294] The fourth disputed event occurred shortly after this collision: at this point in the chase, the police cruisers had formed a semi-circle around Rickard's vehicle in an attempt to cut off any means of escape (there was a building behind Rickard).[295] Rickard reversed his vehicle, and Plumhoff and another officer, Evans, exited their vehicles and approached Rickard.[296] Evans pounded on the passenger side window of Rickard's vehicle with his gun in his hand.[297] The wheels of Rickard's vehicle were spinning, and the vehicle made contact with a second police car.[298] Plumhoff asserted that Rickard was "revving" the engine, causing this contact, but Rickard's estate stated that the vehicle was rocking back and forth, which the court should not consider as "revving."[299]

Analyzing the question of whether the officers' actions were objectively reasonable in light of the facts and circumstances confronting them, the district court held that the undisputed facts did not support a finding that it was objectively reasonable for the officers to use deadly force.[300] The court held that the officers were not in danger when they fired the shots into Rickard's car because none of them were in danger of being hit by Rickard's vehicle, no one believed or suspected that Rickard was armed,

287. *See Estate of Allen*, 2011 WL 197426, at *10.
288. *See id.* at *2.
289. *See id.*
290. *See id.*
291. *See id.*
292. *See id.* at *3.
293. *See id.*
294. *See id.*
295. *See id.*
296. *See id.*
297. *See id.*
298. *See id.*
299. *See id.*
300. *See id.* at *8.

and Rickard had been stopped for a broken tail light.[301] Additionally, although the defendants argued that Rickard engaged in felonious activity during their pursuit, the court recognized that these facts were disputed.[302] Viewing the videotape of the pursuit, and citing *Scott* for the proposition that "on a motion for summary judgment, the court may view the facts in the light depicted by videotapes," the trial court stated: "The objective evidence here, the videos of the chase, would not support a reasonable person in concluding that there were aggravated assaults. Therefore, the officers' conduct was not objectively reasonable, even from the officers' perspective."[303]

The court further asserted that the defendant was equally guilty of the dangerous driving behaviors that he attributed to Rickard, which could have been prevented had the chase been terminated.[304] The district court clarified that "dangerous conduct that was solely the product of engaging in a high-speed chase cannot serve as the foundation for deadly force."[305] Further, the disputed facts regarding the aggression of Rickard's driving precluded finding in the defendant's favor that his use of force was objectively reasonable because the facts must be interpreted in the light most favorable to Rickard.[306]

The Sixth Circuit affirmed the decision.[307] Noting the case's similarity to *Scott*, it nevertheless distinguished the facts of the case at hand.[308] The Sixth Circuit differentiated the case by noting that in *Scott*, Harris was fleeing at high speed with the potential to harm innocent bystanders when the deadly force was used, whereas Rickard was surrounded by police and at a virtual stop when they opened fire on him.[309] Additionally, in *Scott* the police used a maneuver that they knew had the potential to cause serious harm but did not necessarily guarantee it, and in this case the police officers shot fifteen times at close range, all while being aware that there was a passenger in the car.[310]

In sum, the Sixth Circuit held that the case at hand was distinguishable from *Scott* because, after viewing the video, the court could not

> conclude that it provides clear support for either the plaintiff's or the defendants' version of what occurred[, especially in regard] to the degree of danger that the officers were placed in as a result of Rickard's alleged conduct. Unlike in *Scott*, we cannot conclude that the officers' conduct was reasonable as a matter of law.[311]

---

301. *See id.*
302. *See id.*
303. *See id.* (citing Scott v. Harris, 550 U.S. 372, 380–81 (2007)).
304. *See id.*
305. *See id.* (citing Tennessee v. Garner, 471 U.S. 1, 9–11 (1985)).
306. *See id.*
307. Estate of Allen v. City of W. Memphis, 509 F. App'x 388, 393 (6th Cir. 2012), *rev'd sub nom.* Plumhoff v. Rickard, 134 S. Ct. 2012 (2014).
308. *Id.* at 391.
309. *Id.* at 391–92.
310. *Id.* at 392.
311. *Id.*

Accordingly, the Sixth Circuit affirmed the district court's decision.[312]

Plumhoff appealed to the Supreme Court, which held that Plumhoff's behavior was objectively reasonable both under the Fourth Amendment and in light of clearly established law.[313] The Court relayed the facts of the case in three paragraphs, citing to the district court's decision and finding that Rickard was "swerving through traffic at high speeds," and that, when cornered in the parking lot by the police officers, Rickard's wheels were spinning, indicating that he was using the accelerator.[314]

Analyzing the reasonableness of the chase, the Court compared the chase to that in *Scott*, finding that there was no reason to decide this case differently.[315] That same assertion was made during oral arguments by Plumhoff's counsel that "[j]ust as in *Scott v. Harris*, the videos in many ways speaks [sic] for itself," and that "[t]he video in many ways—in every way, in [his] opinion, shows that this [chase] was dangerous."[316] The Court also found Rickard's driving "outrageously reckless," holding that "Rickard was obviously pushing down on the accelerator" when he was cornered in the parking lot.[317] Further, according to the Court, the "record conclusively disproves" Rickard's claim that the chase was over when the officers fired at Rickard.[318] In oral arguments, Justice Breyer noted that "when [he] look[ed] at the film, [he] thought well, sure, [Rickard's] going back to the highway," and although Rickard's counsel argued that the police knew that the chase was over, Justice Breyer "didn't see any evidence showing that preferred or otherwise."[319] Concluding its analysis of the Fourth Amendment reasonableness inquiry, the Court held that given the circumstances, "all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road."[320] The Court held that "it is beyond serious dispute" that Rickard caused a grave safety risk to the public, and like in *Scott*, "the police acted reasonably in using deadly force to end that risk."[321]

The Court went on to hold that Plumhoff would be entitled to summary judgment under the "clearly established" law prong of the analysis, as

312. *Id.* at 393.

313. Plumhoff v. Rickard, 134 S. Ct. 2012, 2017 (2014).

314. *Id.* (quoting Estate of Allen v. City of W. Memphis, Nos. 05-2489, 05-2585, 2011 WL 197426, at *3, *8 (W.D. Tenn. Jan. 20, 2011), *aff'd*, 509 F. App'x 388, *rev'd sub nom. Plumhoff*, 134 S. Ct. 2012).

315. *Id.* at 2021.

316. Transcript of Oral Argument, *supra* note 283, at 12.

317. *Plumhoff*, 134 S. Ct. at 2021.

318. *Id.* at 2021–22.

319. Transcript of Oral Argument, *supra* note 283, at 12. Justice Breyer commented in his concurrence in *Scott* that "watching the video footage of the car chase made a difference to [his] own view of the case," and he recommended that readers view the video as well. Scott v. Harris, 550 U.S. 372, 387 (Breyer, J., concurring). Justice Breyer also noted that "the video makes clear the highly fact-dependent nature of this constitutional determination." *Id.*

320. *Plumhoff*, 134 S. Ct. at 2022.

321. *Id.*

well.[322] Because as of the date of the event "it was not clearly established that it was unconstitutional to shoot a fleeing driver to protect those whom his flight might endanger," the Court held that Plumhoff was entitled to qualified immunity because the "lengthy, high-speed pursuit . . . *indisputably* posed a danger both to the officers involved and to any civilians who happened to be nearby."[323]

*Plumhoff*, like *Scott*, demonstrates that the Court at times conclusively decides summary judgment motions, even in cases when the lower courts—or a dissenting Justice—find the facts in dispute and accordingly better left for trial.[324] In Part III, this Note contends that the Court confidently arrived at this conclusion based on its own perception of the facts, made possible because of the video record of the events in controversy.

### *C. The Video Effect: Opinions Relying on* Tolan *and* Plumhoff

Because *Tolan* and *Plumhoff* were so recently decided, only a handful of federal cases have relied on them extensively. However, a brief survey of these decisions shows the role that video evidence often plays in courts' decisions and the effects these cases have already had.

#### 1. The *Tolan* Cases

In *Bibbs v Allen*,[325] Jerry Bibbs brought a complaint against Officer Allen, claiming that during a routine traffic stop, Allen tasered Bibbs repeatedly and without justification. Although Allen admitted that he tasered Bibbs, the facts of the event were "hotly dispute[d]" by the parties.[326] Before analyzing the disputed event, the district court noted that although Allen's police car was equipped with an in-car video system, it was not working the morning of the encounter.[327] Based on the testimonial divergence, and heeding *Tolan*'s directive to view the facts in the light most favorable to the party asserting the injury, the court declined to grant summary judgment to the defendant.[328]

In *Garcia v. Dutchess County*,[329] police allegedly used excessive force against James J. Healy, Jr., eventually resulting in his death.[330] The altercation took place in Healy's home, with no cameras present, and the court held that material disputed facts precluded deciding the motion at the summary judgment stage.[331] The court quoted *Tolan* for the two-pronged qualified immunity inquiry, and specifically that "courts may not resolve

322. *Id.* at 2022–23.
323. *Id.* at 2023 (emphasis added).
324. *See supra* note 179 and accompanying text.
325. No. 13-cv-10362, 2014 WL 3956127 (E.D. Mich. Aug. 13, 2014).
326. *Id.* at *1.
327. *Id.* at *1 n.1.
328. *Id.* at *4.
329. No. 11-cv-1466 (SHS), 2014 WL 4116959 (S.D.N.Y. Aug. 21, 2014).
330. *Id.* at *1. The claim was brought by Denise Ann Garcia, the administrator of Healy's estate and mother of his children. *Id.*
331. *Id.*

genuine disputes of fact in favor of the party seeking summary judgment."[332] Additionally, the court quoted *Tolan*'s direction that when conducting the qualified immunity analysis on a summary judgment motion, "courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions."[333] Comparing the facts of the case as construed most favorable to the plaintiff, the court held that qualified immunity was inappropriate.[334]

The final recent case that heavily relied on *Tolan* in its analysis is *King v. Glanz*.[335] Donald Francis King was an unarmed mentally ill man who was shot and severely injured by sheriffs after they were called to his home for a domestic disturbance.[336] The record consisted of testimony from eyewitnesses, including the deputy sheriffs at the scene and various neighbors, who provided conflicting accounts regarding whether King's hands could be seen, whether it would have been possible for King to be hiding a long gun under his coat, and whether King threatened to shoot the deputies.[337] After reviewing these factual disputes, the court noted that *Tolan* had "recently reiterated that it is reversible error for a court to weigh the evidence or resolve any disputed issues in favor of the moving party,"[338] and that "reaching factual inferences that conflict with the non-movant's evidence is contrary to the 'fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.'"[339] The court also quoted *Tolan*'s reminder that "witnesses on both sides come to [the] case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system."[340] Because of the conflicting witness testimony and factual disputes, the court denied summary judgment, holding that a jury must determine the facts.[341] The court further acknowledged that in order to grant summary judgment for the sheriffs, it would have to resolve disputed facts in the sheriffs' favor (specifically, that the sheriffs had reason to believe that King was hiding a long gun), which would be inappropriate under summary judgment procedure.[342]

### 2. The *Plumhoff* Cases

In *Godawa v. Byrd*,[343] the court granted summary judgment for Officer Byrd after Edward and Tina Godawa alleged excessive force resulting in

332. *Id.* at *5 (quoting Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014)).
333. *Id.* at *13 n.13 (quoting *Tolan*, 134 S. Ct. at 1861).
334. *Id.* at *15 (citing *Tolan*, 134 S. Ct. at 1866).
335. No. 12-CV-137-JED-TLW, 2014 WL 2805313 (N.D. Okla. June 20, 2014).
336. *Id.* at *1.
337. *See id.* at *1–2.
338. *Id.* at *3 (citing *Tolan*, 134 S. Ct. at 1866–68).
339. *Id.* (quoting *Tolan*, 134 S. Ct. at 1868).
340. *Id.*
341. *See id.* at *7.
342. *See id.* at *8.
343. No. 2:12-CV-170 (WOB-JGW), 2014 WL 3809781 (E.D. Ky. Aug. 1, 2014).

the death of their son, Michael Godawa.[344] After oral arguments, the court asked the parties to file supplemental briefs addressing the Supreme Court's decision in *Plumhoff*.[345]

Byrd, who was patrolling on bicycle, had questioned Godawa, who was in a vehicle, if he had been drinking.[346] Once Byrd approached Godawa the officer turned on his lapel camera and recorded their interactions.[347] The parties agreed that the lapel video recorded the facts of the events, and that the facts were therefore undisputed.[348] The parties disputed only the conclusions, making the matter appropriate for resolution on cross-motion.[349]

Relying on the lapel video, the court held that the evidence established that Godawa backed his car over Byrd's bicycle, almost hitting Byrd, and then continued to drive, knocking Byrd onto the hood of the car.[350] The court noted that the impact is not actually seen on the video but was heard.[351] After this, "in what was clearly a split-second judgment," Byrd fired at Godawa through the passenger window.[352] The court held that Byrd's use of force was objectively reasonable, consistent with *Plumhoff*'s precedent.[353] Additionally, the court held that the case was indistinguishable from *Plumhoff* because "the record conclusively disproves respondent's claim that the chase in the present case was already over when petitioners began shooting."[354] The court held that in this case, as in *Plumhoff*, "[u]nder the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded," was that Byrd would continue his flight, endangering other drivers and pedestrians.[355] Accordingly, the court granted the officer's motion.[356]

In another case involving a car chase by police officers and an allegation of excessive force, *Small v. Glynn County*,[357] the court cited both *Tolan* and *Plumhoff*, and noted that *Tolan* required the court to take "due care to credit contradicting evidence in favor of the Plaintiffs and draw evidentiary inferences in favor of the Plaintiffs as the nonmoving party."[358] However, the court was blunt about the importance of the video to its decision, stating:

344. *Id.* at *1, *3, *8.
345. *Id.* at *1.
346. *Id.*
347. *Id.* at *1 n.3.
348. *Id.* at *1 n.2.
349. *Id.*
350. *Id.* at *4.
351. *Id.* at *2.
352. *Id.* at *4.
353. *Id.*
354. *Id.* at *6–7 (quoting Plumhoff v. Rickard, 134 S. Ct. 2012, 2021–22 (2014)).
355. *Id.* at *7 (quoting *Plumhoff*, 134 S. Ct. at 2021–22).
356. *Id.* at *8.
357. No. CV 212-115, 2014 WL 4928877 (S.D. Ga. Sept. 30, 2014), *aff'd sub nom.* McGehee v. Glynn Cnty., No. 14-14456, 2015 WL 1214252 (11th Cir. Mar. 18, 2015).
358. *Id.* at *1.

> Very few facts are actually up for dispute. This is because the Court has had the ability, duty really, to watch and hear this tragedy from the perspective of no less than four separate dashboard cameras. Rather than flatly accept any attorney's characterization of the events, the Court has watched the videos a multitude of times.[359]

The court stated that "[t]he videos capture []better than any brief ever could[]" the tense moments of the chase.[360] In this case, the low-speed chase ended in the death of the driver, Caroline Small, after she was shot by a police officer.[361]

The court noted that the plaintiff argued that a jury could infer from the video evidence that Small had no specific intent to harm anyone during the chase and that her flight was a result of the officers' chase.[362] However, the court held that

> [e]ven inferring that Small's ultimate desire was escape and viewing the videos in that light, the videos document at multiple junctures why reasonable officers would have believed that in her reckless attempt to avoid capture, she would hurt them with her car. The videos as a whole show she was determined to continue to elude police . . . . [T]he videos support an objectively reasonable conclusion that probable cause existed to believe Small was using her car as a weapon.[363]

Comparing this video evidence to the facts of *Plumhoff*, the court granted qualified immunity to the officer.[364]

In contrast, the court in *Luna v. Mullenix*[365] came to the conclusion that summary judgment should not be granted because the video in a police chase supported the plaintiff's version of the events.[366] Noting that *Scott* instructed courts to "view facts in accordance with the video," the court held that the videotapes supported the plaintiff's assertion that a reasonable jury could find that the plaintiff's driving did not pose an immediate danger to other officers or drivers.[367] The court noted that the qualified immunity analysis requires a court to analyze "particular facts," facts that the Court in *Plumhoff* found supported the use of deadly force.[368] The facts of this case, as viewed on the videotapes, were distinguishable from *Plumhoff* (among other cases where deadly force was objectively reasonable), and therefore summary judgment was inappropriate.[369]

---

359. *Id.*
360. *Id.* at *4.
361. *Id.* at *4–5. The case was brought by Keith Small. *Id.* at *1.
362. *Id.* at *8.
363. *Id.*
364. *Id.* at *12.
365. 773 F.3d 712 (5th Cir. 2014).
366. *Id.* at 716.
367. *Id.* at 721–22.
368. *Id.* at 720.
369. *Id.* at 720–26.

## III. THE REALITY OF JUDGE AS VOYEUR: BUT IS IT A GOOD THING?

The Court's holdings in *Tolan* and *Plumhoff* appear to be in conflict.[370] The Court held that *Tolan* was inappropriate for summary judgment because of genuine disputes of material fact and firmly stated the importance of viewing all evidence and inferences in the light most favorable to the nonmoving party.[371] By contrast, the *Plumhoff* Court confidently granted the officer's motion for summary judgment, reversing the lower court's denial of the motion.[372] Notably, findings of disputed facts that could affect the qualified immunity analysis had influenced the lower court decisions.[373] This Note proposes that the difference in the decisions is attributable to the type of evidence presented in each case. The testimonial "he said, she said" evidence in *Tolan* made the case inappropriate for summary judgment, while in *Plumhoff*, the audiovisual evidence disposed of disputed facts and allowed the case to be decided by motion. The purported factual disputes of *Plumhoff* were reconciled because the Justices were able to observe the car chase that was the basis for the action with their own eyes and ears by watching and listening to the police dash camera videos that had recorded it.[374] This Note shows that the appellate judges' review of and reliance on audiovisual evidence is firmly based in precedent—from *Arnstein* through *Scott*.[375] Similarly, *Adickes* lays the basis for *Tolan*, along with the tendency of appellate judges to decline to grant summary judgment in cases that rely solely on testimonial evidence.[376] Part III discusses the contours of this argument.

As demonstrated by the post-*Plumhoff* decisions reviewed in this Note,[377] audiovisual evidence will continue to play a significant role in courts' summary judgment decisions.[378] However, despite the precedential appropriateness of appellate judges' de novo review of audiovisual evidence, its propriety should be questioned. The consequences of such review—and the unavoidably subjective perception that judges bring to audiovisual observation—are especially fraught in summary judgment motions based on qualified immunity, potentially resulting in decisions with great repercussions for civil rights litigation. Part III concludes that direct judicial review of audiovisual evidence should, at the very least, be

370. *See supra* notes 227–31 and accompanying text.
371. *See supra* Part II.A.
372. *See supra* Part II.B.
373. *See supra* Part II.B.
374. This possibility has not gone unnoticed. *See* Wasserman, *supra* note 230, at 14 (noting that the presence of video footage as one of three proposed reasons for the Court's disparate treatment of *Plumhoff* and *Tolan*).
375. *See supra* Part I.B.1, I.D.
376. *See supra* Part I.B.2.
377. *See supra* Part II.C.2.
378. *See* Wasserman, *supra* note 225, at 601 ("The effect of this balanced proliferation of technology is to place video recording at the heart of modern civil rights litigation and the enforcement of constitutional liberties in controversies arising from police-public encounters.").

examined and questioned by the judiciary, and that in most instances this review should be left to a jury.

### *A.* Tolan *Was Vacated and Remanded Because, Like* Adickes*, All Evidence Was Testimonial*

*Adickes* and *Tolan* show that regardless of the changes in summary judgment standards created by the 1986 trilogy, summary judgment is inappropriate when genuine disputes of material fact exist, and these cases illustrate that courts are especially likely to find disputes in cases where evidence is purely testimonial. Because judges are prohibited from making credibility determinations, cases based on "he said, she said" testimonial evidence are difficult to decide on a pretrial motion.[379] *Tolan*'s strong directive reminding courts that all facts and inferences must be viewed in the light most favorable to the nonmoving party[380] leads to a high likelihood that judges will find a genuine dispute of material fact exists in the parties' motions, requiring a trial where those credibility determinations can be made. Although the 1986 trilogy is generally regarded as pro-defendant,[381] *Tolan* reinforced the inappropriateness of summary judgment in such testimonial cases and reaffirmed a plaintiff's right to a day in court. It is also possible that the *Adickes* and *Tolan* Courts were particularly sensitive to the potential civil rights violations in these cases and, with only testimonial evidence in the record, hesitant to take the decision away from a jury who would likely view the evidence with a broader variety of outlooks, or at least with perspectives more reflective of their respective communities.

### *B. Precedent Establishes the Judicial Audiovisual Review in* Plumhoff

By contrast, the precedential cases upon which the *Plumhoff* decision is grounded show that courts have unhesitatingly looked to the parts of the record that they consider objective and have freely interpreted that record when determining summary judgment motions.[382] Courts have done this even when they are deciding a question of fact. In *Arnstein*, the Second Circuit was adamant that the question of whether the songs in contention were sufficiently similar was an issue for the jury, but the judges nevertheless listened to the recordings themselves and found the songs similar enough to justify a trial (upon the presumption that other elements of the action were satisfied).[383] While judicial review is necessary to decide whether a case should be decided on a motion or whether it is trial worthy, the Second Circuit's decision to listen as "ordinary lay hearer[s]"[384]

379. *See supra* notes 47–49 and accompanying text.
380. *See supra* notes 266–68 and accompanying text.
381. *See supra* note 182 and accompanying text.
382. *See supra* Part I.B.1, I.D.
383. *See supra* Part I.B.1. In this particular case the court found other issues necessitated the fact-finding role of a jury as well, so the weight of the court's decision did not fall on its interpretation of this objective record. *See supra* Part I.B.1.
384. *See supra* note 40 and accompanying text.

seems close to intruding on the role of the jury, and the opinion does not further describe or define how judges are to listen as "lay listeners." The judges were not "lay listeners," but rather highly educated jurists trained in litigating such matters. On the other hand, although the judges were not "lay listeners," there is no reason to believe that they were especially qualified to discern subtleties in musical compositions. As dissenting Judge Clark pointed out, the "judicial eardrum" may be "peculiarly insensitive."[385] Despite the specialized judicial knowledge that these intellectual heavyweights possessed in the field of law, the judges were not qualified as musical experts, and yet they eschewed the option of relying on expert advice, which could surely have informed their decision.[386] The judges in the majority forced themselves into a illogical position: to listen to the recordings as "lay listeners," which they were not, while refusing competent assistance from expert witnesses. Judge Clark's skepticism of his fellow judges' ability to accurately perceive and interpret the musical pieces for similarities echoes later criticisms volleyed at judges who use their own perceptions to evaluate the worthiness of visual art and video.[387] The "anti-intellectual and book-burning"[388] rejection of the musical expert's assistance is analogous to the current prevalent belief that the video "speaks for itself,"[389] without need for further visual literacy or skepticism. Although Judge Clark did not believe that the jury would have been more qualified to evaluate the compositions, his dissent recognized that judges may not be the most appropriate arbiters in this case.[390]

Similarly, in *Campbell* and *Koons*, the issue was whether the works in question were allowable under the fair use doctrine, requiring a case-by-case analysis that could not "be simplified with bright-line rules,"[391] (as is the qualified immunity analysis), and the appellate judges went straight to the sources when making their decisions.[392] There was no discussion of disputed facts in either case because the courts took for granted that because they could experience the pieces of art themselves, there were no facts to dispute.[393] Both cases called for judicial analysis of whether the allegedly infringing work was a parody of the original, and both cases involved works in genres—rap music and contemporary art, respectively[394]—that may not have been easily accessible to sitting judges. Given the collective background of the Justices reviewing *Campbell*, it is not unreasonable to suggest that they may not have been the intended audience of 2 Live Crew's

385. *See supra* note 55 and accompanying text.
386. *See supra* notes 56–57 and accompanying text.
387. *See supra* Part I.E.2.
388. *See supra* note 56 and accompanying text.
389. *See supra* note 180 and accompanying text; *see also* note 316 and accompanying text.
390. *See supra* notes 57–58 and accompanying text.
391. *See supra* note 132 and accompanying text.
392. *See supra* notes 132–39 and accompanying text; *supra* notes 141–56 and accompanying text.
393. *See supra* Part I.D.1–2.
394. *See supra* Part I.D.1–2.

recording and therefore less able to evaluate the "purpose and character of the use."[395] In this case, however, Justice Breyer and the Court recognized the artistic merit of 2 Live Crew's composition.[396] In contrast, the Second Circuit held against Koons,[397] who was (and is) a divisive figure in the contemporary art world.[398] A conversation about the worthiness of his art already existed,[399] and Second Circuit judges were not necessarily the most qualified viewers to weigh in on this debate. The *Koons* decision was particularly poorly received, with one critic commenting that "if copyright law won, then art lost."[400]

The *Scott* decision was a natural progression from courts' consistent use of musical and visual records. Because the "objective reasonableness" of an officer's conduct is a question of law reserved for the court, a case can only go to trial if the court finds the officer's actions objectively unreasonable, or if genuine disputes of material fact exist upon which a court finds that a reasonable jury could find for the plaintiff.[401] By holding in *Scott* that the evidence must be viewed in the light depicted by the video, the Court made it easier to decide these cases pretrial, because it gave courts permission to view the video directly and conclude that there are no genuine disputes based on their own perceptions of the events and therefore no need to proceed to trial.[402] *Plumhoff* followed in *Scott*'s footsteps, and although the Court's opinion did not comment on the use of the video in making the decision, its language spoke definitively.[403] The Court held that the driving was "obviously reckless" and that Rickard was "obviously pushing down the accelerator," both conclusions considered points of dispute to the lower

---

395. *See supra* note 133 and accompanying text.

396. *See supra* note 135 and accompanying text.

397. *See supra* notes 155–56 and accompanying text.

398. Reviewing the Whitney's Koons retrospective for the *New York Times*, Roberta Smith wrote of Koons's art:

> Conflating Minimalism, Pop and Conceptual Art in a gift-wrapped version of Duchamp's ready-made, [Koons's works] were the first of several shocks—"Is it art? " "Is it any good? " "Do I love it or hate it? "—that Mr. Koons has regularly delivered to his expanding audience over the last four decades.

Roberta Smith, *Shapes of an Extroverted Life*, N.Y. TIMES, June 27, 2014, at C19.

399. *See* Carol Vogel, *Think Big. Build Big. Sell Big.*, N.Y. TIMES, June 15, 2014, at AR1 ("Mr. Koons, who has been making art out of kitsch since the 1980s, has been slammed by some critics as glibly calculating, even as others have praised him.").

400. *See* James Traub, *Art Rogers vs. Jeff Koons*, DESIGN OBSERVER GROUP (Jan. 21, 2008), http://designobserver.com/feature/art-rogers-vs-jeff-koons/6467/ (arguing that Koons's sculpture was a piece of art independent from Rogers's photograph, in the tradition of Picasso). It is also worth noting that the visual evidence that the court used to compare the pieces—two identically sized black and white photographs of the works—differed greatly from the actuality of the pieces. *See* Tushnet, *supra* note 152, at 721. Koons's sculpture was a large and garishly colored sculpture, and Rogers's a black and white photograph. *See id.* Regardless of whether this would have changed the outcome of the case, it is yet another example of deception by image.

401. *See supra* note 176 and accompanying text.

402. *See supra* note 174 and accompanying text.

403. *See supra* notes 317–20 and accompanying text; *see also* Mezey, *supra* note 217, at 4 ("[*Plumhoff v. Rickard*], factually quite similar to *Scott v. Harris* and likewise based on video evidence, seems to ensure that the Supreme Court will continue to model its impoverished approach to the legal interpretation of images.").

courts.[404] Further, the oral arguments support the idea that the Court relied on the video to inform their decision, albeit without specifying what the Court found especially compelling or convincing about the video footage.[405]

### *C. Problems with Judicial Review of Audiovisual Evidence*

This Note asserts that the bottom line is that appellate judicial review of audiovisual evidence is anything but the objective, neutral solution to divisive, fact-bound, and problematic cases that courts tout it to be. As the scholarship of Dellinger, Kahan and co-authors, and Mezey has shown, viewers bring their own cultural, personal, and experiential filters to viewing audiovisual evidence.[406] Not only are these biased perceptions difficult to overcome, but they are especially dangerous because they are often undetectable to the people holding them,[407] including appellate judges. As Dellinger points out, judges educated in the law have been taught to interpret and dissect briefs and oral arguments and therefore approach these tools of advocacy with a healthy skepticism and with legal knowledge of their own.[408] Yet when it comes to an audiovisual record, it is very difficult to overcome the deeply ingrained adages that "seeing is believing," and the power of seeing through one's "own eyes" or hearing with one's "own ears" is approached with little suspicion.[409] As Kahan and his coauthors note, although people tend to be aware of other individuals' cognitive biases, they do not perceive these biases in themselves.[410] Judges' beliefs in their own infallible powers of perception forces the conversation back to a need to acknowledge who, as a whole, make up the judiciary, and how such a composition may skew results in favor of one party or another. Appellate judges are not necessarily representative of society at large or of the jury pool.[411]

Direct judicial review results in two major problems. First, when judges view the video directly and draw inferences and conclusions from it, they are putting themselves in the role of the jury. On top of the constitutional

404. *See supra* Part II.B.

405. *See supra* note 286 and accompanying text.

406. *See supra* Part I.E.2.

407. *See supra* note 207 and accompanying text.

408. *See supra* note 198 and accompanying text.

409. *See supra* notes 170–78 and accompanying text; *supra* notes 315–23 and accompanying text; *supra* Part II.C.2.

410. *See supra* note 207 and accompanying text.

411. As of August 11, 2009, the federal judiciary (district and appellate judges) were 70 percent white male, 15 percent white female, 6 percent African American male, 2 percent African American female, 4 percent Hispanic male, and 1 percent Hispanic female. RUSSELL WHEELER, THE CHANGING FACE OF THE FEDERAL JUDICIARY 1 (2009), *available at* http://www.brookings.edu/~/media/research/files/papers/2009/8/federal-judiciary-wheeler/08_federal_judiciary_wheeler.pdf. In the courts of appeals, the percentages were similar: 71 percent white male, 17 percent white female, 4 percent African American male, 2 percent African American female, 4 percent Hispanic male, and 1 percent Hispanic female. *Id.* The 2010 U.S Census reported a national population of 72.4 percent white, 12.6 percent African American, and 16.3 percent Hispanic. *2010 Census Data*, U.S. CENSUS 2010, http://www.census.gov/2010census/data/ (last visited Apr. 23, 2015).

problems with this, noted extensively by Professor Thomas,[412] this prevents the jury from functioning as it should: bringing together people from a variety of backgrounds and perspectives and giving all jurors the opportunity to voice their opinions and concerns, as posited by Kahan and his coauthors.[413] The second problem stemming from direct judicial review is that judges do not approach audiovisual evidence with the visual literacy explained by Professor Mezey.[414] The judiciary seems to be not just unaware of their own biases and preferences and the power of video to produce powerful emotional responses, but also its potential malleability.[415] Although video is becoming increasingly prevalent in daily life and in law enforcement activities, the judiciary is not becoming any more adept at navigating audiovisual evidence with the scrutiny and legal tools that it uses when approaching other, more traditional forms of evidence.[416]

Looking at the particular problems that direct judicial review of audiovisual evidence creates, the civil rights plaintiff would seem to be in an especially disfavored position. The 1986 trilogy encouraged courts to grant defendants' motions—certainly *Arnstein* and *Adickes* would not go to trial today. Additionally, the qualified immunity analysis also heavily favors the officer defendant.[417] Finally, when audiovisual evidence is in the record, appellate judges—and thus far the Supreme Court has confirmed this hypothesis[418]—may be more likely to view the evidence in favor of the defendant officers. With all of these factors weighing in the defendant's favor, it would be important for courts to determine instances where an unfavorable inference should be drawn against the defendant, for example, if a police officer has video capability to record activity and chooses not to. The issues raised by judicial review of audiovisual evidence at summary judgment are not going away, and this Note advocates that the courts strive to address the parameters of its use. It is simply not the case that video "speaks for itself."

A final illustration of audiovisual evidence's power of persuasion comes from the oral arguments in *Plumhoff* before the Supreme Court.[419] The Court challenged defense counsel regarding whether it was clearly established law that a police officer could shoot at a suspect fleeing in a vehicle.[420] Before defense counsel could reply, Justice Scalia—perhaps in jest—said: "My goodness, they do it all the time. You watch the movies

412. *See supra* notes 189–92 and accompanying text.
413. *See supra* note 206 and accompanying text.
414. *See supra* notes 217–19 and accompanying text.
415. *See supra* notes 218–24 and accompanying text.
416. *See supra* Part II.C.2.
417. *See* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments: Not Much* Hope *Left for Plaintiffs*, 29 TOURO L. REV. 633 (2013) (discussing the Supreme Court's recent decisions regarding the qualified immunity analysis and the resulting difficulties for plaintiffs).
418. *See supra* Parts I.D.3, II.B.
419. Transcript of Oral Argument, *supra* note 283.
420. *Id.* at 51–52.

about bank robberies, you know, it happens all the time. Are these movies unrealistic?"[421]

When a Supreme Court Justice cites his experience in a movie theater to question the propriety of a police officer's actions, it is time to reevaluate the use of video in court proceedings and challenge its credibility—and the experiences that we bring with us as viewers—as we would with any other piece of evidence.

## CONCLUSION

This Note proposes that the Court decided *Tolan* and *Plumhoff* as it did because in *Tolan*, the evidence was purely testimonial, while in *Plumhoff*, an audiovisual record was available to the Court. Precedent shows that deciding *Plumhoff* based on this audiovisual evidence was perfectly allowable, and even preferable in some judges' opinions.

However, reconciling the cases in this manner leads to a bigger problem in need of examination: the propriety of direct appellate judicial review of audiovisual evidence. This Note proposes that judges must undergo further education regarding the near impossibility of experiencing audiovisual evidence objectively, as well as audiovisual evidence's malleability. Finally, this Note concludes that more often than not, a jury should view the audiovisual evidence, bringing to this purported objective evidence a variety of viewpoints and perspectives. When judges view the audiovisual evidence directly and use this evidence to decide a case on its merits at the pretrial stage, they risk infringing on the jury's rightful place in the litigation process.

421. *Id.* at 52.