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Brian L. Weakland

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Brian L. Weakland*

I. Introduction

Imagine, if you will, a pretrial motion that tests more than the sufficiency of a pleading. Imagine a motion that considers more than the mere existence of residual material fact issues — a motion more diabolical and more deadly than any practitioner has dared to make in the history of American civil litigation. Faster than a compulsory counterclaim, more powerful than a preliminary injunction, able to leap tall discovery materials in a single bound — it's super summary judgment.

Without much fanfare, the staid and usually fruitless summary judgment motion is undergoing a metamorphosis in the federal court system. Until recently, Federal Rule of Civil Procedure 56 was employed primarily to stop time-barred claims, cases involving clear immunity from liability, and cases in which absolutely no evidence supported the claim. Today, courts grant summary judgment when the quality and quantity of evidence are insufficient to meet the prescribed burden of proof. In other words, if plaintiff's burden is x and plaintiff's evidence equals x minus .001, the court grants summary judgment for defendant.

The Supreme Court's decision in *Anderson v. Liberty Lobby, Inc.*,[1] pushed the summary judgment standard into this new dimension. As a later discussion of that case reveals, if the summary judgment movant plays her discovery cards correctly, she can create an impression that the opposing party lacks evidence sufficient to meet its burden at trial. The judge need not consider the multitude of material fact issues raised by the complaint and answer. The judge must determine whether an objective consideration of the evidence palpably demonstrates a party's inability to prove its case. There is no need to impanel a jury, it is reasoned, when a claimant would

* Associate, Tucker Arensberg, P.C., Pittsburgh, Pennsylvania. B.A., 1975, The Pennsylvania State University; J.D., 1984, University of Pittsburgh School of Law.

1. 477 U.S. 242 (1986).

suffer a directed verdict at trial anyway.

The standard for the new summary judgment is as slippery as the standard for the old. In the past, each word of Rule 56[2] was scrutinized without the emergence of a bright line interpretation: What is genuine?[3] How is an issue defined?[4] What is meant by materiality?[5] What constitutes a fact? Each motion under Rule 56 calls these questions into play and the courts' answers to them have not been consistent.[6]

The post-*Anderson* standard provides the movant a second approach based on sufficiency of the evidence. Once the movant introduces exculpatory evidence on its behalf, the claimant must tender its prima facie evidence to the judge who weighs and measures the evidence against the claimant's burden.[7] According to *Anderson*, if the evidence is insufficient it is impossible for the claimant to meet its burden at trial. The slipperiness of the new standard is caused by uncertainty regarding the quality or quantity of evidence needed to meet the metaphysical burden.

Neither *Anderson* nor subsequent circuit court cases offer much guidance for the trial judge who is faced with a quality or quantity summary judgment motion. The courts granting such motions generally intone that under any measure of quality or quantity the claimant's evidence fails to rise to the required level of proof.[8] In such determinations, when a judge is called upon to apply amorphous legal principles to resolve potentially meritorious claims, the dimen-

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2. According to Federal Rule of Civil Procedure 56(c):

> 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 a judgment as a matter of law.

3. Cameron v. Frances Slocum Bank & Trust Co., 824 F.2d 570, 574 (7th Cir. 1987); Cook v. Providence Hosp., 820 F.2d 176, 179 (6th Cir. 1987).

4. Ivey St. Corp. v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 488 (1987).

5. Republic Nat'l Bank v. Eastern Airlines, 815 F.2d 232, 238 (2d Cir. 1987); Mission Indians v. American Management & Amusement, Inc., 824 F.2d 710, 717 (9th Cir. 1987) *cert. dismissed*, 109 S. Ct. 7 (1988), *modified*, 840 F.2d 1394 (9th Cir. 1988); Kennedy v. Josephthal & Co., 814 F.2d 798, 804 (1st Cir. 1987).

6. *See infra* notes 17-18 and accompanying text and Table 1.

7. Federal Rule of Civil Procedure 56(e) advises the nonmoving party to put forward evidence to show a genuine issue of material fact when a motion for summary judgment is supported by discovery evidence or affidavits. If the nonmoving party merely relies on the allegations of its pleadings, the rule states that summary judgment should be entered "if appropriate."

8. Flotech, Inc. v. E.I. Du Pont de Nemours & Co., 814 F.2d 775, 781-82 (1st Cir. 1987); *see also infra* notes 86-102 and accompanying text.

sions of the judge's discretion grow exponentially.[9] In effect, the judge weighs the credible evidence at the pre-trial stage and decides whether the case should be preempted from review by the ultimate fact-finder. The evidence may consist of self-serving affidavits, selected incontroverted documents, bits and snatches of deposition transcripts, and similar items. While the evidentiary materials may be limited because of the timing of the summary judgment motion, the judge must nevertheless determine the weight of each item of evidence and, ultimately, decide whether the case should continue.[10] The dramatic adversarial clash of the parties may be reduced to a series of cold affidavits, the comparison of which may not produce what the judge considers to be a significant controversy. With *Anderson* as support, the judge may doom the case by granting the motion for summary judgment.

Several years have passed since the Supreme Court announced its liberal standards for summary judgment. During that time, lower courts have continued their struggle to apply the proper summary judgment standards to the factual situations before them. This Article, in part, chronicles that struggle. First, the Article explains the new standards, their implications for motions practice in federal court, and their effect on the discovery process. Next, the Article reviews recent cases employing the new summary judgment standards to show how courts currently view the evidence necessary to overcome summary judgment in the areas of age discrimination, libel, and antitrust. Finally, the Article proposes a model for resolution of summary judgment motions based on epistemology, the study of knowledge, and a concept called "epistemic coherence."

II. The Reinvention of Rule 56

A. The Need for Summary Judgment

When the Federal Rules of Civil Procedure were promulgated in 1937, the federal courts officially adopted notice pleading rather

9. In the federal system, trial judges are vested with discretion to manage discovery proceedings and to direct trials. In a practical sense, these judges are vested with de facto discretion to resolve the proper applications of legal principles enunciated by the appellate courts. For example, the application of strict scrutiny, heightened scrutiny, and rationality theories in an equal protection claim is extremely difficult for the trial judge because the appellate courts are unable to develop solid tests for each standard. *See, e.g.*, Deibler v. City of Rehoboth Beach, 790 F.2d 328, 334 n.1 (3d Cir. 1986).

10. Federal Rule of Civil Procedure 56 permits a summary judgment motion to be filed at any time by the defending party and, by the claimant, any time after the expiration of 20 days from the commencement of the action.

than essential fact pleading.[11] Under Federal Rule of Civil Procedure 8(a), the complainant need only set forth in the complaint "a short and plain statement of the claim showing that the pleader is entitled to relief, and . . . a demand for judgment for the relief the pleader seeks." During the discovery phase, litigators are supposed to elicit the facts required to send the claim to a jury. Indeed, the Federal Rules discourage judges who place high standards on pleading craftsmanship, and encourage them to expedite the case into a posture for trial.[12]

Although notice pleading has its virtues, including less cumbersome pleadings and fewer traps for the unwary draftsman, it has its share of vices. For example, it permits the perpetuation of cases initiated by ambiguous or frivolous complaints. It also allows facially acceptable claims that are wholly unsupported by the true facts to drift into the expensive and vexatious discovery phase.

To deal with the deluge of claims occasioned by notice pleading, the Federal Rules of Civil Procedure established a mechanism by which factually unsupported claims could be terminated before trial.[13] Rule 56 allows the court to enter summary judgment on a claim or defense when no genuine issue of material fact remains for trial.[14] The Rule also allows the court to decide certain issues before trial based on the lack of factual controversy on the claim.[15] In theory, then, federal civil practice enjoys the freedom of notice pleading without the agony of pursuing a frivolous or unsupported claim to verdict.

Casting a shadow over the procedural rules is the constitutional right to trial by jury in civil matters. No less formidable than any other constitutional guarantee, the seventh amendment suffers as the courts broaden summary judgment standards because it is summary judgment that deprives a litigant of jury review. Although notice pleading opens the courthouse doors to more filings, summary judgment throws the claims back into the street. The seventh amendment is not weakened, however, as long as live, factual controversies are not numbered among the rejections.[16]

Of course, the difficulty lies in determining the cases that merit

11. In a notice pleading system complainants need not list chapter and verse of the offense allegedly perpetrated by the defendant.

12. FED. R. CIV. P. 1, 8(f).

13. FRIEDENTHAL, KANE & MILLER, CIVIL PROCEDURE § 9.1 (1985).

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

15. FED. R. CIV. P. 56(d).

16. Moreover, it is clear that summary judgment does not per se abridge a civil litigant's right to trial by jury. Plaisance v. Phelps, 845 F.2d 107, 108 (5th Cir. 1988).

a jury trial and those that do not. The standard set forth in Federal Rule of Civil Procedure 56, whether 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," has been applied with varying degrees of success by the district courts. As Table 1 illustrates, the district courts had approximately a sixty percent success rate in 991 published appellate decisions decided in 1986 dealing with summary judgment.[17] Nevertheless, there were at least 401 cases in 1986 in which the district judge had earlier ruled that no reasonable minds could differ as to the material facts and the courts of appeals reasonably differed.[18]

TABLE 1

Affirmances of Summary Judgments
Published Opinions - 1986

Circuit	Total Cases Affirm-Reverse	Affirmance Rate
D.C.	17 - 19	47%
First	29 - 19	60%
Second	41 - 23	64%
Third	21 - 42	33%
Fourth	30 - 18	62%
Fifth	67 - 43	61%
Sixth	65 - 26	71%
Seventh	77 - 28	73%
Eighth	57 - 34	63%
Ninth	106 - 75	59%
Tenth	26 - 14	65%
Eleventh	54 - 60	47%
TOTAL	590 - 401	59.5%

17. These cases were reported in volumes 778 through 809 of Federal Reporter Second. The table does not consider unpublished opinions, in which presumably the affirmance rate would be higher.

18. For a view of the tension between district and appellate judges in the Third Circuit regarding the court of appeals' strict interpretation of summary judgment, see Weakland, *Life in the Third Circuit*, PA. LAW., Oct. 1987, at 6.

From the district courts' perspective, summary judgment can be a blessed thing. For judges, summary judgment can eliminate many of the hours spent presiding over cases in which litigants press hopeless cases to juries. Summary judgment has the added benefits of decreasing the judges' docket and providing the judges with the civil law equivalent of swift execution of justice — the thrill of pulling the plug on a terminal case. For litigants, the threat of summary judgment offers some leverage for settlement before trial, as well as the joy of striking fear into the heart of a weak opponent.[19]

Summary judgment becomes increasingly attractive to district judges as their individual dockets increase. Studies abound on growing dockets and the resulting pressures on district judges.[20] Perhaps subconsciously feeling the need to adjudicate assiduously, district court judges entered summary judgment at least 401 times in 1986 in derogation of the Rule 56 standard and the seventh amendment.[21]

This is not meant to scourge the work of district judges. It is recognized that judges have an innate desire to do justice and to do it expeditiously.[22] If Litigant *A* has a losing case, the judge probably will recognize the outcome before the jury renders its verdict. If Litigant *A* has a losing case that will require a four week trial, the judge will likely use all available measures to avoid belaboring the obvious

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19. More recently, however, threats of summary judgment have probably become less intimidating because of the widespread use of the motion in federal practice. The more threatening motion in federal practice, and the motion in vogue among irritated litigants, is one for sanctions under Federal Rule of Civil Procedure 11.

20. Administrative Office of the United States Courts, Federal Judicial Workload Statistics (Dec. 1986) (available in United States Courts of Appeals libraries); Van Dusen, Rand Institute for Civil Justice 438 (1985) (available in Philadelphia County Bar Association library).

21. *See supra* notes 17-18 and accompanying text.

22. About 340 B.C., the Greek philosopher, Aristotle, conceptualized justice as compensation for wrong done and wrote:

> The law never looks beyond the question, "What damage was done?" and it treats the parties involved as equals. All it asks is whether an injustice has been done or an injury inflicted by one party on the other. Consequently what the judge seeks to do is to redress the inequality, which in this kind of justice is identified with injustice . . . . What the judge aims at doing is to make the parts equal by the penalty he imposes, whereby he takes from the aggressor any gain he may have secured. The equal, then, is a mean between the more and the less . . . . The equal, which we hold to be just, is now seen to be intermediate between [gain and loss]. Hence, we conclude that corrective justice must be the mean between loss and gain. This explains why the disputants have recourse to a judge; for to go to a judge is to go to justice. The judge aims at being as it were the incarnation of justice. Then, what men seek in a judge is a middle term—in some societies the judges are actually called "mediators." People think that, if they get the mean, they will get the just. Thus the just is in its way a mean, the judge being, as we have seen, a mediating factor between the disputing parties. What the judges does is to restore equality.

ARISTOTLE, ETHICS BOOK FIVE, CHAPTER FOUR (Thompson trans. 1953).

result.[23] If Litigant *B* moves for summary judgment, the temptation for the judge to avoid a protracted trial arises. Finally, if a summary judgment motion is pending and all the evidence appears to favor one side, then the Federal Rules and justice require the judge to grant the motion for summary judgment.

In 1986, about one-third of federal appellate court cases dealt with summary judgments.[24] These are cases in which the district judge could not resist the temptation to grant summary judgment and in which the losing parties have absolutely nothing to show for their efforts. Unlike settlements, some jury verdicts or appellate orders of additur or remittitur, summary judgment does not represent a compromise of claims. The losing party has only appellate review as hope for vindication.[25]

The finality of summary judgment and the real or imagined difficulty in having summary judgment upheld on appeal led the Supreme Court, in 1986, to rediscover Rule 56(e) and to force nonmoving parties to meet the challenges presented by a new summary judgment standard. In three cases, the Court gave district judges enough precedential ammunition to shoot down cases by summary judgment and keep them down. First, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[26] allows courts to require that claimants present more persuasive evidence to defeat summary judgment when the factual context renders the claim implausible. Next, *Celotex Corp. v. Catrett*[27] places the burden of showing the existence of a genuine issue of material fact on the nonmoving party, while the moving party need only assert the basis of its motion. Finally, *Anderson v. Liberty Lobby, Inc.*[28] requires the nonmoving party to pre-

23. Federal Rule of Civil Procedure 16 acknowledges the judge's role in fostering settlement of civil cases. Rule 16(c)(7) encourages the litigants to "consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . . ." The Honorable Frederick B. Lacey of the United States District Court for the District of New Jersey suggests that 95 percent of civil case terminations should result from counsels' efforts to settle with the judge's active participation: "I believe the judge should actively and firmly (but not coercively) seek to settle every case on his docket, then he should 'institutionalize,' if you will, the settlement conference. I suggest that no more than 5 percent of each year's civil terminations should result from fully tried cases." Lacey, *The Judge's Role in the Settlement of Civil Suits*, FED. JUD. CENTER, 4 (1977). *See also* Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363 (1983-84); Rude & Wall, *Judicial Involvement in Settlement: How Judges and Lawyers View It*, JUDICATURE, Oct.-Nov. 1988, at 175.

24. *See supra* notes 17-18 and accompanying text. This figure does not include criminal and habeas corpus cases.

25. *See* 28 U.S.C. § 1291 (1976).

26. 475 U.S. 574, 587 (1986).

27. 477 U.S. 317, 324 (1986).

28. 477 U.S. 242, 252 (1986). *See also* Holzberg, *High Court Encourages Summary*

sent enough evidence at the summary judgment stage not only to show a prima facie case, but to meet its burden of persuasion as well. Together, these three cases represent a dramatic shift toward more liberal use of summary judgment.[29]

B. The Matsushita, Celotex and Anderson Decisions

Although *Matsushita*, *Celotex*, and *Anderson* all pointed summary judgment standards in the movant's direction, the cases involved widely disparate factual situations. *Matsushita* was an antitrust case brought by American manufacturers of electronic products against a consortium of Japanese electronics manufacturers.[30] *Celotex* involved an occupational disease claim brought by a widow against an asbestos manufacturer.[31] *Anderson* involved a libel claim brought by a self-proclaimed citizens' lobby against a magazine.[32] The only common threads in these cases appear to be the relative weaknesses of plaintiffs' evidence and the presence of summary judgment motions.

Of the three decisions, perhaps *Matsushita* best represents the future course of summary judgment. Similar to most antitrust cases, *Matsushita* required the collection and analysis of a wide array of factual material demonstrating a conspiracy and an anti-competitive motive.[33] The district court in *Matsushita* granted summary judgment and the opinion consumed 221 pages.[34] The Court of Appeals for the Third Circuit reversed and the appellate district court opinion ran sixty-nine pages.[35] The Supreme Court was then presented with a forty volume appendix "that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions."[36] The Supreme Court's finding that

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Judgments, LITIG. NEWS, Feb. 1988 at ____; Wallance, *Summary Judgment Ascending*, LITIG., Winter 1988, at 6.

29. *See* Weakland, *supra* note 18, at 9 (quoting Remarks of the Honorable John J. Gibbons, Chief Judge, United States Court of Appeals for the Third Circuit).

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

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

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

33. Claims were brought under sections 1 and 2 of the Sherman Anti-Trust Act, section 2(a) of the Robinson-Patman Act, and section 73 of the Wilson Tariff Act. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 578 (1986).

34. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100 (E.D. Pa. 1981), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

35. *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

36. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 577 (1986).

summary judgment against the American manufacturers was warranted indicates that the mere compilation of relevant facts is not sufficient to create an issue of material fact for trial.

Matsushita, however, is an important decision because of the analytical approach utilized by the Court. The Court applied the evidence and inferences therefrom to the claim presented to determine whether the claim was plausible. The *Matsushita* approach demands closer scrutiny.

Zenith Radio Corporation and National Union Electric Corporation filed suit in 1974, alleging that twenty-one Japanese corporations conspired for more than twenty years to seize control of the American market for so-called consumer electronic products (CEPs). The complaint sought relief under Sections 1 and 2 of the Sherman Act, Section 2(a) of the Robinson-Patman Act, Section 73 of the Wilson Tariff Act, and the Antidumping Act of 1916.[37] The scheme asserted was predatory pricing, which the Court defined as a below-cost pricing policy by a single firm, having a dominant share of the relevant market, in order to force competitors out of the market or to deter potential entrants from entering.[38] According to the American manufacturers, the Japanese companies conspired to cut prices of CEPs to drive the American manufacturers out of the American market and then to set artificially high prices to cover earlier losses.[39]

The Court of Appeals for the Third Circuit held that a conspiracy to engage in predatory pricing constituted an antitrust violation under the Sherman Act.[40] Further, the court found that genuine issues of fact existed as to whether the Japanese companies formed a conspiracy to seize control of the American market by cutting prices in the United States while enjoying artificially high prices in Japan.[41] The court's finding that predatory pricing, if proven, would be a per se violation of the Sherman Act was not before the Supreme Court on appeal.[42] The Supreme Court defined the issue as "whether respondents adduced sufficient evidence in support of their theory to survive summary judgment."[43]

One might expect that the Supreme Court would embark on a

37. *Id.* at 578.
38. *Id.* at 584, n.8.
39. *Id.* at 584.
40. *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238, 305-06, *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).
41. *Id.*
42. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 (1986).
43. *Id.*

search for sufficient evidence to support the American manufacturers' theory. Instead, despite forty volumes of evidence, the Court largely considered the plausibility of predatory pricing as a successful antitrust tactic. The Court's consideration of the evidence adduced in opposition to summary judgment took a back seat to scholarly analysis of antitrust theory. For example, the Court discussed the implications of formal agreements through Japan's Ministry of International Trade and Industry to fix minimum prices for CEPs exported to the American market, expert opinion evidence that Japanese companies absorbed losses as great as twenty-five percent in the American market, and the five-company rule whereby each Japanese company agreed to sell its products to only five American distributors.[44]

The Court challenged the plausibility of Zenith's theory. In so doing, the Court discussed theses by noted antitrust scholars, which showed that predatory pricing is a high risk tactic at best, one that is rarely tried and rarely successful.[45]

The Court held that "if the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with *more persuasive* evidence to support their claim than would otherwise be necessary."[46] The Court noted that the antitrust claimant must show more than ambiguous conduct that may be construed to infer intent to

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44. *Id.* at 581.

45. The Court took judicial notice that, for a predatory pricing scheme to be rational, "the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." *Id.* at 589. Quoting then-Professor Robert Bork, the Court noted:

> Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses.

R. BORK, THE ANTITRUST PARADOX 145 (1978); McGee, *Predatory Pricing Revisited*, 23 J. LAW & ECON. 289, 295-97 (1980). The Court also cited an article by Judge Frank H. Easterbrook, commenting on the *Matsushita* case, showing that presumably it would be impossible for the Japanese manufacturers to maintain supracompetitive prices for an extended time. The Court adopted Easterbrook's conclusion:

> On plaintiffs' theory, the cartel would need to last at least thirty years, far longer than any in history, even when cartels were not illegal. None should be sanguine about the prospects of such a cartel, given each firm's incentive to shave price and expand its share of sales. The predation-recoupment story therefore does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place. They were just engaged in hard competition.

Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 27 (1984).

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

conspire.[47] The claimant must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.[48] Pushing the standard for summary judgment ever so slightly, the Court ruled that respondents "in this case . . ., must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents."[49] Such a standard suggests that an antitrust claimant must endure a two-stage summary judgment review. First, the court considers the rationality of the claim per se. Second, the court views the relevant evidence to determine if the alleged conspiracy was reasonable under the circumstances. In other words, the more likely the alleged conspiracy was to be successful, the more likely a claimant will survive summary judgment.[50]

Matsushita is a textbook example of how the new super summary judgment standard usurps the jury function. The opinion appears to be crafted not by a judge searching for an issue of fact for trial, but by a panel of factfinders trying to determine a verdict. The Court weighed and measured the evidence and stated:

> The alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is *strong evidence* that the conspiracy does not in fact exist. Since the losses in such a conspiracy accrue before the gains, they must be "repaid" with interest. And because the alleged losses have accrued over the course of two decades, the conspirators could well require a correspondingly long time to recoup. Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidentally) on the conspirators' ability to escape antitrust liability for their *minimum* price-fixing cartel. Each of these factors *weighs more heavily* as the time needed to recoup losses grows. If the losses have been substantial—as would likely be necessary in order to drive out the competition—petitioners would most likely have to sustain their cartel for years simply to break even.[51]

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47. *Id.* at 587-88, (citing First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253 (1968); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984)).

48. 475 U.S. at 558 (quoting *Monsanto*, 465 U.S. at 764).

49. *Id.*

50. *See Matsushita*, 475 U.S. at 598 (White, J., dissenting).

51. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 592-93 (footnote omitted) (emphasis added). The Court also cited a law review article about the case that had been written after the court of appeals decision. *Id.* at 592 n.15 (citing Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984)). The article noted that 15 years of losses in the American market by the Japanese would require a monopolizing cartel to last 30 years to

Are these not the analytical processes that the Constitution intends for a jury under the seventh amendment?[52] Why should judges, who are vested with no greater understanding of economic theory than the remainder of society, obtain the task of sorting out the plausible antitrust conspiracies from the implausible? In *Matsushita*, could not a reasonable jury have found an antitrust violation on the basis of the Japanese companies' documented agreement that governed marketing strategies and prices in the United States? Would the decision be altered if the Japanese manufacturers were gaining an increasing share of the CEP market following the decision of the Court? Would the verdict change if the plaintiff could prove that because of rapid technological advances inherent in the industry later entrants to the monopolized market would be unable to provide competitive products? As Justice White pointed out in his dissent in *Matsushita*, the plausibility of the alleged scheme should have been determined by a jury because the evidence presented a genuine issue of material fact.[53]

Celotex Corp. v. Catrett[54] presented a more basic procedural issue: the placement of burdens of proof upon the summary judgment movant and respondent. In *Celotex*, the wife-plaintiff brought a wrongful death action against a number of asbestos manufacturers, claiming that her husband's death resulted from exposure to the manufacturers' products.[55] During discovery, the plaintiff neither identified any Celotex products in her answers to interrogatories, nor did she provide witnesses who could place a Celotex asbestos product at her husband's worksite.[56] Celotex moved for summary judgment because Mrs. Catrett failed to produce evidence that any Celotex product was the proximate cause of her husband's injuries.[57]

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recoup its losses with higher prices. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 27 (1984). The article concluded: "The predation-recoupment story therefore does not make sense, and we are left with the more plausible inference that the Japanese firms did not sell below cost in the first place." *Id.* at 26-27, n.45. Note, however, that expert opinion of record is to the contrary. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 723 F.2d 238, 311 (1983), *rev'd sub nom.* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

52. One issue not articulated by the Court, but which may have been at the heart of its mission of justice, was whether a consortium of Japanese electronics manufacturers would be treated fairly by an American jury.

53. *See Matsushita*, 475 U.S. at 599 (White, J., dissenting).

54. 477 U.S. 317 (1986).

55. The custom in asbestos and other occupational disease cases is that the claimant sues the panoply of asbestos manufacturers whose products the claimant or other workers can identify as having been on the jobsite.

56. 477 U.S. at 320.

57. *Id.* at 319-20.

In response to the defendant's motion for summary judgment, Mrs. Catrett produced three documents that she claimed "demonstrate[d] that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to Celotex asbestos products.[58] The documents included decedent's deposition transcript, a letter from a former employer, and a letter from an insurance company to Celotex.[59] In turn, Celotex argued that the documents were inadmissible hearsay and could not be used to defeat a properly supported motion for summary judgment.[60]

Prior to the Supreme Court's decision, the Court of Appeals for the District of Columbia ruled that Celotex's motion was fatally defective because Celotex made no effort to discover evidence supporting its motion.[61] In other words, Celotex had the burden of presenting facts demonstrating that decedent did not use its asbestos products. The court of appeals held that the summary judgment movant was required to put forward evidence to prove lack of a genuine issue of material fact.[62]

The Supreme Court reversed, holding that under Federal Rule of Civil Procedure 56, once the movant makes a motion, he need not adduce evidence showing proof of a lack of a material fact issue.[63] The Court held:

> Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.
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> . . . [W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim.[64]

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58. *Id.* at 320.
59. Celotex Corp. v. Catrett, 477 U.S. 317, 320 (1986).
60. *Id.*
61. Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 184 (D.C. Cir. 1985), *rev'd sub nom.* Celotex Corp. v. Catrett, 477 U.S. 317 (1986).
62. *Id.* at 184.
63. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).
64. *Id.* at 322-23 (quoting FED. R. CIV. P. 56(c)). The court of appeals in Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988), cited *Celotex* and stated that a "complete failure of proof on an essential element renders all other facts immaterial because

The Court's underlying rationale was that the claimant bears the ultimate burden of proving its claim. To require the non-claimant to adduce evidence in order to escape liability is to place improperly the burden of proof upon the defending party.[65] Thus, the burden remains with the claimant. If the movant chooses to buttress its motion with affidavits, admissions, or other discovery evidence, the burden does not shift to the claimant, but perhaps simply has intensified under Federal Rules of Civil Procedure 56(e).[66]

On the same day *Celotex* was decided by the Supreme Court, the Court ruled that when the nonmoving party is the claimant, it must respond with additional evidence to defeat a summary judgment motion if it bears a greater burden at trial.[67] In *Anderson*, the Court held that a trial judge pondering a summary judgment motion must consider the "actual quantum and quality of proof necessary to support liability" when determining whether the claimant's proffered evidence is sufficient to raise a genuine issue of material fact.[68]

In *Anderson*, a publisher and his magazine were sued for libel by a self-proclaimed citizen's lobby.[69] According to the Court, the publication portrayed Liberty Lobby "as neo-Nazi, anti-Semitic, racist, and Fascist."[70] The defendants moved for summary judgment on the grounds that the plaintiffs were public figures, that the *New York Times Co. v. Sullivan*[71] standard of actual malice was applicable, and that, as a matter of law, actual malice was absent.[72] In support of their motion, the defendants submitted an affidavit from the articles' author listing the source of every alleged libelous statement.[73] In response, plaintiffs presented evidence that several sources

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there is no longer an issue of material fact" remaining for trial. The non-moving party, of course, is charged with the burden of proof as to that essential element. *See also* George v. Parke-Davis, 684 F. Supp. 249 (E.D. Wash. 1988).

65. 477 U.S. at 324.

66. Federal Rule of Civil Procedure 56(e) places the risk upon the nonmovant when it rests upon the mere allegations of its pleadings. *See* Celotex Corp. v. Catrell, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting). The Supreme Court remanded *Celotex* after it found that Celotex's motion was facially adequate. *Id.* at 328. On remand, Catrett v. Johns-Manville Corp., 826 F.2d 33 (D.C. Cir. 1987), the Court of Appeals for the District of Columbia held that the record contained sufficient evidence to create a jury question as to whether plaintiff's decedent was exposed to a Celotex asbestos product. 826 F.2d at 39-40. Judge Bork dissented, stating that the element of causation was not satisfied by plaintiff's evidence, and that the plaintiff's proffered evidence was inadmissible and could not be considered under Federal Rule of Civil Procedure 56(e). *Id.* at 41-42 (Bork, J., dissenting).

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

68. *Id.* at 254.

69. *Id.* at 244-45.

70. *Id.* at 245.

71. 376 U.S. 254 (1964).

72. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 245 (1986).

73. *Id.*

were unreliable, that the information was not verified prior to publication, and that another editor of the magazine considered the articles terrible and ridiculous.[74]

The Court recognized that a public figure suing for libel must present a greater degree of proof than necessary for a run-of-the-mill civil case.[75] The public figure must prove, by clear and convincing evidence, that the publisher knew the statements to be false or acted with reckless disregard for their truthfulness.[76] Therefore, the Court reasoned, the nonmoving party must present evidence showing reasonable potential to meet the higher level of proof.[77] According to the Court, the trial court should view summary judgment motions through a substantial level of proof prism when the claimant faces higher evidentiary burdens.[78]

Lest trial courts believe they have free reign to make quality and quantity determinations of the evidence, the Court adopted language to create some pause. For example, the Court stated that evidence may be "so one-sided that a party must prevail as a matter of law," but the judge "must ask himself not whether he thinks the evidence unmistakably favors one side or the other."[79] The Court also noted that the trial judge may consider the insufficient caliber or quantity of evidence, but may not usurp jury functions, including "[c]redibility determinations, weighing the evidence, and the drawing of legitimate inferences from the facts."[80] *Anderson* sets forth the following murky test for use by trial courts: for summary judgment to be merited, the claimant must not have produced a sufficient quantity of evidence (don't do any weighing) nor evidence of sufficient quality (please, no inferences or credibility assessments) to withstand the appropriate burden of proof (not sufficient for you, but sufficient for a rational jury).[81]

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74. *Id.* at 246.
75. *Id.* at 252.
76. *Id.*
77. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-53 (1986).
78. *Id.* at 254.
79. *Id.* at 252.
80. *Id.* at 255.
81. *Anderson* also held that the standard for summary judgment is identical to the standard for directed verdict under FED. R. CIV. P. 50(a): the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). If reasonable minds could differ as to the import of the evidence, a verdict should not be directed. Brady v. Southern R. Co., 320 U.S. 476, 479-80 (1943); *Anderson*, 477 U.S. at 250. *Cf.* Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985) (even when a directed verdict would be appropriate after the evidentiary hearing, the trial court should not try the case in advance by summary judgment).

Matsushita, *Celotex*, and *Anderson* combine to form a powerful new direction for summary judgment. *Celotex* requires the plaintiff to come forward with evidence before trial upon a mere motion by the defendant.[82] *Matsushita* requires that the evidence be sufficient to render the plaintiff's claim plausible.[83] *Anderson* allows the trial court to enter judgment if the evidence produced by the plaintiff is not sufficient, under the applicable standard of proof, to permit a

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The difficulty with this comparison lies in the timing of the two motions. The Federal Rules of Civil Procedure provide that a summary judgment motion may be made at any time after the expiration of 20 days from commencement of the action. A directed verdict motion is made at the close of the evidence offered by an opponent. FED. R. CIV. P. 50(a), 56(a). The Court in *Anderson* now tells litigants to package their evidence into documentary form so that all of it can be placed before a court deciding a summary judgment action. The result: testimonial evidence must be converted to affidavits, although the *Anderson* court stated that the summary judgment standard "by no means authorizes trial on affidavits." *Anderson*, 477 U.S. at 255. A question for the Court: by what other means can the nonmovant place all of its evidence before the trial court? *Cf.* Wilson v. Westinghouse Elec. Corp., 838 F.2d 286, 289 (8th Cir. 1988) ("court may grant summary judgment where a party's sudden and unexplained revision of testimony creates an issue of fact where none existed before"; affidavit contradicted deposition).

Judge Edward R. Becker, in his concurrence in J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 618 (3d Cir. 1987), recognized the timing issue raised by *Celotex* and *Anderson*:

> [I]t is quite likely that, when a complaint is first filed—or amended to set out a new theory of liability—a plaintiff will indeed lack enough evidence to get to a jury on every element. But we would not want to end the case because the plaintiff has not then adduced sufficient evidence. We would instead want to permit the plaintiff to go forward with the discovery he believes necessary, and only put him to his proofs after he has had the opportunity to develop them.

Unfortunately, the Supreme Court did not recognize this timing problem in *Anderson*.

In Washington v. Armstrong World Indus., 839 F.2d 1121, 1123 (5th Cir. 1988), the court held that a claim of future discovery of facts not then known by the nonmovant is insufficient to defeat a motion for summary judgment. The Court of Appeals for the Eighth Circuit, however, stated that "a party must have an adequate opportunity to develop his claims through discovery before summary judgment is appropriate . . . ." Redmond v. Burlington N. R.R. Pension Plan, 821 F.2d 461, 469 (8th Cir. 1987). *Cf.* Continental Maritime, Inc. v. Pacific Coast Metal Trades, AFL-CIO, 817 F.2d 1391 (9th Cir. 1987) (district court did not abuse discretion in denying additional time for discovery); Meyer v. Dans un Jardin, S.A., 816 F.2d 533 (10th Cir. 1987) (nonmoving party has burden of showing how additional time and discovery will allow him to rebut movant's allegations); Garrett v. City & County of San Francisco, 818 F.2d 1515 (9th Cir. 1987) (trial court may continue motion for summary judgment if nonmovant needs to discover additional facts).

Although the Court held in *Anderson* that summary judgment and directed verdict standards are alike and their difference is one of timing, at least one lower court has held that Rule 12(b)(1) motions enjoy the same standard. In Trentacosta v. Frontier Pacific Aircraft Indus., 813 F.2d 1553 (9th Cir. 1987), the court ruled that a nonmoving party is required to present evidence outside its pleadings in opposition to a motion to dismiss for lack of subject matter jurisdiction because the burden upon the nonmovant in such a motion is the same as that required under Rule 56(e) and set forth under *Celotex*, *Anderson*, and *Matsushita*. *Id.* at 1558. One wonders whether the courts are moving toward one standard for all pre-verdict motions questioning the sufficiency of proof. The Federal Civil Procedure Rules Committee is considering a rule to merge Rule 12(b)(6) and Rule 56, in order to place more emphasis on critical fact pleading. Weakland, *supra* note 18, at 9.

82. *See supra* notes 63-66 and accompanying text.

83. *See supra* notes 46-50 and accompanying text.

reasonable jury to return a verdict in plaintiff's favor.[84] Although the Court maintained that the province of the jury has not been denigrated by these decisions, it is evident that the trial judge now has greater precedential support for entering summary judgment in one-sided cases.[85]

C. *Application of the New Summary Judgment Standards*

Anderson v. Liberty Lobby, Inc. can be cited for a variety of legal propositions. In *Metzger v. Osbeck*,[86] the Court of Appeals for the Third Circuit employed the generally accepted strict view of summary judgment motions, citing *Anderson* for the proposition that

> the Judge's role "is not himself to weigh the evidence and determine the truth of the matter," but to determine whether the evidence creates a genuine issue of material fact which, "because [it] may reasonably be resolved in favor of either party," "properly can be resolved only by a finder of fact."[87]

The court, however, adopted the softer *Anderson* approach, noting that summary judgment may be granted when the evidence is "so one-sided that . . . [the defendant] must prevail as a matter of law."[88] This softer standard was accompanied by the caveat that

> a court should be reluctant to grant a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind, for in such cases much depends upon the credibility of witnesses testifying as to their own states of mind, and assessing credibility is a delicate matter best left to the fact finder.[89]

Questions of intent usually prevent summary judgment. Intent typically becomes a crucial factor in recovering damages in employment discrimination and libel cases. In recent years, courts have ap-

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84. *See supra* notes 75-78 and accompanying text.
85. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).
86. 841 F.2d 518 (3d Cir. 1988).
87. *Id.* at 519 (quoting *Anderson*, 477 U.S. at 250).
88. *Id.* at 521 (citing *Anderson*, 477 U.S. at 251).
89. *Id.* (quoting Watts v. University of Del., 622 F.2d 47, 52 (3d Cir. 1980). Metzger v. Osbeck, 841 F.2d 518 (3d Cir. 1988), held that summary judgment is not appropriate when questions of intent are raised. The court noted that a defendant should not escape liability simply by stating that he did not intend to perform the alleged intentional act. *Id.* at 521. *See* Crawford v. LaBoucheire Bernard Ltd., 815 F.2d 117 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 328 (1987) (a court may find intent in ruling on a summary judgment motion when that intent "may be inferred from objective facts," even though state of mind is usually a jury question). *Id.* at 122-23. *See also* Three Movies of Tarzana v. Pacific Theatres, Inc., 828 F.2d 1395 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1028 (1988).

plied the newly articulated standards for summary judgment in these two areas. In employment discrimination cases, recovery generally hinges upon the employer's motivation in discharging the employee.[90] In libel cases, intent is implied in actual malice, since a defamatory statement must be made with knowledge of its falsity or with reckless disregard for its truth.[91]

During the course of litigation, courts usually will enter summary judgment at three different stages. First, summary judgment may be entered on the basis of certain threshold matters, such as lack of subject matter jurisdiction, lack of in personam jurisdiction, statute of limitations, standing, and lack of proper venue.[92] In these circumstances, the new summary judgment standards have not altered courts' traditional views and approaches. The second category of summary judgment situations, which is more fact specific, considers threshold issues pertaining to the stated claim. For example, in Age Discrimination in Employment Act (ADEA) cases, for a defendant to be considered an employer, it must employ twenty or more employees for twenty or more weeks during the relevant time period.[93] Courts may easily decide such precise threshold questions on motions for summary judgment.[94] The third category upon which the new summary judgment standards impact deals with ultimate fact issues and the quality and quantity of evidence.[95] In such cases, the court considers the evidence presented and determines whether the proof is so one-sided that a rational jury could reach but one conclusion.[96] When the evidence is two-sided, however, summary judgment is not appropriate.[97]

1. Employment Discrimination Cases.—Perhaps no field of

90. *See, e.g.*, Delgado v. Lockheed-Georgia Co., 815 F.2d 641 (11th Cir. 1987); Ballinger v. North Carolina Agricultural Extension Serv., 815 F.2d 1001 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 232 (1987); Carey v. United States Postal Serv., 812 F.2d 621 (10th Cir. 1987). Summary judgment may also be entered when the claimant does not follow statutory time limits for the filing of a court action. Zipes v. Trans World Airlines, 455 U.S. 385 (1982).

91. *See* New York Times v. Sullivan, 376 U.S. 254 (1964); Jenkins v. KYW, 829 F.2d 403 (3d Cir. 1987).

92. *See In re* Remington Rand Corp., 836 F.2d 825, 833 (3d Cir. 1988); Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1417 (9th Cir. 1987); Trentacosta v. Frontier Pacific Aircraft Indus., 813 F.2d F.2d 1553, 1558-59 (9th Cir. 1987).

93. 29 U.S.C. §§ 621-634 (1985).

94. Claims involving facial challenges to statutes or regulations are also appropriate for summary judgment treatment. IDK, Inc. v. Clark County, 836 F.2d 1185 (9th Cir. 1988). Suits on notes can typically be decided on summary judgment. FDIC v. Cardinal Oil Well Servicing Co., 837 F.2d 1369 (5th Cir. 1988).

95. This is the *Matsushita* type of summary judgment.

96. *See supra* notes 33-51 & 67-81 and accompanying text.

97. O'Connor v. Ortega, 480 U.S. 709 (1987).

law is as susceptible to summary judgment controversies as employment discrimination. From threshold matters to ultimate fact issues, employment discrimination litigants often find themselves litigating summary judgment motions. In *Martin v. United Way*,[98] the Court of Appeals for the Third Circuit reviewed a trial court's grant of summary judgment in an ADEA and Title VII[99] case. The district court granted United Way's motion for summary judgment reasoning that the organization was not engaged in an "industry affecting commerce," and that United Way was not an "employer" since it did not employ twenty or more employees for twenty or more weeks during the relevant years.[100] Although each basis was a threshold matter, the court held that issues of fact remained for trial.[101] Presumably, the jury would decide these issues.[102]

The ultimate question of liability in employment discrimination cases also has been challenged on summary judgment. An examination of these cases is interesting because the results reflect individual court's philosophies toward such claims, and because of the peculiar burden-shifting that occurs both before and during trial.

In *McDonnell Douglas Corp. v. Green*,[103] the Supreme Court announced a three-prong, burden-shifting test to evaluate employment discrimination claims.[104] First, the plaintiff must prove, by a preponderance of the evidence, a prima facie case of discrimination.[105] This is established in ADEA cases by showing that the claimant (1) belongs to a protected class; (2) was qualified for the position; (3) was dismissed despite being qualified; and (4) ultimately was replaced by a person sufficiently younger to permit an inference of age discrimination.[106] Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to

98. 829 F.2d 445 (3d Cir. 1987).

99. Title VII of the Civil Rights Act of 1964, *amended by*, 42 U.S.C. §§ 2000e-2000e-17 (1981).

100. Martin v. United Way, 829 F.2d 445, 446 (3d Cir. 1987).

101. *But see* Wheeler v. Hurdman, 825 F.2d 257 (10th Cir. 1987) (as a matter of law a general partner in an accounting firm was not an employee entitled to bring suit under ADEA).

102. Federal criminal statutes generally require that the alleged criminal act affect interstate commerce. In criminal trials, a prosecutor can only gain a conviction upon proving the interstate element of the crime beyond a reasonable doubt. *See, e.g.*, Hobbs Anti-Racketeering Act, 18 U.S.C. § 1951 (1982); Mann Act, 18 U.S.C. §§ 2421-2424 (1982); Sherman Antitrust Act, 15 U.S.C. § 1 (1982); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (1982).

103. 411 U.S. 792 (1973).

104. *Id.* at 802.

105. *Id.*

106. Maxfield v. Sinclair Int'l, 766 F.2d 788, 793 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986).

articulate some legitimate, nondiscriminatory reason for the employee's rejection.[107] Third, if the defendant meets this burden, the plaintiff has an opportunity to prove, by a preponderance of the evidence, that the legitimate reasons offered by the defendant were not true reasons, but were a pretext for discrimination.[108] Lower courts have uniformly engaged in this three-prong analysis when ruling on a motion for summary judgment.[109]

Courts have granted summary judgment motions when employment discrimination plaintiffs have failed to present sufficient evidence to establish a prima facie case. In *Barnes v. Southwest Forest Indus.*,[110] the Court of Appeals for the Eleventh Circuit held that six security guard plaintiffs failed to prove a prima facie case even though the plaintiffs demonstrated that the employer hired younger employees without giving the older plaintiff employees an opportunity to compete for those jobs.[111] The court, adding a new element to the four prima facie factors, held that the plaintiffs failed to demonstrate that they were actually available to take those jobs.[112] Similarly, in *Ballinger v. North Carolina Agricultural Extension Serv.*,[113] the Court of Appeals for the Fourth Circuit affirmed summary judgment entered against a fifty-five-year-old woman who asserted claims of gender and age discrimination.[114] The woman had applied for a position as county chairman of an agricultural extension service, but the position was filled by her co-worker at the service, a thirty-four-year-old man.[115] A screening committee for the county commissioners recommended both workers for the position.[116] The court held that the plaintiff failed to establish a prima facie case for age or sex discrimination because she and her co-worker were both recommended for the promotion.[117]

Summary judgment also has been entered when a court finds that a plaintiff has not presented sufficient evidence to show that an

107. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

108. *Id. See also* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

109. *See, e.g.*, Thornbrough v. Columbus & Greenville R.R., 760 F.2d 633, 638-39 (5th Cir. 1985); Dillon v. Coles, 746 F.2d 998, 1003 (3d Cir. 1984).

110. 814 F.2d 607 (11th Cir. 1987).

111. *Id.* at 610-11.

112. *Id.* at 610. The court's holding, however, is based on a fact issue more properly left to the jury, perhaps suggesting a philosophy about the quality of proof needed to reach a jury in ADEA cases in the Eleventh Circuit.

113. 815 F.2d 1001 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 232 (1987).

114. *Id.* at 1003.

115. *Id.*

116. *Id.* at 1004.

117. *Id.* at 1005. The issues surrounding the dual recommendation to the commissioners and the eventual decision to hire the younger man were not sent to the jury.

employer's justification for an employment decision was a pretext to age discrimination. In *Dea v. Look*,[118] the Court of Appeals for the First Circuit affirmed an entry of summary judgment for the employer because the plaintiff failed to produce any evidence rebutting the employer's explanation for plaintiff's discharge. According to the employer, the plaintiff wrongfully used the employer's fuel.[119] The court, however, did not consider, as adequate rebuttal evidence, that another employee, who also wrongfully used the gasoline, was reinstated to his job with back pay.[120]

In *Carey v. United States Postal Serv.*,[121] the Court of Appeals for the Tenth Circuit, using the Supreme Court's three-prong analysis, examined a Title VII claim and determined that the plaintiff offered no evidence demonstrating that the employer's decision to award a supervisor position to a black employee was reverse discrimination.[122] The employer's proffered reason for choosing the black employee was an obligation pursuant to a settlement agreement reached in a prior Title VII case.[123]

By contrast, the Court of Appeals for the Third Circuit almost routinely denies summary judgment motions in employment discrimination cases. In *Chipollini v. Spencer Gifts, Inc.*,[124] an employer allegedly terminated a fifty-eight-year-old manager due to a cutback in expenses and a moratorium on the construction of more stores for the employer.[125] The employer also claimed that the plaintiff was terminated because of his indifferent, uncooperative, and ineffective attitude regarding certain special projects of the employer.[126] Nevertheless, a forty-three-year-old man subsequently assumed the plaintiff's duties and his title.[127] The court noted that the plaintiff had met his prima facie burden.[128] The court then placed the following burden upon an employer moving for summary judgment: "[T]o meet its burden on summary judgment, the defendant employer must show that the plaintiff will be unable to introduce either direct

118. 810 F.2d 12 (1st Cir. 1987).
119. *Id.* at 14.
120. *Id.*
121. 812 F.2d 621 (10th Cir. 1987).
122. *Id.* at 624.
123. *Id.* at 624. The court distinguished Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) on the ground that the Postal Service did not implement any affirmative action or hiring quota systems. *Carey*, 812 F.2d at 625.
124. 814 F.2d 893 (3d Cir. 1987), *cert. dismissed*, 483 U.S. 1052 (1987).
125. *Id.* at 895.
126. *Id.*
127. *Id.*
128. *Id.* at 898.

evidence of a purpose to discriminate, or indirect evidence of that purpose by showing that the proffered reason is subject to factual dispute."[129]Thus, the plaintiff need not come forward with evidence at the summary judgment stage to show that the employer's reasons for termination were pretextual unless the defendant can demonstrate the plaintiff's inability to present such evidence. Although, this may be a subtle distinction, the standard indicates that the Third Circuit does not employ the *McDonnell Douglas* burden-shifting test to overcome the usual summary judgment burden standard. In the Third Circuit, the burden remains with the movant on summary judgment.[130]

2. Libel Suits.—Another fertile ground for summary judgment disposition is libel litigation. *Anderson* was a libel case.[131] The *Anderson* Court ruled that in cases involving public officials or public figures, the nonmoving plaintiff must set forth sufficient facts to show that he or she can meet the actual malice standard at trial.[132] Recent libel case law demonstrates that libel plaintiffs must come forward with substantial evidence showing actual malice by the defendant to avoid summary judgment.

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129. Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 899 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 26 (1987).

130. Other Third Circuit cases showing a restrictive view of summary judgment for employment discrimination claimants include: Sorba v. Pennsylvania Drilling Co., 821 F.2d 200 (3d Cir. 1987) (summary judgment was reversed because the record contained "evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge [which] reasonably *could* support an inference that the employer did not act for [those] nondiscriminatory reasons."); *see also* White v. Westinghouse Elec. Corp., 862 F.2d 56 (3d Cir. 1988); Jackson v. University of Pittsburgh, 826 F.2d 230 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 732 (1988); Bhaya v. Westinghouse Elec. Corp., 832 F.2d 258 (3d Cir. 1987); E.E.O.C. v. City of Mount Lebanon, 842 F.2d 1480 (3d Cir. 1988). *But see* Healy v. New York Life Ins. Co., 860 F.2d 1209 (3d Cir. 1988). The *Healy* court affirmed summary judgment for the employer and stated:

> [w]e emphasize that, despite the breadth of the language in *Chipollini*, discrimination cases are inherently fact-bound. Certainly *Chipollini* does not stand for the proposition that summary judgment is *never* available in discrimination actions. Rather, we understand the teaching of *Chipollini* to be that where plaintiffs proffer evidence of pretext and create a genuine issue of material fact as to the credibility of the employer's "legitimate" business reasons, summary judgment is foreclosed.

Id. at 1219.

For a more comprehensive review of the new summary judgment standard as applied to employment discrimination cases, see *John v. Jansonius, The Role of Summary Judgment in Employment Discrimination Litigation*, 4 LAB. LAW. 747-95 (Fall 1988).

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

132. *Id.*; *cf.* Zerange v. TSP Newspapers, Inc., 814 F.2d 1066 (5th Cir. 1987) (a nonmovant must prove actual malice with convincing clarity at the summary judgment stage) (citing *Anderson*).

Saenz v. Playboy Enterprises, Inc.[133] presents a typical summary judgment disposition in a post-*Anderson* libel case. In *Saenz*, a New Mexico Department of Corrections secretary sued Playboy for libel based on a March 1981 article in Playboy Magazine entitled "Thirty-Six Hours at Santa Fe."[134] The article recalled the plaintiff's earlier career as a U.S. Government official in Uruguay and Panama and stated, inter alia, that "allegations of torture by his police clients would follow Saenz through subsequent assignments in Columbia and Panama" and that "[Saenz] had intimate and influential relations with Uruguayan police."[135]

To oppose Playboy's motion for summary judgment on the issue of actual malice, the plaintiff produced a letter that the Playboy reporter had written to his agent describing Saenz as a "State of Siege character, with his career in Latin torture chambers . . . ."[136] The court, however, held that this letter was not sufficient to raise a jury question of actual malice by the reporter or the publication.[137] The court stated:

> Although it might not be unreasonable to believe that this rather ambiguous statement demonstrates a belief that Saenz was a torturer, it alone could hardly constitute clear and convincing evidence that the defendants knew or intended the defamatory inference that might now be drawn from their publication . . . . At best, the statement is indirect evidence from which no more than a mere suggestion of culpability may be drawn. The letter does not state that Saenz was himself involved in torture. Nor was the statement written contemporaneously with the article or included in the text of the publication itself. Though relevant to the issue of malice, when considered in light of the clear and convincing evidence Saenz must ultimately produce, this one letter, standing alone, is insufficient to require a jury to resolve the plaintiff's claimed factual dispute. Charged as we believe we are with considering "the 'quantum' of proof required and . . . whether the evidence is of sufficient 'caliber or quality' to meet that 'quantum' " . . . we conclude that a reasonable jury could not find that Saenz established actual malice by clear and convincing evidence.[138]

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133. 841 F.2d 1309 (7th Cir. 1988).

134. *Id.* at 1311.

135. *Id.* at 1312.

136. *Id.* at 1319.

137. *Id.*

138. Saenz v. Playboy Enters., Inc., 841 F.2d 1309, 1319 (7th Cir. 1988) (citing *Anderson*).

Given the holding that a smoking gun letter is insufficient to raise a jury question as to the defendants' actual malice or reckless disregard of the truth, one may wonder what level of proof libel plaintiffs must produce to defeat a summary judgment motion. According to the Court of Appeals for the Third Circuit, actual malice questions can be presented to the jury if the publisher defendant has "obvious reasons to doubt the veracity of the informant or the accuracy of his reports."[139] In *Schiavone Construction Co. v. Time, Inc.*,[140] the court reminded district courts to view the evidence through the prism of the *Anderson* summary judgment standard:

> Even though the standard for actual malice is difficult to meet, and even though it must be met by clear and convincing evidence, we nonetheless must not lose sight of the fact that we must decide this question on summary judgment. On summary judgment, . . . "[t]he non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt."[141]

Questions still remain about the quantum of proof necessary to

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139. Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069, 1090 (3d Cir. 1988) (quoting St. Armant v. Thompson, 390 U.S. 727, 732 (1968)).

140. 847 F.2d 1069 (3d Cir. 1988).

141. *Id.* at 1090 (quoting Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977)). While the Third Circuit tends to give the benefit of the doubt to the nonmovant, two Third Circuit cases have held that a defendant was entitled to summary judgment when the plaintiff failed to produce sufficient evidence of actual malice. In Jenkins v. KYW, 829 F.2d 402 (3d Cir. 1987), a television broadcast described a Philadelphia County Common Pleas Court judge as entering an unconscionably light sentence to a convicted killer, only to have the criminal commit another murder while on probation. The assistant district attorney expressed opinions during the television broadcast relating to judge's sentencing obligations. The court affirmed the district court's grant of summary judgment for the defendant stating that:

> We discern no evidence which, by a clear and convincing standard, would show that the defendant had serious doubts about the truthfulness of the broadcast. The plaintiff has not shown that the investigation by the television reporters disclosed the falsity of a statement at issue, nor that they entertained serious doubt as to any statement's truth. Moreover, many of the allegedly defamatory statements are clearly opinions. These opinions, however biting, are protected by the First Amendment.

Id. at 407.

In Dunn v. Gannett N.Y. Newspapers, Inc., 833 F.2d 446 (3d Cir., 1987), an Elizabeth, New Jersey, mayor sued a local Spanish newspaper. Following the mayor's speech lamenting the local Hispanic population as litterbugs, the newspaper stated that the mayor called Hispanics "cerdos," which translated into English means "pigs." The mayor argued that his reputation in the community was harmed by the headline: "Alcalde de Elizabeth al Ataque: LLAMA 'CERDOS' A LOS HISPANOS," which translated into English means "Elizabeth Mayor on the attack: CALLS HISPANICS 'PIGS.' " The mayor argued that actual malice should be implied because the defendant knew that the headline was an exaggeration of the truth. The court held that the mayor did not produce sufficient evidence to show actual malice. The mayor's remarks about Hispanics could not easily be translated because there is no word for "litterbug" in Spanish. *Id.* at 448-51.

defeat libel summary judgment motions. It is clear, however, that a nonmovant must present some facts to support a claim that actual malice existed.[142] A mere assertion that a reasonable jury would not believe the defendant's denial of actual malice is insufficient to avoid summary judgment.[143] Nevertheless, the raising of the issue of actual malice at the summary judgment stage seems to have surpassed the defense of truth as the best way for libel defendants to extricate themselves from such lawsuits.[144]

Circuit Judge Bork, expressing disdain for the litigiousness of one libel plaintiff, applied the *Anderson* summary judgment standard in *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*[145] A publisher filed a libel suit following the publication of a Wall Street Journal article that connected the publisher with an American Nazi group.[146] Judge Bork was particularly disturbed because only two weeks after the Supreme Court held that the *Anderson* article was not the product of actual malice, Liberty Lobby, the plaintiff in *Anderson*, sued another publication for libel arising out of a story based on essentially the same sources as in *Anderson*.[147]

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142. Contemporary Mission, Inc. v. New York Times, Co., 842 F.2d 612 (2d Cir. 1988) *cert. denied*, 109 S. Ct. 145 (1988). A New York Times article examined a Westport, Connecticut, religion whose priests had the trappings of wealth by operating a large, tax-exempt mail order business. The court held that "[o]ur independent review of the record reveals no indication of clear and convincing evidence that the Times acted with actual malice." *Id.* at 622. *See also* Flotech, Inc. v. E.I. DuPont de Nemours & Co., 814 F.2d 775 (1st Cir. 1987).

143. Contemporary Mission, Inc. v. New York Times, Co., 842 F.2d 612, 622-23 (1988).

144. *See, e.g.*, Anderson v. Cramlet, 789 F.2d 840 (10th Cir. 1986).

145. 838 F.2d 1287 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 75 (1988).

146. *Id.* at 1290.

147. The court stated that:

> This suit epitomizes one of the most troubling aspects of modern libel litigation: the use of [the] libel complaint as a weapon to harass. Despite the patent insufficiency of a number of appellant's claims, it has managed to embroil a media defendant in over three years of costly and contentious litigation. The message to this defendant and the press at large is clear: discussion of Liberty Lobby is expensive. However well-documented a story, however unimpeachable a reporter's source, he or she will have to think twice about publishing where litigation, even to a successful motion for summary judgment, can be very expensive if not crippling. We have conducted an independent review of the record in this case, and have found that each of appellant's claims is clearly barred on several common law and constitutional grounds.

Id. at 1303. The court also noted that:

> Liberty Lobby has brought a number of libel suits against media defendants that have characterized it as racially prejudiced or anti-Semitic. *See, e.g., Dall v. Pearson*, 246 F. Supp. 812 (D.D.C. 1963), *aff'd*, C.A. No. 18, 414 (D.C.Cir. Oct. 22, 1964), *cert. denied*, 380 U.S. 965, 85 S. Ct. 1108, 14 L.Ed.2d 155 (1965) (libel suit based on columnist's statements that Liberty Lobby's congressional testimony was an "anti-Semitic diatribe" and "an attack on the Jews"); *Liberty Lobby, Inc. v. Anderson*, 562 F.Supp. 201 (D.D.C. 1983), *aff'd in part, rev'd in part*, 746 F.2d 1563 (D.C.Cir. 1984), *rev'd in part*, 477 U.S. 242, 106

3. Antitrust Litigation.—Antitrust law also plays host to numerous motions for summary judgment, especially following the liberal summary judgment standard established in *Matsushita.*[148] Antitrust cases often generate a great volume of documents and information, some important and some needless, making a court's decision to enter summary judgment a difficult one. In this area, the individual philosophies of the courts of appeals can be outcome determinative. The Court of Appeals for the Seventh Circuit favors summary disposition in antitrust litigation.[149] The court held that

> [t]he very nature of antitrust litigation would encourage summary disposition of such cases when permissible. Not only do antitrust trials often encompass a great deal of expensive and time-consuming discovery and trial work, but also . . . the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation . . . . The ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way.[150]

Although such language may dissuade potential plaintiffs from filing antitrust suits in the Seventh Circuit, antitrust plaintiffs are less inhibited in the Ninth Circuit. In *Three Movies of Tarzana v. Pacific Theatres, Inc.*,[151] the court held that "[s]ummary judgment is disfavored in complex antitrust litigation if extensive factual determinations must be made concerning intent and motive . . . . However, it is appropriate in the absence of any significant probative evidence tending to support the complaint."[152] Meanwhile, the Court of

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S. Ct. 2505, 91 L.Ed.2d 202 (1986) (libel suit based upon magazine's statements that Liberty Lobby was "anti-Semitic" and "infiltrated by Nazis"); *Liberty Lobby, Inc. v. National Review, Inc.*, No. 79-3445, (D.D.C. Apr. 20, 1982) (libel action based on *The National Review's* characterization of Liberty Lobby as "a hotbed of anti-Semitism"); *Liberty Lobby, Inc. v. Rees*, 667 F. Supp. 1 (D.D.C. 1986) (libel action based on characterization of Liberty Lobby as racist and anti-Semitic); *Carto v. Buckley*, 649 F.Supp. 502 (S.D.N.Y. 1986) (libel action based on charge that the "distinctive feature" of Liberty Lobby publication, *The Spotlight*, is "racial and religious bigotry"). None of these suits has been successful and in no *instance* has Liberty Lobby been allowed to present its claims to a jury.

Id. at 1303 n.9.

148. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1976).

149. Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 488 (1987).

150. *Id.* at 660 n.4 (citing Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979). *See also* First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 289 (1968).

151. Three Movies of Tarzana v. Pacific Theatres, Inc., 828 F.2d 1395 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 1028 (1988).

152. *Id.* at 1398 (citations omitted).

Appeals for the Tenth Circuit held that restraint of trade allegations must be supported by "significant probative evidence" in order to overcome a motion for summary judgment.[153]

The *Matsushita* approach to motions for summary judgment in the antitrust context emphasizes placing before the court credible, hard evidence of an antitrust violation. For example, in *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*,[154] the complaint alleged that various parent companies had conspired to control coal production and pricing by deputizing persons to sit on boards of competing subsidiaries, thereby creating an interlocking directorate.[155] The plaintiff brought suit under Section 8 of the Clayton Act.[156] The complaint did not identify the names of the directors on the various boards involved in the alleged deputization scheme.[157] The court stated that "no evidence was proffered that particular persons sat on the boards of corporations *shown*, rather than merely alleged in conclusory terms, to be competitors in the required statutory sense. The ambiguous allegation that certain persons were 'officers and/or directors' of competing companies remained ambiguous on the critical point."[158] Finding no evidence to support the allegation, the court affirmed the lower court, stating:

> We think that the district court rightly adjudged that despite adequate opportunity to put a forecast of hard proof of its § 8 claim on the line, Pocahontas had not done so. In those circumstances a court need not withhold summary judgment, even in complicated cases such as antitrust, simply because there may remain "some metaphysical doubt as to the material facts." . . . The burden cast upon Pocahontas was to come forward with "specific facts showing that there is a genuine issue for trial," Fed. R. Civ. P. 56(e); it could not at this point rely only on its conclusory pleading allegations to hold the case at issue . . . . The district court rightly perceived that on no more hard evidence than Pocahontas had put in the record no rational trier of fact, properly instructed in the substantive law and on the burden of proof, could find for Pocahontas on its § 8 claim, and that summary judgment was therefore appropriate.[159]

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153. Instructional Sys. Dev. Corp. v. Aetna Casualty & Sur. Co., 817 F.2d 639, 644 (10th Cir. 1987).

154. 828 F.2d 211 (4th Cir. 1987).

155. *Id.* at 215.

156. 15 U.S.C. § 19 (1982).

157. Pocahantas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 217 (4th Cir. 1987).

158. *Id.* at 217.

159. *Id.* (citing *Matsushita*). *Accord* Alberta Gas Chems. v. E.I. DuPont de Nemours,

It appears that courts hesitate to draw many inferences from the evidence in antitrust cases, although inferences are frequently drawn by courts in employment discrimination cases.[160] One possible explanation is that the Supreme Court, in *Matsushita*, instructed trial courts to make factual determinations based on some conception of logic.[161] Another explanation is that courts do not want to become entangled in the complex details of antitrust evidence, as indicated by the Court of Appeals for the Seventh Circuit's approach.[162] In any event, the summary disposition of antitrust cases has gained popularity since *Matsushita*.

III. Summary Judgment Model — Epistemic Coherence

Super summary judgment, the standard employed in *Matsushita* and to some extent in *Anderson* and *Celotex*, has given federal district courts a license to look beyond the evidence of record and impose the courts' own beliefs based on outside information or studies when ruling on summary judgment motions.[163] In effect, courts are free to draw upon their own gathered evidence in addition to evidence adduced by the parties. Unfortunately, the adversarial clash of the parties cannot challenge these outside sources because courts introduce such evidence at the decision-making stage. Although courts have an interest in judicial efficiency and docket control, these interests must be weighed against concern for not only our adversarial system of justice, but also the seventh amendment right to a jury trial in civil cases. The basic premise in the Anglo-American system of justice is that the truth will emerge from the adversarial clash of the parties. Given *Matsushita* and its progeny, one wonders whether truth now emerges solely from judicial cogitation.[164]

Federal Rule of Civil Procedure 56 does not require courts to seek the truth when ruling. Truth-seeking, like fact-finding, is within the province of the jury. Unfortunately, the Supreme Court has led lower courts away from the fundamental standard embodied in Rule 56, which is to determine whether a genuine issue of material fact

826 F.2d 1235 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 2830 (1987) (summary judgment upheld because the plaintiff failed to set forth specific facts showing an injury on a claim under § 7 of Clayton Act). *See also* Miller v. Indiana Hosp., 843 F.2d 139 (3d Cir. 1988).

160. *See supra* notes 98-130 and accompanying text.

161. *See supra* notes 46-51 and accompanying text.

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

163. *See, e.g., supra* note 45 and accompanying text.

164. Because courts of appeals, in published opinions, affirm less than sixty percent of summary judgment cases, the truth, as pronounced by judges, is not always "nothing but the truth." *See supra* note 18 and accompanying text.

remains for trial. The rule, as explained in *Celotex*,[165] requires that the parties produce evidence before trial to show that a trial is necessary.[166] The truth does not emerge in the pre-trial phase of litigation. The only question is whether the parties need to proceed through the trial process. Because the judge is not (and should not be) a fact-finder in the summary judgment stage,[167] a court cannot discover the truth, nor should it try to, when ruling upon a motion for summary judgment. Facts or truths can only emerge through the adversarial process during trial.[168]

At the summary judgment stage, the judge only needs to determine whether a material fact issue remains for a fact-finder at trial. Although this task sounds relatively easy in the context of a lawsuit, courts and litigators, who cannot focus on precise issues of material fact without muddying the resolution with extraneous or irrelevant evidence, have complicated its execution.

Once courts reject attempts to seek the truth at the summary judgment stage, they will be more likely to avoid considering extraneous evidence in determining whether any *genuine* issue of fact remains for trial. In addition, the court must intensely scrutinize the interplay of the remaining evidence. Does the proffered evidence logically fit together to form a coherent picture favoring the summary judgment movant? Or is there evidence that tarnishes the movant's position to such a degree that a fact-finder is needed to arrive at the truth? This should be the court's mental process when ruling upon a motion for summary judgment, as required by Rule 56. This is also the classical cognitive approach known as "epistemic coherence."[169]

Epistemology is the study of the structure of knowledge and beliefs.[170] Every belief or any knowledge a person possesses can be based on a number of inductive inferences gained through sensory perception or by some other means.[171] One scientist breaks down

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165. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

166. *Id.* at 323-24.

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

168. One may argue that facts or truths emerge at the summary judgment stage because the law recognizes that certain issues can be settled, or facts may be ascertained, and may be used for res judicata or collateral estoppel purposes in later litigation. Prakash v. American Univ., 727 F.2d 1174 (D.C. Cir. 1984); Ruple v. City of Vermillion, S.D., 714 F.2d 860 (8th Cir. 1983), *cert. denied*, 465 U.S. 1029 (1984).

169. *See* P.K. MOSER, EMPIRICAL KNOWLEDGE, READINGS IN CONTEMPORARY EPISTEMOLOGY 7 (1986).

170. *See* H. REICHENBACH, EXPERIENCE AND PREDICATION, AN ANALYSIS OF THE FOUNDATIONS AND THE STRUCTURE OF KNOWLEDGE 387 (1952).

171. *Id.*; *see also* E.P. PAPANOUTSOS, THE FOUNDATIONS OF KNOWLEDGE (1968). "Knowledge begins with perception"—the simplest cognitive fact, the starting point of experience. With the aid of memory and reflective powers, we form concepts, *i.e.*, justice—simple

knowledge into components of inductive inferences: The structure of scientific inferences is to be conceived as a concatenation of inductive inferences, resting on ideas of probability. The transition from probability to practical truth plays a decisive role, but the probability character of the inferences is not always easily seen; the short steps of inductive inferences can be combined into long chains forming longer steps of so complicated a structure that it may be difficult to see the inductive inference as the only atomic element in them.[172] The atomic particles that form the structure of knowledge or belief must be considered in relationship to each other. The belief becomes justified only when the atomic particles, the inductive inferences, logically support the conclusory belief.[173]

Justification takes two forms in epistomology, propositional and doxastic.[174] Propositional occurs when a person's total evidence makes a proposition likely to be true (more likely than its denial) on that person's total evidence, even if the person believes it for the wrong reason. Doxastic occurs when a proposition has propositional justification for a person, and when that person believes it *on the basis of* the justifying evidence. Thus, doxastic justification requires that one's belief be appropriately related to one's evidence.[175] As the epistemic model for summary judgment demonstrates, a court does not need to have doxastic justification in ruling on a motion for summary judgment because the court is not searching for truth.[176]

It is here that belief and truth take divergent paths. Because

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clear forms of thought whose content is reached by removing peripheral elements. All concepts have the following in common: "the cognitive function of knowledge proceeds by means of the concept from the level of sense experience to that of logical formulations and distinctions." *Id.* at 153.

172. H. REICHENBACH, *supra* note 170, at 387.

173. According to P.K. MOSER, *supra* note 169, at 4, a belief is epistemically justified for a person only if that belief is more likely to be true, on that person's total evidence, than is the denial of that belief. This likelihood is known as "confirmation." Thus, he writes, if a proposition *P* is more likely to be true than its denial, not-*P*, then the truth of *P* is more confirmed than the truth of not-*P*. *Id.*

174. *Id.*

175. *Id.*

176. The search for truth has been the quest of philosophers throughout civilization. According to some philosophers, truth is objective judgment based upon the material of experience and representations and is ordered and formed according to pure forms of understanding. Truth is not the associative, subjective connection of representations. E.P. PAPANOUTSOS, *supra* note 171, at 136-37. "There are questions regarding the truth or untruth of which it is *not* for man to decide; all the capital questions, all the capital problems of valuation, are beyond human reason." F.W. NIETZCHE, THE ANTICHRIST 157 (1888). Niels Bohr, a noted Danish physicist, expressed a less restricted view of truth when he wrote: "There are trivial truths and the great truths. The opposite of a trivial truth is plainly false. The opposite of a great truth is also true." GEORGE SELDES, THE GREAT THOUGHTS 46 (1985) (quoting N.Y. Times, Oct. 20, 1957).

truth is an elusive concept, epistemologists confine their trade to studying the structure of what is perceived as knowledge, whether or not that knowledge is truth. Judges may approach summary judgment motions as junior epistemologists, not judging the truth of the underlying contentions, but rather considering the foundations justifying the parties' beliefs.

One scientist has identified three alternative foundation models justifying empirical beliefs:[177] The foundation of such belief terminates in unjustified beliefs; the regress of such belief goes on indefinitely (on never-ending building blocks of empirical knowledge); or the foundation circles back on itself in some way.[178] The model most clearly suited for the summary judgment standard is the third model, known as the "epistemic coherence theory."[179] Before applying the model to summary judgment motions, however, the theory must be described in greater detail.[180]

The coherence theory is not linear in its series of justifications. All justifications derive from coherent relations among beliefs, with logical consistencies, logical implications, and coherence as the explanation.[181] Consistency is a necessary condition for coherence. In

177. Empirical beliefs are those beliefs based on empirical, sensory or perceptual knowledge, as contrasted with conclusory or a priori knowledge. *See* P.K. MOSER, *supra* note 169, at 3. Even the truth of empirical knowledge, the fundamental building block of beliefs, can be disputed, according to Moser. "Philosophers have asked whether empirical knowledge is based on beliefs that are indubitable (not subject to doubt), incorrigible (not subject to falsity), or irrevisable (not subject to revision). It is doubtful whether any of our beliefs enjoys immunity of indubitability, incorrigibility or irrevisability." *Id.*

178. L. BONJOUR, THE STRUCTURE OF EMPIRICAL KNOWLEDGE 87 (1985) (available at University of Pittsburgh, Hillman library).

179. *See* J. DANCY, AN INTRODUCTION TO CONTEMPORARY EPISTEMOLOGY 110-12 (1985).

180. Epistemic infinitism, in which the foundations for a belief consist of an indefinite number of empirical beliefs, cannot be used for our model because a judge is presented with a finite amount of evidence on summary judgment. Such a model would suppose that a judge's decision could never be made because his examination of the evidence would be never-ending. Epistemic infinitism is based on an endless regression of empirical beliefs. For example, *B* is supported by *B1*, which is supported by *B2*, *ad infinitum*. Beliefs in epistemic infinitism are conditionally justified—justified only if their predecessors are justified. Epistemic infinitism is not a favored model because at some point in the infinite chain it is probable that at least one belief cannot be justified. P.K. MOSER, *supra* note 169, at 7-8.

An additional foundation has been labeled, "epistemic contextualism," in which the inferential justification terminates ultimately in beliefs not in need of any justification. They are "contextually basic" and do not find evidential support from anything, including themselves. A belief may qualify as contextual as long as one's peers allow one to hold the belief without any reasons. The contextualism flaw is that the theory supports the holding of self-contradictory beliefs with no support so long as peers do not object. P.K. MOSER, *supra* note 169, at 8-9.

181. P.K. MOSER, *supra* note 169, at 7. Moser describes coherence as a logical consistency as follows: "Two beliefs are coherent if and only if it is logically possible that both beliefs are true. Coherence is an explanation, if one belief explains the truth or falsity of the other." *Id.* at 5. "[U]nder this view, empirical knowledge does not have noninferentially, justified foundations, but works in a systematic, network-like structure." *Id.* at 7. (Noninferentially

an entirely coherent system, "no proposition would be arbitrary, every proposition would be entailed by the others jointly and even singly, *no proposition would stand outside the system.*"[182] One scientist noted that:

> [T]o have a coherence theory of justification, we need to give a good sense to the idea that justification can grow . . . . The idea here will be that, as the set increases in size, we can hope that each member of it is better explained by the rest. Explanations can improve in quality; this accounts for the growth of justification.[183]

A belief, therefore, is justified when it is based upon a set of supporting coherent inferences or beliefs. For example, consider two islands. The inhabitants of one island see only horses, deer, and sheep, and believe that all animals have hooves, a true belief on their island. The inhabitants of the other island see only ducks, geese, and frogs, and believe that all animals have webbed feet, a true belief on their island. This demonstrates the basic flaw of the coherence theory; the theory does not consider any relation between a system of beliefs and anything external to that system.[184] Coherence, therefore, is a matter of how well a body of component beliefs interact to produce an organized, tightly structured system of beliefs, "rather than either a helter-skelter collection or a set of conflicting subsystems."[185]

Judges, moreover, can utilize the epistemic coherence model when ruling on summary judgment motions. The model does not seek absolute truth, but rather internal coherence based on the relationship among beliefs within a closed system of inferences. The model requires the nonmoving party, as in *Celotex*,[186] to come forward with a justified belief rendering the movant's belief (or argument) logically inconsistent. When the set of all justified beliefs offered by both parties is incoherent, and the movant's ultimate belief (or argument) is inconsistent with that set of justified beliefs, the court should deny summary judgment. Truth must be ascertained by

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justified beliefs are justified beliefs whose justification does not depend on the justification of further beliefs.).

182. J. DANCY, *supra* note 179, at 110.

183. *Id.* at 111.

184. L. BONJOUR, *supra* note 178, at 108. If coherence is the sole basis for empirical justification, it follows that "a system of empirical beliefs might be adequately justified, indeed might constitute empirical knowledge, in spite of being utterly out of contact with the world that it purports to describe." *Id.*

185. *Id.* at 93.

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

the fact-finder at trial.[187]

Justified beliefs are not merely allegations contained in the pleadings or the denials by the nonmovant, but rather consist of documentary evidence or affidavits based on fact and not opinion. Each belief contained in the set of beliefs examined by the judge must be justified by the whole of the evidence. When a belief is not justified or supported, it should be discarded from the set. This is consistent with the standards of Federal Rule of Civil Procedure 56(e), which requires the parties to set forth evidence, not allegations, in support or opposition to a motion for summary judgment.[188]

Under the epistemic model, frivolous cases can be eliminated on summary judgment when the moving party sufficiently presents a set of justified beliefs and the nonmoving party cannot produce evidence to justify its own allegations within the standards required by Rule 56(e). *Matsushita*-type cases, however, may survive summary judgment motions because courts are not permitted to look beyond the set of justified beliefs presented by the parties. The epistemic model bars consideration of propositions standing outside the system,[189] and also omits the *Anderson* concept of higher burdens of proof.[190] One can argue that a nonmovant who produces evidence of a justified belief that upsets the movant's coherent set of justified beliefs should escape summary judgment because a genuine issue of material fact

187. The epistemic coherence model can also be used to describe the jury deliberation process, with one important exception. When the justified beliefs of the parties clash, jurors may make credibility determinations and disregard or discount some of the evidence. Presumably, when unjustified beliefs are discarded from the set of beliefs (or evidence) presented at trial, the ultimate belief is reached and justified (the verdict)? Because the jury cannot consider attorneys' statements, newspaper articles, outside publications, or comments made beyond the courtroom, the verdict is justified only by the coherent relationships between the finite set of supported beliefs presented in the courtroom. A pure coherence model suffers when jurors are asked to apply their common sense and disparate life experiences in forming their decisions.

188. The Federal Rules of Civil Procedure provide that:

> 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. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. 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 affidavits or as 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).

189. *See* J. DANCY, *supra* note 179, at 110.

190. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (nonmovant required to produce sufficient evidence to show it could meet the clear and convincing level of proof required in libel cases).

remains for the jury. Whether this degree of inconsistency rises to a level necessary to prevent entry of judgment for the defendant in libel or fraud cases (where the claimant faces a higher burden of proof) is a question that is more appropriate for a fact-finder at trial than a judge during pretrial motions.[191]

In summary, the epistemic coherence model demands that the parties adequately support evidence presented pursuant to a summary judgment motion. The model restricts the court to the evidence presented. The court's task is to determine if the presented evidence paints a coherent picture of the movant's argument or belief. If the combined set of justified beliefs of the plaintiff and defendant are incoherent and do not justify the movant's belief, summary judgment should be denied.

IV. Conclusion

Summary judgment is probably the most prevalent pretrial motion, and the most confusing. At one time, litigators were confident that they could produce enough evidence to get the case before a jury. Now, given the *Matsushita*, *Celotex*, and *Anderson* burdens of proof required at the summary judgment stage, litigators present their case through affidavits and documentary evidence—a paper trial. Today, federal courts employ this super pretrial motion to dispose of cases that judges perceive to be one-sided.

Unfortunately, the new summary judgment standard encourages courts to weed out meritless cases by searching for the truth. Federal Rule of Civil Procedure 56 does not address truth determinations on summary judgment. The rule contemplates a determination of whether the parties have presented a live, factual dispute that should be settled at trial. To resolve summary judgment motions properly, courts must consider all of the supported evidence submitted by both

191. *See, e.g.*, *In re* Winship, 397 U.S. 358 (1970), wherein Justice Harlan stated:

> [I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what *probably* happened. The intensity of this belief—the degree to which a factfinder is convinced that a given act actually occurred—can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

Id. at 370 (Harlan, J., concurring).

parties, and determine whether the evidence justifies the movant's belief without any supported evidence to the contrary. If the evidence is not coherent and does not totally support the movant's proposition, the summary judgment motion should be denied.

Consider the following case under the super summary judgment standard and the epistemic coherence model:

By all accounts, it was a typical teenage party. Herbert and Diane Meussner of Butler County, Pennsylvania, were vacationing in Virginia on July 13, 1981, when their children decided to invite a few friends over to their house. At midnight, the party started to break up. One guest, eighteen-year-old Lynn Ann Muto, decided to stay at the house with her friend, Becky Meussner, and Becky's brother Stephen. At approximately 3 a.m., a neighbor discovered the Meussner house engulfed in flames. By the time help arrived, the three teenagers had died of smoke inhalation and burns.

The administrator of Lynn Ann Muto's estate filed a complaint claiming that Lynn's death was proximately caused by the negligence of Stephen Meussner. The complaint, filed in the Court of Common Pleas of Butler County, Pennsylvania, in 1982, alleged that Stephen fell asleep with a lighted cigarette and caused the fire.[192] Following discovery, the defendants, the administrators of Stephen's estate, moved for summary judgment on the ground that the plaintiff possessed no evidence showing that Stephen was responsible for the fire and that, as a matter of law, the plaintiff could not meet the burden of proof required at trial.[193]

The plaintiff argued that, although no witness could testify that Stephen was smoking in the house or that Stephen committed any other act to cause the fire, circumstantial evidence created issues of material fact sufficient to preclude summary judgment. Specifically, the plaintiff noted that the point of the fire's origin was near a couch in the living room, couches are not a combustible source, and someone's negligence probably caused the fire. Moreover, Stephen was seen before the fire outside the house with a cigarette, and Stephen's body was found closest to the point of origin.

Under super summary judgment, the court would grant the motion. The plaintiff cannot prove with the available evidence that Stephen negligently caused the fire. As a matter of law, the court would

192. Muto v. Meussner, No. A.D. 82-757 (C.P. Butler County 1982).

193. The author, as defendants' counsel, made the motion for summary judgment. Although the argument was similar to the holding in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the motion and its resolution predated *Anderson.*

determine that there is insufficient evidence to argue that either of the three victims was individually responsible for the fire. Under the epistemic coherence model, however, the court would deny the motion. Some evidence of Stephen's negligence exists; his body was found closest to the origin of the fire. Because someone's negligent act probably caused the fire, the question of Stephen's negligence rests on the jury's finding of proof by a preponderance of the evidence.

The court denied the motion because the defendant improperly asked the court to resolve a factual issue.[194] The court correctly acknowledged the principles underlying a motion for summary judgment—the court is no more capable of determining the truth than a jury.

194. Muto v. Meussner, No. A.D. 82-757 (C.P. Butler County 1982) (order denying summary judgment). At the subsequent trial, the jury returned a verdict for the defendant.