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SUMMARY JUDGMENT AND PROBLEMS IN APPLYING THE *CELOTEX* TRILOGY STANDARD

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I. INTRODUCTION

In an effort to provide swift justice while respecting due process, the courts have refined a tool that in theory serves this purpose superbly: summary

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judgment.[1] Unfortunately, swift justice and due process often create conflicting interests.[2] As a result, the tool that appears effective in theory presents significant difficulties when judges must apply it in practice.

In Federal Rule of Civil Procedure 56 it is stated that summary judgment "shall be rendered forthwith if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."[3] Obstacles that judges confront when determining whether a genuine issue of material fact exists, are the subject of this Note. Stated simply, a material fact is one which will affect the outcome of the case, and a material fact raises a genuine issue if a reasonable jury could reach different conclusions concerning that fact.[4]

During its 1986 term, the Supreme Court announced the *Celotex* trilogy of decisions,[5] articulating precise standards for determining the existence of a genuine issue of material fact. Nevertheless, judges have found the easily understood standard difficult to apply.[6] Indeed, courts often struggle with applicable substantive doctrines in order to rationalize just results.

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[1]Some would even argue that the changes made by the Court were an abuse of the Court's power and an infringement upon the legislative process. *See* Jeffrey W. 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, 181-87 (1988).

[2]The summary judgment doctrine balances the need to dispose of controversies quickly and efficiently against the litigants' right to a trial. In general, summary judgment reflects the dilemma inherent in the very purpose of the Federal Rules: "to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. *Cf.* OHIO R. CIV. P. 1(B) (The Rules "shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice"). In particular, summary judgment threatens a party's Seventh Amendment right to trial by jury. The courts, however, have established that when a judge finds that there is "no genuine issue of material fact" as required by Federal Rule of Civil Procedure 56(c) or Ohio Rule of Civil Procedure 56(C), no such right exists since the party has no claim to bring before a court and hence cannot be deprived of any right to trial. Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320 (1902); General Inv. Co. v. Interborough Rapid Transit Co., 139 N.E. 216, 219-20 (N.Y. 1923).

[3]FED. R. CIV. P. 56(c).

[4]For example, when the parties in a negligence action involving a car accident disagree as to the color of the traffic light, a reasonable jury could find for either party, and the answer would be outcome determinative. Thus, the color of the light raises a genuine issue of material fact. *See generally* William W. Schwarzer, SUMMARY JUDGMENT UNDER THE FEDERAL RULES: DEFINING GENUINE ISSUES OF MATERIAL FACT, 99 F.R.D. 465 (1983).

[5]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).

[6]*See* Paul v. Uniroyal Plastics Co., 575 N.E.2d 484, 487 (Ohio Ct. App. 1988) ("Generally, the complexity of a summary judgment motion lies not in application of [the] standards, but in determining whether each party has produced sufficient evidence to substantiate its contentions."). *But cf.* D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to*

In this Note, the difficulties judges encounter in applying the *Celotex* standards are illustrated through an examination of summary judgment decisions in the United States Supreme Court and in Ohio courts. Ohio's judges often look to the Supreme Court's interpretations of the Federal Rules of Civil Procedure for guidance in applying Ohio's summary judgment rule,[7] and summary judgment decisions of this state therefore exemplify the pitfalls that the Supreme Court has created.

Trial court judges need standards which are more practical in application so that the decison-making process will yield more consistent results. In an attempt to encourage the development of such standards which can co-exist with the *Celotex* trilogy, possible guidelines the court might use to assure the most consistent, objective review of summary judgment motions are explored in this Note. Following this introduction, Part II of this Note continues with a survey of the legal background of summary judgment. In Part III, some of the problems in applying the current doctrine are identified. Finally, proposals to improve the doctrine are offered in Part IV.

II. HISTORICAL BACKGROUND AND PERSPECTIVE

A. *Summary Judgment in England*

Although its precursors can be traced to at least the 1200's,[8] the modern origin of America's summary judgment procedure began in England in the mid-1800's.[9] Nineteenth century merchants found England's pleading

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Summary Judgment, 54 BROOK. L. REV. 35, 36 (1988) (criticizing *Celotex* for its lack of analytical clarity).

[7]Williams v. First United Church of Christ, 309 N.E.2d 924, 925 (Ohio 1974); T&S Lumber Co. v. Alta Constr. Co., 483 N.E.2d 1216, 1219 (Ohio Ct. App. 1984) ("The judicial interpretations of the Federal Rules of Civil Procedure, upon which the Ohio Rules are modeled, serve as an authoritative guide to the interpretation of the Ohio Rules."). *But cf.* Gates Mills Inv. Co. v. Village of Pepper Pike, 392 N.E.2d 1316, 1323 (Ohio Ct. App. 1978) (finding that a Seventh Circuit interpretation of Federal Rule 56(c) "is not binding upon state courts").

[8]*See generally,* John A. Bauman, *The Evolution of the Summary Judgment Procedure,* 31 IND. L.J. 329 (1956) (detailing the history of summary judgment in England and Europe and how the history influenced Federal Rule of Civil Procedure 56). Bauman traces the origin of summary judgment to England's Statute of Action, 11 Edw. (1283) (Eng.), the Statute of Merchants, 13 Edw. (1285) (Eng.), and the Ordinance of the Staple 27 Edw. 3, ch. 9 (1353) (Eng.). *Id.* at 330.

[9]Robert W. Millar, *Three American Ventures in Summary Civil Procedure,* 38 YALE L.J. 193, 215 (1928) (providing a detailed perspective on summary judgment as applied during the colonial period and through the mid-1800's and attributing the earliest summary proceedings in America to statutes enacted in Virginia in 1732); *see also* Charles E. Clark & Charles U. Samenow, *The Summary Judgment,* 38 YALE L.J. 423, 463 (1929) (reviewing the summary proceeding statutes in existence in 1929).

Despite the existence of summary proceedings in America, as early as the 1700's, England's Summary Procedure on Bills of Exchange Act, 18 & 19 Vict., ch. 67 (1855) (Eng.), serves as the template for today's Rule 56. *See* the Advisory Committee Note to

requirements and discovery practices unbearably slow in yielding justice.[10] Furthermore, unscrupulous debtors' lawyers used the existing system to victimize merchants. These lawyers created unjust delay by exploiting a system which lacked a method for determining the factual basis of a pleading prior to trial.[11]

As the socio-economic structure of England shifted to a predominantly merchant-class society, the merchants clamored for a speedy means to collect debts and to dispense with sham defenses.[12] England responded by enacting the Summary Procedure on Bills of Exchange Act.[13] The Act postponed entry of judgment until after a hearing, and required the debtor to post security only "as one of several alternatives available to a defendant who asked leave to defend an action prior to the entry of judgment."[14] If, however, the debtor could not challenge the cause of action or failed to appear at the hearing, then the court would summarily enter judgment against him.[15] Initially, the Act limited England's summary proceedings to claims concerning bills of exchange and promissory notes;[16] but, over approximately the next eighty years, applications

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Rule 56 as originally promulgated; *see also* FLEMMING JAMES, JR., CIVIL PROCEDURE 233 (1965); 6 JAMES W. M. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.05 (2d ed. 1992); 10 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2711 (2d. ed. 1983).

[10] Bauman, *supra* note 8, at 329-30.

[11] *Id.* at 332-34.

[12] *Id.* at 329-30.

[13] In 1853, Lord Henry Brougham, a member of the Scottish bar, unsuccessfully attempted to persuade parliament. He proposed a means of debt collection predicated on the existing law in Scotland and was in the form of an *ex parte* proceeding that assumed the creditor was entitled to execution against the debtor unless the debtor gave a security which would suspend the charge pending a hearing. The proceeding was *ex parte* in nature because the plaintiff would register his claim in an appropriate court. Subsequently, the plaintiff would be entitled to "the ordinary methods of execution on judgments." Bauman, *supra* note 8, at 336. Only after the process of executing the order had begun did the defendant receive notice of the action and then have the opportunity to raise a defense if he could post a security. *Id.* at 334-38.

Parliament received Lord Brougham's proposal with skepticism. The reasons were varied, but the most significant one was that the rule was too stringent. In 1855, Sir Henry Keating proposed a less stringent rule. The proposal "had a generally favorable reception from the bar since it was regarded as 'comparatively moderate and reasonable' when compared to the 'startling measure proposed by Lord Brougham.'" *Id.* (citations omitted). Parliament approved the proposal as the Summary Procedure on Bills of Exchange Act which is also known as Sir Keating's Act. Summary Procedure on Bills of Exchange Act (Sir Keating's Act), 1855, 18 & 19 Vict., ch. 67 (Eng.).

[14] Bauman, *supra* note 8, at 339.

[15] *See id.* at 338 (citing Keating's Act, 1855, 18 & 19 Vict., ch. 67, § 1, Schedule A (Eng.)).

[16] 18 & 19 Vict., ch. 67 (1855).

of the proceedings expanded to the point of including virtually all civil causes of action.[17]

B. *Summary Judgment in the United States*

1. Before the Federal Rules of Civil Procedure

The development of summary proceedings in America was similar to that in England. Initially, summary judgment only applied to a limited number of causes of action.[18] Gradually, however, the Rule became applicable to all civil proceedings.[19] As early as 1732, Virginia had a summary process available in its courts and, by the nineteenth century, many states also included summary proceedings in their judicial systems.[20]

In 1911, the Ohio Supreme Court decided *White v. Calhoun*.[21] In *White*, the Ohio courts' inherent power to strike out sham answers[22] was recognized, and their authority to summarily dispose of cases without trial by jury, enabling them to quickly provide plaintiffs with favorable judgments, was approved.[23] Thus, *White v. Calhoun* marks the beginning of summary judgment in Ohio.[24]

Shortly thereafter, the Connecticut bar began to encourage its courts to adopt a summary judgment rule. The most noted advocate involved in this effort was

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[17] *See* Bauman, *supra* note 8, at 338.

[18] WRIGHT ET AL., *supra* note 9, § 2711; C. Christopher Brown, *Summary Judgment in Maryland*, 38 MD. L. REV. 188, 191 (1978); Henry H. Fowler, *Virginia Notice of Motion Procedure*, 24 VA. L. REV. 711, 717 (1938).

[19] Clark & Samenow, *supra* note 9, at 469; *see also* FED. R. CIV. P. 56 advisory committee notes.

[20] Clark & Samenow, *supra* note 9, at 463; Millar, *supra* note 9, at 215; Bauman, *supra* note 8, at 343. Despite the prevalence of summary proceedings in the states, the federal courts had no such proceeding and did not even apply state summary proceeding laws until 1872. The Practice Conformity Act of June 1, 1872, ch. 255, § 517 Stat. 196 (codified at 28 U.S.C § 1652 (1988)) authorizes federal courts to conform practice and pleadings, except in equity and admiralty cases, to those of the State in which the district court sits. Thus, if that state had enacted a summary procedure, the federal court could apply it in actions before the court. WRIGHT ET AL., *supra* note 9, § 2711; *see also* United States Gypsum Co. v. Insurance Co. of N. Am., 19 F. Supp. 767, 768 (D.C.N.Y. 1937) (applying the contemporaneous summary judgment procedure available in New York).

[21] 94 N.E. 743 (Ohio 1911).

[22] *Id.* at 743 (describing a sham answer as one good in form, but false in fact, and not pleaded in good faith).

[23] *See id.* at 744 (quoting Gostorfs v. Taafee, McCahill & Co., 18 Cal. 385 (1861)). Interestingly, the basis of Ohio's summary judgment rule lies in a common law power despite the fact that the summary judgment procedure has no common law origin. *See* Millar, *supra* note 9, at 194.

[24] *Cf.* Clark & Samenow, *supra* note 9, at 463 (observing that Indiana's statute which provided its courts with the same power is only the "bare embryo" of summary judgment).

Yale law professor Charles Clark. His advocacy succeeded and, in 1928, that State adopted an extensive summary judgment rule.[25]

Clark followed up his efforts by writing an article to amplify his views on Connecticut's summary judgment rule.[26] Today that article serves as the supplement to the Advisory Committee's notes on Rule 56, and Clark has become renowned as the most influential voice in the development of the Federal Rules of Civil Procedure.[27] The article contains a survey of all then-existing summary proceeding statutes in the Unites States, and also the law of England and Canadian provinces. Clark's opinion is clear: The courts should make liberal use of summary judgment as a tool to protect plaintiffs from unjust delay.[28] He believed that, in addition to providing an effective means of "preventing delays by defendants, and . . . securing speedy justice for creditors[,]"[29] summary judgment would make the entire judicial process more efficient. Furthermore, it would encourage creditors to resort to the courts to satisfy debts because of new found confidence in the ability of the courts to provide rapid justice.[30]

2. After the Federal Rules of Civil Procedure

Clark's influence on the federal rules, enacted in 1938,[31] is explicitly manifest in the Advisory Committee Notes to Rule 56, which rule governs summary

[25] *See generally* Charles E. Clark, *The New Summary Judgment Rule*, 3 CONN. B.J. 1 (1929) (outlining the rule and its purposes).

[26] Clark & Samenow, *supra* note 9. Charles Samenow was a student of Clark's and co-authored the article.

[27] Charles Clark became an Assistant Professor of Law at Yale Law School in 1919. By 1924, Clark became a Full Professor, and in 1929, he became the school's dean. Clark's rapid rise at the school coincided with a rise in the school's prestige, and he played a substantial role in the school's growing reputation. Clark also served as a judge for the Second Circuit Court of Appeals of the United States from 1939 to 1963. That bench, which included Learned Hand, August Hand, Thomas Swann and Jerome Frank, was widely regarded as the finest in the country, if not the world. *See* MARVIN SCHICK, LEARNED HAND'S COURT 12 (1970).

But it is Clark's work as a Reporter to the Supreme Court's Advisory Committee on Rules for Civil Procedure that has lead to his being recognized "as one of the giants of the judicial reform movement of the first half of the century. . . ." *Id.* at 31. Clark was the primary drafter of the Federal Rules that were enacted in 1938. He had served in that role for three years and resumed it at the Court's request in 1942. Clark remained as the Reporter until 1956.

For an extensive analysis of Clark's role in the formation of the Federal Rules, see Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976).

[28] *See* Clark & Samenow, *supra* note 9, at 469-71; *see also* Charles Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 576-77 (1952) (advocating in favor of using summary judgment).

[29] Clark & Samenow, *supra* note 9, at 423.

[30] *Id.* (citing Am. Jud. Soc. Bul. XIV (1919)).

judgment.[32] His philosophy is implicitly adopted in the sweeping generalizations of Rule 56's language that suggests liberal applications.[33] For example, the Federal Rule's application to all civil claims without restriction is indicative of the Clark imprimatur.[34] Furthermore, section C of the rule also evinces Clark's liberal influence.[35] First, the courts are given authority to summarily dispose of matters before them. Second, judges are given ample discretion to determine whether they should exercise that authority. In particular, judges exercise substantial discretion when determining whether a "genuine issue of material fact" exists.[36]

Since the enactment of the federal rules, the United States Supreme Court has seldom granted certiorari on cases raising issues about their application.[37] In 1944, however, the Court attempted to define the phrase "genuine issue of material fact." In *Sartor v. Arkansas Natural Gas Corp.*,[38] counsel for the plaintiffs/petitioners argued that "[t]o proceed to summary judgment, ... [i]t must appear ... either that the ... evidence is ... too incredible to be accepted by reasonable minds, or that, conceding its truth it is without legal probative

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[31] The Federal Rules of Civil Procedure became effective on September 16, 1938. FED. R. CIV. P. 86(a); McCrone v. United States, 307 U.S. 61 (1939).

[32] "For the history and nature of the summary judgment procedure ... see Clark & Samenow, The Summary Judgment (1929), 38 Yale L.J. 423." FED. R. CIV. P. 56 advisory committee notes.

[33] The federal rule states in part:

> (c) Motion and Proceedings Thereon. ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

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

Federal Rule of Civil Procedure 56(e) is also relevant. It states in part:

> (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. ... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavit, or an otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

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

[34] *See* FED. R. CIV. P. 56(c) advisory committee notes.

[35] *See* the text of FED. R. CIV. P. 56, *supra* note 33.

[36] FED. R. CIV. P. 56(c).

[37] *See* Stempel, *supra* note 1, at 100 n.32.

[38] 321 U.S. 620 (1944).

force . . . ."[39] The Court seemed to agree. It held that a proper summary judgment required "evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party."[40]

3. Current Summary Judgment Doctrine: The *Celotex* Trilogy

After *Sartor* and before 1986, Ohio and federal courts alike were cautious in their use of summary judgment,[41] denying its potential as envisioned by Dean Clark. In 1986, however, the Court decided the *Celotex* trilogy of cases[42] and established new, greatly liberalized standards for allowing summary judgment. In 1991, Ohio adopted the *Celotex* framework in *Wing v. Anchor Media, Ltd.*,[43] and since then, the two jurisdictions have relied upon the same standards to determine the absence of genuine issues of material fact, which requires the court to enter judgment, as a matter of law, in favor of a moving party.

a. Step One Towards Increasing Judicial Discretion

Matsushita Electric Industrial Co. v. Zenith Radio Corp.[44] was a complex antitrust case.[45] The plaintiffs were American manufacturers who claimed that the defendant Japanese electronics firms schemed to sell their products in Japan at artificially high prices in order to sell their products in the United States at artificially low prices.[46] After several years of discovery, the defendants moved for summary judgment.[47] The district court granted summary judgment in favor of the defendant,[48] but the court of appeals reversed.[49]

When the Supreme Court reviewed the matter, it found the scheme alleged by the plaintiffs to be "implausible."[50] The Court indicated that predatory

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[39] Supplemental Brief for Petitioner at 17, Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944) (No. 232) (quoting Whitaker v. Coleman, 115 F.2d 305, 306 (5th Cir. 1940)).

[40] 321 U.S. at 624.

[41] *See* Associated Press v. United States Tribune Co., 326 U.S. 1, 6 (1945) (citing Sartor v. Arkansas Natural Gas. Co., 321 U.S. 620 (1944)); *accord* Norris v. Ohio Standard Oil Co., 433 N.E.2d 615, 616 (Ohio 1982) ("[s]ummary judgment. . . . [m]ust be awarded with caution. . . ." (citations omitted)).

[42] *See* cases cited *supra* note 5.

[43] 570 N.E.2d 1095, 1099 (Ohio 1991).

[44] 475 U.S. 574 (1986).

[45] *See id.* at 576-77.

[46] *Id.* at 577-78.

[47] *Id.*

[48] *Id.* at 579.

[49] 475 U.S. at 580.

[50] *Id.* at 587.

pricing was a highly unlikely means to use in attempting to create a monopoly, particularly in the context of a conspiracy.[51] The Court further reasoned that the inability of Japanese manufacturers to wrest away a market share sufficient to justify the losses incurred by the twenty years of below-market pricing belied the American manufacturers' claims of conspiracy.[52]

Matsushita was the first crack in the dam. The Court did not make any radical changes to summary judgment doctrine;[53] it merely opened the door to opportunities for increased judicial discretion in granting summary judgments. The Court weighed the evidence before it, determined that plaintiffs' claims were implausible, and required them to "come forward with more persuasive evidence to support their claim than would otherwise be necessary."[54] Accordingly, the Court found that the record presented no genuine issue for trial and remanded the case for further proceedings to determine whether other facts might raise a genuine issue.[55]

b. Step Two Towards a More Liberal Summary Judgment Doctrine

In *Anderson v. Liberty Lobby, Inc.*,[56] the Court further extended judges' discretion by adopting the directed verdict standard to determine the existence of a genuine issue of material fact.[57] Willis Carto, the founder of Liberty Lobby, brought an action against Jack Anderson, claiming that Anderson's magazine published thirty libelous statements in an article concerning Carto.[58] Anderson moved for summary judgment, claiming that Carto could not raise any issue as to actual malice because Anderson's magazine staff conducted research prior to publication and believed in the truth and accuracy of the facts contained in the alleged libelous article.[59]

The district court agreed with Anderson and granted summary judgment.[60] On appeal, the circuit court affirmed summary judgment as to 21 of the statements but reversed summary judgment on the other nine. The court held

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[51] *Id.* at 588-91.

[52] *Id.* at 591-93.

[53] *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2083 (1992). *But see* Marcy J. Levine, *Summary Judgment: The Majority Undergoes a Complete Reversal in the 1986 Supreme Court,* 37 EMORY L.J. 171, 184-88, 191-96 (1988) (observing that *Matsushita* was the culmination of a complete reversal in the Court's attitude towards the use of summary judgment in antitrust cases).

[54] 475 U.S. at 587.

[55] *Id.* at 597-98.

[56] 477 U.S. 242 (1986).

[57] *Id.* at 250.

[58] *Id.* at 244-45

[59] *Id.*

[60] *Id.* at 246.

that, despite the substantive law's requiring Carto to establish actual malice by clear and convincing evidence, Carto did not have to meet the higher standard to defeat Anderson's summary judgment motion.[61] The court feared that summary judgment determinations based on varying degrees of required proof would involve a judge's impermissibly weighing the evidence. Thus, it instead applied a lower standard to determine that a reasonable jury could find in favor of Carto.[62]

Justice White delivered the Supreme Court's opinion, explaining that the court of appeals erred in not considering the higher standard of proof. He stated that the materiality of a fact must be determined in the context of the substantive law.[63] He also wrote that a genuine issue requires more than the "mere existence of *some* alleged factual dispute."[64] The essence of the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[65]

Anderson's equating the summary judgment standard to the directed verdict standard followed the lead of the *Matsushita* Court. Just as Justice Powell imposed a greater burden of proof on the *Matsushita* plaintiff who had an implausible claim, Justice White also required a greater showing when a plaintiff had a burden of establishing his claim by clear and convincing evidence at trial.[66] Thus, the Court remanded the case, providing yet another yardstick by which a judge may measure whether an issue of material fact is genuine.

As a result of *Anderson*[67] and *Matsushita*,[68] federal judges obtained the authority to exercise greater discretion when deciding summary judgment and a concomitant confidence that their decisions would withstand appeal.[69] The

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61 477 U.S. at 246.

62 *Id.* at 247.

63 *Id.* at 248.

64 *Id.* at 247.

65 *Id.* at 252. The Court amplified its position by holding that "[t]he judge's inquiry . . . unavoidably asks whether reasonable jurors could find . . . that the plaintiff is entitled to a verdict. . . ." *Id.*

66 In this respect, perhaps *Matsushita* is the more liberal decision of the two. *Anderson* requires the judge to draw lines as to where evidence is "so one sided" based on the substantive law at issue. 477 U.S. at 252. By comparison, *Matsushita* permits even greater judicial discretion by permitting the judge to draw lines based on her own sense of what constitutes an "implausible" claim without any external guidance such as substantive laws provide. 475 U.S. 574, 587 (1986).

67 477 U.S. 242 (1986).

68 475 U.S. 574 (1986).

69 *See* Levine, *supra* note 53, at 209.

third case of the trilogy, *Celotex Corp. v. Catrett*,[70] addressed a different, but related, issue. The *Celotex* Court identified the burden of proof borne by a non-movant. While *Matsushita* and *Anderson* make it easier for federal judges to grant summary judgment, *Celotex* makes it easier for defendants to obtain summary judgment.

c. The Last Step

In *Celotex Corp. v. Catrett*, the defendant-Corporation claimed that plaintiff Myrtle Catrett failed to adduce evidence sufficient to establish her wrongful death claim.[71] The district court found the claim persuasive and granted Celotex's motion for summary judgment. On appeal,[72] the circuit court reversed summary judgment, reasoning that Celotex failed to produce evidence of its own that would negate Catrett's claim. The Supreme Court[73] then reversed the circuit court's decision.[74]

The Court permitted the defendant to prevail on summary judgment merely by showing the defect in the plaintiff's claim, thus placing the onus on the plaintiff to establish her case. Under *Celotex*, when the summary judgment movant does not have the burden of proof at trial, that movant does not have an affirmative burden of production in support of his motion.[75] In other words, the Court required defendant Celotex to be able to specify how plaintiff Catrett failed to establish her claim, but the Court did not require Celotex to produce evidence of its own to disprove Catrett's claim.

In dissent,[76] Justice Brennan agreed with, and provided the most lucid explanation of *Celotex*'s shifting burdens analysis. The summary judgment movant has the burden of establishing the nonexistence of a genuine issue. This burden has two components: a burden of production and a burden of

[70]477 U.S. 317 (1986).

[71]The issue in *Celotex* concerns whether a genuine issue existed as required by FED. R. CIV. P. 56(e). This standard is a corollary to FED. R. CIV. P. 56(c), and no case law exists indicating any distinction between the two concerning the applicable standards for determining the existence of such an issue.

[72]Catrett v. Johns-Manville Sales Corp., 756 F.2d 181 (D.C. Cir. 1985), *rev'd sub nom.* Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[73]*Celotex*, 477 U.S. 317 (1986).

[74]*Id.* at 319.

[75]*See infra* notes 115-16; *cf.* Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 39-40 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988) (reversing defendant Celotex's summary judgment; but Celotex Corp. had adduced sufficient evidence to prevail absent the plaintiff's effective rebuttal).

[76]477 U.S. at 329-37.

persuasion.[77] The burden of production initially requires "the moving party to make a *prima facie* showing that it is entitled to summary judgment."[78]

Determining whether this burden requires the movant to produce independent evidence supporting the motion depends on the movant's burden of persuasion at trial.[79] For example, since a defendant typically does not have a burden of persuasion at trial, the defendant who moves for summary judgment usually can satisfy the motion's burden of production by specifically identifying a fatal flaw in the plaintiff's claim, without producing separate evidence negating plaintiff's claim. In contrast, when a plaintiff moves for summary judgment she typically has the burden of persuasion at trial and therefore must produce her own evidence identifying the absence of a genuine issue in order to sufficiently support her motion.

If the moving party satisfies her initial burden of production, the burden then shifts to the non-movant to produce evidence that will raise a genuine issue.[80] In contrast, the burden of persuasion, with respect to the summary judgment motion, always remains with the movant. The movant must first satisfy her initial burden of production, however, before the court determines whether she satisfied her burden of persuasion.[81] Thus in any summary judgment decision, the court focuses primarily on whether the movant has satisfied her burden of production with little or no explicit attention to issues concerning the movant's burden of persuasion.

d. Summary Judgment in Ohio

Enacted in 1959, Ohio's first summary judgment statute[82] foreshadowed the *Anderson* decision because it expressly incorporated the directed verdict standard espoused by the Court.[83] But the confluence of state and federal

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[77] *Id.* at 330.

[78] *Id.* at 331.

[79] *Id.*

[80] *Id.* at 330.

[81] 477 U.S. at 330.

[82] 1965 OHIO LAWS 131 § 2311.041 (repealed 1971).

[83] The subsequent amendments did not change Ohio's standard for determining when genuine issues of material fact existed. Currently, Ohio's Rule states in part:

> (C) Motion and proceedings thereon. . . . Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party

doctrine became complete after the Ohio Supreme Court decided *Wing v. Anchor Media, Ltd.*[84] In *Wing*, the court expressly adopted the shifting burdens analysis announced in *Celotex*.[85] Thus, after *Wing*, the standards of review for both federal courts and Ohio courts became synonymous.[86] In *Jeries v. Prudential Life Insurance Co.*,[87] the court set forth Ohio's standard:

> [S]ummary judgment shall only be granted where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment shall not be granted unless it appears from the evidence that reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion is made. In reviewing a motion for summary judgment, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Temple v. Wean United, Inc.*, [267 N.E.2d 267, 274 (Ohio 1977)].
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> Moreover, upon motion for summary judgment . . . , the burden of establishing that material facts are not in dispute, and that no genuine issue exists, is on the [movant]. *Harless v. Willis Day Warehousing Co.*, [375 N.E.2d 46, 47 (Ohio 1978)]. However, a motion for summary judgment forces the [non-movant] to produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas*, [570 N.E.2d 1095, 1096] paragraph three of the syllabus citing *Celotex v. Catrett*, 477 U.S. 317 (1986).[88]

III. Difficulties in Application

A. Problems Predicted

In contrast to the *Celotex* opinion, the Court was sharply divided over the appropriate legal framework used in *Matsushita* and *Anderson*.[89] In *Matsushita*,

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> being entitled to have the evidence or stipulation construed most strongly in his favor.

OHIO R. CIV. P. 56(C).

[84]570 N.E.2d 1095 (Ohio 1991).

[85]*Id.* at 1096 (paragraph 2 of the court's syllabus); *see also* Bowen v. Kil-Kare, Inc., 585 N.E.2d 384, 394 (Ohio 1992) (Wright, J., concurring in part and dissenting in part) ("[o]ur adoption of the *Celotex* standard implicitly incorporated [the Anderson v. Liberty Lobby, Inc.] standard as well. . . .").

[86]*See, e.g.*, Blaschak v. Union Sav. Bank & Trust Co., No. 91-J-7, 1992 WL 247431, at *3 (Ohio App. 7th Dist. Sept. 30, 1992).

[87]No. 61992, 1991 WL 263662 (Ohio App. 8th Dist. Dec. 12, 1991).

[88]*Id.* at *2. The *Jeries* court used the three authorities that are most frequently cited by Ohio courts in their summary judgment opinions.

[89]The *Celotex* majority opinion, written by Justice Rehnquist, included Justices Marshall, Powell, and O'Connor. Justice White concurred while Justice Brennan filed a dissenting opinion in which Chief Justice Burger and Justice Blackmun joined. The

Justice Brennan joined Justice White's dissent,[90] criticizing the majority's use of "unnecessarily broad and confusing language."[91] More specifically, they feared the new standard would "undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment."[92]

In *Anderson,* Justices Brennan[93] and Rehnquist[94] each wrote dissents predicting critical problems for courts which would have to apply the directed verdict standard when deciding a motion for summary judgment. Rehnquist was concerned that the Court's new standard would be of little practical effect.[95] Brennan agreed and was also concerned that the new standard would "transform what [was] meant to provide an expedited 'summary' procedure into a full-blown paper trial on the merits."[96]

B. *Practical Problems in Adjudication*

Out of the three opinions, one sentence is the source for the trial courts' greatest consternation. The *Anderson* Court stated that a "judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."[97] In other words, a judge must evaluate the sufficiency of the evidence without weighing its credibility.[98]

Perhaps courts silently decide[99] whether the movant has carried his burden of persuasion because the court must avoid the appearance of weighing the

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Brennan dissent disagreed with the Court's application of the particular facts to the law, but agreed with the legal framework that the Court employed. Only Justice Stevens, who filed a separate dissent, did not endorse the Court's legal framework in *Celotex Corp. v. Catrett,* 477 U.S. 317, 337-39 (1986).

[90] 475 U.S. 574, 598-607 (1986).

[91] *Id.* at 601.

[92] *Id.*

[93] 477 U.S. 242, 257-68 (1986).

[94] *Id.* at 268-73.

[95] Chief Justice Rehnquist opined:

> It seems to me that the Court's decision today unpersuasively answers the question presented, and in doing so raises a host of difficult and troubling questions for which there may well be no adequate solutions. What is particularly unfair is that the mess we make is not, at least in the first instance, our own to deal with; it is the district courts and courts of appeals that must struggle to clean up after us.

Id. at 268.

[96] *Id.* at 266-67.

[97] *Id.* at 249.

[98] 477 U.S. at 255.

[99] *See supra* text accompanying notes 80-81.

evidence before it.[100] *Anderson* requires the judge to determine whether the evidence can persuade a reasonable jury. *Celotex* requires the judge to determine whether the evidence persuades the judge. Thus, an inherent difficulty in the summary judgment standard is that, in theory, courts must determine whether a party has produced sufficient evidence to satisfy the burden of production without considering the persuasiveness of the evidence produced. This is an impossibility.

Both Justice Rehnquist and Justice Brennan recognized the inherent difficulty in the standard set forth by the majority. The Court created a standard that would be difficult, if not impossible, to accurately apply. Further, while Brennan and Rehnquist noted the practical difficulties that the new standard would impose on judges, others have noted the potentially detrimental effects of this standard on the entire adversarial process.[101]

1. A Change in Effectiveness

Since the Court announced the *Celotex* trilogy, commentators have expressed concerns about the validity of shifting the emphasis from plaintiff to defendant in summary judgments.[102] When the Advisory Committee adopted Rule 56, they noted its success in New York.[103] At the time, plaintiffs constituted a large majority of the summary judgment movants.[104] Furthermore, Dean Clark

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[100] *See supra* text accompanying note 97.

[101] As the Honorable Judge Jack B. Weinstein observed:

> The Supreme Court's recent [*Celotex*] trilogy of cases interpreting Rule 56 undoubtedly will add to the difficulties plaintiffs face in getting to trial. The decisions essentially allow a defendant to require the plaintiff quickly to assemble and present its case at great expense in order to survive a motion for summary judgment. Perhaps Dean Carrington's proposal to amend Rule 56 . . . could restore balance to this situation.

Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1914 (1989); *see also* Risinger, *supra* note 6, at 41-42; *see generally* Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990); Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770 (1988).

[102] *See* articles cited *supra* note 101. Prior to the *Celotex* trilogy, the burdens of proof seemed to favor plaintiffs by requiring defendants to affirmatively prove a negative in order to establish that a plaintiff's complaint did not raise a genuine issue of material fact. After *Celotex*, the shifting burdens analysis now appears to favor defendants. *But see infra* Part III.B.1.

[103] FED. R. CIV. P. 56 advisory committee notes.

[104] A search on WESTLAW surveying all New York cases available for 1935 and 1936 which included the term "summary judgment" in their synopsis revealed that, out of 234 cases, 152 involved only plaintiff motions for summary judgment. Fifty-nine cases involved only defendant motions for summary judgment, and twenty-three cases involved both parties' making motions for summary judgment. This survey is consistent with Dean Clark's finding in Connecticut for the years 1925-1926. Charles E. Clark, *Fact Research in Law Administration*, 2 CONN. B.J. 211, 218-19 (1928). Clark and Samenow also

clearly viewed summary judgment as a tool to protect plaintiffs.[105] Given this background, the shift in emphasis to the defendant might appear radical.

Contrary to any apparent radical shift, however, the Court merely increased the power of a tool that already favored the defendant. An empirical review of summary judgment decisions in federal district courts in Ohio confirms that making summary judgment more attainable by defendants does not mean plaintiffs have suffered.[106] To the contrary, the days of the summary judgment being a plaintiff's weapon had long since passed when the Court decided the *Celotex* trilogy.

As illustrated in the table below, research revealed 309 summary judgment opinions for the six years preceding the *Celotex* trilogy.[107] During that period, plaintiffs moved for summary judgment in 11% of the opinions that did not involve motions by both parties, and defendants accounted for 89% of the motions. In comparison, research for the six years following *Celotex* revealed 319 summary judgment opinions.[108] During this period, plaintiffs moved for summary judgment in 13% of the opinions that did not involve motions by both parties, and defendants accounted for 87% of the motions. Thus, the *Celotex* trilogy does not appear to have inspired defendants' counselors to move for summary judgment more often than before. Furthermore, even if the trilogy did increase the number of motions made, the influence appears to have affected plaintiff and defendant movants in a similar fashion rather than providing defendants with any greater incentive to move for summary judgment.

The *Celotex* trilogy has, however, altered the effectiveness of summary judgment as a defendants' tool. Prior to *Celotex*, when an opinion involved only

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point out that New York's statistics at the time were comparable to Connecticut's. Clark & Samenow, *supra* note 9, at 469 n.324.

[105]Clark & Samenow, *supra* note 9, at 469-70.

[106]Because this review is limited to those decisions reported on WESTLAW, it is not exhaustive in its scope; rather it merely touches on the "tip of the iceberg". *See* Steven Steinglass, *Section 1983 Litigation in the Ohio Courts: An Introduction for Ohio Lawyers and Judges*, 41 CLEVE. ST. L. REV. 407, 424 (1993) (stating that a review of reported appellate decisions concerning 1983 litigation in Ohio is instrucive but not exhaustive). Many summary judgment motions are ruled on without opinion or publication; others never are resolved because the case reaches settlement or other adjudication first. Nevertheless, despite the limited scope of the review contained in this Note, the results are consistent with those of other similar, more detailed and authoritative reviews. *Cf.* William P. McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule*, 6 J. LEGAL STUDIES 427 (1977) (providing an authoritative approach to the empirical study of summary judgments); *see also* Issacharoff & Lowenstein, *supra* note 101, at 91-94 (analyzing all summary judgment decisions made in the federal district courts during the first quarter of 1988).

[107]Search of WESTLAW, federal district court database and the following query: "Co(Ohio) & sy("Summary Judgment") & da(bef 1986) & da(aft 1979)".

[108]Search of WESTLAW, federal district court database and the following query: "Co(Ohio) & sy("Summary Judgment") & da(bef 1993) & da(aft 1986)".

one party moving for summary judgment, 8% of the motions resulted in the plaintiff prevailing. Of all those summary judgments entered during this time, 53% favored the defendant. After *Celotex*, 10% of these opinions favored plaintiffs and 69% favored the defendant. The difference in the effect on defendants becomes more apparent when comparing the relative rates of their motions being granted pre-*Celotex*. Before *Celotex*, courts granted 59% of defendant motions for summary judgment. After *Celotex*, courts granted 79% of defendant motions for summary judgment.

The 20% difference in defendant success rates is substantial; however, claims that *Celotex* shifted power from plaintiffs to defendants are less forceful in light of the relative plaintiff success for these pre- and post- *Celotex* years. Between 1979 and 1986, the courts granted 74% of plaintiff motions for summary judgment. Between 1986 and 1993, the courts granted 77% of plaintiff motions.

	1/1/79 - 12/31/85	1/1/87 - 12/31/92
Total Number of Cases	309	319
Cases with only 1 Movant	214	235
Percentage of Plaintiff Motions	11%	13%
Percentage of Defendant Motions	89%	87%
Percentage of all Motions Granted in Favor of Plaintiff	8%	10%
Percentage of all Motions Granted in Favor of Defendant	53%	69%
Percentage of Plaintiff Motions Granted	74%	77%
Percentage of Defendant Motions Granted	59%	79%

Thus, while defendants prevail on their motions more often than before *Celotex*, the decision merely made the playing field more even rather than tipping it in favor of defendants. On the other hand, when considering the effect of the trilogy on the power of summary judgment as a tool for defendants, the fact that defendants are more likely to prevail now than prior to *Celotex* is probably more significant than the relative likelihood of plaintiffs' and defendants' success.

2. Protecting the Merchant Class

After *Celotex*, the shift that occurred in federal courts did not transfer power from plaintiff to defendant[109], but rather, it increased protection for the merchant class.[110] England's Parliament enacted its summary judgment statute

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[109] *See* Geoffrey C. Hazard, Jr., *The Federal Rules Fifty Years Later: Discovery Vices and Trans-substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2241 (1989).

[110] *See* Stempel, *supra* note 1, at 161 ("Defendants are disproportionately comprised of society's 'haves': banks, insurance companies, railroads, business organizations, governments and government agencies.").

primarily to protect merchants.[111] From this basis, many of the states as well as the federal courts adopted the procedure.[112] Interestingly, proponents of the new procedure spoke in terms of speed and justice to litigants rather than specifying the practical benefits that were intended to inure to the merchant class.[113]

In describing the burden of production placed upon either party in a summary judgment proceeding, the language of *Celotex* is ostensibly neutral.[114] Later in its opinion, however, the Court implicates that summary judgment might favor the moving party.[115] The Court stated that a party may obtain summary judgment without "show[ing] 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."[116] The Court continued to explain that "the 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 non-moving party's case."[117]

Rehnquist's *Celotex* opinion remained consistent with the rhetoric previously used to describe the burdens of summary judgment. His doctrine assigned burdens without regard to the nature of the parties except for their adversarial relationship as a movant and non-movant.[118] Despite his neutral language, however, in practice the new burden becomes clear. Whereas the old standard, applied by the circuit court, resulted in finding that a genuine issue of material fact existed,[119] the Court's new standard worked to protect the defendant Celotex Corporation, i.e., the "merchant class."

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[111] *See supra* text accompanying notes 12-13.

[112] *Supra* text accompanying note 9.

[113] *See, e.g.*, Robert L. Willis, *A Proposed Summary Judgment Statute for Ohio*, 19 OHIO ST. L.J. 1, 22-23 (1958).

[114] As stated in *Celotex*:

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

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

[115] *See generally* Elizabeth T. Collins, Note, *Celotex Corp. v. Catrett: Lessening the Moving Party's Burden for Summary Judgment?*, 17 MEM. ST. U. L. REV. 293 (1987).

[116] *Celotex*, 477 U.S. at 325. *But cf.* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (requiring defendant to "foreclose the possibility" of a conspiracy in order to prevail on its motion for summary judgment).

[117] 477 U.S. at 325.

[118] *Id.* at 327; *supra* note 114.

[119] *See* Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 184 n.10 (D.C. Cir. 1985), *rev'd sub nom.* Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (citing National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023, 1027 (D.C. Cir. 1978) ("Facts not conclusively

England's summary judgment was designed to protect merchants from sham defenses.[120] Today's summary judgment, after the *Celotex* trilogy, is designed to protect merchants from sham claims. The courts have avoided the appearance of making such "political"[121] decisions by placing emphasis on the use of summary judgment as a means to a more efficient justice system. Certainly, the "process" purpose is at least as important as the "political" purpose, and the best justification for the rhetoric is the fact that the former purpose serves the latter.

Rehnquist's rhetoric not only camouflages the "political" aspects of the decision, but it also maintains the fiction that rules of procedure are non-partisan.[122] Regardless of Rehnquist's skillful draftsmanship, his position is difficult for courts to maintain because rather than maintaining a non-partisan process, *Celotex* affirms the original intent of the rule to protect merchants. In fact, when courts attempt to maintain a non-partisan quality to the rule, it can become a primary source of confusion in the application of a fairly simple rule.[123]

In general, rules of procedure should be non-partisan,[124] but as with everything else in law, there is always an exception. Summary judgment does not need to be constrained by any attempts at maintaining the appearance of being non-partisan. There are other checks available to assure that the application of summary judgment does not unduly infringe on the adversary's opportunities for equal justice.[125] If the courts and legislators address summary

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demonstrated, but essential to the movant's claim, are not established merely by his opponent's silence; rather the movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue.")).

120*See supra* text accompanying note 12.

121*See* Stempel, *supra* note 1, at 161. The term "political" is borrowed from Professor Stempel's article. He describes the word not as referring to an overtly partisan decision that favors a particular party, but rather as a decision that significantly affects the distribution of "social welfare and power in society." *Id.*

122*See id.* ("All rules [of civil procedure] are probably inherently political.").

123*See* case cited *supra* note 6.

124*See* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2093 (1989).

125*Cf.* U.S. CONST. amend. V (due process clause); U.S. CONST. amend. VII (right to trial by jury); U.S. CONST. amend. XIV, § 1 (due process clause); FED. R. CIV. P. 11 (providing sanctions against attorneys making frivolous claims or, in this case, motions); *see also* John F. Lapham, Note, *Judgment Before the Completion of Discovery: A Proposed Revision of Federal Rule of Civil* Procedure *56 (f)*, 24 U. MICH. J. L. REF. 253, 279-81 (1990). Additionally, the court may utilize its power under FED. R. CIV. P. 16 to monitor the conduct of the parties prior to trial and assure that plaintiffs have adequate opportunity to realize their due process rights and that defendants do not abuse the power of summary judgment as a weapon for delay or short-cut 'justice'.

judgment as it is—a defensive tool[126]—then they will be able to develop clear guidelines that judges can consistently apply.

3. A Threat to the Judicial Process

Undoubtedly, the *Celotex* trilogy has changed the law's perspective on summary judgment.[127] Whether the panoramic perspective is positive or negative, the details remain troubling. In particular, current summary judgment doctrine threatens the integrity of the judicial process because of the discretion a judge must now exercise in deciding the motion.

Anderson[128] and *Matsushita*[129] set forth a seemingly impossible standard for determining the existence of a genuine issue of material fact. Any effort to weigh the sufficiency of evidence without evaluating its credibility can only result in a judge's making a highly subjective determination. Justice Holmes believed that the law may be more a matter of experience than reason,[130] but it is reason which provides the assurance that the law provides justice. Without manageable guidelines, litigants are left to rely only on their judge's own sense of fairness. Of course, judges should rely on their sense of fairness when making summary judgment determinations, but they also should rely on practical guideposts to allow litigants a better opportunity to predict the judge's decision.

Matsushita is an example of how apparently arbitrary jurisprudence can threaten the integrity of summary judgment.[131] Remarkably, the Court relied on its own economic theories to assess the implausibility of the plaintiffs' argument.[132] The Court explained in detail why the alleged scheme was contradictory to the experts' views on sound business practices; but, it did not

[126]Even when used by plaintiffs, summary judgment is used to defend against sham defenses.

[127]*See* City of Mt. Pleasant, Iowa. v. Associated Elec. Coop., Inc., 838 F.2d 268, 273 (8th Cir. 1988) ("In any case, whatever the meaning of our earlier cases, [after the *Celotex* trilogy] . . . we should be somewhat more hospitable to summary judgments than in the past.").

[128]477 U.S. 242 (1986).

[129]475 U.S. 574 (1986).

[130]*See* OLIVER WENDELL HOLMES, THE PATH OF THE LAW, IN COLLECTED LEGAL PAPERS 167, 172-95 (1920); *see also* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.").

[131]Like *Celotex*, the *Matsushita* Court addressed whether a genuine issue for trial was present as required in FED. R. CIV. P. 56(e); but as discussed in note 71, *supra*, the standards are indistinguishable from those required by FED. R. CIV. P. 56(c).

[132]*See, e.g.*, 475 U.S. at 604 (White, J. dissenting) (stating that the majority "consistently assumes that petitioners valued profit-maximization over growth[,] . . . [and] that this is an assumption that should be argued to the factfinder, not decided by the Court"); *see also* Stempel, *supra* note 1, at 112-14.

draw upon the views of the experts that the parties submitted in the affidavits of record. Instead, the Court ultimately relied upon its own business sense.[133]

Dissenting, Justice White argued that the Court's establishing a judge's authority to weigh the evidence in making a summary judgment determination was unprecedented.[134] Regardless of whether the Court utilized the proper means to expand the judge's role,[135] it certainly moved the doctrine in the direction that Dean Clark intended. Yet, while Clark may have wanted judges to have more discretion in applying summary judgment, it is doubtful that he envisioned the expansive role that *Matsushita* created.[136]

The problem of judges' exercising excessive discretion becomes even more acute when the summary judgment determination is based on affidavits. First, although the Rule requires that an affidavit set forth "specific facts"[137] to raise genuine issues, the Court has acknowledged the difficulty in discerning the difference between specific facts and conclusory allegations.[138] Second, when interpreting an individual's claim on an affidavit, the judge must evaluate the credibility of the claim in order to determine the sufficiency of the claim.[139]

In *Lujan v. National Wildlife Federation*,[140] an affidavit presented both problems at once. Peggy Kay Peterson was a member of the National Wildlife

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[133]*See* 475 U.S. at 588-95.

[134]*See id.* at 601 (White, J. dissenting) ("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.").

[135]Professor Stempel contends that the *Anderson* Court should have effected its changes upon summary judgment through the procedures set forth in the Rules Enabling Act, 48 Stat. 1064 (1934) (codified at 28 U.S.C. § 2072 (1982)), rather than through the radical rule re-interpretation made by a sharply divided Court. Stempel, *supra* note 1, at 181-87.

[136]In 1985, the Civil Rules Committee began to review Rule 56 with the intent to increase its effect. Professor Paul Carrington, who was the Reporter for the Advisory Committee on the Civil Rules, noted that the *Celotex* trilogy may have "made Rule 56 a more powerful engine than the Civil Rules Committee contemplated when it first commenced re-study of the rule in 1985." Carrington, *supra* note 124, at 2093. The same comment possibly can be made with respect to Dean Clark's intent.

[137]FED. R. CIV. P. 56(e); OHIO R. CIV. P. 56(E).

[138]Lujan v. National Wildlife Fed'n, 497 U.S. 871, 889 (1990) ("At the margins there is some room for debate as to how 'specific' must be the 'specific facts' that Rule 56(e) requires in a particular case.").

[139]A judge determines whether an affiant's claim can persuade a reasonable jury to find in favor of the non-moving party; thus, the strength of the claim is at least an implicit factor in the judge's consideration. To this extent, the judge cannot avoid evaluating the claim's credibility. As a result, the judge must base his decision on considerations contrary to the Court's mandate to draw all inferences in a light most favorable to the non-movant. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); *accord* Williams v. First United Church of Christ, 309 N.E.2d 924, 925 (Ohio 1974).

[140]497 U.S. 871 (1990).

Federation.[141] In order for the organization to have standing to sue the defendant Bureau of Land Management (BLM), it had to show that Peterson had been "'adversely affected or aggrieved . . . within the meaning of [the] relevant statute . . . .'"[142] BLM had taken action that would allow public lands to be open for mining activities.[143] The plaintiffs claimed that BLM's action contravened a statute because BLM failed to provide adequate notice of its action.[144] In support of the claim, Peterson submitted an affidavit stating that her "enjoyment of federal lands, particularly those in the vicinity of [the land in question] . . . had been . . . adversely affected . . . ."[145]

BLM moved for summary judgment.[146] It asserted that its action concerned an area limited to 4,500 acres, while the area described in Peterson's affidavit covered two million acres. BLM maintained that Peterson failed to specify that she enjoyed the particular 4,500 acres at issue. The district court agreed and ordered summary judgment in favor of the defendant.[147]

On appeal, however, the circuit court found that the affidavit did raise a genuine issue of material fact. The court found the facts averred to be sufficient because "[i]f Peterson was not referring to the lands in this 4500 acre area, her allegation of impairment to her use and enjoyment would be meaningless, *or perjurious* . . . ."[148]

In a 5-4 decision, the Supreme Court decided that the affidavit was missing facts that the Court could not presume.[149] In contrast, the dissent felt that "the allegations contained in the . . . affidavit, in the context of the record as a whole, were adequate to defeat a motion for summary judgment."[150] The dissent added that when considering particular assertions in light of the entire affidavit, a judge is not necessarily presuming facts "that are neither stated nor implied simply because without them the plaintiff would lack standing."[151]

Although the three courts remained silent on the issue, their disagreement revolved around the credibility of the affidavit. In this case, the credibility of

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[141] *Id.* at 880.

[142] *Id.* at 883 (quoting 5 U.S.C. § 702 (1976)).

[143] *Id.* at 885.

[144] *Id.* at 879.

[145] 497 U.S. at 886.

[146] *Id.* at 881.

[147] National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 331 (D.C. Cir. 1988), *rev'd*, 878 F.2d 422 (1989), *rev'd*, 497 U.S. 871 (1990).

[148] National Wildlife Fed'n v. Burford, 878 F.2d 422, 431 (D.C. Cir. 1989), *rev'd*, 497 U.S. 871 (1990) (emphasis added).

[149] 497 U.S. at 889.

[150] *Id.* at 902.

[151] *Id.* at 903-04.

the affidavit determined the sufficiency of the affidavit. Thus the Court reached a just result, but impliedly violated the *Anderson* standard in the process.

Lujan's history of divergent views highlights the difficulties judges face when applying the *Anderson* standard. Ohio's courts have had similar difficulties applying *Anderson*. While *Lujan* demonstrates judges and justices making very subjective determinations where credibility is an inherent issue in their consideration, *Shilling v. Mobile Analytical Services, Inc.*,[152] illustrates Ohio judges hiding behind a substantive law issue in order to avoid the trap of evaluating the sufficiency of evidence without weighing its credibility.

Suspicious that his drinking water was contaminated with gasoline, plaintiff John Shilling hired the defendant corporation to test the water for contaminants in October, 1985.[153] The defendant did not find any contaminants in the water; so Shilling and his family continued to drink the water. Two years later, in October, 1987, Shilling had it tested again. The defendant performed the test, and the results were negative. Approximately two months later, Shilling then had another laboratory test the water again, and that test indicated that gasoline was mixed in the water.[154]

When a physician determined that Shilling had multiple sclerosis, Shilling subsequently filed a negligence cause of action against the defendant. The defendant moved for summary judgment on the grounds that Shilling failed to establish that his drinking the contaminated water caused his illness.[155] To oppose the motion, Shilling offered the affidavit of Dr. Singer, a Ph.D., neurotoxicologist/psychologist.[156] The affidavit attributed Shilling's illness to drinking the gasoline contaminated water.[157]

The trial court cited an Ohio Supreme Court precedent and stated that, absent testimony from a "medical witness,"[158] the issue was one for the trier of fact. Then the court determined that a "medical witness" was limited to a medical doctor.[159] Thus, the court refused to consider the expert's affidavit because he was a Ph.D. The trial court granted summary judgment in favor of the defendant, and the court of appeals affirmed.[160]

After reviewing the expert's impressive credentials, the supreme court decided that Dr. Singer was qualified to offer the requisite expert testimony

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[152] 602 N.E.2d 1154 (Ohio 1992).

[153] *Id.* at 1155.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] 602 N.E.2d at 1155.

[158] *Id.* (quoting the syllabus of Darnell v. Eastman, 261 N.E.2d 114 (Ohio 1970)).

[159] *Id.*

[160] *Id.* at 1156.

and met the definition of a "medical witness."[161] The court stated that the issue before it was whether a Ph.D. neurotoxicologist/psychologist could satisfy the definition of being a medical witness.[162] Yet, despite its affirmative holding, the court's rationale did not address the broader issue. Instead, the court focused on Dr. Singer's personal credentials to determine that he was qualified to testify.

While the *Shilling* court expressly determined that Dr. Singer was qualified, it impliedly determined that he was credible—at least to the extent that the testimony was sufficient to raise a genuine issue of material fact. In its analysis, the court never discussed whether any other non-medical doctor would be competent to testify. The court only focused on Dr. Singer's unique qualifications.

Although the *Shilling* court probably provided substantial justice and some basis for holdings in analogous cases, its decision ignored the *Anderson* standard. A judge might find a qualified expert not credible, but the judge cannot find an expert to be credible without deciding the expert is qualified. Perhaps a formalist can distinguish between the issues of whether an expert is qualified and whether an expert is credible, but the realist recognizes that one could no more clearly distinguish whether Oedipus spent the night with his mother or his lover.

4. The Changing Standard

Without more definitive guidelines on which to rely, one trend that has been fairly consistent in the courts is that the weight of the evidence will be affected by the subject matter before the court.[163] Of course, the courts have not announced this distinction because it does not comport with traditional, across-the-board applications of procedural devices. Once again, however, this attempt to treat summary judgment as a completely neutral device results in great confusion.

One of the dilemmas summary judgment poses is whether the trial court's decision is solely a matter of law or whether it also includes findings of fact. The civil rules appear to clearly address this issue.[164] The statutory language dictates that trial courts must decide summary judgment motions "as a matter of law."[165] Notwithstanding this mandate, trial courts must make at least a preliminary finding of facts to determine whether the evidence is insufficient

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[161] *Id.* at 1155.

[162] 602 N.E.2d at 1155.

[163] *See infra* text accompanying notes 170-87 and 228-36.

[164] *Compare* OHIO R. CIV. P. 56 (judgment as a matter of law) *with* OHIO R. CIV. P. 52 (findings of fact by the court).

[165] OHIO R. CIV. P. 56(C); *supra* note 83.

to raise a genuine issue.[166] In short, the statement that summary judgment is a finding as a matter of law is yet another legal fiction. In practice, summary judgment reflects a judge's determination that the facts, as she perceives them, are insufficient for a party to win his case at trial.

Thus, in their proper efforts to reach just results, judges render summary judgments that may warp various doctrines to support their positions.[167] The decisions are clearly fact driven, and the existing doctrine merely becomes an obstacle for the judge to negotiate when making a difficult decision.[168] Moreover, the decision itself is often made difficult only because of the standard that hinders the judge.[169]

Two types of claims which illustrate the fact-driven nature of summary judgment determinations are product liability claims and public official defamation claims.[170] These claims are exceptionally illustrative because product liability law generally protects plaintiffs[171] while public official

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[166]This issue also raises significant difficulties for the appellate court. The appellate court must determine whether it is reviewing a finding of fact or law in order to establish its standard of review. This confusion is reflected in Ohio's decisions which enunciate virtually every known standard of review depending on the particular decision being read. *See* AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp., 553 N.E.2d 597, 599 (Ohio 1990) (abuse of discretion); American Energy Servs. v. Lekan, 598 N.E.2d 1315, 1317 (Ohio Ct. App. 1992) (independent review); Fortman v. Dayton Power & Light Co., 609 N.E.2d 1296, 1299 (Ohio Ct. App. 1992) (de novo); Smith v. Wook Kang, No. CA-7003, 1987 WL 11868, at *3 (Ohio Ct. App. 1987), *rev'd*, 524 N.E.2d 506 (Ohio 1988) (plain error).

[167]*Compare* King v. Avila, 760 F. Supp. 681, 682 (N.D. Ill. 1989) (holding that defendant police officer's affidavit sufficiently supported defendant's motion for summary judgment because even though affidavit was not based on officer's personal knowledge, it was based on his personal knowledge of his partner's statement) *with* FED. R. CIV. P. 56(e) ("supporting . . . affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence. . . .) *and* FED. R. EVID. 802 ("hearsay is not admissible. . . .") *and* WRIGHT ET AL., *supra* note 9, § 2738 ("Because the policy of Rule 56(e) is that the judge should consider any material that would be admissible at trial, the rules of evidence and the exceptions thereto determine what averments the affidavit may contain.").

[168]Judges may also stretch doctrine when they are denying summary judgment. *See, e.g.*, Morris v. Children's Hospital Medical Ctr., 597 N.E.2d 1110, 1114, 1116 (Ohio Ct. App. 1991) (allowing plaintiff minor to survive summary judgment by holding conduct of physician and nurse to a standard of negligence rather than medical malpractice).

[169]*See* discussion of Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990), *supra* text accompanying notes 140-51.

[170]Public official defamation law provides the most extreme example of defamation law's protection of defendants, but the protection also extends to defendants in defamation cases involving public figures and private persons. *See, e.g.*, Jacobs v. Frank, 573 N.E.2d 609, 613, 616 (Ohio 1991) (private person); Stepien v. Franklin, 528 N.E.2d 1324, 1328-29 (Ohio Ct. App. 1988) (public figure).

[171]Leichtamer v. American Motors Corp., 424 N.E.2d 568, 577 (Ohio 1981); Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 901 (Cal. 1962); *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 99, at 697 (5th ed. 1984).

defamation law generally protects defendants.[172] Thus when the court must decide a summary judgment motion, it considers the relative rights of the parties based upon the policies driving the substantive law.[173]

When a defendant moves for summary judgment against a public official who claims defamation, the defendant has two substantial advantages. First, the public official plaintiff must adduce clear and convincing evidence to prevail at trial,[174] a burden higher than that placed on most civil litigants.[175] Thus, the standard to survive summary judgment is also higher and defendants are more likely to prevail. Second, defendants who allegedly published defamatory material have First Amendment rights at stake,[176] and the court is exceptionally protective of these rights.[177] Obviously, the clear and convincing standard was established to protect precisely the First Amendment rights involved, and should therefore be a sufficient basis of protection for the defendant. Nevertheless, courts consistently single out the First Amendment concerns when making summary judgment determinations in these cases.[178]

In contrast, the intent of product liability law is to protect plaintiffs.[179] Furthermore, it is difficult to compare the two types of actions because the facts are so dissimilar. One particularly noteworthy distinction is the proximate cause requirement of strict liability.[180] Proximate cause is one of the most difficult elements a defendant must address in order to succeed on his summary judgment motion. Arguably, this element alone could explain the difference between the rates of summary judgment in strict liability and defamation cases rather than any policy implications underlying the respective

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[172]*See* Perez v. Scripps-Howard Broadcasting Co., 520 N.E.2d 198, 202 (Ohio 1988), *cert. denied*, 488 U.S. 870 (1988); Grau v. Kleinschmidt, 509 N.E.2d 399, 403-05 (Ohio 1987); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-12, at 861-72 (2d ed. 1988).

[173]*E.g.*, Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985), *cert. denied*, 474 U.S. 829 (1985) ("Given the ease with which [Title VII] suits may be brought and the energy and expense required to defend such actions, we believe the trial judge properly granted summary judgment.").

[174]*Perez*, 520 N.E.2d ast 202

[175]*See Grau*, 509 N.E.2d at 403-05.

[176]Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984); *see also* TRIBE, *supra* note 172.

[177]Varanese v. Gall, 518 N.E.2d 1177, 1180-81 (Ohio), *cert. denied*, 487 U.S. 1206 (1988) (citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 508 (1984)).

[178]*See id.*; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986); St. Amant v. Thompson, 390 U.S. 727, 730-32 (1968); Moriarity v. Lippe, 294 A.2d. 326, 330-31 (Conn. 1972).

[179]*See* cases and treatise cited *supra* note 171.

[180]*See* Temple v. Wean United, Inc., 364 N.E.2d 267, 270 (Ohio 1977); OHIO REV. CODE ANN. § 2307.71 *et seq.* (Anderson 1991).

laws.[181] The contrast is heightened by the fact that, in public official defamation cases, plaintiffs must prove the defendant's state of mind with convincing clarity,[182] and, after *Anderson*, it is exceptionally difficult for public official defamation plaintiffs to survive summary judgment motions.[183] A more plausible explanation might be that both factors contribute to the discrepancy. Due to the policy implications inevitably involved and the vagueness of the concept, the issue of proximate cause is one where a judge can exercise enormous discretion in her finding.[184] At the summary judgment stage, the degree of discretion a judge chooses to exercise may well be influenced by her innate sense of fairness. That sense of fairness is not completely arbitrary, but rather is shaped by the nature of the claim before her.

Part of the judge's decision-making process includes a determination of which party is apt to be more harmed by denying a trial of the facts.[185] In part, it is an exercise of human compassion when a judge decides that a newspaper is more likely to be harmed by the ordeal of a trial than the allegedly defamed public official.[186] Conversely, the judge may be considerably more sympathetic to the plight of the punch-press operator whose hand is severed in a manufacturer's machine.[187]

To recapitulate, the problems posed by the current standard that courts employ when deciding whether a genuine issue of material fact exists are multifarious. At its most abstract level, summary judgment determinations are undergirded with a tension between the interests in obtaining fast resolution to controversies and maintaining the non-movant's right to due process. At a

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[181] After conducting a WESTLAW search for all defamation cases which involved summary judgment review in Ohio's appellate courts since 1986, 42 opinions were retrieved. In every case, the defendant was the movant, and the defendant prevailed in 90% of the cases. None of the cases involved partial summary judgment on the issue of defamation. In contrast, after conducting a similar search for products liability cases, 21 opinions were retrieved, and defendants only prevailed in 67% of those decisions. The two searches were conducted using the following parameters:

1) The Defamation cases: Database: Oh-cs, Query: "To(237) & "summary judgment" & da(aft 1986) & da(bef 1993)"

2) The Product Liability Cases: Database: Oh-cs, Query: "To (313A) & "summary judgment" & da(aft 1986) & da(bef 1993)".

[182] New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) (requiring proof of actual malice).

[183] Levine, *supra* note 53, at 190-91, 198-200.

[184] *See* KEETON ET AL., *supra* note 171, § 41, 42, at 263-64, 272-75.

[185] *See, e.g.*, Volk v. Multi-Media, Inc., 516 F. Supp. 157, 162 (S.D. Ohio 1981) (finding that plaintiff is not precluded from trial when the "ineptness and sloppiness" of his attorney lead to missing a notice deadline that was a prerequisite of the Age Discrimination in Employment Act); *see also* case cited *supra* note 173.

[186] *E.g.*, Varanese v. Gall, 518 N.E.2d 1177, 1180-81 (Ohio 1988).

[187] *E.g.*, Knitz v. Minster Mach. Co., 432 N.E.2d 814 (Ohio 1982) (reversing lower court's granting and affirming summary judgment in favor of defendant).

more base level, judges may so warp their application of the current standard that it threatens our judicial system's integrity.

IV. APPROACHES TOWARDS CONSISTENCY

Part of our sense of justice includes swift resolution of controversies.[188] This aspect of justice provides the noble, ideological justification for increasing the power of summary judgment. For all its idealism, however, there have been doubts as to whether the new standard has indeed increased judicial efficiency and therefore justice.[189] Perhaps the fastest way to resolve disputes is through settlement.[190] Perhaps the greatest obstacle to reaching resolution is the process of discovery.[191] Summary judgment may impede the first and exacerbate the second.[192] Any new guidelines that the courts develop should attempt to avoid these traps in order to preserve the integrity of the adversarial process.

The first step in developing manageable standards for determining whether a genuine issue of material fact exists is recognizing that summary judgment is a unique procedure which warrants treatment unlike other rules of procedure. Whether employed by plaintiffs or defendants, summary judgment is a defensive weapon.[193] If courts or legislators can focus on this bias rather than attempt to hide it in non-partisan clothing, then clearer, more productive guidelines can be established. Similarly, courts should acknowledge the fact-finding nature of summary judgment instead of making claims that appear to satisfy constitutional concerns.[194] Yet, at the same time, the courts must remain cognizant of the precious, constitutional rights involved.

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[188]*See* FED. R. CIV. P. 1; *supra* note 2.

[189]*See generally* Issacharoff & Lowenstein, *supra* note 101; *see also* Carrington, *supra* note 124, at 2090-91.

[190]*See* Issacharoff & Lowenstein, *supra* note 101, at 100-03.

[191]*See generally* Lapham, *supra* note 125.

[192]THOMAS A. MAUET, PRETRIAL 278 (2d ed. 1993).

[193]Although today's plaintiffs use motions for summary judgment far less than do defendants, the original English principles that protected plaintiffs from defendants who caused unnecessary delays by filing sham answers are still applicable and viable. *See* Society Bank, N.A. v. Kellar, 579 N.E.2d 717, 719 (Ohio Ct. App. 1989).

[194]Summary judgment decisions are particularly dubious when they involve questions of mixed law and fact, i.e. proximate cause. When deciding these issues, also described as questions of ultimate facts, a judge must describe his rationale as though he were able to separate the facts from the law. Yet the decision requires that the judge apply the facts to the law in order to determine what issues exist. Judge William W. Schwarzer, a member of the Advisory Committee for the Federal Rules of Civil Procedure, has written illuminating articles on this subject. *See* William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 455-73 (1992); William W. Schwarzer, *Summary Judgment: A Proposed Revision to Rule 56*, 110 F.R.D. 213, 225-29 (1986); Schwarzer, *supra* note 4.

These last two concerns are dichotomous, but the courts can adequately address the concerns in a manner that provides at least a traditional level of predictability.[195] The key to such a solution is to articulate the two levels of the decision making process that are involved in summary judgment. A judge must decide whether the evidence is sufficient to satisfy the burdens established by the applicable substantive law.[196] This process requires a judge to decide 1) whether the evidence is sufficient to persuade a reasonable jury to find in favor of the non-movant;[197] and 2) whether the evidence is sufficient to persuade the judge that the first consideration will be satisfied.[198]

The two steps require different levels of persuasion. In civil litigation, the highest standard of proof required of a plaintiff is the "clear and convincing" standard. More commonly, however, the plaintiff must adduce evidence sufficient to persuade a jury by a preponderance of the evidence. Whatever the substantive law requires, the standard of proof for the first step is so determined.

In criminal cases, the state, as plaintiff, must typically prove its case beyond a reasonable doubt. Standards of proof vary based upon the liberty or right that is at stake: the greater the right, the higher the standard of proof. Accordingly, judges should be confident beyond a reasonable doubt that the evidence before them is insufficient to entitle the non-movant to a full trial.[199] If this standard, in practice, raises the first standard, it is a reasonable radiation of the court's efforts to protect the litigant's right to a trial.

The two-tiered system allows courts to unleash the shackles that the *Anderson* Court attached.[200] Once the court announces the two steps in the

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[195]Cynics may identify the term "predictable judicial decision" as an oxymoron. Nevertheless, practitioners at least should be able to distinguish the arbitrary from the principled decision, and therein lies traditional predictability—at least as long as traditional principles are applied.

[196]*See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253-55 (1986); Perez v. Scripps-Howard Broadcasting, Co., 520 N.E.2d 198, 202 (Ohio 1988).

[197]OHIO R. CIV. P. 56(C), *supra* note 83.

[198]*See* Cohen v. Eleven West 42nd Street, Inc., 115 F.2d 531, 532 (2d Cir. 1940) ("No doubt, a judge must often come near to trying the issues before he can decide whether there are any issues to try, but that is inherent in the whole practice [of deciding summary judgment motions].").

[199]The Seventh Amendment right to a jury trial is among our most precious rights. Of course, other equally important rights exist, but none is a more important safeguard of our democratic system of justice.

[200]The clear language of *Anderson* can create difficult restraints on a judge who must rationalize the nonexistence of a genuine issue of material fact. Some commentators, however, believe that *Anderson* circumvents the need to distinguish factual from legal questions. *See* WARREN FREEDMAN, SUMMARY JUDGMENT AND OTHER PRECLUSIVE DEVICES 3 (1989); Comment, *The Supreme Court, 1985 Term: Leading Case*, 100 HARV. L. REV. 100, 256 (1987). Contrary to these views, the Court neither expressly nor implicitly denied the courts' need to establish a distinction between legal and factual issues. Moreover, in order to demonstrate the absence of a genuine issue of material fact when the issue is

process, it can then freely identify a circumstance that would require the judge to evaluate the credibility of evidence in order to determine its sufficiency. Credibility is ultimately a question of how sure the fact-finder is of the fact presented. Assuming that the fact-finder is certain of the validity of the fact, she may then decide whether the fact is sufficient.

A. *Use of Summary Jury Trials*

At least one federal district court judge[201] has expounded the virtues of summary jury trials for his court. An in-depth examination of summary jury trials is beyond the scope of this Note, but a brief description of the process may be informative.

> A summary jury trial is conducted before six persons drawn at random from the Court's jury pool, normally used for petit juries, who are summoned under threat of fine or imprisonment. . . . The proceeding consists of opening and closing arguments with an overview of expected trial evidence. No direct testimony is taken from witnesses. The summary jury's 'verdict' is non-binding.[202]

Use of a summary jury trial would provide an equitable compromise when a credibility issue is hopelessly intertwined with a sufficiency issue.[203] When a judge identifies such an issue, his first step would be to presume the evidence to be sufficiently credible and determine on that basis whether summary judgment would be proper. If summary judgment would be proper, then the next step would be to submit the specific evidence to a summary jury trial to evaluate its credibility.[204]

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one of ultimate fact, the judge must distinguish between the two in order to grant summary judgment. Without distinguishing the issues, a genuine issue would always exist in such cases because the legal question could not be resolved without making a factual determination which then, by definition, would raise a genuine issue of material fact.

201 Thomas D. Lambros, United States District Judge in the Northern District of Ohio, created the summary jury trial and uses it with success in his court. Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789 (1989). *But see* Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

202 Hume v. M & C Management, 129 F.R.D. 506, 507-08 (N.D. Ohio 1990). For a more detailed explanation see Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 470-71, 482-86 (1984).

203 *Cf.* FED. R. CIV. P. 16 (c)(5) (authorizing the court to "take appropriate action with respect to . . . the appropriateness . . . of summary adjudication under Rule 56"); FED. R. CIV. P. 43(e) (authorizing the court to hear oral testimony to develop facts not appearing on record); FED. R. CIV. P. 53 (authorizing the court appointment of a special master to assist with difficult issues before the court).

204 The issue concerning whether a judge may compel parties to submit to a summary jury trial has been a point of contention. Both the Sixth and Seventh Circuits, however, have found that such compulsion is impermissible. *See In re:* NLO, 5 F.3d 154, 157 (6th

When the summary jury considers the evidence to determine its credibility, the jury must, of course, consider whether the evidence is sufficient. Only upon consideration of both elements can the jury render its verdict in favor of or against summary judgment. The difference in this process from the judge's making the decision is two-fold. First, the jury cannot err as a matter of law in its determination of the sufficiency of the evidence because the judge has already determined that the evidence is sufficient if credible. If the jury decides that the summary judgment is not appropriate, it does so because the evidence is not sufficient when viewed in light of its credibility. Second, even if the jury apparently nullifies a cause of action, the rights of the parties have been protected by having a jury make the fact determination rather than a judge.[205]

A fundamental aspect of the current summary jury trial process is its advisory nature.[206] However, for the purposes of deciding the questionable existence of an issue of material fact in a summary judgment motion, the jury's verdict should be binding. Unlike current summary jury trials which are used strictly as a "settlement tool,"[207] in this application, the summary jury trial serves to resolve an issue of fact. In the event that the jury determines that the issue is not genuine,[208] then its decision should be binding.

This process, beginning with the judge's decision to involve a summary jury and ending with the summary jury's verdict, limits the jury's function to fact finding. Thus, in the absence of a genuine issue of material fact, the non-moving party has no claim to trial that might allegedly be violated.[209] On this basis, the binding effect of the summary jury verdict should be consistent with Seventh

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Cir. 1993); Strandell v. Jackson County, Ill., 838 F.2d 884, 886-88 (7th Cir. 1988); *see also* S. 2027, 101st Cong., 2d Sess. § 3 (1990) (a failed bill that would have authorized federal courts to compel participation in summary jury trials). *But see* McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 46-48 (E.D. Ky. 1988) (holding that a local rule was valid and intended to give judges in that district authority to compel summary jury trial participation). Regardless of which is the better view, the dispositive use of summary jury trials with respect to summary judgment is sufficiently distinct from its current capacity as merely a settlement tool that compelled participation may be entirely proper despite the current circuit court opinions to the contrary.

[205] When used to determine a factual issue relevant to the summary judgment determination, the summary jury trial decision would be binding. This is a change from current summary jury trial practices. Whether a judge could require the litigants to participate in such binding adjudication is beyond the scope of this note. Of course the predicate for this proposal is that the judge does have this authority.

[206] *See supra* text accompanying note 202.

[207] *See* Hume v. M & C Management, 129 F.R.D. 506, 508 (N.D. Ohio 1990).

[208] "[I]f the evidence is merely colorable, . . . or is not significantly probative. . . [,]" then no genuine issue of fact exists. Bowen v. Kil-Kare, Inc., 585 N.E.2d 384, 394 (Ohio 1992) (Wright, J., concurring in part and dissenting in part) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (omissions in the original)).

[209] Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319-20 (1902).

Amendment principle that is at risk in summary disposition of cases, that being the right to trial by jury.[210]

Using a summary jury trial, however, might be contrary to summary judgment's intended purpose of expediting resolution of controversies.[211] Still, if the result of using summary jury trials is the warranted, increased protection of litigants' rights to trial, the added delay is a small price for the greater protection of individual rights that is achieved by placing inherently unpredictable decisions into the jury's deliberation, rather than a judge's determination. Moreover, other methods can be implemented to offset delays created by summary jury trials.

B. Entering Summary Judgment Sua Sponte

A summary jury would be used when a decision is inherently unpredictable.[212] In cases where a summary judgment determination is highly predictable,[213] the motion itself could be preempted by incorporating a mandatory summary judgment standard. When the trial court recognizes that no issues of fact are before it, the court should notify the parties of the determination. After giving the parties adequate time to resolve their dispute privately, the court should *sua sponte* enter summary judgment for the appropriate party.

Like the use of a summary jury trial, *sua sponte* summary judgments are already in use in the federal courts.[214] The Ohio Supreme Court, however, has repudiated the power in its state courts. In *Marshall v. Aaron*,[215] the court seized upon the statutory language indicating that summary judgment shall not be rendered "*unless it appears from . . . [the] evidence or stipulation and only therefrom,* that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. . . ."[216] Using this language, and without additional precedent, the court made a restrictive interpretation of Rule 56(C) requiring that summary judgment

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[210] *See supra* note 2.

[211] Posner, *supra* note 201.

[212] Two of the most common instances of such decisions are those involving affidavits of experts' opinions and those involving issues of ultimate facts. *See* discussion *supra* text accompanying notes 137-63.

[213] *See* sources cited *infra* note 214.

[214] *E.g.*, Harrington v. Vandalia-Butler Bd. of Educ., 649 F.2d 434, 436 (6th Cir. 1981) (citing Kistner v. Califano, 579 F.2d 1004, 1006 (6th Cir. 1978) and Capital Films Corp. v. Charles Fries Prods., 628 F.2d 387, 390-91); *see also* WRIGHT ET AL., *supra* note 9, § 2719; E. H. Schopler, Annotation, *Court's Power, on Motion for Summary Judgment, to Enter Judgment Against Movant*, 48 A.L.R.2d 1188 (1956). *But cf.* Powell v. United States, 849 F.2d 1576, 1582 (5th Cir. 1988) (holding that a district court improperly granted summary judgment *sua sponte* when it did so without giving proper notice to the parties).

[215] 472 N.E.2d 335 (Ohio 1984).

[216] *Id.* at 338 (quoting OHIO R. CIV. P. 56(C) (emphasis and omissions in the original)).

could only be entered pursuant to a motion by a party. This holding is contrary to the salutary purposes of the rule to the extent that it limits the court's ability to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."[217]

The liberal application of a *sua sponte* summary judgment in light of mandatory standards to establish genuine issues is a close cousin to more restrictive pleading requirements.[218] The approaches are similar because both would encourage more specific pleading and would make it more difficult to prevail when pleadings are sloppily drafted. In addition, both would likely curb the number of complaints filed.

Unlike creating more strict pleading requirements, mandatory summary judgment guidelines would be consistent with the original intent of the framers of the Federal Rules of Civil Procedure and the Ohio Rules of Civil Procedure. Charles Clark was a strong proponent of notice pleading,[219] and his influence prevailed in this area of federal civil procedure.[220] The intent of notice pleading is to liberalize the rules to the extent that controversies are resolved on their facts rather than the technical skills of lawyers.[221] Any attempt to initiate more stringent pleading requirements in an effort to curb litigation would conflict with this principle. In contrast, as discussed *supra*, Clark envisioned a liberal application of summary judgment.[222] Extending the application of summary judgment through the use of *sua sponte* entry would be consistent with this vision. More importantly, it is unlikely that suits would be lost on technicalities as is feared would be the case with more strict pleading requirements. Lawyers would have to be sufficiently skilled in order to assure that a litigant's claim raised a genuine issue of material fact, but this is a skill already required. The only difference in this proposal is that the evidence submitted by counsel will be subject to the judge's independent review.

In addition, the practical effect is likely to be that rather than courts entering summary judgments *sua sponte*, the mere threat would further discourage sham claims. The threat would be more effective than the current system because the expectation that a judge will summarily dispose of a claim includes the

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[217]FED. R. CIV. P. 56 advisory committee notes. *But cf.* Pond v. Carey Corp., 517 N.E.2d 928, 931 (Ohio 1986) ("A motion for summary judgment . . . does not test the legal sufficiency of the pleadings, but is a factual inquiry.").

[218]*Cf.* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure,* 86 COLUM. L. REV. 433, 484-91 (1986) (suggesting a more flexible use of summary judgment as a means of curbing litigation rather than adopting more stringent pleading standards).

[219]*See generally,* Charles E. Clark, *The Handmaid of Justice,* 23 WASH. U. L. Q. 297, 312-20 (1938).

[220]Smith, *supra* note 27, at 915-17.

[221]Conley v. Gibson, 355 U.S. 41, 48 (1957).

[222]*But cf.* Clark, *supra* note 219, at 318-19 (stating that summary judgment is "adapted only for rather simple issues" and "is very far from universal in its applicability").

awareness that the litigation costs which the opposing party will incur will be even lower when that party can prevail prior to trial without making its own motions. The ability to summarily dispose of a case in this manner would also provide the court with another means of enforcing case management which should always result in reduced costs.[223]

C. *Acknowledging Summary Judgment as a Hybrid Law*

Because summary judgment is a defensive weapon rather than just a means of maintaining order in the adjudication process, courts and litigants alike would be well served if judges made the fact-finding aspect of the summary judgment decision patently tied to the substantive law. In other words, summary judgment doctrine should clearly articulate that the judge's role as a preliminary fact-finder is tailored to the cause of action before him.[224] The failure to acknowledge the judge's fact-finding function at this stage leaves the courts susceptible to criticism.

Summary judgment decisions which are apparently inconsistent buttress the criticism that judges reach those decisions on an ad hoc basis.[225] In discussing the development and use of local rules, Professor Stephen Subrin observed that the "general, flexible Federal Rules" allowed flexible case-by-case management, but because "[n]either judges nor lawyers wanted every decision to be ad hoc[,]" absolute standards, with exceptions for good cause, were created. [226] He then concluded that non-trans-substantive rules might avoid the inevitable prejudice of different cases that would result from the use of absolute standards.[227] Because courts must apply absolute summary judgment standards to different cases, they avoid prejudice and injustice by creating a body of law which can appear inconsistent.

For example, in *Smiddy v. Wedding Party, Inc.*,[228] the defendant's van stalled on an interstate highway. After the engine stalled, the defendant coasted the van to a stop in the second of four lanes. He asked a truck driver to push the van off the road, but the truck-driver declined. The defendant then sat in his van thinking of what to do next. Within approximately one minute, another vehicle, driven by the appellant/plaintiff's decedent, struck the rear of the van

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[223]*See* FED. R. CIV. P. 16 advisory committee notes.

[224]*Cf.* Carrington, *supra* note 124, at 2083 ("As courts struggle . . . to give effective enforcement of substantive rights, procedural rules sometimes taken on subtly different contextual meanings."); Marcy J. Levine, *supra* note 53, at 214 (cautioning that the language from each of the *Celotex* trilogy cases be used in the context of their respective cause of action).

[225]*See* Arnstein v. Porter, 154 F.2d 464, 479-80 (2d Cir. 1946) (Clark, J., dissenting).

[226]Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2043 (1989).

[227]*Id.*

[228]506 N.E.2d 212 (Ohio 1987).

resulting in a fatal accident.[229] The court held that an issue of fact existed as to whether it was impossible for the defendant to comply with a statute[230] which required the driver to place warning markers one hundred feet in front of and behind the van.[231]

When compared with *Smiddy, Lewis v. Bland*[232] is a troubling case. In *Lewis*, a police officer in his cruiser saw a speeding vehicle "swerve to avoid a truck and go left of center while navigating a turn."[233] The officer made a U-turn and began what escalated into a high speed pursuit. Subsequently, the officer ran a stop sign during the chase and struck a third vehicle injuring its driver, Brian Lewis.[234] The officer made a sworn statement that he was responding to an "emergency call".[235] Without any additional analysis, the court observed that an "emergency call situation" could be identified as a matter of law, and this situation did not raise any issue of material fact that would preclude summary judgment.[236]

The facts of these two cases are sufficiently distinguishable as to not pose a problem when viewing the efficacy of summary judgment on a case by case basis. The problem arises, however, because, in theory, the court should consistently apply the law to all cases. Courts or commentators may justify these two decisions by pointing out that, in the former case, the justices simply applied the standard more stringently than did the judges of the latter case. While such analysis is accurate, it glosses over the factual differences that lead to varying degrees of the same standard's application.

The cynical acid might be quite diluted and yet still reveal the equities at play here. In the former case, summary judgment would have been predicated on the conduct of a commercial van driver that would have precluded the decedent's estate from any recovery for his untimely demise. In the latter case, summary judgment was predicated, in part, on a police officer's sworn statement that lead to the exoneration of a city from liability. Thus, the differing degrees of applying the same standard of review may be the flesh, but it is the facts and the underlying equities that are the soul of these decisions.

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[229] *Id.* at 214.

[230] OHIO REV. CODE ANN. § 4513.28(D) (Anderson 1991).

[231] 506 N.E.2d at 215-16.

[232] 599 N.E.2d 814 (Ohio Ct. App. 1991).

[233] *Id.* at 815.

[234] *Id.*

[235] OHIO REV. CODE ANN. § 2744.02(B)(1)(a) (Anderson 1991) (providing that police officers responding to an emergency are not subject to a negligence standard). Thus the issue before the court was whether the facts at bar satisfied the definition of an "emergency call," as a matter of law, pursuant to OHIO REV. CODE ANN. § 2744.01(A) (Anderson 1991).

[236] 599 N.E.2d at 816.

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In cases involving different causes of action or very distinct underlying equities, the reflection of summary judgment doctrine between cases becomes somewhat distorted. When summary judgment doctrine is limited to similar causes of action, however, the doctrine's reflection is more likely to remain true. If litigants could expect a particular level of scrutiny based on their cause of action, there would be sufficient consistency to diffuse this "*ad hoc*" criticism.

This is not to suggest that new procedural standards be developed for every cause of action. To the contrary, these cases demonstrate that differing standards already exist.[237] Courts only need to articulate those differences rather than allowing them to silently influence their decisions. Such articulation would help develop a coherent body of law that places summary judgment in a substantive context. In turn, judges and litigants would benefit from dependable, consistent guidelines. In addition, if judges expressly acknowledge that their standard is defined within the context and doctrine of the substantive law at bar, the doctrine would foster the perception of judicial integrity by undermining any allegations of arbitrary jurisprudence.

At its abstract level, the concept of defining a rule of procedure based on the substantive law at issue may be disconcerting. Yet, the proposal's unusual aspect is not this concept. Indeed, judges currently seem to adapt their standard of review in light of the substantive issues.[238] If anything is unusual about the proposal, it is the suggestion that the myth of summary judgment as a pure rule of procedure should be acknowledged as just that: a myth. As cognoscenti of the *Erie* doctrine[239] are well aware, the line between substantive law and procedure can be very unclear. Summary judgment, however, encompasses both. In summary judgment decisions, the procedure cannot be separated from the substance. The attempts to do so have resulted only in confusion at best and ad hoc jurisprudence at worst.

V. CONCLUSION

Currently, trial court judges struggle with an impractical standard to use in applying a unique, beneficial tool for providing justice. Together, our courts and legislators must create practical standards that provide a manageable system of review in determinations concerning the existence of genuine issues

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[237] *See also* Levine, *supra* note 53, at 184 (Antitrust conspiracy and public figure defamation cases are "areas involv[ing] questions of 'state of mind' and have traditionally recieved special treatment under the summary judgment rule").

[238] *See* Carrington, *supra* note 124, at 2083; *cf.* United States v. One 1975 Mercedes 280S, 590 F.2d 196, 199 (6th Cir. 1978) ("Summary judgment procedures under Rule 56, FED. R. CIV. P., must necessarily be construed in the light of the statutory law of forfeitures. . . .").

[239] *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965); Byrd v. Blue Ridge Elec. Coop., Inc., 356 U.S. 525, 536-39 (1958); Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73-75 (1938); *see also* JACK H. FRIEDENTHAL ET AL., PROCEDURE § 4.3 (1985).

of material fact. The standards must permit judges to render consistent opinions and promote the policies that summary judgment continues to serve.

This Note offers three proposals to improve summary judgment adjudication. First, the court should adopt the use of summary jury trials to resolve inherently difficult summary judgment determinations. Although a summary jury may be an expensive and time consuming process, it would insure that the fact-finder properly determined that no genuine issue of material fact exists. In addition, this procedure is far less time consuming and expensive than actual litigation of the claim. The primary benefit of this system is when issues of credibility are involved the jury may weigh that credibility in making its determination. Furthermore, because the judge predetermines the issue of law prior to submitting the factual issue to the jury, there is no danger of the facts distorting the law at this stage of adjudication.

Second, the Ohio legislature should permit courts to enter summary judgment *sua sponte* when appropriate. Armed with the power to enter summary judgment *sua sponte*, courts could dispose of cases more quickly and offset delays created by the use of summary jury trials. In addition, the mere existence of the power would increase deterrence of frivolous claims and defenses.

Third, judges should treat summary judgment doctrine as a hybrid of substantive and procedural law. Initially this might raise concerns that there will be as many different standards for summary judgment as there are substantive laws. Yet, this is precisely the benefit of acknowledging the hybrid nature of the rule. Courts already render opinions based on various standards defined by the substantive context of the case. The failure to articulate these variations threatens the perception of judicial integrity. Once the summary judgment standards are explicitly tied to a substantive context, judges and litigants alike will benefit from more reliable, consistent guidelines.

By acknowledging the countervailing interests at play in the summary judgment determination and allowing judges to freely exercise preliminary, fact-finding discretion within articulable boundaries, new doctrine can improve upon that which already exists. The result should be to increase confidence in the judicial process through raising the level of assurance of equitable, efficient resolutions of disputes.

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