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The *Celotex* Trilogy Revisited: How Misapplication of the Federal Summary Judgment Standard is Undermining the Seventh Amendment Right to a Jury Trial

The Honorable David H. Simmons,* Stephen J. Jacobs,**
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I. INTRODUCTION

In 1986, the Supreme Court of the United States decided three cases that redefined the standards pertaining to summary judgment motions: *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,¹ *Anderson v. Liberty Lobby, Inc.*,² and *Celotex Corp. v. Catrett*.³ In the eighteen years since that time, however, numerous district courts and courts of appeals, although paying lip service to the principles articulated in this “trilogy” of cases (the “*Celotex* trilogy” or “1986 trilogy”), have struggled to uniformly apply these cases in a consistent manner and have instead taken widely divergent positions regarding various aspects of their application. In some cases, certain district courts and courts of appeals have flatly failed to apply the mandate of those cases.

During that same eighteen year period, the number of federal civil trials has dropped sharply from a high of 12,529 in 1985—one year before the trilogy was decided—to what was then an all time low

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1. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).
2. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).
3. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

of 4,569 in 2002.⁴ The declining trend has continued, as shown by the following table representing the total number of federal civil trials and total number of jury trials during the four most recent 12 month periods ending on March 31:

Time Period	Total Number of Federal Civil Trials	Number of Federal Civil Jury Trials
April 1, 2000 to March 31, 2001	5,782	3,860 ⁵
April 1, 2001 to March 31, 2002	4,766	3,112 ⁶
April 1, 2002 to March 31, 2003	4,321	2,811 ⁷
April 1, 2003 to March 31, 2004	4,100	2,622 ⁸

Prior to the trilogy in 1986, the trend for the previous two decades had been an increase in the number of federal civil trials, which increase peaked in 1985—one year before the trilogy was decided—when there were 12,529 federal civil trials.⁹ Since 1985, the number of federal civil trials has plummeted by more than 60%.¹⁰ This marked drop in the number of federal civil trials is inversely proportional to the rapid growth in all other aspects of the legal profession, including the sheer number of lawyers, money spent on litigation, and increased volume of legal authority.¹¹

Numerous factors have been suggested for the sharp decline in the number of trials in district courts, including the increased cost of trial, fear of the uncertainty of litigation, the rise of alternative dispute resolution, use of class actions and multi-district litigation, and a change in the type of cases being filed.¹² One commentator has noted that the decrease in federal civil trials is “consistent with a documented increase in the prevalence of summary judgment,”¹³ and that

4. Shari Seidman Diamond and Jessica Bina, *Puzzles about Supply-Side Explanations for Vanishing Trials: A New Look at Fundamentals*, 1 J. EMPIRICAL LEGAL STUD. 637, 638 (2004).

5. Federal Judicial Caseload Statistics 2001, March 31, 2001, Table C-4, available at <http://www.uscourts.gov/caseload2001/tables/c04mar01.pdf>.

6. Federal Judicial Caseload Statistics 2002, March 31, 2002, Table C-4, available at <http://www.uscourts.gov/caseload2002/tables/c04mar02.pdf>.

7. Federal Judicial Caseload Statistics 2003, March 31, 2003, Table C-4, available at <http://www.uscourts.gov/caseload2003/tables/C04Mar03.pdf>.

8. Federal Judicial Caseload Statistics 2004, March 31, 2004, Table C-4, available at <http://www.uscourts.gov/caseload2004/tables/C04Mar04.pdf>.

9. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462 (2004).

10. *Id.*

11. *Id.* at 1.

12. Diamond and Bina, *supra* note 4, at 638.

13. Galanter, *supra*, note 9, at 35.

certain data suggests that we may have moved into "a new era in which dispositions by summary judgment are a magnitude several times greater than the number of trials."¹⁴

It is this commentator's opinion, however, that, although many of the above-referenced factors may have contributed to this decline, a major factor—if not *the* major factor—behind this decline, is the overzealous use of the summary judgment mechanism, which district courts have utilized beyond that which was contemplated by the Supreme Court in 1986.

II. THE EVOLUTION OF THE SUMMARY JUDGMENT STANDARD CAUSED BY THE TRILOGY

Prior to the trilogy in 1986, the Supreme Court jealously protected the right to a jury trial and frequently held that summary judgment should not be used to undermine that right. The case of *Poller v. Columbia Broadcasting System, Inc.*¹⁵ is illustrative. In *Poller*, the United States District Court for the District of Columbia had entered summary judgment in an antitrust case. In reversing the summary judgment, the Supreme Court recited Federal Rule of Civil Procedure 56 and then stated:

This rule authorizes summary judgment 'only where moving party is entitled to judgment as a matter of law, *where it is clear what the truth is, . . .* (and where) no general issue remains for trial . . . (for the purpose of the rule is *not to cut litigants off from their right of trial by jury* if they really have issues to try.'¹⁶

The Court further stated that ". . . summary procedures should be used *sparingly* in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."¹⁷

Likewise, in its decisions in *Beacon Theatres, Inc. v. Westover*¹⁸ and *Dairy Queen, Inc. v. Wood*,¹⁹ the Supreme Court demonstrated its commitment to "protect the constitutional right to a jury trial" by limiting the discretion of a trial judge to decide issues that may infringe

14. *Id.* at 36.

15. *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962).

16. *Id.* at 467 (citing *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944) (emphasis added)).

17. *Id.* at 473 (emphasis added).

18. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

19. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).

upon that right.²⁰ This commitment was reinforced by this Court's pre-trilogy decisions pertaining to the entry of summary judgment, including *Poller*,²¹ *First National Bank of Arizona v. Cities Service Co.*,²² and *Adickes v. S.H. Kress & Co.*²³

When the trilogy was decided in 1986, the Supreme Court felt compelled to clarify the existing summary judgment standards delineated by the foregoing cases, not create new standards. Each of the trilogy cases added its own element to the clarification. *Matsushita* requires that a moving party's evidence be sufficient to render the non-moving party's claim implausible.²⁴ *Anderson* permits a district court to enter summary judgment if the non-moving party's evidence is insufficient, under the applicable law, to convince the trial judge that a jury could return in the non-moving party's favor.²⁵ *Celotex* made it easier under Rule 56 to shift the burden to the non-moving party to producing evidence in support of its position.²⁶ In other words, *Celotex* simplified making a Rule 56 motion, while *Anderson* and *Matsushita* increased the likelihood that the motion will be granted.²⁷

The 1986 trilogy, however, did not and should not undermine the longstanding commitment to protect the jury trial right. In *Anderson*, the Court stated that "[o]ur holding . . . does not denigrate the role

20. *Id.* at 472; *Beacon Theatres*, 359 U.S. at 510.

21. *Poller*, 368 U.S. at 473.

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

Id.

22. *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 304 (1968) ("[T]he summary judgment technique tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury.").

23. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 176 (1970).

The right to confront, cross-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.

Id.

24. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

25. *Id.*

26. *Id.*

27. *Id.*

of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge”²⁸ In *Celotex*, the majority stated that “Rule 56 must be construed with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried before a jury”²⁹

Notwithstanding the Supreme Court’s stated desire to preserve the right to a jury trial, when deciding the trilogy, certain members of the Supreme Court accurately predicted that district courts would struggle to apply the mandates of their decisions. In his dissent in *Anderson*, for example, Justice William Brennan opined that it was difficult if not impossible to draw the line between impermissible weighing of the evidence and determining whether the evidence was sufficient to be presented to a jury. According to Justice Brennan:

I simply cannot square the direction that the judge “is not himself to weigh the evidence” with the direction that the judge also bear in mind the “quantum” of proof required and consider whether the evidence is of sufficient “caliber or quantity” to meet that “quantum.” I would have thought that a determination of the “caliber and quantity,” *i.e.*, the importance and value, of the evidence in light of the “quantum,” *i.e.*, amount “required,” could *only* be performed by weighing the evidence.³⁰

He further observed that if a trial judge weighed the evidence on a summary judgment motion, then “concerns are raised concerning the constitutional rights of civil litigants to a jury trial.”³¹ Finally, Justice Brennan predicted the difficulties that lower courts would face in implementing the principles articulated in *Anderson* when he stated that “. . . it is the district courts and courts of appeals that must struggle to clean up after us.”³² Numerous other commentators have echoed Justice Brennan’s comments and criticized the trilogy as inviting lower courts to weigh the evidence on summary judgment.³³ Justice Bren-

28. *Anderson*, 477 U.S. at 255.

29. *Celotex*, 477 U.S. at 327.

30. *Anderson*, 477 U.S. at 266 (Brennan, J., dissenting).

31. *Id.* at 267.

32. *Id.* at 268.

33. See, *e.g.*, Miller, *supra* note 24; Daniel P. Collins, Note, *Summary Judgment and Circumstantial Evidence*, 40 STAN. L. REV. 491, 501-504 (1988); Jeffrey W. Stempel, A *Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 137-140 (1988); Brain L. Weakland, *Summary Judgment in Federal Practice: Super Motion v. Classic Model of Epistemic Coherence*, 94 DICK. L. REV. 25, 35 (1989); Nancy Levit, *The Caseload*

nan also identified another critical issue concerning the moving party's burden in his *Celotex* dissent:

[T]he Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the nonmoving party cannot prove its case. . . . This lack of clarity is unfortunate: district courts must routinely decide summary judgment motions, and the Court's opinion will very likely create confusion.³⁴

Over the last 18 years, the predictions articulated in the dissents in *Anderson* and *Celotex* have proven to be visionary. As such, the Supreme Court should fortify its commitment to the Seventh Amendment right of a litigant to have his or her lawsuit resolved by a trial before a jury of his or her peers and clarify the proper role of the summary judgment mechanism. That is the only way to restore the proper balance between the two, such that summary judgment only terminates litigation where there is no doubt about what is the truth.

III. THE APPLICATION OF THE TRILOGY

When confronted with a summary judgment motion, every federal court recites the fundamental requirements of granting summary judgment, as outlined in the trilogy. Summary judgment is only proper when no reasonable jury could return a verdict for the nonmoving party.³⁵ A judge may not weigh the evidence.³⁶ The evidence of the nonmovant is to be believed.³⁷ All reasonable inferences must be drawn in favor of the nonmoving party.³⁸ The court may not make credibility determinations.³⁹ Although some or all of these statements are faithfully recited in most district court opinions involving summary judgment, it appears that, in many cases, the very courts who recite these statements are not adhering to their mandate.

Several cases demonstrate that federal courts are improperly weighing evidence, making credibility determinations, and drawing inferences against the nonmoving party—activities that all violate the 1986 trilogy and the plain requirements of Rule 56. In *Aschinger v.*

Conundrum, Constitutional Restraint, and the Manipulation of Jurisdiction, 64 NOTRE DAME L. REV. 321, 329 (1989).

34. *Celotex*, 477 U.S. at 329 (Brennan, J., joined by Burger, C.J., and Blackmun, J., dissenting).

35. *Anderson*, 477 U.S. at 248.

36. *Id.* at 249.

37. *Id.* at 255.

38. *Id.*

39. *Id.*

Columbus Showcase Co.,⁴⁰ for example, a retired director of a closely held corporation brought an action for fraud against the corporation and his brother, another director of the corporation.⁴¹ The plaintiff had sold his stock to his brother at \$50 per share. At issue was the defendant brother's representations to the plaintiff that he would "take the same deal" if he was the seller instead of the buyer.⁴² Six years later, the defendant brother sold the stock at a substantially higher price, \$338 per share. The district court granted summary judgment in favor of the defendant's brother, and the Sixth Circuit, in weighing the evidence before it, affirmed the ruling of the district court, stating that "[w]e find it unlikely that a reasonable shareholder would consider [the brother's remark] to be "material."⁴³ The Court also found the plaintiff's reliance on the statement to be "unreasonable."⁴⁴ Finally the Court concluded that there was no evidence of an intent to defraud, because the price disparity in the stock, by itself, was insufficient to show knowledge of falsity.⁴⁵

It is apparent that, in *Aschinger*, the Sixth Circuit improperly drew inferences in favor of the moving party and made a factual determination that should have been left for a jury. After all, it is not unreasonable to rely on a brother's statement that he would sell stock at the same price for which he is proposing to buy it. Further, the mere disparity in price gives rise to the reasonable inference—which the district court was required to draw in favor of the non-moving party—that the defendant brother was lying to the plaintiff when he made the statement at issue. As such, summary judgment should have been denied and the matter should have gone to trial. Moreover, the Sixth Circuit's analysis of what a reasonable shareholder would find "material" invades the jury's province.

Likewise, in *Williams v. Borough of West Chester, Pennsylvania*,⁴⁶ the parents of an individual who committed suicide while in police custody sued the City and certain members of the City's police force. The decedent, who had a history of suicide attempts, hanged himself with his belt while incarcerated. In order to prevail, the plaintiffs needed to demonstrate that the defendants acted with "deliberate indifference" towards the possibility of suicide. The plaintiffs intro-

40. *Aschinger v. Columbus Showcase Co.*, 934 F.2d 1402 (6th Cir. 1991).

41. *Id.* at 1410.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Aschinger*, 934 F.2d at 1410.

46. *Williams v. Borough of West Chester, Pennsylvania*, 891 F.2d 458 (3d Cir. 1990).

duced testimony from one officer that the decedent's history of suicide attempts was "widely known" in the police department.⁴⁷ The defendants introduced evidence showing that the officers had no knowledge of the decedent's history.⁴⁸ Despite this clear factual dispute, the district court granted the defendants' summary judgment motion and the Third Circuit affirmed, stating that, although the case was "extremely close," the plaintiff did not produce *sufficient* evidence upon which a reasonable jury could have concluded that the officers knew about the decedent's history.⁴⁹ The Third Circuit even conceded that the plaintiffs had introduced "some circumstantial evidence tending to show deliberate indifference," but that was not "enough [evidence] to survive summary judgment."⁵⁰ The Third Circuit was required to draw all inferences in favor of the plaintiff, and was not at liberty to discount the evidence supporting the inference of deliberate indifference. Instead, however, it improperly weighed the evidence and incorrectly substituted summary judgment for a jury trial.

In *Aschinger* and *Williams*, the circuit courts of appeals affirmed the decisions of the district courts, in essence ratifying the improper use of the summary judgment standard. In *Leonard v. Dixie Well Service & Supply, Inc.*,⁵¹ conversely, the Fifth Circuit reversed the entry of summary judgment in favor of defendants, thereby correcting the error of the district court. In granting summary judgment, the district court had characterized the defendant's evidence as "impressive and comprehensive" while labeling the plaintiff's evidence as "inaccurate and imprecise."⁵² The Fifth Circuit reversed, finding that the district court impermissibly weighed the evidence:

The district judge erred in basing his decision on finding [defendant's] documentary evidence inherently more "reliable" or "accurate" than [plaintiff's evidence] . . . [I]t is for the jury at trial, not for the judge on a pretrial motion, to decide whose evidence is more credible. A judge assessing the "persuasiveness" of evidence presented on a motion for summary judgment may discount such evidence as unspecific or immaterial, but not as unbelievable.⁵³

47. *Id.* at 465.

48. *Id.* at 465-66.

49. *Id.* at 466.

50. *Id.*

51. *Leonard v. Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291 (5th Cir. 1987).

52. *Id.* at 293.

53. *Id.* at 294.

The Fifth Circuit's correction of the district court's error shows that the Fifth Circuit's jurisprudence is clearly contrary to the holdings of the Third Circuit in *Williams* and the Sixth Circuit in *Aschinger*.

In addition to weighing evidence, making credibility determinations, and drawing inferences against the non-moving party, some federal courts have also overzealously used summary judgment by applying the so-called implausibility doctrine, by engaging in a piecemeal review of a nonmovant's evidence, and by impermissibly shifting the burden of proof to the non-moving party by essentially requiring that the non-moving party prove its case at the summary judgment stage.

The implausibility doctrine, set forth in *Matsushita*, states that summary judgment is not proper merely because one set of facts appears more plausible than that offered in opposition to the motion.⁵⁴ Some lower courts, however, have expanded the implausibility doctrine with regard to assessing the "genuineness" of a nonmovant's economic theory in an antitrust setting. In so doing, those courts have increased the nonmovant's burden to oppose a summary judgment motion by requiring the nonmovant to present more compelling proof than that which a jury would require in order to render a verdict.⁵⁵ Further, in the case of *Luigino's v. Peterson*,⁵⁶ the Eighth Circuit improperly separated, isolated, and rejected in piecemeal fashion each facet of the non-moving party's circumstantial evidence regarding the defendant/moving party's state of mind, rather than considering the cumulative effect of the totality of that evidence. This violated the Supreme Court's directive that on a summary judgment motion the evidence must be reviewed by the court "as a whole."⁵⁷ The importance of the comprehensive and cumulative review of circumstantial evidence, es-

54. *Matsushita*, 475 U.S. at 587. See also *Handeen v. Lemaire*, 112 F.3d 1339, 1354 (8th Cir. 1997) (a movant is not entitled to judgment simply because the facts offered by it appear more plausible than those facts tendered in opposition).

55. See, e.g. *Knight v. Sharif*, 875 F.2d 516, 523 (5th Cir. 1989) (finding that plaintiff could not provide plausible interpretation of disputed documents); *Ryder Energy Distribution Corp. v. Merrill Lynch Commodities, Inc.*, 865 F.2d 492-93 (2d Cir. 1989) (holding that plaintiff could not prove causation in breach-of-duty action); *Cuesta v. Sch. Bd.*, 285 F.3d 962, 970 (11th Cir. 2002) (concluding that defendant did not need to introduce evidence contradicting plaintiff's argument because argument itself was implausible).

56. *Luigino's v. Peterson*, 317 F.3d 909 (8th Cir. 2003).

57. *Matsushita*, 475 U.S. at 587. See also *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 657 (7th Cir. 2002); *Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 505 (6th Cir. 1996); *Wagner v. Wheeler*, 13 F.3d 86, 90 (4th Cir. 1993); *Miller*, *supra* note 24, at 1032, 1064, 1092-93; *Samuel Issacharoff & George Loewenstein, Second Thoughts About Summary Judgment*, 100 YALE L. J. 73, 93 (1990); *Collins*, *supra* note 33, at 492.

pecially in cases involving fraud, was recognized by the Supreme Court over a century ago:

All experience shows that positive proof of fraudulent acts, . . . , is not generally to be expected, and it is for that reason, among others, that the law allows in such controversies a resort to circumstances as the means of ascertaining the truth, and the rule of evidence is well settled that circumstances altogether inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof⁵⁸

In addition, there are several instances in which federal courts have appeared to apply *Matsushita* to authorize courts to weigh evidence at the summary judgment stage, in effect requiring the nonmovant to prove its case, not merely to demonstrate the existence of a "genuine issue of material fact."⁵⁹ Finally, it is not uncommon for district courts to misallocate the burden of persuasion on summary judgment, fail to consider the movant's burden before addressing the nonmovant's burden, or, in violation of *Anderson*, fail to appreciate the heightened burden.⁶⁰

58. *Wager, et al. v. Hall*, 83 U.S. 584, 601-602 (1872).

59. *See, e.g., In re Baby Food Antitrust Litigation*, 166 F.3d 112, 121-32 (3d Cir. 1999) (citing *Matsushita* in affirming grant of summary judgment against plaintiffs after discounting plaintiffs' expert testimony and asserting that ordinary business practices were just as likely explanations for exchanges of pricing information, discovery of competitors' memoranda in defendants' files, and "truce" between defendants); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88 (1st Cir. 1993) (finding that plaintiff provided insufficient testimony of four expert witnesses, including two medical experts, in support of the proposition that defendant's product was proximate cause of decedent's death); *Zettle v. Handy Mfg. Co.*, 998 F.2d 358, 362-63 (6th Cir. 1993) (affirming summary judgment in products liability case in part because plaintiff failed to prove that death by electrocution was foreseeable result of defendant's use of metal instead of plastic handle on its electric washer, despite plaintiff's deposition of defendant's engineer who admitted that company was aware that some of their customers tended to use out-of-date wiring systems, which would heighten risk that electric currents would flow through handle); *Wonder Labs, Inc. v. Procter & Gamble Co.*, 728 F. Supp. 1058, 1064-66 (S.D.N.Y. 1990) (court granted summary judgment in a trademark action by a toothbrush manufacturer having registered the mark "Dentist's Choice" against a toothpaste manufacturer that used the term "dentist's choice" in its advertising in part because plaintiff could not provide sufficient evidence of the likelihood of confusion).

60. *See, e.g., Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 802 (5th Cir. 1993) (reversing summary judgment where defendant/movant did not satisfy its burden, and therefore the burden did not shift back to plaintiff to provide supporting evidence); *Jones v. City of Columbus, Ga.*, 120 F.3d 248, 253-254 (11th Cir. 1997) (reversing summary judgment where district court did not address movant's initial burden before determining whether nonmovants met their burden); *Hagadorn v. M.F. Smith & Associates, Inc.*, 172 F.3d 878 (10th Cir. 1999) (unpublished opinion) (reversing summary judgment where defendant/movant failed to satisfy its "heightened" evidentiary burden); *Hemstreet v. Burroughs Corp.*, 861 F.2d 728 (Fed. Cir. 1988) (reversing summary judgment where the

It is also important to note that the trilogy and the way in which it is interpreted and applied not only affects litigation in the federal judicial system, but also in numerous states.⁶¹ California, Massachusetts, Missouri, New Jersey, Arizona, and Tennessee, and the District of Columbia,⁶² have adopted the standards for summary judgment set forth in this Court's 1986 decisions.⁶³

District courts and courts of appeal are not uniformly applying the summary judgment principles articulated in the 1986 trilogy. The only thing consistent about the current application of the trilogy by federal courts is the inconsistency of its application. Although the trilogy contains clear "qualifying language reaffirming the significance of trials and juries, indicating that the three cases are not *carte blanche* to the district courts[,]"⁶⁴ at least one Circuit Court of Appeal, the Sixth Circuit, has found that the trilogy, "taken in the aggregate, lowered the movant's burden on a summary judgment motion."⁶⁵

Equally troubling is the fact that many of these federal courts are impermissibly weighing evidence, construing inferences in favor of the moving party, and making credibility determinations that deny litigants the ability to reach trial and thereby obstruct litigants from their Seventh Amendment right to a jury trial.⁶⁶ This overly aggressive use of summary judgment, unfortunately, appears to have become common since the 1986 trilogy and undermines the Supreme Court's long history of deference to a litigant's constitutional right to a jury trial.

defendant/movant did not satisfy its "heavy burden of persuasion" of showing plaintiff/nonmovant's inequitable conduct); *Foster v. Alliedsignal, Inc.*, 293 F.3d 1187, 1195-1196 (10th Cir. 2002) (reversing summary judgment where the defendant/movant did not satisfy its burden of setting forth "clear and convincing evidence" of retaliatory discharge).

61. See *Miller*, *supra* note 24, at 1051.

62. Florida is not one of those states. See *Lich v. N.C.J. Investment Company*, 728 So.2d 1191, 1194 (Fla. 2d DCA 1999) (J. Altenbernd, dissenting); *Green v. CSX Transportation, Inc.*, 626 So.2d 974, 975 (Fla. 1st DCA 1993).

63. See, e.g., *Aguilar v. Atlantic Richfield Co.*, 24 P.3d 493 (2001); *Kourouvacilis v. General Motors Corp.*, 575 N.E.2d 734 (Mass. 1991); *Y.G. & L.G. v. Jewish Hospital of St. Louis*, 795 S.W.2d 488, 495, n 2 (Mo. Ct. App. 1990); *Brill v. Guardian Life Ins. Co. of America*, 666 A.2d 146 (N.J. 1995); *Orme School v. Reeves*, 802 P.2d 1000 (Ariz. 1990); *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993); *Graff v. Malawer*, 592 A.2d 1038 (D.C. 1991).

64. *Miller*, *supra* note 24, at 1041.

65. See *Barrett v. Harrington*, 130 F.3d 246, 252 (6th Cir. 1997); *Nicely v. McBrayer, McGinnis, Leslie & Kirkland*, 163 F.3d 376, 380 (6th Cir 1998).

66. See Fed. R. Civ. P. 38(a).

IV. HOW THE APPLICATION OF THE TRILOGY IS UNDERMINING THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL

An order granting summary judgment that gives lip service the trilogy, but in reality is founded upon one or more of the improper grounds discussed in Section III herein, denies the non-moving party his or her constitutional right to a jury trial, an important part of which is the right to cross-examine adverse witnesses. As discussed in Section II herein, prior to the trilogy in 1986, the Supreme Court repeatedly acted to accord the Seventh Amendment respect and scope consistent with Rule 38(a).⁶⁷

The 1986 trilogy, however, did not and should not undermine that longstanding commitment to protect the jury trial right. In *Anderson*, the Court stated that “[o]ur holding . . . does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge”⁶⁸ In *Celotex*, the majority stated that “Rule 56 must be construed with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried before a jury”⁶⁹

Indeed, since the trilogy, the Court has reaffirmed the importance of the Seventh Amendment right to a jury trial in several contexts, including breach of a collective bargaining agreement and breach of union duties in a labor law matter,⁷⁰ a copyright infringement matter,⁷¹ an action by a Chapter 11 trustee to void fraudulent transfers in a bankruptcy proceeding,⁷² and an equal protection and due process matter pursuant to 42 U.S.C. § 1983.⁷³ More recently, in the case of *Swierkiewicz v. Sorema*,⁷⁴ the Supreme Court held that, in order to survive a motion to dismiss, a discrimination plaintiff need not plead

67. See *Poller v. Columbia Broad. Sys.*, 368 U.S. 464 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962); *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970).

68. *Anderson*, 477 U.S. at 255.

69. *Celotex*, 477 U.S. at 327.

70. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1989).

71. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

72. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

73. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

74. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002).

more evidence than he or she must prove to succeed on the merits at trial.⁷⁵

Unfortunately, the decisions of a significant and growing number of other courts have employed an overly zealous application of the Supreme Court's 1986 trilogy that deprives litigants of their constitutional jury trial right. As one commentator has opined, it is time for the Supreme Court to intercede, and re-affirm this Court's commitment to a litigant's constitutional right to a jury trial, to reduce the confusion apparent in the case law, and to prevent misapplications of Rule 56:

Taking decisionmaking authority from juries runs counter to basic and long-cherished principles of our system. One primary function of the jury has been to make commonsense determinations about human behavior, reasonableness, and state of mind based on objective standards, the paradigm being the reasonable person standard. Since the Supreme Court trilogy, there is evidence that these responsibilities have been taken away from juries by pretrial disposition even when none of the possible justifications for restricting jury trial discussed in this Article are present. Given the existing, convoluted jurisprudence, it is imperative that the Supreme Court provide some clarity rather than leaving the matter entirely to the genial anarchy of trial court discretion.⁷⁶

Several other commentators have expressed similar observations regarding the encroachment of improper grants of summary judgment on the constitutional right to a jury trial.⁷⁷

The importance of a trial by jury to our system of justice is found in the opportunity to cross-examine adverse witnesses before a jury:

[I]t is particularly difficult for the nonmoving party to challenge the "self-serving testimony" of the moving party without the benefit of trial accessories, namely cross-examination. . . . Only through *live* cross examination can the fact-finder observe the demeanor of a witness, and assess his credibility. A cold transcript of a deposition is generally no substitute because it cannot unmask the veracity of a testifying witness clad in a costume of deception; it cannot unveil that a seemingly well-groomed witness is coming apart at the seams: "that he fidgets when answering critical questions, his eyes

75. *Id.* at 511-512.

76. Miller, *supra* note 24, at 1134.

77. See Stempel, *supra* note 33 at 165; Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, at 255, 256 (1993); Robert J. Gregory, *One Too Many Rivers To Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 FLA. ST. U. L. REV. 689, at 702 (1996).

shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers."⁷⁸

These sentiments echo those raised by the Supreme Court in *Poller* pertaining to the importance of cross-examination of adverse witnesses in antitrust and other cases where "motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."⁷⁹ The Seventh Amendment right to a jury trial is especially important in cases in which the state of mind of an adverse party is a critical or central issue, and effective cross-examination may affect the outcome of the proceeding. "Much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue."⁸⁰

V. CONCLUSION

Litigants continue to be denied their Seventh Amendment right to a jury trial by the lower courts by misapplication of Rule 56. District courts and circuit courts of appeals continue to overstep the permissible boundaries of summary judgment, thereby invading the province of the jury. The barrier to jury trials in federal court is becoming more and more formidable in federal practice today. As more and more cases are being resolved improperly by summary judgment "trial by affidavit," a litigant's constitutional right to a jury trial, which is the cornerstone of our country's civil justice system, is being grossly undermined.

Accordingly, it is critical that the Supreme Court take action to strike the proper balance between the objectives of the summary judgment procedure and a litigant's constitutional jury trial right, eliminate the significant inconsistencies that have developed among the federal courts in the administration of the summary judgment principles articulated in the 1986 trilogy, and provide much needed guidance to the federal courts on some of the procedural aspects of the trilogy that have clearly generated confusion.

78. *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1265-66 (5th Cir. 1991) (quoting *Anderson*, 477 U.S. at 270) (Rehnquist, J., joined by Burger, C.J., dissenting)).

79. *Poller*, 368 U.S. at 491. See also *60 Ivy Street Corp. v. R.C. Alexander*, 822 F.2d 1432, 1437 (6th Cir. 1987) ("Summary judgment is seldom appropriate in cases where the parties' intentions or states of mind are crucial elements of the claim because of the likelihood of self-serving testimony and the necessity for the factfinder's credibility determinations.").

80. 10B CHARLES WRIGHT, ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2730.