ANOTHER STEP IN THE COUNTER-REVOLUTION: A SUMMARY JUDGMENT ON THE SUPREME COURT'S NEW APPROACH TO SUMMARY JUDGMENT

*D. Michael Risinger**

Fifty years after the promulgation of the Federal Rules of Civil Procedure, there seems to be an emerging consensus that federal civil procedure is in the midst of a counterrevolution,[1] though its exact nature is subject to debate. Some see it as a corrective for perceived abuses of the procedural system;[2] others view it as a cynical movement to restore to defendants, particularly powerful, establishment "repeat player" defendants,[3] traditional procedural advantages they lost by virtue of the Federal Rules' emphasis on full disclosure and decision on the merits.[4] Whatever the conscious motivation, it seems clear that many of the burdens flowing from recent changes in the system have fallen more heavily upon plaintiffs than defendants.[5] This Arti-

---

* Professor of Law, Seton Hall University School of Law.

[1] *See, e.g.*, Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and* Erie, 54 BROOKLYN L. REV. 1 (1988); Burbank, *The Chancellor's Boost*, 54 BROOKLYN L. REV. 31 (1988). *See also* Marcus, *The Revival of Fact Pleading under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983).

[2] *See, e.g.*, Vairo, *Through the Prism: Summary Judgment and the Trilogy*, in CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS, TRIAL EVIDENCE, CIVIL PRACTICE AND EFFECTIVE LITIGATION 181, 183 (1988) (A.L.I.-A.B.A. course materials).

[3] The "repeat player" language is, of course, Professor Galanter's from an earlier influential article, Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

[4] I find myself tending toward this view. Overtones of this position are also present in Weinstein and Marcus, *supra* note 1.

[5] See, for example, the judge-created (and arguably *ultra vires*) rules requiring fact pleading detail in civil rights complaints, e.g., Rotolo v. Borough of Charleroi, 532 F.2d 920 (3d Cir. 1976), and the committee-created new Rule 11. On the subject of their asymmetrical impact, see Jennings, *Relationship of Procedure to Substance in Civil Rights Actions Under Section 1983: No Cause for Complaint?*, 12 SETON HALL L. REV. 1 (1981) (pleading rules) and Nelken, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74

cle looks at one example, the new approach to summary judgment put forth by the United States Supreme Court a year and a half ago in *Liberty Lobby*,[6] *Celotex*,[7] and *Matsushita*.[8]

When I first looked at these opinions, I was not particularly alarmed. The application of directed verdict sufficiency standards to summary judgment in *Liberty Lobby* was hardly a radical idea,[9] though it is true that prior decisions were sufficiently unclear that the explicitness of *Liberty Lobby* was arguably new.[10] There did seem to be something strange in *Celotex*'s handling of Rule 56 of the Federal Rules of Civil Procedure and the movant's burden reflected in *Adickes v. Kress*,[11] but neither the rule nor that case were models of analytic clarity to begin with. Justice Brennan's dissent manifested concern at the effects of the majority opinion, but it was not clear to me at first reading exactly what he was saying. This was especially true since he asserted that most of what he said in dissent was not "inconsistent with or different than" the majority opinion,[12] and Justice Stevens labelled both the majority and Justice Brennan's dissent an "abstract exercise in Rule construction."[13] Finally, *Matsushita* seemed to be too tied up with narrow constructions of both the substantive law and the standards of proof in the antitrust area to be of general impact.[14]

GEO. L.J. 1313 (1986). The examples could be multiplied considerably in the areas of class actions, discovery, settlement offers, etc. Incidentally, this is not without its uncomfortable irony for me, since I personally bear some responsibility for the existence and content of new Rule 11, which was enacted partly in response to Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems with FRCP 11*, 61 MINN. L. REV. 1 (1976). We see here an example of the law of unintended consequences (at least unintended by me, I don't know about those folks who were on the Rules Advisory Committee). I'm not quite ready to disown my offspring totally, but I personally won't let him back in the house until he starts leaning on defendants as much as plaintiffs, since defendants probably violate new Rule 11 more often than plaintiffs. *See id.* at 56 n.183 for the exposition for why this is likely to be so.

[6] Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

[7] Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[8] Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574 (1986).

[9] *See* Sartor v. Arkansas Gas Corp., 321 U.S. 620 (1944).

[10] *See Liberty Lobby*, 477 U.S. at 246.

[11] Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). This is the case that most accounted for the pre-1986 cautious approach to summary judgment referred to in note 14, *infra*.

[12] *Celotex*, 477 U.S. at 334.

[13] *Id.* at 339. Justice Brennan, at any rate, construed Stevens' remarks to apply to both the majority and his dissent. *See id.* at 334 n.4.

[14] This footnote must stand as my *apologia* for a number of things I do not intend

As it turns out, academics who teach procedure can learn a lot from a continuing hands-on involvement in actual litigation. Had I not recently had to respond to a defendant's summary judgment motion in a fairly complicated civil rights action, I might have continued to overlook the real weaknesses in the Supreme Court's new approach to summary judgment, and never seen what Justice Brennan was getting at.[15]

Summary judgment, as the Court says in *Liberty Lobby*, is most appropriately viewed as an early motion for directed verdict.[16] However, summary judgment presents a special problem. It is true that in a normal directed verdict motion the judge must struggle with the difficulties and indeterminacies repre-

---

to do in the text. I do not intend to dissect at length the lack of clarity in pre-1986 federal summary judgment jurisprudence. This area has long been perceived as a muddle that most courts muddled through. This is largely because the operative language of Rule 56 speaks of showing that there is "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). This phrase invites the conflation of the record prediction and sufficiency issues treated in the text. Pre-1986, however, the center of gravity of the muddle was caution, as befits a situation where improper granting of a motion is an error of constitutional dimension. *See* note 23 *infra*. *See generally* Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, (1974).

Nor do I intend to finely parse the opinions in *Liberty Lobby*, *Celotex* and *Matsushita*. In a way they are a very odd set of cases with an equally odd set of shifting alliances, and may mean less than they say. *Liberty Lobby*, for example, involved an explicit incorporation of the "clear and convincing evidence" standard of proof into the summary judgment test in a public figure libel action, and some of the six Justices joining the majority opinion (White, Marshall, Blackmun, Powell, Stevens and O'Connor, JJ.) may well have been influenced by free speech considerations rather than general issues of summary judgment. (For instance, Justice Blackmun and Justice Stevens both dissented in *Celotex* and *Matsushita*.) Clearly, something the reverse of free speech considerations accounts for Justice Rehnquist's dissent in *Liberty Lobby* in light of the fact that he authored *Celotex* and joined in *Matsushita*. Also, it is pertinent to note that the five-justice majorities in *Celotex* and *Matsushita* included Justice Powell, and the *Matsushita* majority included Justice Burger, both since departed from the Court.

The resulting "new approach" to summary judgment is not analytically much more coherent than the old approach, and for those who insist on a line by line exposition of why this is so (aside from the failure to separate record prediction and sufficiency treated in this article), I recommend Vairo, *supra* note 2. *See also* Comment, *The Movant's Burden in a Motion for Summary Judgment*, 3 UTAH L. REV. 731 (1987).

[15] This response cost me nearly a month of my life as a result of motion papers even thinner than those in *Celotex*. In this regard, I wonder if Justice Marshall contemplated the impact on civil rights cases when he startlingly joined the majority in all three cases of the new summary judgment trilogy. I cannot think that he did, but I believe Chief Justice Rehnquist knew exactly what *he* was doing.

[16] 477 U.S. 242, 250 (1986).

sented by the sufficiency of evidence test.[17] However, one thing is not at all indeterminate when a directed verdict motion is decided: the contours of the relevant record. That is because, for better or worse, the record has been made, and made publicly in such a way as to be equally available in memory to the moving party, the opponent, and the judge. This is in sharp contrast to the situation in which a party makes a motion for summary judgment.

In dealing with a summary judgment motion, the court must inevitably[18] go through a two-step process. First, it must make a prediction about what the record will look like at trial, and second, it must appropriately apply the sufficiency standard. The problems of summary judgment in general, and the Supreme Court's "new" approach in particular, involve the first step, not the second.

Although current Rule 56 is hardly clear in unbundling the two steps, it appears to contemplate a process in which the moving party, whether plaintiff or defendant, bears the burden of drawing from the various materials available to the parties but not yet available to the judge, and of presenting them in such a way as to make a convincing showing that the record can be confidently predicted in its relevant dimensions at that time.[19] This

---

[17] The usual statement of that test is "could a reasonable jury find to the appropriate standard of proof the facts upon which the plaintiff bears the burden of producing evidence" if directed verdict is sought in favor of a defendant, and "must a reasonable jury find to the appropriate standard of proof all of the facts upon which the plaintiff bears the burden of producing evidence" when directed verdict is sought by a plaintiff (assuming no issues of affirmative defense). These are tests of indeterminate meaning, that is, they suggest to a judge the general nature of what is required in a decision, but no particular case can be said to be resolved by the terms of the test. The indeterminacy of the meaning of this test, coupled with the traditional notion that only the jury is authorized to discount the face value of live testimony based on veracity judgments (that is, calling the witness a liar) makes the sufficiency judgment a delicate and difficult one even in the presence of an actual record.

[18] Inevitably, but not necessarily consciously. The inevitability springs logically from the characterization of summary judgment as early directed verdict. However, in most instances, record prediction has been a not fully conscious process. It is often accomplished by implication, since the prediction was not analytically or consciously separated from the sufficiency judgment.

[19] Rule 56(c) does indicate that summary judgment is proper only if the record before the court "shows" that there is no genuine issue as to any material fact. FED. R. CIV. P. 56. However, it does not indicate exactly how that showing is to be accomplished by the movant. It also does not go on to consider that this issue may be either one of what the record at trial will look like (only a trial can show this for sure), or one of the sufficiency of a clearly predictable record, or combine problems of prediction and suffi-

is the movant's "price of admission," and only if the movant is willing to pay that price, with all the drudgery it entails in any fairly complex file, should the opponent be put to the burden of formulating a response.

The Supreme Court seems to have been numb to these "price of admission" functions, particularly in *Celotex*, and as a result has introduced a procedure which is asymmetrical, grossly favoring defendants over plaintiffs no matter which party is the movant.[20] Under this approach, if the plaintiff (the party with the burden of producing evidence at trial) makes the motion, the plaintiff must tender the extraneous proofs that justify a prediction of the record in order to obtain consideration of the motion. But if the defendant makes the motion, the plaintiff still bears the burden of tendering the extraneous proofs that justify a prediction of the record, or the plaintiff risks summary judgment against him.

The supposed justification for this is that, since the defendant bears no burden of producing evidence at trial, the defendant should bear no significant burden of producing evidence at

---

ciency. In any event, Rule 56(e) provides that motions only require response if "supported as provided by this rule" but none of the rest of the rule explicitly provides anything concerning what kind of support is required. All it says for sure is that under Rule 56(b) defendants do not always need affidavits. Oddly, there is no explicit direction on how to deal with documentary evidence, which is central to many if not most defensible summary judgment motions.

[20] At this point I must defend myself against charges that I am being Chicken Little. The argument goes this way: *Liberty Lobby* does not create any new procedure regarding allocation of burdens to establish the predicted contours of the record at trial. It deals only with the sufficiency question. Indeed, in footnote 4 of that opinion Justice White assumes that there is some such burden on a moving defendant under Rule 56, and refers to *Celotex*, 477 U.S. at 317. And, in *Celotex*, though Justice White joins Justice Rehnquist's majority opinion as the fifth vote, his separate concurrence makes clear that he believes some serious price-of-admission burden continues to rest on moving defendants. Finally, *Matsushita* is irrelevant, since it deals only with the sufficiency of evidence standard in anti-trust cases and not with any issue of record prediction, to which I reply, I hope the sky is *not* falling. However, I don't buy it. Certainly Justice Brennan's dissent in *Celotex* asserts that the majority opinion will lead to lower courts requiring responses to "unsupported" summary judgment motions by defendants. Second, the prudent plaintiff's attorney, faced by a motion supported so thinly as to be little more than the "conclusory assertion that the plaintiff has no case" condemned by Justice White in his *Celotex* concurrence, *id.* at 328, cannot afford to take the chance that Justice Brennan is right about the way lower courts will read the majority opinion. In that regard, personal experience tells me that the new procedure is already, in some practically important sense, established.

the point of the summary judgment motion.[21] In arriving at such a conclusion, the Court has failed to notice that it is dealing with two separate evidentiary exercises, and has conflated the two to arrive at a result unsupportable in history, logic or policy. The plaintiff bears the burden of producing evidence at trial sufficient to justify a reasonable person's finding facts about the event that gave rise to the controversy, facts which correspond to the substantive elements of the plaintiff's case. The prediction of the trial record at the time of summary judgment is a different evidentiary question. There is nothing inconsistent with the plaintiff's trial burden (and the sufficiency question it raises) to say that a defendant movant must produce evidence (generally from the material equally available to both parties after discovery) to justify a finding concerning what the record will look like, and further must bear the risk of nonpersuasion if the record cannot be confidently predicted.[22] To come to any different conclusion would seem to be a violation of the constitutionally protected right to a jury trial in civil cases in federal court.[23]

---

[21] *Celotex*, 477 U.S. at 324. The specific language is "[i]n cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." *Id.* The important thing here, however, is not language but context. "[R]eliance solely on" can denote either a detailed presentation concerning these things or a general reference in bulk. In *Celotex* itself, this reliance was by general reference, not by detailed exposition. See the discussion of this point in Justice Brennan's dissent, *id.* at 332-33.

[22] This distribution of the burden of record prediction is apparently the gravamen of Justice Brennan's dissent. The difficulty with this otherwise excellent exposition is that the dissent speaks of the movant's burden to show "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." This, of course, conflates sufficiency with record prediction in such a way as to make the dissent's intent difficult to comprehend at first reading (at least, it was by me).

[23] Protected, assuming we are dealing with a case "at common law." U.S. CONST., amend. VII. The constitutional considerations under the seventh amendment would suggest that it is worse to grant summary judgment wrongly than to withhold it wrongly, and this relatively higher disvalue of false positives as against false negatives suggests an enhanced standard of proof for the record prediction exercise, which I have expressed in the text by the phrase "confidently predict." In normal proof terminology it is probably best expressed by a standard at least as high as the rubric "clear and convincing evidence." There is even authority for a higher standard than this. *See* Costa v. Josey, 83 N.J. 49, 50, 415 A.2d 337, 339 (1980) (movant "must exclude any reasonable doubt as to the existence of a factual issue").

As regards "confident prediction," it is worth noting that the first nineteenth century summary procedures all were limited to cases involving notes or bills of exchange. It may be true that one can confidently predict the record of a largely document-centered case, but the more a case turns on the testimony of witnesses, the more difficult it is to

Whatever the historical status of directed verdict,[24] it is clear that the summary judgment mechanism is a novelty with no independent claim to constitutionality beyond being an early motion for directed verdict.[25] Every time summary judgment is granted where, after an actual trial, directed verdict could not have been, there has been a violation of the constitutional right to jury trial because of a misprediction of the trial record.

The Constitution aside,[26] look at the practical position of plaintiffs. Something close to a one page form motion by defendant can throw on the plaintiff the responsibility to dredge, structure, collate and cross-reference all materials in the file to make them available to the judge before trial. Because the material must be reduced to a coherently structured written form, this task can sometimes take as long or longer than actually trying the case.[27] And if this task is done with less than complete thor-

---

predict what the record at trial will actually look like, no matter how many statements, affidavits or depositions you have. As anyone who has ever tried a case will tell you, witnesses are inherently unpredictable.

[24] Directed verdict per se probably did not exist at the time of the drafting of the Bill of Rights. The Supreme Court only narrowly approved the constitutionality of the directed verdict mechanism at a relatively recent date. Galloway v. United States, 319 U.S. 372 (1943) (6-3 decision).

[25] The historical antecedents of Rule 56 are the subject of some controversy. Most authorities point to England's 1855 Summary Procedure on Bills of Exchange Act (Keating's Act) as the precursor of modern summary judgment. *See* C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 557 (2d ed. 1947); F. JAMES, CIVIL PROCEDURE 233 (1965); Louis, *supra* note 14, at 745. *See also* FED. R. CIV. P. 56, advisory committee note. I have previously asserted that the nineteenth century motion to strike for sham was as much if not more the functional antecedent of summary judgment than was Keating's Act. Risinger, *supra* note 5, at 30-34. Whichever view one takes, it is clear that the summary judgment mechanism is a twentieth century invention, and in its developed form was the creation of the initial drafters of the Federal Rules of Civil Procedure. At its creation, it was a radical provision, revolutionary in scope. *Id.* at 32.

[26] "What's the Constitution among friends?" — Timothy Campbell, late nineteenth century New York Congressman, quoted in BARTLETT'S UNFAMILIAR QUOTATIONS (Cowles Books 1971) (sometimes attributed to Grover Cleveland).

[27] One asserted justification for the summary judgment mechanism is efficiency, but I fail to see the efficiency of a process that routinely creates the necessity for two trials . . . the first one on paper as a precondition to obtaining the one to a jury. What really is needed is a more realistic and efficient prospect of actual trial. We have all heard of the impact of the Speedy Trial Act, coupled with an increased penchant by some federal prosecutors for mammoth criminal cases, on the prospects of obtaining an honest to goodness civil jury trial in federal court. Typically, one is scourged to finish discovery in months in order to sit awaiting trial for years. For example, in the Newark Vicinage of the District of New Jersey in the last calendar year, federal judges actually tried an average of only six civil jury trials apiece. Telephone conversation with William T. Walsh, Clerk of the Court, District of New Jersey (Mar. 16, 1988). These judges were not

oughness, since the judge has no other access to the potential record material, the result will be not merely a finding that the record cannot confidently be predicted, but the entry of judgment for the defendant.

Now consider where this leaves even the successful plaintiff. She has just outlined for the defendant her whole case — every piece of evidence, every forensic argument concerning interrelationship and meaning. Perhaps this would not be so bad if there were a parallel mechanism that could force a similar blueprint from the defense, but there is not.

It is probably true that the implications of the Supreme Court's newest pronouncements have not yet fully percolated into practice, but it may not be long before they do. I have heard one federal judge say in open court during the argument on a motion for summary judgment that "the Supreme Court has told us to make wider use of summary judgment to eliminate cases." That signal seems to have been widely read into the summary judgment trilogy, regardless of the legal unclarity of the opinions and the practical unclarity of the shifting majorities and dissents that these opinions represent.[28] Over time, defendants can be expected to become better at making thinner and thinner "put the plaintiff to his proof about his proof" motions. This, coupled with the perceived exhortation for more summary judgments, is bound to lead to many summary judgments improvidently granted in favor of defendants, not because judges do not understand directed verdict sufficiency law (as well as it can be understood), but because they have mispredicted what the record would have been at trial. And it bears repeating that each time this happens there is not merely an error, but an error of constitutional dimension.[29]

---

playing golf. They were doing other things the system expects them to do, but "case management techniques" and dubious summary judgments are not the answer to this situation. (And of course, once again, it is generally plaintiffs and not defendants who are most disadvantaged by the difficulties in getting a trial.) For an excellent and extended reflection on the development of modern civil procedure ending with an impassioned call for returning the jury trial to the center of the adjudication process, see Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

[28] *See High Court Encourages Summary Judgments*, LITIGATION NEWS (Feb. 1988) (article about *Liberty Lobby*, *Celotex*, and *Matsushita*).

[29] Perhaps the least defensible part of Chief Justice Rehnquist's opinion in *Celotex* occurs when he virtually equates the importance of the error represented by an errone-

What is needed is a completely new Rule 56, which explicitly recognizes the two-step nature of summary judgment, and places the burden of production and persuasion on the claim that the trial record can be confidently predicted pretrial squarely on the movant, whether plaintiff or defendant.[30]

---

ously denied summary judgment with the importance of the error in erroneously granting summary judgment. Of course, both are errors. However, there are many legal contexts where we are forced by constitutional principle to disvalue one form of error more than another. In criminal cases, the requirement of proof beyond a reasonable doubt reflects a constitutionally mandated greater disvalue for false positives (erroneous convictions) over false negatives (erroneous acquittals). So here, also, the seventh amendment mandates that we not equate erroneous denials of summary judgment with erroneous grants of summary judgment. No one has a constitutional right to a summary judgment, but everyone has a constitutional right to a jury trial under the seventh amendment. Since we cannot eliminate error, we are obliged to structure our procedures to err on the side of the Constitution.

[30] Any new rule ought also to address the standards and functions (if any) of the summary judgment mechanism in non-jury cases, where the formal issue of evidentiary sufficiency is irrelevant, were there to be an actual trial.