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No More Litigation Gambles: Toward a New Summary Judgment

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NO MORE LITIGATION GAMBLES: TOWARD A NEW SUMMARY JUDGMENT

The United States Supreme Court in the 1986 cases of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[1] *Anderson v. Liberty Lobby, Inc.*,[2] and *Celotex Corp. v. Catrett*[3] enunciated standards for granting summary judgment that signal a change in traditional summary judgment doctrine.[4] By removing doctrinal barriers of its own creation,[5] the Court approved a more liberal rule effectively challenging that party with the burden of proof at trial.[6] The standards announced in *Matsushita* and *Anderson* affect the burden of proof on the party opposing a summary judgment motion. The standard announced in *Celotex* affects the burden of production on the party bringing the motion, and the subsequent burden of production and proof on the party opposing the motion. The new standards will have their greatest impact on complex cases involving state of mind, motive, and intent, but their overall effect is to create a more favorable climate for granting summary judgment in all types of cases.[7]

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment.[8] Rule 56(c) provides that summary judgment should be entered when "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."[9] The Rule is designed to eliminate trial where no genuine factual issues exist.[10] Although it is a means of effecting judicial efficiency

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[1] 106 S. Ct. 1348 (1986).

[2] 106 S. Ct. 2505 (1986).

[3] 106 S. Ct. 2548 (1986).

[4] *Matsushita* has been called a "judicial bombshell." Stoll and Goldfein, *Economic Sense in the Supreme Court*, 195 N.Y.L.J., Apr. 15, 1986, at 1, col. 1, and a case which "appear[s] to signal a new day." Laufer, *New Standards For Summary Judgment in Federal Courts*, 115 N.Y.L.J., June 17, 1986, at 1, col. 1, at 3, col. 2.

[5] See *infra* notes 42–64 and 120–23 and accompanying text for a discussion of Poller v. Columbia Broadcasting Sys., 368 U.S. 464 (1962), and Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[6] Commentators have noted that traditional summary judgment doctrine unnecessarily impedes the motion's single most important use: to challenge the party with the burden of proof. Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 722 (1984) [hereinafter *The Actual Malice Controversy*]. *See also* Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 769 (1974) [hereinafter *A Critical Analysis*] (summary judgment employed to identify factually deficient claims).

[7] One commentator has asserted that through mistaken analysis various opinions of the United States Supreme Court created a climate singling out cases involving state of mind, motive, or intent as incapable of or inappropriate for summary judgment. Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U.L. REV. 774, 786 (1983) [hereinafter Sonenshein].

[8] FED. R. CIV. P. 56.

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

[10] "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Advisory Committee's Note, Report of Proposed Amendments To Certain Rules of Civil Procedure for the United States District Courts. Submitted by the Judicial Conference of the United States*, September, 1962, 31 F.R.D. 621, 648 (1962) [hereinafter *Advisory Committee's Note*].

by eliminating unnecessary litigation,[11] the immediate effect of Rule 56 is felt by the litigants. Where the defendant is the moving party, the grant of a summary judgment motion relieves the defendant from the burden of a trial. The plaintiff, in turn, is foreclosed from presenting his or her case to a jury, because the judgment is that no genuine issues exist for a jury to try.[12] Although Rule 56(c) provides that either party to a civil suit may move for summary judgment,[13] this note will focus on those cases where the defendant is the moving party.

Although Rule 56 deliberately does not exclude particular kinds of issues from the operation of summary judgment procedures,[14] courts have hesitated to apply the Rule in cases involving state of mind, motive, and intent.[15] Issues of intent are a common element in these types of cases, and their resolution depends on the observation of the demeanor of the witnesses on the stand, who are subject to direct and cross-examination.[16] Therefore, such cases generally were considered inappropriate for summary disposition,[17] and particularly appropriate for jury resolution.[18] In sum, the courts did not want to replace trial by jury with "trial by affidavit."[19]

Responding to such concerns, the Supreme Court raised doctrinal barriers against the use of summary judgment in the context of antitrust[20] and libel,[21] areas which are in effect paradigms of the state of mind case. Commentators[22] and judges,[23] however, criticized this categorical exclusion of certain kinds of cases from the operation of Rule 56. Critics of the barriers imposed by the Supreme Court argued that these barriers hindered the Rule's purpose of eliminating needless trials.[24]

The Supreme Court implicitly overturned these barriers against the use of summary judgment in cases involving the defendant's state of mind in its 1986 term in *Anderson v. Liberty Lobby, Inc.*,[25] a libel case, and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio*

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[11] Sonenshein, *supra* note 7, at 774.

[12] *See* 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 56.06[2] (2d ed. 1986) (if the only question involved in the litigation is one of law and there is no dispute as to material issues of fact, losing party may not contend that it has been deprived of right to jury trial).

[13] FED. R. CIV. P. 56(a), (b).

[14] Arnstein v. Porter, 154 F.2d 464, 479 (2d Cir. 1946) (Clark, J., dissenting); Sonenshein, *supra* note 7, at n.49.

[15] Sonenshein, *supra* note 7, at 780.

[16] Morrison v. Nissan Co., 601 F.2d 139, 141 (4th Cir. 1979). *See also Advisory Committee's Note*, *supra* note 10, at 648 (where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate).

[17] *The Actual Malice Controversy*, *supra* note 6, at 709.

[18] Sonenshein, *supra* note 7, at 780.

[19] *Id.* at 779. *See also* Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (judicial reservations about summary judgment in part have their origins in judges' profound attachment to the jury system).

[20] *See* Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 473 (1962) (summary judgment to be used sparingly in complex antitrust actions where proof consists of motive and intent).

[21] *See* Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979) (dictum) (actual malice involves proof of state of mind and does not readily lend itself to summary disposition).

[22] Sonenshein, *supra* note 7, at 809. *See also The Actual Malice Controversy*, *supra* note 6, at 716, 720–21.

[23] *See The Actual Malice Controversy*, *supra* note 6, at 709 & n.20.

[24] Sonenshein, *supra* note 7, at 810.

[25] 106 S. Ct. 2505 (1986).

Corp.,[26] an antitrust case. In *Anderson*, the Supreme Court held that the "clear and convincing" evidence requirement must be considered by a court ruling on a motion for summary judgment in a case where the actual malice[27] standard — which involves a state of mind determination — applies.[28] More broadly, the Court held that the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury, or whether it is so "one-sided" that one party must prevail as a matter of law.[29]

In the context of a complex conspiracy case, the Supreme Court in *Matsushita* held that to survive a motion for summary judgment, a plaintiff seeking damages for violation of § 1 of the Sherman Act, which proscribes "[e]very contract, combination . . . or conspiracy, in restraint of trade . . . ,"[30] must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.[31] Proof of conspiracy necessarily requires an inquiry into motive and intent,[32] and if the factual context renders plaintiff's claim of motive implausible, then the plaintiff must present more persuasive evidence to support his or her claim than otherwise would be required.[33]

The *Anderson* and *Matsushita* decisions are important because they have introduced a heightened standard of judicial inquiry at the summary judgment stage. Courts faced with a motion for summary judgment in a state of mind case no longer can deny categorically the motion and defer consideration of the state of mind issue to a jury determination. Instead, after *Matsushita*, courts must subject the litigants' evidence of conspiracy to searching inquiry at the summary judgment stage. Where a heightened burden of proof applies, as in cases alleging actual malice defamation, *Anderson* requires that a plaintiff meet that heightened standard before being entitled to a jury trial. In practical terms, where a defendant in a case involving state of mind moves for summary judgment, a plaintiff no longer can expect a court simply to deny the motion because the case involves a determination of the defendant's state of mind. Overcoming a motion for summary judgment is now a higher hurdle for plaintiffs.

In *Anderson* and *Matsushita* the Court focused on the plaintiff's burden of proof in demonstrating that there is a genuine factual issue for trial. In a third case, *Celotex Corp. v. Catrett*,[34] the Court widened its focus to include the defendant's burden of production in supporting its motion for summary judgment. In *Celotex*, a products liability case

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[26] 106 S. Ct. 1348 (1986).

[27] In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Supreme Court held that, in a libel suit brought by a public official, the first amendment requires the plaintiff to show that in publishing the defamatory statement the defendant acted with "actual malice," defined as "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279–80. The Court further held that such actual malice must be shown with "convincing clarity." *Id.* at 285–86.

[28] *Anderson*, 106 S. Ct. at 2513.

[29] *Id.* at 2512. Under the Supreme Court's holding, the inquiry is not whether there are a minimum of facts supporting the plaintiff's case but whether a jury reasonably could find either that the plaintiff proved its case by the quality and quantity of evidence required by the governing law or that it did not. *Id.* at 2513.

[30] 15 U.S.C. § 1 (1982).

[31] *Matsushita*, 106 S. Ct. at 1357.

[32] See *infra* notes 43–46 and accompanying text for a discussion of proof of intent in antitrust cases.

[33] *Matsushita*, 106 S. Ct. at 1356. The Court held that the plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.*

[34] 106 S. Ct. 2548 (1986).

which did not involve state of mind issues, the Court held that Rule 56 neither expressly nor impliedly requires a defendant moving for summary judgment to support his or her motion with affidavits or similar materials which negate the plaintiff's claim.[35] The Court — emphasizing that summary judgment is a tool designed to isolate factually unsupported claims and to prevent them from going to trial[36] — clearly stated that courts should give due regard not only to the rights of plaintiffs who have an adequate basis for bringing their claims to a jury, but also to defendants opposing claims that have no factual basis.[37] Thus, while *Anderson* and *Matsushita* place a heavy burden of proof on a plaintiff to support its claim in order to survive summary judgment attack, *Celotex* eases the burden of production on a defendant launching that attack. It is thus easier for defendants to bring a motion for summary judgment, and more difficult for plaintiffs to resist.

Taken together, this trilogy of cases redefines Rule 56 and gives it greater potential to eliminate trial, even in cases once considered inappropriate for summary disposition: those involving state of mind, motive, or intent. The trial courts are now required to give searching inquiry to the plaintiff's evidence in order to determine if there is a genuine issue for trial. A categorical assessment that a case involves issues of state of mind, motive, or intent will no longer, standing alone, bar entry of summary judgment.

This note analyzes the development of the Supreme Court's new summary judgment doctrine. Section I will examine the evolution of the Court's caution against the use of summary judgment in cases involving state of mind, motive, or intent. The section will focus on summary judgment doctrine in the areas of antitrust and "actual malice" defamation, as examples of state of mind cases in which the Supreme Court directly cautioned against the use of summary judgment. Section II will examine how *Anderson* and *Matsushita* implicitly removed those cautionary barriers. Additionally, Section II will examine the articulation in *Celotex* of a doctrine that requires that courts, when ruling on motions for summary judgment, must respect not only a plaintiff's right to trial, but also a defendant's right to summary judgment where the plaintiff has not met the burden of proof required to demonstrate a need for trial. Section III will examine how the purpose of Rule 56 is better served by the removal of these doctrinal cautions and by the formulation of a more liberal standard. This last section will address the application of the new standards. The note will conclude that the Supreme Court has signalled a new regard for the use of summary judgment that makes the procedure both workable and desirable.

I. The Evolution of the Court's Caution Against the Use of Summary Judgment in Cases Involving State of Mind, Motive, or Intent

Cases involving state of mind, motive or intent have posed particular problems in the application of the summary judgment procedure.[38] Courts reasoned that observing the demeanor of the testifying defendants during direct and cross-examination was critical to the resolution of the issue of intent, and therefore, more properly within the province of the jury.[39] Courts, erring on the side of safety, thus were reluctant to grant

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[35] *Id.* at 2553.

[36] *Id.* at 2555.

[37] *Id.*

[38] Sonenshein, *supra* note 7, at 786.

[39] Morrison v. Nissan Co., 601 F.2d 139, 141 (4th Cir. 1979).

summary judgment where the defendant's state of mind was at issue.[40] Consequently, caution was the watchword for judges at the summary judgment stage.[41]

A. *The Supreme Court Caution Against the Use of Summary Judgment in Antitrust Cases*

In 1964, the Court in *Poller v. Columbia Broadcasting System* articulated its clearest expression of the caution against the use of summary judgment in state of mind cases within the context of an antitrust conspiracy case.[42] In the antitrust context, state of mind issues may include a party's improper motive to monopolize or an illicit intent to conspire to monopolize.[43] Some element of deliberateness must be shown.[44] The offense of conspiracy to monopolize under Section 2 includes such elements as proof of a concerted action deliberately entered into with the specific intent to achieve monopoly power.[45] A specific intent to create a monopoly need not be shown by direct evidence of subjective state of mind, but can be inferred from conduct.[46]

Poller was a private antitrust action brought against the Columbia Broadcasting System (CBS) alleging conspiracy to restrain and monopolize trade in violation of Sections 1 and 2 of the Sherman Act.[47] The plaintiff in *Poller* claimed that CBS cancelled its affiliation with his ultra high frequency (UHF) station pursuant to a conspiracy between CBS and third parties to drive the plaintiff out of business. The plaintiff alleged that the purpose of the conspiracy was to give CBS a short-term monopoly of the UHF market in the Milwaukee area and eventually to eliminate UHF competition in Milwaukee entirely.[48] The District Court for the District of Columbia granted the defendant's motion for summary judgment,[49] based on four affidavits which alleged the lack of an illicit motive required to prove a violation of the Sherman Act.[50] The Court of Appeals for the District of Columbia affirmed.[51]

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[40] Sonenshein, *supra* note 7, at 787. Sonenshein traces this view to Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401 (1899), a case involving a directed verdict, where the Court held that while a jury has no right to disregard arbitrarily defendant's uncontradicted and unimpeached evidence on the issue of lack of fraudulent intent, the evidence must nonetheless be submitted to a jury to determine the credibility of defendant's witnesses. *Id.* at 408. Therefore, the directed verdict was made in error. *Id.* Cases involving the existence of fraud were said to be peculiarly within the province of the jury, from which it was rarely safe to withdraw them. *Id.* at 410.

[41] *See Morrison*, 601 F.2d at 141.

[42] 368 U.S. 464, 473 (1962).

[43] For instance, a firm may obtain monopoly power and violate Section 2 of the Sherman Act by "deliberately pursuing a course of conduct which ha[s] the effect of expanding or maintaining power, or [by forming] a specific intent to maintain its power by such conduct." L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 30 (1977).

[44] *Id.*

[45] *Id.* at 132.

[46] *Id.* at 133.

[47] *Poller*, 368 U.S. at 465. The plaintiff sued under Section 4 of the Clayton Act, 15 U.S.C. § 15, which provides that "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws is given a private right of action." *Poller*, 368 U.S. at 475 (Harlan, J., dissenting).

[48] *Id.* at 466.

[49] Poller v. Columbia Broadcasting Sys., 174 F. Supp. 802, 805 (D.D.C. 1959).

[50] *Poller*, 368 U.S. at 468.

[51] Poller v. Columbia Broadcasting Sys., 284 F.2d 599, 606 (D.C. Cir. 1960).

The Supreme Court reversed, holding that while the evidence may not have been sufficient to warrant the finding that CBS acted with improper motive, the truth was not evident from the record and summary judgment should, therefore, have been denied.[52] In dictum, the Court expressed a restrictive view of the use of summary judgment in antitrust cases where state of mind is a critical issue:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."[53]

In *Poller*, the Court thus provided a simple, categorical standard for evaluating a summary judgment motion in an antitrust case.[54] Where issues of intent are involved, the *Poller* Court suggests that trial is preferred to summary disposition.[55] This approach is appropriate even where the evidence does not support the claim and the plaintiff is unlikely to succeed at trial.[56]

Not all of the Justices in *Poller* agreed that a restrictive use of summary procedures was required in antitrust cases.[57] In a dissenting opinion, Justice Harlan noted that the language of Rule 56 does not indicate that it should be used any more "sparingly" in antitrust litigation — or that its use in antitrust cases is subject to more stringent criteria — than in any other type of case.[58] Noting that the private antitrust remedy tempts vexatious litigation and requires an inordinate amount of time from the trial courts, Justice Harlan found "good reason for giving the summary judgment role its full legitimate sweep in this field."[59]

Justice Harlan found it important that the plaintiff in *Poller* had complete access to all potential witnesses by means of pretrial discovery, yet failed to produce any evidence that would support his claim of improper motive.[60] In Justice Harlan's opinion, if the case had proceeded to trial on such evidence, it could not have been permitted to go to the jury.[61] Justice Harlan noted that because the plaintiff presented no extrinsic evidence of an unlawful purpose, and CBS had denied any unlawful motive to eliminate plaintiff as a competitor, the jury was left with no affirmative evidence of any intent to restrain trade.[62] According to Justice Harlan, the possibility that the jury might disbelieve CBS's assertions of no unlawful motive was not enough to take the case to trial.[63] A trial should

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[52] *Poller*, 368 U.S. at 472–73.

[53] *Id.* at 473.

[54] Sonenshein, *supra* note 7, at 790.

[55] *Poller*, 368 U.S. at 473.

[56] *See id.* at 472–73.

[57] Justices Frankfurter, Whittaker, and Stewart joined Justice Harlan's dissenting opinion. *Id.* at 474.

[58] *Id.* at 478 (Harlan, J., dissenting).

[59] *Id.* (Harlan, J., dissenting).

[60] *Id.* (Harlan, J., dissenting).

[61] *Id.* at 479–80 (Harlan, J., dissenting).

[62] *Id.* at 480 (Harlan, J., dissenting).

[63] *Id.* (Harlan, J., dissenting).

not proceed, said Justice Harlan, on the mere hope that witnesses will revise their testimony upon the stand: "Courts do not exist to afford opportunities for such litigation gambles."[64]

Whereas Justice Harlan rejected the majority's reasoning as being antithetical to the proper application of Rule 56, the lower courts enthusiastically embraced the *Poller* reasoning,[65] and invoked it as a "talismanic statement" that, in antitrust cases, summary judgment was inappropriate.[66] *Poller* thus became a kind of "magic wand waved indiscriminately by those opposing summary judgment motions in antitrust actions."[67]

Despite the Court's language in *Poller* disfavoring the summary disposition of antitrust cases and the strong response of the lower courts heeding that language, summary judgment was still available to defendants. Several years after *Poller*, the Supreme Court in *First National Bank of Arizona v. Cities Service Co.* affirmed a grant of summary judgment to a Sherman Act defendant.[68] The majority opinion attempted to distinguish *Poller* on its facts, and thus limit the broad sweep of its near prohibition of summary judgment in complex antitrust cases, yet the dissent argued that the majority opinion could not possibly be reconciled with the *Poller* dictum warning against summary judgment in such cases.[69]

The majority of the Court in *Cities Service* recognized substantial similarities between the case at bar and *Poller*, in that both cases involved the motive underlying a failure to deal with a competitor.[70] The majority, however, noted that there were "crucial differences" between the two cases and in the plausibility of each plaintiff's allegations.[71] Specifically, the Court stated that in *Poller*, the competitive relationship was such that it was plausible for the plaintiff to argue that CBS had conspiratorial motives. In *Cities Service*, in contrast, it was much more plausible that the defendant's motives were nonconspiratorial.[72]

The majority opinion in *Cities Service* reflected Justice Harlan's concerns in his dissent in *Poller*.[73] The Court noted in *Cities Service* that the mere hope of developing supporting evidence at trial was not enough to entitle any antitrust plaintiff who files a complaint to proceed to trial in the absence of any significant probative evidence tending to support the complaint.[74] While an issue of fact would not have to be resolved conclusively in

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[64] *Id.* (Harlan, J., dissenting).

[65] *The Actual Malice Controversy*, *supra* note 6, at 713–14.

[66] Sonenshein, *supra* note 7, at 787.

[67] Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977).

[68] 391 U.S. 253, 299 (1968).

[69] *Id.* at 303 (Black, J., dissenting).

[70] *Id.* at 285.

[71] *Id.*

[72] *Id.* The dissent stated that where there are possible illegitimate motives, it could never accept as the appropriate standard under *Poller* whether other motives were more probable. *Id.* at 305 (Black, J., dissenting). More broadly, the dissent stated that "this case illustrates that the summary judgment technique tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury." *Id.* at 304 (Black, J., dissenting).

[73] See *supra* notes 58–64 and accompanying text for a discussion of Justice Harlan's concerns about the Court's restrictive view of summary judgment procedure as enunciated in *Poller*.

[74] *Cities Service*, 391 U.S. at 289–90. *See also* Morrison v. Nissan Co., 601 F.2d 139, 141–42 (4th Cir. 1979) (although motive and intent play leading roles in antitrust cases, Rule 56 is not to be read out of antitrust cases).

favor of the plaintiff, the right to trial on antitrust claims would be recognized only where there was sufficient evidence supporting the claimed factual dispute to require the factfinder's resolution of the differing versions of the truth at trial.[75]

While the Court in *Cities Service* nominally stood by *Poller* by confining the holding to its facts,[76] other courts more explicitly criticized the *Poller* opinion. In the 1981 case of *Weit v. Continental Illinois National Bank & Trust Company*, the Seventh Circuit Court of Appeals said that no greater caution or concern was required for antitrust litigant rights than for litigant rights in other substantive areas of litigation.[77] The *Weit* court refused to ignore the practical realities of complex antitrust litigation and held that judicial economy mandates the entry of summary judgment when, after extensive discovery, the court concludes that no reasonable jury could return a verdict for the plaintiffs.[78] A trial on such unsupported claims, said the court, serves "only as a forum for impeachment and argument by counsel."[79] The *Weit* court distinguished *Poller* from the case at bar, noting that in *Poller*, the permissible inferences from the evidence favored the plaintiff.[80] In *Weit*, however, the court stated that the circumstantial evidence supporting the complaint, when measured against the evidence supporting the defendant's denials, was so insubstantial that it precluded a verdict for the plaintiffs.[81] Thus, the *Weit* court read Rule 56 as a neutral device for eliminating needless trials, affording no greater deference to antitrust plaintiffs.

The Fifth Circuit Court of Appeals in the 1979 case of *Aladdin Oil Co. v. Texaco, Inc.*, was more explicit in its disregard of the *Poller* caution.[82] Specifically, the *Aladdin Oil* court stated that the "facile notion pressed upon us that antitrust cases are typically unsuited for summary procedures can be traced to *obiter dictum* in *Poller v. Columbia Broadcasting System, Inc.*"[83] In accord with the *Poller* dissent, the *Aladdin Oil* court noted that Rule 56 should apply equally to all actions.[84] The court stated that antitrust cases are not necessarily ill-suited for summary judgment but that any cases which raise genuine issues of motive, intent, and credibility are more appropriately suited for trial.[85] The court concluded that the best procedure in deciding a motion for summary judgment was not to rely on *obiter dictum* or quotable statements, but on the text of the Rule itself, which states that summary judgment is appropriate in any case in which there is not a genuine issue of material fact.[86]

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[75] *Cities Service*, 391 U.S. at 289.

[76] *See id.* at 284–86. *See also* Sonenshein, *supra* note 7, at 790–91.

[77] 641 F.2d 457, 464 (7th Cir. 1981).

[78] *Id.*

[79] *Id.*

[80] *Id.* at 466.

[81] *Id.*

[82] *See* 603 F.2d 1107, 1110–12 (5th Cir. 1979).

[83] *Id.* at 1110.

[84] *Id.* at 1111.

[85] *Id.*

[86] *Id.* at 1112. Other courts have also cleared the *Poller* hurdle and granted summary judgment where state of mind and issues of intent are present. One commentator points out that where there was no probative evidence on the state of mind issue, these courts have granted summary judgment as they would in a case not involving state of mind where there was no genuine factual dispute. Sonenshein, *supra* note 7, at 794. *See e.g.*, Products Liability Ins. Agency v. Crum & Forster Ins., 682 F.2d 660, 663 (7th Cir. 1982) (defendant is entitled to have complaint dismissed on summary judgment, if, after discovery, it is clear that plaintiff will not be able to establish an essential element

The *Poller* dictum was a statement of the traditional doctrine that summary judgment is inappropriate in cases involving state of mind. The *Poller* standard prefers trial, even where sufficient evidence to support the claim is lacking and the plaintiff is unlikely to succeed at trial.[87] While many courts read *Poller* as a kind of prohibition against the use of summary judgment in antitrust cases,[88] other courts — most notably the Supreme Court in *Cities Service* — confined *Poller* to its facts.[89] These courts recognized that no plaintiff, even an antitrust plaintiff, was entitled to a trial where there was no significant probative evidence tending to support the complaint.[90] The *Poller* standard for application of Rule 56 nevertheless remained the traditional doctrine. Although easy to apply because a motion for summary judgment could be denied simply by identifying the case as one involving complex issues of state of mind, the *Poller* standard violated the Rule's purpose of eliminating needless trials.[91]

B. *Conflicting Concerns in Actual Malice Defamation Cases*

The law of libel presented a curious situation for judges deciding summary judgment motions, where proof of actual malice, a state of mind issue, was an element of the plaintiff's case. The presence of a state of mind issue, usually a signal to the courts to protect the plaintiff's right to trial, also signalled the courts to protect the defendant's first amendment rights to free speech, where the state of mind issue was the presence or absence of actual malice. A judge hearing a motion for summary judgment in an actual malice libel case thus faced conflicting concerns in deciding whether the case should go to trial.

These conflicting concerns presented, on the one hand, the general judicial reluctance to grant summary judgment in state of mind cases where observation of the demeanor of the witness was deemed critical to the determination of credibility,[92] thus suggesting that plaintiffs should proceed to trial. On the other hand, the developments in the substantive law of libel — which increased the plaintiff's burden of proof — made the plaintiff's case more difficult to prove and thus more susceptible to a grant of summary judgment for the defendant. The major development in the substantive law of libel was the 1964 Supreme Court decision in *New York Times v. Sullivan*, which required proof of actual malice before a state court could award damages for libel actions brought by public officials against critics of their official conduct.[93]

To prevail in such a case, a plaintiff had to demonstrate that the defendant acted with actual malice, defined as "with knowledge that it [the allegedly defamatory state-

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of claim at trial: "a trial would be a waste of time. This is as true in an antitrust case as in any other type of case."); Curtis v. Campbell-Taggart, Inc., 687 F.2d 336, 338 (10th Cir.), *cert. denied*, 459 U.S. 1090 (1982) (summary procedures are appropriate to avoid needless trials and unnecessary expense, where "the record [in an antitrust case] clearly indicates that there are no circumstances under which plaintiff can prevail").

[87] See *supra* notes 47–56 and accompanying text for a discussion of *Poller*.

[88] See *supra* notes 65–67 and accompanying text for a discussion of lower courts' reaction to *Poller*.

[89] See *supra* notes 68–86 and accompanying text for a discussion of cases limiting the scope of *Poller*.

[90] *Id.*

[91] Sonenshein, *supra* note 7, at 790.

[92] See *supra* notes 38–41 and accompanying text for a discussion of the application of summary judgment in state of mind cases.

[93] 376 U.S. 254, 283 (1964).

ment] was false or with reckless disregard of whether it was false or not,"[94] with "convincing clarity,"[95] or by "clear and convincing proof."[96] First amendment concerns thus required the plaintiff to bear a heavier burden of proof — clear and convincing proof — than that required of most other civil plaintiffs, merely preponderance of the evidence.[97] This heightened and constitutionally required evidentiary standard,[98] therefore, imposed a heavy burden of proof on plaintiffs and made it more difficult to reach and persuade a jury.[99] The Court in *New York Times* held, however, that a lower burden of proof would lead to self-censorship,[100] and would not allow the first amendment guarantee of freedom of expression the "breathing space" it needed to survive.[101]

As a result of the Court's decision in *New York Times*, lower courts hearing actual malice defamation cases tended to grant a defendant's motion for summary judgment in spite of the state of mind issues.[102] The courts' receptiveness to defendants' motion for summary judgment was based in part on the belief that self-censorship could result not only from the defendants' fear of an adverse verdict after a full trial, but also from defendants' fear of a lengthy trial, even where the defendant would likely prevail at trial.[103] Thus, by granting summary judgment to defendants in actual malice cases, the courts responded to both the plaintiff's difficulty in meeting the heightened evidentiary standard, and to the fear of self-censorship underlying that standard.

The pull of constitutional concerns for freedom of expression proved to be greater than the resistance of courts to granting summary judgment in state of mind cases. Thus, despite the general reluctance to grant summary judgment in cases involving state of mind, a line of cases[104] developed in which courts, out of first amendment concerns of self-censorship, consistently granted summary judgment in favor of defamation defendants.[105] The practice became so widespread that one court described the grant of summary judgment in actual malice cases as the rule rather than the exception.[106] Another court described the grant in favor of defamation defendants to be "rooted as

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[94] *Id.* at 280.

[95] *Id.* at 285–86.

[96] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971).

[97] Nader v. de Toledano, 408 A.2d 31, 49 (D.C. App. 1979), *cert. denied*, 444 U.S. 1078 (1980).

[98] Note, *Public Figure Defamation: Preserving Summary Judgment To Protect Free Expression*, 49 FORDHAM L. REV. 112, 116 (1980) [hereinafter Note].

[99] *The Actual Malice Controversy*, *supra* note 6, at 707.

[100] New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[101] *Id.* at 271–72.

[102] *The Actual Malice Controversy*, *supra* note 6, at 709–11. Louis noted that "[a] survey of the results of summary judgment motions made by defendants on the issue of actual malice between 1976 and [19]80 shows that over 75% were granted." *Id.* at 710 n.23.

[103] Comment, *The Propriety of Granting Summary Judgment for Defendants in Defamation Suits Involving Actual Malice*, 26 VILL. L. REV. 470, 471–72 (1980–81) [hereinafter Comment].

[104] *See* Comment, *supra* note 103, at 482 n.86. The author collects an extensive list of cases in which summary judgment was granted to defamation defendants. *See also The Actual Malice Controversy supra*, note 6, at 710 n.23, for statistics on the grant of summary judgment to defamation defendants.

[105] *See, e.g.*, Washington Post v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967) ("In the First Amendment area, summary procedures are even more essential. . . . The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself. . . . ").

[106] Hutchinson v. Proxmire, 431 F. Supp. 1311, 1330 (W.D. Wis. 1977), *aff'd*, 579 F.2d 1027 (7th Cir. 1978), *rev'd*, 443 U.S. 111, 114 (1979).

deeply as judicial precedents can reach."[107] While the trend was clearly in favor of defamation defendants at the summary judgment stage, differing views developed as to the exact basis for the ready grant of summary judgment to defendants.[108] The liberal grant of summary judgment could be based on either special procedural protection for defamation defendants, or on the recognition that the substantive law of libel protected defamation defendants by requiring plaintiffs to meet a more difficult burden of proof than is generally required in civil cases.

One view, enunciated in 1970 by Judge Skelly Wright in *Wasserman v. Time, Inc.*, was that first amendment considerations necessitated a departure from normal summary judgment procedures in two ways.[109] First, the trial judge would evaluate all the evidence in its most reasonable light rather than in the light most favorable to the plaintiff.[110] Second, rather than determine whether a reasonable jury could find actual malice with convincing clarity, the trial judge personally would be required to find actual malice with convincing clarity if the plaintiff is to survive summary judgment attack and proceed to trial.[111] According to *Wasserman*, first amendment concerns require special judicial involvement at the summary judgment stage and allow the judge to draw reasonable inferences and weigh credibility in determining whether actual malice has been shown with "convincing clarity."[112] The *Wasserman* view thus made the defendant's motion for summary judgment more likely to succeed.

Another view expressly rejected the suggestion in *Wasserman* that the trial court itself should judge the credibility of witnesses and draw its own inferences from the evidence. Like the *Wasserman* court, the Ninth Circuit Court of Appeals in the 1974 case of *Guam Federation of Teachers, Local 1581 v. Ysrael* recognized that special scrutiny of the evidence is necessary to provide a buffer against interference with first amendment rights.[113] The *Guam* court held, however, that in spite of the special standard, the courts should examine the evidence in the same manner as in all other cases involving a motion for summary judgment.[114] Under *Guam*, the trial court deciding a summary judgment motion is not to weigh the proof and make independent findings. Rather, the trial court's function is to determine whether the plaintiff has demonstrated a genuine issue of material fact from which a jury, using the appropriate "clear and convincing" standard of proof, could find actual malice.[115] Thus, whereas the *Wasserman* view necessitated a departure from normal summary judgment procedures, the *Guam* view was that the usual procedural rules should govern summary judgment and the libel plaintiff was not

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[107] National Nutritional Foods Ass'n. v. Whelan, 492 F. Supp. 374, 379 (S.D.N.Y. 1980).

[108] See Nader v. de Toledano, 408 A.2d 31, 45–48 (D.C. App. 1979), *cert. denied*, 444 U.S. 1078 (1980), for a discussion of the conflicting views as to the proper judicial procedure for reviewing motions for summary judgment in actual malice cases.

[109] 424 F.2d 920, 922–23 (D.C. Cir.) (per curiam) (Wright, J., concurring), *cert. denied*, 398 U.S. 940 (1970). *See also Nader*, 408 A.2d at 46.

[110] *Wasserman*, 424 F.2d at 922 (Wright, J., concurring). *See also Nader*, 408 A.2d at 46.

[111] *Wasserman*, 424 F.2d at 922 (Wright, J., concurring). *See also Nader*, 408 A.2d at 46.

[112] *Wasserman*, 424 F.2d at 922. *See also Nader*, 408 A.2d at 45–46. While it has been questioned whether Wright calls for special judicial involvement at the summary judgment stage, or only at the directed verdict stage, *see* Comment, *supra* note 103, at 484 n.91, courts following *Wasserman* have applied the convincing clarity standard to the evidence at the summary judgment level. *Id.* at n.92.

[113] 492 F.2d 438, 441 (9th Cir.), *cert. denied*, 419 U.S. 872 (1974).

[114] *Id.*

[115] *Id.* at 442; *Nader*, 408 A.2d at 47.

required to prove actual malice twice: once to the judge at the summary judgment stage, and if convinced, then to the jury at trial.[116] The *Guam* view of the basis for granting summary judgment for defamation defendants was not as liberal as the *Wasserman* view, but like the *Wasserman* view, it required convincingly clear evidence of actual malice at the summary judgment stage.

New York Times and its progeny created a judicial sensitivity to first amendment considerations in actual malice defamation cases, a sensitivity which lead to the ready granting of summary judgment for defamation defendants.[117] Some courts, like that in *Wasserman*, showed sensitivity to the importance of free speech by departing from normal summary judgment procedures to formulate a summary judgment procedure directly favoring defamation defendants. Other courts, like that in *Guam*, showed judicial sensitivity to the importance of free speech, but did so by formulating a summary judgment procedure that incorporated the difficult evidentiary burden, required under *New York Times* to protect free speech, into normal summary judgment procedures.[118] Thus, the widespread grant of summary judgment to defamation defendants could be attributed either to a special procedural protection for such defendants, or to the fact that the substantive law of libel itself made it difficult for plaintiffs to demonstrate the requisite clear and convincing evidence.[119]

As the Supreme Court in *Poller* had cautioned against the use of summary judgment in antitrust cases because of state of mind issues, almost twenty years later the Court expressed a similar caution against the use of summary judgment in actual malice defamation cases because of the presence of state of mind issues. In the 1979 case of *Hutchinson v. Proxmire*, the Supreme Court cast doubt on the ready availability of summary judgment in actual malice defamation cases as it voiced its disapproval of the widespread grant of summary judgment in such cases.[120] In what is commonly referred to as footnote nine, the Court, responding to lower court assertions that summary judgment was the rule rather than the exception in actual malice defamation cases,[121] expressed doubt about the so-called "rule" and reiterated the familiar doctrine that because proof of "actual malice" calls a defendant's state of mind into question, it does not readily lend itself to summary disposition.[122] The Court stated, however, that because the case at bar did not present an actual malice issue, the propriety of dealing with state

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[116] *Nader*, 408 A.2d at 47.

[117] See *supra* notes 102–08 and accompanying text for a discussion of the courts' reasons for granting summary judgment in actual malice cases.

[118] *See* Note, *supra* note 98, at 125 (the statement that the importance of free speech makes summary judgment the rule fails to make explicit the reasoning that the importance of free speech dictates the high standard required to prove liability, and the high standard, in turn, makes summary judgment the rule).

[119] *See* Note, *supra* note 98, at 124–25 ("[i]n granting summary judgment courts often appear to rely on the first amendment considerations underlying [*New York Times*]. More accurately, however, the decisions are based on the lack of evidence of the requisite degree and recognition that unnecessary trials hinder free expression.").

[120] 443 U.S. 111, 120 n.9 (1979).

[121] See *supra* note 106 and accompanying text for a lower court description of the so-called rule.

[122] 443 U.S. at 120 n.9. The Court reversed a grant of summary judgment for defendant on the ground that the plaintiff was not a public figure and thus did not have to show actual malice. *Id.* at 136.

of mind issues in a summary procedure was not before it. The Court declined to pursue the issue of proof further.[123]

While the *Hutchinson* Court, in dictum, questioned the propriety of granting summary judgment in an actual malice case, it provided no guidance to the lower courts as to exactly what was improper.[124] The possibilities as to what practice was being disapproved included the *Wasserman* view that the trial judge personally weigh the evidence in actual malice cases, the *Guam* use of the "convincing clarity" standard at the summary judgment stage, or the use of summary judgment at all in state of mind cases.[125] Reaction to the *Hutchinson* dictum was varied. To some courts, footnote nine presented a bar to the use of summary judgment.[126] In the 1979 case of *Church of Scientology of California v. Siegelman*, for instance, the Southern District Court of New York felt "constrained, in view of the [*Hutchinson*] footnote, to deny the motion"[127] even though the plaintiff's evidence was "far from convincing."[128] In the 1979 case of *Hart v. Playboy Enterprises, Inc.*, the District Court of Kansas said that proof of actual malice could not be prejudged at the summary judgment stage.[129]

For many of the courts interpreting *Hutchinson*, however, summary judgment in actual malice cases, while not the rule, was not the exception.[130] In general, courts adopted what they considered a neutral rule in attempting to heed both the *Hutchinson* caution and the *New York Times* actual malice standard.[131] Under the neutral approach, courts continued to grant summary judgment in favor of defamation defendants, not because of a special procedural concern for first amendment rights, but because they continued to require the plaintiff to meet the "clear and convincing" evidence standard at the summary judgment stage.

In the 1980 case of *Yiamouyiannis v. Consumer's Union*, an actual malice case, the Second Circuit Court of Appeals understood *Hutchinson* as calling for a neutral approach, under which neither the grant nor the denial of a motion for summary judgment was preferred.[132] The *Yiamouyiannis* court stated that defamation actions, for procedural purposes, would be treated no differently from other actions, and that any "chilling effect" on first amendment rights caused by fear of defending a lawsuit would be

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[123] *Id.* at 120 n.9.

[124] Comment, *supra* note 103, at 489.

[125] *See id.* at 489 n.124.

[126] *Id.*

[127] 475 F. Supp. 950, 956 n.16 (S.D.N.Y. 1979).

[128] *Id.* at 955.

[129] 5 MEDIA L. REP. (BNA) 1811, 1814 (D. Kan. 1979).

[130] *See The Actual Malice Controversy*, *supra* note 6, at 712. One study showed that post-*Hutchinson* courts granted summary judgment on the issue of actual malice almost as often as did pre-*Hutchinson* courts. Louis noted survey evidence that, after *Hutchinson*, approximately 75% of all motions for summary judgment were granted to defamation defendants in actual malice cases. *Id.* at 711 n.29. *See id.* at 710 n.23 for pre-*Hutchinson* statistics.

[131] Schultz v. Newsweek, Inc., 668 F.2d 911, 917 (6th Cir. 1982); Yiamouyiannis v. Consumers Union of the United States, Inc., 619 F.2d 932, 940 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980); Nader v. deToledano, 408 A.2d 31, 50 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); Lawrence v. Moss, 639 F.2d 634, 638–39 (10th Cir. 1981); Brophy v. Philadelphia Newspapers Inc., 281 Pa. Super. Ct. 588, 599–601, 422 A.2d 625, 631–32 (1980); National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp., 379 Mass. 220, 231, 396 N.E.2d 996, 1003 (1979), *cert. denied*, 446 U.S. 935 (1980). *See also* Comment, *supra* note 103, at 495–96.

[132] 619 F.2d 932, 940 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980).

disregarded in deciding whether to proceed to trial.[133] However, the plaintiff in *Yiamouyiannis*, still required to prove actual malice with convincing clarity, was unable to defeat the defendant's motion for summary judgment in spite of the neutral rule.[134] The *Yiamouyiannis* court affirmed the grant of summary judgment and held that "no reasonable jury could find with convincing clarity" that the defendant acted with actual malice.[135] Thus, even under a neutral standard neither favoring nor disfavoring summary judgment in actual malice cases, and disregarding the "chilling effects" of defending a lawsuit, the court in *Yiamouyiannis* required "clear and convincing" proof at the summary judgment level.[136]

Similarly, in the 1979 case of *Nader v. de Toledano*, the District of Columbia Court of Appeals, in formulating a neutral standard for consideration of summary judgment motions in actual malice cases, held that the same principles applicable to normal summary judgment motions are applicable to such motions when made in a public figure libel action.[137] The *Nader* court rejected the *Wasserman* view — which granted special procedural protections to defamation defendants — as "impermissibly denigrat[ing] the traditional roles of judge and jury."[138] The *Nader* court rejected the *Wasserman* view that it is the judge at the summary judgment stage who must be convinced of actual malice with "convincing clarity," and agreed with the *Guam* view that the plaintiff need only present evidence which shows a genuine issue of material fact from which a reasonable jury could find actual malice with convincing clarity.[139] Thus, the neutral approach as articulated in *Nader* did not allow the judge personally to weigh the evidence in order to afford special procedural protection to libel defendants, but neither did it eliminate "convincing clarity" as a consideration at the summary judgment stage.[140]

The Supreme Court's assertion in *Hutchinson* that summary judgment is inappropriate in actual malice cases because of state of mind issues did not prevent the courts from continuing to grant summary judgment in actual malice cases.[141] Post-*Hutchinson* decisions discredited the *Wasserman* view that first amendment considerations necessitated a departure from normal summary judgment procedures.[142] Yet, many courts found that summary judgment was still appropriate in actual malice cases. These courts adopted a neutral approach, neither favoring nor disfavoring the grant of summary judgment for the defendant.[143] Under the neutral approach, the trial judge would view the record in the light most favorable to the plaintiff and determine whether a reasonable jury could have found actual malice with convincing clarity.[144] Thus, even under a neutral

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[133] *Id.*

[134] *Id.*

[135] *Id.* at 940, 942.

[136] *Id.* at 940.

[137] 408 A.2d 31, 50 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980).

[138] *Id.* at 49.

[139] *Id.*

[140] *Id. See also* Rebozo v. Washington Post Co., 637 F.2d 375, 381 (5th Cir.), *cert. denied*, 454 U.S. 964 (1981). Other courts expressly have not included the "convincing clarity" standard in the summary judgment standard. *See e.g.*, Vandenburg v. Newsweek, Inc., 441 F.2d 378, 379–80 (5th Cir.), *cert. denied*, 404 U.S. 864 (1971); Arber v. Stahlin, 382 Mich. 300, 308–09, 170 N.W.2d 45, 49 (1969), *cert. denied*, 397 U.S. 924 (1970).

[141] See *supra* notes 130–40 for a discussion of development of the neutral rule.

[142] *See, e.g., Nader*, 408 A.2d at 49.

[143] *See supra* notes 131–40 and accompanying text.

[144] *Nader*, 408 A.2d at 49.

approach the courts needed to consider the heightened evidentiary burden the plaintiff would bear at trial.

Thus, in two lines of cases, the Supreme Court had cautioned against the use of summary judgment. The Court believed that both antitrust and actual malice defamation cases were inappropriate for summary disposition and more appropriate for trial because of the presence of state of mind issues. In *Poller v. Columbia Broadcasting System*, the Court cautioned against the use of summary judgment in antitrust litigation.[145] This caution led many lower courts to treat antitrust defendants categorically for summary judgment purposes by uniformly denying summary judgment because of the complexity and nature of proof required to prove conspiracy.[146] In *Hutchinson v. Proxmire*, the Court cautioned against granting summary judgment in actual malice cases.[147] The caution was the Court's response to a lower court's assertion that granting summary judgment for actual malice defamation defendants was the rule. The categorical treatment in favor of actual malice defamation defendants prior to *Hutchinson* arose out of first amendment concerns about the chilling effects on free speech of both a trial and the heightened burden of proof.[148] Courts and commentators criticized the view embodied in *Poller* and *Hutchinson* that summary judgment was inappropriate in cases involving state of mind, motive, or intent.[149] They argued that the Court's restrictive reading of Rule 56 impeded its purpose of eliminating needless trials and urged that the Rule should be applied to every kind of case without favor or disfavor.[150] Yet in spite of the dissatisfaction with the doctrine of *Hutchinson* and *Poller*, the views expressed in dicta in those opinions remained the traditional summary judgment doctrine.

II. Toward a New Summary Judgment Doctrine: *Matsushita v. Zenith*, *Anderson v. Liberty Lobby* and *Celotex Corp. v. Catrett*

During the 1986 Term, the Supreme Court reexamined the standards for granting summary judgment. Specifically, in the areas of antitrust and libel, the Court examined the burden of proof a plaintiff opposing a motion for summary judgment must meet in order to demonstrate a genuine factual issue for trial. More generally, the Court outlined the burden of production on both the defendant bringing a motion for summary judgment, and on the plaintiff opposing the motion.

In *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, the Court, without citing *Poller*, rejected the notion that some doubt as to the material facts could defeat a Rule 56 motion in an antitrust case.[151] In *Anderson v. Liberty Lobby*, the Court rejected reliance on either *Poller* or *Hutchinson* to preclude summary judgment where actual malice, a state of mind issue, was present.[152] In *Anderson* and *Matsushita*, the Court not only found

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[145] 368 U.S. at 473.

[146] See *supra* notes 65–67 and accompanying text for a discussion of lower court reaction to *Poller*.

[147] 443 U.S. at 120 n.9.

[148] See *supra* notes 104–16 and accompanying text for a discussion of the liberal grant of summary judgment in actual malice cases because of first amendment concerns.

[149] *See, e.g.*, Sonenshein, *supra* note 7, at 780, 809–10; *The Actual Malice Controversy*, *supra* note 6, at 716, 721; *A Critical Analysis*, *supra* note 6, at 765–66.

[150] *See, e.g.*, Sonenshein, *supra* note 7, at 809–10; *The Actual Malice Controversy*, *supra* note 6, at 720–22; *A Critical Analysis*, *supra* note 6, at 767, 769.

[151] Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356 (1986).

[152] *Anderson*, 106 S. Ct. at 2514 & n.7.

summary judgment appropriate notwithstanding the presence of state of mind issues, but set an exacting burden of proof for demonstrating a genuine issue that the plaintiff must meet in order to proceed to trial.

The third case, *Celotex Corp. v. Catrett*,[153] did not raise state of mind issues but it is an important case in the Court's development of a summary judgment doctrine. *Colotex* effectively challenges the party with the burden of proof at trial to demonstrate a genuine need for trial. The Court held that where the plaintiff has failed to make a sufficient showing on an element essential to her case, and on which she has the burden of proof at trial, the defendant is entitled to judgment as a matter of law.[154] These three cases are now considered in more depth.

A. *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*

In *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, the Court considered the standard district courts must apply when ruling on a motion for summary judgment in an antitrust conspiracy case.[155] The Court reversed the Third Circuit Court of Appeal's denial of summary judgment, holding 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."[156] The Court further held that unless respondents show "that the inference of conspiracy is reasonable in light of the competing inferences of independent [lawful] action,"[157] summary judgment should be granted.[158]

Matsushita was a complex case.[159] The plaintiffs/respondents were Zenith Radio Corporation (Zenith) and National Union Electric Corporation (NUE), American firms that manufacture and sell television sets.[160] The defendants/petitioners were Japanese manufacturers of consumer electronic products (CEP's) and American firms, controlled by Japanese parents, that sell Japanese manufactured products in Japan and the United States.[161] The alleged conspiracy began as early as 1953,[162] was in full operation by the late 1960's,[163] and involved twenty-four corporate defendants.[164]

The alleged conspiracy to drive American firms from the American CEP market involved a scheme to fix and maintain artificially high prices for television receivers sold by defendants in Japan and to fix and maintain low prices for television receivers exported to and sold in the United States.[165] The low prices allegedly produced substantial losses for Zenith and NUE.[166] The plaintiffs claimed the scheme violated Sections 1

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[153] 106 S. Ct. 2548 (1986).

[154] *Id.* at 2552–53.

[155] 106 S. Ct. 1348 (1986).

[156] *Id.* at 1362, 1356.

[157] *Id.* at 1357.

[158] *Id.*

[159] *See* Laufer, *supra* note 4, at p.1, col. 1–p.3, col. 1. Stating the facts of *Matsushita* is a "daunting task." *Matsushita*, 106 S. Ct. at 1351.

[160] *Matsushita*, 106 S. Ct. at 1351. NUE withdrew from the market in 1970, after sustaining substantial losses. *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.* at 1352 n.4.

[165] *Id.* at 1351 (citing *In Re* Japanese Electronic Products, 723 F.2d 238, 251 (3d Cir. 1983)).

[166] *Id.*

and 2 of the Sherman Act.[167] Suit was filed in 1974,[168] and after years of detailed discovery[169] the United States District Court for the Eastern District of Pennsylvania delivered a 217-page opinion granting summary judgment to defendants, finding that the admissible evidence did not raise a genuine issue of material fact as to the alleged conspiracy.[170]

In granting the defendants' motion for summary judgment, the district court found that any inference of conspiracy was unreasonable because some of the evidence suggested that the defendants' conspiracy did not injure the plaintiffs, and the most direct evidence on the alleged price-cutting conspiracy did not rebut the more plausible inference of nonconspiratorial, competitive pricing behavior.[171] The Court of Appeals for the Third Circuit reversed,[172] finding that a reasonable fact finder could find a conspiracy based on both direct and circumstantial evidence.[173]

The Supreme Court reversed, holding that the court of appeals applied the wrong standard for determining a genuine issue of fact in an antitrust case.[174] The Court stated that the mere inference of wrongdoing is not enough,[175] and that to survive a motion for summary judgment or prevail on a motion for a directed verdict in an antitrust case, a plaintiff must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.[176] Under this standard, the inference of conspiracy must be reasonable in light of the competing inferences of independent action or nonharmful collusive action.[177] According to the Court, a judge ruling on a motion for summary judgment in an antitrust case must examine the plausibility of the plaintiff's claim and, if the claim is one that simply makes no economic sense, the plaintiff must present more persuasive evidence than otherwise would be necessary.[178]

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[167] *Id.* at 1351–52. Section 1 of the Sherman Act declares illegal every contract, combination, or conspiracy in restraint of trade. 15 U.S.C. § 1 (1982). Section 2 of the Sherman Act proscribes monopolies, attempts to monopolize, and conspiracies to monopolize. 15 U.S.C. § 2 (1982).

[168] *Matsushita*, 106 S. Ct. at 1351.

[169] *Id.* at 1352.

[170] *Id.*

[171] *Id.* at 1352.

[172] *In Re* Japanese Electronic Products, 723 F.2d 238, 251 (3d Cir. 1983), *rev'd sub nom.*, Matsushita Elec. Indus. Co. v. Zenith Radio, 106 S. Ct. 1348 (1986). The plaintiffs, National Union Electric Corporation (NUE) and Zenith Radio Corporation (Zenith) originally filed separate complaints which were eventually consolidated under a new name. *Id.* at 250. The NUE complaint was filed in the District of New Jersey in December 1970. *Id.* The Zenith complaint, filed in the Eastern District of Pennsylvania in September 1974, named the same defendants as did the NUE complaint, with a few additions. *Id.* On January 10, 1975, the Judicial Panel on Multidistrict Litigation transferred the NUE case to the Eastern District of Pennsylvania, for coordinated or consolidated pretrial proceedings with the Zenith case. *Id.*

[173] *Japanese Electronic Products*, 723 F.2d at 304–05.

[174] *Matsushita*, 106 S. Ct. at 1354.

[175] *Id.* at 1362.

[176] *Id.* at 1357 (citing Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984)).

[177] *Id.*

[178] *Id.* at 1356. The Court said that such implausibility was the case in *Cities Service*. In that case, said the Court, the defendant's refusal to deal might have, in isolation, sufficed to create a triable issue, but that the refusal to deal had to be evaluated in its factual context. *Matsushita*, 106 S. Ct. at 1356. That factual context included defendant's independent interest and economic factors strongly suggesting that the defendant had no motive to join the alleged conspiracy. *Id.* Evaluated in that context, the refusal to deal could not by itself support a finding of antitrust liability. *Id.*

The Court acknowledged the traditional summary judgment notion that inferences drawn from the evidence must be viewed in the light most favorable to the nonmoving party.[179] The Court added, however, that antitrust law itself limits the permissible inferences a court can draw from ambiguous evidence,[180] thus limiting the "favorable" treatment a court could give a plaintiff in an antitrust case. In *Matsushita*, the Court reiterated its earlier holding in the 1984 case of *Monsanto Co. v. Spray-Rite Service Corp.*, a case alleging a vertical price-fixing conspiracy.[181] In *Monsanto*, the Court held that conduct which is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.[182] Instead, the plaintiff must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.[183] Thus, in an antitrust case a plaintiff must show a plausible, rational motive to conspire and must introduce evidence which not only supports the inference of conspiracy but which tends to exclude the possibility of nonconspiratorial behavior.

Applying these standards, the *Matsushita* Court found that because predatory pricing was "economically senseless,"[184] there was no rational motive to conspire. The Court reasoned that such a lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence.[185] The Court concluded that in the absence of any rational motive to conspire, the evidence relied on by the Third Circuit — defendants' pricing practices, their conduct in the Japanese market, and their agreements respecting price and distribution in the American market — was insufficient to create a genuine issue for trial.[186]

Thus, the Court found that summary judgment was not only appropriate in a complex antitrust case where motive and intent played leading roles, but also was mandated unless plaintiff could show a plausible economic motive to conspire, coupled with persuasive evidence of conspiracy tending to exclude the possibility of permissible competitive behavior.[187] Failing to refer to its decision in *Poller*, and in contrast to that Court's admonition that "summary procedures should be used sparingly in complex antitrust litigation,"[188] the *Matsushita* Court demanded that the plaintiff "do more than

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[179] *Id.* at 1356–57.

[180] *Id.* at 1357.

[181] 465 U.S. 752, 755 (1984).

[182] *Id.* at 764.

[183] *Id.*

[184] *Matsushita*, 106 S. Ct. at 1362. The Court said:

> Here, the conduct in question consists largely of (i) pricing at levels that succeeded in taking business away from respondents, and (ii) arrangements that may have limited petitioners' ability to compete with each other (and thus kept prices from going even lower). This conduct suggests either that petitioners behaved competitively, or that petitioners conspired to *raise* prices. Neither possibility is consistent with an agreement among 21 companies to price below market levels. Moreover, the predatory pricing scheme that this conduct is said to prove is one that makes no practical sense: it calls for petitioners to destroy companies larger and better established than themselves, a goal that remains far distant more than two decades after the conspiracy's birth.

Id. at 1361.

[185] *Id.*

[186] *Id.* at 1362.

[187] *Id.*

[188] Poller v. Columbia Broadcasting Systems, 368 U.S. 464, 473 (1962).

simply show that there is some metaphysical doubt as to the material facts."[189] Rather, stated the Court, there must be "specific facts showing that there is a *genuine issue for trial.*"[190] The *Matsushita* Court thus held that ambiguous evidence of conspiracy will not suffice to defeat a motion for summary judgment.[191]

The Court maintained that a rule limiting the inferences which may be drawn from ambiguous evidence of conspiracy would not be harmful to competitive conduct.[192] The Court concluded instead that a rule allowing fact finders to infer conspiracy despite the implausibility of the evidence would pose a danger to competitive conduct because the effect of such inferences often is to deter pro-competitive conduct.[193] As an example, the Court noted that price cutting in order to increase business is the very essence of competition, and a mistaken inference of conspiracy would chill the very conduct the antitrust laws were designed to protect.[194] After *Matsushita*, the Court thus demands that courts ruling on a summary judgment motion in a case alleging conspiracy examine more searchingly the plausibility of inferences and the complexities of economic behavior.[195]

Justice White wrote a dissenting opinion in which he faulted the majority opinion on much the same grounds as did the dissenting opinions in *Anderson*. According to Justice White, the Court's confusing and inconsistent statements regarding the standards for granting summary judgment invade the fact finder's province.[196] In particular, Justice White stated that the majority's language regarding plausibility suggested that a judge hearing a defendant's motion for summary judgment should exceed the traditional bounds of summary judgment inquiry and weigh the evidence personally.[197] The requirement that a judge, hearing a motion for summary judgment in an antitrust case, must determine if the evidence makes the inference of conspiracy more probable than not, said Justice White, overturned settled law.[198] Justice White did not, however, rely on or even cite to *Poller* as a justification for denying summary judgment.[199]

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[189] *Matsushita*, 106 S. Ct. at 1356.

[190] *Id.* (emphasis in original).

[191] *Id.* at 1362.

[192] *Id.* at 1360.

[193] *Id.*

[194] *Id.*

[195] *See id.* at 1356 (purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial).

[196] *Id.* at 1362–63 (White, J., dissenting). Justice White criticized the majority for preferring its own economic theorizing to that of the plaintiff's expert, *id.* at 1365 (White, J., dissenting), and for making assumptions, such as that defendants favored profit maximization over growth, which should be argued to the fact finder and not decided by the court. *Id.* (White, J., dissenting).

[197] *Id.* at 1363 (White, J., dissenting). Such a proposition, said Justice White, was not supported by either *Cities Service* or *Monsanto*, cases which he believed "held that a particular piece of evidence standing alone was insufficiently probative to justify sending the case to the jury." *Id.* (White, J., dissenting).

[198] *Id.* at 1363–64 (White, J., dissenting).

[199] The failure of either the majority or the dissent to mention *Poller* has been described as "a silence which speaks volumes about the Court's intentions." Apex Oil Co. v. Di Mauro, 641 F. Supp. 1246, 1256 (S.D.N.Y. 1986). In *Apex*, a case alleging violations of Sections 1 and 2 of the Sherman Act, *id.* at 1253, the plaintiff relied heavily on the *Poller* caution for the proposition that the Court could not have meant what it said in *Matsushita*, and that summary judgment must thus be used sparingly in antitrust cases. *Id.* at 1256.

In light of the *Matsushita* decision, the District Court for the Southern District of New York in the 1986 case of *Apex Oil Co. v. Di Mauro* considered the propriety of granting summary judgment in the antitrust context and concluded that summary judgment *is* available in large antitrust conspiracy cases.[200] The plaintiffs in *Apex*, a case involving the commodities market, alleged violations of Sections 1 and 2 of the Sherman Act.[201] The *Apex* court found that the nature of a conspiracy case demands that, on a motion for summary judgment, the trial court give searching scrutiny to the inferences available from ambiguous evidence.[202] The *Apex* court attributed the marked change evidenced in *Matsushita* to the onslaught of massive antitrust litigation during the twenty-five years since *Poller* was decided, an onslaught which the court asserted places great stress on judicial resources.[203] The *Apex* court found, in both *Anderson* and *Celotex Corp. v. Catrett*, further encouragement for district courts to utilize the summary judgment procedure.[204] The *Apex* decision thus interprets the three Supreme Court decisions as changing the status of Rule 56 to a more favored procedure for piercing the pleadings and eliminating needless trials from an overburdened judicial system.[205]

B. *Anderson v. Liberty Lobby*

In the 1986 case of *Anderson v. Liberty Lobby*, the Supreme Court squarely addressed the question of the burden of proof a plaintiff must meet at the summary judgment stage on the issue of actual malice under *New York Times*.[206] The case traced its roots to October 1981, when the magazine *The Investigator* ran two articles edited by defendant Anderson.[207] The articles portrayed the plaintiffs Willis Carto and Liberty Lobby as neo-Nazi, fascist, anti-Semitic, and racist.[208]

Carto and Liberty Lobby sued the editor Anderson, the author of the articles, and Investigator Publishing Company for libel in the United States District Court for the District of Columbia.[209] The defendants moved for summary judgment, claiming that Liberty Lobby and Carto were "limited-purpose public figures," and therefore, had to

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[200] *Id.*

[201] *Id.* at 1253.

[202] *Id.* at 1255–57. The court in *Apex* granted summary judgment to defendants on all claims. *Id.* at 1286.

[203] *Id.* at 1256.

[204] *Id.* at 1257.

[205] *See id.* at 1256–57.

[206] Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2508 (1986).

[207] Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201, 205 (D.D.C. 1983). The articles were entitled "The Private World of Willis Carto" and "Yockey: Profile of an American Hitler." *Id.* One article detailed the history of the plaintiff Liberty Lobby and its chief lobbyist, Carto. *Id.* Liberty Lobby is a not-for-profit corporation, self-described as "the first citizens' lobby in the United States," whose avowed purpose is to advocate and promote "patriotism, nationalism, lawfulness, protection of the national interests of the United States and the economic interests of its citizens, and strict adherence to the United States constitution and the form of government it establishes." *Id.* A second article concerned the late author and lawyer, Yockey, who had inspired an underground fascist movement. *Pretrial Evidence Standard To Be Tested*, 9 NEWS MEDIA & L. 5 (1985). An introductory article, signed by "The Editors" was entitled "America's Neo-Nazi Underground: Did *Mein Kampf* Spawn Yockey's *Imperium*, a Book Revived by Carto's Liberty Lobby?" *Anderson*, 562 F. Supp. at 205.

[208] *Anderson*, 562 F. Supp. at 205.

[209] *Id.*

prove actual malice by "clear and convincing proof" in order to prevail at trial.[210] The trial judge ruled that the plaintiffs were "limited-purpose public figures" based on their avowed purpose to advocate and promote patriotism and nationalism, their active involvement in publishing a newspaper, and in broadcasting both radio commentary and a television news show.[211] The trial judge found, however, that because the author had "thoroughly investigated and researched the articles," the plaintiff was unable to prove the existence of actual malice.[212] This finding justified the granting of summary judgment for the defendants.[213] In so ruling, the trial judge cited Judge Wright's concurring opinion in *Wasserman* for the proposition that actual malice is a constitutional issue to be decided in the first instance by the trial judge.[214] This was the test that had been rejected by courts which adopted the neutral rule in response to the *Hutchinson* dictum.[215]

Carto and Liberty Lobby appealed to the Court of Appeals for the District of Columbia Circuit.[216] The appellate court considered whether the requirement of "convincing clarity" applied at the summary judgment stage, or whether a lesser burden of proof was sufficient.[217] The Supreme Court did not address this issue in *Hutchinson*.[218] While some courts believed that after *Hutchinson* the requirement of "convincing clarity" did not apply at the summary judgment stage,[219] courts which adopted the neutral rule of *Nader* assumed that the "clear and convincing" standard applied at every stage of litigation at which liability for actual malice libel could be determined.[220]

Despite this assumption in *Nader*, the court of appeals held that the "convincing clarity" standard did not have to be met at the summary judgment stage in order to defeat the defendant's motion.[221] The appellate court reasoned that imposing the increased burden of proof at the summary judgment stage would change the threshold inquiry from a search for minimum facts supporting the plaintiff's case to an evaluation of the weight of those facts.[222] The appellate court concluded that this would force the plaintiff to present his entire case prematurely in pretrial affidavits and depositions.[223]

In further support of its position, the appellate court stated that there would be "slim basis" for the Supreme Court's statement in *Hutchinson* that actual malice does not lend itself readily to summary judgment if, in order to survive a motion for summary judgment, the plaintiff must establish an arguably "clear and convincing" case.[224] The court apparently thought that if the "clear and convincing" standard applied at the summary judgment stage, actual malice would lend itself readily to summary judgment.

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[210] *Id.* at 207. In addition, defendants claimed that Carto and Liberty Lobby were "libel-proof" because their reputations already were besmirched by other articles written about them. *Id.* at 209 n.12.

[211] *Id.* at 208.

[212] *Id.* at 209.

[213] *Id.*

[214] *Id.* See *supra* notes 109–12 and accompanying text for a discussion of the *Wasserman* standard.

[215] See *supra* notes 137–40 and accompanying text for a discussion of the neutral rule.

[216] Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984).

[217] *Id.* at 1566.

[218] See *supra* notes 120–23 for a discussion of *Hutchinson*.

[219] *See*, Note, *supra* note 98, at 126 n.71.

[220] *See* Comment, *supra* note 103, at 496–97.

[221] *Anderson*, 746 F.2d at 1570.

[222] *Id.*

[223] *Id.*

[224] *Id.*

For at this premature stage, said the court, a plaintiff would not be able to marshall the evidence required to meet the heightened evidentiary burden.[225]

The court of appeals acknowledged yet rejected the rule set forth in *Yiamouyiannis* and *Nader* under which the trial judge must view the record in the light most favorable to the plaintiff and determine whether a reasonable jury could have found actual malice with convincing clarity.[226] Those courts, said the court of appeals, were addressing the question of whether the normal summary judgment standard applied, as opposed to some test more favorable to the defendant.[227] They were not addressing, however, the question of to what burden of proof the standard should be applied.[228] Moreover, the court of appeals found that those decisions rested upon lack of evidence of malice, not upon lack of "convincing clarity" in that evidence.[229]

The appellate court, having rejected the evidentiary requirement of "convincing clarity" at the summary judgment stage, also rejected the requirement of "independent judicial determination" of the ultimate issue of actual malice at the summary judgment stage.[230] The appellate court found that "independent judicial determination" was incompatible with the preliminary nature of the summary judgment inquiry.[231] The court traced the requirement of "independent judicial determination" to *Bose Corp. v. Consumers Union*, a case not cited by the trial judge which ruled on the motion for summary judgment.[232] In *Bose*, the Supreme Court held that in cases raising first amendment issues, an appellate court must decide independently whether the evidence in the record is sufficient to find that actual malice has been shown with "convincing clarity."[233] *Bose* thus required "independent judicial determination" not at the summary judgment stage, but at the appellate level after a bench trial on the issue of liability in an actual malice case.[234] Nonetheless, the appellate court in *Anderson* concluded that the *Bose* requirement of an independent judicial determination of actual malice was unwarranted at the summary judgment stage because it would require the plaintiff to present his or her full case prematurely.[235]

The *Anderson* court of appeals held that to overcome a motion for summary judgment a plaintiff only has to offer a "minimum amount of evidence that could persuade a reasonable person."[236] The court of appeals held that courts should apply the "clear and convincing" burden of proof and exercise "independent judicial determination" of

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[225] *Id.* The court analogized the application of the "clear and convincing" evidence standard in actual malice cases to the "beyond a reasonable doubt" constitutional standard in criminal cases, noting that "probable cause" is sufficient to take the case to trial and that the heightened evidentiary standard only applies after the government has had an opportunity to present its full case. *Id.* at 1570–71.

[226] *Id.* at 1571. See *supra* notes 132–40 and accompanying text for a discussion of *Yiamouyiannis* and *Nader*.

[227] The court characterized the normal test as a test of "could a reasonable jury find." *Anderson*, 746 F.2d at 1571.

[228] *Id.*

[229] *Id.*

[230] *Anderson*, 746 F.2d at 1571.

[231] *Id.* at 1571.

[232] *Id.*

[233] Bose Corp. v. Consumer's Union, 466 U.S. 485, 514 (1984).

[234] *Id.*

[235] *Anderson*, 746 F.2d at 1571.

[236] *Id.*

the ultimate issue of actual malice only after the plaintiff has had an opportunity to present all of the evidence.[237] The court expressly agreed with the two-stage approach set forth by Judge Wright in *Wasserman*.[238] Thus, the appellate court apparently interpreted *Wasserman* to require judicial determination of whether actual malice has been shown with "convincing clarity" only after the plaintiff has presented its full case at trial and the judge is ruling on a motion for a directed verdict.[239] The court of appeals then held that with respect to at least nine of the thirty allegedly defamatory statements, summary judgment had been improperly granted because "a jury could reasonably conclude that the . . . allegations were defamatory, false, and made with actual malice."[240]

On appeal, the Supreme Court held that the court of appeals did not apply the correct standard in reviewing the district court's grant of summary judgment.[241] The Court held that a court ruling on a motion for summary judgment in an actual malice case must be guided by the "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice exists.[242] The Court thus incorporated the evidentiary standard applicable at trial into the summary judgment determination.

The Court began its analysis of *Anderson* by stating that by its very terms Rule 56(c)[243] provides that the mere existence of "some" alleged factual dispute between the parties is not enough to defeat a motion for summary judgment; instead, there must be a genuine issue of material fact.[244] Then, addressing the requirement of materiality, the Court stated that the substantive law will identify which facts are material.[245] Materiality, said the Court, is only a criterion for categorizing factual disputes, not a criterion for evaluating the evidentiary standards which apply to those disputes.[246] The materiality question is thus separate from the question of the evidentiary standard's incorporation into the summary judgment determination.[247]

The Court noted that it is the question of whether an issue is "genuine" which incorporates the evidentiary standard into the summary judgment determination.[248] The Court defined a dispute as "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[249] The Court said that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which requires the trial judge to "direct a verdict if, under the governing law, there can

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[237] *Id.*

[238] *Id.* The Court quoted the following language from Judge Wright's concurring opinion:

> Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant . . . . If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with "convincing clarity."

Id. (quoting *Wasserman*, 424 F.2d at 922).

[239] *See* Comment, *supra* note 103, at n.91.

[240] *Anderson*, 746 F.2d at 1577.

[241] *Anderson*, 106 S. Ct. at 2508.

[242] *Id.* at 2515.

[243] See text accompanying note 9 for the text of Rule 56(c).

[244] *Anderson*, 106 S. Ct. at 2510.

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *See id.*

[249] *Id.*

be but one reasonable conclusion as to the verdict."[250] The inquiry in each, stated the Court, is whether there is sufficient disagreement as to the truth to require submission to a jury, or whether the evidence is so one-sided that one party must prevail as a matter of law.[251]

The Court noted that this inquiry into the sufficiency of the evidence necessarily implicates the substantive evidentiary burden that would apply at trial.[252] Whether a jury could reasonably find for either party, according to the Court, can only be defined by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant.[253] The reasonableness of a jury's ultimate decision must be measured by the applicable evidentiary standards that govern its deliberations.[254] The judge ruling on a motion for summary judgment, said the Court, must keep in mind the quantum and quality of proof necessary to prove actual malice,[255] and "must view the evidence presented through the prism of the substantive evidentiary burden."[256] The Court stressed that such a standard does not denigrate the role of the jury, and that credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts remain jury functions.[257] The Court further stated that the trial judge should act with caution in granting summary judgment, reasoning that where there is reason to believe that the better course is to proceed to trial, the motion should be denied.[258]

The Court dealt with *Hutchinson* in a footnote, stating that *Hutchinson*'s footnote nine merely acknowledged the Court's general reluctance to grant special procedural protections to defendants in libel cases in addition to the constitutional protections embodied in the substantive law.[259] The Court thus interpreted its holding in *Anderson* — that the applicable evidentiary standard applies at the summary judgment stage — as broad enough to encompass summary judgment for all litigants. Consequently, Rule 56 does not afford special procedural protection for libel defendants.[260] The Court's denial of special procedural protections for one type of litigant thus makes the incorporation of the substantive evidentiary standard into the summary judgment determination the "neutral rule," neither favoring nor disfavoring a particular class of litigants.[261]

As the Court would not allow plaintiffs to rely on *Hutchinson* for the proposition that summary judgment was inappropriate specifically in libel cases, neither would it allow plaintiffs to rely on *Poller* for the proposition that state of mind issues were

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[250] *Id.* at 2511.
[251] *Id.* at 2512.
[252] *Id.*
[253] *Id.* at 2513.
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.* at 2513–14.
[259] *Id.* at 2514 n.7 (quoting Calder v. Jones, 465 U.S. 783, 790–91 (1984)).
[260] *See* 106 S. Ct. at 2515 n.1 (Brennan, J., dissenting) (Court's holding is not confined in its application to first amendment cases; the holding 'changes summary judgment procedure for *all* litigants, regardless of the substantive nature of the underlying litigation).
[261] The courts in *Yiamouyiannis* and *Nader* thus would appear to have given the *Hutchinson* caution all it was due in adopting a neutral rule which nonetheless required "clear and convincing" proof at the summary judgment stage. See *supra* notes 130–40 and accompanying text for a discussion of *Yiamouyiannis* and *Nader*.

inappropriate generally for summary disposition.[262] *Poller*, said the Court, should not be read to hold that a plaintiff could defeat a motion for summary judgment in a libel or conspiracy case merely by asserting that the jury might disbelieve the defendant's witnesses on the state of mind issues.[263] Rather, said the Court, the plaintiff has the burden of producing evidence that would support a jury verdict.[264] Under Rule 56(e)[265] noted the Court, the party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his or her pleadings, but must set forth specific facts showing that there is a genuine issue for trial.[266] Citing *Cities Service*,[267] the Court maintained that the plaintiff cannot defeat a motion for summary judgment without offering "any significant probative evidence tending to support the complaint."[268] The plaintiff, said the Court, must present affirmative evidence from which a jury might return a verdict in the plaintiff's favor.[269] This proposition holds even where the evidence is likely to be within the possession of the defendant,[270] as long as the plaintiff has had a full opportunity to conduct discovery.[271] After *Anderson*, the standard governing the grant of summary judgment for all litigants will be whether a jury could reasonably find for the plaintiff on the evidence presented viewed in light of the substantive evidentiary burden.[272]

Justice Brennan dissented from the majority opinion in *Anderson* and characterized it as an invitation, or an instruction, to the trial court to weigh the evidence as a juror would at trial.[273] In Justice Brennan's view, a direction to the judge to bear in mind the

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[262] *Anderson*, 106 S. Ct. at 2514.

[263] *Id.* The Court thus implied that *Poller* could no longer offer support for the categorical treatment of state of mind cases, under which judges ruling on summary judgment motions preferred trial, even where the plaintiff had failed to produce evidence supporting his or her claim and was unlikely to succeed at trial. *See Anderson*, 106 S. Ct. at 2514. *See also Apex*, 641 F. Supp. at 1256, discussed *supra* notes 200–05 ("However true that sentiment [in *Poller*] may have been in 1962, it is not true today.") *Id.*

[264] *Id.*

[265] Rule 56(e) provides 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).

[266] *Anderson*, 106 S. Ct. at 2514.

[267] See *supra* notes 68–75 and accompanying text for a discussion of *Cities Service*.

[268] *Anderson*, 106 S. Ct. at 2514.

[269] *Id.*

[270] In *Poller*, one of the reasons given for the sparing use of summary judgment was that "the proof is largely in the hands of the alleged conspirators." *Poller*, 368 U.S. at 473.

[271] *Anderson*, 106 S. Ct. at 2514.

[272] *Id.* at 2512. As a result, the focus is on the character of the evidence presented, and not on the character of the claim.

[273] *Id.* at 2519 (Brennan, J., dissenting).

"caliber and quality" of evidence sufficient to meet the "quantum" of proof required is a direction to weigh the evidence.[274] Justice Brennan expressed concern that this procedure would transform the summary judgment process into a "full blown paper trial on the merits,"[275] and would undermine the constitutional rights of civil litigants to a jury trial.[276]

In Justice Brennan's view, to defeat a motion for summary judgment a plaintiff need present only evidence which, either directly or by permissible inference,[277] supports all the elements the plaintiff needs to prove in order to prevail on the claim.[278] The role of the fact finder, said Justice Brennan, is to determine whether the evidence is "clear and convincing" or proves a point by a mere preponderance.[279]

Justice Rehnquist wrote a separate dissenting opinion, joined by then Chief Justice Burger, in which he said that the decision to "engraft" the standard of proof applicable to a fact finder onto the law governing summary judgment was an exercise in "intellectual tidiness" which would do more mischief than benefit.[280] Justice Rehnquist objected to what he believed were special procedural protections for libel defendants,[281] and predicted that the decisions of trial judges on summary judgment motions in libel cases would be more erratic and inconsistent than before.[282]

Justice Rehnquist based his objection on the concern that the Court created a new summary judgment standard without providing any guidelines as to how the standard would be applied in a given case.[283] In Justice Rehnquist's opinion, the differentiated burdens of proof applicable to civil and criminal cases — preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt — do not convey a logical or analytical message easily applied to a procedural motion, but instead convey "almost a state of mind"[284] whose effect on the fact finder may be "unknowable."[285]

C. *Celotex Corp. v. Catrett*

Matsushita and *Anderson* addressed the burden of proof required at the summary judgment stage in antitrust and actual malice defamation cases. In *Matsushita* and *Anderson*, the Court effectively removed doctrinal barriers to the use of summary judgment

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[274] *Id.* (Brennan, J., dissenting).

[275] *Id.* (Brennan, J., dissenting).

[276] *Id.* at 2520 (Brennan, J., dissenting).

[277] These inferences are a product of the substantive law underlying the claim. *Id.* (Brennan, J., dissenting).

[278] *Id.* (Brennan, J., dissenting).

[279] *Id.* (Brennan, J., dissenting).

[280] *Id.* at 2520, 2522–23 (Rehnquist, J., dissenting).

[281] *Id.* at 2521 (Rehnquist, J., dissenting) (citing Calder v. Jones, 465 U.S. 783 (1984)). But see *supra* note 260 for Justice Brennan's opinion that the Court's holding changes summary judgment procedures for all litigants.

[282] *Id.* at 2523 (Rehnquist, J., dissenting).

[283] *Id.* (Rehnquist, J., dissenting).

[284] *Id.* at 2522 (Rehnquist, J., dissenting).

[285] *Id.* (Rehnquist, J., dissenting) (quoting Addington v. Texas, 441 U.S. 418, 424–25 (1979)). Lower court judges have begun to apply the teaching of *Anderson*. The District Court for the Southern District of New York in *Rizzuto v. Nexxus Products Co.* granted defendant's motion for summary judgment in an actual malice case where plaintiffs had not offered "an iota of evidence" from which a jury could find that the plaintiffs proved actual malice by clear and convincing evidence. 641 F. Supp. 473, 480 (S.D.N.Y. 1986).

in state of mind cases. In *Celotex Corp. v. Catrett*, a case decided on the same day as *Anderson*, the Court addressed the broader question of the production of evidence burden placed on the moving and nonmoving party by Rule 56 in all cases.[286]

In *Celotex*, a products liability case, plaintiff Catrett claimed that her husband's death resulted from exposure to products containing asbestos manufactured or distributed by, among others, defendant Celotex.[287] Celotex, without introducing any documentary evidence, filed a motion for summary judgment.[288] Celotex argued that summary judgment was proper because the plaintiff had failed to produce any evidence that any Celotex product was the proximate cause of death, and more particularly, that the plaintiff had failed to identify any witnesses who could testify about the decedent's exposure to the plaintiff's products despite interrogatories specifically requesting such information.[289]

In response, the plaintiff produced three documents, all tending to establish that the decedent had been exposed to the petitioner's products during 1970–71.[290] The district court granted summary judgment for the defendant because there was no showing that the plaintiff was exposed to the defendant's products within the statutory period.[291] The Court of Appeals for the District of Columbia Circuit reversed, holding that the defendant's summary judgment motion was rendered "fatally defective" by the fact that the defendant "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion."[292] While acknowledging that the defendant would have difficulty in "proving the negative"[293] that the plaintiff had not been exposed to the defendant's products, the court stated that the defendant's "barebones approach" would not suffice to support a motion for summary judgment.[294]

The Supreme Court reversed, holding that the moving party is not required to support its motion with affidavits or other similar material negating the opponent's

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[286] 106 S. Ct. 2548, 2551, 2552–53 (1986).

[287] *Id.* at 2551.

[288] Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 184 (D.C. Cir. 1985).

[289] *Celotex*, 106 S. Ct. at 2551.

[290] *Id.*

[291] *Id.* The district court ruled from the bench and there was no written opinion. *Catrett*, 756 F.2d at 183 n.3.

[292] *Id.* at 184 (emphasis in original).

[293] *Id.*

[294] *Id.* at 185. Judge Bork dissented, saying "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." *Id.* at 188 (Bork, J., dissenting). Analogizing a grant of summary judgment to a directed verdict, Judge Bork said "a directed verdict would clearly be required since the plaintiff lacks any admissible evidence of causation, an essential element of her case." *Id.* (Bork, J., dissenting). Judge Bork also based his conclusion on the power of a trial judge to grant summary judgment *sua sponte* when he or she notices the absence of a factual dispute, and the absence is not corrected after notice: "If the district court, on its own motion, may grant summary judgment whenever it concludes that required evidence cannot be produced, it necessarily follows that a defendant may obtain summary judgment when it brings that situation to the court's attention." *Id.* at 189 (Bork, J., dissenting).

Judge Bork noted the plaintiff's failure to produce any admissible evidence of causation after two years of preparation. *Id.* at 191 (Bork, J., dissenting). Seeking to preserve the utility of summary judgment as a means of disposing of meritless cases which waste trial court time and energy, Judge Bork concluded: "I understand the judicial impulse to save a plaintiff's case from what may have been careless preparation, but the deformation of summary judgment procedures is too high a price to pay for the gratification of that impulse." *Id.* (Bork, J., dissenting).

claim.[295] The plain language of Rule 56(c), stated the Court, "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."[296] The Court stated that summary judgment is appropriate in such a case because there can be no genuine issue of material fact: "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[297] The Court reiterated its holding in *Anderson* that the standard for granting summary judgment mirrors the standard for a directed verdict.[298]

In holding that the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim, the Supreme Court noted that Rule 56(c) refers to affidavits "if any" and that Rules 56(a) and (b) provide that claimants and defendants may move for summary judgment "with or without supporting affidavits."[299] Thus, whether or not the moving party accompanies its motion with affidavits, the motion should be granted provided that whatever is before the court demonstrates that the standard for entry of summary judgment under Rule 56(c) is met.[300] The burden on the moving party, said the Court, may be discharged by the moving party merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case.[301] The nonmoving party, in turn, must designate "specific facts showing that there is a genuine issue for trial."[302] Such an interpretation, said the Court, would allow the summary judgment rule to accomplish its purpose of isolating and disposing of factually unsupported claims or defenses.[303]

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[295] *Celotex*, 106 S. Ct. at 2553. Because the court of appeals declined to address either the adequacy of the showing made by the plaintiff in opposition to the defendant's motion for summary judgment, or whether such a showing, if reduced to admissible evidence, would be sufficient to carry plaintiff's burden of proof at trial, the Court remanded to the court of appeals to make those determinations. *Id.* at 2555.

[296] *Id.* at 2552–53.

[297] *Id.* at 2553.

[298] *Id.*

[299] *Id.*

[300] *Id.*

[301] *Id.* at 2554. The Court said its conclusion was bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all her evidence. *Id.* "It would surely defy common sense," said the Court, "to hold that the District Court could have entered summary judgment *sua sponte* in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it." *Id.* (citing Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 189 (D.C. Cir. 1985) (Bork, J., dissenting)).

[302] *Id.* at 2553. The evidence produced by the nonmoving party does not have to be in a form that would be admissible at trial in order to avoid summary judgment. *Id.* Rule 56(c) lists the kinds of evidentiary material permitted, and "it is from this list that one would normally expect the nonmoving party to make the [required] showing." *Id.* at 2554.

[303] *Id.* at 2553. The Court explained its language in Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970), where in reversing a grant of summary judgment in favor of a defendant the Court said that "both the commentary on and background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact." *Id.* at 159. The 1963 Amendment added the last two sentences to Rule 56 (e):

> 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,

The Court noted further that because the plaintiff in this case had over a year to conduct discovery, there could be no serious claim that the plaintiff was "railroaded" by a premature motion for summary judgment.[304] Any such potential problem, noted the Court, could be dealt with adequately under Rule 56(f),[305] which allows a summary judgment motion to be denied, or the hearing on the motion continued, if the nonmoving party has not had an opportunity to make full discovery.[306]

The Court concluded its opinion by expressing its support for the use of Rule 56 in identifying claims and defenses that have no factual basis.[307] Summary judgment, said the Court, is not a disfavored procedural shortcut, but a means of securing the "just, speedy and inexpensive determination of every action."[308] The Court emphasized that Rule 56 must be read not only to protect the rights of plaintiffs with genuine claims to a jury trial on the merits, but also for the rights of defendants who demonstrate prior to trial that no such genuine claim exists.[309] The *Celotex* opinion thus expresses due regard for the rights of all defendants moving for summary judgment, not just for those defendants formerly disfavored because of the presence of state of mind issues.

III. Analysis of the "New" Summary Judgment

The standards for granting summary judgment enunciated in *Matsushita*, *Anderson*, and *Celotex* suggest that the Court increasingly is receptive to the use of Rule 56 for

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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).

The purpose of the amendment was to overturn a line of cases, chiefly in the Third Circuit, that had held that a party opposing a summary judgment motion could create a dispute as to a material fact asserted in an affidavit by the moving party without producing any evidentiary matter by simply relying on contrary averments in his own complaint. *Adickes*, 398 U.S. at 159 n.20. The *Celotex* Court agreed with the statement in *Adickes* in the literal sense that the 1963 Amendment was not designed to modify the burden of making the showing generally required under Rule 56(c), *Celotex*, 106 S. Ct. at 2554, but refused to construe the language to mean that the burden is on the moving party to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue which the nonmoving party would bear the burden of proof at trial. *Id.* The *Adickes* Court was correct in concluding that the 1963 Amendment was not intended to *reduce* the burden on the moving party, but, said the *Celotex* Court, it is obvious that the Amendment was not intended to add to that burden. *Id.* Read otherwise, said the Court, an amendment designed to facilitate the granting of summary judgment motions would be interpreted to make it more difficult to grant such motions. *Id.*

[304] *Id.*

[305] Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

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

[306] *Celotex*, 106 S. Ct. at 2554–55.

[307] *Id.* at 2555.

[308] *Id. See* FED. R. CIV. P. 1.

[309] *Celotex*, 106 S. Ct. at 2555.

early disposition of claims where no genuine factual issue exists.[310] These three Supreme Court decisions offer encouragement for the trial courts[311] to utilize the summary judgment procedure in all cases, and especially in cases where the propriety of its use has been unsettled.

More particularly, the Supreme Court has moved away from its restrictive, cautionary stance towards summary judgment in cases involving state of mind issues. The cautions expressed in the *Poller* dictum in the conspiracy area and in the *Hutchinson* footnote in the actual malice area expressed a general disapproval of the use of summary judgment in cases involving state of mind. Although the concern of the Court regarding the need for trial in difficult cases involving credibility determinations was legitimate,[312] the categorical approach suggested by *Poller* and *Hutchinson* did not give enough regard to the plaintiff's prospects for success at trial.[313] As a generalization, the caution against the use of summary judgment in state of mind cases was a means of protecting plaintiffs at the pretrial stage where those plaintiffs would have to shoulder a heavy burden of proof at trial.[314] As such, the generalization was rough justice.[315] Whereas the substantive law favored defendants at trial by requiring the plaintiff to meet a heightened evidentiary burden, the caution against the use of summary judgment in state of mind cases favored plaintiffs in the pretrial stage by allowing them to proceed to trial. Such "rough justice," however, was an improper application of Rule 56 because it prohibited summary judgment even though a particular plaintiff had offered no substantial evidence to support the claim and had little prospects for success at trial.[316]

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[310] *See* Hoenig, *Products Liability: Recent Developments*, 196 N.Y.L.J., Sept. 24, 1986 at 1, col. 1. With the Supreme Court's clarification in the *Celotex* and *Anderson* cases of the dynamics of summary judgment practice and its admonition that such motions should be granted where appropriate, it may now be expected that federal district court judges will act more confidently in dismissing claims that fall short of the required evidentiary showing on behalf of the party who has the burden of proof on a key issue.

Id.

[311] See *supra* notes 200–05 and accompanying text for a discussion of the *Apex* decision. It is interesting to note that the *Apex* decision, citing all three Supreme Court cases and finding encouragement from the Supreme Court for the use of summary judgment procedures, is a case arising in the Second Circuit. The Second Circuit has been perceived in the past as being hostile to summary judgment disposition. *See, e.g.*, Ingenito v. Bermec Corp., 441 F. Supp. 525, 543 (S.D.N.Y. 1977) (court notes "the strong policy against summary judgment in this Circuit."). However, the Second Circuit is trying to dispel that perceived hostility. The Committee on the Pretrial Phase of Civil Cases of the Judicial Conference of the Second Circuit, in its recent final report, recommended to the Circuit's judges that steps be taken to lessen the uncertainty about summary disposition in the Second Circuit. Second Circuit Committee on the Pretrial Phase of Civil Litigation, at 19. The report urged the adoption of steps clarifying the application of summary judgment, in order to provide greater incentive to use summary judgment procedures as an effective device for accelerated disposition of cases. *Id.* at 20.

[312] *See The Actual Malice Controversy*, *supra* note 6, at 714, 722 (suggesting a new summary judgment doctrine which will accommodate the legitimate concerns that underlie the state of mind caution).

[313] *Id.* at 720–21 (traditional summary judgment doctrine was denied almost automatically in state of mind or other cases of unequal access to the evidence without regard to plaintiff's ultimate prospects for success at trial: "This rigidity developed out of a blind fear that any retreat from a protective rule might prejudice all such plaintiffs unfairly.").

[314] *See id.*

[315] *Id.* at 721.

[316] *See* Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 478 (1962) (Harlan, J., dissenting); *see also Celotex*, 106 S. Ct. at 2555.

The approach articulated in *Anderson* and *Matsushita* allows the trial court to question whether a particular plaintiff in a state of mind case has any prospect for success at trial.[317] Under *Anderson*, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."[318] Under *Matsushita* the inquiry is whether "the record taken as a whole could . . . lead a rational trier of fact to find for the non-moving party."[319] This new approach reinvigorates the summary judgment procedure by requiring a more searching inquiry at the pre-trial stage.

The reinvigoration of the summary judgment procedure raises substantive questions of fairness to plaintiffs and defendants at the pretrial stage. Whereas a cautious use of summary judgment can be viewed as more fair to plaintiffs by preserving their right to a jury trial, a more liberal use of summary judgment can be viewed as more fair to defendants by not requiring them to defend a claim that presents no genuine issues of fact. Concerns expressed in the dissenting opinions in *Matsushita* and *Anderson* about the effect of a more liberal use of summary judgment on the rights of plaintiffs to a jury trial reflect a belief that justice is better served by allowing the plaintiff his or her day in court.[320] The majority opinions, on the other hand, reflect the belief that what is better for the plaintiff is not necessarily better for the administration of justice, or for the defendant who is put to the expense of a needless trial.[321] Yet, generalizations about the fairness of summary judgment procedures to plaintiffs or defendants as a group does not answer the more important question: as between this plaintiff and this defendant, what is the just disposition of their dispute?

The majority's answer to the question of fairness is that a particular plaintiff is entitled to proceed to trial only if he or she in fact has demonstrated the existence of a "genuine" controversy. The new standards require from the plaintiff a more rigorous demonstration of the "genuineness" of his or her claim. If a genuine claim is demonstrated, summary judgment will be denied and the plaintiff is entitled to proceed to trial.[322] Thus, the new standards do not deny a plaintiff his or her right to trial, but they do require each particular plaintiff to demonstrate that in fact a trial is needed.

Although it is not inconsistent with a principle of justice or fairness that a plaintiff demonstrate the "genuineness" of his or her claim, it would be unfair to plaintiffs if the

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[317] *See The Actual Malice Controversy*, *supra* note 6, at 720–21. Louis states that under a more liberal approach "the court at least may inquire whether the particular plaintiff has any prospect of success. Such an inquiry will not always result in the entry of summary judgment, but it will permit the court to ask the relevant question." *Id.*

[318] *Anderson*, 106 S. Ct. at 2512. In a similar formulation, one commentator has said: "Some issues involving state of mind . . . may turn on ambiguous inferences and thus be inappropriate for summary judgment in a *particular* case. Nonetheless, in many cases the inferences will point in only one direction, and there is no reason to deny summary judgment in such cases." Sonenshein, *supra* note 7, at 809–10.

[319] *Matsushita*, 106 S. Ct. at 1356.

[320] *See id.* at 1365 (White, J., dissenting); *Anderson*, 106 S. Ct. at 2520 (Brennan, J., dissenting). *See also* Sonenshein, *supra* note 7, at 785.

[321] *See Celotex*, 106 S. Ct. at 2555. *See also* Sonenshein, *supra* note 7, at 785 ("the court's denial of a summary judgment motion in these circumstances will force one party to incur needless litigation expenses, and will force society to bear the burden of ever-increasing delay in the administration of justice").

[322] *See Anderson*, 106 S. Ct. at 2510 (summary judgment will not lie if the dispute about a fact is genuine; availability of summary judgment turns on whether a proper jury question is presented).

threshold for "genuineness" were set at a level too high to reach by the available pretrial steps. The belief that a plaintiff in a state of mind case could demonstrate the genuineness of his or her claim only through examination of the defendant's witnesses at trial was, of course, the origin of the caution against the use of summary judgment in state of mind cases. Yet it is possible, using the available pretrial steps, for a plaintiff to demonstrate a genuine claim and proceed to trial even where that claim involves a state of mind issue.

Proof of intent, motive, and other state of mind issues does not depend always on observation of a witness, but can be proven by objective evidence available through discovery. To the extent such proof is available, state of mind questions should not go to the jury automatically where the plaintiff fails to offer substantial probative evidence contradicting the defendant's evidence of innocent motive or lack of intent.[323] Such a practice strains judicial resources and contravenes the very purpose of summary procedures.

To the extent such issues do depend on credibility determinations and the observation of a witness's demeanor, trial courts should heed the admonition of Justice Harlan in his dissenting opinion in *Poller*. There, he asserted that a plaintiff who offers no substantial evidence and appears unlikely to succeed at trial should not be allowed to go to trial on the gamble that the defendant's witnesses will change their testimony under cross-examination.[324] One commentator notes that "questions of intent are no more susceptible than other questions to the possibility of witnesses changing their testimony between discovery and trial. If such possibility is sufficient to defeat a summary judgment motion despite the absence of a real factual dispute, then summary judgment will never be granted."[325] Thus, courts should not deny a summary judgment motion where a plaintiff produces no substantial evidence on the mere possibility that the plaintiff will win its gamble at trial.

Although the plaintiff who must prove an illicit state of mind, motive, or intent should not go to trial on the mere possibility that a genuine claim will develop, neither should a plaintiff be without protection at the summary judgment stage from premature dismissal of a genuine claim. Where there is a question of the plaintiff being "railroaded" so as not to afford adequate time or discovery to uncover evidence of illicit intent or improper motive, the Court in *Celotex* identified the proper remedy: Rule 56(f), which allows the trial judge to refuse the motion for judgment, to continue discovery, or to make such order as is "just."[326] Rule 56 itself thus provides a safeguard against the plaintiff's inability to meet the threshold of genuineness by the available pretrial steps.

One commentator describes this provision as an "escape procedure"[327] for plaintiffs, and as a means for distinguishing between "[t]hose plaintiffs who disclose at least some evidence and who can show reasonable possibilities for obtaining the rest before or at trial" and "those who have little or no evidence, and who have either failed to employ discovery or have employed it to no avail."[328] Thus, a judge deciding a motion for summary judgment should heed not only admonitions regarding plaintiffs with little

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[323] *See* Sonenshein, *supra* note 7, at 794–95.

[324] *Poller*, 368 U.S. at 480 (Harlan, J., dissenting).

[325] Sonenshein, *supra* note 7, at 790.

[326] *Celotex*, 106 S. Ct. at 2554–55.

[327] *See The Actual Malice Controversy*, *supra* note 6, at 720.

[328] *Id.* at 719.

prospect for success at trial, but should heed their own judgment regarding plaintiffs who should be given a further chance to demonstrate the genuineness of their claims.

In exercising that judgment whether to deny a motion for summary judgment or continue the hearing under Rule 56(f), the court could take into account the presence of state of mind issues which may or may not be proven by objective evidence in a particular case, the plaintiff's lack of equal access to the evidence, and any facts which raise doubts about the defendant's denials or explanations of the alleged improper conduct.[329] This approach considers the particular plaintiff's difficulty in establishing a case before trial upon which a reasonable jury could return a verdict in his or her favor. This is preferable to an approach, typified by *Poller* and *Hutchinson*, which presupposes such difficulty for all plaintiffs, whether or not their evidence will ever be sufficient to support a verdict in their favor.[330] Such an approach is also preferable because it focuses on the provisions of the Rule itself rather than on judicially created exceptions to the Rule for particular types of plaintiffs.

In addition to the protection afforded by Rule 56(f), the new standards inject a new element of fairness into the summary judgment process: predictability. Because the new standards for summary judgment mirror the standard for a directed verdict under Rule 50(a),[331] it would be unusual for a plaintiff who has survived a summary judgment motion not to defeat a Rule 50(a) motion and thus reach the jury.[332] The new standards thus give due regard to plaintiffs by not putting them to the expense of a trial where a directed verdict would be entered against them, and by giving plaintiffs who do survive a Rule 56 motion a more accurate prediction of their prospects of reaching the jury at trial.

The dissenting opinions in *Anderson* suggest that questions of "state of mind" still linger. Yet, it is not so much the witness's state of mind as the judge's state of mind in measuring the evidence against the evidentiary standard which troubles the dissenting Justices.[333] These Justices maintain that the threshold for determining whether there is a need for trial[334] has been raised too high. These opinions suggest that the incorporation of the substantive evidentiary burden requires more than is necessary from plaintiffs,[335] and more than should be allowed from judges, who, the dissenting Justices feared, would usurp a plaintiff's right to a jury trial.[336]

The heightened burden of proof at the summary judgment stage requires not only more from plaintiffs, but also from judges. Judges deciding a motion for summary judgment must give closer scrutiny to the plaintiff's evidence in order to determine if a reasonable jury could return a verdict in the plaintiff's favor. In making that determination, judges must be guided by the "reasonable jury" standard and must not make

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[329] *Id.* at 720.

[330] *See A Critical Analysis, supra* note 6, at 766.

[331] *Anderson*, 106 S. Ct. at 2511.

[332] Stewart, *Rulings Make Summary Judgment Possible in Complex Litigation*, 9 NAT'L L. J. 22, n.26.

[333] *See Anderson*, 106 S. Ct. at 2522 (Rehnquist, J., dissenting). *See also id.* at 2519 (Brennan, J., dissenting) (Court's opinion is full of language which invites, if not instructs, trial courts to assess and weigh the evidence much as a juror would).

[334] *Id.* at 2511.

[335] *See id.* at 2520 (Brennan, J., dissenting) (plaintiff need only present evidence which supports his or her claim, regardless of the burden of proof).

[336] *See id.* (Brennan, J., dissenting) (grave concerns are raised concerning the constitutional right to jury trial if judge is to weigh the evidence).

their own independent determination. The ability of the trial courts, prior to *Matsushita* and *Anderson*, to get around the cautions of *Poller* and *Hutchinson* without requiring independent judicial determination[337] demonstrates how the trial courts can apply Rule 56 to state of mind issues as they would to any factual issue,[338] and grant summary judgment when no genuine factual dispute exists.[339] Judges can and must do their job of disposing of factually unsupported claims, but they must not take over the role of the jury. Diligence in observing the "reasonable jury" standard and judicious use of Rule 56(f) should provide adequate safeguards.

The Supreme Court's opinions in *Matsushita*, *Anderson*, and *Celotex* could be read as a shift from a pro-plaintiff to a pro-defendant stance in deciding motions for summary judgment.[340] Although the focus of this discussion and these cases has been on motions for summary judgment brought by the defendant, the opinions are better read not as serving the interests of plaintiffs or defendants — or of a particular class of defendants — but as serving the purposes of the Rule as a means of conserving the resources of the courts by isolating and disposing of factually unsupported claims or defenses.[341] The categorical approach of the past obscured the proper application of the Rule. The recently enunciated standards by the Supreme Court should be read to clarify the purpose of the Rule by drawing lines based on the merits of a particular claim or defense rather than on the type of litigant who is asserting that claim or defense.

Conclusion

The Supreme Court decisions in *Matsushita*, *Anderson*, and *Celotex* signal a change in the status of summary judgment procedure, especially in cases involving state of mind. These decisions have reinvigorated summary judgment as a means for challenging effectively the party with the burden of proof so as to terminate unfounded litigation and to conserve the courts' and litigants' resources. In moving away from a restrictive,

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[337] *See supra* notes 130–40 and accompanying text (rejection of *Wasserman* requirement of independent judicial determination of actual malice at summary judgment stage and development of "neutral" rule in deciding motions for summary judgment in actual malice defamation cases).

[338] *See* Sonenshein, *supra* note 7, at 794 & n.89.

[339] *See id.* at 794.

[340] The pro-defendant stance could be read in the *Celotex* holding that the movant simply must point out to the trial court the absence of evidence essential to the opponent's claim, *Celotex*, 106 S. Ct. at 2553, 2554, coupled with the *Anderson* holding that in response to defendant's motion the plaintiff must present evidence which meets the heightened evidentiary burden he or she would bear at trial. *Anderson*, 106 S. Ct. at 2513. Thus, while the defendant has to produce no affirmative evidence and the plaintiff has to produce evidence which not only supports his or her case but does so "clearly and convincingly," such a procedure will eliminate "the incongruous shift of the evidentiary burden in a summary judgment proceeding away from the party who will bear it at trial." *A Critical Analysis*, *supra* note 6, at 758. The new standards apply to both defendants and plaintiffs moving for summary judgment and should not be construed to favor either:

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

Celotex, 106 S. Ct. at 2555.

[341] *A Critical Analysis*, *supra* note 6, at 769 (the primary function of summary judgment is to intercept factually deficient claims and defenses in advance of trial).

cautionary stance that invited courts to deny categorically summary judgment even where the plaintiff had little or no chance to succeed at trial, the Supreme Court offers encouragement to trial courts to utilize the summary judgment procedure to fulfill the promise of Rule 1 of the Federal Rules of Civil Procedure of "just, speedy, and inexpensive determinations of every action."

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