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THE CALIFORNIA SUPREME COURT SPEAKS OUT ON SUMMARY JUDGMENT IN ITS *OWN* "TRILOGY" OF DECISIONS: HAS THE *CELOTEX* ERA ARRIVED?

Glenn S. Koppel*

I. INTRODUCTION

In 1986, the U.S. Supreme Court handed down a trilogy of decisions that revolutionized summary judgment practice in federal courts and redefined the relationship between judge and jury.[1] In the wake of the revolutionary 1995 court of appeal decision in *Union Bank v. Superior Court*,[2] the California Supreme Court handed down its own trilogy of decisions on summary judgment in California.[3] Within an eight-month period, this stunning series of carefully sequenced landmark decisions laid down the law on summary judgment in California and ended six years of silence by the high court on the subject. These three decisions extend the reach of summary judgment to resolve issues traditionally reserved for jury determination. California's trilogy challenges everyone with a stake in the state's civil justice system to reconsider the appropriate balance between the values of judicial efficiency and full and fair access to the courts.

The trilogy moves California extremely close to the federal standard, and answers the question left unresolved

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1. The federal trilogy of decisions comprises *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

2. 37 Cal. Rptr. 2d 653 (Ct. App. 1995).

3. Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089 (Cal. 2000); Saelzler v. Advanced Group 400, 23 P.3d 1143 (Cal. 2001); Aguilar v. Atl. Richfield Co., 24 P.3d 493 (Cal. 2001).

after *Union Bank* of whether a moving defendant must conclusively negate an essential element of the plaintiff's case to support its summary judgment motion.[4] Justice Stanley Mosk, however, in what would be his last opinion, carefully circumscribed the reach of the court's opinion in *Aguilar v. Atlantic Richfield Co.* by stating that California has not made a "wholesale adoption" of the federal summary judgment law.[5] This article explores how close the trilogy has brought California's summary judgment practice to its federal counterpart and what significant differences, if any, remain.

Part II briefly surveys the development of summary judgment law in California leading up to the recent trilogy. Part III.A analyzes the opinions in *Guz v. Bechtel National, Inc.*,[6] *Saelzler v. Advanced Group 400*,[7] and *Aguilar v. Atlantic Richfield Company*.[8] *Guz*, *Saelzler* and *Aguilar* each arise out of the defendant's use of summary judgment to secure a dismissal of the plaintiff's claims.[9] In each decision, the California Supreme Court held that the defendant had met its movant's burden to show that an element of plaintiff's cause of action could not be "established,"[10] which shifted the burden to the plaintiff to show that a triable issue existed. Ultimately, in each of the decisions, the Court held that the plaintiff failed to meet this burden.[11] The issue of shifting summary judgment burdens has long been a controversial one in California jurisprudence, because it addresses the ease with which a moving defendant can force the plaintiff to assemble its case on paper before trial to support his right to proceed to a full-blown trial on the merits.[12] Part III.B

4. Six years ago, commentators interpreted *Union Bank* as ushering in the federal standard as defined in the federal trilogy of U.S. Supreme Court decisions. *See* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL §§ 10.24, 10.243 (Justice William F. Rylaarsdam et al. eds., 1996). Such sweeping statements about *Union Bank*, however, were premature. *See infra* Part II.F. The recent *Guz-Saelzler-Aguilar* trilogy of California Supreme Court summary judgment decisions render these broad predictions far more accurate today.

5. *See Aguilar*, 24 P.3d at 511 n.15.

6. 8 P.3d 1089 (Cal. 2000).

7. 23 P.3d 1143 (Cal. 2001).

8. 24 P.3d 493 (Cal. 2001).

9. *See Guz*, 8 P.3d at 1089; *Saelzler*, 23 P.3d at 1148; *Aguilar*, 24 P.3d at 502-03.

10. *See* CAL. CIV. PROC. CODE § 437c(o)(2) (2002).

11. *Guz*, 8 P.3d at 1124; *Saelzler*, 23 P.3d at 1147; *Aguilar*, 24 P.3d at 520.

12. For a review of the controversy in the California courts over the ease

examines the impact of each decision in the trilogy on how it shifts the defendant's burden of production. Part III.C explores each decision's impact on the responding plaintiff's burden of production. Part III.D compares the U.S. Supreme Court's 1986 trilogy of summary judgment decisions, which marked a watershed in federal summary judgment practice, with its recent California counterpart, noting the striking similarities between the two. Both trilogies signaled the end of summary judgment's traditional status as a procedural pariah, incorporating the procedure into the mainstream of case management tools.[13] Additionally, the trilogies dramatically expanded the role of summary judgment to include the determination of issues previously within the exclusive province of the jury.[14] Part III.D also explores the

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with which the moving defendant can shift the summary judgment burden to the plaintiff, see *Scheiding v. Dinwiddie Constr. Co.*, 81 Cal. Rptr. 2d 360, 363-73 (Ct. App. 1999). For a critique of the defendant's use of summary judgment after the U.S. Supreme Court's 1986 summary judgment trilogy as a tactic to force plaintiffs to conduct needless discovery to develop its case prior to trial to defeat summary judgment, see Jeffrey Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and The Adjudication Process*, 49 OHIO ST. L.J. 95 (1988). Stempel writes,

> Thus, *Anderson* . . . may require total development of a claimant's case prior to trial. This is counterproductive. Why require a plaintiff to take needless depositions when he or she could call those witnesses at trial? This expense is avoidable. An attorney would be bordering on malpractice, in light of *Anderson*, if he or she failed to muster all the evidence in support of the essential elements of the client's case on the motion for summary judgment.

Id. at 172. *See also* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 111 (1990) ("Summary judgment under *Celotex* provides a unidirectional rule allowing defendants to force plaintiffs to reveal trial strategies while not forcing reciprocal disclosure by defendants.").

13. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" (quoting FED. R. CIV. PROC. 1)); *Aguilar*, 24 P.3d at 508-09.

14. See, for example, Justice Brennan's dissent in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 268 (1986), opining that the majority's decision in *Anderson* may erode the constitutionally enshrined role of the jury, and Justice White's dissent in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 601 (1986), stating that "the court makes a number of assumptions that invade the factfinder's province." *See also Saelzler*, 23 P.3d at 1157 (Kennard, J., dissenting) ("The majority's errors deprive plaintiff of her constitutional right to a trial by jury. A judge ruling on a motion for summary judgment is not sitting as a trier of fact. When, as here, the plaintiff has a triable issue of material fact it is the jury that must decide the issue.").

practical impact of the federal trilogy on summary judgment practice, and draws lessons from the federal experience for California courts as they carry out the mandate of the California Supreme Court's trilogy of decisions. Part IV discusses the politics of summary judgment, focusing on the ongoing activity in the California legislature to effect a counterrevolution in summary judgment by statutorily overruling the trilogy. Part IV concludes with an appeal for a balanced approach to summary judgment that proceeds from a public interest perspective, rather than from the perspective of special interest groups lobbying the legislature to manipulate summary judgment procedure to achieve a tactical litigation advantage.

II. BACKGROUND

A. *All About Burdens: Establishing the Analytical Framework*

For a substantial part of the twentieth century, both federal and California courts have struggled to determine "how and when the movant's burden has been satisfied, when the burden shifts to the opposing party, and how the opponent may defeat a properly supported summary-judgment motion."[15] Making sense of the confusion requires a clear understanding of the burdens of *production* and *persuasion*, both at the summary judgment stage and at trial, and how those burdens relate to each other. In the words of Justice Mosk, "how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production [on summary judgment] depends on *which* would bear *what* burden of proof at trial."[16]

1. *Summary Judgment Burdens*

The party moving for summary judgment bears two burdens: a burden of *production* and a burden of *persuasion*.[17]

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15. 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2727, at 463-64 (3d ed. 1998).

16. *Aguilar*, 24 P.3d at 510.

17. As the California Supreme Court explained,

> First, . . . the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . .

These two distinct burdens are sometimes commingled under the umbrella term "burden of proof" which can muddy summary judgment analysis.

In his opinion in *Aguilar*, Justice Mosk meticulously reviewed the progression of summary judgment burdens.[18] He concluded that the movant bears "an initial burden of *production* to make a prima facie showing of the nonexistence of any triable issue of material fact."[19] If the court determines that the movant has carried that burden, the burden of production is said to "shift" to the party opposing the motion, the respondent, to make a showing sufficient to forestall summary judgment.[20] The respondent must therefore, "make a prima facie showing of the existence of a triable issue of material fact."[21] If the court determines that the moving party has failed to make a sufficient showing to carry its burden of production, then the burden does not shift to the respondent and the court denies the motion.[22]

The movant also bears a burden of persuasion.[23] Unlike the burden of production, the burden of persuasion never

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> Second, . . . the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.

Aguilar, 24 P.3d at 510. Likewise, Justice Brennan's dissension in *Celotex*:

> The burden of establishing the nonexistence of a "genuine issue" is on the party moving for summary judgment. This burden has two distinct components: an initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party.

Celotex, 477 U.S. 317 at 330 (Brennan, J., dissenting) (citations omitted).

18. *Aguilar*, 24 P.3d at 510-11.

19. *Id.* at 510 (emphasis added).

20. *Id.*

21. *Id.*

22. *See* WRIGHT ET AL., *supra* note 15, § 2739, at 391-92 ("'Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied *even if no opposing evidentiary matter is presented.*'" (alteration in original) (quoting from The Advisory Committee Note to the 1963 Amendments to Rule 56)). *See also* WILLIAM W. SCHWARZER ET AL., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 14:123 (Steven J. Adamski et al. eds., 2001) ("Because summary judgment is a 'drastic device,' cutting off a party's right to present his or her case to the jury, the moving party bears a 'heavy burden' of demonstrating the absence of any material issues of fact."); *Celotex*, 477 U.S. at 336 (Brennan, J., dissenting) ("Celotex' failure to fulfill this simple requirement constituted a failure to discharge its initial burden of production under Rule 56, and thereby rendered summary judgment improper.").

23. *See Aguilar*, 24 P.3d at 510.

shifts to the opposing party and requires the movant to establish in the mind of the court a "requisite degree of belief"[24] that summary judgment should be granted because there is no triable issue of material fact.[25] If the court, considering all the evidence presented by the moving and responding parties, is persuaded that there is no triable issue of material fact, the court will grant the motion.[26]

2. *Trial Burdens*

At trial, the law of evidence imposes upon the party asserting a cause of action, or a defense to a cause of action, both an initial burden of *production* and a burden of *persuasion*.[27]

The burden of production operates during the course of the trial, "empower[ing] the judge to decide the case without jury consideration when a party fails to sustain the burden."[28] The party who initially bears the production burden must

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24. *Id.* The "requisite degree of belief" depends on the issue to be determined. At trial, the "burden of [persuasion] may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt." CAL. EVID. CODE §115. On summary judgment,

> The burden of persuasion imposed on a moving party by Rule 56 is a stringent one. Summary judgment should not be granted unless it is clear that a trial is unnecessary . . . and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party. In determining whether a moving party has met its burden of persuasion, the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion. . . . "[I]f . . . there is any evidence in the record from any source from which a reasonable inference in the [nonmoving party's] favor may be drawn, the moving party simply cannot obtain a summary judgment . . . ."

Celotex, 477 U.S. at 330 n.2 (Brennan, J., dissenting) (alterations in original) (citations omitted) (quoting *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 258 (3d Cir. 1983)). *See also* WRIGHT ET AL., *supra* note 15, §2727, at 455-58 ("Before summary judgment will be granted it must be clear what the truth is and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant.").

25. *See* Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000) ("In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact.").

26. *Id.*

27. JOHN W. STRONG, MCCORMICK ON EVIDENCE §336, at 409 (5th ed. 1999).

28. *Id.*

come forward with evidence sufficient to permit a "reasonable jury" to render a verdict based on reason as opposed to mere speculation.[29] If the court determines that the party failed to carry its initial production burden, the court will remove the case from the jury by granting a directed verdict.[30] The court will issue a directed verdict when there is "but one reasonable conclusion as to the verdict."[31] The burden of production can shift to the adversary if "in the judge's view the proponent has not merely offered evidence from which reasonable people *could draw* the inference of the truth of the fact alleged, but evidence from which (in the absence of evidence from the adversary) reasonable people *could not help but draw* this inference."[32]

The burden of persuasion, by contrast, never shifts and "becomes a crucial factor only if the parties have sustained their burdens of producing evidence and only when all of the evidence has been introduced."[33] The persuasion burden operates only at the decision stage to guide the jury's deliberations.[34] For instance, the judge will instruct the jurors how to decide "if their minds are left in doubt."[35] In the ordinary civil case, the party bearing the burden of persuasion must convince the jury that its version of the truth is more likely than not correct.[36] If, after weighing the evidence and evaluating each witness's credibility, the jury's mind is in equipoise, it must render a verdict for the opposing party.[37] In certain civil cases, the court requires the jury to reach an even higher level of belief.[38]

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29. FED. R. CIV. PROC. 50.

30. STRONG, *supra* note 27, at 409 ("The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding or directed verdict) if evidence on the issue has not been produced.").

31. Brady v. S. Ry. Co., 320 U.S. 476, 479-80 (1943).

32. STRONG, *supra* note 27, at 420 (emphasis added).

33. *Id.* at 409.

34. *Id.* at 410.

35. *Id.*

36. *Id.* at 421-22.

37. 1 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 70 (1986) ("When the evidence is in equipoise on a matter that a party must establish by a preponderance of the evidence, summary judgment will be granted against that party.").

38. STRONG, *supra* note 27, at 423. For example, in a libel action by a public figure against a newspaper, the plaintiff must show that the defendant acted with "actual malice" and such malice must be shown with "convincing clarity" so as not to impinge upon the speaker's First Amendment freedom of

3. *The Link Between Summary Judgment and Trial Burdens*

Through the courts' insistence on linking summary judgment burdens with trial burdens, summary judgment has evolved in federal court, and recently in California, from a rarely granted, drastic measure to the workhorse of modern case management techniques.[39] This linking has increased the power of the judge to dispose of claims on summary judgment because the judge is allowed to act as though she were ruling on a directed verdict motion made after the full development of the evidence at trial.[40] As will be discussed below, the U.S. Supreme Court's linking of the trial burden of persuasion, applicable to the jury's decision-making process, to the respondent's summary judgment burden[41] has expanded the judge's role to include evaluating the *persuasiveness* of the plaintiff's case, a function formerly limited exclusively to the jury.[42] California's recent summary judgment trilogy follows the federal example in this respect.[43]

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speech. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

39. *See* Robert K. Smits, Comment, *Federal Summary Judgment: The "New" Workhorse For An Overburdened Federal Court System*, 20 U.C. DAVIS L. REV. 955, 967 (1987).

40. *See* Stempel, *supra* note 12, at 163-67.

41. *Anderson*, 477 U.S. at 254 ("[T]here is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.").

42. Professor Stempel notes,

> By deciding, before full development of the record at trial, that the nonmovant's side of a disputed factual story is not sufficiently probative to support a verdict by a reasonable jury, the judge can more easily eliminate not only claims that she finds unpersuasive in the instant case but also legal rights with which she is unsympathetic.

Stempel, *supra* note 12, at 166.

43. *See, e.g.*, Aguilar v. Atl. Richfield Co., 24 P.3d 493 (Cal. 2001). The court stated,

> [I]n order to carry a [respondent's] burden of production [on summary judgment] to make a prima facie showing that there is a triable issue of the material fact of the existence of an unlawful conspiracy, a plaintiff, who would bear the burden of proof by a *preponderance of evidence* at trial, must present evidence that would allow a reasonable trier of fact to find in his favor on the unlawful conspiracy issue by a *preponderance of the evidence*, that is, to find an unlawful conspiracy *more likely than not*.

Id. at 511 (emphasis added). *See also* Saelzler v. Advanced Group 400, 23 P.3d 1143, 1161 (Cal. 2001) (Werdergar, J., dissenting) ("[T]he majority misunderstands the substantial factor test, improperly suggesting it burdens plaintiff with proving it *'more probable than not'* . . . that defendants' carelessness caused her injuries.") (emphasis added).

B. *The Traditional View of California Summary Judgment: A "Drastic Measure"*[44]

Summary judgment originated in England as a *plaintiff's* motion.[45] The procedure was designed to facilitate debt collection by allowing a plaintiff creditor to pierce sham defenses interposed in a debtor's answer by showing that there was no dispute as to the agreement between creditor and debtor and the fact of nonpayment.[46] The moving plaintiff thereby could shift to the defendant debtor a pre-trial burden to submit affidavits supporting its defense of non-payment.[47] If the defendant could not show any supporting documents in its defense, or if the defense was a "sham or frivolous," the court could enter a judgment for the creditor without trial.[48]

In 1933, California's legislature adopted summary judgment, but made it available only to plaintiffs.[49] The federal rules, adopted in 1938, contained Rule 56, which made summary judgment available to both plaintiffs and defendants.[50] California followed suit, making summary judgment available to defendants in 1939.[51]

From 1938 until the federal trilogy of cases in 1986, federal courts struggled to determine "how and when the movant's burden has been satisfied, when the burden shifts to the opposing party, and how the opponent may defeat a properly supported summary judgment motion."[52]

Wright, Miller and Kane, in their leading treatise on federal procedure, observe that "much of the confusion in the [federal] decisions as to the showing required on a summary-judgment motion stems from the divergent views various

44. Justice Stanley Mosk stated in his opinion in *Molko v. Holy Spirit Ass'n.*, 762 P.2d 46, 53 (Cal. 1988), that "[s]ummary judgment is a drastic measure that deprives the losing party of a trial on the merits. It should therefore be used with caution, so that it does not become a substitute for trial."

45. *See* Stempel, *supra* note 12, at 134.

46. *See id.* (citing Charles E. Clark & William Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 424 (1929)); *see also* WRIGHT ET AL., *supra* note 15, at 191-92.

47. *See* Stempel, *supra* note 12, at 134.

48. *Id.* at 137-40.

49. *See* Walsh v. Walsh, 116 P.2d 62, 64 (Cal. 1941).

50. *See* WRIGHT ET AL., *supra* note 15, at 192-93.

51. *See Walsh*, 116 P.2d at 64.

52. WRIGHT ET AL., *supra* note 15, at 463-64.

judges have had as to the utility and application of Rule 56."[53] Some judges, wary of the potential of summary judgment to become a summary trial by affidavits, have adopted a cautious or hostile stance toward the procedure, labeling it a "drastic" or disfavored measure.[54] Other judges see summary judgment as a key case management tool, designed to avoid wasting judicial resources on a trial, the outcome of which is clear at the pretrial stage.[55] These divergent attitudes toward the appropriate role of summary judgment have been the source of much confusion in federal summary judgment case law[56] and, as this article demonstrates, in California summary judgment cases as well.[57]

The opinions of Judge Jerome N. Frank and Judge Charles E. Clark in the Second Circuit case of *Arnstein v. Porter* starkly illustrated these divergent views.[58] Judge Frank was "outspokenly critical of the summary judgment procedure,"[59] while Judge Clark, "the principal draftsman of the federal rules, acted as the spokesman for those sympathetic to Rule 56."[60]

In his copyright infringement action, Arnstein testified in his deposition that Cole Porter had plagiarized some of his musical compositions, while Porter, in his deposition testimony, flatly denied having access to the compositions

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53. *Id.* at 464.

54. See, for example, *Eagle Oil & Ref. Co., Inc. v. Prentice* stating that

> Because the procedure is summary and presented on affidavits without the benefit of cross-examination, a trial by jury and opportunity to observe the demeanor of witnesses in giving their testimony, the affidavits filed on behalf of the [nonmoving] defendant should be liberally construed to the end that he will not be summarily deprived of the full hearing available at a trial of the action and the rights incident thereto. . . . The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact.

122 P.2d 264, 265 (Cal. 1942). *See also* Molko v. Holy Spirit Ass'n, 762 P.2d 46, 53 (Cal. 1988) ("Summary judgment is a drastic measure that deprives the losing party of a trial on the merits. It should therefore be used with caution, so that it does not become a substitute for trial." (citations omitted)).

55. *See* Arnstein v. Porter, 154 F.2d 464, 480 (2d Cir. 1946) (Clark, J., dissenting).

56. *See* WRIGHT ET AL., *supra* note 15, at 464.

57. *See* discussion *infra* notes 152-93.

58. *See* WRIGHT ET AL., *supra* note 15, at 464-65.

59. *Id.* at 465 n.9.

60. *Id.* at 464.

and copying them.[61] The federal district court granted Porter's summary judgment motion, which was reversed on appeal.[62] The appeal centered on the existence of a genuine issue of material fact regarding Porter's access to the plaintiff's songs.[63] Judge Frank and Judge Clark crossed swords over whether the jury should be allowed to determine the plaintiff's and defendant's credibility at trial.[64]

Judge Frank, writing for the court, demonstrated a cautious, almost hostile, attitude toward summary judgment that emphasized the paramount value of preserving issues of credibility for the jury.[65] Noting that depositions should not "supplant the right to call and [cross] examine the adverse party . . . before the jury,"[66] Judge Frank wrote that "[p]laintiff, or a lawyer on his behalf on [cross-examination of defendant] may elicit damaging admissions from defendant; more important, plaintiff may persuade the jury, observing defendant's manner when testifying, that defendant is unworthy of belief."[67] Judge Frank was especially concerned about foreclosing cross-examination where the case turned on witness credibility, "especially as to matters peculiarly within defendant's knowledge."[68] Where the case turned on the *defendant's* credibility, as it did in *Arnstein*,[69] Judge Frank believed that the defendant's credibility created a triable issue, even where "the plaintiff . . . has offered nothing [on summary judgment] which discredits the honesty of the defendant . . . ."[70] Judge Frank urged caution in granting

61. Arnstein v. Porter, 154 F.2d 464, 467 (2d. Cir. 1946).

62. *Id.* at 468, 475.

63. *Id.* at 469.

64. For example, Judge Frank noted that "[a]lthough part of plaintiff's testimony on deposition (as to 'stooges' and the like) does seem 'fantastic,' yet plaintiff's credibility, even as to those improbabilities, should be left to the jury." *Id.* at 469. Judge Clark responded that "cross-examination can hardly construct a whole case without some factual basis on which to start." *Id.* at 478 (Clark, J., dissenting).

65. *See id.* at 469-71.

66. *Id.* at 470.

67. *Id.* Judge Frank also noted that deposition testimony is a weak substitute for "oral testimony of the witness, in the presence of the Court and Jury." *Id.* (quoting Hammock v. McBride & McBride, 6 Ga. 178, 183 (1849) (Lumpkin, J., dictum)).

68. *Id.* at 471.

69. *Id.* at 469 ("With credibility a vital factor, plaintiff is entitled to a trial where the jury can observe the witnesses while testifying.").

70. *Id.* at 471.

summary judgment to avoid transforming the procedure into a "trial by affidavits."[71]

Judge Clark's dissent in *Arnstein* presages the Supreme Court's opinion in *Celotex Corp. v. Catrett*[72] forty years later by emphasizing that summary judgment under Rule 56 is not "disfavored," but rather is "an integral and useful part of the procedural system envisaged by the rules."[73] Judge Clark concluded,

> Of course it is error to deny trial when there is a genuine dispute of facts; but it is just as much error – perhaps more in cases of hardship, or where impetus is given to strike suits – to deny or postpone judgment where the ultimate legal result is clearly indicated.[74]

Until 1986, federal courts sided with Judge Frank's cautious approach to summary judgment, "perceiving it as threatening a denial of such fundamental guarantees as the right to confront witnesses, the right of the jury to make inferences and determinations of credibility, and the right to have one's cause advocated by counsel before a jury."[75] Until the *Celotex* opinion, the federal courts widely shared an interpretation of the Supreme Court's opinion in *Adickes v. S.H. Kress* that a moving defendant must submit affirmative

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71. *Id.*

72. 477 U.S. 317 (1986).

73. *Arnstein*, 154 F.2d at 479.

74. *Id.* at 480.

75. Issacharoff & Loewenstein, *supra* note 12, at 77. Notwithstanding the value Judge Frank placed on the opportunity a trial presents for the jury to assess the demeanor of witnesses and the value of cross-examining those witnesses, the federal courts have generally refused to deny summary judgment on the "mere allegation that the opponent desires to rest his case on the credibility of the witnesses." *See* FRIEDENTHAL ET AL., CIVIL PROCEDURE § 9.3, at 463 (3d ed. 1999). To forestall summary judgment on credibility grounds, the opposing party must controvert the moving party's affidavits or provide evidence to impeach those affidavits. *See id.* Consistent with this view, California's summary judgment statute specifically prohibits denying summary judgment "on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment . . . ." CAL. CIV. PROC. CODE § 437c(e) (2002). Evidence that the movant's witness is interested in the outcome of trial, however, can create a genuine issue of credibility for trial. FRIEDENTHAL ET AL., *supra*, at 463 ("If the opponent can show some reason why the movant's witness might be disbelieved at trial, as, for example, if the witness would profit personally from an outcome in favor of the movant, summary judgment is inappropriate as the credibility of the witness clearly is in issue.").

evidence to negate the plaintiff's case.[76] Furthermore, the federal courts denied summary judgment when there was the "slightest doubt" as to the facts.[77]

California courts traditionally pursued the cautious approach to summary judgment. Justice Mosk, in his 1988 opinion in *Molko v. Holy Spirit Ass'n*, reiterated the black-letter characterization of summary judgment as a "drastic measure that deprives the losing party of a trial on the merits . . . [and] should therefore be used with caution, so that it does not become a substitute for trial."[78] In adopting this cautious approach, California courts, like Judge Frank, placed a premium on "a trial by jury and opportunity to observe the demeanor of witnesses in giving their testimony."[79] To avoid the potential for transforming summary judgment into a substitute for trial, California courts adopted a prophylactic summary judgment standard that imposed a heavy burden on the moving defendant to conclusively negate, by affirmative evidence, an essential element of the plaintiff's case even though the defendant would not bear such a burden of production at trial.[80] The

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76. Adickes v. S.H. Kress, 398 U.S. 144 (1970). *See* Issacharoff & Loewenstein, *supra* note 12, at 80 ("Nonetheless, *Adickes* was widely interpreted to require a movant for summary judgment to 'foreclose the possibility' that the nonmovant might prevail at trial."); *see also* Melissa L. Nelken, *One Step Forward, Two Steps Back: Summary Judgment After Celotex*, 40 HASTINGS L.J. 53, 63-64 & n.56 (1988).

77. *See* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 4.15, at 269 (5th ed. 2001).

> As originally drafted, Rule 56 contemplated that summary judgment would be a readily available procedural device used in conjunction with the broad discovery afforded by the Federal Rules. A series of decisions by the courts of appeal, however, held that the motion could not be granted when there was the "slightest doubt" as to the facts. Since such a doubt about the facts almost always exists, even after a jury verdict, this definition of the threshold sharply constricted the use of summary judgment. That view influenced the decision in *Adickes v. S. H. Kress & Co.*

Id.

78. Molko v. Holy Spirit Ass'n, 762 P.2d 46, 53 (Cal. 1988); *accord* Walsh v. Walsh, 116 P.2d 62, 64 (Cal. 1941) ("By an unbroken line of decision in [California] since the date of the original enactment of section 437c, the principle has become well established that issue finding rather than issue determination is the pivot upon which the summary judgment law turns."); Eagle Oil & Ref. Co. v. Prentice, 122 P.2d 264 (Cal. 1942).

79. *Eagle Oil*, 122 P.2d at 265.

80. *See Aguilar*:

> Language in certain decisions purportedly requiring a defendant

Second District Court of Appeal in *Barnes v. Blue Haven Pools*[81] expressly held that the trial burden of production has no effect on the moving defendant's summary judgment burden:

> There is nothing in the [California summary judgment] statute which lessens the burden of the moving party simply because at the trial the resisting party would have the burden of proof on the issue on which the summary judgment is sought to be predicated. In such a case, on the motion for summary judgment, the moving party must generally negative the matters which the resisting party would have to prove at the trial.[82]

The California Supreme Court in *Molko* also adopted this view of the moving defendant's burden: "To succeed, the defendant must conclusively negate a necessary element of the plaintiff's case, and demonstrate that under no hypothesis is there a material issue of fact that requires the process of a trial."[83]

The traditional, cautious approach to summary judgment can be more clearly understood within the context of what one procedural commentator calls the "Open Courts" paradigm of adjudicatory procedure that prevailed in federal courts from 1938 through the mid-1980s.[84] The liberal

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> moving for summary judgment to conclusively negate an element of the plaintiff's cause of action derives from summary judgment law as it stood prior to the 1992 and 1993 amendments [to the summary judgment statute], does not reflect such law as it stands now, and is accordingly disapproved.

Aguilar v. Atl. Richfield Co., 24 P.3d 493, 512 n.19 (Cal. 2001) (citations omitted).

81. Barnes v. Blue Haven Pools, 81 Cal. Rptr. 444 (Ct. App. 1969). In *Barnes*, the plaintiff was injured when he dove into a pool manufactured by the defendant. *Id.* at 445. In a suit against the pool manufacturer, the plaintiff alleged that the pool was too shallow for diving and that the diving board was too large and too long. *Id.* at 446 n.1. Defendant moved for summary judgment based on plaintiff's discovery responses, which revealed he had no evidence to prove the pool was defectively designed. The court held that defendant failed to meet its movant's burden to "demonstrably show[ ] a carefully constructed pool, free of defects." *Id.* at 447. *See also infra* note 82 and accompanying text.

82. *Id.* at 447 ("There are, of course, cases . . . where the moving defendant, by its affidavits, effectively precluded any possibility of recovery by the plaintiff in the absence of challenges to their veracity or completeness.").

83. *Molko*, 762 P.2d at 53.

84. Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 714 (1993).

Federal Rules of Civil Procedure reflects this paradigm.[85] The primary goal of the "Open Courts" paradigm was the "just resolution of disputes."[86] The federal rules employed a variety of procedures to achieve the goal of open access to the courts and to facilitate a determination of claims on the merits, including simplifying the rules, relaxing pleading requirements, and providing for broad discovery.[87] Broad discovery rules, for example, were intended to provide a "level playing field by assuring equal access to proof."[88] Most state judicial systems, including California's, were greatly influenced by the federal rules reform model of notice pleading and liberal discovery.[89] The traditional view of summary judgment as a drastic measure that should not be a substitute for trial is consistent with the "Open Courts" paradigm's overriding concern that parties with meritorious claims be afforded a full and fair opportunity to prove those claims in court.

C. *The U.S. Supreme Court's 1986 "Trilogy": Unleashing Summary Judgment in Federal Court*

In 1986, the U.S. Supreme Court handed down a trilogy of landmark summary judgment decisions[90] that marked a dramatic shift in the federal judiciary's attitude toward summary judgment from a disfavored measure to the

85. *Id.* at 716-17.

86. *Id.* at 714.

87. *See id.*

88. Edward D. Cavanaugh, *A New World of Discovery; Proposed Amendments to the Federal Rules of Civil Procedure Favor Well-Heeled Litigants*, S.F. RECORDER, Aug. 8, 1998, at 4; *see* JAMES, *supra* note 77, § 5.2, at 287 ("Since the enactment of the Federal Rules, wide mutual discovery . . . has made it possible to prosecute types of claims where relevant evidence is in the hands of defendants, thus shifting the balance of advantage.").

89. *See* Edwin W. Green & Douglas S. Brown, *Back to the Future: Proposals for Restructuring Civil Discovery*, 26 U.S.F. L. REV. 225, 226 (1992) ("Modern pleading and discovery burst onto the scene in California in 1958. The California legislature modeled the California Discovery Act of 1957 . . . after the Federal Rules of Civil Procedure . . . .") (internal quotation marks omitted); FRIEDENTHAL ET AL., *supra* note 75, § 7.1, at 386 ("[The federal] discovery rules virtually revolutionized the practice of law in the United States. Of all the Federal Rules, they have been the most widely copied; nearly every state has adopted a similar set of provisions permitting broad, intensive discovery.").

90. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

"workhorse" of case management.

In a five to four decision, the U.S. Supreme Court, in *Celotex Corp. v. Catrett*, made it easier for defendants to win summary judgment motions in federal court by lessening the moving defendant's burden.[91] In reversing the court of appeal, the Supreme Court rejected the lower court's interpretation of *Adickes* that a defendant must submit affirmative evidence to negate the opponent's claim.[92] Declaring that "[s]ummary judgment procedure is not . . . a disfavored procedural shortcut, but rather . . . an integral part of the Federal Rules as a whole," the Supreme Court held that "the burden on the moving [defendant] may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case."[93] *Celotex* thereby alleviated the burden on a moving defendant to show the nonexistence of a triable issue when the defendant would not bear the burden of production on that issue at trial. The broad language of "showing . . . an absence of evidence" contrasts with California's traditional requirement that the defendant "conclusively negate, by affirmative evidence" an essential element of plaintiff's case.[94]

In a five to four decision in *Anderson v. Liberty Lobby, Inc.*,[95] the U.S. Supreme Court again made it easier for judges to grant summary judgment by increasing the burden on responding plaintiffs to forestall summary judgment. In *Anderson*, the Court equated a summary judgment motion with a directed verdict motion,[96] holding that the "standard [for granting a summary judgment] mirrors the standard for

91. Smits, *supra* note 39, at 967 ("In *Celotex*, the Court reduced the initial burden of going forward to the moving party who will not have the burden of proof at trial.").

92. *See Celotex*, 477 U.S. at 323, 325.

93. *Id.* at 325.

94. *See supra* notes 79-80 and accompanying text.

95. *Anderson*, 477 U.S. at 242.

96. The Court stated,

> [T]he genuine issue summary judgment standard is very close to the reasonable jury directed verdict standard: The primary difference . . . is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.

Id. at 251 (internal quotation marks omitted).

a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict."[97] The Court's opinion in *Anderson* required the district court to apply the burden of persuasion applicable *at trial* when determining the sufficiency of the plaintiff's evidentiary submission in opposition to the summary judgment motion.[98] Under this new standard, the court, in ruling on summary judgment, must determine "'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.'"[99]

Anderson involved a libel suit against a public figure in which the applicable burden of persuasion at trial required the jury to be convinced of the defendant newspaper's malice by clear and convincing evidence.[100] Therefore, in applying the respondent's burden standard from *Anderson* to determine whether the plaintiff's evidence presented a "genuine issue" for trial, the district court must *evaluate* whether the "evidence presented in the opposing affidavits is of *insufficient caliber or quantity* to allow a rational finder of fact to find actual malice by clear and convincing evidence."[101]

Justice Brennan, in his dissenting opinion, expressed the concern that the Court's reformulation of the summary judgment standard would transform the judge's task on summary judgment from determining *the existence of* a triable issue to determining the triable issue itself.[102] According to Justice Brennan, the majority's opinion directed the district court to weigh the evidence, thereby transforming what is meant to provide an expedited "summary" procedure into a full-blown paper trial on the merits:[103] "I would have thought that a determination of the 'caliber and quantity,' *i.e.,* the importance and value, of the evidence in light of the 'quantum,' *i.e.,* amount 'required,' could *only* be performed by

97. *Id.* at 250.
98. *Id.* at 252-53.
99. *Id.* at 252 (quoting Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1871)).
100. *Id.* at 254.
101. *Id.* (emphasis added).
102. *Id.* at 267 (Brennan, J., dissenting).
103. *See id.* at 266 (Brennan, J., dissenting).

weighing the evidence."[104]

In the third case in the trilogy, *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, the Supreme Court, in another five to four decision, effectively increased the respondent's burden of an antitrust plaintiff in order to avoid summary judgment.[105] The Court required the district court to assess the strength of plaintiff's evidence to determine whether it created a genuine issue for trial.[106] In *Matsushita*, a group of American electronics manufacturers alleged that certain Japanese companies had conspired to sell their products below marginal cost to drive the plaintiffs out of the American market.[107] The trial court granted defendants' motion for summary judgment, which the court of appeals reversed.[108] The Supreme Court reversed the court of appeal and characterized the plaintiffs' claims as "implausible" because they "simply made no economic sense."[109] Based upon its finding that the plaintiffs' evidence was consistent with two equally plausible competing inferences, the Court held that the plaintiffs' evidence was insufficient to support a rational inference by a jury of antitrust conspiracy.[110] By so holding, the *Matsushita* Court deprived the jury of its traditional role of choosing between competing inferences. *Matsushita's* impact on the respondent's burden extends beyond the antitrust context. As a leading treatise on civil procedure observed,

> Consistent with the trend toward a more liberal expansive use of summary judgment, the decision between competing inferences is not always for the jury; it is permissible for such a determination to be made by the court in granting summary judgment if one of the inferences is more plausible than the other.[111]

By eliminating the traditional restraints on summary

104. *Id.*

105. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

106. *See id.* at 600 (White, J., dissenting) ("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.").

107. *See id.* at 574.

108. *Id.* at 580.

109. *Id.* at 587.

110. *See id.* at 587-88.

111. FRIEDENTHAL ET AL., *supra* note 75, at 459-60.

judgment, the Supreme Court's 1986 trilogy blurred the line between "issue finding rather than issue determination," which the California Supreme Court found to be the "pivot upon which [California] summary judgment law turns."[112]

The change of judicial attitude toward summary judgment, reflected by the Supreme Court's trilogy, was part of a wider shift in the public's attitude toward litigation. During the 1980s, concern about unrestrained litigation, popularly known as the "litigation explosion," became widespread.[113] Professor Mullenix observed that a myth of American litigiousness and litigation abuses pervaded American culture in the 1980s and prompted demands for civil justice reform designed to restrict access to the courts.[114] Business groups were instrumental in pressing for a "narrow application of the [Federal] Rules."[115] In Professor Stempel's words, "the business community . . . saw itself victimized by bogus or marginal claims that consumed legal resources and actually could succeed at the hands of lay jurors . . . ."[116]

Summary judgment's movement into the mainstream of case management techniques,[117] fueled by the Supreme Court's 1986 trilogy, is part of the larger effort to cut back on litigation and litigation delay.[118] As part of this effort, courts

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112. Walsh v. Walsh, 116 P.2d 62, 64 (Cal. 1941).

113. Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1398 (1994) ("[T]he perception of discovery abuse has been magnified by its connection to the even more widely held perception of an American 'litigation explosion' and its allegedly dire consequences for this country's economy and life.").

114. *See id.* at 1393-409.

115. Stempel, *supra* note 84, at 719.

116. *Id.* at 718.

117. *See* EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT – FEDERAL LAW AND PRACTICE § 3.01 (2d ed. 2000) ("In the present contemporary milieu of 'managerial judging,' summary judgment's critical and efficacious function places it in the very center of the present system of administering civil litigation.").

118. Professor Stempel writes,

> As almost anyone alive during the past decade knows, this is the era of the "litigation explosion," or there is at least the perception that a litigation explosion exists. . . . [T]he perception of a litigation explosion has spurred adoption of alternative dispute resolution methods, tougher pleading standards, sterner and more readily available sanctions for discovery abuse, more comprehensive pretrial management of cases, more prevalent fee shifting or adoption of the English Rule, and generally greater ease of pretrial disposition of cases. In 1986, the effect of this trend upon federal summary judgment

have employed a range of techniques that include aggressive pretrial case management,[119] restrictions on discovery, and court-sponsored alternative dispute resolution.[120]

California's judicial system is also burdened by an increasing caseload[121] and subject to pressure to "reduc[e] the incidence and effect of litigation."[122] Some of the efficiency measures adopted by the California courts raise difficult policy questions. Specifically, what are the adverse consequences on court access by the disadvantaged members of society?[123] One commentator concludes that recent litigation reform measures designed to restrict access to the courts "weigh[ ] more in favor of the socioeconomically advantaged" at the expense of the disadvantaged.[124]

D. *1992-1993 Amendments: The Legislature's Response to the U.S. Supreme Court's "Trilogy"*

In 1992, the legislature amended California's summary judgment statute to define the moving defendant's burden of production.[125] As amended, the California Code of Civil Procedure ("CCP") § 437c(o)(2) provides that a moving defendant must "show" that an essential element of the

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practice became apparent.
Stempel, *supra* note 12, at 96-97.

119. *See* Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1562 (1994) ("Case management is a subcategory of judicial administration, but in the last twenty years it has become the primary administrative technique for reducing delay and cost in the processing of cases.").

120. *See* Stempel, *supra* note 12, at 97-98; Sherman, *supra* note 119, at 1570 ("Hybrid and new ADR methods emerged during the 1980s as private ADR providers, community dispute resolution centers, and courts experimented with the new processes.").

121. *See* John K. Hudzik, *Financing and Managing the Finances of the California Court System: Alternative Futures*, 66 S. CAL. L. REV. 1813, 1832 (1993) ("[T]here is little in the above data or elsewhere to contradict the commonly held view that California judicial system workloads will continue to increase substantially during the next decade and beyond.").

122. *Id.* at 1840-41 ("When issuing its report on California's jobs and future, the Council on California Competitiveness devoted significant attention to the problems and costs of litigation in California. The bulk of their complaints and the focus of most of their recommendations on this topic concern reducing the incidence and effect of litigation.").

123. *Id.* at 1841 ("The important public policy question . . . which must be addressed by the judiciary, policy makers, and the public, is how much access and ease of access are we willing to fund?").

124. Stempel, *supra* note 84, at 695.

125. *See* ASSEMB. B. 2616, 1991-1992 Reg. Sess. (Cal. 1992).

plaintiff's case "cannot be established."[126] After the enactment of the 1992 amendment, but before *Union Bank*, commentators debated the meaning of this ambiguous phrase.[127] Pro-*Celotex* commentators incorrectly interpreted the phrase "cannot be established" to overrule the judicially created requirement in *Barnes* that the moving defendant bear a burden of production on summary judgment to conclusively negate the plaintiff's case through affirmative evidence.[128]

In 1993, the legislature once again amended the summary judgment statute to increase the burden on the responding plaintiff to "set forth specific facts" to support its claims, instead of "rely[ing] on the mere allegations or denials of its pleadings."[129] This amendment, however, did not address the movant's burden; rather, the 1993 amendment affected the respondent's burden by adding the following language to § 437c(o)(1) and (2):

> [The responding party] may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense

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126. CAL. CIV. PROC. CODE § 437c(o)(2) (2002) ("A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action . . . cannot be established.").

127. See, for example, Curtis E.A. Karnow's article stating that

> the statute remains opaque. It still places the burden of showing that a cause of action has "no merit" on the defendant moving for summary judgment . . . . While many interpretations of the new language are conceivable, it probably will have the effect of continuing the imposition on moving defendants to demonstrate a negative, that there is no evidence of an essential element.

Curtis E.A. Karnow, *Archeology of Error: Tracing California's Summary Judgment Rule*, 24 PAC. L.J. 1845, 1883-84 (1993). In comparison, see WEIL & BROWN, *supra* note 4, at § 10.237, stating that "[t]he 1992 amendments represent a significant departure from former law. Legislative history shows it was the legislature's intent to adopt the federal standards governing burden of proof on summary judgment motions as expressed in *Celotex*." *See also* Hagen v. Hickenbottom, 48 Cal. Rptr. 2d 197, 206 (Ct. App. 1995) ("There was an initial debate as to whether the new statutory requirement of a showing that an element 'cannot be established' effected any significant change from the preexisting requirement that the defendant 'conclusively negate' the element.").

128. *See* Glenn S. Koppel, *Populism, Politics and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 505 n.296 (1997).

129. ASSEMB. B. 498, 1993-1994 Reg. Sess. (Cal. 1994).

thereto.[130]

It is far from clear that the legislature, by enacting the 1992 and 1993 amendments to the summary judgment statute, intended to follow the federal example in *Celotex* to the extent of overruling *Barnes*.[131] Under the best of circumstances, it is tricky business to divine the collective intent of a group of legislators who are responsive to the demands of a variety of interest groups.[132] The use of legislative history to interpret the 1992 amendment is particularly unenlightening because key legislators only dimly understood the meaning of *Celotex* and were motivated to read into that decision a meaning that best conformed to the interests of their constituents. The legislative history behind these amendments has been characterized as "murky" and "remarkably obscure."[133]

Notwithstanding the above, a rigorous analysis of the convoluted legislative history behind the 1992 amendment reveals that the bill's sponsor intended to equalize the burdens on plaintiffs and defendants who move for summary judgment.[134] California case law had required a moving plaintiff to satisfy, in effect, two burdens, while requiring a moving defendant to meet only one.[135] The amendment relieved the moving plaintiff from the burden of conclusively proving up each element of its own claim as well as negating

130. CAL. CIV. PROC. CODE § 437c(o)(1), (2) (2002).

131. Barnes v. Blue Haven Pools, 81 Cal. Rptr. 444 (Ct. App. 1969).

132. Contemporary statutory interpretation scholarship debunks the fiction that courts merely troll statutes for legislative intent. *See, e.g.*, Jane S. Schacter, *The Pursuit of "Popular Intent:" Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 110 (1995) ("The viability of such 'intentionalism' has long been discredited by scholars and is sharply undermined by contemporary skepticism about objective theories of meaning and about the pluralist political process from which statutes emerge.").

133. Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360, 365 (Ct. App. 1999) ("Most of the debate has centered on the legislative history of the amendments, which was remarkably obscure considering the magnitude of the potential change in the culture of California litigation.").

134. *See* Koppel, *supra* note 128, at 510-13.

135. *See* Union Bank v. Superior Court, 37 Cal. Rptr. 2d 653, 659 (Ct. App. 1995); *see also* IRWIN NOWICK & STATE BAR OF CAL., REPORT TO CAL. SENATE COMM. ON JUDICIARY, A.B. 2616, Reg. Sess. at 8 (Cal. 1992) ("Case law currently requires a plaintiff seeking to obtain a summary judgment motion to show both that it has proved up on the cause of action and negated any applicable affirmative defenses.").

the defendant's affirmative defenses.[136] The 1992 amendment to California Civil Procedure Code § 437c(o)(1) now requires the moving plaintiff only to prove each element of its cause of action, thereby eliminating the additional burden to negate the defendant's defenses.[137] The plaintiff's trial bar supported the amendment because it made it easier for plaintiffs to move for summary judgment.[138] The sponsors of the bill interpreted the *Celotex* opinion as supporting the elimination of this second burden.[139]

The report prepared by the Assembly Committee of the Floor Coordinator that accompanied Assembly Bill 2616[140] supports the interpretation that the 1992 amendment was intended to codify existing case law: "[Assembly Bill 2616] [c]larifies the burden of proof on summary adjudication and summary judgment motions to codify state law as to the defendant's burden of proof and *changes* the plaintiff's burden of proof in accordance with the United States Supreme Court's decision in *Celotex Corp. v. Catrett* . . . ."[141] Hence, the report articulates the burden on the moving defendant in a way that is consistent with *Barnes*.[142]

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136. The text of § 437c(o)(1) of the California Civil Procedure Code states:

> A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.

CAL. CIV. PROC. CODE § 437c(o)(1) (2002).

137. *See id.*

138. *See* Jeanna Steele, *On Second Thought: The Plaintiffs Bar Sours on a Summary Judgment Statute*, CAL. LAW., July 2001, at 19 ("The plaintiffs bar supported the amendment too, assuming that it would make it easier for plaintiffs to move for summary judgment.").

139. CALIF. LEG., ASSEMB. DAILY JOURNAL, REP. TO THE GEN. ASSEMB. OF 1993-1994 (1993). Assemblyman Peace, the bill's principal sponsor, described the bill as a "modified form" of the *Celotex* "rule." *Id.* ("AB 2616 adopted in a modified form the rule of *Celotex* and overrode pre-existing California law by providing that a plaintiff may obtain a summary judgment if it proves up the allegations of its complaint.").

140. ASSEMB. COMM. OF THE FLOOR COORDINATOR, REPORT ON ASSEMB. B. 2616 (Cal. Aug. 25, 1992).

141. *Id.*; *see also* Union Bank v. Superior Court, 37 Cal. Rptr. 2d. 653, 660-61 (Ct. App. 1995).

142. *See* REP. ON CAL. ASSEMB. B. 2616. *See also supra* notes 81-82; CALIF. LEG., ASSEMB. DAILY JOURNAL, *supra* note 147 ("[T]his bill clarifies the burden of proof on summary judgment by providing that a *defendant* has shown that its

Despite the bill sponsor's assertion that the amendment adhered to *Celotex*,[143] a historical analysis of the phrase "cannot be established"[144] shows a lack of connection between this phrase and *Celotex* in regard to the movant's burden. The words "cannot be established" first appeared in the 1990 summary judgment statute to define when a cause of action "has no merit" in connection with a summary *adjudication* motion.[145] Because the 1990 statute failed to apply this definition to summary *judgment* motions, which are virtually identical to summary adjudication motions,[146] the 1992 amendment corrected this previous drafting error by applying the definition of "has no merit" to motions for summary adjudication *and* summary judgment.[147] When the phrase "cannot be established" made its statutory debut in 1990, no one believed that this amendment would change the standard for determining summary adjudication motions.[148] The court of appeal, in *Brantley v. Pisaro*, confirmed the disconnect between the phrase "cannot be established" and the federal summary judgment standard as defined by *Celotex* by observing that, "other than limit the issues for which summary adjudication was available, *the 1990 legislation was not intended to change existing summary judgment law*."[149]

E. Union Bank: *The Second Appellate District Interprets the 1992-1993 Amendments to Overrule* Barnes v. Blue Haven Pools

In 1995, the Second Appellate District Court of Appeal

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motion for summary judgment shall be granted if the defendant . . . *negates an element of the plaintiff's cause(s) of action* or proves up its affirmative defense(s).").

143. *See supra* notes 138-40 and accompanying text.

144. CAL. CIV. PROC. CODE § 437c(o)(2) (2002).

145. S.B. 2594, 1990 Leg., Reg. Sess. (Cal. 1990); *see also* Brantley v. Pisaro, 50 Cal. Rptr. 2d 431, 435 (Ct. App. 1996) ("[T]he phrase 'cannot be established' was not new to section 437c in 1992. It first appeared in 1990, and was then placed in subdivision (f), which dealt only with motions for summary adjudication.").

146. The only difference between summary judgment and summary adjudication is that "summary judgment terminates the action between the parties and results in an immediate, appealable judgment," whereas "[s]ummary adjudication orders do *not* terminate the action." WEIL & BROWN, *supra* note 4, at § 10:34.

147. *See* Koppel, *supra* note 128, at 507-08.

148. *See id.*

149. *Brantley*, 50 Cal. Rptr. 2d at 435 (emphasis added).

handed down its landmark opinion in *Union Bank v. Superior Court.*[150] Advocates of the federal burden-shifting procedure under *Celotex* heralded *Union Bank* as "signaling a new era in summary judgment practice in California."[151] The court of appeal in *Union Bank* acknowledged the ambiguity of the words "cannot be established."[152] Relying on an erroneous analysis of legislative history to interpret those words,[153] the *Union Bank* court, in effect, declared that a moving defendant is no longer bound by *Barnes's* requirement to conclusively negate plaintiff's cause of action. The court fashioned a narrow ruling that fell short of a wholesale adoption of *Celotex*:

> Taken together, the 1992 and 1993 amendments to section 437c legislatively overruled this division's holding in *Barnes v. Blue Haven Pools*, . . . insofar as it prohibited a summary judgment motion from being granted when a moving defendant merely relies on a plaintiff's factually devoid interrogatory answers. . . . Now, a moving defendant may rely on factually devoid discovery responses to shift the burden of proof pursuant to section 437c, subdivision (o)(2).[154]

Union Bank's interpretation of the 1992 and 1993 amendments reflecting the legislature's collective intent to overrule *Barnes* has been uncritically accepted as holy writ on the subject by courts and commentators.[155] Even Justice

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150. Union Bank v. Superior Court, 37 Cal. Rptr. 2d 653 (Ct. App. 1995).

151. Hunter v. Pac. Mech. Corp., 44 Cal. Rptr. 2d 335, 337 (Ct. App. 1995); *see also* Calvin House, *Summary Shift, State Defendants Get Benefit Of Federal Standard*, L.A. DAILY J., Mar. 6, 1995, at 7 ("The *Union Bank* decision should settle the debate [over whether the legislature intended] to import the federal standard [for shifting the burden of production from movant to respondent or whether] a defendant still had to negate the plaintiff's case with evidence of his or her own."); Evelio M. Grillo, *Union Bank v. Superior Court- California's Celotex*, 9 CAL. LITIGATOR 210, 211 (Fall 1995).

152. *See Union Bank*, 37 Cal. Rptr. 2d at 659 ("Because there is some ambiguity as to the effect of the language 'one or more elements of the cause of action . . . cannot be established . . .' in the 1992 amendment, . . . resort to contemporaneous legislative history materials such as committee reports is appropriate."). For a critique of the *Union Bank* decision, see Koppel, *supra* note 128, at 509-24.

153. *See* Koppel, *supra* note 128, at 509-24.

154. *Union Bank*, 37 Cal. Rptr. 2d at 663.

155. *See, e.g.*, Thomas Kallay, *Managing the Burdens Imposed on Motions for Summary Judgment in California*, 41 SANTA CLARA L. REV. 39, 68-84 (2000); Steele, *supra* note 138, at 19. Thomas Kallay, an appellate sole practitioner, opposed SB476, which would have statutorily overruled *Union Bank*.

Mosk's opinion in *Aguilar* relies upon *Union Bank's* interpretation of the 1992-1993 amendments.[156]

F. Union Bank's *Aftermath of Confusion*

Union Bank did not end the confusion created by the 1992 and 1993 amendments regarding the moving defendant's burden on summary judgment. California courts applied various summary judgment standards, ranging from the "traditional" approach discussed earlier to that of *Celotex*.[157]

Several California Supreme Court decisions handed down after *Union Bank*, including *Guz v. Bechtel National, Inc.*,[158] the first case of the trilogy, continued to apply *Barnes's* "conclusive negation" standard.[159] Some courts of appeal continued to use the word "negate" to describe the burden of a moving defendant on summary judgment. For example, in *Sada v. Robert F. Kennedy Medical Center*,[160] the Second District Court of Appeal reversed summary judgment for the

156. Aguilar v. Atl. Richfield Co., 24 P.3d 493, 509 n.10, 513 (Cal. 2001) ("T]he legislative history of the 1992 and 1993 amendments contains certain summaries at least arguably supporting the perdurance of the conclusive negation requirement. But it was the 1992 and 1993 amendments 'that [were] enacted, not any' such summary." (alteration in original)). Even *Union Bank* conceded the ambiguity of the 1992 amendment, relying on legislative history which the court of appeal in *Scheiding v. Dinwiddie Constr.* characterized as "remarkably obscure." Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360, 365 (Ct. App. 1999).

157. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

158. Guz v. Bechtel Nat'l Inc., 8 P.3d 1089 (Cal. 2000).

159. Sharon P. v. Arman, Ltd., 989 P.2d 121, 128 (Cal. 1999). *See* Calvillo-Silva v. Home Grocery, 968 P.2d 65 (Cal. 1998); Kovatch v. Cal. Cas. Mgmt. Co., 77 Cal. Rptr. 2d 217, 227 (Ct. App. 1998); *Scheiding*, 81 Cal. Rptr. 2d at 371 ("The Supreme Court has not directly considered the issue and has persisted in its use of the terminology from the older cases, thus perpetuating the doubts of the courts still contending that the historic requirement of 'proving the negative' continues to burden the moving party.").

160. 65 Cal. Rptr. 2d 112 (Ct. App. 1997). *Sada's* post-*Union Bank* analysis of the summary judgment burdens stems from pre-*Union Bank* case law that applied the "negation" standard developed in *Barnes*:

> Although the burden of proof in a title VII action claiming an unjustifiable refusal to promote ultimately rests with the plaintiff, in the case of a motion for summary judgment or summary issue adjudication, the burden rests with the moving party to negate the plaintiff's right to prevail on a particular issue. In other words, the burden is reversed in the case of a summary issue adjudication or summary judgment motion.

Univ. of S. Cal. v. Superior Court, 272 Cal. Rptr. 264, 268-69 (Ct. App. 1990) (citations omitted). *See Sada*, 65 Cal. Rptr. 2d at 119.

defendant in an employment discrimination case, holding that the affirmative evidence submitted by the moving defendant failed to "negate" essential elements of the plaintiff's case.[161] In *Sada*, the court ruled that the trial burdens of production in an employment discrimination case have no effect on summary judgment burdens of production.[162] This ruling does not follow *Celotex*, which equates the burdens at summary judgment with those at trial.[163] Citing as authority the Sixth District's opinion in *Addy v. Bliss & Glennon*,[164] the *Sada* court states that "'the burden rests with the moving party to negate the plaintiff's right to prevail on a particular issue . . . . [I]n other words, the [trial] burden is *reversed* in the case of a . . . summary judgment motion.'"[165] The court's opinion did not cite the *Union Bank* decision issued by the Second District two years earlier.[166]

The Sixth District continued to cite *Barnes* after *Union Bank*. *Addy v. Bliss & Glennon* was a 1996 employment discrimination case in which the parties disputed the applicable summary judgment standard.[167] Addy argued that Bliss & Glennon ("B & G") was required to "*negate* each of the theories of liability contained in the complaint."[168] B & G contended that it "may show a cause of action has no merit [merely] by *pointing out* to the court the *absence* of essential evidence to support some element of plaintiff's case."[169] The court of appeal cited *Barnes* and agreed with Addy that "the burden rests with the moving party to negate the plaintiff's right to prevail on a particular issue."[170] Although the court

161. *See Sada*, 65 Cal. Rptr. 2d at 119.

162. *See id.* at 118.

163. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323, 327 (1986).

164. 51 Cal. Rptr. 2d 642 (Ct. App. 1996).

165. *Sada*, 65 Cal. Rptr. 2d at 119.

166. *See id.* *Sada's* ruling that, in employment discrimination cases, the summary judgment burdens are the reverse of the trial burdens conflicts with another Second District decision issued three years earlier. *Compare Sada*, 65 Cal. Rptr. 2d at 119, *with* Caldwell v. Paramount Unified Sch. Dist., 48 Cal. Rptr. 2d 448, 457 (Ct. App. 1995) (stating that, with respect to certain types of employment discrimination cases, "the burdens of proof for purposes of a defendant's motion for summary judgment are precisely the same" as those on the parties before the court generally).

167. *Addy*, 51 Cal. Rptr 2d at 645.

168. *Id.*

169. *Id.*

170. *Id.* at 649 (citing Barnes v. Blue Haven Pools, 81 Cal. Rptr. 444, 447 (2d Dist. 1969)).

required the moving defendant to make an "*affirmative showing* in support of his motion," the *Addy* court affirmed summary judgment for defendant, holding that B & G had met its burden and "submitted admissible evidence demonstrating that Addy could not establish a prima facie case [of employment discrimination]."[171]

Consistent with the U.S. Supreme Court's opinion in *Celotex*, the First Appellate District's decision in *Hunter v. Pacific Mechanical Corp.*[172] appeared to extend *Union Bank's* narrow holding, interpreting the phrase "cannot be established" to permit the moving defendant to simply "*point out*" an absence of evidence on the plaintiff's side.[173] The *Celotex* Court coined the phrase "point out,"[174] which has become indelibly associated in California summary judgment jurisprudence with the federal summary judgment standard under *Celotex*.[175] The phrase, however, is ambiguous. A minority of federal courts have interpreted the words "point out" to relieve the moving defendant from the burden of taking affirmative steps to assemble a prima facie case for summary judgment, permitting the defendant to *simply argue* the absence of evidence to support the plaintiff's case.[176] *Hunter* was criticized by the Sixth Appellate District in *Addy* for suggesting that "a moving defendant may shift the burden by *suggesting* the possibility that the plaintiff cannot prove its case."[177] *Addy* ruled that "a defendant must make an

171. *Id.* at 645. The court also held that B & G made an unrebutted showing of "legitimate, nondiscriminatory reasons for not offering Addy the position." *Id.* at 649.

172. Hunter v. Pac. Mech. Corp., 44 Cal. Rptr. 2d 335 (Ct. App. 1995).

173. *Id.* at 338 (emphasis added).

174. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) ("[T]he burden on the moving party may be discharged by 'showing' – that is, *pointing out* to the district court – that there is an absence of evidence to support the nonmoving party's case." (emphasis added)).

175. *See, e.g.*, Aguilar v. Atl. Richfield Co., 24 P.3d 493, 513 (Cal. 2001) ("Summary judgment law in this state, however, continues to require a defendant moving for summary judgment to present evidence, and not simply *point out* through argument, that the plaintiff does not possess . . . needed evidence. In this particular at least, it still diverges from federal law." (emphasis added)).

176. *See* SCHWARZER ET AL., *supra* note 22, § 14:137.1, at 14-32 (citing Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 532 (9th Cir. 2000)); Cray Communications, Inc. v. Novatel Computer Sys., Inc., 33 F.3d 390, 394 (4th Cir. 1994).

177. Addy v. Bliss & Glennon, 51 Cal. Rptr. 2d 642, 647 (Ct. App. 1996).

affirmative showing in support of his or her motion,"[178] consistent with the view that California's summary judgment statute "implies the . . . need for concrete evidence from the moving party."[179] *Hunter* did *not* hold that a moving defendant can simply allege or argue that the opposing party has no evidence because the moving defendant in that case submitted in support of its motion plaintiff's factually vague deposition testimony.[180] The unsettled question was whether *factually vague discovery responses* satisfied the statute's implied requirement of "concrete evidence."[181]

In *Hagen v. Hickenbottom*, the Sixth Appellate District interpreted the 1992 amendment to require the moving defendant to make "an affirmative *showing* in support of his or her motion . . . [which] connotes something significantly more than simply 'pointing out to the . . . court' that 'there is an absence of evidence'" and adopted a middle view between a full-blown *Celotex* standard and the traditional negation view.[182] *Hagen* further held,

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178. *Id.* at 645.

179. Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360, 367 (Ct. App. 1999).

> Unlike the federal rule described by Professor Wright, which he says provides that the moving party "need not produce evidence, but simply can *argue* that there is an absence of evidence," California's procedure requires the moving party to support its motion with evidence in the relatively elaborate form of separate statements. The court is neither permitted to act sua sponte nor solely upon the basis of argument: "In determining whether the papers show . . . there is no triable issue as to any material fact the court *shall consider all of the evidence set forth in the papers, . . . and all inferences reasonably deducible from the evidence* . . . ." . . . The statute itself thus implies the corresponding need for concrete evidence from the moving party and expressly requires the moving party to supply more than the bare assertion, whether alleged in a pleading or by way of argument, that the opposing party has no evidence to support a particular claim.

Id. (citations omitted) (emphasis in original).

180. *See id.* at 371. In *Leslie G. v. Perry & Assocs.*, the second appellate district ruled that

> a moving defendant need not support his motion with affirmative evidence negating an essential element of the responding party's case. Instead, the moving defendant may (through factually vague discovery or otherwise) point to *the absence of evidence to support the plaintiff's case*. When that is done, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact.

50 Cal. Rptr. 2d 785, 791 (Ct. App. 1996). *Leslie G.* was before the same division of the second appellate district that decided *Sada*.

181. Hunter v. Pac. Mech. Corp., 44 Cal. Rptr. 2d 335, 338 (Ct. App. 1995).

182. Hagen v. Hickenbottom, 48 Cal. Rptr. 2d 197, 207 (Ct. App. 1995).

> Before the burden of producing even a prima facie case should be shifted to the plaintiff in advance of trial, a defendant who cannot negate an element of the plaintiff's case should be required to produce direct or circumstantial evidence that the plaintiff not only does not have but cannot reasonably expect to obtain a prima facie case.[183]

The *Hagen* court anchored its holding in the requirement that the defendant submit sufficient evidence (direct or circumstantial) to show an absence of evidence to support the plaintiff's case.[184] Under *Hagen's* approach, the issue of the movant's burden focuses on whether the discovery materials offered by the moving defendant constitute sufficient circumstantial evidence to support the inference that plaintiff "not only does not have but *cannot reasonably expect to obtain a prima facie case.*"[185] Plaintiff's factually devoid discovery responses *may* support this inference as long as the plaintiff has had reasonable opportunity to discover its case.[186]

Hagen, however, cautioned that "the burden should not shift without a stringent review of the direct, circumstantial and inferential evidence,"[187] recognizing that not all discovery responses would qualify.[188] For example, the *Hagen* court held that the plaintiff's "'factually vague' deposition responses,"[189] similar to those submitted by the moving

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183. *Id.*

184. *Id.* at 208-09.

185. *Id.* at 207 (emphasis added).

186. *Id.* at 207-08 (noting that the nonmoving plaintiff in *Union Bank* could have, but did not, seek a continuance for further investigation or discovery).

187. *See* Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360, 372 (Ct. App. 1999) (characterizing the court's view in *Hagen*).

188. *Hagen*, 48 Cal. Rptr. 2d at 208 ("The *Union Bank* court subsequently made clear that not every discovery response which does not further the adversary's case will suffice in and of itself to show that the case 'cannot be established.'").

189. *Id.* In *Hagen*, the plaintiffs brought an action to set aside a trust on the theory that the defendant exercised undue influence over the decedent. *Id.* at 198. The moving defendant did not rely on any of the plaintiff's factually devoid interrogatory answers but, rather, upon the plaintiff's "factually vague" deposition testimony that indicated that plaintiffs did not have personal knowledge of undue influence by defendant. *Id.* at 203. While acknowledging that the record suggested that the plaintiffs' "prospects of ultimately [winning were] slight," the court nevertheless held that the defendant failed to meet its burden to show the plaintiffs could not establish undue influence because they "almost certainly would not have been present" had such undue influence occurred. *Id.* at 208. The court held, therefore, that the burden did not shift to

defendant in *Hunter*,[190] did not support an inference that the plaintiff could not reasonably expect to obtain a prima facie case at trial.[191] *Hagen* carefully distinguished between "a case that is simply weak and a case that 'cannot be established.'"[192]

The California Supreme Court's trilogy ultimately adopted the *Hagen* court's interpretation of the 1992 amendment. It moved summary judgment in the *Celotex* direction by moving beyond the pre-*Celotex* and pre-*Union Bank* "conclusive negation" standard, and rejected the interpretation of *Hunter* that apparently allowed the moving defendant to simply *assert* or *argue* the absence of evidence.[193]

III. AN ANALYSIS OF CALIFORNIA'S SUMMARY JUDGMENT "TRILOGY"

A. *A Brief Introduction to California's "Trilogy" of Summary Judgment Decisions:* Guz, Saelzler *and* Aguilar

This section presents a brief sketch of the facts of each decision in the California trilogy, which lays a foundation for the analysis of the impact of these decisions on the movant's burden[194] and the respondent's burden.[195]

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the plaintiffs to prove a prima facie case. *Id.* at 209.

190. *Id.* at 208; Hunter v. Pac. Mech. Corp., 44 Cal. Rptr. 2d 335, 336-39 (Ct. App. 1995). In *Hunter*, plaintiff Hunter, a bricklayer at various construction sites, sued defendant PMC, a contractor, claiming that he sustained asbestos-related injuries through exposure to asbestos as a result of working in close proximity to PMC employees. *Hunter*, 44 Cal. Rptr. 2d at 336. In affirming summary judgment for PMC, the court recognized that PMC's reliance on Hunter's factually vague deposition testimony, that he was personally unaware of PMC's activities at any of the job sites at which he worked, was sufficient to shift the burden to Hunter, who was unable to establish a triable issue of fact that PMC's activities were a substantial factor in causing his injuries. *Id.* at 339. The court of appeal held that Hunter's lack of personal knowledge satisfied PMC's burden to point out the absence of proof by Hunter on causation. *See id.* The *Hagen* court "respectfully questioned" *Hunter's* conclusion "that 'factually vague' deposition responses by *the plaintiff himself* sufficed, *in the circumstances of that case*, to shift the burden to the plaintiff." *Hagen*, 48 Cal. Rptr. 2d at 208 (emphasis added).

191. *Hagen*, 48 Cal. Rptr. 2d at 208-09.

192. *Id.* at 209. The *Hagen* court acknowledged that the plaintiffs' "prospects of ultimately proving undue influence [were] slight." *Id.*

193. *See, e.g.*, Aguilar v. Atl. Richfield Co., 24 P.3d 493, 513 (Cal. 2001) ("Summary judgment law in this state . . . continues to require a defendant moving for summary judgment to present evidence, and not simply point out through argument, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence.").

194. *See infra* Part III.B.

1. Guz v. Bechtel National, Inc.

John Guz was forty-nine years old when he lost his job after Bechtel National, Inc. ("Bechtel") eliminated his work unit and transferred its tasks to another Bechtel office.[196] Guz brought a wrongful discharge action against Bechtel in California Superior Court asserting three claims: an age discrimination claim under California's Fair Employment and Housing Act ("FEHA") statute,[197] breach of an implied contract to be terminated only for good cause, and breach of the implied covenant of good faith and fair dealing.[198]

The trial court granted summary judgment for Bechtel and dismissed the action.[199] "The court reasoned that '[Guz] was an at-will employee and has not introduced any evidence that he was ever told at any time that he had permanent employment or that he would be retained as long as he was doing a good job.'"[200] Furthermore, the court ruled that Guz failed to present sufficient evidence to make out a prima facie case of age discrimination, and failed to produce sufficient evidence to rebut Bechtel's nondiscriminatory reason for terminating his employment.[201]

The court of appeal reversed the lower court in a two to one decision.[202] In regard to Guz's breach of contract claim, the court found that "Guz's longevity, promotions, raises, and favorable performance reviews, together with Bechtel's written progressive discipline policy, and Bechtel officials' statements of company practices, raised a triable issue that Guz had an implied-in-fact contract to be dismissed only for good cause."[203] As to the age discrimination claim, the court found that a triable issue existed regarding whether Bechtel's proffered reason for discharging Guz, a downturn in business, was a pretext for unlawful age discrimination.[204]

The California Supreme Court, over a strongly worded dissent by Justice Kennard, reversed the court of appeal's

195. *See infra* Part III.C.
196. Guz v. Betchel Nat'l Inc., 8 P.3d 1089, 1094 (Cal. 2001).
197. CAL. GOV'T CODE § 12941 (Deering 1999).
198. *See Guz*, 8 P.3d at 1094.
199. *Id.*
200. *Id.* at 1099 (alteration in original).
201. *Id.*
202. *Id.* at 1094.
203. *Id.* at 1099.
204. *Id.*

ruling on Guz's breach of contract claim, finding that "neither the policies, nor other evidence, suggest any contractual restriction on Bechtel's right to eliminate a work unit as it saw fit."[205] The Court also reversed the lower appellate court's ruling on Guz's age discrimination claim on the grounds that Bechtel's affirmative evidence of its legitimate reasons for discharging Guz shifted the burden to Guz to "point[ ] to evidence which nonetheless raises a rational inference that intentional discrimination occurred,"[206] and that Guz failed to carry his respondent's burden.[207] The Court held, "as a matter of law, . . . Guz failed to point to evidence raising a triable issue that Bechtel's proffered reasons for its actions were a pretext for prohibited age discrimination."[208]

Justice Chin wrote a concurring opinion that presented an additional basis for holding that Bechtel met its movant's burden by showing that "Guz cannot state a prima facie age discrimination case."[209]

Justice Kennard dissented because she believed that Guz satisfied his respondent's burden by submitting rebuttal evidence that would have allowed a reasonable jury to rationally infer that Bechtel's proferred reasons for terminating his employment were a pretext for age discrimination.[210]

Although he concurred with the majority, Justice Mosk conceded that "the question [of intentional age discrimination] is close."[211]

2. Saelzler v. Advanced Group 400

Marianne Saelzler was a Federal Express employee who entered Sherwood Apartments, owned by the defendant, to deliver a package to a resident.[212] As she attempted to leave the premises, three young men beat her and attempted to rape her.[213] Prior to her attack, Ms. Saelzler saw two of the

205. *Id.* at 1094.
206. *Id.* at 1115.
207. *Id.*
208. *Id.* at 1124.
209. *Id.* at 1125 (Chin, J., concurring).
210. *See id.* at 1134 (Kennard. J., dissenting).
211. *Id.* at 1124 (Mosk, J., concurring).
212. *See* Saelzler v. Advanced Group 400, 23 P.3d 1143, 1147 (Cal. 2001). This second case in the trilogy was decided on May 31, 2001. *Id.* at 1143.
213. *See id.* at 1147.

men loitering outside a locked gate that had been propped open; she saw her third attacker already inside the complex.[214] The property owner was aware of frequent and recurring criminal activity inside the building complex, yet did not provide any daytime security on the premises.[215] Conceding that the defendant owed a duty to Ms. Saelzler to provide reasonable daytime security measures and that the defendant breached that duty, the Superior Court nonetheless dismissed Ms. Saelzler's claim on summary judgment on the grounds that she "failed to prove the breach was a proximate cause of her assault."[216]

Once again, a divided court of appeal reversed two to one, holding that Ms. Saelzler's causation evidence did in fact create an issue of fact for the jury.[217] As in *Guz*, the California Supreme Court reversed the court of appeal.[218] Justice Chin, writing this time for the majority, ruled that the property owner had met its movant's burden to show Ms. Saelzler "[had] not established, and cannot reasonably expect to establish, a prima facie case of causation, a showing that would forecast the inevitability of a nonsuit in defendants' favor."[219] Because Ms. Saelzler could not identify her attackers, the Court ruled that "her submission in opposition to summary judgment lacked specific facts showing that defendants' alleged negligence was an actual, legal cause of her injuries" and, therefore, she failed to carry her respondent's burden.[220]

Justices Werdergar and Kennard filed separate dissents. Justice Kennard accused the majority of "bending both the rules of summary judgment and the legal causation element of negligence . . . ,"[221] depriving Ms. Saelzler of "her

214. *See id.*

215. Saelzler v. Advanced Group 400, 92 Cal. Rptr. 2d 103, 105 (Ct. App. 1999) ("Upon reviewing the record we find the trial court accurately summarized the situation at Sherwood Apartments when Saelzler's job required her to enter the complex. 'Plaintiff has presented overwhelming evidence that moving defendants had knowledge of frequent, recurring criminal activity on the premises of their 28-building apartment complex.'").

216. *Id.* at 106.

217. Saelzler v. Advanced Group 400, 23 P.3d 1143, 1148 (Cal. 2001).

218. *Id.* at 1155.

219. *Id.* at 1146.

220. *Id.* at 1147.

221. *Id.* at 1155 (Kennard, J., dissenting).

constitutional right to a trial by jury."[222] Justice Werdergar also accused the majority of misstating the summary judgment burdens and "the requirements for proof of causation," and concluded that, "[i]ndisputably, a reasonable jury in this case could conclude, contrary to the majority, that 'roving guards would have encountered [plaintiff's] assailants or prevented the attack.'"[223]

3. Aguilar v. Atlantic Richfield Company

In 1991, the California Air Resources Board mandated the sale of a cleaner burning gasoline known as CARB gasoline.[224] The price of CARB gasoline "moved generally upward across all of the petroleum companies more or less together, rising quickly and falling slowly."[225] Theresa Aguilar filed a class action complaint against the defendant oil companies, asserting that they entered into an unlawful conspiracy to restrict the output of CARB gasoline in order to raise its price,[226] in violation of California's Cartwright Act,[227] which is analogous to section 1 of the Sherman Act.[228]

The oil companies moved for summary judgment, submitting affirmative evidence in the form of employee affidavits which denied collusion.[229] The trial court initially granted summary judgment to the oil companies but reversed itself, believing it had applied the wrong summary judgment standard in assessing whether defendants met their movant's burden.[230] The court of appeal reversed, ruling that the trial court had misinterpreted case law by requiring the defendants to submit affidavits from each of their employees responsible for capacity, production and pricing decisions.[231]

The California Supreme Court affirmed the grant of summary judgment, ruling that the evidentiary submission of

222. *Id.* at 1157.

223. *Id.* at 1161-62 (Werdergar, J., dissenting) (quoting the majority opinion, 23 P.3d at 1152) (second alteration in original).

224. *See* Aguilar v. Atl. Richfield Co., 24 P.3d 493, 502 (Cal. 2001).

225. *Id.*

226. *Id.*

227. *Id.* (citing CAL. BUS. & PROF. CODE § 16720 (1997) (original version at ch. 530, § 1, Stat. 1907, 984-85 (1907)).

228. *Id.* (citing 15 U.S.C. § 1 (1980) (original version at Sherman Act ch. 647, § 1, 26 Stat. 209 (1909)).

229. *See id.* at 502-03.

230. *See id.* at 503-04.

231. *Id.* at 504-05.

the oil companies satisfied their movant's burden.[232] Importing plaintiff's trial burden of persuasion into her respondent's summary judgment burden, the Court further ruled that Ms. Aguilar had not carried her respondent's burden because her evidence did not show that an inference of unlawful conspiracy was *more likely* than an inference of permissible competition.[233] Instead, Ms. Aguilar's evidence was considered to be equally consistent with both inferences.[234] *Aguilar* is the capstone opinion in the trilogy, purporting to comprehensively and definitively state the current law of summary judgment in California.

B. *The Movant's Burden: To Conclusively Negate, or Merely Show the Absence of, Plaintiff's Case?*

This section examines the impact of the trilogy of decisions on the movant's burden on summary judgment and concludes that, consistent with *Union Bank*, the judicially-created "conclusively negate" standard is no longer applicable in determining the extent of the moving defendant's burden.[235] This section also analyzes the degree to which the trilogy has moved summary judgment jurisprudence beyond the narrow holding of *Union Bank* toward adoption of the federal standard.[236]

232. *Id.* at 521.

233. *See id.* "More likely than not" is a burden of persuasion standard that governs the jury's decision when its mind is in equipoise. When the jury cannot determine, based upon the evidence, whether to believe the plaintiff's case or the defendant's case, it must find in favor of the defendant because the plaintiff has failed to carry its burden of persuasion. *See* AREEDA & HOVENKAMP, *supra* note 37 and accompanying text.

234. *See Aguilar*, 24 P.3d at 515.

235. *See* Union Bank v. Superior Court, 37 Cal. Rptr. 2d 653 (Ct. App. 1995).

236. *See supra* Part II.C.

1. Guz v. Bechtel National, Inc.: *The Age Discrimination Claim*[237]

a. *The Supreme Court's* Guz *Opinion Sidesteps the "Conclusively Negate" vs. "Absence of Evidence" Issue*[238]

In *Guz*, the California Supreme Court's majority opinion avoids the issue of whether a defendant can meet its movant's burden of production by showing that the responding plaintiff's case will be insufficient to meet his burden of production at trial. Justice Chin's concurring opinion lays the groundwork for the court's official abandonment, in *Aguilar*, of the traditional summary judgment standard requiring the moving defendant to "conclusively negate" an essential element of the plaintiff's case.[239] Justice Chin's concurrence in *Guz* then became a springboard for his majority opinion in *Saelzler*, which was ultimately embraced by Justice Mosk's majority opinion in *Aguilar*.[240]

The Court's opinion in *Guz* applies the traditional pre-*Union Bank* requirement for satisfying the movant's burden of production on summary judgment:

> Under California's traditional rules, we determine with respect to each cause of action whether the defendant seeking summary judgment has *conclusively negated* a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law.[241]

The summary judgment standard quoted above was articulated by the California Supreme Court in its 1988

237. Although Guz asserted several causes of action, my analysis of the *Guz* opinion addresses only the age discrimination claim because most of the justices' meaningful discussion of summary judgment relates to that claim.

238. I use the phrase "absence of evidence" to mean insufficient evidence in the plaintiff's case to create a triable issue, i.e. to satisfy plaintiff's burden of production at trial.

239. Guz v. Bechtel Nat'l Inc., 8 P.3d 1089, 1125 (Cal. 2001) (Chin, J., concurring).

240. *See* Aguilar v. Atl. Richfield Co., 24 P.3d 493, 513 (Cal. 2001) ("In his concurring opinion in *Guz*, Justice Chin anticipated the conclusion that we here reach. We therefore embrace it fully." (citation omitted)).

241. *Guz*, 8 P.3d at 1099 (emphasis added).

opinion *Molko v. Holy Spirit Ass'n.*[242] *Molko* predates the 1992-1993 amendments by four years and the *Union Bank* decision by seven years. As authority for the continuing validity of the *Molko* summary judgment standard, the *Guz* opinion cites a string of California Supreme Court decisions, each of which quotes the summary judgment standard articulated in *Molko.*[243] None of these decisions, which post-date *Union Bank*, cites the *Union Bank* opinion as authority on summary judgment. Thus, the high court in *Guz* continued its practice of using the traditional summary judgment terminology and continued to avoid ruling on the validity of *Union Bank's* 1995 interpretation of the 1992-1993 amendments to the summary judgment statute.

The *Guz* Court was able to avoid the "absence of evidence" issue because Bechtel sought to support its movant's burden on two alternative grounds, one based on showing an absence of evidence to support Guz's case, and the other based on the traditional "conclusive negation" standard in *Molko.*[244] Opting to avoid the *Celotex* issue, the Court decided that Bechtel met its movant's burden under California's traditional standard.

Relying on the federal *Celotex* approach, under which "the standard [for granting summary judgment] mirrors the standard for a directed verdict,"[245] Bechtel argued that Guz bore an initial burden on summary judgment to present admissible evidence sufficient to establish a prima facie case of age discrimination at trial.[246] Under the three-step *McDonnell Douglas* burden-shifting test applicable in federal courts, as well as in California courts, in trials alleging age discrimination,[247] Bechtel would not bear a burden at trial to

242. Molko v. Holy Spirit Ass'n, 762 P.2d 46, 53 (Cal. 1998).

243. *Id.* More precisely, the language employed in these opinions, including the language employed in *Guz*, misquotes *Molko*, which used the conjunctive, not the disjunctive: "To succeed, the defendant must conclusively negate a necessary element of the plaintiff's case, *and* demonstrate that under no hypothesis is there a material issue of fact that requires the process of a trial." *Id.* (emphasis added).

244. *See Guz*, 8 P.3d at 1112.

245. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).

246. *See Guz*, 8 P.3d at 1112.

247. *Id.* at 1113. Because of the similarity between California and federal age discrimination statutes, "California has adopted the three-stage burden-shifting test established by the United States Supreme Court for trying claims

produce evidence of a nondiscriminatory motive (the second step) unless and until Guz first met his trial burden to produce a prima facie case of age discrimination. Therefore, Bechtel argued, it would have been able to move for a directed verdict immediately after the close of Guz's prima facie case and argue that Guz failed to state a case.[248] Because *Celotex* held that a defendant should bear no greater burden to support its summary judgment motion than it would bear to support its directed verdict motion at trial, Bechtel argued that it met its movant's burden on summary judgment by showing that Guz could not demonstrate a prima facie case of discrimination at trial.[249]

Relying on California's traditional summary judgment standard,[250] Guz contended that "he should have no [initial] prima facie burden to avoid summary judgment."[251] Under that standard, Bechtel would have to present affirmative evidence on summary judgment that showed a nondiscriminatory motive even though Bechtel would not have carried that *initial* burden of production at trial.

When *Guz* reached the supreme court, California courts of appeal were split over the manner in which the *McDonnell Douglas* burden-shifting test should be applied to an employer's motion for summary judgment in state

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of discrimination, including age discrimination, based on a theory of disparate treatment." *Id.* The U.S. Supreme Court describes the three-step burden-shifting test as follows:

> In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination.

Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (footnote and citation omitted).

248. *Guz*, 8 P.3d at 1100 n.7.

249. *Id.* at 1112. "Bechtel contends that, in order to survive summary judgment, Guz was obliged to demonstrate a prima facie case of discrimination, but could not do so because it is undisputed that the bulk of his duties were assumed by an *older* employee." *Id.*

250. *See supra* Part II.B.

251. *Guz*, 8 P.3d at 1115.

employment discrimination cases.[252] Some appellate districts following the *Celotex* approach[253] held that the summary judgment burdens precisely match the trial burdens for production laid down in *McDonnell Douglas*.[254] These courts, according to *Guz*, "indicated that the plaintiff can survive an employer's motion for summary judgment only by presenting, at the outset, triable evidence satisfying the prima facie elements of *McDonnell Douglas*."[255] Other courts of appeal, following the traditional "negation" standard, held that the *McDonnell Douglas* burdens were *reversed* from what they would be at trial.[256] These courts have held that "a plaintiff opposing summary judgment need not demonstrate triable issues until the moving defendant has made an initial no-merit 'show[ing]'"[257] of non-discriminatory motive, thereby reversing the *McDonnell Douglas* burdens of production.[258]

The supreme court declined the invitation of the California Chamber of Commerce, as amicus curiae, to reach the *Celotex* question as to whether "a moving defendant could obtain summary judgment solely by showing, after opportunity for discovery, that the *opposing plaintiff* had *failed to present* triable evidence crucial to his case."[259] The high court also declined to resolve the split among the California courts of appeal concerning the manner in which summary judgment burdens of production operate in California state law employment discrimination cases.[260]

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252. *See id.* at 1114-15.
253. *See supra* notes 92-111.
254. *See supra* note 247.
255. *Guz*, 8 P.3d at 1115.
256. *See id.*
257. *Id.* at 1114.
258. *Id.*
259. *Id.* at 1100 n.7.

> Bechtel and one of its amici curiae have questioned whether such traditional standards apply to this case. Bechtel suggests that, to survive summary judgment, *Guz* had the burden . . . to establish, under the generally accepted three-step procedure for testing such claims, a prima facie case of intentional age discrimination. The California Chamber of Commerce argues more broadly that the 1992 and 1993 amendments to the California summary judgment statute adopted then extant *federal* standards, under which a moving defendant could obtain summary judgment solely by showing, after opportunity for discovery, that the *opposing plaintiff* had *failed to present* triable evidence crucial to his case.

Id. (citations omitted).
260. *See id.* at 1115.

Both issues were left unresolved, but were addressed in Justice Chin's concurring opinion.[261]

The Court explained that Bechtel met its movant's burden under California's traditional summary judgment standard:

> Bechtel *did* adduce, in support of its motion for summary judgment, *affirmative evidence* which, unless materially contradicted or rebutted, would establish that each of Guz's causes of action lacked merit. By any interpretation of the summary judgment statute, the burden thereupon shifted to Guz to show the existence of one or more triable issues of material fact . . . .[262]

The Court then ruled that the summary judgment burden of production shifted to Guz:

> Thus, even if Guz had no initial burden to demonstrate a prima facie case of discrimination – *a question we do not decide* – Guz *did* have a burden, in the face of Bechtel's showing of nondiscriminatory reasons, to show there was nonetheless a triable issue that decisions leading to Guz's termination were actually made on the prohibited basis of his age.[263]

b. *Dismissal of Guz's Age Discrimination Claim: A Relaxed Application of the "Conclusively Negate" Standard*

To support its movant's burden to show nondiscriminatory reasons for terminating Guz, Bechtel largely relied on the depositions of its own employees.[264] This deposition testimony established that Bechtel eliminated Guz's work unit, including his position, as part of a work force reduction to consolidate costs.[265] Second, the deposition testimony established that the younger employees, chosen to fill the vacant positions in the new unit, were more qualified than Guz for the available position.[266] The supreme court majority found that the testimony of these employees, Bechtel executives and managers, constituted a "creditable and

261. *See id.* at 1125.
262. *Id.* at 1100 n.7 (citation omitted).
263. *Id.* at 1117 (first emphasis added).
264. *See id.* at 1116-17.
265. *See id.*
266. *See id.*

sufficient showing of innocent motive,"[267] a "facially dispositive showing,"[268] that shifted the burden of production to Guz to respond "by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred."[269] Rejecting Guz's rebuttal evidence aimed at showing Bechtel's proffered reasons were false and concluding that "Guz made major concessions to both the plausibility and truthfulness of Bechtel's proffered reasons,"[270] the Court reversed the court of appeal and affirmed the trial court's grant of summary judgment to Bechtel.[271]

There is a serious question whether Bechtel's evidentiary showing of legitimate reasons for terminating Guz *conclusively negated* the element of age discrimination as a substantial factor in Guz's termination. Guz's case turned on the critical issue of Bechtel's reason for terminating his employment (cost reduction or "age-related animus").[272] To show Bechtel's nondiscriminatory motivation, Bechtel offered the deposition testimony of its own employees, high-ranking executives who played major roles in Guz's termination.[273] Such testimony by interested witnesses raises significant issues of credibility and bias. Courts have urged caution in granting summary judgment to employers in discrimination cases where intent is an issue.[274] Caution is especially warranted where the employer's own employees are the sole source of proof of its nondiscriminatory intent.[275]

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267. *Id.* at 1118. Bechtel asserted the reasons for the termination: (1) a "downturn in workload" and to consolidate costs; (2) Guz's tasks were then assumed by existing workers at the new unit; and (3) the younger employees chosen to fill the positions at the new unit were better qualified for those particular positions than Guz. *Id.* at 1130.

268. *Id.* at 1115.

269. *Id.*

270. *Id.* at 1120 ("Essentially uncontradicted are Bechtel's showings (1) that Guz himself proposed Shaeffer as the logical choice to assume Guz's overhead duties, (2) that Tevis had non-age-related business reasons for hiring Wraith, Siu, Wallace, Vreim, and Stenho, and (3) that those persons were well qualified for their positions."). Justice Kennard's dissent argues that Guz presented sufficient evidence establishing a prima facie case *and* "evidence from which a rational factfinder could conclude that the employer's proffered explanation for its actions was false." *Id.* at 1133. *See also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 154 (2000) (Ginsburg, J., concurring).

271. *Guz*, 8 P.3d at 1124.

272. *Id.* at 1112.

273. *Id.* at 1116-17.

274. *See* BRUNET ET AL., *supra* note 117, § 6.12, at 98.

275. *See* CAL. CIV. PROC. CODE § 437c(e) (2002). The California summary

While the testimony of Bechtel's employees may be credible and sufficient to satisfy Bechtel's *trial* burden of production under *McDonnell Douglas* for the purpose of avoiding a *directed verdict* against Bechtel, it is questionable whether that testimony *conclusively negates* the material fact of discriminatory intent sufficient to shift the burden of production to Guz *on summary judgment.* The Court's determination that Bechtel met its movant's burden on discriminatory intent might have been justified if the court had been applying the *Celotex* standard under which summary judgment burdens mirror directed verdict burdens.[276] Bechtel's showing would have been sufficient to meet its burden of production *at trial* to provide sufficient evidence on which a jury could reasonably find Bechtel terminated Guz for legitimate reasons and to shift the burden back to Guz to provide evidence of pretext.[277] At trial, Bechtel's case would not have to be conclusive to shift the burden to Guz to show Bechtel's proffered legitimate reasons were a pretext for age discrimination. The *Guz* Court, however, purported to be applying California's traditional

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judgment statute recognizes the danger of precluding a trial when an individual's state of mind is a material fact and the sole source of proof of that individual's state of mind is the individual's own testimony. *See id.* Although section 437c(e) applies to witness affidavits and declarations, the underlying principle concerning the credibility of a witness whose intent is a material fact appears applicable to a witness's deposition testimony. *Compare* federal summary judgment practice. WRIGHT ET AL., *supra* note 15, § 2739, at 396 ("[W]hen motive, intent, or subjective feelings and reactions are in issue, summary judgment may be denied despite the opposing party's noncompliance with Rule 56(e)."). But another view is that

> Rule 56 is silent on the admissibility of affidavits of interested parties. Nonetheless, some commentators have expressed concern about relying on the affidavits of interested parties in support of a summary judgment motion . . . . The common thread among those commentators who have expressed skepticism toward the input of interested parties into the summary judgment process is recognition of the need for the trier of fact to assess questions of credibility relevant to controverted issues . . . . It would be unwise to establish a rigid rule against the use of interested party or witness affidavits in support of a summary judgment motion . . . . [W]here there exists no specific basis on which to question an affiant's testimony other than his interest in the case, most courts today will find summary judgment to be appropriate.

BRUNET ET AL., *supra* note 117, § 8.10, at 193-96. For a discussion of credibility as a triable issue, *see supra* notes 66-75 and accompanying text.

276. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

277. *See supra* note 247.

standard,[278] not the federal standard articulated in *Celotex*.[279]

Having concluded that Bechtel's "facially dispositive" evidence of nondiscriminatory motive shifted the summary judgment burden of production to Guz,[280] the majority ruled that Guz failed to meet its respondent's burden to rebut Bechtel's evidence. The majority determined that Guz's evidence failed to contradict Bechtel's proferred reasons for firing Guz and "essentially conceded that the reasons cited by Bechtel in support of its motion for summary judgment – cost efficiency and concerns about BNI-MI's performance as a unit – were the true reasons why Bechtel decided to eliminate BNI-MI." Justice Kennard's dissent argues at length that Guz *did* present evidence from which a rational fact finder could conclude that Bechtel's proffered explanation was false and that Guz was "the victim of intentional age discrimination."[281]

Therefore, although the Court chose to anchor its holding in *Guz* on California's traditional conclusive negation summary judgment standard, it appears to have relaxed the application of that standard. As demonstrated in the next section,[282] the concurring opinion of Justice Chin laid the groundwork for the Court's subsequent rejection of the conclusive negation requirement of *Barnes* and *Molko,* and

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278. *See supra* notes 261-65 and accompanying text.

279. *See supra* notes 92-112 and accompanying text.

280. The Court explained,

> Bechtel's explanation of nondiscriminatory reasons was creditable on its face. Indeed, . . . Guz has largely conceded the truth, if not the wisdom, of Bechtel's proferred reasons. Guz thus had the burden to *rebut* this facially dispositive showing by pointing to evidence which nonetheless raises a rational inference that intentional discrimination occurred. . . . Guz has failed to do so.

Guz, 8 P.3d at 1115.

281. Justice Kennard stated,

> Because, as I have explained, Guz's evidence was sufficient . . . not only for a jury to reject Bechtel's proffered reasons for the discharge but also for an appellate court to uphold an age discrimination verdict, that evidence squarely presented "the ultimate question" in any disparate treatment case, namely, "whether the plaintiff was the victim of intentional discrimination." That issue was in this case a material issue of fact in dispute. Therefore, the trial court erred when, in granting summary judgment for Bechtel, it precluded Guz from having the merits of this material issue of fact resolved at trial.

Guz v. Bechtel Nat'l Inc., 8 P.3d 1089, 1132 (Kennard, J., dissenting). *See infra* Parts III.C-III.C.1 (concerning Respondent Guz's burden).

282. *See infra* notes 283-311.

the Court's movement toward the federal summary judgment model in *Saelzler* and *Aguilar*.

c. *Justice Chin's Concurring Opinion: Groundwork for the Leap Toward the Federal Standard in* Aguilar

The greatest significance of the *Guz* opinion for understanding the current state of California summary judgment law lays in Justice Chin's concurrence, which directly addressed the "prima facie burden" issue that the majority opinion sidestepped. The concurrence, which was fully embraced by Justice Mosk in *Aguilar*,[283] laid the foundation for overturning the traditional view of summary judgment as articulated in *Barnes*[284] and *Molko*.[285]

The court in *Guz* held that Bechtel met its movant's burden by submitting *affirmative evidence* establishing a nondiscriminatory motive for Guz's termination (the second step in the *McDonnell Douglas* three-step burden-shifting trial scenario),[286] satisfying Bechtel's movant's burden and shifting the burden to Guz to demonstrate that Bechtel's proffered legitimate reason was a mere pretext for age discrimination.[287] The Court affirmed the trial court's award of summary judgment to Bechtel, ruling that "as a matter of law, . . . Guz . . . failed to point to evidence raising a triable issue that Bechtel's proffered reasons for its actions were a pretext for prohibited age discrimination."[288] The Court did *not* sustain the trial court's summary judgment order on the alternative ground that Guz had failed to establish a prima facie case of age discrimination (the first step of the three-step *McDonnell Douglas* burden-shifting analysis).[289] The Court also did *not* rule that Guz failed to demonstrate a prima facie case,[290] but rather held that "Guz's evidence

283. *See* Aguilar v. Atl. Richfield Co., 24 P.3d 493, 520 (Cal. 2001).

284. Barnes v. Blue Haven Pools, 81 Cal. Rptr. 444 (Ct. App. 1969).

285. Molko v. Holy Spirit Ass'n, 762 P.2d 46 (Cal. 1988).

286. *See supra* note 247. *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

287. *See* Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089 (Cal. 2000).

288. *Id.* at 1124.

289. *See supra* note 247.

290. *See Guz*, 8 P.3d at 1122 ("[E]ven if barely adequate to demonstrate a prima facie case, [Guz's comparative-age evidence] is insufficient for trial in the face of Bechtel's strong contrary showing that its reasons were unrelated to age-

raised, at best, only a weak suspicion that discrimination was a likely basis for his release. Against that evidence, Bechtel has presented a plausible, and largely uncontradicted, explanation that it eliminated BNI-MI, and chose others over Guz, for reasons unrelated to age."[291]

Justice Chin directly addressed Bechtel's first argument that Guz had an *initial* burden to demonstrate a prima facie case of age discrimination[292] (the first step of the three-step *McDonnell Douglas* burden-shifting analysis).[293] He stated that Guz had failed to meet *that* burden.[294] As an additional ground for supporting the trial court's grant of summary judgment, Justice Chin agreed with Bechtel, stating that "Bechtel, the moving party on summary judgment, has met its burden of showing that Guz cannot state a prima facie age discrimination case. Accordingly, Bechtel had no duty even to rebut Guz's age discrimination claim, although I agree that it also did so."[295]

Justice Chin would have brought California summary judgment jurisprudence even closer to the federal model under *Celotex*[296] than did the court of appeal's opinion in *Union Bank*.[297]

The *Union Bank* decision held that, where plaintiff's interrogatory responses show that the plaintiff essentially has "no case," those responses satisfy the movant's burden to "show[ ] that one or more elements of the cause of action . . . cannot be established."[298] *Union Bank* did not speak to the situation in which the plaintiff has a case but the defendant argues that the plaintiff's case is legally insufficient to create an issue for the jury, i.e., to avoid a directed verdict at trial. The U.S. Supreme Court's summary judgment trilogy *did* speak to this issue, essentially allowing a defendant to satisfy its movant's burden by "showing" or "pointing out" that the

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related bias.").

291. *Id.* at 1123 (emphasis added).

292. *See id.* at 1115 ("Bechtel urges we adopt the latter view and impose an initial prima facie burden on a plaintiff opposing an employer's motion for summary judgment. Here, Bechtel insists, Guz could not demonstrate a prima facie case . . . .").

293. *See supra* note 247.

294. *Guz,* 8 P.3d at 1125-26.

295. *Id.* at 1125.

296. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

297. Union Bank v. Superior Court, 37 Cal. Rptr. 2d 653 (Ct. App. 1995).

298. *See id.* at 654 (quoting CAL. CIV. PROC. CODE § 437(o)(2) (2002)).

plaintiff's case is insufficient to survive a directed verdict motion at trial.[299] The federal trilogy eliminated the pre-existing distinction in standards between pre-trial and trial motions that address the legal sufficiency-of-the-evidence, and applied the same standard to define the movant's burden for each of these sufficiency-of-the-evidence motions, whether made before or during trial.[300]

Guz was not a "*no evidence*" case. Guz offered evidence on summary judgment which, he argued, made out a prima facie case of age discrimination.[301] Bechtel argued that Guz's evidence was *legally insufficient* to satisfy his *trial* burden of production to make out a prima facie case of age discrimination, required by the first step of the *McDonnell Douglas* burden-shifting formula.[302] Justice Kennard, in a vigorous dissent in *Guz*, disagreed with Justice Chin's conclusion that "Guz cannot state a prima facie case."[303] Even the majority opinion did not rest on the grounds that Guz's evidence, directed at establishing a prima facie case, could not withstand a directed verdict motion.

Justice Chin's concurring opinion reached beyond the holding of *Union Bank* and constituted another step in the direction of the federal summary judgment model under *Celotex*. Justice Chin asserted the proposition, not expressed in *Union Bank*, that California summary judgment law after the 1992-1993 statutory amendments allows a defendant to meet its movant's burden by challenging the sufficiency of the

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299. *Celotex*, 477 U.S. at 325.

300. The Court in *Anderson v. Liberty Lobby, Inc.*, explained that

> [The] "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986) (quoting Bill Johnson's Rests., Inc. v. N.L.R.B., 461 U.S. 731, 745 n.11 (1983)).

301. Guz v. Bechtel Nat'l Inc., 8 P.3d 1089, 1115 (Cal. 2000) ("However, Guz asserts, if he did have an initial burden to demonstrate a prima facie case of age discrimination to avoid summary judgment, he satisfied it by pointing to evidence that, when implementing its work force reduction, Bechtel treated younger employees more favorably than older.").

302. *Id.* ("Here, Bechtel insists, Guz could not demonstrate a prima facie case because the transfer of Guz's specific BNI-MI duties to an older worker, Shaeffer, negated an inference of anti-age animus as a matter of law.").

303. *Id.* at 1134 n.4 (Kennard, J., dissenting).

plaintiff's case just as it would at trial through a directed verdict motion. In *Guz*, Justice Chin extended the rationales of the *Scheiding v. Dinwiddie Construction Co.* and *Hagen v. Hichenbottom*[304] decisions made in different appellate districts of the Court of Appeal of California where the movant argued the plaintiff had *no case* based on plaintiff's factually devoid discovery responses:

> To prevail on summary judgment in a discrimination case, the defendant must show that the plaintiff both has not established and cannot reasonably expect to establish a prima facie case. A defendant can meet the former burden merely by showing the absence of evidence of discrimination. But that is not enough. The defendant must also show by *direct or circumstantial evidence* that the plaintiff cannot reasonably expect to obtain a prima facie case. This latter showing, however, is not impossibly difficult. *If a plaintiff has had the full opportunity to obtain discovery* and to present all available evidence in support of a discrimination claim, and still has failed to establish a prima facie case, the trial court may reasonably infer that the plaintiff cannot do so. If the plaintiff cannot present a prima facie case, a nonsuit at trial would be inevitable.[305]

In both *Scheiding* and *Hagen*, the "circumstantial evidence" that the defendant offered to support an *inference of an absence of evidence* to support the plaintiff's case consisted of *factually devoid discovery responses*.[306] *Hagen* and *Scheiding* agreed with *Union Bank* in acknowledging that *some* factually devoid discovery responses could support an inference of an absence of evidence, but these opinions also emphasized that not all factually devoid responses will suffice

304. Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360 (Ct. App. 1999); Hagen v. Hickenbottom, 48 Cal. Rptr. 2d 197 (Ct. App. 1995). Justice Chin finds these two cases to strike the right balance between the divergent approaches found in various Court of Appeal of California decisions. *See Guz*, 8 P.3d at 1125-26 (Chin, J., concurring). For example, some courts simply required a defendant to "point to the plaintiff's lack of evidence," whereas others required the defendant to submit affirmative evidence to show plaintiff's inability to prove its case. *See id.*

305. *Guz*, 8 P.3d at 1126 (Chin, J., concurring) (emphasis added).

306. *See generally Scheiding*, 81 Cal. Rptr. 2d 360, 372 ("We agree with *Hunter* that the *circumstantial evidence* which would be required by *Hagen* can consist of 'factually devoid' discovery responses from which an absence of evidence can be inferred."); *Hagen*, 48 Cal. Rptr. 2d 197.

to show that the case cannot be established.[307] *Scheiding* cautioned that "the burden should not shift without *stringent review* of the direct, circumstantial and inferential evidence."[308] Both *Hagen* and *Scheiding* noted that a moving defendant cannot shift the burden to the plaintiff by merely arguing the absence of evidence to the court.[309] Justice Chin's concurrence extended this inferential reasoning beyond the limits of devoid discovery responses, allowing defendants to argue that plaintiff's case is legally insufficient to support a reasoned jury verdict.[310] This concept of the movant's burden is virtually indistinguishable from the federal standard under the *Celotex* trilogy, which allows the defendant to point to an absence in the record of evidence to support the plaintiff's case.[311]

This expansive, federalized view of summary judgment opened up the possibility that California summary judgment, like its federal counterpart, could be used to evaluate the *strength* of a plaintiff's case, moving the court close to the judge-jury boundary line. The next two decisions in the California trilogy, *Saelzler* and *Aguilar*, make that possibility a reality.

2. Saelzler v. Advanced Group 400

a. *A Reversal of Course: The Court Finally Falls in Line Behind* Union Bank

In *Saelzler,* the dispute between plaintiff and defendant turned on the issue of the movant's burden.[312] Unlike *Guz*, where Bechtel submitted affirmative evidence in the form of affidavits to support its movant's burden under the

307. *See Hagen*, 48 Cal. Rptr. 2d at 208. The *Scheiding* court rejected the moving defendant's reliance on plaintiff's discovery responses, stating, "The deposition [of plaintiff Dinwiddie] and standard interrogatories [served on Dinwiddie] in this case did not contain questions aimed specifically at the presence or absence of Dinwiddie at jobsites, and neither of these discovery devices was comparable to an 'all facts' interrogatory on the subject." *Scheiding*, 81 Cal. Rptr. 2d at 372.

308. *Scheiding*, 81 Cal. Rptr. 2d at 372.

309. *See Hagen*, 48 Cal. Rptr. 2d at 207; *Scheiding*, 81 Cal. Rptr. 2d at 367.

310. *See, e.g., Guz,* 8 P.3d at 1126, 1129 ("Guz's inability to present any credible evidence to establish his age discrimination claim supports the superior court's grant of summary judgment in Bechtel's favor.").

311. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

312. *See* Saelzler v. Advanced Group 400, 23 P.3d 1143, 1145 (Cal. 2001).

traditional standard, the defendant in *Saelzler* merely pointed to an *absence of evidence* in the record to support plaintiff's case on proximate cause, specifically, her inability to identify her assailant.[313]

In reversing the trial court's award of summary judgment to the landlord, the court of appeal applied the traditional "conclusive negation" standard:

> Before a defendant is allowed summary judgment the evidence should conclusively establish the general causal connection between absence of security and criminal activity does not apply in this case by showing this particular criminal would have committed this crime against this victim despite the presence of reasonable security measures.[314]

Therefore, the moving defendant could win a reversal in the supreme court *only* if the court overturned the traditional requirement of "proving the negative" and allowed the landlord to show that Saelzler did not have enough evidence to go to trial.

The supreme court in *Saelzler* squarely addressed the question of the continuing vitality of the traditional summary judgment rule that the moving defendant must conclusively negate the plaintiff's case.[315] Justice Chin wrote the court's opinion in *Saelzler*. Building upon the foundation he laid seven months earlier in his *Guz* concurrence, Justice Chin made clear that the traditional requirement that a moving defendant conclusively negate the opposing party's case is no longer the applicable summary judgment standard in California.[316] The California Supreme Court adopted the following interpretation:

> Under the current version of the summary judgment statute, a moving defendant need not support his motion with affirmative evidence negating an essential element of

313. *Id.* at 1155.

314. Saelzler v. Advanced Group 400, 92 Cal. Rptr. 2d 103, 106, 112 (Ct. App. 1999).

315. *See supra* notes 78-83 and accompanying text.

316. *Saelzler*, 23 P.3d at 1154 (rejecting the court of appeal's holding that "defendants' flagrant failure to provide daytime security justified shifting the burden of proof to defendants to conclusively establish the absence of a causal relation between its breach of duty and the assault on plaintiff, by showing this particular assault would have occurred even if reasonable security measures had been taken.").

> the responding party's case. Instead, the moving defendant may . . . point to *the absence of evidence to support the plaintiff's case.* When that is done, the burden shifts to the plaintiff to present evidence showing there is a triable issue of material fact.[317]

This standard represents a reversal of course for the California Supreme Court. In *Sharon P. v. Arman, Ltd.*, decided two years prior to *Saelzler* and four years after *Union Bank*, the high court applied the traditional movant's burden standard requiring defendant to "conclusively negate[ ] a necessary element of the plaintiff's case or demonstrate[ ] that under no hypothesis is there a material issue of fact that requires the process of trial."[318] One month after *Saelzler*, Justice Mosk would expressly repudiate the language from *Sharon P.* in his opinion in *Aguilar*.[319]

b. *The Court Extends the Narrow Holding of* Union Bank: *"Pointing To" the Absence of Evidence*

Saelzler represents a major extension of the narrow holding in *Union Bank*.[320] *Union Bank* repudiated the traditional requirement that defendant "prove the negative."[321] The court in *Union Bank*, however, had narrowly confined its holding[322] to sanction the use of

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317. *Saelzler*, 23 P.3d at 1155 (quoting Leslie G. v. Perry & Assocs., 50 Cal. Rptr. 2d 785, 791 (Ct. App. 1996)). Note however, summary judgment law in California continues to require a defendant moving for summary judgment to present evidence, and not simply *point out through argument,* that the plaintiff does not posses, and cannot reasonably obtain, needed evidence. *See* Aguilar v. Atl. Richfield Co., 24 P.3d 493, 513 (Cal. 2001); CAL. CIV. PROC. CODE § 437c(b) (Deering 2002).

318. Sharon P. v. Arman, Ltd., 989 P.2d 121, 125 (Cal. 1999) (quoting Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 211 (Cal. 1993)).

319. *Aguilar*, 24 P.3d at 513 n.19 ("*[L]anguage* in certain decisions purportedly requiring a defendant moving for summary judgment to conclusively negate an element of plaintiff's cause of action derives from summary judgment law as it stood prior to the 1992 and 1993 amendments, does not reflect such law as it stands now, and is accordingly *disapproved.*" (citation omitted)).

320. *See supra* notes 154-56 and accompanying text.

321. Union Bank v. Superior Court, 37 Cal. Rptr. 2d 653, 658 (Ct. App. 1995) ("However, the 1992 and 1993 amendments to section 437c have legislatively overruled the prior decision of this court in *Barnes.*"). *See also* Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360, 365-67 (Ct. App. 1999).

322. The court stated,

> [T]he only issue raised by this petition relates to whether *Barnes v. Blue Haven Pools* required that the summary judgment motion at issue

factually devoid interrogatories to show that an element of the plaintiff's case "cannot be established."[323] The moving defendant in *Saelzler* did not support its motion with factually devoid discovery responses but, rather, pointed to Saelzler's inability to identify her attackers and, on that basis, argued Saelzler could not meet her trial burden of production for causation.[324] The supreme court's opinion in *Saelzler* extended *Union Bank's* holding by stating that "the moving defendant may . . . point to *the absence of evidence to support the plaintiff's case*."[325]

As he did in his concurring opinion in *Guz*, Justice Chin relied heavily on *Scheiding*.[326] *Scheiding*, however, held only that a moving defendant who cannot negate an element of plaintiff's case can, nevertheless, rely on "factually devoid discovery responses" as circumstantial evidence "from which an absence of evidence can be inferred."[327] Justice Chin's opinion also extends *Scheiding* beyond the narrow confines of factually devoid discovery responses.

By allowing the moving defendant to "*point to the absence of evidence to support the plaintiff's case*," *Saelzler* moved California summary judgment to the brink of the federal *Celotex* model. *Celotex* permits the defendant to discharge its burden by "'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the

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be denied. Our opinion can only be read to apply to the specific issue before the court . . . . We are not addressing other issues concerning the manner rule 56 of the Federal Rules of Civil Procedure may apply to California summary judgment motions or the further applicability of *Celotex Corp. v. Catrett* to section 437c as amended in 1992 and 1993.

Union Bank, 37 Cal. Rptr. 2d at 665 (citations omitted); *Scheiding*, 81 Cal. Rptr. 2d at 365-66.

323. "Taken together, the 1992 and 1993 amendments to section 437c legislatively overruled this division's holding in *Barnes v. Blue Haven Pools*, insofar as it prohibited a summary judgment motion from being granted when a moving defendant merely relies on a plaintiff's factually devoid interrogatory answers." *Union Bank*, 37 Cal. Rptr. 2d at 663 (quoting CAL. CIV. PROC. CODE § 437c(o) (Deering 2002)).

324. Saelzler v. Advanced Group 400, 23 P.3d 1143, 1151-52 (Cal. 2001).

325. *Id.* at 1155 (quoting Leslie G. v. Perry Assocs., 50 Cal. Rptr. 2d. 785, 791 (Ct. App. 1996)). The full quote from *Leslie G.* states: "Instead, the moving defendant may (through factually vague discovery responses or otherwise) point to *the absence of evidence to support the plaintiff's case*." The words "through factually vague discovery responses or otherwise" were curiously omitted from the quotation used in the *Saelzler* opinion.

326. *Saelzler*, 23 P.3d at 1146.

327. *Scheiding*, 81 Cal. Rptr. 2d at 372.

nonmoving party's case . . . ."[328]

c. *The Court's Application of the "Pointing To" Standard to the Facts in* Saelzler: *Which Party Bears the Burden to Identify Saelzler's Assailant?*

Saelzler is not a case where the plaintiff presented no evidence on a material issue.[329] Rather, a majority of the California Supreme Court justices held that Saelzler's case on causation was insufficient to support a rational inference that

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328. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

329. *Saelzler's* analysis of the plaintiff's case is reminiscent of the U.S. Supreme Court's assessment of the plaintiff's case in *Celotex*. In both opinions, the respective supreme courts found that the moving defendant successfully shouldered its movant's burden by showing an absence of evidence to support proximate cause. In *Celotex*, the defendant relied upon the plaintiff's *factually devoid interrogatories* to establish that Mrs. Catrett could offer at trial no witness to establish her deceased husband's exposure to its brand of asbestos. *Celotex*, 477 U.S. at 320. Therefore, Mrs. Catrett could not establish causation. Similarly, the California Supreme Court emphasized that Saelzler could not identify her attackers and, therefore, she could not prove proximate cause. *Saelzler*, 23 P.3d at 1151-52. However, *unlike* Mrs. Catrett, Saelzler *did* present evidence of causation. *Id.* at 1163-64 (Werdergar, J., dissenting). The issue that divided judges from the trial court to the California Supreme Court was whether Saelzler's evidence was *sufficient* to support a *reasonable* inference of causation. *Compare id.* at 1155 ("The evidence at hand, however, merely shows the speculative possibility that additional daytime security guards and/or functioning security gates might have prevented the assault."), *with id.* at 1157 (Kennard, J., dissenting) ("Here, plaintiff offered evidence from which a reasonable trier of fact could find that defendants' failure to maintain their property in a safe condition was more than a minimal cause of plaintiff's assault.") *and id.* at 1163 (Werdergar, J., dissenting) ("In sum, plaintiff submitted sufficient evidence . . . to permit a rational jury to find that defendants' omissions were a substantial factor in causing her injuries."). The court of appeal's opinion, and the dissenting opinions of Justices Kennard and Werdergar, argue that Saelzler did not bear the burden to identify her assailants because she did not have to identify her assailants to make out a legally sufficient case on proximate cause. *See* Saelzler v. Advanced Group 400, 92 Cal. Rptr. 2d 103, 112 (Ct. App. 1999) ("Having created this situation, it should not be the crime victim's responsibility to prove the behavior of her unknown assailants followed the general pattern – commit crimes where and when the risk of detection is minimal or better yet non-existent and avoid committing them where the risks are significant."); *Saelzler*, 23 P.3d at 1156 (Kennard, J., dissenting) ("Thus, under well-established law plaintiff here need not prove with certainty that the presence of security guards would have prevented the sexual assault."); *Saelzler*, 23 P.3d at 1161 (Werdergar, J., dissenting) ("Moreover, in requiring plaintiff to 'prove [her assailants] would not have succeeded in assaulting her if defendants had provided additional security precautions,' the majority both misstates the applicable proof burden and places it on the wrong party." (citation omitted)).

the complete absence of security measures in the building complex was a substantial factor in causing the criminal attack on Ms. Saelzler.[330]

The majority placed the burden on Ms. Saelzler to identify her assailant.[331] They concluded that her inability to do so precluded the jury from rationally inferring that her *particular* assailant would have been deterred by reasonable security measures in the building.[332] The dissenting justices disagreed, arguing that Saelzler had presented sufficient evidence to support an inference that reasonable security measures would likely have deterred her assailant from attacking her.[333]

The building owners did not dispute that they owed a duty to Ms. Saelzler to provide reasonable security on the premises and that they breached that duty by failing to provide daytime security personnel.[334] Indeed, the trial court found "overwhelming evidence of prior incidents of trespass and broken or inoperable perimeter fences or gates, and a 'long list' of criminal activity on the premises, including a juvenile gang possibly 'headquartered there.'"[335] The trial court concluded that there existed triable issues of duty and breach:

> Given the "high foreseeability" that violent crime would occur on their premises, moving defendants had a duty to provide security and to diligently repair security devices on the premises such as the locks on their gates .... Moving defendants, however, have provided no evidence about their security precautions. And Plaintiffs have provided evidence that the only precautions moving defendants have taken was in hiring security guards to patrol at night. Thus, clearly an issue of fact exists as to whether moving defendants breached their duty to provide reasonable safety precautions to check [the] rampant violence.[336]

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330. *See Saelzler*, 23 P.3d at 1143. Justices Kennard, Werdergar, and Mosk dissented. *See id.* at 1155, 1157.

331. *See id.* at 1151-52.

332. *See id.* at 1155.

333. *See id.* at 1155-64.

334. *See id.* at 1148.

335. *Id.*

336. Saelzler v. Advanced Group 400, 92 Cal. Rptr. 2d 103, 105 (Ct. App.1999) (alteration in original) (footnote omitted).

Nevertheless, defendants successfully argued in the trial court and the supreme court that Ms. Saelzler could not prove *causation* because she could not identify her assailants.[337] The majority agreed with the property owners that, had the assailant been a tenant in the complex, the owner's failure to repair broken locks on several gates to the complex could not have caused the assault because he would have gained entry with his key.[338] Even if the perpetrator had not been a tenant, he could have entered the complex by following a tenant through the gate.[339] The majority further observed that "plaintiff cannot show that roving guards would have encountered her assailants or prevented the attack."[340] The court concluded that Ms. Saelzler was "unable to prove [that] it was 'more probable than not' that additional security precautions would have prevented the attack."[341]

The court of appeal majority and the dissenting California Supreme Court justices argued that the plaintiff's evidence of high foreseeability that violent crime would occur on defendant's premises, coupled with the complete absence of daytime security measures, was sufficient to support a rational inference by a jury that reasonable security measures would have deterred Ms. Saelzler's attackers.[342] Justice Werdergar charges,

> [T]he majority flatly misstates the requirements for proof of causation. California's substantial factor [causation] standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. The majority misunderstands the substantial factor test, improperly suggesting it burdens plaintiff with proving it more probable than not . . . that defendants' carelessness caused her injuries.[343]

The court of appeal majority and the dissenting supreme court justices in *Saelzler* were troubled by the potential for

337. *Saelzler*, 23 P.3d at 1147.
338. *Id.* at 1151.
339. *Id.* at 1149.
340. *Id.* at 1152.
341. *Id.*
342. *Id.* at 1163.
343. *Id.* at 1161 (citations and internal quotation marks omitted). "Even at trial, a plaintiff need not establish causation with certainty . . . a certain element of guesswork is always involved." *Id.* at 1156.

abuse posed by the newly invigorated summary judgment procedure.[344] These judges expressed grave concern that the dismissal of Ms. Saelzler's claim on summary judgment deprived her of her right to a jury trial[345] and crossed the line that divides the functions of judge and jury by converting questions of fact into questions of law.[346] Justice Werdergar emphasized that the majority also slipped across the law-fact divide by confusing the issue of a landlord's *duty*, a policy-laden question of law for judges to resolve, from factual questions of causation which fall peculiarly within the province of the jury to apply its common sense and ordinary experience.[347]

Saelzler also raises questions about the extent to which the moving defendant's burden has been relaxed under the liberal summary judgment standard announced by Justice Chin. The dissenting justices criticized the majority for shifting the burden of identifying Ms. Saelzler's assailants from the moving defendant to Ms. Saelzler, requiring her to establish causation with certainty.[348] The court of appeal's opinion articulates this position best:

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344. *See id.* at 1155-57 (Kennard, J., dissenting) ("Only by bending both the rules of summary judgment and the legal causation element of negligence can the majority reach its result."). *Id.* at 1155.

345. *See id.* at 1157 (Kennard, J., dissenting) ("The majority's errors deprive plaintiff of her constitutional right to a trial by jury. A judge ruling on a motion for summary judgment is not sitting as a trier of fact. When, as here, the plaintiff has a triable issue of material fact it is the jury that must decide the issue.").

346. Justice Werdergar in her dissent stated,

> Like other fact questions, that of causation indisputably is entrusted to the "common sense which we have traditionally attributed to that body." *O'Keefe v. South End Rowing Club* [cite omitted] In the past, we have found "no reason to assume that a . . . common sense determination of . . . [causal] responsibility will be beyond the ken of . . . juries" *Safeway Stores, Inc. v. Nest-Kart*, and the majority provides no reason to assume so here.

Id. at 1161-62 (Werdergar, J., dissenting) (citation omitted).

347. *See Saelzler*, 23 P.3d at 1158 (Werdergar, J., dissenting). Justice Werdergar stated that the "question of causation long has been recognized as a *factual* one, and it is only where reasonable men and women will not dispute the absence of causality that it becomes a question of law . . . ." *Id.* (internal quotation marks, citation, and alteration omitted). She elaborated that "[p]roof of the relation of cause and effect can never be more than the projection of our habit of expecting certain consequents to follow certain antecedents merely because we have observed those sequences on previous occasions. . . . *Such questions are peculiarly for the jury*." *Id.* at 1160 (quotation marks omitted).

348. *Saelzler*, 23 P.3d at 1156-60.

> Having created this [criminal] environment into which Ms. Saelzler innocently entered, it should not be the crime victim's responsibility to prove the behavior of her unknown assailants followed the general pattern – commit crimes where and when the risk of detection is minimal or better yet non-existent and avoid committing them where the risks are significant. Instead proof of causation is lacking only when the evidence shows this particular crime was an exception – it would have happened even had the owner satisfied the standard of care by providing a reasonable level of security precautions.[349]

Under this line of reasoning, the defendant should have borne the burden of conclusively establishing that "the general causal connection between absence of security and criminal activity does not apply in this case by showing this particular criminal would have committed this crime against this victim despite the presence of reasonable security measures."[350] Arguably, had the *Saelzler* majority applied the traditional California summary judgment standard, utilized by the court of appeal, the landlord would have borne the burden to *conclusively* negate causality.[351] Instead, the court reversed the traditional standard by requiring Ms. Saelzler to *conclusively* establish causality, a burden she would not have borne even at trial.[352]

Underlying the differences between the judges and justices in *Saelzler* are divergent views on substantive policy questions pertaining to tort law liability of landlords for crimes committed on their property.[353] However, the *Saelzler*

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349. *Saelzler,* 92 Cal. Rptr. 2d at 112.

350. *Id.*

351. *See Saelzler,* 23 P.3d at 1154. Justice Chin criticized the "burden-shifting approach" taken in the lower appellate court for being "directly contrary to the state's summary judgment statute, which provides that a defendant meets its burden of showing that a cause of action has no merit 'if that party has shown that one or more elements of the cause of action . . . cannot be established . . . .'" *Id.*

352. *Cf. id.* at 1155. *See also id.* at 1156 (Kennard, J., dissenting) ("In essence, the majority imposes on plaintiff the burden of showing causation with certainty. This is wrong.").

353. *See id.* at 1145. Justice Chin opened his majority opinion by focusing not on summary judgment, but on the need to consider the substantive question of "the liability of apartment owners . . . to persons injured on their premises by the criminal acts of others" and to "balance . . . competing policy concerns." *Id.* By contrast, Justice Werdergar opened her dissenting opinion by asserting that

opinion highlights a difficult question about the extent to which, if at all, the more liberal summary judgment standard announced in that decision, in the future, will provide leverage for judges to divert cases from the jury that they disfavor on substantive grounds.

As postscript to this analysis of the movant's burden in *Saelzler*, it is interesting to note that Justice Mosk, known as a liberal on social policy issues, joined Justice Werdergar's dissent in opposing the dismissal of plaintiff's claim on summary judgment, apparently on substantive tort law grounds.[354] One month after *Saelzler* was decided, Justice Mosk authored the court's opinion in *Aguilar* that placed a powerful summary judgment procedure in the hands of defendants.[355] Ironically, Justice Mosk's opinion in *Aguilar* frustrated efforts by liberals in the legislature to launch a counterrevolution in summary judgment by restoring the traditional California approach.[356]

3. Aguilar v. Atlantic Richfield Co.

The capstone of the California Supreme Court's trilogy is Justice Stanley Mosk's opinion in *Aguilar v. Atlantic Richfield Co.*, in which he definitively sets forth "the law that courts must apply in ruling on motions for summary judgment in all actions."[357]

Aguilar brought a class action on behalf of herself and all other retail consumers of CARB gasoline alleging that nine major oil companies "had entered into an unlawful conspiracy to restrict the output of CARB gasoline and to raise its price."[358] The oil companies moved for summary judgment,

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Justice Chin confused the "policy-laden questions about the existence . . . of a landlord's *duty* to maintain reasonably safe premises" with the factual issue of causation. *Id.* at 1157. Justice Werdergar went on to suggest that the court used the causation issue to "further . . . insulate even the most careless [landlords] from their minimal responsibilities . . . ." *Id.* at 1158.

354. *Id.* at 1164.

355. Aguilar v. Atl. Richfield Co., 24 P.3d 493 (Cal. 2001).

356. See Dan Walters, *Justice Mosk's Last Decision Creates Political Problem for Democrats*, SACRAMENTO BEE, July 6, 2001, at A3.

357. *Aguilar*, 24 P.3d at 501 ("We granted review in this cause to clarify the law that courts must apply in ruling on motions for summary judgment, both in actions generally and specifically in antitrust actions for unlawful conspiracy.").

358. *Id.* at 502. This private class action was backed by State Attorney General Bill Lockyer. *See* Walters, *supra* note 356, at A3. The subject of the suit was politically charged.

Democrats, led by Gov. Gray Davis and Lockyer, have accused

submitting "declarations by officers or managers or similar employees with responsibility in the premises, generally stating on personal knowledge how the company made its capacity, production, and pricing decisions about CARB gasoline, asserting that it did so independently, and denying that it did so collusively with any of the others."[359] In response, Aguilar

> presented evidence including the companies' gathering and dissemination of capacity, production, and pricing information, through the independently owned and operated Oil Price Information Service . . . ; their use of common consultants; and . . . execution of exchange agreements – under which . . . two companies may trade . . . products of the same type in different geographical areas and/or at different times *or* products of different types in the same geographical area and/or at the same time – including any consequent activity, or lack of activity, in the spot market, where individual wholesale bulk sales and purchases are transacted. She also presented . . . evidence in the form of opinion by experts.[360]

Initially, the trial court granted defendants' summary judgment motion, finding that the declarations submitted by the oil companies satisfied their movants' burden to show an absence of conspiracy and that Aguilar failed to meet her respondent's burden to make a prima facie showing of an unlawful conspiracy.[361] The trial court, on Aguilar's motion

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> electricity generators and brokers of gouging the state. Davis insists that the companies should be compelled to rebate $9 billion. Democrats have been conducting investigative hearings, and Lockyer says he's pursuing a criminal investigation. . . . By upholding a higher standard of proof [for plaintiffs in price fixing suits] . . . Mosk's decision will make it much more difficult for lawsuits to be filed against energy companies on mere suspicion that they have fixed power prices.

Id.

359. *Aguilar*, 24 P.3d at 503.

360. *Id.*

361. *Id.* at 504. The trial court concluded,

> "[T]he *only* logical inference which can be drawn" from Aguilar's evidence, even after it has been "examin[ed] . . . in its entirety and without compartmentalization," is that the "actions" of the petroleum companies "were a pro-competitive response to a regulatory requirement which forced members of an oligopoly to restructure their product mix and incur substantial additional capital expenditures." Aguilar had "attempted to weave" a "complex, tangled web" of unlawful conspiracy. Her evidence, however, "suggest[ed]" only individual companies "using all available information sources to determine

for a new trial, reversed its summary judgment ruling based on its belief that it had applied the wrong legal standard for determining whether the defendants' declarations were sufficient to meet their movants' burden.[362] In granting a new trial, the trial court explained that the requirements of *Biljac Associates v. First Interstate Bank*[363] were initially misread, and that the proper standard required the defendants to submit declarations from "*each* person responsible within *each* company for its capacity, production, and pricing decisions about CARB gasoline."[364] The trial court found that the defendants' submissions did not meet this exacting standard.[365]

A unanimous court of appeal reversed the new trial order and reinstated the trial court's summary judgment order,

> reject[ing] the superior court's . . . determination that it made an error in law in its reading and application of *Biljac*, finding no support therein for any requirement that the petroleum companies had to present evidence in the form of declarations by *each* person responsible within *each* company for its capacity, production, and pricing decisions about CARB gasoline.[366]

The supreme court unanimously affirmed the decision.[367]

In writing for the court, Justice Mosk set out to end six years of confusion following *Union Bank* over the summary judgment standards applicable in California courts. He began his analysis by stating, "Our task in this cause is to clarify the law that courts must apply in ruling on motions for summary judgment, both in actions generally and specifically in antitrust actions for unlawful conspiracy."[368]

> capacity, supply, and pricing decisions which would maximize their own individual profits – without regard to the profits of their competitors" and did "not support even the inference of" such a conspiracy.

Aguilar, 24 P.3d at 504 (alterations in original).

362. *Id.*

363. 267 Cal. Rptr. 819 (Ct. App. 1990).

364. *Aguilar*, 24 P.3d at 504 (emphasis added).

365. *See id.* at 504.

366. *Id.* at 504-05 (emphasis added).

367. *See id.* at 521. Justice Werdergar apparently did not participate in this decision. Two court of appeal associate justices – Hollenhorst and Kitching – sat by assignment. Justice Kennard, who dissented in both *Guz* and *Saelzler*, joined with the majority in *Aguilar* in affirming the grant of summary judgment to the defendants. *See id.*

368. *Id.* at 505.

In *Aguilar*, the court resolved all doubt that California summary judgment procedure has essentially caught up with federal summary judgment practice under *Celotex*.[369] Justice Mosk's opinion declared twice that "summary judgment law in this state now conforms, *largely but not completely*, to its federal counterpart as clarified and liberalized in *Celotex, Anderson*, and *Matsushita*."[370] Citing legislative history, the court held that the "purpose of the 1992 amendment [to the summary judgment statute] was 'to move summary judgment law' in this state 'closer' to its 'federal' counterpart as clarified in *Celotex, Anderson*, and *Matshushita*, in order to liberalize the granting of such motions."[371] Relying heavily upon the foundation laid by the first two trilogy decisions, *Guz* and *Saelzler*, *Aguilar* posits that in California, summary judgment law no longer requires "a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action."[372] Just like the federal summary judgment procedure under the *Celotex-Anderson-Matsushita* trilogy, California summary judgment burdens of production match the trial burdens of production. The *Aguilar* opinion states that "how the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial."[373]

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369. *See supra* Part II.C.

370. *Aguilar*, 24 P.3d at 509, 512 (emphasis added).

371. *Aguilar*, 24 P.3d at 508. Justice Mosk acknowledged

> that the legislative history of the 1992 and 1993 amendments contains certain summaries at least arguably supporting the perdurance of the conclusive negation requirement. But it was the 1992 and 1993 amendments "that [were] enacted, not any" such commentary. It is the former that "must prevail over" the latter, and not the opposite.

Id. at 513 (alteration in original) (citations omitted). The difficulty with this reasoning is that the 1992 amendment's language "cannot be established" is ambiguous and the legislative history is "remarkably obscure considering the magnitude of the potential change in the culture of California litigation." Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360, 365 (Ct. App. 1999). For a critique of *Union Bank's* analysis of the legislative history behind the 1992-1993 amendments, *see Koppel*, *supra* note 128, at 509-24.

372. *Id.* at 512. The California Supreme Court's *Molko* decision, as well as other case law requiring "a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action derives from summary judgment law as it stood prior to the 1992 and 1993 amendments, does not reflect such law as it stands now, and is accordingly disapproved." *Id.* at 515 n.19.

373. *Aguilar*, 24 P.3d at 510.

By equating summary judgment and directed verdict standards,[374] *Aguilar* disavows the language in *Barnes v. Blue Haven Pools* that "[t]here is nothing in the [summary judgment] statute which lessens the burden of the moving party simply because at the trial the resisting party would have the burden of proof on the issue on which the summary judgment is sought to be predicated."[375] Though a defendant may choose to negate plaintiff's case by submitting affirmative evidence, such as affidavits, in support of its summary judgment motion, it is not required to do so.[376]

Aguilar's pronouncement that California summary judgment law conforms to the federal model is limited, however, by the words *"largely but not completely."*[377] Elsewhere in the court's opinion, Justice Mosk restated this limitation: *"We agree that the 1993 amendment did not amount to such a 'wholesale adoption.'* But . . . we disagree with any implication that the parties' burden of persuasion and/or production on summary judgment is not dependent on the burden of proof at trial."[378]

What, then, are the remaining differences between California and federal summary judgment law and how significant are these differences? The *Celotex* decision stated that a moving defendant could meet its summary judgment burden to show "no genuine issue of material fact" by *pointing out* to the district court the absence of evidence to support the plaintiff's case.[379] Justice Mosk indicates that

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374. The Court stated,

> If a party moving for summary judgment in any action . . . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment. In such a case, as Justice Chin stated in his concurring opinion in *Guz*, the "court should grant" the motion "and avoid a . . .trial" rendered "useless" by nonsuit or directed verdict or similar device.

Aguilar, 24 P.3d at 514 (quoting Justice Chin's concurring opinion in Guz, 8 P.2d at 1126).

375. Barnes v. Blue Haven Pools, 81 Cal. Rptr. 444, 447 (Ct. App. 1969). *See Aguilar*, 24 P.3d at 514 n.25 ("To the extent that *Barnes v. Blue Haven Pools*, which was decided under summary judgment law as it stood prior to the 1992 and 1993 amendments, is to the contrary, it is no longer vital inasmuch as such law as it stands now is materially different.") (citation omitted).

376. *See Aguilar*, 24 P.3d at 521.

377. *Id.* at 860 (emphasis added).

378. *Id.* at 862 n.15 (emphasis added).

379. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

California summary judgment law parts company with *Celotex* in this respect: "Summary judgment law in this state, however, continues to require a defendant moving for summary judgment to present evidence, and not simply point out, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence."[380] Accordingly, the court rejected "[l]anguage in certain decisions purportedly allowing a defendant moving for summary judgment simply to 'point[ ]' out, through argument, 'an *absence of evidence* to support' an element of plaintiff's cause of action."[381]

The difference, however, between requiring a moving defendant to "present evidence" and "simply point[ing] out through argument" (the corresponding divergence of California from federal summary judgment law), may be more apparent than real. The meaning of the phrase "point out through argument" is ambiguous and the source of much confusion.[382]

A minority view within the federal courts, which is also expressed in a leading treatise on federal procedure, holds that "the moving party on a summary-judgment motion need not produce evidence, but *simply* can *argue* that there is an absence of evidence by which the nonmovant can prove his case."[383] The few decisions that adopt this view reflect a misunderstanding of *Celotex*.[384]

Celotex does employ the phrase "point out" but only in the context of requiring the moving defendant to affirmatively "show" or demonstrate to the court, by reference to the record,

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380. *Aguilar*, 24 P.3d at 513 (footnote omitted).

381. *Id.* at 513 n.23. The Court cites *Hunter v. Pac. Mech. Corp.*, 44 Cal. Rptr. 2d 335 (Ct. App. 1995), as an example of one of those decisions. *Id.*

382. *See generally* Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360, 367 n.1 (Ct. App. 1999) ("There is opportunity for confusion inherent in the vocabulary of the discussion," referring to words like "showing," "demonstrate," and "inform."); Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc., 210 F.3d 1099, 1102 (9th Cir. 2000) ("The vocabulary used for discussing summary judgment[] is somewhat abstract.").

383. WRIGHT ET AL., *supra* note 15, § 2720, at 345; SCHWARZER ET AL., *supra* note 22, § 14:137, at 14-32, 14-33 ("[Although] [s]everal cases state the opposing party's lack of evidence may be 'shown' by argument alone . . . most courts state the opponent's lack of evidence on an issue must be 'shown' by *reference to materials on file* . . . demonstrating the opponent will not be able to meet its evidentiary burden.").

384. *See, e.g.*, Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 532 (9th Cir. 2000); Cray Communications, Inc. v. Novatel Computer Sys., Inc., 33 F.3d 390, 394 (4th Cir. 1994).

that there is an "absence of evidence to support the nonmoving party's case."[385] The word "argument" is not found anywhere in the Supreme Court's opinion in *Celotex*.

The court of appeals in *Celotex* interpreted the Supreme Court's opinion in *Adickes v. S.H. Kress*[386] to require the defendant to support its motion with *affirmative evidence* negating plaintiff's case and, therefore, held that Celotex failed to meet its movant's burden of production when Celotex submitted the plaintiff's factually devoid interrogatory answers, which indicated she could not identify any witnesses to her husband's exposure to Celotex asbestos.[387]

The Supreme Court reversed, "find[ing] no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim."[388] The Court held that the factually devoid interrogatory answers submitted by Celotex satisfied its movant's burden.[389] The issue in *Celotex*, therefore, revolved around whether the moving defendant had to submit *affirmative evidence* in the form of affidavits to *negate* an essential element of plaintiff's case or whether the moving defendant could submit plaintiff's responses to defendant's discovery requests showing that the *plaintiff lacked its own evidence* to meet its burden of production at trial.[390] Although the Court held that the moving defendant did not have to submit evidence to affirmatively disprove the negative, the Court *did* impose an affirmative burden on the moving defendant to point to the record to demonstrate that the plaintiff has no case: "[A] summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' Such a motion, *whether or not accompanied by affidavits*, will be 'made and supported as provided in this rule.'"[391]

The Supreme Court disagreed with the position taken by the court of appeals' majority that "the *Adickes* language . . .

385. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).
386. Adickes v. S. H. Kress, 398 U.S. 144 (1970).
387. *Celotex*, 477 U.S. at 321-22, 325.
388. *Id.* at 323.
389. *Id.* at 334-35.
390. *Id.* at 322.
391. *Id.* at 324 (emphasis added).

should 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 proof."[392] The Court's use of the word "evidence" apparently did not subsume plaintiff's factually devoid responses to Celotex's interrogatories requesting plaintiff to identify her causation witnesses. Rather, the Court used the word "evidence" more narrowly to refer to defendant's *affirmative* evidence, such as *affidavits*, submitted to *negate* plaintiff's case. It is in this context that the language "pointing out" should be interpreted. The Court states, "[T]he burden on the moving party may be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case."[393] Justice White's concurring opinion and Justice Brennan's dissent confirm this interpretation of the Court's opinion. They argued that a bald assertion by the defendant of an absence of evidence to support plaintiff's claim is plainly insufficient to shift the burden to the plaintiff.[394] Justice Brennan agreed with the Court's rejection of the court of appeals' ruling that "the defendant must provide affirmative evidence disproving the plaintiff's case."[395]

In light of the foregoing, Justice Mosk's distinction between simply "pointing out," as that phrase is used in *Celotex*, and presenting "evidence," as that word is used in the recent California decisions relied upon in *Aguilar*,[396] is not meaningful. While *Celotex* does not use the word "evidence" to include factually devoid discovery responses, the court of appeal decisions relied upon by Justice Mosk in *Aguilar* do include them.[397] In *Scheiding*, the court of appeal noted that

392. *Id.* at 325 (emphasis added). The Ninth Circuit reconciles *Adickes* and *Celotex* by distinguishing them on the grounds that each case addressed different methods by which a movant may seek to meet its summary judgment burden. *See* Nissan Fire & Marine Ins. Co., v. Fritz Cos., 210 F.3d 1099, 1103-04 (9th Cir. 2000). In *Adickes*, the moving defendant chose to attempt to negate the plaintiff's case with affidavits of its *own* witnesses. *Id.* While in *Celotex*, the moving defendant sought to show an absence of evidence to support the plaintiff's case. *Id.*

393. *Celotex*, 477 U.S. at 325.

394. *Id.* at 328 (White, J., concurring).

395. *Id.* at 329 (Brennan, J., dissenting).

396. Aguilar v. Atl. Richfield Co., 24 P.3d 493, 513-14 (Cal. 2001).

397. *See id.* at 513 n.22.

California's summary judgment statute "requires the moving party to support its motions with *evidence* in the relatively elaborate form of separate statements."[398] Therefore, "[t]he statute itself thus implies the corresponding need for *concrete evidence* from the moving party and expressly requires the moving party to supply more than the *bare assertion*, . . . by way of *argument,* that the opposing party has no evidence to support a particular claim."[399]

Because the statute expressly requires the moving party to submit "evidence" to "show" that the plaintiff has no case, *Scheiding*, as well as *Hagen*[400] and Justice Chin's concurring opinion in *Guz* (which relied heavily upon *Scheiding*),[401] interprets "evidence" to include the opposing party's factually devoid discovery responses: "We agree with *Hunter* that the *circumstantial evidence* which would be required by *Hagen* can consist of 'factually devoid' discovery responses from which an absence of evidence can be inferred."[402] *Scheiding's* application of the above-stated principle to the facts of that case illustrate the truth of the court's observation that "[t]here is an opportunity for confusion inherent in the vocabulary of the discussion."[403]

Scheiding, like *Celotex*, was an asbestos case in which the plaintiff claimed that he had been exposed to asbestos on job sites where defendant, Dinwiddie Construction Company ("Dinwiddie"), was present.[404] Dinwiddie's summary judgment motion "contended that the plaintiffs had no evidence to suggest Dinwiddie's presence at the work sites where Robert's asbestos exposure allegedly occurred."[405] Relying on "several cases holding that a defendant can meet the burden of proof by showing, through the use of discovery responses, that a plaintiff has no evidence to support the case,"[406] Dinwiddie based its motion on "the declaration of

398. Scheiding v. Dinwiddie Constr. Co., 81 Cal. Rptr. 2d 360, 367 (Ct. App. 1999) (emphasis added).

399. *Id.* (emphasis added).

400. *See supra* notes 182-92.

401. Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1124 (Cal. 2000) (Chin, J., concurring).

402. *Scheiding,* 81 Cal. Rptr. 2d at 372.

403. *Id.* at 367 n.1.

404. *Id.* at 361-62.

405. *Id.* at 362.

406. *Id.*

defense counsel stating that [plaintiff] failed to ever mention Dinwiddie in the course of discovery."[407] The court held that Dinwiddie failed to carry its movant's burden because

> Dinwiddie conducted no discovery. In his deposition plaintiff was not asked a single question concerning Dinwiddie.... The plaintiff had no duty to volunteer information that was not requested. The distinction is material because without the premise of such a duty, neither the moving party nor the trial court here could rely on the inference of completeness which was fundamental to the holdings of both *Union Bank* and *Hunter*.[408]

The *Scheiding* opinion erroneously concluded by characterizing Dinwiddie's proffered basis for its motion as "mere argument."[409] The court *meant* to express its holding that the plaintiff's deposition testimony, relied upon by Dinwiddie, was not "factually devoid."[410] Viewed as *circumstantial evidence*, the testimony did not support the logical inference that plaintiff had no case against Dinwiddie.[411]

Scheiding illustrates the point that every movant *argues* its motion by pointing out parts of the record that support its argument. Essentially, the *Scheiding* court held that Dinwiddie failed in its use of discovery to lay the groundwork for its summary judgment motion. In other words, Dinwiddie did not do enough to affirmatively demonstrate an absence of evidence to support the plaintiff's case.

The question that remains unresolved in California courts after *Aguilar*, as it did in federal courts after *Celotex*, is not whether the moving defendant "must *affirmatively show* the absence of evidence in the record."[412] The question

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407. *Id.*

408. *Id.* at 370-71.

409. *Id.* at 373.

410. *Id.* at 370.

411. *Id.* at 372. Other post-*Union Bank* decisions in the California Court of Appeal have held that factually *vague* deposition responses by plaintiff supported a moving defendant's summary judgment burden. *See* Hunter v. Pac. Mech. Corp., 44 Cal. Rptr. 2d 335 (Ct. App. 1995). *But see* Hagen v. Hickenbottom, 48 Cal. Rptr. 2d 197, 208 (Ct. App. 1995) (questioning the conclusion of *Hunter*, decided in a different district of the appeals court, "that 'factually vague' deposition responses by the plaintiff himself sufficed, in the circumstances of that case, to shift the burden to the plaintiff.").

412. Celotex Corp. v. Catrett, 477 U.S. 317, 331 (1986) (Brennan, J.,

is, rather, how much affirmative discovery must the moving defendant engage in to meet its movant's burden on summary judgment?

A close reading of the Supreme Court's *Celotex* opinion reveals that *mere conclusory assertions*, either in an attorney's declaration or in a memorandum of points and authorities, that the opposing plaintiff has no evidence is insufficient to satisfy the moving defendant's summary judgment burden.[413] The few contrary federal decisions[414] holding that mere argument, unsupported by specific references to the record, is sufficient represent a minority view that incorrectly interprets *Celotex*. Under both *Celotex* and *Aguilar*, the moving defendant must take affirmative steps, including adequately utilizing discovery, to show an absence of evidence to support the opposing party's case.[415] A recent opinion of the Ninth Circuit, *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*,[416] reflects the majority view that the moving defendant in federal court still bears a significant burden under *Celotex*:

> We note that *Celotex* did not hold that a moving party without the ultimate burden of persuasion at trial may use a summary judgment motion as a substitute for discovery. . . . In a typical case, in order to carry its initial burden of production by pointing to the absence of evidence to support the nonmoving party's claim or defense, the moving party will have made reasonable efforts, using the normal tools of discovery, to discover whether the nonmoving party has enough evidence to

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dissenting) (emphasis added).

413. *See, e.g.*, *id.* at 328 (White, J., concurring) ("It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."); *id.* at 332 (Brennan, J., dissenting) ("Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient."). *But see* Cray Communications, Inc. v. Novatel Computer Sys., 33 F.3d 390, 393 (4th Cir. 1994) ("[U]nder *Celotex*, 'the moving party on a summary judgment motion need not produce evidence, but simply can argue that there is an absence of evidence by which the nonmovant can prove his case.'").

414. *See* Fairbank v. Wunderman Cato Johnson, Corp., 212 F.3d 528 (9th Cir. 2000); *Cray Communications*, 33 F.3d at 390.

415. *See* SCHWARZER ET AL., *supra* note 22, at 14-32, 14-33 (providing the practice pointer: "Avoid any uncertainty. Do not rely solely on argument to make your showing. Utilize discovery procedures to force disclosures establishing the opposing party has no evidence to support some element of its claim or defense.").

416. 210 F.3d 1099 (9th Cir. 2000).

carry its burden of persuasion at trial.[417]

Although it is clear that under both *Aguilar* and *Celotex* the moving defendant who seeks to show an absence of evidence to support the plaintiff's case must engage in reasonable discovery to lay the foundation for its summary judgment motion, the question that requires judicial clarification is, what constitutes reasonable discovery in a given case?[418]

The *Celotex* Court fragmented over the question of what affirmative steps a moving defendant must take to satisfy the "showing."[419] Justice Brennan's dissent, joined by Chief Justice Berger and Justice Blackmun, chided the majority for "giving insufficient guidance to the district courts" on this issue.[420]

Justice Brennan's dissent noted that where "the moving party [opted to] demonstrate to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim . . . a conclusory assertion that the nonmoving party has no evidence is insufficient."[421] The dissent, while agreeing with the movant's burden standard adopted by the majority, did not agree with its application to the facts of the case.[422] Notwithstanding Mrs. Catrett's failure to identify any witnesses to her deceased husband's exposure to defendant's asbestos in response to defendant's interrogatories, the record did indicate the existence of potential testimony from her husband's former supervisor regarding the deceased's exposure to Celotex asbestos.[423] Justice Brennan's dissent concluded that Celotex had a burden to affirmatively demonstrate the absence of relevant testimony by the supervisor by deposing the supervisor; because Celotex failed

417. *Id.* at 1105 (citations omitted).

418. Districts in the California Court of Appeal disagree over the sufficiency of the moving defendant's discovery activities to show the insufficiency of plaintiff's case to create a triable issue. *Compare* Hagan v. Hickenbottom, 48 Cal. Rptr. 2d 197 (Ct. App. 1995), *with* Hunter v. Pac. Mech. Corp., 44 Cal. Rptr. 2d 335 (Ct. App. 1995). *See also* text accompanying *supra* notes 172-192.

419. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

420. *Id.* at 329 (Brennan, J., dissenting).

421. *Id.* at 331-32 (Brennan, J., dissenting) (citations omitted).

422. *See id.* at 329 (Brennan, J., dissenting).

423. *See id.* at 336-37 (Brennan, J., dissenting).

to do so, it did not meet its movant's burden.[424]

Justice Brennan's dissent suggested concrete ways in which a moving defendant may seek to demonstrate or show an absence of evidence to support plaintiff's case:

> [A]s the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of the documentary evidence. [Or] the moving party may demonstrate this by reviewing for the court the admissions, interrogatories and other exchanges between the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party.[425]

The *Aguilar* opinion, like the U.S. Supreme Court's opinion in *Celotex*, while providing much-needed guidance on the principles of California summary judgment law, provides insufficient guidance to trial courts in the practical application of those principles. It is unclear precisely what a moving defendant must do to satisfy the requirement that it present evidence to show an absence of evidence to support the plaintiff's case.

The *Aguilar* court indicates that some forms of factually devoid discovery responses that show the plaintiff has "no case" will suffice.[426] The court stated that "[t]he defendant may [also] present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence – *as through admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing.*"[427]

What, short of an express (and unlikely) concession by the plaintiff that it has no case, will satisfy the court's standard? Taking a leaf from Justice Brennan's dissent in *Celotex*, must the defendant scour the record for potential evidence that might support the plaintiff's case and negate these through discovery?

Aguilar, like *Saelzler*, extends the holding of *Union Bank*

424. *Id.*
425. *Id.* at 332 (Brennan, J., dissenting).
426. Aguilar v. Atl. Richfield Co., 24 P.3d 493, 513-14 (Cal. 2001).
427. *Id.* (emphasis added).

beyond the use of factually devoid discovery responses to prove that plaintiff has no case. Where defendant's discovery *does* reveal the existence of *some evidence* that plaintiff will likely present at trial, *Aguilar*, like *Celotex*, permits the moving defendant to demonstrate that such evidence would be legally insufficient to forestall a directed verdict motion by the defendant at trial. Citing *Saelzler*, and quoting from Justice Chin's concurring opinion in *Guz*, the Court states,

> To speak broadly, all of the foregoing discussion of summary judgment law in this state, like that of its federal counterpart, may be reduced to, and justified by, a single proposition: If a party moving for summary judgment in any action . . . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment. In such case, as Justice Chin stated in his concurring opinion in *Guz*, the 'court should grant' the motion 'and avoid a . . . trial' rendered 'useless' by nonsuit or directed verdict or similar device.[428]

Under the actual facts of *Aguilar*, the moving defendants did *not* seek to demonstrate an *absence* of evidence to support Aguilar's case, through factually devoid discovery responses or otherwise. Rather, the oil companies submitted *affirmative evidence* in the form of declarations from fewer than all of their officers and managers who played a role in capacity, production and pricing decisions.[429] Had the case proceeded to trial, the defendants would have called these employees to the stand during their case in chief to attempt to persuade the jury that the defendants did not collude to restrict output and raise prices.

Justice Mosk observed that "[t]he defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action."[430] When a moving defendant submits its *own affirmative evidence*, such as declarations from the defendant's own high level employees denying that they engaged in actionable conduct on behalf of their employer (as was the case in *Aguilar* and *Guz*), what is the standard of sufficiency such affirmative evidence must meet to shift the burden to the plaintiff? Must this evidence

428. *Id.* at 514.
429. *See id.* at 502-03.
430. *Id.* at 513.

be "conclusive?"

The court implies that the evidence must be conclusive.[431] However, where the moving defendant *chooses* to conclusively negate the plaintiff's case, the *Aguilar* decision seems to have lessened the burden here also by redefining what it takes for evidence to be "conclusive." The trial court in *Aguilar*, in deciding that it improperly granted summary judgment, read *Biljac* to require that the oil companies submit declarations from "*each* person responsible within *each* company for its capacity, production, and pricing decisions."[432] This rigorous requirement is consistent with *Biljac's* ruling that the moving defendant conclusively negate plaintiff's case. The oil companies' submissions in support of their motion did not satisfy this rigorous requirement.[433] The *Aguilar* court agreed with the court of appeal's ruling that the superior court "misread and misappl[ied]" *Biljac*.[434] Observing that *Biljac*, decided in 1990, did not interpret the *current* summary judgment law as amended in 1992 and 1993, the court stated:

> *Biljac* held *at most* that declarations by each person responsible within each of certain entities for certain decisions were *sufficient* under summary judgment law as it stood prior to the 1992 and 1993 amendments to negate an unlawful conspiracy, presumably conclusively. *Biljac* did *not* hold that declarations by officers and managers and similar employees of the sort that the petroleum companies presented here were *insufficient* under summary judgment law *as it stands now even to carry their initial burden of production to make a prima facie showing of the absence of any conspiracy.*[435]

Justice Mosk wrote that the oil companies met their movant's burden to show the nonexistence of a triable issue of conspiracy:

> Through the declarations by their officers and managers and similar employees -- and through material from others including third parties -- [the defendants] presented evidence that would require a reasonable jury *not* to find any conspiracy more likely than not. The declarations in question, it must be emphasized, generally

431. *See id.*
432. *Id.* at 504-05 (emphasis added).
433. *Id.* at 504.
434. *Id.*
435. *Id.* at 520 (emphasis added at end of quotation) (citation omitted).

> stated on personal knowledge how the companies made their capacity, production, and pricing decisions about CARB gasoline. Hence, they did more than baldly assert that they made them independently, and did more than baldly deny that they made them collusively with each other.[436]

The declarations of *some* employees submitted by the oil companies that they did not collude with competitors to fix prices, did not account for *all* employees who played a role in capacity, production and pricing decisions.[437] Under a strict application of *Barnes's* conclusive negation standard, Aguilar might have successfully challenged the sufficiency of these declarations on grounds of completeness.[438] However, *Aguilar* appears to have also overruled or, at least modified, this aspect of *Barnes* by allowing the defendants to submit declarations from fewer than all pertinent employees. In doing so, the court has apparently lessened the burden of a defendant who chooses to support its motion with paper evidence of its own affirmative case directed to that element.[439]

Also, *Aguilar* relaxed the conclusive negation standard by implicitly holding that declarations of defendants' high-level employees did not create triable issues of credibility. As in *Guz*, the defendants' witnesses were interested employees, each of whom denied engaging in actionable conduct.[440] Such witnesses would be vulnerable to bias impeachment at trial.[441]

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436. *Id.* at 518 (footnote omitted).

437. *Id.* at 502-03.

438. *Barnes* explained that "[t]here are, of course, cases . . . where the moving defendant, by its affidavits, effectively precluded any possibility of recovery by the plaintiff in the absence of a challenge to their veracity or *completeness*." Barnes v. Blue Haven Pools, 81 Cal. Rptr. 444, 447 (Ct. App. 1969) (emphasis added) (citations omitted).

439. *See* Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1104 (9th Cir. 2000). The Ninth Circuit, in *Nissan,* by closely comparing the *Adickes* and *Celotex* opinions, observed that a moving defendant without the ultimate burden of persuasion at trial may seek to support its motion *either* by offering affirmative evidence to negate the plaintiff's case *or* by "showing" an absence of evidence to support plaintiff's case. *See id.* at 1106. The Ninth Circuit also suggested that a moving defendant who seeks to negate plaintiff's case must do so completely, with no "unexplained gaps," noting the holding in *Adickes* that defendant did not successfully negate the plaintiff's case because of such gaps in the affidavits submitted by Kress. *Id.* at 1104.

440. *Aguilar*, 24 P.3d at 502-03.

441. *See* CAL. CIV. PROC. CODE § 324c(e) (Deering 2002).

C. *The Respondent's Burden: Setting a High Standard of Sufficiency*

In each of the trilogy decisions, the California Supreme Court lessened the burden on the moving defendant in a summary judgment motion, thereby making it easier for defendants to shift the burden to the nonmoving plaintiff to produce evidence that a triable issue exists.[442] In each case, once the burden shifted to the plaintiff, the court's trilogy increased the respondent's burden, making it more difficult for the plaintiff to present sufficient evidence to forestall summary judgment.[443] The supreme court in each of these decisions required the plaintiff's evidence to meet a very high standard of sufficiency to satisfy the respondent's burden.[444] In the process, the supreme court came close to weighing the strength of plaintiff's case, substituting summary judgment for the trial itself.

These were not cases, like *Union Bank*, in which the plaintiff revealed through factually devoid discovery responses that there was a complete absence of evidence to support plaintiff's burden of production at trial.[445] In each of the trilogy cases, a supreme court majority found that the plaintiff's case was not *strong enough* to create a triable issue. Two of these decisions, *Guz* and *Saelzler*, reversed a split court of appeal and were met with dissents, indicating that judges differed on whether a jury could reasonably find for the plaintiff. In the third decision of the trilogy, *Aguilar*, the court followed the controversial *Matsushita* decision that paved the way in federal court for more aggressive use of summary judgment in complex antitrust matters to resolve subjective issues of motive and intent. [446]

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442. *See supra* Part III.A.
443. *See supra* Part III.A.
444. *See supra* Part III.A.
445. *See supra* Part III.A.
446. *See* Patricia M. Wald, *Federal Practice and Procedure Symposium Honoring Charles Alan Wright: Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1907 (1998).

1. Guz v. Bechtel National, Inc.: *The Age Discrimination Claim*[447]

Once the supreme court had ruled that Bechtel had met its movant's burden to show a nondiscriminatory reason for firing Guz, the burden shifted to Guz to block summary judgment.[448] To meet this burden, Guz had to present sufficiently persuasive evidence that a jury could render a reasoned verdict in his favor. The court's majority ruled that Guz failed to meet his respondent's burden.[449] The court found Guz's rebuttal "unpersuasive," "weak" and lacking in "sufficient probative force" to support a rational inference of intentional age discrimination when weighed against "Bechtel's strong and unrebutted showing that it took its actions for nondiscriminatory reasons . . . ."[450] The majority concluded that Guz's prima facie case, though technically sufficient, "raise[d], at most, a weak inference of prohibited bias."[451] In making this subjective evaluation of the strength

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447. Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089 (Cal. 2000). Although the Court's opinion addresses Guz's three causes of action, this analysis focuses on the Court's treatment of Guz's age discrimination claim because it sheds more light than the other two claims on the current status of summary judgment law in California.

448. *See id.* at 1115. The California Supreme Court ruled that Bechtel submitted sufficient evidence of nondiscriminatory reasons for eliminating Guz's work unit and "thereafter, cho[osing] persons other than Guz for vacant positions in the unit to which [the phased-out unit's] functions were transferred" to meet movant Bechtel's burden. *Id.* Bechtel's proffered reasons for eliminating Guz's work unit were a downturn in workload and a desire to cut costs. *Id.* at 1120. Bechtel also presented evidence that the younger persons chosen over Guz to fill the vacant positions in the new unit were qualified for their positions, which was uncontradicted by Guz. *See id.*

449. *See id.* at 1112 ("None of Guz's theories is persuasive.").

450. *Id.*

451. *Id.* at 1118 n.25.

Disagreeing with Justice Chin's concurring opinion, Justice Kennard concluded that Guz's evidence

> was sufficient to establish a prima facie case of age discrimination under the *McDonnell Douglas* test: (1) He was over 40 years of age when terminated; (2) his job performance exceeded Bechtel's legitimate expectations (he was promoted six times, and was given 17 merit raises, and he received a Silver Performance Plus Award for saving the company $1.7 million; his 1991 performance review described him as a 'strong performer in his group'; and in his 22 years at Bechtel, he was never told his skills were deficient); and (3) Bechtel treated younger workers more favorably than older workers by transferring from the disbanded BNI-MI unit (where Guz was employed) to SFRO-MI and selecting for two of the three new SFRO-MI positions, workers between seven and 15 years younger than Guz: and by retaining the two

of Guz's prima facie case, the court emphasized that the size of Guz's statistical sample was not large enough to show a pattern of discrimination[452] and that the workers who filled the vacant positions were not young enough to support an inference of age-based preference.[453] Additionally, the court refused to credit Guz's evidence that Bechtel's nondiscriminatory reasons were false and, therefore, a pretext for age related bias.[454] The court emphasized that "Guz made substantial concessions to the truth of Bechtel's proffered nondiscriminatory reasons for its decision to eliminate BNI MI and for choosing others to fill positions at SFRO-MI."[455]

Although Justice Mosk in his concurrence conceded that "the question [was] close," he nonetheless agreed with the majority that Guz failed to meet his respondent's burden "in light of Guz's concessions as to the nondiscriminatory nature of many of [Bechtel's] actions, and in light of the weakness of Guz's prima facie case . . . ."[456]

Justice Kennard dissented, concluding, as did a majority of justices in the California Court of Appeal decision, that "the evidence does show a triable issue of fact, and that plaintiff deserves a trial on the merits to determine whether he lost his job for legitimate business reasons or because of illegal age discrimination."[457] Evaluating the same evidence as the majority, Justice Kennard found that "Guz could still prevail at trial" based upon his prima facie case of age discrimination and his "sufficient additional evidence from

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youngest of the six workers at BNI-MI, while terminating the two oldest.

Id. at 1132 (Kennard, J., dissenting).

452. *See id.* at 1122 ("[T]he premise that Bechtel purposely favored two workers on the basis of youth when deciding which BNI-MI employees to retain is weakened, for statistical purposes, by the small size of that unit, which included only six persons.").

453. *See id.* ("Moreover, an issue arises whether the younger persons with whom Guz seeks comparison were younger *enough* to raise a logical suspicion of intentional age bias.").

454. *See id.* at 1121 ("In sum, we see no grounds in this record for an inference that Bechtel has materially dissembled in explaining the reasons, unrelated to chronological age, for the personnel decisions leading to Guz's dismissal."). *But see id.* at 1130 (Kennard, J., dissenting) (reciting the evidence Guz presented to show Bechtel's reasons for terminating Guz were pretextual).

455. *Id.* at 1119 (emphasis omitted).

456. *Id.* at 1124 (Mosk, J., concurring).

457. *Id.* at 1134 (Kennard, J., dissenting).

which a reasonable fact finder could reject 'the employer's asserted justification [as] false.'"[458] Justice Kennard suggested the court's imposition on Guz of a high standard of sufficiency of the evidence on summary judgment undercut California's public policy against age discrimination in employment reflected in the FEHA.[459] Perceiving a connection between summary judgment standards and the enforceability of substantive rights, Justice Kennard wrote,

> The nature and purpose of the prohibition against age discrimination in employment should be kept in mind when assessing the sufficiency of the evidence and the allocation of the proof burdens on a summary judgment motion in an age discrimination case.[460]

The evidence submitted by the plaintiff in *Guz* can be accurately characterized as presenting a *close case*, not "no case" as in *Union Bank* and *Celotex*. In *Union Bank* and *Celotex*, the plaintiffs could not identify a single witness to testify to the material facts in response to defendants' interrogatories as to which defendant claimed there was no genuine issue.[461] In *Guz*, the majority assessed the probative strength and persuasiveness of Guz's case on the critical issue of Bechtel's subjective intent in terminating Guz's employment and weighed Guz's evidence against Bechtel's evidence of nondiscriminatory motive.[462] Motive and intent are questions of fact traditionally reserved for jury determination.[463] Since employers rarely, if ever, make statements that candidly admit to discriminatory intent

458. *Id.*

459. *See id.* at 1130.

460. *Id.* at 1132 n.2.

461. *But see id.* at 1112 (Chin, J., concurring) ("Guz has presented no meaningful evidence *whatsoever*, direct *or* circumstantial, suggesting age discrimination.").

462. *See id.* at 1112. The majority compares Guz's "weak" statistical evidence of age bias against Bechtel's "strong and unrebutted showing that [Bechtel] took its actions for nondiscriminatory reasons . . . ." *Id.*

463. *See* WRIGHT ET AL., *supra* note 15, § 2730, at 7 ("Inasmuch as a determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable people might differ – a function traditionally left to the jury – summary judgment often will be an inappropriate means of resolving an issue of this character."). *But see* BRUNET ET AL., *supra* note 117, § 6.12, at 201 ("While courts may be 'cautious' about granting motions for summary judgment in cases involving motive and intent, in cases brought . . . under the Age Discrimination in Employment Act . . . such a question may, in appropriate situations, be resolved by summary judgment.").

when firing an employee, Guz's case, like most age discrimination cases, is circumstantial.[464] In the words of a leading treatise on age discrimination law:

> [T]here is some awkwardness in using the summary judgment device in [the age discrimination] context. For what is at issue . . . is the matter of intent. In other words, the plaintiff in an [age discrimination case] must establish the existence of discriminatory intent on the defendant's part. Given the subtleties and nuances involved, almost invariably there will be a dispute as to this issue, which of course clearly is a material factor in every discriminatory treatment claim. Accordingly, it might be concluded that summary judgment will hardly ever be a suitable basis for resolving [age discrimination] claims.[465]

Reasonable judges, on both the court of appeal and the supreme court, evaluating the same evidence, sharply differed on the issue of sufficiency of plaintiff's evidence to create a triable issue for the jury.[466] The supreme court's opinion comes close to crossing the line that separates the functions of judge and jury by weighing the probative strength of Guz's case against Bechtel's case. Rather than letting jurors decide whether they were persuaded by Guz's evidence, a majority of the justices appear to have made that determination themselves in a summary trial. Though Guz's case may have arguably been "weak," summary judgment was not originally intended to winnow out weak cases from trial.[467] In close cases like this one, where judges diverge on a

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464. *See, e.g.*, Wohl v. Spectrum Mfg., Inc., 94 F.3d 353, 354 (7th Cir. 1996).

465. 2 HOWARD C. EGLIT, AGE DISCRIMINATION § 7.55 at 346 (2d ed. 1994). *But see* Krenick v. LeSueur, 47 F.3d 953, 959 (8th Cir. 1995) ("[E]mployment discrimination cases involving motive and intent [are not exempted] from summary judgment procedures . . . . [The] plaintiff must still present sufficient evidence to permit a jury [were the case to go to the jury,] to find that the defendant's proffered reason is merely a pretext for intentional discrimination.").

466. *See Guz*, 8 P.3d at 1099 ("[W]hether a downturn in workload was the real reason for Bechtel's action was in legitimate dispute.").

467. *See, e.g.*, WRIGHT ET AL., *supra* note 15, § 2725, at 432 ("Therefore, a party moving for summary judgment is not entitled to a judgment merely because the facts the party offers appear more plausible than those tendered in opposition, or because it appears that the adversary is unlikely to prevail at trial."). Similarly, Jeffrey Stempel has noted that

> Under [*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)], the judge now has greater license to eliminate the jury prior to trial. Previously,

question of fact, courts should proceed cautiously, erring in favor of a full development of the record at trial.[468]

Guz represents a tactical victory for employers in California who may find courts increasingly willing to aggressively use summary judgment to dismiss weak discrimination cases.[469] In federal court, defendants in age discrimination suits commonly employ summary judgment to prevent plaintiffs' cases from being heard by sympathetic juries, "where the chances of the employer prevailing decrease."[470]

Based on the rise in the number of Age Discrimination in Employment Act ("ADEA") cases determined by summary judgment in federal court under the influence of the *Celotex* trilogy,[471] it is reasonable to predict that *Guz* will trigger an increase in summary dispositions of employment discrimination cases in California state court as well.

2. Saelzler v. Advanced Group 400

Once the majority concluded that the property owner had met its movant's burden,[472] a crippling burden of production

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> the judge had to wait until at least mid-trial before her excursion into what many regarded as jury territory could begin. By deciding, before full development of the record at trial, that the nonmovant's side of a disputed factual story is not sufficiently probative to support a verdict by a reasonable jury, the judge can more easily eliminate not only claims that she finds unpersuasive in the instant case but also legal rights with which she is unsympathetic.

Stempel, *supra* note 12, at 167.

468. *See Guz*, 8 P.3d at 1134 (Kennard, J., dissenting). Justice Kennard believed that *Guz* was such a case:

> Guz's lawsuit against Bechtel is now at the summary judgment stage, where the question to be decided is whether the evidence submitted by Guz and Bechtel shows there is an issue of material fact in dispute that needs to be resolved by a full trial in open court. Unlike the majority, I conclude that the evidence does show a triable issue of fact, and that plaintiff deserves a trial on the merits to determine whether he lost his job for legitimate reasons or because of illegal age discrimination. Because the majority denies plaintiff the opportunity to prove his case at trial, I dissent.

Id.

469. The tactical significance of the *Guz* appeal motivated interest groups to file amicus briefs for plaintiff (American Association for Retired Persons) and for defendant (California Chamber of Commerce, Employers Group, California Employment Law Council).

470. *See* EGLIT, *supra* note 465, § 7.55, at 343.

471. *Id.* at 346, 348.

472. The Court's decision in *Saelzler* lessened the movant's burden in two

shifted to Ms. Saelzler that required her to identify her assailants, a burden she ultimately could not meet.[473]

Reversing the superior court's summary judgment in favor of the property owner, a divided court of appeal ruled that Ms. Saelzler's evidence created a triable issue on causation:

> This is a case where the property owner flagrantly failed to provide any security – at least during the time of day plaintiff was attacked. There is no question but this apartment complex had a duty to protect against criminal assaults of this nature. They had occurred frequently on the property and thus were highly foreseeable. As to the standard of care, the property owner completely failed any test of reasonableness by supplying no security at all – and even allowing the "locked" gates to fall into disrepair. When a property owner supplies no security whatsoever – to say nothing of when it falls below the standard of care appropriate to the threat of crime on the premises – logic and common sense tell us absence of security is a contributing cause of most crimes on that property.[474]

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ways. First, the Court adopted the federal standard that allows a moving defendant to point to the absence of evidence to support the plaintiff's case. *See supra* notes 314-16 and accompanying text. Second, the Court extended the application of that relaxed standard beyond the *Celotex-Union Bank* scenario in which defendant could show, through factually devoid discovery responses, that plaintiff had *no case*. *See supra* notes 321-26. The court of appeal and Justices Kennard, Werdergar and Mosk argued that Ms. Saelzler had presented a compelling case of negligence, including proximate cause. *See* Saelzler v. Advanced Group 400, 92 Cal. Rptr. 2d 103, 112 (Ct. App. 1999) ("In cases like this one, where there was a clear duty to provide security and absolutely none was provided, it makes no sense – in logic or in policy – to hold this complete absence of security was not a cause of a given crime when that security would have substantially reduced the probability the crime would have occurred."); Saelzler v. Advanced Group 400, 23 P.3d 1143, 1162 (Cal. 2001) (Werdergar, J., dissenting) ("Indisputably, a reasonable jury in this case could conclude, contrary to the majority, that 'roving guards would have encountered [plaintiff's] assailants or prevented the attack.'").

473. *See, e.g., Saelzler*, 23 P.3d at 1161 (Werdergar, J., dissenting) ("Moreover, in requiring plaintiff to 'prove [her assailants] would not have succeeded in assaulting her if defendants had provided additional security precautions,' the majority both misstates the applicable proof burden and places it on the wrong party. Plaintiff need only raise 'a triable issue' of fact." (alteration in original) (citations omitted)); *id.* at 1155 (Kennard, J., dissenting) ("The [Court's] holding places a virtually insurmountable barrier in the path of any plaintiff seeking to recover damages for injuries allegedly suffered as a result of a property owner's unreasonable failure to provide security to protect against foreseeable third party criminal acts.").

474. *Saelzler*, 92 Cal. Rptr. 2d at 111.

A divided supreme court reversed, placing upon Ms. Saelzler the burden to identify her attackers "to prove that they would not have succeeded in assaulting her if defendants had provided additional security precautions."[475] The majority concluded that without such identification, a jury could only speculate on causation.[476] Mixing policy considerations more appropriate to the issues of duty and breach of duty with the factual question of causation,[477] the majority explained that it is entirely speculative that the attack on Ms. Saelzler could have been avoided had the defendants increased security measures, "as assaults and other crimes can occur despite the maintenance of the highest level of security."[478]

The court held that Ms. Saelzler's case on causation was speculative because there was no way for the jury to rationally determine whether the lack of security precautions would have deterred her *particular* assailants from assaulting her. They went on to state that

> Plaintiff admits she cannot prove the identity or background of her assailants. They might have been unauthorized trespassers, but they also could have been tenants of defendants' apartment complex, who were authorized and empowered to enter the locked security gates and remain on the premises. The primary reasons for having functioning security gates and guards stationed at every entrance would be to exclude *unauthorized* persons and trespassers from entering. But plaintiff has not shown that her assailants were indeed unauthorized to enter. Given the substantial number of incidents and disturbances involving defendants' own tenants, and defendants' manager's statement that a juvenile gang was "headquartered" in one of the buildings, the assault on plaintiff could well have been made by tenants having authority to enter and remain on the premises. That being so, . . . [plaintiff] cannot show that defendants' failure to provide increased daytime security at each

475. *Saelzler*, 23 P.3d at 1161.

476. *Id.* at 1155 ("The evidence at hand . . . merely shows the speculative possibility that additional daytime security guards and/or functioning security gates might have prevented the assault.").

477. *See id.* at 1164 (Werdergar, J., dissenting) (referring to the majority's concern that tenants of low cost housing would ultimately bear the costs of imposing liability for failure to provide security).

478. *Saelzler*, 23 P.3d at 1152.

> entrance gate or functioning locked gates was a substantial factor in causing her injuries.[479]

Following the federal summary judgment standard, articulated in *Anderson v. Liberty Lobby*,[480] the court in *Saelzler* injects the burden of persuasion standard, applicable to the jury's deliberations *at trial*, into the judge's *pre-trial* determination whether the plaintiff has presented sufficient evidence to preclude summary judgment. In so doing, the California Supreme Court has made it more difficult for plaintiffs to successfully oppose summary judgment in California Superior Court. The court measured the sufficiency of Ms. Saelzler's evidence according to the *preponderance of the evidence* burden of persuasion standard. Applying this standard, the court concluded that Ms. Saelzler was "unable to prove it was 'more probable than not' that additional security precautions would have prevented the attack"[481] and, therefore, did not meet her respondent's burden.[482] Thus, *Saelzler* opens the door to judicial evaluation of the *persuasiveness* of the plaintiff's case on summary judgment, much as the jury would do during its deliberations at trial. In this respect, *Saelzler* parallels the U.S. Supreme Court's decision in *Anderson v. Liberty Lobby* that instructed lower federal courts to evaluate the opposing plaintiff's evidence on summary judgment according to the "clear and convincing evidence" burden of persuasion applicable to the jury's deliberations at the close of trial.[483]

Justice Kennard criticized this aspect of the majority's opinion in *Saelzler*, asserting that it blurs the critical distinction[484] between issue finding and issue determination, which the California Supreme Court once called the "pivot" upon which California's summary judgment law traditionally turns.[485] In Justice Kennard's words,

> [T]he critical inquiry at the summary judgment stage is *not* whether the court ruling on a summary judgment motion . . . concludes the plaintiff has produced evidence

479. *Id.* at 1151-52.

480. 477 U.S. 242 (1986). *See supra* notes 96-103 and accompanying text for a discussion of the federal summary judgment standard.

481. *Saelzler*, 23 P.3d at 1152.

482. *Id.* at 1155.

483. *Anderson*, 477 U.S. at 254.

484. *Saelzler*, 23 P.3d at 1157 (Kennard, J., dissenting).

485. Walsh v. Walsh, 116 P.2d 62, 64 (Cal. 1941).

> that an element of the plaintiff's cause of action is more probable than not. Rather, it is whether the plaintiff has produced evidence from which *a reasonable trier of fact* could conclude that the evidence is sufficient to establish that an element of the cause of action is more probable than not.... A judge ruling on a motion for summary judgment is not sitting as a trier of fact.[486]

This critique is reminiscent of Justice Brennan's dissenting opinion in *Anderson* where he expressed his fear "that this new rule ... will transform what is meant to provide an expedited 'summary' procedure into a full-blown paper trial on the merits."[487]

The court of appeal majority and the dissenting supreme court justices agreed that requiring Ms. Saelzler to identify her assailants was tantamount to requiring her to prove causation with certainty.[488] Although the majority purported to apply the *substantial factor* test of causation, Justice Werdergar's dissent criticized the majority for distorting the application of that test, "improperly suggesting it burdens plaintiff with proving it more probable than not that defendants' carelessness caused her injuries."[489] In effect, this placed the burden on Ms. Saelzler to show *with certainty* that the assault would not have occurred *but for* the absence of reasonable security measures. As noted in Justice Kennard's dissent, "[e]ven at trial, a plaintiff need not establish causation with certainty."[490]

The court of appeal and supreme court justices who opposed granting the defendant's summary judgment motion agreed that *the property owner, not Ms. Saelzler*, should bear the burden to show Ms. Saelzler's assailants were atypical criminals who would have committed the assault even in the presence of roving security patrols.[491] In this regard, Justice

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486. *Saelzler*, 23 P.3d at 1157 (Kennard, J., dissenting).

487. *Anderson*, 477 U.S. at 266.

488. *See Saelzler*, 92 Cal. Rptr. 2d at 110; *Saelzler*, 23 P.3d at 1156 (Kennard, J., dissenting) ("Even at trial, a plaintiff need not establish causation with certainty."); *id.* at 1160 (Werdergar, J., dissenting) ("Similarly, no one can say with certainty that heightened security would have deterred the attempted rape of plaintiff, nor is the plaintiff's burden.").

489. *Saelzler*, 23 P.3d at 1161 (Werdergar, J., dissenting) (quotation marks and citation omitted).

490. *Id.* at 1156 (Kennard, J., dissenting).

491. *Saelzler*, 92 Cal. Rptr. 2d at 112 ("Before a defendant is allowed summary judgment the evidence should conclusively establish the general

Kennard wrote,

> Although there may be some criminals so reckless as to attack a person in broad daylight notwithstanding the presence of security guards, common sense suggests that such criminals are a minority. Knowing nothing about plaintiff's never apprehended assailants, *a jury might reasonably conclude* that such individuals are more likely to be among the typical class of criminals who would be deterred by the presence of security guards instead of among the reckless few who would not.[492]

Saelzler was not a case where the plaintiff could present no evidence in support of a rational inference of causation, as in an auto collision case where there are no eyewitnesses to the accident nor any circumstantial evidence, such as skid marks, from which to rationally infer causation. The justices in *Saelzler* who opposed summary judgment for the defendant agreed with Justice Werdergar that plaintiff's causation evidence was sufficient to create a jury issue.[493] She stated, "Indisputably, a *reasonable jury in this case could conclude*, contrary to the majority, that 'roving guards would have encountered [plaintiff's] assailants or prevented the attack.'"[494]

As in *Guz*, reasonable justices in *Saelzler*, both on the court of appeal and the supreme court, evaluated the same evidence, yet their views diverged as to the sufficiency of the evidence necessary to create a jury issue on a question of *fact*. Specifically, they differed sharply on the question whether, based on Ms. Saelzler's evidence, a jury could only *speculate* or *rationally infer* that defendant's admitted breach of duty to Ms. Saelzler, substantially contributed to her attack.[495] The justices also disagreed on where to draw the line between questions of fact, to be determined by the jury, and questions

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causal connection between absence of security and criminal activity does not apply in this case by showing this particular criminal would have committed this crime against this victim despite the presence of reasonable security measures.").

492. *Saelzler*, 23 P.3d at 1157 (Kennard, J., dissenting).

493. *Id.* ("Here, plaintiff offered evidence from which a reasonable trier of fact could find that defendants' failure to maintain their property in a safe condition was more than a minimal cause of plaintiff cause of plaintiff's assault.").

494. *Id.* at 1162 (Werdergar, J., dissenting).

495. *Id.* at 1160.

of law, to be judicially determined.[496] The court of appeal majority and the dissenting supreme court justices emphatically argued that the causation issue in *Saelzler* was one "peculiarly for the jury," that "cannot be decided as a matter of law."[497]

These differences illustrate the fundamental point that the question, whether a plaintiff's evidence is sufficient to meet its burden of production, on summary judgment or trial, though denominated as a question of law, is a subjective question over which judges, evaluating the same evidence, can differ widely. Courts should therefore exercise extreme caution in such cases before denying a plaintiff its opportunity to fully develop its case before a jury.

In the new era of summary judgment in California, *Saelzler* raises fundamental questions concerning the appropriate relationship between a newly invigorated summary judgment procedure and the appropriate role of the jury in California's civil justice system. Does *Saelzler* portend a shift in the line that divides the functions of judge and jury? *Saelzler* should provoke thoughtful consideration about what compromises Californians are willing to make to balance the right to a jury determination of factual issues based on a fully developed record against the need to efficiently manage overcrowded court dockets.

3. Aguilar v. Atlantic Richfield Co.

Aguilar's significance, in terms of summary judgment law, lies chiefly in its teaching about the movant's burden and what steps the defendant must take to shift the burden to the plaintiff to demonstrate the legal sufficiency of the plaintiff's case at trial.

Less significant is the court's holding that the class action plaintiff's evidence was insufficient to meet her

496. *See, e.g., id.* at 1157 (Kennard, J., dissenting) ("A judge ruling on a motion for summary judgment is not sitting as a trier of fact. When, as here, the plaintiff has a triable issue of material fact it is the jury that must decide the issue.").

497. *Id.* at 1160 (Werdergar, J., dissenting). *See also* Saelzler v. Advanced Group 400, 92 Cal. Rptr. 2d 103, 110 (Ct. App. 1999) ("So under elemental common law principles the very causal connection at dispute in this case is one of those which is properly established by 'common experience' and is a jury question inappropriate for summary judgment.").

respondent's burden.[498] Once the court ruled that the oil companies had met their movant's burden, the burden shifted to Aguilar to present evidence sufficient to survive a directed verdict motion at trial.[499] The court applied the standard utilized by the U.S. Supreme Court in *Matsushita* to determine the sufficiency of Aguilar's case, thereby increasing the nonmoving plaintiff's burden in opposing a summary judgment motion in an antitrust action brought in state court under California's Cartwright Act.[500]

Matsushita, one of the U.S. Supreme Court's trilogy of summary judgment opinions, expanded the application of summary judgment in federal antitrust cases by overruling the Supreme Court's 1962 decision in *Poller v. Columbia Broadcasting System, Inc.*,[501] which cautioned restraint in utilizing summary judgment to resolve antitrust cases:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised.[502]

In *Matsushita*, a sharply divided Supreme Court abandoned this restrictive view, signaling a more aggressive role for federal summary judgment in antitrust cases and substantially increasing the responding plaintiff's burden to oppose a defendant's summary judgment motion.[503] In a five to four decision, the *Matsushita* Court held that where a plaintiff's antitrust claim is "implausible," that is, "if the claim is one that simply makes no economic sense, respondents must come forward with more persuasive evidence to support their claim than would otherwise be

498. *See* Aguilar v. Atl. Richfield Co., 24 P.3d 493, 518 (Cal. 2001) ("Aguilar did not carry the burden of production shifted onto her shoulders to make a prima facie showing of the presence of an unlawful conspiracy.").

499. *Id.* at 514.

500. *See supra* note 227.

501. Poller v. CBS, Inc., 368 U.S. 464 (1962).

502. *Id.* at 473.

503. *See* BRUNET ET AL, *supra* note 117, at 264 ("Despite obvious uncertainties, the general thrust of *Matsushita* is to subject antitrust conspiracy cases to the possibility of summary disposition and to place upon the plaintiff an additional evidentiary burden when relying on ambiguous circumstantial evidence to prove the existence of a conspiracy.").

necessary."[504] Additionally, where an antitrust plaintiff's case proves conduct by defendant that is "as consistent with permissible competition as with illegal conspiracy," such evidence is insufficient to support a rational inference of antitrust conspiracy.[505] Where plaintiff's evidence is susceptible of competing inferences, *Matsushita* extended the then-existing reach of federal summary judgment, imposing on the plaintiff the additional burden of presenting evidence "'that tends to exclude the possibility' that the alleged conspirators acted independently."[506]

Justice White's dissent, joined by Justices Brennan, Blackmun and Stevens, criticized the majority for using language that "suggests a departure from traditional summary judgment doctrine."[507] Justice White accused the majority of adopting a summary judgment standard that "invade[s] the factfinder's province"[508] by "suggest[ing] 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."[509] Justice White also criticized the majority for using "unnecessarily broad and confusing language" that could be interpreted as an invitation to district court judges to substitute their judgment for that of the jury:

> If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law. . . . In defining what respondents must show to recover, the Court makes assumptions that invade the factfinder's province.[510]

Matsushita therefore increased the respondent's burden on summary judgment in antitrust cases. Judge Patricia Wald, Circuit Judge of the U.S. Court of Appeals for the D.C. Circuit, stated,

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504. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).
505. *Id.* at 588.
506. *Id.*
507. *Id.* at 599.
508. *Id.*
509. *Id.* at 600.
510. *Id.* at 601.

> [I]n contrast to the older notion that summary judgment was frowned upon in "complex" cases, the Court stated [in *Matsushita*] the "factual context" of a given claim can ratchet up the obligation on the party opposing summary judgment to come forward with "persuasive evidence" that there is a genuine issue of material fact at bay.[511]

Consistent with *Matsushita*, Justice Mosk's opinion in *Aguilar* declares that in California, "summary judgment is available, and always remains available, even in complex cases," including antitrust actions for unlawful conspiracy under the Cartwright Act.[512] While conceding "the court may not weigh the plaintiff's evidence or inferences against the defendants' as though it were sitting as the trier of fact," *Aguilar* adopts *Matsushita's* summary judgment standard requiring the nonmoving plaintiff to persuade *the judge* that an inference of conspiracy is *more likely than* an inference of permissible competition.[513] Thus, the preponderance of the evidence burden of persuasion standard, which traditionally informs the jury's deliberations, now informs the judge's evaluation of plaintiff's antitrust evidence on summary judgment.

Aguilar held that Aguilar's evidence was "at best ambiguous . . . showing or implying conduct that was at least as consistent with permissible competition by the petroleum companies as independent actors, as with unlawful conspiracy by them as colluding ones."[514] It further held that Aguilar failed to satisfy the *additional burden* that *Matsushita* imposes on plaintiffs who oppose *federal summary judgment* motions in such circumstances "to present evidence that tend[s] to exclude the possibility that the petroleum companies acted independently rather than collusively."[515]

Justice Mosk's opinion expressly declined to decide whether California "summary judgment law in this state now conforms to its federal counterpart as clarified and liberalized in *Matsushita* with respect to a plaintiff's 'implausible'

511. Wald, *supra* note 446, at 1907.

512. Aguilar v. Atl. Richfield Co., 24 P.3d 493, 518 (Cal. 2001); *see supra* note 227.

513. *Aguilar*, 24 P.3d at 514.

514. *Id.* at 518.

515. *Id.*

antitrust cause of action asserting an unlawful conspiracy under section 1 of the Cartwright Act."[516]

It remains to be seen whether *Aguilar's* impact will extend beyond antitrust actions and, like *Matsushita's* impact in federal court, encourage judges to weigh competing inferences on summary judgment.

D. *Lessons from the Federal Experience after the* Celotex *Trilogy: Caveats for California Summary Judgment*

The parallels between the federal summary judgment trilogy and California's recent summary judgment trilogy are striking. Both trilogies consist of high court decisions, handed down within a period of several months, that were carefully sequenced to culminate in a capstone decision: *Celotex* in the federal trilogy, and *Aguilar* in the California trilogy. In each instance, the capstone decision proclaimed the liberation of summary judgment from the traditional restrictions that placed on the moving defendant a burden of production that it would not bear at trial, making it easier for defendants to move for summary judgment.[517] Each trilogy announced a major shift in the judicial attitude surrounding summary judgment. Prior to each trilogy, summary judgment was viewed as a "disfavored procedural shortcut"[518] or, in the words of Justice Mosk, "a drastic measure that deprives the losing party of a trial on the merits; . . .[one which] should be used with caution, so that it does not become a substitute for trial."[519] Each trilogy confirmed the new role of summary judgment as a critically important tool of efficient case management of crowded court dockets.[520]

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516. *Id.* at 514 n.25 ("That is because, as even the petroleum companies themselves admit, Aguilar's claim, whatever its merits, is far from implausible.").

517. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (explaining that the standard for granting summary judgment mirrors the standard for a directed verdict under federal rules of civil procedure 50(a)); *Aguilar*, 23 P.3d at 512 ("Neither does summary judgment law in this state any longer require a defendant moving for summary judgment to conclusively negate an element of the plaintiff's cause of action. In this particular too, it now accords with federal law.").

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

519. Molko v. Holy Spirit Ass'n, 762 P.2d 46, 53 (Cal. 1998).

520. *Celotex,* 477 U.S. at 327 ("Summary judgment is properly regarded . . . as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'");

A brief examination of the impact of the federal trilogy on summary judgment practice in the federal courts holds some important lessons for California courts about the potential impact of the California trilogy.

The federal trilogy sent a signal to lower courts to use summary judgment more aggressively to control burgeoning dockets.[521] According to one commentator's survey, lower courts have responded to this signal by showing "a new willingness to resolve issues of intent or motive at the summary judgment stage, and, in the extreme version, to grant summary judgment where 'taken as a whole, [plaintiffs' evidence does not] exclude other reasonable hypothesis with a fair amount of certainty.'"[522] A leading treatise on age discrimination law confirms that at the federal level, "large and increasing number[s] of ADEA cases are being resolved at the summary judgment stage."[523] Circuit Judge Wald

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Issacharoff & Loewenstein, *supra* note 12, at 73 ("[T]he expansion of summary judgment is designed to control both the volume of litigation overall and its scope in any particular case."); BRUNET ET AL., *supra* note 117, at 65 ("In *Celotex* , the Supreme Court transformed traditional burden-shifting rules in summary judgment practice, and in so doing helped the device achieve its intended goal of enhancing efficiency by avoiding unnecessary trials.").

521. *See, e.g.*, WRIGHT ET AL., *supra* note 15, at 468-69; John Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett with Adickes v. Kress and the Evidentiary Problems Under Rule 56.*, 6 REV. LITIG. 227, 251 (1987) ("[T]he most significant ramifications of *Celotex* and its related cases may be as much a matter of emphasis as of substance."); Stephen Caulkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1114-15 (1986) ("[S]ince many summary decisions turn less on precise phrasings of legal standards than on attitudes toward the motion, the [Supreme Court's] celebration of summary judgment may be more important than any reformulation of standards."); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 164 (2000) ("[T]he actual holdings in Matsushita, Anderson and Celotex might have been less important than the ceremonial crowning they gave to Rule 56.").

522. Issacharoff & Loewenstein, *supra* note 12, at 89. *See also* Saelzler v. Advanced Group 400, 23 P.3d 1143, 1161 (Cal. 2001) (Kennard, J., dissenting) (discussing the California Supreme Court's imposition of a similar burden on plaintiffs in *Saelzler* to negate alternative hypothetical scenarios with certainty).

523. EGLIT, *supra* note 465, at 348. Eglit continues,

> And while such rulings are very much fact-oriented and so afford little basis for ready generalizations, it is safe to conclude that judicial willingness to dispose of cases at the summary judgment stage is in part a function of the attitudes of judges as to the proper role of summary judgment in the employment discrimination context.

Id. Similarly, Paul Mollica, referring to his sampling of summary judgment decisions during 1997-1998, expressed that

> In a fair number of... employment [discrimination] cases, the

reports that, in the D.C. Circuit, "[t]he courts have taken very seriously indeed the Supreme Court's perceived invitation in *Matsushita*, *Anderson*, and *Celotex* to 'go forth, and grant summary judgment.'"[524] Judge Wald reports that "[f]ederal jurisprudence is largely the product of summary judgment in civil cases."[525] Based on her review of the 1996 civil docket in the District Court for the District of Columbia, Judge Wald predicts "that we are approaching a time when a civil trial will be thought of as a 'pathological event.'"[526]

These are signs that the premonitions of the dissenting justices in both trilogies regarding the overuse of summary judgment were not without substance. Circuit Judge Wald warns that the federal courts have moved from under-utilizing summary judgment to the opposite extreme, and stresses the need to find an appropriate balance:

> I believe our circuit's experience shows that we are now at a stage where the focus should be on ensuring that summary judgment stays within its proper boundaries, rather than on encouraging its unimpeded growth. Its expansion across subject matter boundaries and its frequent conversion from a careful calculus of factual disputes (or the lack thereof) to something more like a gestalt verdict based on an early snapshot of the case have turned it into a potential juggernaut which, if not carefully monitored, could threaten the relatively small residue of civil trials that remain. That appraisal may seem alarmist, but my perusal of a sample of summary judgments suggests that, at the very least, there is a real danger of summary judgment being stretched far beyond its originally intended or proper limits.[527]

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summary judgment went to the heart of the employer's alleged discriminatory intent. A few cases found that plaintiffs failed to prove even a prima facie case of discrimination. A larger number of decisions affirmed summary judgment by holding that the plaintiff could not establish discriminatory intent, either directly or indirectly.

Mollica, *supra* note 521, at 168-69.

524. Wald, *supra* note 446, at 1926.

525. *Id.* at 1897. *See also* Mollica, *supra* note 521, at 141 (noting the "emergence of summary judgment as the new fulcrum of federal civil dispute resolution").

526. Wald, *supra* note 446, at 1915 ("And despite the high profile that 'alternative dispute resolution' has enjoyed in the past decade and a half, summary judgment may in fact be the more commonly used mode of disposition on the merits . . . .").

527. *Id.* at 1917. *See also* Issacharoff & Loewenstein, *supra* note 12, at 89

IV. CONCLUSION AND POLITICAL POST-SCRIPT

The recent trilogy of California Supreme Court decisions demonstrates that summary judgment law applicable in California courts is virtually indistinguishable from federal summary judgment law. Like the federal trilogy, *Guz*, *Saelzler*, and *Aguilar* have unleashed summary judgment from its traditional restraints. The unanswered question is how trial and appellate judges will apply this liberal standard "on the ground" in the many factual settings of summary judgment motions that will be decided by the courts. Will the lower courts in California follow the example of their federal counterparts by moving summary judgment practice from one extreme to the other?

As California's summary judgment trilogy demonstrates, judges differ sharply on the issue of legal sufficiency of the evidence.[528] No bright line exists between questions of law to be determined by a judge on summary judgment, and questions of fact to be determined by a jury. The law-fact distinction "involves an assessment of the proper division of duties between the judge and jury, which in turn should be guided by a proper application of the Seventh Amendment to insure that courts do not usurp the function of the jury."[529] Warning signals from the federal bench counsel caution in the application of the liberal *Celotex* standard in California courts.[530] If unchecked, unbalanced application of the new summary judgment standard, in the zealous pursuit of efficiency, could erode fundamental features of our civil justice system including the value we place on a jury's

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("There is evidence in the post-trilogy case law that summary judgment has moved beyond its originally intended role as a guarantor of the existence of material issues to be resolved at trial and has been transformed into a mechanism to assess plaintiff's likelihood of prevailing at trial."). Mollica likewise states that

> some of the recent tendencies in summary judgment are suspect and must be reconsidered. The 1997-98 case law sample highlights some of these: arrogation of intent, reasonableness and even credibility determinations. Combined with the strictness with which district courts and courts of appeals enforce Rule 56, we have taken a sizable risk that weak but valid causes of action – along with due process and the Seventh Amendment jury right – may be sacrificed on the alter of efficiency.

Mollica, *supra* note 521, at 205.

528. *See supra* notes 281, 303, 344-49, 460-61, 469, 478-81, and 487-505.

529. BRUNET ET AL., *supra* note 117, § 1.09, at 33.

530. *See supra* notes 521-24 and accompanying text.

determination of facts and fact inferences,[531] and the due process guarantee of a full and fair day in court.[532]

Summary judgment is a politically charged procedural device.[533] Many commentators have written that summary judgment favors "repeat-players (such as governments and large employers) and more affluent defendants."[534] The trial bar opposes liberal use of summary judgment by the courts.[535] Political activity continues in the Democrat-controlled California legislature to amend the summary judgment statute to restore summary judgment to its pre-*Union Bank* status.[536] The latest of these legislative initiatives, SB 476, passed the state Senate in spring 2001 and seemed headed for unimpeded passage in the Democrat-controlled Assembly.[537]

Surprisingly, efforts to enact SB 476 were suspended for

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531. See Stempel, *supra* note 12, at 166, stating that

> the jury determinations of fact existence and fact inference serve other values as well: the infusion of community standards into litigation; promoting public confidence in the judicial system and fairness of litigation results; maintaining democratic values of participation; and citizen access to the system... Revised rules of summary judgment, directed verdict, and judgment n.o.v. that reduce jury participation undermine these values and consequently diminish the system as a whole.

532. The U.S. Supreme Court has stated that

> If the forum state wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.

Phillips Petroleum v. Shutts, 477 U.S. 797, 811-12 (1985).

533. For a more detailed discussion of the politics of summary judgment, see Koppel, *supra* note 128.

534. Mollica, *supra* note 521, at 194. *See also* Issacharoff & Loewenstein, *supra* note 12, at 75 ("[S]ummary judgment fundamentally alters the balance of power between plaintiffs and defendants by raising both the costs and risks to plaintiffs in the pretrial phases of litigation while diminishing both for defendants.").

535. Walters, *supra* note 356, at A3 ("In general, the lawyers [who specialize in personal injury cases] want to make it more difficult for judges to toss out suits while business groups and insurers, often the target of personal injury cases, want to keep the law as it is.").

536. For an account of post-*Union Bank* efforts, in 1996, in the Republican-controlled California legislature to amend the summary judgment statute to explicitly conform to the federal standard under *Celotex*, see Koppel, *supra* note 128, at 533-42.

537. Steele, *supra* note 138. The plaintiffs bar, represented by the Consumer Attorneys of California, co-sponsored SB 476.

the current legislative session as a direct result of the death of Justice Mosk, who authored the *Aguilar* opinion.[538] According to one political commentator:

> By happenstance, Mosk issued his ruling and died just as lobbyists for personal injury lawyers were readying their final push on legislation that would rewrite the summary judgment rules and make it tougher for judges to toss out suits.... The timing couldn't have been worse for the lawyers. If they and Sen. Martha Escutia, D-Los Angeles, moved the bill, they would be accused of besmirching Mosk's final legacy – just days after they had heaped praise on his memory. The lawyers and Escutia put the bill on indefinite hold ....[539]

The debate in the legislature and in the courts over the appropriate role of summary judgment should proceed not from partisan efforts to achieve the tactical high ground in litigation, but from a shared willingness to utilize the procedure for the "common good."[540] The goal should be to serve the public interest in an accessible and efficient civil justice system that affords litigants just and speedy results,[541] without sacrificing either justice or speed.

538. Aguilar v. Atl. Richfield Co., 24 P.3d 493 (2001).

539. Walters, *supra* note 356, at A3.

540. Stempel, *supra* note 84, at 751.

541. *See* FED. R. CIV. PROC. 1 ("These rules ... shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").