Comments

CIVIL PROCEDURE

JUSTICE DELAYED IS JUSTICE DENIED: SUMMARY JUDGMENT FOLLOWING *ANDERSON V. LIBERTY LOBBY, INC.*

In *Anderson v. Liberty Lobby, Inc.*,[1] the United States Supreme Court considered whether a higher burden of proof under substantive law requires a judge to use a correspondingly higher standard for deciding whether to grant summary judgment under Rule 56 of the Federal Rules of Civil Procedure.[2] The Court, consistent with the trend of its recent decisions,[3] broadened the interpretation of summary judgment under Rule 56 by holding that the determination of whether a given factual dispute requires submission to a jury is a question governed by the substantive evidentiary standards applicable to the case at bar.[4]

This Comment analyzes the language of Rule 56 and examines the state of the caselaw dealing with the appropriate standard for granting summary judgment prior to the *Anderson* decision. It then discusses some of the policy considerations courts face while ruling on summary judgment motions. Finally, this Comment suggests that the scope of the *Anderson* decision is not limited to first amendment cases, but extends to all areas in which Rule 56 is applicable.

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1. 106 S. Ct. 2505 (1986).

2. FED R. CIV. P. 56. The sections of Rule 56 pertinent to this Comment state:

(c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

* * *

(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.

3. The Court has recently interpreted Rule 56 more broadly than it has in the past. *Compare* Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962)(an antitrust case where the Court read much of the purpose out of Rule 56 by categorically holding that when motive is an element of the claim, summary judgment is always inappropriate) *with* Matushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986)("To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of Sec. 1 must present evidence 'that tends to exclude the possibilty' that the alleged conspirators acted independently." 106 S. Ct. at 1357, *citing* First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 280 (1968)).

4. *Anderson*, 106 S. Ct. at 2514.

THE FACTS OF *ANDERSON*

In 1981, a magazine published by Jack Anderson printed two articles allegedly defaming both Liberty Lobby, Inc., a non-profit corporation and self described "citizens' lobby," and the organization's founder and treasurer Willis Carto.[5] Carto brought actions on behalf of the corporation and himself. Following discovery, Anderson moved for summary judgment under Rule 56. He asserted that because respondents were public figures[6] they were required to prove their case under the *New York Times Co. v. Sullivan*[7] "clear and convincing" standard of proof for malice,[8] and that summary judgment was proper because actual malice was absent as a matter of law. In support of their motion,[9] appellants submitted an affidavit by the author of the articles in question assuring that the articles had been thoroughly researched and that the facts were obtained from numerous reliable sources.[10] Responding to the motion, Liberty Lobby argued that a factual issue of actual malice remained because the author relied on patently unreliable sources for the factual bases of the articles.[11]

The district court, applying the *New York Times* "clear and convincing" evidentiary standard in determining whether a genuine issue of actual malice existed, entered summary judgment for Anderson on the grounds that the author's investigation, research and reliance on numerous sources precluded a finding of actual malice.[12] The court of appeals for the District of Columbia circuit, reversing in part, held that the clear and convincing evidence standard for actual malice need not be considered at the summary

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5. The facts of *Anderson* are as set forth in 106 S. Ct. at 2508-09.

6. The district court, using the guidelines enunciated in Gertz v. Robert Welch, 418 U.S. 323 (1974), found that the respondents, as political lobbyists, were "limited-purpose" public figures. The guidelines enunciated in *Gertz* for determining whether a person is a public figure for purposes of the *New York Times* rule are as follows:

> [The public figure] designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he has become a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Id. at 351.

7. 376 U.S. 254 (1964).

8. In *New York Times*, the Court held that in a libel suit brought by a public official, the first amendment requires the plaintiff to show that in publishing the defamatory statement the defendant acted with actual malice—"with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280. The Court went on to hold that such actual malice must be shown with "convincing clarity." *Id.* at 285-86.

9. While the issue of the initial burden of production was not presented in *Anderson*, see 106 S. Ct. 2511 n.4, the Court did address that related issue in a later case. *See* Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986). In *Celotex*, the Court held that: "[R]egardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 2553.

10. *Anderson*, 106 S. Ct. at 2507.

11. *Id.*

12. Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201, 209 (1983). The district court held that: "Because malice requires that the defendant *in fact* entertained serious doubts,' failure to check the reliability of a source is not sufficient to indicate the presence of malice, unless there was an obvious reason to doubt the source's veracity." *Id.* at 208 (quoting St. Amant v. Thompson, 390 U.S. 727, 732 (1968))(emphasis in original).

judgment stage.[13] Rather, the court held that this standard should be applied only after the plaintiff has had the opportunity to present evidence.[14]

The United States Supreme Court vacated the court of appeals decision and remanded the case stating that the appellate court was wrong in its determination of the correct standard for granting summary judgment, and that the district court was correct in applying the clear and convincing evidence standard.[15] The Supreme Court initially discussed the requirement, under summary judgment analysis, that a material factual dispute exist.[16] The bulk of the opinion, however, analyzed first the requirement that the factual dispute must be "genuine,"[17] and second the test that must be applied in determining the genuineness of the factual dispute. By holding that the applicable substantive evidentiary standard governs in determining whether a given factual dispute is genuine,[18] the Court shed some light on the darkness surrounding the appropriate standard for granting summary judgment.[19] Arguably, in holding as it did, the *Anderson* Court restored some of the underlying purpose of summary judgment.[20]

SUMMARY JUDGMENT UNDER RULE 56

Rule 56(c) entitles a moving party to summary judgment when the totality of pretrial discovery shows that there is no genuine issue as to any material fact.[21] As the *Anderson* Court pointed out, the language of the rule itself requires more than "the mere existence of *some* alleged factual dispute between the parties" to defeat an otherwise properly supported motion for summary judgment.[22] The purpose of Rule 56, as stated by the advisory committee, also implies that summary judgment deserves a more substantial role in the judicial system.[23] When amending the Rule in 1963, the advisory committee asserted: "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial."[24] Furthermore, Rule 56(e) provides that,

13. Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563, 1570 (D.C. Cir. 1984). The court of appeals held that the district court correctly entered summary judgment in favor of Anderson on twenty-one of the alleged defamatory statements because one element of each cause of action—either defamatory content, factual nature or malice—was missing. The court concluded, however, that a jury could reasonably find that the nine remaining allegations were defamatory, false, and made with actual malice. *Id.* at 1577.

14. *Id.* at 1570.

15. *Anderson*, 106 S. Ct at 2515.

16. *Id.* at 2510. This issue was not fully addressed by the *Anderson* Court, nor will it be analyzed in this Comment. For a discussion of the topic see C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2725, at 93-95 (1983); W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 469-81 (1984).

17. FED. R. CIV. P. 56(c). For the text of Rule 56(c) see *supra* note 2.

18. *Anderson*, 106 S. Ct. at 2514.

19. *See infra* notes 37-46 and accompanying text.

20. *See infra* note 26 and accompanying text.

21. FED. R. CIV. P. 56(c). For the text of Rule 56(c) see *supra* note 2.

22. *Anderson*, 106 S. Ct. at 2510 (emphasis in original).

23. FED. R. CIV. P. 56 (advisory commitee note).

24. As courts have frequently noted, the purpose of summary judgment is to enable a court to expeditiously eliminate trials when no genuine issue of material fact is present. *See, e.g.*, Matsushita Elec. Indus. Co. Ltd., v. Zenith Radio Corp., 106 S. Ct. 1348, 1356 (1986)(the purpose of summary judgment " 'is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial' "); Chambers v. United States, 357 F.2d 224, 227 (8th Cir. 1966)("the purpose

when a properly supported motion for summary judgment is made, the adverse party "must set forth specific facts showing that there is a genuine issue for trial."[25]

Unfortunately, Rule 56 does not offer a definitive standard for determining the presence of a "genuine issue." Nor does it offer any guidance to an interested party regarding what must be shown to establish the absence or presence of a genuinely disputed issue of fact. Attempts by courts and counsel to derive general principles from either Rule 56 or the wealth of caselaw[26] dealing with summary judgment have proven futile and frustrating, and have forced the use of "quotable statements"[27] to support whatever outcome is deemed more appropriate.[28]

THE CASELAW PRIOR TO *ANDERSON*

Before *Anderson*, courts across the nation used diverse and conflicting standards when interpreting and applying Rule 56.[29] This fact is illustrative of the judicial uncertainty that existed regarding the proper interpretation and application of the summary judgment doctrine. The degree of uncertainty was especially pronounced when courts were faced with determining the requisite standard for ascertaining the presence of a genuine issue.[30] This confusion resulted in a lack of uniformity.[31] Furthermore, as one commentator has noted, the incorrect use of summary judgment aggravates the problems Rule 56 was designed to solve.[32]

The confusion surrounding Rule 56 is partially understandable. As previously noted,[33] the language of the rule does not offer clear guidance. In addition, turning to the extensive body of caselaw involving summary judgment had, until recently,[34] proved equally frustrating.[35] The unique facts

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of our summary judgment rule is to expeditiously determine cases without necessity for formal trial. . . ."); Surkin v. Charteris, 197 F.2d 77, 79 (5th Cir. 1952)(the purpose of summary judgment is to "enable the court to expeditiously dispose of cases").

25. FED. R. CIV. P. 56(e). Section (e) states in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

26. *See infra* notes 37-46 and accompanying text.

27. Jones v. Borden Co., 430 F.2d 568, 574 (2d. Cir. 1970)(quoting 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1232.2, at 114 (1958)("But the best procedure for a correct understanding of summary judgment [is to rely] on the text of the rule, rather than on quotable statements made in one or another case.' ").

28. *See infra* notes 37-46 and accompanying text.

29. *See infra* notes 37-46 and accompanying text.

30. *Id.*

31. *Id.*

32. Bauman, *A Rationale of Summary Judgment*, 33 IND. L.J. 467, 467 (1958)("the incorrect use of the summary judgment procedure obviously increases delay and expense in the final disposition of litigation and thus aggravates the very problem the procedure was devised to solve.").

33. *See supra* notes 20-27 and accompanying text.

34. In addition to its decision in *Anderson*, the Court confronted another major summary judgment issue in Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986). In a wrongful death action, the *Celotex* Court dissipated some confusion arising when a motion for summary judgment is made by the party not having the burden at trial, and the subject matter of the motion involves facts. Such cases present the difficult question of what "burden" the moving party bears. The Court specifically rejected the notion that the moving party must produce evidence to negate the existence of a factual

and policies underlying the cases, coupled with the diverse articulation of rationales for the decisions, frustrated any attempt to derive a general standard for determining when summary judgment should be granted. Further confusion resulted from the fact that most summary judgment motions are replete with boilerplate language selected in such a fashion as to support the outcome deemed appropriate.[36]

Compounding the problem, the decisions that offered some sort of general principles often appeared misguided and inconsistent in their articulation of a standard.[37] Some courts expressed a restrictive approach toward summary judgment, stating that summary judgment is improper when there is the "slightest doubt"[38] as to the facts.[39] A handful of courts went even further, holding that the production of a mere "scintilla" of evidence is sufficient to preclude summary judgment.[40] Other courts applied a less restrictive standard by denying summary judgment only when the non-movant produces "specific facts" indicating the existence of a genuine issue of material fact.[41] Still other courts, apparently already employing a standard simi-

issue. Its burden may be discharged by demonstrating, on the record, before the court—by reference to pleadings, depositions, answers to interrogatories or admissions, or by affidavits—that there is an absence of evidence to support an essential element of the opponent's case. *Id.* at 2553-54.

35. The confusion surrounding the interpretation and application of summary judgment is illustrated by the frequency with which lower court summary judgment decisions are reversed by appellate courts. Several jurisdictions have a greater than 50% reversal rate. *See, e.g.,* Damsel, *Summary Judgment: Obsolete or a Useful Tool?,* 51 FLA. B.J. 535, 536 (1977)(81.2% reversal rate of Florida cases since 1966); *see also* Sheehan, *Summary Judgment: Let the Movant Beware,* 8 ST. MARY'S L.J. 253, 254 (1976)(Texas Supreme Court affirmed 30% of summary judgment decisions reviewed since 1968); Zack, *New Teeth for an Old Tiger,* 48 CAL. ST. B.J. 654, 654 (1973)(reversal in almost 50% of California summary judgment decisions); McLauchlan, *An Empirical Study of the Federal Summary Judgment Rule,* 6 J. LEGAL STUD. 427, 450 (1977)(a study of 428 cases from all three levels of federal courts found a 51.4% affirmance rate).

36. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis,* 83 YALE L.J. 745, 746 (1974).

37. *See infra* notes 39-43 and accompanying text.

38. *See, e.g.,* Thomas v. United States Dept. of Energy, 719 F.2d 342, 344 (10th Cir. 1983)("If the facts support an inference whereby the non-movant might prevail, summary judgment is inappropriate."); United States v. O'Block, 788 F.2d 1433, 1435 (10th Cir. 1986)("summary judgment is inappropriate if an inference can be deduced from the facts which would allow the non-movant to prevail."); Tomalewski v. State Farm Life Ins. Co., 494 F.2d 882, 883 (3d Cir. 1974)("[S]ummary judgment may not be granted where there is the slightest doubt as to the facts."); Bozant v. Bank of New York, 156 F.2d 787, 789 (2d Cir. 1946)(court concluded that on an appeal from summary judgment all issues of fact to which there is the "least doubt" must be construed against the defendant).

39. The Arizona courts subscribed to the slightest doubt standard prior to Anderson. *Compare* Lucchesi v. Frederic N. Stimmell, M.D., Ltd., 149 Ariz. 76, 79, 716 P.2d 1013, 1016 (1986)("If there is even the slightest doubt or uncertainty in respect to any issue of material fact, the request for summary judgment should be denied.") *with* Dombey v. Phoenix Newspapers, Inc., 150 Ariz. 476, 486, 724 P.2d 562, 572 (1986)(quoting *Anderson*).

40. *See, e.g.,* Dawn v. Sterling Drug, Inc., 319 F. Supp. 358 (1970)(copyright infringment action where the court noted that summary judgment procedures "should be used sparingly so that no plaintiff having a scintilla of merit to his case should be denied his day in Court." *Id.* at 361.); Manok v. Southeast Dist. Bowling Ass'n., 306 F. Supp. 1215 (1969)(antitrust action wherein the court granted summary judgment despite the adoption of the "mere scintilla" rule. The court held that the existence of a conspiracy was too incredible for reasonable minds to accept. *Id.* at 1220.); Reagan v. Commonwealth Theatres of Puerto Rico, Inc., 300 F. Supp. 676 (1969)(denied the motion for summary judgment in this because a " 'scintilla' of controversy of facts exists." *Id.* at 678.).

41. *See, e.g.,* Marcus v. St. Paul Fire and Marine Ins. Co., 651 F.2d 379, 382 (5th Cir. 1981)(held that summary judgment is improper if "substantial evidence" is offered by the non-movant); Willetts v. Ford Motor Co., 583 F.2d 852, 856 (6th Cir. 1978)(conclusory allegations are insufficient to send a case to a jury, the non-movant must produce specific facts showing the exist-

lar to the one enunciated by the Supreme Court in *Anderson*, paralleled the standards for directed verdicts while ruling upon summary judgment.[42] Finally, adding to the confusion, a line of cases primarily from the Third Circuit denied summary judgment whenever the pleadings could be said to create a dispute as to a material fact, even though the pleadings were unsupported by evidentiary material.[43] This latter line of cases threatened to render Rule 56 a nullity and thus prompted the 1963 amendment[44] of the Rule.[45] Until *Anderson*, however, nothing was done to quell the emasculating effect[46] that earlier decisions had on the summary judgment procedure.

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ence of a factual issue); British Airways Bd. v. Boeing Co., 585 F.2d 946, 951 (9th Cir. 1978)(the non-movant must produce specific facts showing it they can contradict evidence produced at the summary judgment stage); Stevens v. Barnard, 512 F.2d 876, 878 (10th Cir. 1975)(in responding to a properly supported motion for summary judgment, the non-movant must produce specific facts showing the existence of a genuine issue for trial).

42. *See, e.g.*, Taylor v. Gallagher, 737 F.2d 134 (1st Cir. 1984)(if no reasonable juror could find for the non-movant, summary judgment is proper); Rebozo v. Washington Post Co., 637 F.2d 375 (5th Cir. 1981)(libel action in which it was held that the applicable substantive evidentiary standard must be considered when ruling on a motion for summary judgment); Yiamouyiannis v. Consumers Union of U.S., Inc., 619 F.2d 932, 933 (2d Cir. 1980)("a judge, in denying a defendant's summary judgment motion, must conclude that, based on evidence asserted in the plaintiffs' affidavits, a reasonable jury could find malice with convincing clarity.' "); Roberts v. Browning, 610 F.2d 528, 529 (8th Cir. 1979)(the court rejected the "mere scintilla" standard in favor of a "substantial evidence" standard. The court's standard mirrors the one defined in the principal case, stating that the evidence produced by the non-movant must be sufficient to avoid a directed verdict.); Guam Federation of Teachers, Local 1581, A.F.T. v. Ysrael, 492 F.2d 438 (9th Cir. 1974)(plaintiff in libel action entitled to reach the jury despite the necessity of displaying actual malice with clear and convincing evidence at the summary judgment stage).

43. *See, e.g.*, Frederick Hart & Co. v. Recordgraph Corp., 169 F.2d 580 (3d Cir. 1948). In that case the court held that:

> [T]he complaint must be viewed in the light most favorable to the plaintiff . . . and should not be dismissed unless it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of his claim; further, no matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it.

Id. at 581. Other cases have used the same or similar language. *See also* Stanaland v. Atlantic Coast Line R. Co., 192 F.2d 432 (5th Cir. 1951); King Edward Employees F.C.U. v. Travelers Indem. Co., 206 F.2d 726 (5th Cir. 1953); Sherwin v. Oil City Nat'l Bank, 229 F.2d 835 (3d Cir. 1956).

44. FED. R. CIV. P. 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

45. The advisory committee, in fact, specifically stated this purpose as a reason for the amendment: "The last two sentences [to subdivision e] are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device." FED. R. CIV. P. 56 (advisory committee note)(1963).

46. *See, e.g.*, Chubbs v. City of New York, 324 F. Supp. 1183, 1189 (E.D.N.Y. 1971), where the court stated:

> On these facts we would be inclined to grant summary judgment. But, in this Circuit at least, District Courts may not rely to any substantial extent on summary judgment predicated upon testimonial proof to avoid a full trial even though a recovery seems hopeless. . . .
>
> Since courts are composed of mere mortals they can decide matters only on the basis of probability, never on certainty. The 'slightest doubt' test, if it is taken seriously, means that summary judgment is almost never used—a pity in this critical time of overstrained legal resources.

Id. at 1189.

THE RELEVANT POLICY CONSIDERATIONS

The policies behind Rule 56 have also added to the confusion and debate surrounding the proper interpretation and implementation of Rule 56. As stated previously, one of the primary purposes of the summary judgment doctrine is to prevent needless trials, thereby reducing the drain upon an already over-burdened judicial system while expediting valid litigation.[47] Competing with this policy is the constitutional guarantee[48] that one seeking redress in court will receive a fair and impartial jury trial.[49] While few would disagree that the constitutional guarantee to a jury trial is imperative to our idea of a democratic society, reality forces the recognition that justice is not always better served by permitting every litigant a day in court. Some trials are an exercise in futility.[50] Furthermore, justice seems better served through the application of summary judgment where cases are patently without merit such that the doctrine obviates unnecessary defenses, expenses, exposure and aggravation which often accompany meretricious litigation.

Another policy concern is that plaintiffs who lack equal access to the evidence may be unable to respond adequately to a motion for summary judgment and, as a consequence, may suffer summary judgment unfairly.[51] This argument, however, appears to ignore the Rule itself. Rule 56(f)[52] permits the judge to continue the motion pending discovery, as well as to deny

47. As noted by one commentator: "The rapid escalation in claims filed is so widely recognized as scarcely to deserve further note." Sonenshein, *State of Mind and Credibility in the Summary Judgment Context: A Better Approach*, 78 NW. U.L. REV. 774, 774 n.1 (1983).

48. U.S. CONST. AMEND. VII provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

49. Understandably, this is a very strong and emotional argument for those advocating a restrictive summary judgment doctrine. As one commentator put it:

> Legislative proposals abridging the jury trial clearly present to the citizens the choice of preserving a forum to seek simple justice through a jury trial, or abandonment of the hard-fought principles of our forefathers who believed that no amount of economy and efficiency is adequate consideration for a fair and impartial jury whose record of performance through the years has demonstrated an uncanny grasp of equity and fair play.

Troutman, *The Jury Trial*, 51 FLA. B.J. 331, 332 (1977).

50. *See, e.g.*, Damsel, *Summary Judgment: Obsolete or a Useful Tool?*, 51 FLA. B.J. 535, 537 (1977). That commentator observes:

> Unfortunately, situations arise whereby a plaintiff with the sponsorship of the attorney files an action against a defendant that is based upon elements of chance and psychology. He takes such a case on the premise that if the action is unsuccessful, the plaintiff has lost only time and possible legal fees, while putting the defendant through the expense of litigation and exposure to damages—and secure that the specter of a lawsuit and possible damage recovery might lead the defendant to a settlement without respect to the merits of the case. These are very real, practical, everyday problems. The most successful tool in our process at this time is a summary judgment procedure.

Id. at 537.

51. *See, e.g.*, First Nat'l Bank of Ariz. v. Cities Service Co., 391 U.S. 253, 297-298 (1968)(complex antitrust action in which respondents furnished affidavits and other evidence to refute the existence of a conspiracy. The trial court severely restricted the scope of the petitioner's discovery. Additionally, four important deponents died during the eleven years that passed between the date the lawsuit was filed and the date that respondent's motion for summary judgment was granted. Thus, the petitioners were unable to contradict the evidence brought by the respondents and relied only upon their original allegations in responding to respondents' motion. The Court concluded that more is required of the non-movant than merely relying upon allegations when a properly supported motion for summary judgment is made.).

52. FED R. CIV. P. 56(f). For the text of Rule 56(f) see *supra* note 2.

it, where critical evidence remains inaccessible.[53] In fact, the Court in *Anderson* tempered its decision with a discussion of Rule 56(f).[54]

Finally, as suggested by the dissenting Justices, another policy concern is that the *Anderson* decision will denigrate the role of the jury and turn "trial by jury" into "trial by affidavit."[55] However, the dissenters miss the mark. *Anderson* does not assign to the trial judge the function of passing on the weight or credibility of evidence or on what inferences should be drawn from the evidence. The majority recognized that, in ruling on a motion for summary judgment, the judge is bound to resolve all evidentiary disputes and draw all inferences in the non-movant's favor.[56] Construing the evidence in such a fashion, the judge determines whether the evidence is sufficient to sustain a verdict for the opponent, rendered by a reasonable jury acting under appropriate instructions, including those defining the applicable standard of proof. In the absence of sufficient evidence, there is no genuine dispute.

THE SCOPE OF *ANDERSON*

In their separate dissents, Justices Brennan and Rehnquist attacked the majority opinion as devoid of guidance and ultimately limited in scope.[57] Further, Justice Rehnquist argued that any future application of the *Anderson* decision should be limited to first amendment cases.[58]

According to Brennan and Rehnquist, the Court's opinion fails to offer guidance to lower court judges faced with summary judgment motions.[59] In some respects, the majority opinion offers only limited guidance to lower court judges, but this is not an oversight by the majority. Rather, this reflects the complexity of the issues involved in ruling on motions for summary jugment. Every motion for summary judgment contains different facts, evidence, and procedural and substantive law. In addition, as Justice Rehnquist recognized, the differentiated burden of proof standards the trier must use are necessarily vague and impressionistic.[60] Nevertheless, as Justice

53. Care must be taken, however, not to allow subsection (f) to frustrate the summary judgment process. *See* Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 483 (1984)("The court should examine critically any assertion of need for additional discovery in light of the true issues presented by the motion, bearing in mind that an opponent's failure to come forward with a factual showing at this stage may presage a similar inability at trial.").

54. Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511 n.5 (1986).

55. *Anderson*, 106 S. Ct. at 2519 (Brennan, J., dissenting). As suggested by Justice Brennan in his dissent:

> It is hard for me to imagine that a responsible counsel, aware that the judge will be assessing the 'quantum' of the evidence he is presenting, will risk either moving for or responding to a summary judgment motion without coming forth with *all* of the evidence he can muster in support of his client's case. Moreover, if the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial.

Id. at 2519-20 (emphasis in original).

56. *Anderson*, 106 S. Ct. at 2513.

57. *See Anderson*, 106 S. Ct. at 2515 (Brennan, J., dissenting); 106 S. Ct. at 2521 (Rehnquist, J., dissenting).

58. *Anderson*, 106 S. Ct. at 2520 (Rehnquist, J., dissenting).

59. *Id.* at 2519 (Brennan, J., dissenting); *id.* at 2521 (Rehnquist, J., dissenting).

60. *Id.* at 2522 (Rehnquist, J., dissenting).

Rehnquist goes on to note, these standards probably do make a difference when considered by the trier of fact, even if the difference is simply in affecting the state of mind of the trier.[61] While the majority articulates a standard for ruling on summary judgment motions, it leaves up to the lower courts the task of providing the requisite guidance in different and unique scenarios.

Both dissenters also argue that the higher standard imposed by the Court will have little, if any, practical effect.[62] In some cases, particularly those representative of the hypotheticals posited by the dissenters in which the case turns on credibility determinations, the *Anderson* decision will not play a role.[63] However, not all cases involve credibility determinations or such heavily controverted evidence. Such are the cases in which the primary purpose of the *Anderson* decision will come into play. This primary purpose is the sending of a message to district and appellate court judges that summary judgment motions should not be approached timidly.

Finally, Justice Rehnquist appears to believe[64] the *Anderson* decision will be limited in its application to first amendment cases.[65] Upon a strict reading of Justice White's majority opinion,[66] this view is tenable. For a variety of reasons, however, it seems clear that this decision is not confined to first amendment cases. The opinion can be interpreted to require change in summary judgment procedure in all cases, regardless of the substantive nature or evidentiary standard of the underlying litigation.[67] The Court

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61. *Id.*

62. *Anderson*, 106 S. Ct. at 2520 (Brennan, J., dissenting); *id.* at 2521 (Rehnquist, J., dissenting).

63. Both Justices Brennan and Rehnquist pose hypothetical cases wherein the crucial evidence involves the credibility determination of a witness. These hypotheticals raise an issue similar to the issue sub judice, the only difference being that Justice Brennan's hypothetical is postured in a contract setting, and Justice Rehnquist's hypothetical involves libel. *Anderson*, 106 S. Ct. at 2520 (Brennan, J., dissenting); *id.* at 2521 (Rehnquist, J., dissenting). The majority recognized that imposition of the clear and convincing standard in cases where witness credibility is at issue may have no practical effect. *Id.* at 2513.

64. *Anderson*, 106 S. Ct. at 2520 (Rehnquist, J., dissenting).

65. There are competing public policies involved in first amendment summary judgment litigation. Since many of these cases revolve around state of mind issues, a number of courts have held that summary judgment is inappropriate. *See, e.g.*, Lawrence v. Moss, 639 F.2d 634, 639 (10th Cir. 1981)("[M]alice calls in question a defendant's state of mind and does not lend itself readily to summary judgment."). On the other hand, as Judge Wright observed in Washington Post Co. v. Keogh, 365 F.2d 965, 967-68 (D.C. Cir. 1966), a libel action against a newspaper:

> That state of mind should generally be a jury issue does not mean it should always be so in all contexts, especially where the issue is recklessness, which is ordinarily inferred from objective facts. Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. . . .
>
> In the First Amendment area, summary judgment procedures are even more essential. . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.

Any question of whether this view survives Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979)(a defamation action in which the Court stated in a footnote that the proof of actual malice "does not readily lend itself to summary disposition."), was resolved in *Anderson*, 106 S. Ct. at 2514 n.7 (quoting Calder v. Jones, 465 U.S. 783, 790-91 (1984)): "Our statement in Hutchinson . . . that proof of actual malice 'does not readily lend itself to summary disposition' was simply an acknowledgment of our general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.' "

66. *Anderson*, 106 S. Ct. at 2509-10.

67. *See* Justice Brennan's dissent in *Anderson*, 106 S. Ct. at 2515 n.1 ("The Court's holding today is not, of course, confined in its application to First Amendment cases.").

held that: "whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to that case."[68] The first amendment is not singled out, nor is it even mentioned. Further, the majority emphasized that the standard must be imposed even in "run-of-the-mill civil cases."[69] It should also be noted that the cases used by the Court to support its decision were not first amendment cases.[70] In a decision regarding an antitrust conspiracy which was handed down earlier in the term, the Court used language similar to that used in *Anderson*.[71] Later in the term, the Court cited *Anderson* with approval in *Celotex Corp. v. Catrett*,[72] a wrongful death action. Finally, and perhaps most foreshadowing, is the fact that other courts have applied the standard enunciated by the *Anderson* Court in a wide range of cases[73] not involving first amendment issues.[74]

CONCLUSION

In *Anderson v. Liberty Lobby, Inc.*, the United States Supreme Court held that in determining whether a given factual dispute requires submission to a jury, a court must be guided by the substantive evidentiary standards that apply to the individual case before it. The *Anderson* decision quells much of the confusion surrounding Rule 56 by giving the courts a standard by which to judge summary judgment pleadings. The real value of the decision remains to be seen. The scope of the decision is also something that must be hammered out in future decisions. But, if nothing more, the decision sends a message to trial courts that summary judgment is a useful tool

68. *Anderson*, 106 S. Ct. at 2514.

69. *Id.* at 2512. There the Court emphasized that "[i]f the defendant in a run-of-the-mill civil case moves for summary judgment . . . based on the lack of proof of a material fact, the judge must ask . . . whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict."

70. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968)(antitrust action); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)(discrimination conspiracy action); Dombrowski v. Eastland, 387 U.S. 82 (1967)(conspiracy action). It is interesting to note that the Court reversed judgments granting summary judgment in both *Adickes* and *Dombrowski*.

71. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 106 S. Ct. 1348, 1356 (1986)("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' ").

72. 106 S. Ct. 2548, 53 (1986). *See supra* note 9.

73. *See, e.g.*, Berg v. First American Bankshares, Inc., 796 F.2d 489, 497 (D.C. Cir. 1986)(violation of Sec. Excg. Act of 1934); Kas v. Financial General Bankshares, Inc., 796 F.2d 508, 518 (D.C. Cir. 1986)(violation of Sec. Excg. Act of 1934); Gramenos v. Jewel Companies, Inc., 797 F.2d 432, 436 (7th Cir. 1986)(civil rights action); Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490, 496 (7th Cir. 1986)(violation of Sec. Excg. Act of 1934); Bushman v. Halm, 798 F.2d 651, 657 (3d Cir. 1986)(Fed. Torts Claim Act action); Professional Mgrs. v. Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 223 (5th Cir. 1986)(insurer brought action for declaration that legal malpractice policy did not cover particular claim). It is interesting to note that the district courts granted summary judgment in all of these cases and in only one, *Bushman*, was summary judgment overturned.

74. Thus far, the Arizona Supreme Court has only applied the Anderson holding once. Dombey v. Phoenix Newspapers, Inc., 150 Ariz. 476, 486-90, 724 P.2d 562, 572-76 (1986)(An individual and his corporation sought to recover against defendant newspaper for publication of allegedly defamatory material. The Arizona Supreme Court, applying the *Anderson* clear and convincing standard to a motion for summary judgment, held that the evidence of actual malice presented a jury question.).

deserving more aggressive application. To effectuate this goal, the *Anderson* decision must not be confined to first amendment cases.

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