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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendments to Rule 56

Dear Mr. McCabe:

I would like to submit the following comments on the proposed amendments to Rule 56 of the Federal Rules of Civil Procedure.

Background

The comments that are set out below rest heavily on the experience I have had in civil litigation since 1969. For the first quarter century I was a staff attorney at the NAACP Legal Defense and Educational Fund in New York City. The bulk of the litigation on which I worked was civil appeals, primarily from summary judgment decisions or what were then JNOV motions, with a smaller part devoted to motion practice. I saw the use of summary judgment grow and evolve over this process, and engaged in motion practice under local rules using the sort of statement of undisputed facts which the committee proposes become the national practice. Since 1995, while at the University of Washington, I have devoted the largest part of my work to civil appeals, primarily in the Supreme Court. Again, most of those appeals were from decisions granting summary judgment, with a substantial minority concerned with post-trial motions for judgment as a matter of law. Reviewing the records in these cases disclosed the manner in which summary judgment is being used, and the recurring problems that have arisen.

In addition, I have taken a detailed look at the nature of summary judgment practice at the time when Rule 56 was first written, and have compared that with what now occurs in the federal courts. A copy of that analysis is attached. Although the details of this are considerably more intricate than would warrant the Committee's attention, the bottom line is that the language of Rule 56 was written for a use of summary judgement

very different from what occurs today. That is not to say that the current usages are improper, but that difference is important to understanding the difficulties that have arisen under Rule 56 over the past seventy years.

The Two Distinct Types of Summary Judgment Motions

The essential feature of modern summary judgment is that it is used today in two quite distinct types of situations.

First, summary judgment is used where a case turns (or is alleged to turn) on a question (or questions) of law, but the pleadings themselves do not disclose or frame that legal issue. For example, a case might turn on whether the applicable statute of limitations is two years or five years. The complaint itself, however, might not recite the date on which the cause of action arose, e.g. the date of a car crash. Thus if the car crash was three years earlier, the defendant could not move to dismiss under rule 12(b)(6), but would have to rely on a motion for summary judgment to get into the record the undisputed fact that the accident had occurred on a particular date. This type of summary judgment is like a Rule 12(b)(6) motion, except that Rule 56 is used because one or more key undisputed facts is not in the pleadings. For simplicity I will refer to these summary judgment motions as question-of-law motions.[1]

In the case of a question-of-law summary judgment motion, the moving party uses affidavits or other documents to set out the undisputed facts which it contends are legally conclusive. Those facts usually *are* undisputed, and few problems arise. In certain types of cases there may also be undisputed facts favorable to the non-moving party, which in turn sets out those facts. (That might occur, for example, where the question of law was whether a particular arm of the state for Eleventh Amendment purposes.) But in this category of cases the parties really do agree about what happened; the summary judgment process readily spells that out, and the court decides the question of law framed by those undisputed facts.

Second, Rule 56 is used to attack the sufficiency of the evidence of the non-moving party. The purpose of the motion is to

[1]Where a party moves for judgment as a matter of law after trial, the courts refer to the sufficiency of the evidence as a "question of law," but the phrase in this instance has a different meaning. A Rule 12(b)(6) motion is a question of law in the sense that it involves such things as the interpretation of a statute; a Rule 50(a) motion for judgment as a matter of law in the sense that it is a question for the court, as distinguished from a question of fact for the jury.

demonstrate that the evidence of the non-moving party is so weak that, if trial were held and a jury ruled for the non-moving party, the party seeking summary judgment would be entitled to judgment as a matter of law. This type of summary judgment is in effect a preemptive Rule 50 motion.[2] It is with this type of motion in mind that the Supreme Court and lower courts at times state that the standard for summary judgment is the same as the standard for judgment as a matter of law under Rule 50. For simplicity I will refer to these summary judgment motions as evidence-sufficiency motions.

In the case of an evidence-sufficiency motion, there emphatically is a dispute about the material fact at issue, e.g. whether the defendant was driving negligently when he hit the plaintiff. The papers of the moving party are used to spell out, in admissible form, the evidence that would be adduced at trial to support the moving party; those affidavits and documents ordinarily (and understandably) omit the evidence of the moving party that would be harmful to the moving party. The non-moving party then uses affidavits and documents to set out the evidence which it will introduce at trial. In its reply brief, the moving party then attacks the evidence set out by the moving party, in a manner similar to the arguments that would be made in a post-trial Rule 50 motion for judgment as a matter of law.

Rule 56 was not written with either of these types of motions in mind; both, especially the latter, emerged largely after Rule 56 was written. In the case of a question-of-law motion, there are lots of facts in dispute; we adapt Rule 56(c) to cover this by focussing on a few critical material facts that are undisputed, e.g. the date of the car accident. The courts either ignore the other material facts that are vigorously disputed, or characterize those facts as no longer material (because no facts other than the date of the car crash are material any longer) if the moving party prevails on the law.

In the case of an evidence-sufficiency motion, the courts have come to say that if the evidence of the non-moving party is insufficient, the disputes of material fact are not "genuine." That of course, is not how the term "genuine" is used in ordinary English, but the courts have given the word a special meaning here. These two types of summary judgment are entirely sensible, but the wording of Rule 56 bears little resemblance to what is going on.

It would substantially improve and clarify the use of summary judgment if the Committee were to dispense with the old language of Rule 56, and instead spell out and distinguish these two types

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[2]In a case to be tried to the court, an evidence-sufficiency motion is a preemptive argument that an adverse decision by the trial judge would be "clear error" under Rule 52.

of summary judgment motions.

First, we need somewhat different procedures to deal with these two types of summary judgment. The local and judge-specific practices that have been cobbled together over the years often work well for one type of summary judgment, but not for the other. Rule 56 cannot address these differences so long as a single phrase (which does not readily describe either type of summary judgment) is used for both. I analyze below several of the issues raised by the Committee proposals; the correct answer, I suggest, depends on which type of summary judgment motion is involved.

Second, in the absence of this distinction, it is not uncommon for district court summary judgment decisions to be overturned because the district court conflated the standards applicable to the different types of summary judgment. Current Rule 56 has no language that (at least in ordinary English) deals with an evidence-sufficiency motion. As a result, district courts at times treat an evidence-sufficiency motion as a question-of-law motion, are write as though the facts were undisputed when the real problem concerns how much evidence each side has about clearly disputed facts, and grant summary judgment for reasons that the appellate courts readily see as unsound.

Third, although a Rule 56 evidence-sufficiency motion is supposed to be governed by the Rule 50 standard, because the wording of the Rules 50 and 56 is different, divergent standards have emerged. Because Rule 56 neither distinguishes the two types of summary judgment nor uses the language of Rule 50 to refer to evidence-sufficiency motions, the current language of the Rule 56 has bred an awkward line of cases for evidence-sufficiency summary judgment, which establish a special standard for deciding whether there is "a genuine issue of material fact" that is different from the standard that would be applied if, on the same record, the party seeking summary judgment were to seek judgment as a matter of law. That practice is reflected in the large number of cases which in granting summary judgment conclude, not that no reasonable jury could find for the non-moving party, but instead that there is no "genuine dispute of material fact." In the area of employment discrimination there are a raft of decisions about what evidence--although admissible at trial--is not sufficient to defeat summary judgment. Those rules usually are not applied to a Rule 50 motion.

Fourth, the Committee's proposal provides in Rule 56(c)(4)(A)(ii) that a moving party's statement establish that a fact (e.g. negligence, or intentional discrimination) "cannot be genuinely disputed" by

> showing that the materials cited [by the moving party] do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support a fact.

In a typical evidence-sufficiency motion, however, the moving party's statement of undisputed facts usually summarizes only the evidence favorable to the moving party; if the moving party's lawyer has done a good job, nothing in its statement will contain any evidence, favorable to the other side, indicating that the moving party's account of the evidence is disputed. That cannot warrant summary judgment; obviously the ability of the moving party to describe (allegedly) undisputed evidence providing no support for the other side is meaningless.

The only other method of obtaining summary judgment suggested by this proposal would be to show that the non-moving party has no "admissible evidence" to support the disputed fact (e.g., negligence or unlawful intent). In most evidence-sufficiency summary judgment cases, however, the non-moving party at least has admissible evidence. It would make no sense to limit evidence-sufficiency summary judgment to cases in which the evidence of the non-moving party is inadmissible, but deny summary judgment where that party has evidence which, although admissible is insufficient to withstand a Rule 50 motion for judgment as a matter of law. I do not think that the Committee intended to forbid such motions. But nothing in this proposed language addresses--at least without a very awkward interpretation of the terms used--a typical evidence-sufficiency summary judgment motion.

The Point-Counter Point Proposal

With regard to question-of-law summary judgment motions, these motions are about undisputed facts alleged to be legally dispositive. There is therefore a need to identify the undisputed material facts which--according to the moving party--are conclusive of a claim or defense. The point-counter point proposal is directed at identifying undisputed facts, and in this regard its purpose--at least--is appropriate for this type of summary judgment motion. In my experience, however, there is rarely any need for this sort of procedure to facilitate a question-of-law summary judgment motion. Where a moving party contends some undisputed fact or facts are dispositive, and the difference between the parties is a question of law, there is rarely a fuss over what those facts are.

On the other hand, in the case of an evidence-sufficiency summary judgment motion, there emphatically is a disputed material fact, e.g. negligence or unlawful motive. The task before the court is not to identify undisputed facts or "genuineness", but to decide whether the evidence that will be offered at trial by the non-moving party would be sufficient to withstand a Rule 50 motion for judgment as a matter of law. If the moving party is seeking summary judgment on that basis, its statement of "undisputed" facts will usually be a combination of (a) the moving party's evidence, some undisputed and other disputed, (b) inferences the

moving party asserts should be drawn from its evidence, and perhaps (c) a claim that the dispositive fact (e.g. negligence) is (therefore) not really disputed. The non-moving party's statement would be a similar mix of undisputed facts, disputed facts, and inferences masquerading as facts. It would be surprising if this exchange was helpful to a district judge.

The proposed committee note objects that statements and responses should not include "hundreds of facts," and ought instead "focus on a small number of truly dispositive facts." In a question-of-law summary judgment motion, this distinction makes sense; but in the case of a evidence-sufficiency summary judgment motion, this proposed limit is unfair to both sides.

A typical Rule 50 motion does not turn on "a small number of truly dispositive facts." There usually are no "dispositive facts" favoring the party seeking judgment as a matter of law. The statements and responses offered with regard to an evidence-sufficiency summary judgment motion are lengthy because the parties are (quite properly) seeking to summarize the often length evidence that would occur at a trial of a week, or far more; the documents are "unwieldy volumes" because a dispute about the sufficiency of the evidence of the non-moving party calls upon both sides to present essentially the documentary evidence they would offer at trial. No sensible judge would propose that a Rule 50 motion refer only to "a small number of truly dispositive facts," or suggest that the court intends to ignore the "unwieldy volumes of materials" in evidence at trial.

In sum, if the Committee is disposed to endorse the point-counter point system, it should be limited to question-of-law summary judgment. In an evidence-sufficiency summary judgment motion, the point-counter point system is not a sensible system for summarizing the evidence that each side expects to adduce at trial.

The Proposed Requirement of An Explanatory Opinion In All Cases

In the case of question-of-law summary judgment, this is a sound proposal. If the motion is granted, the court of appeals cannot review that decision in the absence of an opinion explaining the judge's action. An opinion or other explanation is also important if the motion is denied. The court's action on that summary judgment motion--e.g., declining to dismiss on statute of limitations grounds--will often be the last occasion on which the district judge addresses the issue. The party which unsuccessfully sought summary judgment may well want to pursue that legal issue on appeal, and the court of appeals will need to understand why the motion was denied.

In the case of an evidence sufficiency motion, a decision granting that motion requires an opinion or other explanation in

order to permit review. But where the motion is denied, the writing of an opinion usually will serve no such purpose. If the case goes to trial and the non-moving party wins, the moving party will then file a Rule 50 motion for judgment as a matter of law (having also filed such a motion during trial), and the trial judge will have to write an opinion disposing of the Rule 50 motion. On appeal it is correctness of this later opinion which the appellate court will evaluate. In cases I have handled in which there were two opinions, one denying summary judgment and one denying a motion for judgment as a matter of law, the earlier opinion rarely if ever mattered or was discussed by the parties. In part that is because the evidence at trial is usually somewhat different than the materials before the court at the summary judgment stage, and the sufficiency of that evidence is assessed in light of the jury instructions, at least insofar as those instructions were not disputed. Requiring a judge to write an opinion explaining the denial of summary judgment is usually a waste of judicial resources. If the moving party wins at trial, there will be no appeal in which the summary judgment opinion would be reviewed; if the moving party loses at trial, it is the Rule 50 opinion that the court of appeals, quite properly, will review.

The Note observes that where summary judgment has been denied "identification of central issues may help the parties to focus further proceedings." That possibility does not warrant requiring an opinion in all cases. A district judge has the discretion to write an opinion where he or she thinks it might be useful, but it makes no sense to require opinions just to give the litigants practice pointers for the forthcoming trial.

"Should" v. "Must" Grant Summary Judgment

The current language seems appropriate, but a Note explaining this issue would be helpful.

The current language of the Rule suggests that, once the matter has been fully briefed (and perhaps argued), the court will know whether or not there is a "genuine issue," and can (and at least usually should) decide the case accordingly.

But with regard to evidence-sufficiency summary judgment, which require the court to predict whether at trial the moving party would be entitled to judgment as a matter of law, the answer to that question will at times be unclear to the judge who only has before him or her the (perhaps voluminous) summary judgment papers. It is entirely common for the evidence and contentions of the parties to be somewhat different at trial than they were at summary judgment. The live testimony of a witness at trial usually departs from the words of a lawyer-drafted affidavit. Cross-examination before a judge and jury may well elicit responses different than a deposition. Demeanor, usually known at

summary judgment, is observable at trial, and responses to it may shape the answers of the witness. In my experience the arguments which a party makes after trial in a Rule 50 motion are usually somewhat different than the arguments it made in support of summary judgment, if only because the trial developed in ways in which neither party foresaw. These differences do not preclude an award of summary judgment. But where the party seeking evidence-sufficiency summary judgment seeks to persuade the court that the evidence adduced at trial would warrant judgment as a matter of law in its favor, these differences would at times lead the district judge to conclude that the nature of the future trial record is insufficiently clear to warrant summary judgment.

In addition, a judge considering a summary judgment motion may reasonably conclude that he or she does not understand the factual issues as well as he or she would at the end of a trial. It makes no sense to require a judge at the summary judgment stage to attempt to anticipate the result of a post-trial rule 50 motion, when the court believes it could more soundly evaluate after trial the sufficiency of the evidence. The wisdom of doing so increases with the number and complexity of the issue.

When a party files a motion for judgment as a matter of law *during* a trial, Rule 50 does not require that it be granted if the trial judge believes that the evidence of the non-moving party is insufficient. It makes little sense to direct the judge to do so at the earlier summary judgement stage, when the court's understanding of the evidence and issues will often be less detailed than when a Rule 50 motion is made during trial.

Two Suggestions for Reform

(1) The proposed Rule contemplates three rounds of briefing--the motion, response, and reply. Although this makes perfect sense with regard to a question-of-law motion, it usually will be inadequate with regard to an evidence-sufficiency motion.

With regard to the latter, the initial motion will set forth the evidence favoring the moving party, perhaps including statements of the opposing party hurtful to his or her own case. Frequently, however, the initial motion ignores some or all of the evidence the non-moving party might rely on. The non-moving party's response then sets forth the evidence favorable to that side. The moving party's reply next spells out--often for the first time--the defects that the moving party contends undermine the probativeness of the non-moving party evidence submitted with its response.

At that juncture, under current procedure, the briefing ends and the district judge decides the case. As a result, although the issue is whether the non-moving party's evidence is

insufficient to support a verdict for that party, the moving party only sets out its argument in this regard in the reply brief, and the non-moving party never has an opportunity--in the district court--to address what may well be the central contentions of the moving party.

This procedure will often be unfair to the non-moving party. Equally seriously, it often leads to reversal on appeal. The district court, unaware of how the non-moving party might respond to the moving party arguments first set out in the reply brief--if it had had a chance to do so--may well decide the case on grounds that will be easy to attack on appeal. The non-moving party, which had no opportunity in the district court to respond to arguments first made in the reply brief, will of course be able on appeal to address, at times quite persuasively, portions of the district court opinion that adopted those untested moving party arguments.

I would suggest that in the case of evidence-sufficiency summary judgment motions Rule 56(b) be modified to make provision for a fourth filing, permitting the non-moving party to respond to new contentions and arguments made in the moving party's reply brief.

(2) Under current practice a moving is permitted to file with its summary judgment motion, documents or affidavits containing material that had never previously been disclosed to the non-moving party. That is usually not a serious problem with regard to question-of-law summary judgment motions, because those motions are actually about undisputed facts; if the non-moving party does not actually disagree with an undisputed fact, prior notice really does not matter.

But in the case of evidence-sufficiency motions, the attached documents or affidavits are the evidence which the moving party asserts it will offer at trial about some disputed issue (e.g., negligence), and which it contends would there entitle the moving party to judgment as a matter of law. At trial the non-moving party would have an absolute right to cross-examine the individual who provided the affidavit about his or her statements or about those documents. If, however, this material is not disclosed to the non-moving party until the summary judgment motion, the non-moving party has no such opportunity, and the resulting summary judgment record may differ significantly from the record at trial. For the reasons set out in the attached memorandum, current Rule 56(f) has not proved a reliable method of solving this problem.

I would suggest that Rule 56 be modified, in the case of evidence-sufficiency summary judgment motions, to require that any affidavits or documents on which the moving party wishes to rely must be disclosed at least 90 days prior to the filing of the motion and prior to the end of discovery.

The attached analysis includes at the end suggested language addressing each of these issues.

Yours sincerely,

Eric Schnapper
Professor of Law

CONTENTS

I. Introduction 1

II. The Origin and Evolution of Summary Judgment 5

A. Summary Judgment Before Rule 56 5

B. The Innovations in Rule 56 20

C. The Emergence of The Directed Verdict Standard 25

III. Summary Judgment and The Course of Discovery 36

A. The Problems With Rule 56 36

B. The Inadequacy of Rule 56(f) 42

C. Controlling the Timing of Summary Judgment 52

IV. Prior Disclosure of the Moving Party's Evidence 58

V. Summary Judgment on an Alternative Ground 67

VI. The Moving Party's Initial Burden 84

VII. The Importance of the Burden of Persuasion 104

Conclusion 110

Proposed Rule 113

THE SUMMARY JUDGMENT RECORD

I. INTRODUCTION

In federal courts summary judgment long ago replaced trials as the primary method of resolving factual disputes. In the year ending March 31, 2004, there were only 4100 civil trials in federal courts, compared to 191,539 cases that were resolved by court action prior to trial.[1] A large number of these pre-trial dispositions were decisions to award summary judgment[2], most often to the defendant. Of those summary judgment decisions, a majority involved cases in which the parties disagreed about the facts, but the court resolved that dispute in favor of the moving party.[3]

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[1]Data on terminations of civil cases is collected by the Administrative Office of the United States Courts: http://www.uscourts.gov/caseload2004/tables/CO4Mar04.pdf The highest percentage of cases going to trial were diversity motor vehicle personal injury cases. (4.1%). On the other hand, only a single habeas corpus case went to trial, compared to 3,590 that were terminated by court action prior to trial.

[2]In 1996, among civil cases terminated in the District Court for the District of Columbia, 22% were resolved by summary judgment, compared to 3% resolved by trial. Of the remaining cases, 19 % were settled, 9% were voluntarily dismissed, 3% were dismissed for lack of jurisdiction and 3% were dismissed for want of prosecution. The remaining 27% of the terminations, classified only as "other," included for example cases dismissed under Rule 12(b)(6). Patricia Wald, *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1915 and n. 113 (1998).

[3]For June 1, 2005, Westlaw lists 86 federal decisions in which the phrase "summary judgment" appears; 59 of these involved motions for summary judgment. There were 28 cases in which the motion concerned disputed facts and 18 cases in which the motion was based in undisputed facts. In 10 cases summary judgment was sought on several grounds, at one of which involved undisputed facts and one of which concerned disputed facts; in 3 instances it is not possible to ascertain the

The process of summary judgment seems beguilingly simple. A party which wishes to seek summary judgment files, generally at a time of its choosing, a motion under Rule 56, and includes with that motion a memorandum and supporting affidavits, documents, or other material. The non-moving party is generally obligated to file its response, including any affidavits or other supporting materials, within a few weeks. The moving party then submits a reply brief challenging the sufficiency of the evidence offered by the non-moving party. Summary judgment is awarded if the district or appellate court conclude the evidence proffered by the non-moving party is deficient in some dispositive particular.

The sufficiency of the non-moving party's evidence is today judged under the same standard that would apply if the case had gone to trial and the moving party had sought judgment as a matter of law: could a reasonable jury find for the non-moving party?[4] This standard is intended to replicate the result that would occur if the case proceeded to trial and judgment as a matter of law ("JML") was sought by the party seeking summary judgment.[5] The reason for applying the JML

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basis of the motion. Summary judgment was awarded (in whole or part) in 28 of the 38 instances in which it was sought regarding disputed facts. List on File, ---- Law Review. There assuredly were a substantial number of other summary judgment decisions on June 1, 2005, not reproduced by Westlaw.

There are on average 16 trials each working day in federal court.

[4]F.R.Civ.P. Rule 50(a)(1); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-62 (1986).

[5]The Federal Rules of Civil Procedure uses the phrase "judgment as a matter of law" to refer to what in the past were separately denoted a motion for a directed verdict and a motion for judgment notwithstanding the verdict (j.n.o.v.). Older decisions sometimes

standard at the pre-trial summary judgment stage is to avoid the waste of time and resources that would occur if a trial were held of a case in which the moving party was certain to prevail, either as the verdict winner or because its motion for judgment as a matter of law would have to be granted.

But the result of a JML motion, or of a summary judgment motion applying that standard, depends not only on the contours of the reasonable jury standard, but also on the body of evidence to which that standard is applied. Application of the JML standard in deciding a summary judgment motion will reliably result in the same outcome as a post-trial JML motion only if the record before the court that decides the summary judgment motion is in all material respects the same as the record that would be before the court at the end of the trial.

As this article explains, however, the record creation process that exists for summary judgment is fundamentally different from the record creation process at trial. The record creation process at (and leading to) trial is elaborate and well established, having evolved over centuries of Anglo-American civil litigation. There are no analogously detailed or clear processes for creating the summary judgment record. Rule 56 is largely silent on this question, primarily because the JML standard--which makes the content of that record a critical issue--simply was not being applied to summary judgment motions when Rule 56 was originally written in 1937.

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refer to this as the directed verdict standard. Those phrases are used interchangeably in this article, depending on which is most appropriate in the context in which the standard is discussed.

The important current problems regarding summary judgment concern, not what standard should be applied to evaluate the record, but what procedures should govern the creation, and thus the content, of the record to which that standard is applied. In some cases, particularly where the factual issues are fairly simple, the summary judgment record may easily be essentially the same as would exist if the case went to trial. But nothing in Rule 56 itself guarantees that result; to the contrary, the lack of a more specific record-creation process in Rule 56 has led to a number of recurring problems which can result in a summary judgment record quite different from the record that would be made at trial.

II. THE ORIGIN AND EVOLUTION OF SUMMARY JUDGMENT UNDER RULE 56

A. SUMMARY JUDGMENT BEFORE RULE 56

The absence from Rule 56 of more specific procedures for resolving the types of summary judgment motions that are now common is a result of the origins and evolution of that Rule. When Rule 56 was originally promulgated in 1937, the purpose of summary judgment, and the substantive standard for awarding it, were very different than they are today. For the administration of the then prevailing standard of summary judgment, Rule 56 relied on procedures that for several decades prior to 1937 had been utilized without apparent difficulty in Great Britain and a number of the states. The framers of Rule 56, in an effort to permit greater use of summary judgment, removed several important of restrictions on the types of cases in which summary judgment was allowed. The absence of those limitations led to an evolutionary change in the purpose of and the standard for awarding summary judgment. But while the courts today apply an entirely new substantive standard, the procedures established by Rule 56 are essentially what they were more than sixty years ago, when they were utilized to administer a very different summary judgment standard.

The procedural provisions of Rule 56, largely unchanged from the form in which they were originally drafted in 1937, can only be understood in light of the pre-Rule 56 purpose of and substantive

standard for summary judgment, and of the procedures that existed prior to Rule 56 for administering that standard. The Advisory Committee which drafted Rule 56 was uniquely familiar with earlier summary judgment practice. The Reporter of Advisory Committee, then Dean Robert Clark, was the leading authority on summary judgment, which prior to 1937 existed in a number of the states,[6] in addition to the District of Columbia[7] and Great Britain.[8] Clark in 1929 had co-authored the preeminent study of those summary judgment statutes and rules[9]; his article, perhaps not surprisingly, was expressly cited in the 1937 Committee Notes to Rule 56 as explaining how summary judgment (then) worked.[10] The federal judges on the Advisory Committee would in some

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[6]Ala. Code (1923), §§ 10226-68; Ark. Dig. Stat. (Crawford & Moses, 1921), c. 102, §§ 6250-6258; Conn. Rules of Civil Practice, § 14A (1); Conn. Prac. Book (1934) §§ 52-55; Ky. Stat. (Carroll, 1927) §§ 444-49; Ill. Anno. Stat. (Smith-Hurd) ch. 110, § 181 (1936); Mich. Comp. Laws (1929) c. 266, §§ 14260, 14261;
Rules of the N.J. Supreme Court (1913), Rules 80-84, *reprinted in* 2 N.J.Misc. 1225-27; N.Y. Civil Practice Rules, Rule 113 and Rule 114 (1921); General Laws of R.I., ch. 524 § 1 (1938); Tenn. Code (Williams, 1934) §§ 9507-43; Va. Code (1924) § 6133; W.Va. Code (1931) §56-2-6; Wis. Stat. (1935) § 270.635.

[7]Rule 73, Supreme Court of the District of Columbia, *reprinted in* Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315, 317 (1902).

[8]The Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. c. 67 (1855); *see* Rules under the Judicature Act, Order III, Rule 6 and Order XIV, Rule 1 (1928).

[9]Charles Clark and Charles Samenow, *The Summary Judgment*, 38 Yale L. J. 423 (1929).

[10]Advisory Committee Note, 1937 Adoption ("For the history and nature of the summary judgment procedure and citations of state statutes, see clark and Samenow, the summary Judgment (1929), 38 Yale L.J. 423.")

instances have had experience administering state summary judgment provisions, which were utilized in federal courts under the Conformity Act.

Pre-Rule 56 summary judgment statutes and rules[11] generally[12] involved a number of substantial limitations that are quite different from summary judgment practice under Rule 56 today. First, under state summary judgment statutes and rules, only plaintiffs were permitted to seek summary judgment. Second, summary judgment could be awarded only regarding certain specified types of claims, particularly actions on notes and other contract actions.[13] Third,

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[11]*See* B. Shientag, SUMMARY JUDGMENT (1941); Frank Boesel, *Summary Judgment Procedure*, 6 Wis. L. Rev. 5 (1930); James Chadbourn, *A Summary Judgment Procedure for North Carolina*, 14 N.C.L.Rev. 211 (1936); Charles Clark, *The New Summary Judgment Rule*, 3 Conn. Bar. J. 1 (1929); Charles Clark, *The New Summary Judgment Rule In Connecticut*, 15 A.B.A.J. 82 (1929); Charles Clark and Charles Samenow, *The Summary Judgment*, 38 Yale L. J. 423 (1929); Felix Cohen, *Summary Judgments in the Supreme Court of New York*, 32 Colum. L. Rev. 825 (1932); Edward Finch, *Summary Judgment Procedure*, 19 A.B.A.J. 504 (1933); Edward Finch, *Summary Judgment Procedure*, 17 J. Am. Jud. Soc. 180 (1934); Edward Finch, *Extension of the Right of Summary Judgment*, 4 N.Y.St. Bar Ass'n Bul. 264 (1932); Ernest Fintel, *Methods of Objecting to Pleadings and of Obtaining Summary Judgment*, 4 Mo. L. Rev. 114 (1939); Hilton McCabe, *Summary Judgment*, 11 So. Cal.L.Rev. 436 (1938); Louis Ritter and Evert Magnuson, *The Motion for Summary Judgment and its Extension to All Classes of Actions*, 21 Marq. L. Rev. 33 (1936); Leonard Saxe, *Summary Judgments in New York, A Statistical Study*, 19 Cornell L. Q. 237 (1933); Bernard Shientag, *Summary Judgment*, 4 Fordham L. Rev. 186 (1935); Bernard Shientag, *Summary Judgment*, 74 N.Y.L.Rev. 187 (1940); Note, *Motions for Summary Judgment*, 1 N.Y.U.L.Rev. 16 (1923).

[12]A few state innovations in summary judgment had begun to occur immediately before the drafting of Rule 56, but there was in 1937 little if any practical experience with the ramifications of administering those innovations. The description in this section of pre-Rule 56 summary judgment refers to the form of summary judgment that generally prevailed prior to 1937.

[13]James Chadbourne, *A Summary Judgment Procedure for North Carolina*, 14 N.C.L.Rev. 211, 220 (1936) ("The most prevalent types of limitations

the non-moving party could only respond by affidavit; reliance on other types of materials (documents, discovery responses, etc.) was neither sufficient nor, apparently, permitted. Fourth, the affidavit of the non-moving party did not have to be made on personal knowledge. Fifth, summary judgment for the plaintiff could be sought, and frequently was granted, within a few weeks after the commencement of an action.

The summary judgment rule in the District of Columbia is illustrative of pre-Rule 56 summary judgment:

> In any action arising ex contractu, if the plaintiff or his agent shall have filed, at the time of bringing his action, an affidavit setting out distinctly his cause of action, and the sum he claims to be due, exclusive of all set-offs and just grounds of defense, and shall have served the defendant with copies of his declaration and of said affidavit, he shall be entitled to a judgment for the amount so claimed, with interest and costs, unless the defendant shall file, along with his plea, if in bar, an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part.[14]

These seemingly strange aspects of pre-Rule 56 summary judgment derived from the original purpose of summary judgment, which was quite different than the purpose of summary judgment today. Summary judgment had been devised in Great Britain in 1855, and was adopted by the states (at least before 1937), as a method of quickly disposing of

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are the restrictions to claims for liquidated demands and to contract actions.")

[14]District of Columbia Supreme Court Rule 73 (1898), *quoted in* Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315, 321 (1902).

cases in which the defendant (or his or her attorney) was in bad faith in disputing the plaintiff's claims. The 1855 British Summary Procedure on Bills of Exchange Act recited that that measure was enacted because bona fide holders of dishonored bills of exchange and promissory

> notes are often unjustly delayed and put to unnecessary expense in recovering the amount thereof by reason of frivolous or fictitious defenses of actions.[15]

In 1902 the Supreme Court explained "[t]he purpose of the rule [permitting summary judgment] is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.[16] The District of Columbia Court of Appeals in 1894 reiterated that summary judgment "is intended to prevent the delay of justice by the common expedient of resorting to sham or pretended defenses."[17]

In the absence of some form of summary judgment, defendants to simple and often indisputable claims (e.g. for payment of a note) could oppose the action and delay its resolution for years, even though the defendant lacked, and knew it lacked, any defense at all. If a defendant pled the general issue, or simply denied the allegations of the complaint, there often was no way to resolve the case short of trial, even though, when the trial was finally held, the defendant actually had no factual defense whatever to offer.[18] Thus it was

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[15]18 & 19 Vict. c. 67 (1855).

[16]Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315, 320 (1902).

[17]Johnson v. Wright, 2 App. D.C. 216, 217 (Ct. App. 1894).

[18]Dwan v. Massarene, 199 A.D. 872, 877, 192 N.Y.S. 577, 581 (1922) ("A fictitious denial, the effect of which was merely intended to force

repeatedly said by courts and commentators prior to Rule 56 that summary judgment was intended to deal with defenses that were "feigned," "sham," or "false," offered for purposes of delay by a "lying and dilatory pleader."[19] Pre-Rule 56 summary judgment was adopted and structured to defeat that bad faith tactic; it was not concerned with cases in which a defendant had an earnest (but ultimately insupportable) belief in the merits of his or her position.

Although the purpose of pre-Rule 56 summary judgment was to dispose quickly of certain cases in which the defendant was in bad faith, the court did not inquire directly into the subjective state of mind of a defendant. Rather, pre-Rule 56 summary judgment identified cases of sham defenses through a structured procedure under which the defendant could be compelled to swear to the specifics of his or her purported defense. The plaintiff first had to swear to the truth of the allegations of the complaint; some states merely required an endorsement of the complaint, while others required a separate affidavit. In some jurisdictions the plaintiff was also required to attest that he or she believed there was no defense to the action.

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the plaintiff to prove his cause before a jury had no place in the Code system of pleading. It was a relic of the artificial common law pleading."); Edward Finch, *Summary Judgment Procedure*, 17 Am.Jud.Soc.J. 180, 180 (1941)("Instead of facilitating the ascertainment of the truth, the general denial in a pleading false in fact actually afforded obstruction, unnecessary waste of time and expense, and interposed a shield behind which a dishonest defendant could for a time and sometimes for years . . . securely and always profitably rest.); Bernard Shientag, *Summary Judgment*, 4 Fordham L.Rev. 186, 191-92 (1935).

[19]James Chadbourn, *A Summary Judgment Procedure for North Carolina*, 14 N.C.L.Rev. 211, 226 (1936)..

Where the plaintiff met this burden, the request for summary judgment would then be resolved by evaluating the defendant's affidavit. The defendant was required to file an affidavit attesting to facts which, if true, would constitute a defense to the action. The defendant's affidavit could not consist of legal conclusions (e.g., "There was no valid contract.") but had to assert specific facts (e.g., "I did not sign the contract."). Specificity, not probative evidence, was the key to a legally sufficient response. In most instances the court would simply determine whether the defendant's affidavit was sufficiently specific in identifying the nature of the defense, and whether the facts asserted in that affidavit would, if true, constitute a defense.

The ultimate issue before the court was at times said to be whether the plaintiff had demonstrated that the defense was a sham, or whether the defendant had demonstrated otherwise.[20] But judicial evaluation of the defendant's affidavit was usually limited to a pronouncement regarding its technical sufficiency; courts did not ordinarily go further and state specifically that the proffered defense was or was not feigned.[21]

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[20]Curry v. MacKenzie, 239 N.Y. 267, 270 (1925)(Cardozo, J.)("To justify . . . the award of summary relief, the court must be convinced that the issue is not genuine, but feigned."); Dwan v. Massarene, 199 A.D. 872, 880, 192 N.Y.S. 577, 582 (1st App. Div. 1922)("[The defendant] must show that his denial or his defense is not false and sham, but interposed in good faith and not for delay."); H. McCabe, Summary Judgment, 11 So.Cal.L.Rev. 436, 441 (1938)("[T]he plaintiff must sustain the burden of submitting convincing proof that the defendant's answer is a sham.").

[21]*But see* Evalenko v. Catts, 125 Misc. 726, 726, 210 N.Y.S. 35, 36 (Sup. Ct. N.Y. Cty. 1925)("This defense seems to me to be purely

The general limitation of pre-Rule 56 summary judgment to motions by plaintiffs stemmed from the purpose and operation of summary judgment in that era. Summary judgment rules and statutes were adopted out of a belief that a large number of dishonest defendants were offering sham defenses solely for the purpose of delay; there was evidently little concern that phoney complaints were being filed in great number.[22] The limitation of pre-Rule 56 summary judgment to plaintiffs had a second, practical basis. In most circumstances liability vel non turns on the actions of a defendant, and often only the defendant would know the specifics of the conduct that might give rise to liability. Thus a plaintiff's inability to offer a detailed sworn account of its contentions, unlike a similar inability by a defendant, might indicate not that the plaintiff's claim was made in bad faith, but only that the plaintiff had not yet learned in detail how or why the defendant had caused the injury complained of.

Summary judgment was limited to certain types of cases because those were the actions in which the defendant usually *would* have personal knowledge of any facts constituting a defense.[23] It made sense to

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sham and frivolous and interposed solely for the purpose of delay.")

[22]James Chadbourn, *A Summary Judgment Procedure for North Carolina*, 14 N.C.L.Rev. 211, 227 (1936) ("[M]any more spurious defenses than complaints are filed; . . . defendants are, for the most part, the feigners; . . . therefore, a procedure designed to expose insupportable please need be available to plaintiff alone. . . . . [T]he motives of plaintiff and defendant to file false pleas are different. Defendant has a much greater one than plaintiff.")

[23]Edelman v. Public Nat. Bank & Trust Co., 136 Misc. 213, 213, 239 N.Y.S. 335, 355 (City Ct. N.Y. 1930) ("[the] . . . original debtor . . . is presumed to know the facts.")

ask whether a defendant's assertions were feigned or genuine only (or at least primarily) where a defendant ordinarily would have personal knowledge of the truth of the matter. (It would seem an odd use of phrase to say that a person was not "in good faith" in asserting something he believed but could not know for sure, such as the country of birth of the winner of the 2025 Tour de France.) So long as summary judgment was restricted to such cases, "[t]he defendant who honestly believes he has a good defense will have no difficulty formulating an affidavit in accordance with [the rule's] requirements."[24] The failure of a defendant to proffer the required affidavit was significant, not as an indication of what evidence might be adduced at trial, but because a defendant whose denial had been in good faith *would* be able to provide such an affidavit. Limiting summary judgment to certain types of cases assured that pre-Rule 56 summary judgment process was reasonably calculated to identify the cases in which the defendant was in bad faith; it did so without imposing on courts the difficult task of inquiring more directly into a defendant's subjective intent.

Summary judgment was not authorized in other, more complex types of cases because in such cases the lack of an affidavit from the defendant would not necessarily indicate that the defendant's denial was in bad faith. In cases where the defendant often would not know all relevant facts (e.g. in a product liability case), the pre-Rule 56

[24]Cropley v. Vogeler, 2 App. D.C. 28, --- (Ct.App. 1893). Dean Clark explained that summary judgment was authorized in those cases in which any defense would be "one easily set forth by affidavits." Charles Clark, *The New Summary Judgment rule in Connecticut*, 15 A.B.A.J. 82, 84 (1929).

process would have made no sense (because there might well be facts, unknown to the defendant, constituting a defense) and would not have served to single out bad faith defenses (a defendant might in good faith deny the allegations of the complaint simply because the defendant did not know all possibly relevant facts). Even in cases that were within the scope of the statute or rule involved, courts balked at awarding summary judgment if the circumstances were complicated. In such a situation the questions could be "so complex that it is impossible without a more elaborate and extensive investigation than the summary judgment procedure contemplates to determine which, if either, side is the faker."[25] Because pre-Rule 56 summary judgment was limited to plaintiffs, and available only in the types of cases in which the defendant would ordinarily have knowledge of the facts that would be the basis of any defense, it made sense to permit summary judgment at the very outset of the case, before the defendant non-moving party could possibly engage in any discovery or investigation. Under the summary judgment rule in the District of Columbia, the plaintiff requested summary judgment when the complaint was filed, and the defendant was expected to respond to that request when serving its answer.

Despite the limitations on the types of claims for which summary judgment could be sought, in some cases that arose under the pre-Rule 56 statutes and rules a defendant candidly acknowledged that for

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[25]James Chadbourn, *A Summary Judgment Procedure for North Carolina*, 14 N.C.L.Rev. 211, 225 (1936).

legitimate reasons it did not know whether the claims were meritorious.[26] That occurred, for example, where the defendant was an insurance company, the executor of an estate, or the bona fide holder in due course of a note. The literal terms of the pre-Rule 56 provisions required summary judgment in that situation, because the defendant was unable to execute the required responsive affidavit. In practice, however, summary judgment was denied.

> Since the Rule was aimed against defenses that are feigned and not genuine, it follows that a defendant's genuine lack of knowledge of the facts constituting the plaintiff's claim is ground for denial of the motion.[27]

Because the defendant's inability to provide that affidavit did not indicate a lack of good faith,[28] summary judgment was deemed

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[26]*E.g.*,Friedman v. Friedman, 251 A.D. 835, 296 N.Y.S. 714 (2d App. Div. 1937); Asbury Park & Ocean Grove Bank v. Simencky, 160 Misc. 921, 923, 290 N.Y.S. 992, 994 (Sup. Ct. Kings Cty. 1936); Edelman v. Public Nat. Bank & Trust Co., 136 Misc. 213, 239 N.Y.S. 335 (City Ct. N.Y. 1930); Woodmere Academy v. Moskowitz, 212 A.D. 457, 208 NY.S. 578 (A.D. 2d Dept. 1925); Brooklyn Clothing Corp. v. Fidelity-Phenix Fire Ins. Co., 205 A.D. 743, 745, 200 N.Y.S. 208, 210 (App. Div. 2d 1923); Rogan v. Consolidated Coppermines Co., 117 Misc. 718, 727, 193 N.Y.S. 163, 168 (Sup. Ct. N.Y. Cty. 1922); Gleason v. Hoeke, 5 App. D.C. 1, --- (Ct. App. 1894).

[27]Bernard Shientag, SUMMARY JUDGMENT, 83 (1941).

[28]Edelman v. Public Nat. Bank & Trust Co., 126 Misc. at 213, 239 N.Y.S. at 335 (where the defendant does not know the facts, there is no reason for "a suspicion that the denials are frivolous and that the answer was interposed merely for delay."); Bailey v. The District of Columbia, 4 App. D.C. 356, --- (Ct. App. 1894)("Those in charge of the affairs of the [municipal] corporation at the time of the occurrence of the events and transactions involved, may have long since ceased to have any connection with the corporation; and those now in office may know little or nothing of the special facts of such transactions. . . . All that can in reason be required is, that such state of facts, in support of the defense pleaded, be set forth in the affidavit as will satisfy the court of the good faith of the defendant in making the defense, and that such defense is not of a frivolous or dilatory character.")

inappropriate and these cases were set for trial.

Despite these limitations in the scope of pre-Rule 56 summary judgment, it proved extremely important and effective. In 1923, eighty percent of all dispositions by the King's Bench Division, a total of 6,773 cases, were decided by summary judgment.[29] In 1931-32 close to a thousand cases were resolved by summary judgment in New York County alone.[30] And in 1939 more than seven thousand cases were decided on summary judgment in New York state courts.[31]

The concern motivating pre-Rule 56 summary judgment was not cases in which the defendant, although advancing its factual defenses in good faith, would not survive a JML motion, but cases in which the defendant would simply default if and when a trial was held.[32]

Not surprisingly, commentators prior to 1937 explained that summary judgment was different than a directed verdict.[33] The purpose of summary

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[29]Edson Sunderland, *An Appraisal of English Procedure*, 9 J.A.Jud.Soc. 164, 166 (1926); Frank Boesel, *Summary Judgment Procedure*, 6 Wis. L.Rev. 5, 19 (1939).

[30]Edward Finch, *Summary Judgment Procedure*, 19 A.B.A.J. 504, 504, 506 (1933).

[31]Bernard Shientag, *Summary Judgment*, 74 N.Y.L.Rev. 187, 232 (1940).

[32]Am. Jud. Soc. Bulletin No. 14, (1919) (summary judgment procedure warranted for those categories of cases that "it is known from experience, are not generally defended."), *quoted in* James Chadbourne, *A Summary Judgment Procedure for North Carolina*, 14 N.C.L.Rev. 211, 224 n. 52 (1936).

[33]Bernard Shientag, SUMMARY JUDGEMENT, 43-44 (1941):
Section 457a of the Civil Practice Act, providing that "the judge may direct a verdict when he would set aside a contrary verdict as against the weight of the evidence," should have not application to a motion for summary judgment. Otherwise the judge, in effect, would be trying a case

judgment, courts repeatedly observed, was only to identify bona fide factual disputes, not to decide them. As then Professor Clark explained, "[I]ssue-finding, rather than issue-determination, is then the key to the procedure."[34]

Because of the narrow purpose of pre-Rule 56 summary judgment, the evidence which the moving or non-moving party might adduce at trial was generally irrelevant at the summary judgment stage. In the pre-Rule 56 era, what mattered were the affidavits of the plaintiff and defendant, primarily the latter. The moving party's affidavit was important only insofar as it triggered an obligation to respond, and spelled out the nature of the plaintiff's claims. Thereafter the only issue was the sufficiency, in and of itself, of the non-moving party's affidavit.

> Proof is not required; details would be improper . . . . A brief and comprehensive statement of facts, or what the defendant supposes to be facts and honestly expects to prove at the

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> on affidavits, instead of allowing the witnesses to be subjected to the test of cross-examination.

(Footnote omitted).

Louis Ritter and Evert Magnuson, *The Motion for summary Judgment and Its Extension to All Classes of Actions*, 21 Marq. L.Rev. 33, 47-48 (1936):

> Of course, it is not contended that the court should direct a verdict. This would be carrying the motion too far and would result in the serious abuse of having the court "try" actions on affidavits without having the opportunity of seeing the witnesses, their demeanor on the stand, and without being given the assistance of counsel in determining the reputation of the witnesses for truth and veracity.

[34]Charles Clark and Charles Samenow, *The Summary Judgment*, 38 Yale L.J. 423, 449 (1929); *see* James Chadbourn, *A Summary Judgment Procedure for North Carolina*, 14 N.C.L.Rev. 211, 223 (1936)(court to resolve summary judgment motion "without deciding any controverted issue of fact.")

trial . . . is what the rule contemplates and requires.[35]

The actual evidence that the defendant might offer at trial to support its contentions had no bearing on the resolution of pre-Rule 56 summary judgment, and was rarely referred to in state summary judgment decisions from this period. There were few provisions requiring or providing for the introduction or consideration of such non-affidavit evidence. Pre-Rule 56 summary judgment did not attempt to create or anticipate the content of the trial record, because prior to Rule 56 the nature of the ultimate trial record simply did not matter.

[35]Cropley v. Vogeler, 2 App. D.C. 28, --- (Ct. App. 1893); see National Metropolitan Bank v. Hitz, 11 D.C. 198, --- (Sup. Ct. D.C. 1879)("the rule . . . says the defendant shall set out his *grounds* of defence and swear to them. It does not mean a defence in all its details of incident and fact, but the foundation of the defence. That is all. . . . It was never contemplated that this rule required a party to follow his case through all the lights and shadows of the evidence in it.")(Emphasis in original).

B. THE INNOVATIONS OF RULE 56

Rule 56 embodied a number of innovations that ultimately led to a sea change in the standard for summary judgment and that today pose a number of important procedural issues.

The express innovations did not concern the standard for awarding summary judgment. Rule 56(c) provided that summary judgment was to be awarded if there were "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." In the era when Rule 56 was adopted, the phrase "genuine issue" was routinely used to describe the pre-Rule 56 requirement that a defense not be feigned.[36] In 1937, as today, the term "genuine" means sincere or frank, as opposed to fake or dishonest.[37] The genuine issue had to concern "facts;" this carried forward the pre-Rule 56 requirement that the non-moving party's response be specific, rather than being cast in conclusory terms. The genuinely disputed facts had to be material; this embodied the pre-Rule 56 requirement that the facts asserted must actually constitute a defense.

But other changes contained in Rule 56 set the stage for a

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[36]Bernard Shientag, SUMMARY JUDGMENT 87 (1941)("issue . . . not feigned but genuine"); Edward Finch, *Summary Judgment Procedure*, 19 A.B.A.J. 504, 504 (1933)("genuine and bona fide issue"); Edward Finch, *Extension of The Right of Summary Judgment*, 4 N.Y.St. Bar Ass'n Bul. 264, 264 (1932)("genuine issue to try"); Bernard Shientag, *Summary Judgment*, 74 N.Y.L.Rev. 187, 202 (1940)("issue is not genuine but feigned")(*quoting* Curry v. Mackenzie, 239 N.Y. 267, 270, 272, 146 N.E. 375, 376 (1925);

[37]In Rule 56(d) the words "actually and *in good faith* controverted" are used to describe material facts about which there *is* a genuine issue. (Emphasis added).

reformulation of the substantive standard for summary judgment. The pre-Rule 56 practice regarding the requirements and contents of affidavits had, in effect, had constituted the standard for obtaining, and defeating, summary judgment. But the new Rule 56 lacked the specific procedural provisions, requiring an exchange of affidavits with certain specified contents, that had been the hallmark of pre-Rule 56 summary judgement. Under the terms of Rule 56, the moving and non-moving parties were free to offer any supporting materials they wished. With the elimination of the earlier structured process, the meaning of "genuine issue of material fact" became critical. Prior to Rule 56, if the plaintiff party had provided a sufficient affidavit, and the defendant did not, those two circumstances required summary judgment and were characterized as showing that there was no genuine issue. "No genuine issue" was simply a label applied to those cases in which the affidavit of the non-moving party was technically defective. Under Rule 56, the existence vel non of "a genuine issue of material fact" was not merely a conclusion that followed from the application of the technical standards regarding the contents of affidavits; it now was (or would in time have to become) an actual standard.

Rule 56 made two important changes in the types of cases in which summary judgment could be obtained. First, Rule 56 permitted a defendant to seek summary judgment. In 1937 only New York and Wisconsin permitted a defendant to seek summary judgment, having recently[38] expanded summary

[38]The New York rule was amended in 1933, and the Wisconsin rule in 1935. *Compare* Sullivan v. State, 251 N.W. 251, 253, 213 Wis. 185, --- (1933) (*quoting* pre-1935 version of state rule), *with* General Laws of R.I. (1938), ch. 524 §1.

judgment in that manner for the apparent purpose of facilitating rejection of sham claims.[39] Second, Rule 56 permitted summary judgment without regard to the subject matter of the lawsuit, an entirely new innovation in the law. Both changes permitted summary judgment to be sought in circumstances for which the use of pre-Rule 56 summary judgment to detect sham contentions had rightly been thought unsuitable.

Rule 56(e) also required that the affidavits submitted by the non-moving party were to be "made on personal knowledge." This too was a major departure from pre-Rule 56 practice. In 1937 Michigan and Illinois had a similar then recently-adopted requirement[40], but in this era there appear to have been few if any decisions in those states regarding the application of this innovation. More importantly, neither of those states had dramatically expanded, in the manner of Rule 56, the types of cases in which summary judgment could be sought. In Michigan and Illinois only plaintiffs could seek summary judgment, and they could only do so in certain cases; thus in those states most

[39]Judge Finch explained at the time:

> [D]efendant may take advantage of this procedure based upon a defense . . . . I remember the pathetical and ineffectual plea of a defendant prior to the adoption of the amendment that if the rule of summary judgment procedure did not apply to his case, but instead he had to proceed by formal trial, he would be required to go to what was for him an unbearable expense and inconvenience of bringing witnesses from seventeen states. This portion of the amendment will help to reject certain unfounded claims and suits started only for nuisance value settlement.

Edward Finch, *Summary Judgment Procedure*, 17 J. Am. Jud. Soc. 180, 185 (1934).

[40]Ill. Anno. Stat. (Smith-Hurd) ch. 110, § 259.15(1) (1936) (Adopted as a Rule by the Illinois Supreme Court in December Term, 1933); Michigan Court Rule 30, §3 (1930).

non-moving parties would in any event have had personal knowledge of the facts constituting their defenses.

This combination of changes was probably of little significance for the old categories of cases that had been covered by the majority of pre-Rule 56 summary judgement statutes and rules. For example, in an action to enforce a note, a plaintiff moving-party under Rule 56 could still seek summary judgment by filing the sort of affidavit required by those pre-Rule 56 statutes and rules. The sufficiency of a responsive affidavit would undoubtedly have been judged by pre-Rule 56 standards. Most defendants would have had personal knowledge of the facts constituting any proffered defense, so changes embodied in Rule 56 would have had no impact. Rule 56 thus constituted a framework within which traditional pre-Rule 56 summary judgment procedure and standards could have continued.

But the new types of cases in which summary judgment was now permitted, in conjunction with Rule 56(e), would raise novel and difficult issues. Where summary judgment was sought by a defendant, or by a plaintiff in a complex case, the non-moving party often would lack the personal knowledge required by Rule 56(e). Most summary judgment cases in federal court today are of this type. But the lack of such knowledge assuredly could not by itself warrant summary judgment. If that was what Rule 56 meant, it would have abolished vast numbers of causes of actions (those where the plaintiff lacked such knowledge) and defenses (where the defendant lacked such knowledge). Obviously the framers of Rule 56 did not intend such a sweeping change in substantive

law, which assuredly would have exceeded their authority under the Rules Enabling Act.

For the processing and disposition of such cases, the framers provided only Rule 56(f), taken from the law in Michigan and Illinois.[41]

> [T]he 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.

But Rule 56(f), and the accompanying Committee Note, were silent on several critical questions: How is a court to decide between rejecting the motion and granting the continuance? What is the purpose of the discovery, depositions, or affidavit collection to occur during discovery? What "other" types of orders might be "just", when and why? Each of these questions is inextricably related to the meaning of "genuine issue of material fact," all of which would determine what Rule 56 was to mean in the new federal summary judgment cases in which--unlike pre-Rule 56 summary judgment--the non-moving party would often lack personal knowledge of at least some of the facts underlying its claim or defense.

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[41]Ill. Anno. Stat. ch. 110 §259.15(3); Michigan Court Rule 30 § 6 (1930).

C. THE EMERGENCE OF THE DIRECTED VERDICT STANDARD

The application to summary judgment motions of the JML standard, or the directed verdict standard as it was at first known, only emerged slowly during the decades after the promulgation of Rule 56. In 1938 the first edition of *Moore's Federal Practice* described Rule 56 as providing for the dismissal of "frivolous and transparently insufficient" claims and defenses,[42] and relied heavily on pre-Rule 56 state law cases to construe the new federal provision. A note in a 1941 issue of the Federal Rules Service observed that, although the wording of Rule 56 was somewhat different from that of state summary judgment provisions, "no difference in result was intended to follow from this variance in language."[43] In 1943 the second edition of the *Cyclopedia of Federal Procedure* described Rule 56 in pre-Rule 56 terms, insisting it was adopted to deal with litigants who were "interposing a false plea having no foundation in fact, or attempting legal blackmail by bringing any unfounded suit."[44]

> Even though there is considerable doubt as to the existence of a claim or defense, if it appears to be in good faith the party asserting it is entitled to a trial . . . .[45]

The same treatise also asserted, somewhat inconsistently, that "[o]ne

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[42] 3 MOORE'S FEDERAL PRACTICE § 56.04 p. 3185 (1st. Ed. 1938) (*quoting* Strasburger v. Rosenheim (1st Dept. 1932), 234 App. Div. 544, 547, 255 N.Y.Supp. 316, 320).

[43] 4 Fed. R. Serv. 940, 940 (1943).

[44] 8 CYCLOPEDIA OF FEDERAL PROCEDURE § 3502 p. 214 (2d ed. 1943).

[45] *Id.* at p. 220.

of the tests is whether, if the case were tried, it would be *obviously* necessary to grant a motion for a directed verdict."[46] At mid-century several commentators noted that the courts were divided as to whether summary judgment could be granted, notwithstanding the good faith of the non-moving party, merely because the court concluded that a directed verdict would result if the case went to trial.[47] Judge Clark himself did not yet recognize a definitive change in summary judgment practice. He continued to explain summary judgment as a method of dealing with defenses or claims that were "sham or frivolous," and to insist that pre-Rule 56 state practice was a guide to the meaning of Rule 56.[48] The directed verdict standard, Clark wrote, was only "a suggestive and at times fruitful analogy", but "not a rule of thumb."[49]

The federal courts were soon faced with cases in which the non-moving party lacked personal knowledge of the key facts. Such a case reached the Supreme Court only six years after Rule 56 went into effect. In *Sartor v. Arkansas Natural Gas Corp.*[50] summary judgment was sought by the defendant, a procedure largely impossible prior to Rule 56. The plaintiffs had sued for royalties for natural gas that had been

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[46]*Id.* at p. 219 (emphasis added).

[47]Note, 99 U.Pa.L.Rev. 212, 216 (1950); Comment, 48 Colum. L. Rev. 780, 781 (1948).

[48]Charles Clark, *The Summary Judgment*, 36 Minn. L.Rev. 567, 568 (1952).

[49]Id. at 579.

[50]321 U.S. 620 (1944).

extracted from their land, under a lease which entitled them to payment equal to one eighth of the market price. The dispute concerned what the market price was for natural gas in the years 1928-1930. The plaintiffs had no personal knowledge of the disputed facts; they were merely "farmers, ignorant of the gas business, [who] own[ed] a farm situated in the . . . gas field."[51] In denying the request for summary judgment, the Court held that "*at the least* a summary disposition . . . should be on evidence . . . that would require a directed verdict for the moving party."[52] *Sartor* held only that the summary judgment standard was no less demanding than the directed verdict (now JML) standard; it conspicuously left open whether the two standards were identical.[53]

The celebrated 1946 Second Circuit decision in *Arnstein v. Porter*[54] also involved a motion for summary judgment filed by a defendant against a plaintiff had no personal knowledge of the disputed facts. Arnstein alleged that melodies he had originally composed and copyrighted had been appropriated by defendant, Cole Porter. The plaintiff himself did not know whether Porter had ever heard the Arnstein songs, or

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[51]Petition for a Writ of Certiorari at 3, Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944), No. 232 (Oct. Term 1943).

[52]321 U.S. at 624 (Emphasis added).

[53]A year after *Sartor*, the Court seemed to limit summary judgment to cases in which the non-moving party was acting in bad faith. "Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them." Associated Press v. United States Tribune Co., 326 U.S. 1, 6 (1945).

[54]154 F. 2d 464 (2d Cir. 1946).

had remembered them at the time of Porter's own compositions. The majority opinion held that summary judgment had improperly been awarded to the defendant. Both the majority,[55] and Judge Clark's lengthy dissent,[56] assumed that the substantive question raised by such a summary judgment motion was whether the non-moving party would be able to survive a directed verdict motion.

In these early years, other lower courts were reluctant to adopt the directed verdict standard. In 1956 the Fifth Circuit reversed a judge for having attempted at the summary judgment stage to determine whether he would direct a verdict if the case went to trial.

> He should not have concerned himself at this time with the question what he would do if the jury should render a verdict for plaintiffs. A judge indeed does not know what he would do in that regard until he has heard the trial in open court before the jury and has the benefit of the opinion of the jury expressed in their verdict.[57]

This ambivalence about awarding summary judgment where the

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[55]154 F. 2d at 469 (question is whether "the jury may properly infer" facts asserted by non-moving party), 470 ("we cannot say--as we think we must say to sustain a summary judgment--that at the close of a trial the judge could properly direct a verdict."), 473 ("we are . . . unable to conclude . . . that . . . a trial judge could legitimately direct a verdict for the defendant.")

The majority opinion also contains passages reflecting the rather different pre-Rule 56 purpose of summary judgment. 154 F. 2d at 474 ("the avowed purpose of those who sponsored summary judgment practice was to eliminate needless trials where by affidavits it could be shown beyond possible question that the facts were not actually in dispute.")

[56]154 F. 2d at 479 ("surely we cannot now say that a verdict should not be directed."), 480 (summary judgment should be granted, rather than permitting a case to proceed to trial, where "the ultimate legal result is indicated.")

[57]Firemen's Mut. Ins. Co. v. Aponaug Mfg. Co., 149 F. 2d 359, 363 (5th Cir. 1945).

non-moving party was in good faith dispute of fact was reflected in the administration of Rule 56(f). During the first quarter century following the promulgation of Rule 56, where a non-moving party showed that it lacked personal knowledge of the disputed facts, many lower courts simply denied summary judgment outright,[58] the traditional pre-Rule 56 response to that situation. If summary judgment was intended only to reach deliberately false pleadings, the lack of knowledge revealed by a Rule 56(f) affidavit made any further consideration of summary judgment inappropriate. But other lower courts responded to this circumstance by instead granting a continuance for additional discovery, the appropriate course if the directed verdict standard would ultimately be applied to the summary judgment motion.[59] The award of summary judgment despite the filing of a Rule 56(f) affidavit was relatively uncommon, apparently limited to cases in which the court concluded that the non-moving party's Rule 56(f) request had been made in bad faith.[60] Courts in this era often noted pointedly

[58] *E.g.*, Sentry Corp. v. Conal Int'l Corp., 164 F. Supp. 770, 773 (S.D.N.Y. 1958); Hummel v. Riordon, 56 F. Supp. 983, 985-86 (N.D.Ill. 1944); United States v. Gotham Pharmacal Corp., 1 F.R.D. 744, 744 (S.D.N.Y. 1941); Vassardakis v. Parish, 36 F. Supp. 1002, 1006 (S.D.N.Y. 1941).

[59] *E.g.*, Waldron v. British Petroleum Co., 231 F. Supp. 72, 94 (S.D.N.Y. 1964); Dombrovskis v. Esperdy, 185 F. Supp. 478, 484 (S.D.N.Y. 1960); Peckham v. Ronrico Corp., 7 F.R.D. 324, 330 (D.P.R. 1947); Goldboss v. Reimann, 44 F. Supp. 756, 759-60 (S.D.N.Y. 1942).

[60] *E.g.*, Savon Gas Stations No. 6, Inc., v. Shell Oil Co., 203 F. Supp. 529, 532 (D. Md. 1962) ("the [Rule 56(f)] affidavit was rejected as lacking in bona fides and made solely for the purpose of delay"); Dale Hilton, Inc. v. Triangle Publications, Inc., 27 F.R.D. 468, 474-76 (S.D.N.Y. 1961); Lavine v. Shapiro, 257 F. 2d 14, 20-21 (7th Cir. 1958),

when a non-moving party had not attempted to invoke Rule 56(f), as if to suggest that the failure to do so revealed that the party's original pleading or contention had been a sham.[61]

Courts repeatedly recognized that the propriety of summary judgment in any particular case could turn on whether the summary judgment record might differ from the record at trial. For the Supreme Court in *Sartor* that was a key reason for denying summary judgment, despite the large number of affidavits submitted by the moving party. The actual testimony of those witnesses in open court, the majority reasoned, would provide the trier of fact with additional information not contained in the affidavits themselves.

> There are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of testimony.[62]

Similarly, the Second Circuit in *Arnstein* was divided, in part, by a dispute about whether the summary judgment record in that case would be the same as the record that would be created if the case went to trial. The majority rejected summary judgment because it believed that the trial record would differ in several respects. The court suggested that the trial record would be augmented by actual

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[61]Alger v. United States, 252 F. 2d 519, 521 (5th Cir. 1958); Kaz Mfg. Co. v. Chesebrough-Pond's, Inc., 211 F. Supp. 815, 820 (S.D.N.Y. 1962); Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541, 544 (E.D.N.Y. 1957); Sears, Roebuck & Co. v. American Plumbing & Supply Co., 19 F.R.D. 334, 345 (E.D.Wis. 1956).

[62]321 U.S. at 628 (*quoting* AEtna Life insurance Corp. v. Ward, 140 U.S. 76, 88 (1891)).

performances of the songs written by the defendant and by the plaintiff.[63] The majority also noted that the plaintiff might call expert witnesses to testify about how listeners would react to the melodies in question.[64] And the court stressed that only at trial would the trier of fact observe the demeanor of the witnesses, "a highly useful, even if not an infallible, method of ascertaining the truth."[65] Judge Clark, on the other hand, doubted the majority would uphold a verdict for the plaintiff based on the meager summary judgment record[66], and saw no reason to hold a trial because "it seems quite likely that the record at trial will be the one now before us."[67]

Commentators focussed on the same problem. One author, urging adoption of the directed verdict standard, insisted that in deciding a summary judgment motion the judge "has before him the essence of all the evidence that will be available at the trial, and on this evidence he bases his ruling."[68] Another warned that a judge dealing with a motion for summary judgment necessarily had less information than he or she would at the directed verdict stage.[69] Courts were

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[63]154 F. 2d at 473.

[64]*Id.*

[65]154 F. 2d at 471; *see* Colby v. Klune, 178 F. 2d 872, 873-74 (2d Cir. 1949)("the affidavits do not supply all the needed proof. . . . . [A] witness' demeanor is a kind of 'real evidence'; obviously such 'real evidence' cannot be included in affidavits.")

[66]154 F. 2d at 479.

[67]154 F. 2d at 478.

[68]Note, 5 Vand.L.Rev. 607, 613 (1952).

[69]Note, 13 Brook.L.Rev. 5, 8-9 (1947)("a motion for direction

admonished to "weigh the possible effect of a trial in open court to color, explain, or contradict the evidence submitted to the court in writing on such a [summary judgment] motion."[70]

Over time, despite these concerns, the directed verdict standard prevailed. The adoption of that standard, or something like it, was probably inevitable. The expansion of Rule 56 reached a large number of new types of cases in which the non-moving party would lack personal knowledge of the disputed facts. In such cases the content of the summary judgment record, much of it unearthed only after the action was commenced, was likely to indicate little or nothing about the bona fides of the non-moving party, the original concern of pre-Rule 56 summary judgment.

If Rule 56 were to have any application to such cases--which over time encompassed the vast majority of all summary judgment motions--it would have to turn on some type of objective assessment of the evidence adduced by the parties. The directed verdict standard, rather than some new criterion, made eminent sense. Where the evidence proffered by the non-moving party was sufficient to defeat a directed verdict motion, it was difficult to see how or why summary judgment

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of verdict is not made at all until pre-trial procedures have been completed, a trial in due form commenced, and the witnesses, at least those of the plaintiff, examined and cross-examined in the presence of the court. Summary judgment procedure does not go so far. Even if the motion has been preceded by the taking of depositions, it would be unusual to find anything like a testing of credibility such as cross-examination n open court affords.")

[70]Mac Asbill and Willis Snell, *Summary Judgment Under the Federal Rules--When An Issue of Fact is Presented,* 51 Mich. L. Rev. 1143, 1144 (1953).

could be granted, particularly if the non-moving party had requested a jury trial. On the other hand, if the summary judgment record demonstrated that the granting of a directed verdict was inevitable, there manifestly would be no point in permitting continuation of the litigation.

In 1983 the Supreme Court indicated that the standard for awarding summary judgment was very similar to the standard for a awarding a directed verdict or jnov.

> Substantively, [the "genuine issue" test] is very close to the "reasonable jury" rule applied on motions for directed verdict. . . . In the civil context, most courts treat the two standards identically, although some courts have found slight differences.[71]

Three years later *Anderson v. Liberty Lobby, Inc.*[72] held that the two standards were substantively identical:

> [T]he inquiry under each is the same: 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.[73]

The Court explained that "[t]he primary difference between the two motions is procedural."[74]

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[71]Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745 n. 11 (1983).

[72]477 U.S. 242 (1986).

[73]477 U.S. at 251-52 (1986).

[74]477 U.S. at 251 (*quoting* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. at 745 n. 11).

Anderson mischaracterized *Sartor* in the following terms:

> The Court has said that summary judgment *should be granted* where the evidence is such that it "would require a directed verdict for the moving part." *Sartor v. Arkansas Gas Corp.*, 321 U.S. 620, 624 (1944).

A sea change in the receptiveness of federal courts to summary judgment motions is routinely traced to the decisions in *Anderson*, *Celotex v. Catrett*[75] and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*[76], the so-called summary judgment trilogy. Those decisions are characterized as an enthusiastic endorsement of summary judgment, which chastened lower court judges who previously had been indifferent to the importance and efficacy of summary judgment. But that analysis is both incomplete and unfair. For decades after the adoption of Rule 56, federal judges who had begun their careers when summary judgment was a device for disposing of sham defenses were quite understandably reluctant to dismiss cases in which there was a bona fide dispute of fact, however one-sided the evidence might appear. Nothing on the face of Rule 56 expressly directed or authorized them to do so. *Anderson* and the trilogy changed federal practice, not because they advocated more enthusiastic use of some long-ignored principles Rule 56, but because they emphatically adopted an interpretation of the purpose and meaning of that Rule which were quite different from what anyone had in mind when it was originally promulgated in 1937.

With the emergence of the JML standard in summary judgment cases, the process for creating the summary judgment record became of central

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477 U.S. at 251 (Emphasis added). To the contrary, as the full quotation from Sartor makes clear, text at n. ---, *supra*, *Sartor* actually held, not that summary judgment must be granted whenever a verdict would be directed, but only that the summary judgment standard was at least as demanding as the directed verdict standard .

[75]477 U.S. 317 (1986).

[76]475 U.S. 574 (1986).

importance. Rule 56 itself, framed in another era for different purposes, simply was not written to address this problem. Rule 56(f), authorizing the district court to enter any "just" order, provided neither standards for nor a regular procedure to shape the record.

III. SUMMARY JUDGEMENT AND THE COURSE OF DISCOVERY

A. THE PROBLEMS WITH RULE 56

A judicial determination of whether to grant summary judgment is initiated by a motion. Although that seems almost a banal commonplace, the summary judgment process in this respect is quite different from a trial, which occurs at a time set and announced, usually well in advance, by the court. Proceeding by motion gives to the moving party several distinct advantages that would not exist with regard to a JML motion at trial. The moving party presumptively determines when in the course of discovery summary judgment will be considered. Only the moving party has advance notice of when the motion will be filed. And, although the moving party has virtually as long as it wants to prepare its motion and supporting materials, the non-moving party must assemble its responsive memorandum and materials in a matter of a few weeks.

None of this mattered under pre-Rule 56 summary judgment. Because under pre-Rule 56 summary judgment there was no need to create a record, the timing of the motion was of little importance. Pre-Rule 56 summary judgment usually occurred at the very beginning of a lawsuit; under the District of Columbia rule quoted above[77] the plaintiff was expected to submit its request for summary judgment "at the time of bringing his action." Rule 56(a), reflecting practice before 1937, permits a plaintiff to move for summary judgment twenty days after filing the complaint, without even waiting for an answer. Under pre-Rule

[77] P. ---, *supra*.

56 summary judgment, the non-moving party, if in good-faith, usually would be able at the very outset of the litigation to respond fully to a summary judgment motion.

But the tactical opportunities afforded to a non-moving party by treating summary judgment as a matter to be raised by motion can have considerable importance to the creation of the record that is central to modern summary judgment.

First, by permitting the moving party to determine the timing of a summary judgment motion, Rule 56 gives that party presumptive control over the point in the record development process at which the sufficiency of the non-moving party's evidence will be assessed. It is clearly in the interest of the moving party to have summary judgment decided before all potentially inculpatory evidence has been discovered, and before weaknesses may have been revealed in what may be seemingly compelling statements of its own witnesses. If the moving party's own motion requires certain investigation or discovery, the moving party can take as much time as it needs to fully prepare, and then seek summary judgment as soon as it has acquired the needed material, without waiting for the non-moving party to prepare further. Only the moving party will know, as the court and non-moving party may not, whether there is as yet undiscovered inculpatory evidence that might be unearthed through further discovery or at trial, and the moving party has no obligation to reveal that information. The moving party has every reason to proceed in a manner which will put its own evidence in the best possible light, while making it as difficult

as it can for the non-moving party to include contrary evidence in the record. So long as the court responds by then ruling on that pending summary judgment motion, as courts presumptively do with any motion, the moving party's tactical choices will have a substantial, possibly decisive control over the content of the record.

Summary judgment thus operates as sort of a retroactive discovery cutoff; not only (absent contrary order from the court) is further discovery impossible, but there is no longer time to await or obtain responses to previously requested discovery. The filing of a summary judgment motion summarily ends the record building process. With only a few weeks to respond once that motion has been filed, the non-moving party is usually able to do little more than summarize whatever information has been identified by its investigation up until that point in time. There is little chance for meaningful additional investigation. In the absence of some sort of scheduling order which controls the timing of such dispositive motions, the moving party has the ability by filing a summary judgment motion to cut off without prior notice, at any time of its choosing, the discovery and investigative efforts of the non-moving party.

All of this matters because a non-moving party that would have sufficient evidence at trial to defeat a JML motion may well lack that evidence earlier in the litigation. Ordinarily the evidence presented at trial is considerably greater and more complex than what was known to counsel for either party, or even for both parties, at the time the original complaint was filed. The emergence of the ultimate

record is also shaped by the fact that each side has an understandable interest in not disclosing any potentially harmful evidence or information. Attorneys and parties usually do not lie in responding to discovery and questioning, but they generally respond only to the precise inquiry that has been made, and do not volunteer information that would be helpful to the other side. One of the most important consequences of the pre-trial preparation period can be that it affords the parties time to understand precisely how to frame a question (or discovery request or subpoena) or what to investigate to obtain the inculpatory information that the other side has been hoping would remain unearthed. Conversely, the key weapon for preventing the disclosure of adverse information is delay; each party seeks to run out the clock by postponing revelation of that information until the time for obtaining it has passed. A moving party's control over the timing of summary judgment can be outcome determinative if it is used to stop the clock before the process has run its course. Letting a party determine the timing of summary judgment is much like letting the coach of a basketball team control the game clock. *Second*, treating summary judgment as an ordinary motion can give the moving party a considerable tactical advantage in time. Under Rule 56 only the moving party has advance knowledge of *when* the summary judgment motion will be filed. That did not matter under pre-Rule 56 summary judgment, because the moving papers and response typically consisted of no more than short affidavits.

But under modern summary judgment the summary judgment motion

may be supported by hundreds of pages of documents, including detailed affidavits drafted with great care by opposing counsel for the express purpose of supporting the motion. Equally importantly, a legally sufficient response to a summary judgment motion will often require both a painstaking analysis of the moving party materials and a careful review of applicable law, to assess precisely every detail that needs to be included in responsive affidavits or other materials. Apparently fulsome responses for the non-moving party can be deemed insufficient if the court perceives some fatal, albeit perhaps far from obvious, omission. The district and appellate courts, and the moving party on appeal, have literally months to identify some such defect in the record which the non-moving party had to pull together in only a few weeks.

The amount of notice that each party has about when to prepare and what to include in its fact-intensive material can thus be of considerable importance. Under Rule 56, because the moving party controls the filing date of the summary judgment motion, that party has months or perhaps years (if it wishes) to identify and organize documents, prepare supporting affidavits, and draft a motion organizing the material in a compelling fashion. Local rules typically give the non-moving party only a few weeks to respond. If the attorney for the moving party needs additional time, he or she simply postpones filing the motion for as long as necessary. If the attorney for the non-moving party wants additional time for investigation or discovery, it must respond anyway, and then litigate a Rule 56(f) request for

additional time.

Such a system would be inconceivable in the process of creating a trial record. No court would permit a litigant to control the trial date and keep it secret from the opposing party until a few weeks before trial. The timing of JML motions under the Rule 50 does not confer on the moving party the same advantages of Rule 56. A JML motion during trial must be made at the end of the evidence for the non-moving party, or of all evidence. There is little time to prepare such a motion, which in any event is usually made orally and is thus fairly short. The post-trial JML motion is written, and could in theory be as voluminous as a summary judgment motion. But under Rule 50(b) that any post-trial JML motion is due within ten days of the entry of judgment, which gives the moving party about the same amount of time as the non-moving party to prepare its supporting memorandum.

B. THE INADEQUACY OF RULE 56(f)

The moving party's choices regarding the timing and subject matter of a summary judgment motion prevail unless the non-moving party can convince the court that there is something seriously unfair about deciding a summary judgment motion at the time, and regarding the issues, selected by the moving party. The provision of Rule 56 for dealing with these problems is Rule 56(f):

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's 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.

Rule 56(f), unchanged since it was first adopted in 1937, was intended to deal with what then were relatively rare cases in which a non-moving party lacked personal knowledge of the facts at issue.[78] Rule 56(f) was not crafted as a considered response to the problems of building a summary judgment record, and is ill-suited for that task, because those record-building problems were unknown eighty years ago.

The underlying Rule 56(f) procedure is an anachronism. The Rule provides that the reasons for the requested relief must be set out in an affidavit of the non-moving party, a sensible requirement in 1936 but often nonsensical today. In most modern federal summary judgment cases the availability vel non of essential evidence depends on the scope of discovery and investigation, the applicable legal standards, and the particular contentions of the moving party; such

[78] *See* pp. ---, *supra*.

matters are usually outside the knowledge of the party itself, which could only execute such an affidavit after first being tutored by his or her attorney in the state of the law, the contents of the record, and the status of discovery and investigation. Litigants seeking to invoke Rule 56(f) must usually choose between submitting a party-affidavit far outside the party's actual personal knowledge, or submitting an informed attorney-affidavit that violates the Rules.

The structure of Rule 56(f) would often discourage its use by a non-moving party. First, even if a non-moving party wants to attempt to invoke Rule 56(f), it usually still must file, at essentially the same time, a reply on the merits to the summary judgment motion. The party's attorney, pressed to respond in a few weeks to a summary judgment motion that may have been in preparation for months, will have to think twice before devoting precious time to a simultaneous Rule 56(f) request[79]. Second, the very filing of a Rule 56(f) motion, asserting that the non-moving party lacks affidavits (or other materials) "essential" to presenting a response, would on its face be inconsistent with the assertion of the non-moving party in its merits response that there is sufficient evidence to justify rejection of the summary judgment motion. The non-moving party is in effect required, as a condition of submitting a Rule 56(f) request, to come close to admitting

[79] *See* Staten v. Nissan North America, Inc., 134 Fed. Appx. 963, 964 (7th Cir. 2005) (non-moving party responded with Rule 56(f) request but did not reply to the summary judgment motion on the merits); Institut Pasteur v. Simon, 374 F. Supp. 2d 446, 447 (E.D.Pa. 2005) (same).

under oath that if the summary judgment motion is to be decided on the basis of the material that party has so far, that motion should be granted. On the face of Rule 56(f) it would be insufficient to show that any still-missing evidence would be relevant or important or might matter depending on how the court reviews the other evidence; only the absence of "essential" facts will suffice. In some instances clever lawyering might navigate between the Sylla of conceding that the summary judgment motion should be granted, and the Carybdis of acknowledging that the Rule 56(f) request should be denied, but surely no one would intentionally frame a Rule that created this dilemma.

A number of courts have held that a key issue in resolving a Rule 56(f) request is whether the attorney for the non-moving party has been sufficiently vigorous in pursuing discovery prior to the filing of the summary judgment motion[80]. Such an application of Rule

[80] *E.g.*, Staten v. Nissan North America, Inc., 134 Fed. Appx. 963, 965 (7th Cir. 2005)(Rule 56(f) request denied, inter alia, because counsel had not yet taken deposition of witness, even though moving party had cancelled scheduled deposition and may have been "guilty of obstruction"); Evans v. Taco Bell Corp., 2005 WL 1592984 *5 (D.N.H. June 30, 2005)(Rule 56(f) request denied, inter alia, because counsel for non-moving party had not asked for production of documents until after conducting first set of depositions); Duff v. McGraw-Hill Companies, Inc., 2005 WL 1528959 *3 (W.D.Wash. June 21, 2005)(Rule 56(f) request denied because, inter alia, non-moving party failed to file a motion to compel in response to assertedly inadequate discovery response from moving party); Allstate Ins. Co. v. Savage, 2005 WL 1331087 *10 (W.D.Okl. June 2, 2005)(Rule 56(f) request denied, inter alia, because counsel for non-moving party had not yet attempted to subpoena witness who had refused to talk voluntarily with counsel); Edward Brunet, Martin Redish and Michael Reiter, SUMMARY JUDGMENT FEDERAL LAW AND PRACTICE 154-55 and nn. 127-130 (2d ed. 2000); 11 MOORE'S FEDERAL PRACTICE p. 56-80.3 and n. 19 (3d ed. 2005); *but see* Grout v. Mason County, 2005 WL 1532970 *4 (W.D.Wash. June 28,2005)("There is substantial merit in the defendant's argument that the plaintiff has lacked fortitude in pursuing discovery. Nevertheless, it is on the merits of the material facts and not counsel's

56(f) turns Rule 56 into a form of sanction for insufficiently aggressive discovery. But modern summary judgment was not created for the purpose of punishing those parties whose attorneys, in the judgment of the court, had not been diligent in conducting discovery or an investigation. A court's belief that the non-moving party has left unattended much of its needed discovery or investigation is a compelling reason for concluding that the summary judgment record to date is substantially more limited than it would be the record at trial. That is precisely the sort of circumstance in which applying the JML standard to the summary judgment record is likely to yield a result different than the outcome if the same standard were applied at trial.

Such a use of Rule 56(f) is also at odds with the system of safeguards that the Federal Rules of Civil Procedure impose before sanctions can be imposed on a party resisting discovery. Under the discovery rules a party improperly resisting discovery can be subject to sanctions limiting its ability to offer evidence and build a record, but those sanctions are subject to a number of important limitations not present under Rule 56(f). First, a party is told precisely what it is being asked to do (e.g. produce a given document) and by when (a date set forth in the discovery request). Second, if the party fails to do so, no formal steps can be taken until the party seeking discovery has attempted to negotiate a resolution of the problem. Third, if those negotiations fail, the court may be asked to and could directly

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failings that the Court decides issues of summary judgment where possible.")

order the resisting party to comply, again specifying what that party must do and when. Only after the resisting party has defied that order and disregarded a specific deadline is an imposition of evidence-limiting sanctions possible. None of these safeguards exist, however, where a moving party seeks denial of a Rule 56(f) motion as a sanction for a failure to seek sufficient discovery.[81] When courts treat Rule 56(f) motions as affording them an opportunity to police the diligence of the non-moving party's attorney, parties whom the court thinks have been insufficiently aggressive are punished by denial of their Rule 56(f) motions, even though they may not have violated any orders or failed to meet any court-established deadlines.

At best the Rule 56(f) process confers on the district judge discretion to cut off the record-building process. Judges are permitted to end that process and rule on a summary judgment motion if they conclude that the non-moving party has already had a reasonable period of time to prepare his or her case. At first blush this seems consistent with the discretion commonly accorded to district judges, and relies on a judge's sense of fairness and his or her familiarity with the

[81] In *Celotex*, for example, the defendant, which had apparently received no satisfactory response to its discovery request for whatever evidence the plaintiff had regarding exposure to Celotex asbestos, could have sought sanctions in the form of an order forbidding the plaintiff from offering such evidence at trial. Such sanctions, which would of course have resulted in judgment for the defendant, could only have been obtained in a process subject to the discovery sanction safeguards in the Federal Rules. The plaintiff would have known (and had a chance to litigate or negotiate) a prospective deadline by which to find and produce the evidence in question. Celotex, by instead filing a summary judgment motion that cut off further investigation and discovery, sought to achieve the same result without any of the Rule 37 safeguards.

record and the discovery process. But that discretionary Rule 56(f) system is fundamentally different from the record building process at trial. In preparing a record for trial, parties are not in this manner subject to the discretion--however wise and well-intentioned--of the court. Judges do not have the discretion at trial to bar introduction of any evidence obtained by a party after some hypothetical date by which the court concludes, after the fact, that the party had had enough time for trial preparation. Rather, the trial record building process is primarily limited by objective and predictable deadlines: discovery is permitted until an established cutoff date, subpoenas of documents or hostile witnesses can be sought until a different deadline, investigation is permitted until the very end of trial, and examination of the moving party's witnesses is allowed until they leave the stand. The deadline-based system that largely governs the trial-record creation process establishes predictable time limitations on which attorneys can and do rely in organizing their time. If the deadlines are arguably too short (perhaps for both sides), at least the attorneys know where they stand, and can budget their time accordingly. If the deadlines are unnecessarily long (e.g. because the time until a judge's next available trial date is greater than the period needed for discovery and investigation), the attorneys are free to do their pre-trial preparation at any time during that period.

Under the Rule 56(f) regime, on the other hand, the deadlines are unknowable to the non-moving party. The non-moving party usually has no advance notice as to when a summary judgment motion will be

filed. More to the point, under the Rule 56(f) regime the non-moving party could not know at what point in time, if any, a court would *later* conclude that time for investigation and discovery had expired. That date is only announced, after it may have passed, by the judge who rules on the later Rule 56(f) request. Rejection of such a request is, in effect, a retroactive decision that the deadline for discovery and investigation was at some point in time before the summary judgment motion was filed. Rather than requiring advance judicial structuring of the process, Rule 56(f) lets the moving party fix the initial process, directs that most of the briefing and record creation process be completed, and then places on the non-moving party the burden of persuading the court that the whole process has been a mistake, and that the motion was filed too soon. At best that process is inefficient. At worst the system established by Rule 56(f) creates significant institutional pressures on the judge to proceed to decide the summary judgment motion on the merits (at the time of the moving party's choosing), as it would any other motion, rather than start the process over again.

In *Celotex* the Supreme Court suggested that the defendant's summary judgment motion did not appear premature because enough time had elapsed that the plaintiff could not be said to have been "railroaded," a term intended to refer to a situation in which the plaintiff was limited to an unfairly short period of time in which to find the relevant evidence. But the plaintiff's attorney in *Celotex* could not have had any idea what point in time marked the boundary between "railroaded" and "not-railroaded." If the court fixed in advance an unduly short

period of time for obtaining that evidence (e.g. 30 days), the plaintiff would have been railroaded, in the sense that he or she was given too little time, but at least the attorney would have known what was happening. Giving a plaintiff six months might be long enough that no railroading occurred, but if the plaintiff only learned *after* the fact that the evidence had to be obtained within that six month period, the system would still be unfair, and unlikely to yield the same record that would be created if the case went to trial.

As a practical matter, the operational significance of Rule 56(f) is limited, and varies widely. In June 2005, out of approximately 1400 summary judgment decisions available on Westlaw[82], there were only 32 instances in which a Rule 56(f) request was made, and only 11 of those requests were granted.[83] In some courts, or types of cases, requests for a continuance under Rule 56(f) are rare, the parties perceiving that such requests have little chance of success, or may look like a confession of the weakness of the non-moving party's case. In other circumstances, or before other judges, such motions may be routinely granted. Such judge-specific[84] and other differences[85]

[82]A Westlaw search for June 2005 for the phrase "summary judgment" in federal decisions identified 2031 cases. The more detailed analysis of June 1, 2005, decisions indicated that about 70% of the cases using this phrase actually involved a motion for summary judgment. *See* n. --, *supra*.

[83]List on file, ____ Law Review.

[84]*See* Patricia Wald. *Summary Judgment at Sixty*, 76 Tex. L. Rev. 1897, 1941 (1998)("some judges seem quite stingy in affording opportunities for additional discovery prior to summary judgment.")

[85]*Compare* Wichita Falls Office Assocs. v. Bank One Corp., 978 F. 2d 915, 919 n. 4 (5th Cir. 1992)("a continuance . . . for purposes

highlight the failure of Rule 56(f) to establish a predictable, consistent and coherent record-building system.

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of discovery should be granted almost as a matter of course") *with* Vesta fire Insurance Corp. v. Insurance Ventures, Inc., 2005 WL 1417150 *1 (E.D.Cal. June 16, 2005)("The burden is on the party seeking additional discovery to demonstrate that it would prevent summary judgment . . . . The [Rule 56(f)] moving party must also demonstrate that it diligently pursued previous discovery opportunities.) *Compare* Edward Brunet, Martin Redish and Michael Reiter, SUMMARY JUDGMENT FEDERAL LAW AND PRACTICE 86 (2d ed. 2000)("the danger" that summary judgment will be sought before the non-moving party has completed discovery "can *easily* be avoided, simply by resort to the *necessary* protections provided by Rule 56(f)" (emphasis added) *with id.* 151 ("the nonmoving party's 'reasons' require by Rule 56(f) must be substantial, three showings must be made, the protections contained in Rule 56(f) are "permissive", and the court has "substantial discretion" to deny or grant the request.)

See John Lapham, *Summary Judgment Before the Completion of Discovery: A Proposed Revision of Federal Rule of Civil Procedure 56(f)*, 24 U. Mich. J.L.Reform 253, 267 ("the courts of appeals have often applied conflicting standards"), 281 ("Because the rule's language provides little guidance, judges are left on their own to decide when rule 56(f) continuances are appropriate. Resulting standards vary widely.")(footnote omitted)(1990).

C. CONTROLLING THE TIMING OF SUMMARY JUDGMENT

District judges should address these problems by using their authority under Rule 16 to issue a scheduling order that will establish for summary judgment a structure more similar to the predictable and equitable record building process that precedes a JML motion.

First, summary judgment motions regarding disputed questions of fact should be precluded prior to the completion of discovery, except where a moving party has obtained in advance permission to seek summary judgment at an earlier time. This will establish for summary judgment record building the same sort of court-fixed deadline that exists for the creation of the trial record. The non-moving party would face a somewhat earlier deadline (the discovery cutoff date) than at trial (the close of the non-moving party's case) for completing sufficient investigation and discovery to meet the JML standard. But so long as that discovery cutoff date, like a trial date, is known well in advance and is not unreasonably short, and certain other problems[86] are avoided, the attorney for the non-moving party will at least ordinarily be able to assemble by the discovery deadline a record comparable to the trial record. If summary judgment is postponed until the passing of that discovery deadline, additional discovery can often[87] be denied, not because the court makes some subjective after-the-fact judgment about the diligence of the non-moving party's attorney, but because the time for discovery has simply, and

[86] *See* pp. ---, *infra*.

[87] *See* part IV, *supra*.

forseeably, passed.[88]

Potential moving parties should be required to obtain prior judicial approval if they wish to file before the completion of discovery a summary judgment motion regarding disputed facts. That will allow the court to decide in advance whether such a procedure is appropriate, rather than having to entertain such a motion and decide whether to reject it on procedural grounds. Equally importantly, this will avoid burdening the non-moving party with the difficulty of having to prepare simultaneously a response on the merits and an argument that the summary judgment motion was premature. The latter argument will often pose for the non-moving party the dilemmas created by Rule 56(f). The burden should be on the proposed moving party to show in advance that such an early summary judgment motion will not present the court with an incomplete record.

Completion of discovery would not be necessary where the summary judgment motion rests on undisputed facts. But courts should use caution in entertaining such motions. The existence of a substantial body of undisputed evidence may not mean that there is no dispute regarding what factual inferences should be drawn from that evidence. It will often be possible for a moving party to offer a beguiling picture of undisputed facts by cherry picking, setting out actually

[88] *See* Enwomwu v. Trans Union, LLC, 2005 WL 1420857 *3 (N.D.Ga., June 1, 2005) (denying request to postpone summary judgment for additional discovery because "Plaintiff never objected to this Court's discovery schedule or applied to the Court for additional time to conduct discovery."); Evans v. Taco Bell Corp., 2005 WL 1592984 (D.N.H. June 30, 2005) (denying Rule 56(f) request, inter alia, because it was made only after discovery cutoff.)

undisputed subsidiary facts but simply omitting mention of facts, or factual issues, favorable to (but possibly as yet unknown to) the non-moving party. The moving party may also characterize as undisputed facts which, although asserted by its own witnesses, the non-moving party would ultimately dispute once it learned more through investigation and discovery. This situation is aggravated by the very phrase "genuine issue of material fact", which invites courts to confuse issues that are not disputed at all (there is no genuine issue because the parties do not really disagree) with disputed issues where the court thinks the evidence for one side is too weak to survive a JML motion at trial.

There will also be cases in which it would be appropriate to permit a summary judgment motion to be heard on one issue involving disputed facts, even before discovery on other issues has been completed, by establishing for that issue a separate, earlier discovery cutoff. Court should exercise caution before singling out one issue for such accelerated discovery and possible summary judgment. Factual issues which at the pre-trial phase may seem quite distinct may prove at trial to be interrelated to the other evidence and factual questions in the case. Thus a scheduling order that the court contemplates only as a method of addressing the order of discovery and summary judgment (e.g. six months of discovery limited to causation, to be followed by a summary judgment motion) may unintentionally operate like an limine order, excluding discovery or consideration of what might have been important evidence on a particular issue.

For example, in response to claims that they retaliated against a worker for filing charges with EEOC, employers at times move for summary judgment on the ground that the official who fired the defendant had at the time no knowledge that EEOC charges had been filed. Discovery limited to evidence of that official's knowledge might well overlook evidence that would prove critical at trial. For example, the evidence at trial would usually focus at least in part on whether the proffered reason for the dismissal (e.g., the plaintiff was late for work) could be substantiated. That might seem like a separate issue. But the employer must have had *some* reason for firing the plaintiff; any evidence that the profeered reason was not genuine (e.g., he or she was punctual, and the relevant officials knew it) would tend to support the plaintiff's contention he or she was actually dismissed in retaliation, and that the official who denied knowledge of the EEOC charge must therefore have been lying. Evidence of retaliatory motives by some other official would also seem to be a separate issue, but testimony at trial might indicate that that other official had in some fashion influenced the dismissal decision (e.g. by recommending the dismissal, or by failing to disclose to his employer that the plaintiff was actually punctual). Indeed, any evidence at trial of mendacity regarding other issues by the official who dismissed the plaintiff would call into question the veracity of his or her claim of ignorance of the Title VII charge. A party seeking permission to move for summary judgment on one issue before the completion of all discovery should be required to show that evidence regarding the remaining issues could not bear in some

way on the particular question which the potential moving party seeks to raise first.

Second, the court should fix a date certain for the filing of any summary judgment motion, and establish for the response an amount of time appropriate in light of the nature of the anticipated motion and the excepted volume and complexity of any supporting materials. That would help to reduce that disparity that exists under Rule 56 between the preparation time afforded to the moving and non-moving parties.

Third, the court should establish a procedure more workable than Rule 56(f) for cases in which a non-moving party contends that it needs time for additional investigation or discovery in order to respond to a summary judgment motion. The steps outlined above should greatly reduce the frequency with which this problem arises, but it cannot be eliminated altogether. Rather than having to respond simultaneously both on the merits and with a request for additional time, as can occur under Rule 56(f), a non-moving party should be required only to submit by a specified deadline *either* a response on the merits or a request for additional time. If that request is denied, affording the non-moving party this alternative will increase the total amount of time to reply to the merits of the summary judgment motion; as a practical matter, however, the non-moving party still will have substantially less time to reply than the moving party had to prepare the motion itself.

IV. PRIOR DISCLOSURE OF THE MOVING PARTY'S EVIDENCE

Rule 56(c) lists five types of materials that could be offered in support of a motion for summary judgment: pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. The first four categories would of necessity already be known to the non-moving party. But an affidavit prepared for the express purpose of supporting the motion could well contain information or assertions not previously disclosed to the party opposing summary judgment. Indeed, the primary purpose of an affidavit would ordinarily be to proffer sworn statements regarding factual matters *not* already supported by existing, and previously disclosed, pleadings or discovery. Rule 56(e) provides that a summary judgment motion may also be supported with documents; these may (e.g. in response to a motion to produce) or may not have been revealed to the non-moving party prior to the filing of the motion. Rule 56 contains no restriction on such eleventh hour proffers of previously undisclosed evidence. Absent relief under Rule 56(f), such supporting material submitted in this manner is immunized at the summary judgment stage from testing through cross-examination or other forms of discovery.

Such immunity was of no significance to pre-Rule 56 summary judgment. A pre-Rule 56 supporting affidavit was similar to the sworn verification of a complaint. The sole purpose of such an affidavit under that older practice was justify requiring the non-moving party, in response, to swear to its own contentions. Once a court concluded that a moving-party affidavit met this minimal burden, the contents of that

affidavit itself received no further consideration. Under pre-Rule 56 summary judgment, possible cross-examination of the moving party's affiant was simply irrelevant. It did not matter whether the moving party's affiant was lying through his teeth, and might confess as much the minute he or she was deposed. Affidavits were so central to pre-Rule 56 summary judgment practice that the framers of the Rule found it necessary to state with particular specificity that the Rule did not require affidavits.

Under modern summary judgment practice, on the other hand, the content of a moving party's affidavits (and supporting documents) can be of determinative significance in a court's decision to grant or deny a motion. The moving party relies on its affidavits and documents to define the issue on which summary judgment is sought, and the court looks to those materials to delineate the type and quality of evidence that the non-moving party will have to adduce to defeat the motion. But the sufficiency of the response the non-moving party is able to offer may well depend not only on the merits of its position, but also on whether it knew in advance of the information contained in those moving party materials, at a time when the non-moving party was able to attack them through discovery.

Litigants understandably hope to avoid ever disclosing inculpatory information. On the other hand, although they have every intent of disclosing exculpatory information, litigants often seek to postpone disclosing the evidence on which they ultimately intend to rely. Such delay can advantage a litigant by limiting the time the opposing

party has to undermine that evidence through discovery or investigation or to prepare effective cross-examination.[89] If a litigant can succeed in disclosing information only at the very point at which it seeks summary judgment, it may well avoid such discovery or cross-examination altogether. Withholding moving-party evidence until the filing of a summary judgment motion can be even more effective if that motion itself is filed only after the discovery cutoff date. At that point in the proceedings, the moving party can point to that cutoff date in opposing a request under Rule 56(f) for additional discovery.

At trial, of course, it is virtually impossible for such tactics to succeed. Each party always has a right to cross-examine opposing witnesses, even if they had never been deposed, or even if a prior deposition had utterly failed to shake their testimony. No court would or could grant a directed verdict based on the testimony of the moving party's witnesses without first permitting the non-moving party to question those witnesses. Thus any cross-examination that could not occur at the summary judgment stage will always be possible, and supplement the record, at the trial stage.

In *Arnstein v. Porter* Judge Frank described a typical example of the importance of the cross-examination that might be avoided by disclosing exculpatory information only at the time of a summary judgment

[89]Discovery can often be an awkward tool for identifying the evidence on which an opposing party intends to rely. An attorney knows the factual contentions of his or her client and supporting witnesses, and they can be important guides for seeking inculpatory information from the opposing party. But that client and those supporting witnesses are less likely to know the exculpatory information being prepared by the other side, and it can be harder to elicit through discovery.

motion. In a then recent district court case, the judge refused to grant summary judgment for defendants, despite

> a mass of impressive affidavits, containing copies of corporate records, the accuracy of which the plaintiffs did not deny in their affidavits, and which on their face made plaintiffs' case seem nothing but a sham; at the trial, however, cross-examination of the defendants revealed facts, theretofore unknown by the plaintiffs, that so riddled the defendants' case as it had previously appeared on the summary judgment motion that the judge entered judgment against them for several million dollars, from which they did not appeal.[90]

Unlike mere demeanor evidence, which arguably may do no more than raise doubts about the veracity of a witness's statements, cross-examination may elicit additional facts, disclosures and concessions and can thus provide specific affirmative support for a version of the facts different than that suggested by a witness's direct testimony or affidavit.

The fact that the non-moving party actually took the deposition of the affiant is insufficient to replicate the record at trial, or, more precisely, insufficient to afford to counsel for the non-moving party the same opportunity for cross-examination that would exist at trial, unless at the time of that deposition the non-moving party had the same information that that party would have had when the time came at trial for cross-examination. Cross-examination at trial always occurs only after the witness has offered his or her direct testimony, setting forth whatever affirmative evidence the moving party wishes to adduce. During any re-direct examination the witness cannot be asked about new issues, but may only be queried about questions that

[90]154 F. 2d at 471.

arose during cross-examination; that prevents the witness from raising new assertions when that opportunity for cross-examination may no longer exist. But current pre-trial practice does not require a party to disclose, prior to a deposition of one of its witnesses, what that witness will say at trial (or in a summary judgment affidavit). Permitting a moving party to offer new information in a summary judgment affidavit filed after the affiant's deposition is like requiring at trial that the party opposing JML cross-examine the moving party's witness before that witness's direct testimony, a scheme unimaginable outside of the court presided over by the fabled Queen of Hearts.

Summary judgment affidavits that a moving party knows will probably be immune from cross-examination are particularly likely to be unreliable.[91] Affidavits usually are carefully drafted by attorneys and parties[92], which means that their content assuredly differs from the live testimony that even the best prepared witness would give. There are two specific practical reasons why the content of the affidavit and testimony would ordinarily be different. First, in framing an affidavit, the attorney may feel free to omit any facts unfavorable

[91]In *Sartor* counsel for the non-moving party emphasized the impact of "highly skilled attorneys . . . who can prepare a trial in their offices, without danger that a witness may say too much, or be unmasked upon cross-examination." Petition for Writ of Certiorari at 9-10, Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944), No. 232, October Term 1943.

[92]*See* Badger v. Greater Clark County Schools, 2005 WL 1320107 *3 (S.D.Ind. June 1, 2005)(affiant relied on by moving party revealed during a subsequent deposition that "when drafting the affidavit, School administrators changed, modified, or omitted some of his words and statements in order to create an affidavit that better suited the School's legal theories.")

to his or her client. At trial, on the other hand, the attorney must ask non-leading questions of the witness, and the trial witness, unlike an affiant, is required to swear not only not to lie ("the truth . . . nothing but the truth") but also to tell "the whole truth." Thus an affidavit describing a bar fight could mention only the punch thrown by the defendant, but at trial the witness would have to mention (if it had occurred) that the plaintiff had first thrown a chair at the defendant. At trial the failure of such a witness to mention the plaintiff's own actions would be fatal to the credibility of the witness; on summary judgment, on the other hand, that omission could assure the success of the motion. Such a difference can be of particular importance if the non-moving party does not know the facts that would have to be revealed by a witness required to tell the whole truth.

Second, in preparing an affidavit, a skilled attorney can often craft a turn of phrase that would, without actually lying, lead the reader to an inaccurate conclusion. For example, an affidavit might swear "I did not disclose the spy's name", which could be literally true if what the affiant had done was identify the spy by pointing to her in a restaurant. Most competent attorneys, however, would admonish their witnesses not to make such clever but misleading statements at trial; if cross-examination or other evidence revealed the rest of the story, that seemingly clever turn of phrase could destroy the witness's credibility with the trier of fact. Thus the sort of cleverly misleading but not quite false statements that an attorney might well place in an affidavit would frequently be avoided

in live testimony at trial.

Reliance on moving party affidavits was entirely appropriate under pre-Rule 56 summary judgment, but their use poses serious problems in modern summary judgment cases. In *Celotex* utilization of such affidavits by moving parties seemed so traditional that the non-moving party argued, without success, that moving party affidavits should be required. In retrospect the non-moving party had it precisely backwards. The difficult question is not whether moving party affidavits should be required, but why and when they should be permitted at all.

The appropriate solution to these problems is to forbid the use by the moving party of affidavits or other evidence that was not previously disclosed to the non-moving party. If summary judgment, as the Supreme Court now intends, is to replicate the result of a directed verdict motion, then moving parties should not be permitted to base such motions on evidentiary material that had not earlier been provided to the non-moving party. When, in support of a summary judgment motion, the moving party offers an affidavit or other evidence containing information that was not previously disclosed, the appropriate judicial response would be to refuse to consider that new information. Rule 56 does not require a court to accept in support of a summary judgment motion affidavits or other evidence containing assertions that have not been subject to cross-examination or the rigors of discovery. Summary judgment is required only if the moving party affirmatively establishes that the record at trial will be insufficient to withstand

a directed verdict motion. The content of a summary judgment affidavit containing assertions not subject to cross-examination is too likely to differ from the trial court record, where such cross-examination is virtually certain.

Consideration of such newly revealed evidence should simply be barred, rather than (as would be true today) merely being a possible basis for objection by the non-moving party. Such a case-by-case response would create precisely the same procedural problems and dilemmas as does Rule 56(f). The non-moving party would have to respond to the motion at the same time it objected to the new evidence, to show that the new evidence was prejudicial without somehow conceding that the motion should be granted if the evidence were not excluded, and to risk the litigation becoming a dispute about whether the non-moving party had been sufficiently aggressive in seeking to discover that evidence. So long as resort to Rule 56(f) is required, and might fail, the moving party will have a substantial incentive to withhold affidavits, documents or other materials until it files its summary judgment motion.

The better course would be at the outset to shift the burden to the moving party, requiring that the summary judgment motion itself set forth in what manner and at what point in time any supporting documents or other evidence had been previously disclosed to the non-moving party. The certainty that such an affirmative showing will invariably have to be made will more reliably lead to prior disclosure than the mere possibility that a non-moving party will both offer

and prevail on a Rule 56(f) objection.

V. SUMMARY JUDGMENT ON AN ALTERNATIVE GROUND

Rule 56(c) authorizes summary judgment where the moving party shows "that there is no genuine issue as to *any* material fact" and that it is entitled to judgment as a matter of law. In practice the term "any" has a different meaning, depending on whether the party seeking summary judgment is the plaintiff or the defendant. That difference, in turn, affects what issues a court can consider and decide in resolving a summary judgment motion.

A summary judgment motion on behalf of the plaintiff can only be granted if the moving party establishes that it was entitled to prevail on every element of its claim, as well as on every asserted affirmative defense. In a simple tort case the plaintiff would have to show that there was no genuine issue regarding negligence, causation, *and* resulting damages. So with regard to a plaintiff moving party, the term "any" in Rule 56(c) means "any . . . at all." A defendant seeking summary judgment, on the other hand, could prevail on a showing that it is entitled to prevail on even a single necessary element of the plaintiff's claim, or on even one asserted affirmative defense. In that same tort case the defendant would need only show that there is no genuine issue as to *either* negligence *or* causation *or* resulting damages. Thus with regard to a defendant moving party, the term "any" in Rule 56(c) means "any single." The same difference in the burden on moving plaintiffs and moving defendants, and the same difference as to the meaning of "any," could exist with regard to subsidiary issues (Was the defendant driving at 60 m.p.h.? Was the posted speed

limit 30 m.p.h?)

Because of these differences, a problem can arise (indeed is almost always present) when a defendant moves for summary judgment that could not occur in the case of a plaintiff's motion for summary judgment, the only type of summary judgment generally permitted before Rule 56. When a defendant seeks summary judgment on one issue (e.g. was defendant negligent?), there will invariably be other issues in the case (was there causation? was the complaint filed after the expiration of the statute of limitations?) which, if resolved in favor of the moving party, would also entitle it to summary judgment. Rule 56 simply does not say whether, or when, a court presented with a defendant's summary judgment motion with regard to one issue could instead decide to award summary judgment based on another issue.

The courts have dealt inconsistently with this issue. On the one hand, courts of appeals have repeatedly held that summary judgment cannot be awarded on a ground not advanced in the original summary judgment motion.[93] On the other hand, there are appellate decisions holding that summary judgment can be awarded on any alternative ground supported by the record.[94] Judges at times feel free to scrutinize

[93] *E.g.*, Moore v. Cockrell, 2005 WL 1903731 *6 (5th Cir. 2005); Travelers Cas. & Sur. Cor. v. Gerling Clobal Reinsurance Corp., 2005 WL 1983701 *9 (2d Cir. 2005); A.F.A. Tours v. Whitchurch, 937 F. 2d 82 (2d Cir. 1991).

[94] Green v. CSX Transp., Inc., 414 F. 3d 758, 764 (7th Cir. 2005); Lyons v. Red Roof Inns, 130 Fed. Appx. 957, 961 (10th Cir. 2005); Western States Paving Co., Inc. v. Washington State Dept. of Transp., 407 F. 3d 983, 1003 n. 13 (9th Cir. 2005); Johnson v. Gordon, 409 F. 3d 12, 17 (1st Cir. 2005); Springfield Terminal Rwy. Co. v. Canadian Pacific Ltd., 133 F. 3d 103, 106 (1st Cir. 1997).

summary judgment cases for issues that the moving party itself never raised at all.

The tension between these two lines of decisions derives in part from the fact that summary judgment can be granted in two quite different types of situations--cases in which the relevant facts are not actually in dispute, and cases in which the court concludes that there is insufficient evidence to support the non-moving party's version of the relevant disputed facts. Where the facts[95] relevant to some alternative ground are undisputed, there would be no record-building problems if summary judgment were granted on that alternative ground. So long as the moving party had expressly raised the alternative ground in a brief, and the non-moving party thus had an opportunity to offer argument in response, awarding summary judgment on an alternative ground would be entirely sensible.[96] But serious procedural and constitutional problems arise if the alternative ground on which summary judgment is awarded does involve disputed questions of fact. Those problems have arisen in a variety of circumstances.

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[95]Of course, whether the *facts* are undisputed can be quite different from whether the *evidence* is undisputed. Even where the available evidence is not in conflict or in dispute, there may well be a dispute regarding what inferences should be drawn from that evidence regarding some other controverted fact. For example, even where the speed of the defendant driver and the nature of the road conditions are all agreed upon, there may well be a dispute about whether the driver's actions were negligent. In such instances, so long as reasonable jurors could disagree about the inferences, summary judgment would not be appropriate.

[96]If a court acting sua sponte granted summary judgment on an alternative ground, the losing party would be improperly denied an opportunity to brief the issue, but there would be no record-building problem.

In *Celotex v. Catrett*[97], for example, summary judgment was sought on the ground that the decedent, an Illinois resident, had not been utilized any Celotex-made asbestos product in the District of Columbia, where the suit was filed. The plaintiff conceded that there had been no use of those products in the District of Columbia, and contended only that use had occurred at job sites elsewhere.[98] The motion thus presented a question of law on particular undisputed facts--was exposure in the District of Columbia necessary to maintain a suit there? In awarding summary judgment, however, the district judge, stated that he was doing so because there was "no showing that the [plaintiff]

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[97]477 U.S. 317 (1986).

[98]Counsel for the Celotex stated:

> By the plaintiff's own documents, . . . the only exposure to any Celotex products by the decedent was in Chicago. . . . [Plaintiff does] say, for the limited purposes of use in this motion, that he was not exposed to any product in the District of Columbia manufactured by Celotex. . . . [B]ut no further exposure in the District of Columbia.

Joint Appendix at 211-13, Celotex v. Catrett, 477 U.S. 317 (1986), No. 85-198.

> The Court: Was your client exposed to it in the District of Columbia?
>
> [Counsel for Plaintiff]: No, sir, he was not. He was exposed to it in chicago and I believe three or four other areas out west.
>
> The court: You don't state it was exposed here.
>
> [Counsel for Plaintiff]: No, sir, we admit he was not exposed to their product in Washington. But again that would go to a change of venue as opposed to summary judgment.

Id. at 215-16.

was exposed to the defendant's product in the District of Columbia or elsewhere within the statutory period."[99] By adding the two words "or elsewhere," the district court granted summary judgment on a second, alternative ground, that the decedent had never used a Celotex product at all.[100] In the Supreme Court the non-moving party expressly objected to the process by which summary judgment had been awarded on that alternative ground; the Court's decision did not address the issue.[101]

This problem arose in a somewhat different manner in *Adickes*

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[99]Joint Appendix at 217, Celotex v. Catrett, 477 U.S. 317 (1986), No. 85-198.

[100]The defendant's attorney had conceded at an earlier conference that the decedent had utilized a Celotex product outside the District of Columbia. "There was a product used while he was employed, but it was not something to which he was exposed. That is the information I have. . . . It was a completely enclosed product, and there was no possible exposure." Transcript of December 4, 1981, *quoted in* Brief for Respondent at 5 n. 6, Celotex v. Catrett, 477 U.S. 317 (1986), No. 85-198.

The company had earlier made, but then withdrawn, a motion for summary judgment asserting that the decedent had never utilized a Celotex product at all. The company never sought summary judgment or offered any evidence regarding whether the product which the decedent had used was "a completely enclosed product."

[101]Transcript of Oral Argument, Celotex v. Catrett, 477 U.S. 317, 1986 U.S. Trans. Lexis 79 at *35-*37 ("[T]here is no indication anywhere in this [second] motion that they were raising the issue of exposures outside the District of Columbia. I think as the clear text shows, the only fact even discussed in the motion was whether there was evidence of exposure in Washington, D.C. . . . . [T]he most basic requirement when you are moving for summary judgment is to identify a set of undisputed facts that are sufficient to justify judgment as a matter of law. Here, the only fact even being asserted by the motion, plaintiff's ability to prove exposures in Washington, D.C., just wasn't a merits issue. . . . [I]t would have been especially bizarre to require [the plaintiff] to come forward with affidavits substantiating her allegations of exposures in chicago since the motion on its face wasn't even contesting those allegations.")

v. S.H.Kress.[102] In that case the plaintiff, a white civil rights worker, had been arrested after she unsuccessfully had sought service at an S.H. Kress lunch counter in Hattiesburg, Mississippi. She sued S.H. Kress, alleging that the firm had conspired with the Hattiesburg police. In the district court, the district judge refused to permit a deposition of the waitress involved because she was without authority to make official decisions.[103] Kress then filed a motion for summary judgment, relying on affidavits from the store manager and from the police that they had never spoken with each other about or during the incident. The lower courts granted summary judgment because on their view there was no evidence of a conspiracy between the manager and the police.[104]

The Supreme Court, rather than addressing the issue on which summary judgment had actually been sought and granted, undertook to decide instead whether summary judgement was warranted with regard to whether the Hattiesburg police had conspired with a different Kress employee, the waitress who had refused to serve Adickes. That was an issue on which summary judgement had never been sought, and on which neither party had had any reason to offer evidence, because the trial court had earlier held that a conspiracy between the police and the waitress, even if proven, would have been legally insufficient to impose liability on Kress. The Supreme Court assumed, without

[102]398 U.S. 144 (1970).

[103]398 U.S. at 157 n. 16.

[104]398 U.S. at 154-58.

explanation, that Kress could be held liable if the waitress was part of such a conspiracy, and concluded that Adickes had failed to adduce sufficient evidence to defeat summary judgment on that new factual issue. The Court might have upheld an award of summary judgment against the plaintiff, except for the Court's conclusion that the defendant's own affidavits failed to provide specifically deny the existence of such a conspiracy.

To a reader unfamiliar with the proceedings in the district court, the decision in *Adickes* seems a fairly mundane explanation of the evidentiary burdens of moving and non-moving parties, in a case in which the attorneys for both sides did an inexplicably poor job of making a record. In reality the decision illustrates the problems with awarding of summary judgment on a basis that the moving party--regardless of what evidence it put in the record--never articulated in its original motion. If in *Adickes* the record made by the defendant when it sought summary judgment regarding the manager-conspiracy claim had chanced also to deny the existence of a conspiracy with the waitress, that assuredly would not have afforded a proper basis for granting summary judgment on the latter issue; it is the summary judgment motion and supporting memorandum, not apparently irrelevant facts included in an affidavit, that define the proposed justification for summary judgment. The Supreme Court's opinion regarding whether the record warranted summary judgment on the waitress-conspiracy issue proceeds oblivious to the procedural circumstances in which that record was created.

In the lower courts summary judgment is awarded in cases in which the absence of sufficient non-moving party evidence regarding some alternative ground occurred precisely because the moving party in its motion papers had never asserted that the non-moving party lacked evidence on that other issue. In *Hammer v. Ashcroft*[105] the defendant in an age discrimination case initially moved for summary judgment on the ground that the six-year difference between the age of the plaintiff and the age of the younger worker who got his job was insufficient as a matter of law to support a prima facie case of age-based discrimination.[106] The non-moving party responded with a brief arguing that such a six-year age difference was legally sufficient.[107] The non-moving party offered no evidentiary material on that issue because the facts related to the defendant's specific argument (the difference in ages between the two employees) were undisputed and the motion raised a purely legal issue. The defendant then filed a reply brief, objecting that the record (unsurprisingly) contained no evidence that the official who had dismissed the plaintiff *knew* how old the plaintiff was, and the court awarded summary judgment on this new ground.[108]

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[105]2004 WL 1960571 (8th Cir. Sept. 7, 2004).

[106]Defendant's Motion for Summary Judgment at 13-15, Hammer v. Ashcroft, No. 01-3601-CV-S-RED (W.D.Mo.), filed April 9, 2003.

[107]Plaintiff's Response to Defendant's Motion for summary Judgment and Suggestions in Opposition at 16-17, Hammer v. Ashcroft, No. 01-3601-CV-S-RED (W.D.Mo.), filed May 27, 2003.

[108]Defendant's Reply Suggestions in Support of Defendant's Motion for Summary Judgment at 13, Hammer v. Ashcroft, No. 01-3601-CV-S-RED (W.D.Mo.), filed June 3, 2003.

Although the district court granted summary judgment based on its belief that the six year age difference was insufficient as a matter of law, the court of appeals affirmed "not for the reason given by the District Court", but because of the lack of evidence that the deciding official knew the plaintiff's age.[109] The appellate court emphasized that the defendant's new assertion that the official did not know the plaintiff's age was "uncontroverted", ignoring the fact that the reason the plaintiff's summary judgment response had included "no evidence"[110] on this question was because the original summary judgment motion itself had never raised that question.

In *Murray v. United Food and Commercial Workers*[111] the plaintiff alleged that he had been fired because of his age; the defendant contended, to the contrary, that the plaintiff had been dismissed because of inadequate job performance, particularly in the preparation of certain charts. In the district court the moving party contended that non-moving party had not presented sufficient information that the charts were in fact competently prepared[112], and the lower court awarded summary judgment on that issue.[113] On appeal, the employer argued that the

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[109]2004 WL at *4.

[110]*Id.*

[111]100 Fed. Appx. 165 (4th Cir. 2004), *aff'g* 229 F. Supp. 465 (D.Md. 2002).

[112]Motion With Memorandum In Support by Christian Sauter, Donald Cash, United Food & Commercial Workers for Summary Judgment at ----, Murray v. United Food & Commercial Workers Union, Local 400, 229 F.Supp. 2d 465 (D.Md. 2002), No. CIV. JFM-98-2221.

[113]229 F. Supp. 2d at 473.

fatal defect in the record was that it contained no evidence that the official who dismissed the plaintiff did not *believe* (even if mistakenly) that the charts were defective, and the appellate court affirmed summary judgment on that new ground.[114]

The award of summary judgment on such alternative grounds is improper because of the necessarily selective record created in response to a summary judgment motion. When summary judgement is sought regarding one disputed question of fact (as in *Adickes* and *Hammer*), the burden on the non-moving party (once the moving party has met its initial burden[115]) is only to adduce appropriate materials regarding the specific issue on which summary judgment is sought.[116] Thus, in a negligence case, if the defendant moved for summary judgment on the issue of whether it had failed to exercise reasonable care, the plaintiff would not be expected to offer evidence regarding causation, or the extent of his or her injuries, or the propriety of punitive damages. Indeed, a judge would legitimately be annoyed if a non-moving party flooded the record with affidavits, depositions or documents, without bothering to select out (or at least direct the court's attention to) the portions

[114]Murray v. United Food & Commercial Workers Union, 100 Fed. Appx. 165, 174-75 (4th Cir. 2004).

[115]See pp. -----.

[116]In federal court depositions, documents produced in discovery, and other discovery materials are not ordinarily filed with the court, except insofar as they may bear on a particular motion. Thus in responding to a summary judgment motion, a non-moving party is usually making a selection of materials from a substantially larger body of documents. Depositions, for example, are often excerpted, rather than being filed in their entirety, a practice that greatly facilitates the work of the court.

relevant to the particular issue raised by the summary judgment motion.[117] If (as in *Celotex* and *Murray*) the moving party sought summary judgment on a purely legal issue raised by undisputed facts, the would be no reason for the non-moving party to offer any evidence at all in response. The scope of the summary judgment record will thus invariably and quite properly be narrower in scope than the record that would be created at trial, when all disputed issues are before the court for resolution.

Granting summary judgment because a non-moving party's response to a motion regarding one issue failed to include materials regarding a second issue, not the subject of the original motion, denies to the non-moving party the notice and opportunity to be heard guaranteed by the Due Process clause. The fact that the non-moving party was afforded notice of the need to make a record on one issue is simply insufficient to provide the constitutionally required notice of any need to make a record on other, different issues.

The Supreme Court in *Fountain v. Filson*[118] held that summary judgment could not be granted unless the party against whom summary judgment was to be awarded had been put on notice of the need to proffer evidence on the factual issue in question. In that case the plaintiff, Filson, alleged that she had a $6000 interest in certain real property to

[117]It thus wholly inaccurate to describe a summary judgment motion as "thrust[ing] into possible question *any* fatal factual deficiency, whether or not it is in the forefront of controversy." Springfield Terminal Railway Co. v. Canadian Pacific Ltd., 133 F. 3d 103, 107 (1st Cir. 1997)(emphasis added).

[118]336 U.S. 681 (1949).

which Fountain had title, asserting that Fountain's title was subject to a resulting trust in Filson's favor. The defendant (but not the plaintiff) moved for summary judgment, alleging that under the applicable law no such resulting trust could arise on the facts of the case; the district court awarded summary judgment to the defendant on that ground. The Court of Appeals agreed there was no resulting trust, and therefore reversed the judgment in favor of the defendant. The appellate court went further and concluded that the complaint could also be read to assert a claim for a personal judgment against the defendant; the court of appeals concluded that that record demonstrated that the defendant was personally liable to the plaintiff, and therefore awarded summary judgment to the plaintiff.

The Supreme Court reversed, holding that this procedure had denied the defendant an opportunity to present her own evidence regarding the new issue of whether she had a personal liability to the plaintiff:

> [H]ere the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court. . . . [W]e [have] held that judgment notwithstanding the verdict could not be given in the Court of Appeals in favor of a party who had lost in the trial court and who had not there moved for such relief. One of the reasons for so holding was that otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case. He would have had such an opportunity if a proper motion had been made by his opponent in the trial court. The same principle interdicts, a fortiori, the appellate court order for summary judgment here. Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact. There was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment

> it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her.[119]

The circumstances in *Fountain* were particularly compelling, because the original and alternative grounds for summary judgment involved totally unrelated issues, and summary judgement was awarded to a party that had never filed any summary judgment motion at all. But the constitutional problem is the same where the prevailing party had indeed filed such a motion, but did so on an issue distinct from that on which summary judgment was later granted. The burden should be on the moving party to identify with reasonable specificity, in its actual motion or first supporting memorandum, the facts regarding which it asserts that the non-moving party lacks sufficient evidence.

The Court in *Celotex* acknowledged that notice remains an indispensable part of summary judgment. It noted, for example, 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 of her evidence."[120] In practice, of course, parties are virtually never notified (by the summary judgment motion or by the court) that they must come forward with *all* their evidence. Summary judgment motions (or suggestions of summary judgment from the court) are invariably addressed only to one or more specific issues. It would be a rare case indeed in which a party actually contended that all of the facts asserted in the complaint (identity

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[119]336 U.S. at 683.

[120]477 U.S. at 326.

of the parties, amount of damages, etc.) lacked sufficient evidentiary support. *Celotex* made clear that at the least the moving party must always "infor[m] the district court [and thus the non-moving party] of the basis for its motion."[121] A moving party could not evade that obligation by first informing the court that its motion has one basis, and then later, in its reply brief or on appeal, seek summary judgment on a different basis.

Awarding summary judgment under Rule 56 on a new issue of disputed fact would also be at odds with the manner in which the issue of notice is specifically addressed by Rule 12(b)(6). A Rule 12(b)(6) motion to dismiss for failure to state a claim can become a Rule 56 summary judgment motion. Rule 12(b) automatically converts a Rule 12(b)(6) motion to a summary judgment motion if "matters outside the pleading are present to and not excluded by the court." Clearly the parties would not know, at the time they were initially presenting or responding to a Rule 12(b)(6) motion, that they would ultimately be required to present the type of material that would be needed if the court were later to convert that Rule 12(b)(6) motion into a Rule 56 motion. Neither party would ordinarily know whether the opposing party would subsequently offer matters outside the record, and neither party would know whether, after the motion papers had been filed, the court would ultimately decide not to exclude such matters. For these reasons, once a Rule 12(b)(6) motion has in that manner been converted into a summary judgment motion, the Rule provides that "all parties shall

[121]477 U.S. at 323.

be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." In guaranteeing a "reasonable opportunity" to present evidence and other matters, the framers of this provision of Rule 12(b)(6) assured that lack of initial notice would not result in a materially incomplete summary judgment record.[122]

A court acting on a converted Rule 12(b)(6) motion could only award summary judgment regarding the specific factual issue that had been raised in connection with the Rule 12(b)(6) motion. If, for example, a tort defendant asserted that the complaint failed to allege the requisite negligence, and the court decided to treat the motion as one for summary judgment on the issue of negligence and so notified the parties, the court could not on the resulting record award summary judgment because it believed there was insufficient evidence of proximate cause. To do so would deny the non-moving party the required "reasonable opportunity" to present material regarding the issue of proximate cause. It would make no sense to construe the general terms of Rule 56 to permit the unfair result expressly forbidden when the original motion was filed under Rule 12(b)(6) rather than under Rule 56.

Permitting summary judgment on an alternative factual issue under Rule 56 also undercuts the central purpose of the applying the JML standard at the summary judgment stage, to replicate at that stage

[122]The 1946 Committee Note to the amendments to Rule 12(b), which added the language in question, explained that it "insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise." F.R.Civ.P 56, 1946 Committee Note.

what would occur if JML were sought at trial. Unlike Rule 56, the trial and pre-trial processes are replete with safeguards to assure that a party with a meritorious claim or defense does not lose merely because of a lack of adequate notice. The trial record, unlike summary judgment, is not selective; both parties know that all disputed elements of the claims (and defenses) must be addressed at trial. The pre-trial processes, including any pre-trial order, as well as the evidence offered by the ultimate verdict-loser, make clear to a potential non-moving party which issues are disputed. If a party fails to indicate in a timely and appropriate manner that it actually disputes a particular fact, any arguments it may have (including in a JML motion) would be waived.

The Federal Rules are expressly framed to prevent a verdict-loser from attacking a verdict on a new basis raised only after the fact. Rule 50(a)(2) requires that the initial JML motion that must be made during trial "shall specify . . . the law and the facts on which the moving party is entitled to the judgment." The moving party cannot thereafter raise a different asserted deficiency in the record, or advance a new theory under which other facts would suddenly become of pivotal importance. Rule 51(c)(2) also limits the ability of a verdict loser to assert after trial some new legal theory under which absent evidence would become vital; a verdict loser is generally limited to the law as stated in the jury instructions unless at trial it objected to those instructions "stating distinctly the matter objected to and the grounds of the objection." Rules 50(a)(2), 51(a) and 51(c) combine

to prevent a moving party from obtaining judgment as a matter of law on a ground not raised with reasonable specificity at trial; if summary judgment is to replicate the result of a JML motion, similar restrictions are required at the summary judgment stage. The original summary judgment motion, like the original JML motion, should be "the 'main event,' not merely a 'tryout on the road.'"[123]

The confusion among the lower courts regarding whether summary judgment can be granted on some alternative basis "supported by the record" derives from the nature of these procedural problems. The fact that a record does not contain sufficient (or any) evidence favorable to the non-moving party on a disputed factual issue does not by itself indicate that the record would *support* summary judgment on that issue. If that evidence is missing only because the original summary judgment motion never called for production of that evidence, the resulting record, like the record in *Fountain v, Filson*, simply would not support summary judgment on that question. If an alternative basis for summary judgment is indeed different from the ground of the original motion--because it involves a distinct factual question or a new subsidiary factual issue--the very fact that it *is* alternative ground will by definition mean that the original motion did not notify the non-moving party of the need to produce evidence on that matter.

[123]Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

VIII. THE MOVING PARTY'S INITIAL BURDEN

An essential element of pre-Rule 56 summary judgment was that the moving party was required at the outset to submit an affidavit or other sworn statement meeting certain technical requirements. If the moving party's submission failed to satisfy those requirements, summary judgment would necessarily be denied, regardless of the adequacy of the non-moving party response.[124] Summary judgement rules and statutes prior to 1937 generally spelled out a particular threshold standard.

Rule 56 departed from then existing summary judgment provisions in that it contained no such initial burden standard, or indeed any reference at all to the existence of an initial burden on the moving party. Given the dramatic expansion worked by Rule 56 in the types of cases and parties for which summary judgment was permitted, the framers may well have concluded that it was not feasible to articulate some standard that could forseeably be applied to all the new types of summary judgment proceedings that might emerge.

The existence of such an initial burden requirement, however, was such an established part of summary judgment practice that the

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[124]Merriman Co. v. Thomas & Co., 103 Va. 24, 48 S.E. 490 (1904); Charles Clark and Charles Samenow, *The Summary Judgment*, 38 Yale L. J. 423, 430 (1929); William Higgins, *Certain Features of the English Civil Courts and Their Procedure Which Lessen Delay and Tend to Serve the Determination of the Merits of Actions at Law*, Bulletin XI, American Judicature Society, 84 (1918); Louis Ritter and Evert Magnuson, *The Motion for Summary Judgment and Its Extension to all Classes of Actions*, 21 Marq. L. Rev. 33, 41-42 (9\1936); Bernard Shientag, *Summary Judgment*, 4 Fordham L. Rev. 186, 205 (1935); Bernard Shientag, *Summary Judgment*, 74 N.Y.L.Rev. 187, 205-10 (1940).

federal courts[125] applying Rule 56 continued to insist that moving parties indeed had such an obligation, and worked to fill in the gap left by the absence of any standard governing that burden. Only seven years after the adoption of Rule 56, the Supreme Court in its first encounter with federal summary judgment rejected a summary judgment motion precisely because the moving party had not met that initial burden. In *Sartor v. Arkansas Natural Gas Corp.*[126], the plaintiffs had sued for royalties on natural gas extracted from their land, contending that they were entitled to payments of more than three cents per thousand cubic feet. The defendants sought summary judgment on the ground that the relevant price of natural gas during the period in question was no greater than three cents per thousand cubic feet. The plaintiffs in *Sartor* had evidently offered little evidence of their own that the price of natural gas was higher than 3 cents.[127] Rather, "[t]he plaintiffs resisted on the ground that the motion was inadequately supported on the face of the defendant's papers."[128] The Supreme Court upheld that contention, reasoning that the material relied on by the moving party was insufficient to meet that initial burden.[129]

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[125]*E.g.*, Neff Instrument Corp. v. Cohu Electronics, Inc., 269 F. 2d 668, 673 (9th Cir. 1959).

[126]321 U.S. 620 (1944).

[127]Chief Justice Stone's dissent asserted that the plaintiffs had offered "no probative evidence" of a higher price. 321 U.S. at 631.

[128]321 U.S. at 623.

[129]321 U.S. at 623-29.

In 1963 Rule 56 was amended to make clear that a non-moving party could not respond to a properly supported summary judgment motion by merely standing on its pleadings. The 1963 amendment also spelled out the generally recognized existence of an initial burden requirement, stating that a non-moving party could rest upon the allegations of its pleading, without offering any other response, unless the summary judgment motion was "made and supported as provided in this rule." The 1963 Committee Note explained that this initial burden requirement had always existed under Rule 56.

> The amendment is not . . . designed to affect the ordinary standards applicable to the summary judgment motion. . . . Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.[130]

In its 1970 decision in *Adickes v. S.H.Kress & Co.*[131] the Supreme Court again held that summary judgment was improper because the moving party had failed to meet its initial burden. The issue addressed by the Court in *Adickes* was whether an S.H. Kress waitress had conspired with Mississippi police to refuse to serve the white plaintiff because she was a civil rights worker in the company of several African-Americans. The Court held that no non-moving party evidence of such a waitress-conspiracy was necessary to defeat the motion, because the moving party's motion itself lacked the requisite evidentiary foundation.

> [Defendant] argues that it was incumbent on [plaintiff] to come

[130]F.R.Civ.P. 56, 1963 Committee Note.

[131]398 U.S. 144 (1970).

> forward with an affidavit properly asserting the presence of the policeman in the store, if she were to rely on that fact to avoid summary judgment. . . . This argument does not withstand scrutiny, however, for both the commentary and background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact. . . . Because [defendant] did not meet its initial burden of establishing the absence of a policeman in the store, [plaintiff] was not required to come forward with suitable opposing affidavits.

398 U.S. at 159-60.

In *Celotex v. Catrett*[132] the defendant had sought summary judgment, not by offering exculpatory evidence, but by attempting to show through discovery that the plaintiff lacked any inculpatory evidence on the factual issue in question. The Court did not hold that Celotex had succeeded in meeting that burden; the majority simply remanded the issue, while at least three members of the Court would have concluded that the burden was not met.[133] But both agreed, as the defendant itself conceded, that any moving party was required in some fashion to meet a threshold burden of showing that summary judgment was warranted.[134]

Sartor and *Celotex* illustrate two ways[135] in which a moving party

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[132]477 U.S. 317 (1986).

[133]477 U.S. at 328 (majority opinion), 329-37(Brennan J. dissenting).

[134]477 U.S. at 323 (majority opinion), 328 (white, J., concurring), 330-37 (Brennan, J., dissenting).
The existence of the initial burden requirement was also noted in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 4 (1986).

[135]Justice Brennan noted these two distinct approaches in his separate opinion in *Celotex*. 477 U.S. at 331.

could meet this initial burden. First, the moving party could adduce evidence so compelling as to demonstrate that it would be entitled to a directed verdict if the case went to trial.[136] The moving party in *Sartor* had offered ten supporting affidavits; all of them, however, were from either its own employees and experts who worked for gas or pipeline companies "with interests similar to those of the defendant."[137] The Supreme Court held that such supporting material was insufficient to meet the moving party's initial burden, because it simply was not the type of evidence that would compel a directed verdict for the defendants if the case went to trial. To meet that burden, and thus compel the non-moving party to shoulder its own burden, the moving party was required to offer exculpatory evidence "which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party."[138]

> It may be assumed for the purposes of the case that the [moving party's affidavits] offered admissible opinion evidence which, if it may be given conclusive effect, would sustain the motion. . . . [W]e recite the facts which made it inconclusive. . . . [The affidavits] offered, even if entitled to some weight, have no such conclusive force that there is error of law in refusing to follow them.[139]

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[136]The Court had applied the same standard in *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969) (moving party evidence insufficient to meet initial burden because it did not "conclusively disprove" the moving party's claim). The 1963 Committee Note observed that summary judgment would be warranted if the evidence offered by the moving party was "overwhelming." F.R.Civ.P. 56, 1963 Committee Note.

[137]321 U.S. at 624.

[138]321 U.S. at 624.

[139]321 U.S. 624-28.

Affidavits of interested witnesses, the Court held, were inherently incapable of having such conclusive effect.

A moving party cannot, in the words of the 1963 Committee Note contemplated, "establish the absence of a genuine issue" merely by showing that there was *some* evidence to support its own position; that would be sufficient only to defeat a summary judgment motion by the opposing party. A moving party's own evidence could only lead to a directed verdict if it were so compelling that it would (at least ordinarily) be sufficient by itself to require such a result.[140] That would have to be evidence which a jury would be required to credit, and which could be relied on by a court after trial in awarding judgment as a matter of law to a verdict loser. The standard for such evidence is a stringent one. The Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*[141] held that a court asked to award judgment as a matter of law may rely on evidence supporting the moving party only if it is "uncontradicted and unimpeached" and offered by "disinterested witnesses."[142] The Court's unwillingness in *Reeves* to permit reliance on testimony of interested witnesses to overturn a jury verdict is consistent with the holding of the Court in *Sartor* that affidavits of interested witnesses could not be relied upon to

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[140]*E.g.*, Shahit v. City of Detroit Police Officer Arictosqui, 2005 WL 1345413 (E.D.Mich. 2005)(awarding summary judgment based in part on videotape of incident in question).

[141]530 U.S. 133 (2000).

[142]530 U.S. at 148, *quoting* 9A C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, § 2529, p. 300 (2d ed. 1995).

meet the initial burden of a moving party.[143] In the case of an automobile accident to which there was only one eye-witness, an affidavit from that witness would not meet this standard if the witness were one of the litigants, but usually would meet the standard if the witness were a disinterested and presumably reliable third party, such as the Archbishop of Canterbury.[144]

Second, the moving party could meet its initial burden (as the moving party attempted in *Celotex*) by offering discovery responses which affirmatively demonstrated that the non-moving party lacked any (or sufficient[145]) evidence regarding an issue on which the non-moving party bore the burden of proof. Counsel for Celotex recognized its responsibility as the moving party to utilize discovery first to affirmatively seek, and in that manner demonstrate that the non-moving party lacked evidence on a specific identified dispositive issue.

> In the present case, Celotex did everything which was logically possible to show that the Plaintiff would not be able to meet her burden of proof at trial. First, the Defendants jointly propounded discovery seeking disclosure

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[143] 321 U.S. at 628 ("the mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury.") (*quoting* Sonnentheil v. Christian Moerlein Brewing co., 172 U.S. 401, 408 (1899)); *see* Cross v. United States, 336 F. 2d 431 (2d Cir. 1964) (deposition by taxpayer supporting his claim for refund insufficient to support summary judgment).

[144] *E.g.*, Lundeen v. Cordner, 354 F. 2d 401 (8th Cir. 1966) (affidavit regarding to contents of missing document by a disinterested fellow employee of decedent).

[145] *See* First National Bank v. Cities Service co., 391 U.S. 253 (1969) (moving party could meet its initial burden if it "conclusively showed that the facts upon which [the non-moving party] relief to support his allegation were not susceptible of the interpretation which [the non-moving party] sought to give them.")

> of facts establishing decedent's exposure to asbestos-containing products. In response, Plaintiff produced nothing to indicate any exposure of decedent to Celotex products. Then Defendants moved to compel further answers to interrogatories. In response, certain answers to interrogatories were supplemented, but still Plaintiff produced nothing indicating exposure of decedent to Celotex's products.
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> Celotex thereupon filed a Motion for Summary Judgment specifically calling the court's attention to the lack of evidence of exposure to Celotex's products.
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> [I]f a summary judgment motion is filed in the absence of any indication that the party with the burden of proof might be unable to discharge that burden (for example, before the movant has propounded discovery designed to reveal the basis of the claim), then sanctions might well be imposed under either Rule 11 or Rule 56(g) of the Federal Rules of Civil Procedure.[146]

The approach taken in *Celotex* would be applicable as well in a case in which a party believed that any evidence that the adverse party did have to support its contentions was legally insufficient. The moving party could utilize discovery to reveal the nature of all of the opposing party's evidence, and then submit that discovery together with a summary judgment motion arguing that the non-moving party evidence thus disclosed was insufficient to withstand a motion for judgment as a matter of law.

In the years since *Celotex*, however, a new form of summary judgment practice has emerged in the lower courts.[147] Rather than first using

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[146]Brief for Petitioner at 21, 23, Celotex v. Catrett, 477 U.S. 317 (1986), No. 85-198; *see id.* at pp. 3-4.

[147]*See* Edward Brunet, Martin Redish and Michael Reiter, SUMMARY JUDGMENT FEDERAL LAW AND PRACTICE 88-95 (2d ed. 2000)

Indeed, there is uncertainty among the lower courts as to whether there is any initial burden requirement at all. *Compare* De La Vega

discovery to unearth the evidence of the non-moving party, a moving party merely submits with its motion some non-conclusive evidence supporting its own contentions. After the non-moving party has responded with a proffer of evidence, the moving party then files a reply brief attacking--often for the first time--the quality and/or quantity of the non-moving party evidence proffered in response to the motion. The courts then rule on that reply brief challenge to the non-moving party's evidence. For example, in an employment discrimination case the defendant will typically submit with its motion an affidavit from the relevant official denying that he or she acted with a discriminatory purpose, and then set forth in its reply brief its criticism of whatever evidence was proffered in response by the non-moving party.

This new approach does not satisfy the methodologies set forth in either *Sartor* or *Celotex* for meeting the initial burden requirement. The existence of such an affidavit, executed by an employee of the moving-party and asserting the existence of facts which would defeat the non-moving party's claim, assuredly does not establish that there is no genuine issue of material fact. That is precisely the type

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v. San Juan Star, Inc., 377 F. 3d 111, 115-116 (1st Cir. 2004) (unopposed summary judgment motion cannot be granted unless court determines there is no genuine issue of material fact) (citing cases); Carver v. Bunch, 946 F. 2d 451, 453 (6th Cir. 1991) (same); Daniels v. W. Yount, 2005 WL 1490288 (E.D.Cal. June 17, 2004) (initial burden requirement requires judicial examination of basis for summary judgment motion even if no response is filed), *with* Staten v. Nissan North America, Inc., 134 Fed. Appx. 963, 965 (7th Cir. 2005) (summary judgment motion may be granted solely because non-moving party failed to file a response).

of interested testimony that was held insufficient in *Sartor*, and which *Reeves* concluded would have to be disregarded if the employer sought to attack a jury verdict in favor of the plaintiff. Such an affidavit obviously would not be conclusive evidence (as required by *Sartor*) which the trier of fact was required to accept, and (unlike the showing attempted in *Celotex*) would contain no information at all about the sufficiency or nature of the evidence of the non-moving party.

This form of summary judgment procedure is more than just a technical departure from the earlier initial burden requirement. It necessarily entails a substantial risk that the resulting record will differ materially from the record that would be created at trial.

The first practical problem with this form of summary judgment procedure is that the moving party's criticism of the sufficiency of the evidence of the non-moving party's evidence need not and often does not occur (at all, or at least in material respects) until the moving party's reply brief. Because the moving party has not first utilized discovery to unearth the moving party's evidence, or at least has chosen in its initial motion not to set forth and then criticize that evidence, the nature of the moving party's objections to that evidence only comes at the end of the briefing schedule.

The result (and in at least some cases the purpose) of this tactic is to deny the non-moving party any opportunity to respond with additional evidence to the moving party's central arguments. This difficulty is illustrated by a description of summary judgment in Justice Brennan's

separate opinion in *Celotex*. Justice Brennan depicted a four stage process for testing at summary judgement the sufficiency of the evidence of the non-moving party. *Stage One*. The moving party files its motion and supporting papers asserting that the non-moving party has no (or insufficient) evidence to support some essential element of its claim. *Stage Two*. The non-moving party responds by "calling the Court's attention to supporting evidence already in the record that was overlooked or ignored by the moving party"[148] and/or by offering new evidence. *Stage Three*. "[T]he moving party must respond by making an attempt to demonstrate the inadequacy of this evidence."[149] *Stage Four*:

> Once the moving party has attacked whatever record evidence--if any--the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) . . . . Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways . . . .[150]

This seemingly sensible procedure, however, simply does not comport with the actual mechanics of federal motion practice. Stage One is the motion for summary judgment, Stage Two is the nonmoving party's memorandum and supporting documents in response, and Stage Three is the moving party's reply memorandum. After Stage Three the briefing

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[148]477 U.S. at 332.

[149]477 U.S. at 332.

[150]477 U.S. at 332 n. 3.

process and record-building process end, and the district court proceeds to decide the case. The fourth stage hypothesized by Justice Brennan would often be the critical stage for the non-moving party; frequently it is only after Stage Three that the non-moving party understands the nature of the attack on its evidence. But under the normal motion practice there simply is no stage four, and the nonmoving party never has an opportunity to offer the essential argument and material described in the fourth stage of Justice Brennan's scenario.

For example, in a discrimination case the defendant might support its (stage one) motion with an affidavit containing a general denial of any discriminatory motive (e.g. of age discrimination). In response to (stage two) evidence of discrimination (e.g. that most workers fired were over 50), the employer might (at stage three) object to some asserted defect in that evidence (e.g. that the plaintiff's statistics did not control for a particular age-neutral explanation, such as that most of the layoffs were in a department with a large proportion of over-50 workers). Because the plaintiff would have no opportunity to respond with relevant evidence, the resulting summary judgment record would often differ from the record that would exist at trial.[151] In this respect the process entails a problem similar

[151]A plaintiff could not be sandbagged this way at trial. If at trial the official testified and denied knowing the plaintiff's age, the plaintiff would be on notice of that contention and could respond at the rebuttal stage. On the other hand, if the official was called as a defense witness but never mentioned anything about knowledge of the plaintiff's age, and the defense attorney did not mention the issue in his or her opening statement, the court would not consider a motion for judgment as a matter of law on that issue, but would instead hold that the defendant had waived the issue by failing to raise it during trial.

to the award of summary judgment on an alternative ground.

Even if the record does contain evidence undermining this new stage three objection (e.g. the record shows that most layoffs were in departments with younger workers), the non-moving party may be forbidden to rely on that evidence. The non-moving party has no opportunity in the district court to submit a brief pointing to that evidence. A number of circuits hold that a non-moving party cannot on appeal rely on material that is in the record unless that party had expressly called that material and its significance to the attention of the district judge.[152] To the extent that the moving party's objections were first raised in its district court reply brief, the non-moving party would have no opportunity to satisfy this requirement. The practical effect would be equivalent to excluding from the summary judgment record material which is actually in the record but whose relevance did not become apparent until after the filing of the moving party's reply brief.

Under this type of summary judgment procedure, moreover, the critical stage three objection--even though it may advance a factual objection not raised by the original motion--need not in practice be supported by any moving party evidence. The moving party's stage three presentation usually consists of only arguments of counsel, not affidavits or other evidentiary material. In this manner, for example, an employer through a new or merely more specific stage three

[152]Edward Brunet, Martin Redish and Michael Reiter, SUMMARY JUDGMENT FEDERAL LAW AND PRACTICE 62-63 (2d ed. 2000)(citing cases).

argument could obtain summary judgment on the ground that the employee had failed to adduce evidence that layoffs were not concentrated in a department with older workers, even though the moving party knew that that hypothesized explanation had no basis in fact, and could not at stage one have offered an affidavit to support it. At trial, on the other hand, a party could not obtain judgment as a matter of law on a factual matter which it had never contested during trial and regarding which a knowledgeable witness for that party had never testified. Such inaction would result in a waiver of the issue.

The actual practice followed in *Celotex* avoids these problems, because under it the moving party is obligated to unearth the evidence of the non-moving party *before* the summary judgment motion is filed. By requiring the moving party to adduce discovery which has revealed some assertedly fatal flaw in the evidence of the non-moving party, the initial burden requirement properly places on the moving party the obligation of specificity. If, for example, an employer wanted to seek summary judgment on the ground the plaintiff had no evidence that his age was known to the supervisor in question, the employer could not show the apparent absence of a triable issue unless it had expressly asked in discovery for the plaintiff's evidence on that particular issue, and received a response which it could then contend was legally insufficient. Thus where the initial burden requirement is adhered to, the relevant non-moving party evidence is both requested and revealed before the summary judgment motion is filed, the moving party's attack on the sufficiency of that evidence occurs at stage

one, and the response which Justice Brennan called for at the non-existent stage four can occur at stage two.

Adherence to the initial burden requirement also prevents Rule 56 summary judgment from being used as a form of sudden death discovery which undermines the structured discovery process established by Rules 26 through 37. In the absence of an initial burden requirement, a moving party seeking summary judgment could seek disclosure of the evidence of the non-moving party, not through pre-motion discovery, but simply by filing a summary judgment motion.[153] Some lower courts, ignoring the initial burden requirement, have characterized the mere filing of a summary judgment motion, regardless of the strength or scope of supporting material, as placing on the non-moving party the responsibility to adduce (in affidavit or other form) all its evidence.[154] The filing of a summary judgment motion is treated like calling an opponent's hand in poker, except that the moving party issuing the call, unlike the poker player, has no obligation to support its demand.

Under the Federal Rules of Civil Procedure, however, the appropriate method for obtaining documents, information, and other

[153] *Compare* Edward Brunet, Martin Redish and Michael Reiter, SUMMARY JUDGMENT FEDERAL LAW AND PRACTICE 86-87 (2d ed. 2000) (defending this use of summary judgment as a less expensive method of conducting discovery), *with id.* at 329-31 (criticizing use of summary judgment motions as a form of discovery).

[154] *E.g.* Schacht v. Wisconsin Department of Corrections, 175 F. 3d 497, 504 (7th Cir. 1999) ("Roughly speaking, [a summary judgment motion] is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accepts its version of events.")

materials of a non-moving party is through discovery under Rules 26-37, not by filing a summary judgment motion under Rule 56. The well-structured discovery process created by the discovery rules has a number of important structures and safeguards that increase the likelihood that a discovery-based summary judgment record will reflect the ultimate trial record, and which place on the party seeking discovery the responsibility for assuring that the discovery process elicits evidence on a topic that may be important at trial. None of these safeguards exist where a summary judgment motion is utilized as a discovery device.

First, the party seeking discovery is required to make fairly specific discovery requests. Courts would be unlikely to require a party to respond to a single vague interrogatory which asked "State all your evidence." If a party did respond to such a request, courts would not fault the responding party if the party requesting discovery subsequently raised some particular factual question, never specifically mentioned in its sole interrogatory, regarding which no evidence had been produced. In practice, moreover, that simply is not the way discovery is usually conducted. For example, no competent lawyer at a deposition of the opposing party would limit the questioning to a single quaere such as "What evidence do you have that supports your contentions?" And if a defense attorney's deposition questions were limited to liability issues, the defense could not then seek summary judgment on the ground that the deposition contained no information about damages.

Second, the discovery process provides a very specific and structured process for addressing situations in which the party from which discovery is sought does not yet have the needed material or fails to provide an adequate (or any) response. Discovery requests do not ordinarily have rigid, drop-dead compliance deadlines. Although the discovery request itself usually contains some form of deadline, the time for compliance is invariably a matter of negotiation between counsel. If the party from whom discovery is sought does not yet have all the information or documents it ultimately expect to have, that party can simply say so in response to the request. Usually the party seeking the discovery would then have to wait a reasonable period of time, and then renew the request. If the other party still did not offer what it represented was a complete and final response, the party seeking discovery could not file a motion to compel without first seeking to resolve the dispute through further negotiation. If that negotiation failed, a motion to compel would be possible; the motion process itself would afford the non-moving party yet more time to comply with the original discovery request. If the matter remained unresolved, and the court then issued an order compelling the responsive party to give a complete and final answer to the discovery, that order would come with yet another period of time before the court-imposed deadline. Only after that deadline had passed unmet would the court sanction the non-responding party by precluding introduction of certain evidence, a sanction which might then provide

a basis for summary judgment.[155]

Throughout this entire process, which would consume months if not years, the responsive party, with very clear notice of the asserted deficiency, could continue to engage in investigation and its own discovery to obtain material to respond to the outstanding discovery request. Indeed, if the responsive party made related discovery requests of its own, there would be little likelihood that a court would compel an answer to the original discovery request until the party which made it had provided answers to the responsive discovery. Thus in an automobile accident case, the defendant might serve an interrogatory asking for disclosure of the evidence relied on by the plaintiff to prove that the defendant was speeding. The plaintiff might defer responding, and then ask to depose the defendant and seek production of previous accident records. No court would be likely to compel final answers to the defendant's interrogatories until the deposition had been held and the records produced.

The use of summary judgment to discover, and then attack the sufficiency of, the non-moving party's case will often circumvent

[155]The litigation in *Celotex* illustrates the differences in these procedures. The relevant discovery motion in that case was filed on February 13, 1981. On June 29, 1981, the plaintiff responded, indicating that she did not yet have evidence regarding use of a Celotex product by the decedent. On July 27, 1981, Celotex filed a motion to compel. The district court never acted on that motion to compel, and Celotex evidently made no effort to pursue it. Instead, On September 28, 1981, with the motion to compel still pending unresolved, Celotex took a different tack and instead moved for summary judgment. The summary judgment motion was ultimately granted on July 21, 1982, a full year after the filing of the never resolved motion to compel. Brief for Petitioner 3-5, Celotex v. Catrett, 477 U.S. 317 (1986), No. 85-198.

these safeguards in the discovery process. The summary judgment motion may well lack the specificity of a discovery request. The defendant in a car collision case, for example, might simply deny negligence in its opening motion, and only raise more specific arguments (the plaintiff failed to assert that the defendant was not a police officer, or that the defendant's brakes had not failed, or that the speed limit sign was not hidden behind a tree) after the non-moving party's response was filed. Even where the focus of the motion is clear, the time for responding, usually a few weeks, is far shorter than time for responding to discovery. Extensions of time to respond to such a motion are usually counted in days, not months. There is virtually never time, between the filing of the summary judgment and the date for a response, to conduct additional discovery.

IX. THE IMPORTANCE OF THE BURDEN OF PERSUASION

Rule 56 has seemingly inconsistent provisions regarding which party bears the responsibility for establishing whether or not there is a genuine issue of fact for trial. Rule 56(c) states that summary judgment should be granted if the affidavits and other materials "show that there is no genuine issue." That would place the burden on the moving party. On the other hand, Rule 56(e) states that if a motion is "supported as provided by this rule," then summary judgment "shall be entered" unless the non-moving party response "sets forth fact showing that there is a genuine issue." Rule 56(e) places the (or, at least, a) burden on the non-moving party.

The earlier discussion of the moving party's initial burden provides a basis for reconciling Rules 56(c) and 56(e). The initial burden on the moving party is to meet the Rule 56(c) standard, adducing evidence or discovery materials sufficient (if considered by itself) to affirmatively demonstrate that there is no genuine issue. The non-moving party could seek to defeat such an attempted initial showing by offering argument, as occurred in *Sartor*, that the moving party's evidence was deficient in some respect. At this stage the moving party has both a burden of production (of affidavits or other material) and of persuasion (to convince the court it has met the applicable standard). If that initial showing is made, the burden shifts to the non-moving party to come forward with material that rebuts the initial showing. Thus where the moving party met its initial burden with an affidavit from the sole eye-witness to an accident, say the

Archbishop of Canterbury, the non-moving party could meet its burden with evidence that the Archbishop had notoriously poor eyesight (and thus might be unreliable), or was married to the moving party's mother (and was thus not disinterested), or by producing a surveillance videotape of the accident.

But what if the court, after reviewing the submissions of the parties, remains unsure whether the summary judgment record will be sufficiently similar to the likely trial record that any differences would not affect the outcome of such a motion? When a court is asked to resolve any motion based on its prediction about some future event (here, what would occur at a trial), it will at times matter which party bears the burden of persuasion; if the court is unable to make that prediction with the requisite degree of certainty, the motion must be resolved against the party bearing the burden of persuasion. Thus a party seeking a preliminary injunction must establish that in the absence of such relief it will suffer irreparable injury; preliminary relief will be denied if the court cannot determine whether irreparable injury will occur. A prediction about the precise content of the trial record obviously is not a question of law. The answer to this question could be sufficiently unclear that the issue would have to be resolved against the party bearing the burden of persuasion, the party seeking summary judgment.[156] Uncertainty about the nature

[156] Many of the problems described in this article could be avoided if the courts focused with greater care on the issue of whether the moving party had met its burden of showing that the summary judgment record is sufficiently similar to the record that would exist at trial. That recognition would eliminate the existing incentives for the moving party to utilize tactics calculated to create a summary

of the ultimate trial record is precisely the sort of situation that can provide "reason to believe that the better course would be to proceed to a full trial."[157]

There will inevitably be some cases in which it simply is not possible at the summary judgment stage to determine whether the ultimate the trial record will warrant judgment as a matter of law. The goal of a well-crafted summary judgment record-building process should be to reduce the likelihood that the summary judgment record would differ from the trial record to a degree that could affect the outcome of applying the directed verdict standard. But there will unavoidably be instances in which there remains a significant possibility that differences between the summary judgment and trial records could affect the outcome of the case; in such cases summary judgment would be improper because the moving party could not "show" there was no genuine issue for trial. In determining whether the moving party has met its burden of persuasion in this regard, several factors should be considered.[158]

First, summary judgment will often be inappropriate in a close case. Where reasonable people could disagree about the sufficiency of that evidence at the summary judgment stage, any additional information that emerges at trial might tip the balance. There will

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judgment record materially different from the likely trial record.

[157]Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

[158]Bros, Inc. v. W.E.Grace Mfg. Co., 261 F. 2d 428, 430 (5th Cir. 1958) (summary judgment must be denied if there is "a serious and substantial doubt" about whether there may be a genuine issue of material fact.)

usually be some differences, often unpredictable, between the summary judgment record and the ultimate trial record in a case. At trial questions will be asked somewhat differently than they were during a deposition, and even the same questions will at times elicit different answers. The lawyers may perceive in those differences, or in the overall mosaic of evidence, possible new lines of inquiry. In a close case, even small shifts in, additions to or omissions from the evidence might be sufficient to persuade a trial judge that judgment as a matter of law was inappropriate. A case should be permitted to go to trial where application of the directed verdict standard is sufficiently close that such inevitable differences between the summary judgment and trial records could matter. Even in a close case, of course, judgment as a matter of law can be granted at the end of (or during) trial; that is because with the completion of trial (or of the non-moving party's case) the record is closed, and its contents are therefore known in their entirety. But the same is not true when summary judgment is sought during the pre-trial proceedings.

Second, the court should consider the potential importance of any significant and identifiable item or type of additional evidence that may yet be forthcoming at trial. The summary judgment process may identify particular areas in which it is foreseeable that material additional evidence may be developed and offered at trial by the non-moving party. In *Celotex*, for example, that process identified an out-of-town witness who apparently had personal knowledge of whether the decedent had used an asbestos product made by the defendant, but

whom neither side had deposed.[159] Counsel for the defendant conceded on appeal that the proper response would have been to depose that witness before the summary judgment motion was acted on.[160] At times, arguments of counsel and/or the analysis of the court will identify as important a subsidiary factual question (Was the key eye witness drunk?) that neither party had anticipated or explored during the pre-summary judgment litigation. Thus where a non-moving party offers an affidavit containing hearsay (e.g., "I heard a witness to the accident say the defendant was driving too fast"), the central issue is not only whether that statement might nonetheless be admissible hearsay, but also whether the moving party can show that the non-moving party will be unable to produce at trial the witness with personal knowledge.[161]

Third, as the Supreme Court suggested in *Sartor*[162], summary judgment should be denied where demeanor evidence, ordinarily only available at trial, might tip the balance in favor of the sufficiency of the non-moving party's evidence. The 1963 Committee Note recognized that this is an important consideration:

> 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.[163]

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[159]Joint Appendix at 160, 162, Celotex v. Catrett, 477 U.S. 317 (1986),No. 85-198.

[160]1986 U.S.TRANS LEXIS 79 at *6.

[161]*E.g.* Greco v. The National Railroad Passenger Corp., 2005 WL 1320147 (E.D.Pa.)(witness deceased).

[162]*See n. ----, supra.*

[163]F.R.Civ.P. 56, 1963 Committee Note.

In the early years days of practice under Rule 56, summary judgment was repeatedly denied because of the absence of demeanor evidence.[164] In recent years, however, discussion of the unavailability of demeanor evidence has virtually disappeared from summary judgment decisions[165]. If courts are to avoid granting summary judgment in cases in which judgment as a matter of law could be denied, they need to make a serious effort to identify the subset of cases in which the non-moving party's other evidence, although perhaps inadequate by itself to support a favorable verdict, could be sufficient in combination with the demeanor evidence that will become known only at trial.

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[164] *E.g.*, Colby v. Klune, 178 F. 2d 872. 873 and nn. 8-10 (2d Cir. 1949) (citing cases).

[165] Among approximately 1400 summary judgment decisions in Westlaw for June 2005, there is not a single case in which the court even considered the possibility that the existence of demeanor evidence at trial might effect whether to grant summary judgment.

CONCLUSION

Administration of Rule 56 today is a case-by-case exercise of discretion; the framers of Rule 56 could hardly have been expected to do better in 1937, when the entire issue of record creation could not have been forseen. Despite this unanticipated problem, there are undoubtedly cases in which the summary judgment record is nonetheless essentially the same as the record that would emerge at trial. That may occur because of astute judicial management of the process, because of aggressive lawyering (particularly by the non-moving party), or because the case is a relatively simple one. But there is nothing in Rule 56 as currently written that guarantees, or even seeks to assure, that the summary judgment and trial records will be the same.

Purely ad hoc administration of Rule 56 denies to moving parties and non-moving parties alike needed predictability and uniformity. The non-moving party is entitled to advance notice of what it must do by what date in order to create the record it wants at summary judgment; the non-moving party today cannot predict how a court will respond to a Rule 56(f) request, or even when and about what such a request might have to be made. Conversely, moving parties are entitled to have some date certain (other than the end of trial) by which the non-moving party must meet its burdens under Rule 56. It is wasteful to require a moving party to keep resubmitting a summary judgment motion until the court's patience, or the non-moving party's excuses, run out. It is in the interest of both parties that the pre-summary

judgment process lead where possible to the creation of a record so palpably complete that the filing of the first summary judgment motion can lead to a definitive determination of whether a case should be tried, rather than to a new round of investigation or discovery.

Ad hoc exercises of discretion, no matter how wise, are an unsatisfactory method of dealing with the central and recurring problem of record creation. The very reason for adopting *rules* of civil procedure is to build on judicial experience to establish sound and consistent methods for dealing with such recurring problems. Even justified hopes about the exercise of judicial discretion are no substitute for a rule-bound process.

Since Rule 56 was first adopted, federal courts have heard hundreds of thousands of summary judgment motions. Clearly there are recurring record-creation issues and a substantial body of experience about the efficacy of the various ways of responding to those situations. It makes no sense to continue to require federal judges to reinvent the wheel with each new case. After more than sixty years of practice under Rule 56, we surely know enough to recognize the major recurring problems, and to identify the presumptive solutions that are most efficacious and fair. A central purpose of the summary judgment process should be to minimize any differences between the summary judgment record and the record that would later be assembled if the case went to trial. To achieve that end, standards and procedures should be fashioned for the express purpose of structuring the record-creation process in summary judgment cases. A substantial

number of district courts have adopted local rules establishing procedures to identify the *undisputed* facts that may provide a basis for summary judgment.[166] The adoption of local rules framed to assure the completeness of the summary judgment record regarding *disputed* facts would enhance the reliability of the summary judgment process, and provide an important body of experience on which to draw in ultimately amending Rule 56 itself.

[166]Edward Brunet, Martin Redish and Michael Reiter, SUMMARY JUDGMENT FEDERAL LAW AND PRACTICE 481-534 (2d ed. 2000).

Proposed Rule

(1) Summary judgment may be granted if

(a) the undisputed facts require judgment as a matter of law, (b) where there are disputed material facts, and a jury trial has been properly requested, the party seeking summary judgment demonstrates there would at trial be no legally sufficient evidentiary basis for a reasonable jury to find for the party against which summary judgment is sought, or

(c) where there are disputed material facts, and no jury trial has been so requested, the party seeking summary judgment demonstrates that it would be clear error for the court after trial to find in favor of the party against which summary judgment is sought.

A party which moves for summary judgment shall state on which of these bases that motion is sought.

(2) Where the party seeking summary judgment asserts that undisputed facts require judgment as a matter of law, the moving party shall set forth with specificity, in its motion or a separate document, the facts which it contends are undisputed.

(3) A motion for summary judgment under subsection (1)(b) or (1)(c) shall not be filed until after the completion of discovery, except with the prior approval of the court. Summary judgment under subsections (1)(b) or (1)(c) shall not be granted on a ground other than that specifically raised in the motion for summary judgment.

Summary judgment under subsections (1)(b) or (1)(c) may be granted if

(a) there is with regard to the disputed fact or facts conclusive evidence supporting the moving party, or

(b) the non-moving party bears the burden of proof with regard to the disputed fact or facts, and the moving party demonstrates that at trial the non-moving party will not have legally sufficient evidence on the basis of which a reasonable jury could find for the non-moving party.

A summary judgment motion under subsection (1)(b) or (1)(c) shall state on which basis, or bases, it is sought.

(4) Where summary judgment is sought under subsection (1)(b) or (1)(c), the motion shall state when and how the existence of the evidence relied on by the moving party was disclosed to the non-moving party.

(5) Where summary judgment is sought under subsection 3(b), the motion shall--

(a) state with particularity the fact or facts regarding which the moving party asserts that the non-moving party will lack sufficient evidence at trial,

(b) set forth the discovery undertaken by the moving party to identify the evidence regarding such facts which the non-moving party would have at trial,

(c) set forth why the non-moving party bears the burden of proof regarding the fact or facts in question, and

(d) be accompanied by an affidavit and/or documents reflecting any information in the possession of the moving party with regard to those fact or facts, including information that might lead to the identification of relevant admissible evidence. If the moving party has no such information, it shall so state in a sworn affidavit.

(6) Within 30 days after the filing of a motion for summary judgment, the non-moving party shall either file a response to that motion, or submit a request under Rule 56(f) or otherwise for additional time for investigation or discovery. If such a request is made, a response to the motion itself shall be filed within the period determined by the court.

(7) Any affidavit submitted in support of a motion for summary judgment shall state (a) that the affiant is familiar with the motion, and (b) that the affidavit fully discloses all information, admissible or not, that is known to the affiant and is relevant to that motion.