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SUMMARY JUDGMENT PRACTICE IN ARKANSAS: CELOTEX, THE SCINTILLA RULE, AND OTHER MATTERS

John J. Watkins*

Several years ago, a sign outside a federal courtroom in New Orleans warned "No Spitting, No Summary Judgments." That statement reflected the prevailing attitude in the federal courts, which viewed summary judgment as a nefarious device that was to be employed sparingly, if at all. In 1986, however, the Supreme Court announced a new

* Professor of Law, University of Arkansas, Fayetteville.
2. Writing in 1957, an Arkansas federal district judge called summary judgment "a drastic remedy [that] is to be sparingly used." Harry J. Lemley, Summary Judgment Procedure under Rule 56 of the Federal Rules of Civil Procedure — Its Use and Abuse, 11 Ark. L. Rev. 138, 142 (1957). Similarly, summary judgment has been described as "an extreme and treacherous remedy," Croxen v. United States Chem. Corp., 558 F. Supp. 6, 7 (N.D. Iowa 1982), one which should be used "only with great caution and much soul-searching . . . ." Bayou Bottling, Inc. v. Dr. Pepper Co., 543 F. Supp. 1255, 1261 (W.D. La. 1982), aff'd, 725 F.2d 300 (5th Cir.), cert. denied, 469 U.S. 833 (1984). The Second Circuit frequently observed that the trial judge must deny a motion for summary judgment if there is "the slightest doubt" as to its propriety. E.g., Dolgow v. Anderson, 438 F.2d 825, 830 (2d Cir. 1971) (quoting Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d cir. 1945)). A prominent litigator, discussing summary judgment at the Second Circuit judicial conference in 1977, observed that "[t]here is none in this circuit" and that "it takes a touch of Pollyanna for any of us to even consider the motion any
approach. "Summary judgment procedure is properly regarded not as a
disfavored procedural shortcut," the Court said in Celotex Corp. v. Ca-
trett,8 "but rather as an integral part of the Federal Rules as a whole,
which are designed 'to secure the just, speedy and inexpensive determi-
nation of every action.' "4

The Arkansas Supreme Court, however, continues to cling to the
old ways. Although the court has applied the actual holding of Celotex
in one case,6 it has not accepted the notion that summary judgment is a
perfectly respectable method of disposing of lawsuits short of trial. In
fact, a recent decision6 seems to adopt the infamous "scintilla rule,"
under which a motion for summary judgment will be denied so long as
there is the smallest trace of evidence in support of the party opposing
the motion.7

This hostile attitude toward summary judgment is unfortunate.
Like their counterparts in most states, trial judges in Arkansas face
swollen dockets,8 and summary judgment is "an important tool for dis-
tinguishing cases that should be tried from those that should not."9
Moreover, Rule 56 of the Arkansas Rules of Civil Procedure, which
deals with summary judgment, is virtually identical to the correspond-
federal rule.10

longer." Lawrence W. Pierce, Summary Judgment: A Favored Means of Summarily Resolving
4. Id. at 327 (quoting FED. R. CIV. P. 1).
   Discussing the rule in connection with motions for directed verdict, Professor James observed: "It
   is a judicial legend that there once was a 'scintilla rule' under which a verdict could be directed
   only when there was literally no evidence for proponent, but if there ever was such a notion all
   that remains of it today is its universal repudiation." Fleming James, Jr., Sufficiency of the Evi-
   (footnotes omitted).
8. According to the Administrative Office of the Courts, the state's trial courts "are oper-
ating at their maximum capacity, and further increases in filings could produce severe problems." ARKANSAS JUDICIARY ANNUAL REPORT, 1990-91, at 8. There were 90,814 civil cases filed in
the state's circuit, chancery, and probate courts during 1990-91, compared to 83,247 in 1987-88.
While circuit court filings dropped from 28,356 to 23,013 during that period, the decrease is
attributable to Amendment 64, which expanded the civil jurisdiction of municipal courts. Signifi-
cantly, the number of civil cases filed in the circuit courts increased between 1989-90 and 1990-
91, despite the impact of Amendment 64. Id. Filings in municipal courts (both civil and criminal)
increased from 444,916 in 1987-88 to 619,366 in 1990-91. Id. at 10.
9. William J. Dowling, Is There Any Hope for the Celotex Rule on Summary Judgment
10. The Arkansas rule tracks the version of FED. R. CIV. P. 56 that was on the books in
application invites confusion and is inconsistent with the notion of uniformity between state and federal practice that underlies the Arkansas Rules of Civil Procedure.\textsuperscript{11}

I. Federal Practice

Traditionally, the federal courts took a narrow view of the summary judgment device, as illustrated by the oft-repeated statements that summary judgment should not result in "trial by affidavit" and should not be granted if there is the "slightest doubt" as to the facts.\textsuperscript{12} The burden of proving that no material facts were in dispute rested with the party moving for summary judgment,\textsuperscript{13} and the evidence presented to the court was to be construed in favor of the party opposing the motion, who would be given the benefit of all reasonable doubts in determining whether a genuine factual dispute existed.\textsuperscript{14} Moreover, courts would not weigh the factual inferences in evaluating summary judgment.

\textsuperscript{11} See Walter Cox & David Newbern, \textit{New Civil Procedure: The Court that Came in from the Code}, 33 \textit{Ark. L. Rev.} 1, 4 (1979) (noting that the committee appointed by the supreme court to draft the Arkansas rules used the federal rules as a "starting point," having been "persuaded by the need for modernization and the desirability of uniformity with the federal system").

\textsuperscript{12} For a discussion of cases adhering to this view, see 10 \textit{Charles A. Wright et al., Federal Practice & Procedure} § 2712, at 582-83 (2d ed. 1983).

\textsuperscript{13} E.g., Mack v. Cape Elizabeth School Bd., 553 F.2d 720, 722 (1st Cir. 1977) (a defendant seeking summary judgment has the burden of demonstrating no factual dispute, "even though . . . he would have no burden if the case were to go to trial"); Windsor v. Bethesda Gen. Hosp., 523 F.2d 891, 894 (8th Cir. 1975) (in order to be entitled to summary judgment, the defendant employer had burden of "conclusively" demonstrating that plaintiff employee was not discriminated against because of his race).

\textsuperscript{14} 10A \textit{Wright et al., supra} note 12, § 2727, at 124-28.
judgment motions, and the conventional wisdom was that summary judgment was not proper when the case involved intent, knowledge, or motive.

In 1986, however, the Supreme Court decided three cases that substantially reconfigured federal summary judgment practice. The impact of those decisions — of which Celotex was one — cannot be understated. In a recent survey of lower federal court cases, the authors of an article in the Yale Law Journal found “a widespread and dramatic recasting of summary judgment doctrine.” The courts, they concluded, have “expand[ed] evidentiary review at the summary judgment stage of litigation,” granted summary judgment when the plaintiff’s evidence “does not exclude other reasonable hypotheses with a fair amount of certainty,” and demonstrated a “new willingness” to

15. E.g., Redna Marine Corp. v. Poland, 46 F.R.D. 81, 85 (S.D.N.Y. 1969) (“It is not the Court’s function to weigh the evidence or choose between factual inferences that may be drawn.”).

16. E.g., Poller v. CBS, Inc., 368 U.S. 464, 473 (1962) (summary judgment “should be used sparingly in complex antitrust litigation where motive and intent play leading roles”); Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1220 (9th Cir. 1980) (“Cases where intent is a primary issue generally are inappropriate for summary judgment . . . .”); Conrad v. Delta Airlines, Inc., 494 F.2d 914, 918 (7th Cir. 1974) (“Cases in which the underlying issue is one of motivation, intent, or some other subjective fact are particularly inappropriate for summary judgment.”).

resolve issues of intent or motive on summary judgment. In short, summary judgment “has been transformed into a mechanism to assess plaintiff’s likelihood of success of prevailing at trial.”

The first of the trilogy was *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,20 handed down in March 1986. In *Matsushita* a group of American consumer electronics manufacturers brought an antitrust suit against a number of their Japanese counterparts who were alleged to have conspired to use their monopoly profits from the Japanese market to finance a predatory pricing campaign in the United States aimed at driving the plaintiffs out of business. After lengthy discovery and pretrial wrangling, the district court granted defendants’ motion for summary judgment,20 but the Court of Appeals for the Third Circuit reversed. After determining that the district court had erroneously excluded certain evidence offered by the plaintiffs in opposition to the motion, including a large portion of their expert testimony, the court of appeals held that summary judgment was improper because a reasonable factfinder could conclude that defendants had conspired to depress prices in the United States in order to drive out American competitors.

In a five to four decision, the Supreme Court reversed and remanded, directing that the summary judgment be reinstated unless the Third Circuit could identify other evidence in the record that was “sufficiently unambiguous” to permit a conspiracy finding.22 The majority held, on the basis of the evidence considered by the court of appeals, that summary judgment was appropriate. Because the defendants had adequately supported their summary judgment motion, as Rule 56(c) requires, the burden shifted to the plaintiffs to demonstrate a genuine factual dispute. To carry this burden, the Court said, the party resisting summary judgment must do more than “simply show that there is some metaphysical doubt” as to the material facts. “Where the record taken as a whole could not lead a rational trier of fact to find for

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18. Issacharoff & Loewenstein, *supra* note 17, at 88-89. The new attitude is illustrated by this comment by a Ninth Circuit panel: “No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment.” *California Architectural Bldg. Prod. v. Franciscan Ceramics, Inc.*, 818 F.2d 1446, 1468 (9th Cir. 1987).


the non-moving party, there is no ‘genuine issue for trial.’” Moreover, that party “must come forward with more persuasive evidence to support [its] claim than would be otherwise necessary” if the claim is “implausible” in light of the factual context.\(^\text{23}\)

The problem for the plaintiffs in *Matsushita*, the Court said, was the absence of any rational economic motive for the defendants to conspire. Without such motive, the defendants’ behavior in the Japanese market and their pricing practices in the United States did not give rise to an inference of conspiracy, since that conduct was “consistent with other, equally plausible explanations. . . .” There had to be evidence that was “sufficiently unambiguous to permit a trier of fact to find that [the defendants] conspired to price predatorily for two decades despite the absence of any apparent motive to do so.” Such evidence must “ten[d] to exclude the possibility” that the defendants priced their products “to compete for business rather than to implement an economically senseless conspiracy.”\(^\text{24}\)

If nothing else, *Matsushita* illustrates the impact of the underlying substantive law on motions for summary judgment. But, as Professor Childress has pointed out, the decision is significant for two other reasons. First, the case makes clear that the standard for evaluating summary judgment motions mirrors that for directed verdict motions.\(^\text{25}\)
Thus, the question on motion for summary judgment is not "whether enough evidence exists to raise an inference to be resolved at trial, but instead whether sufficient evidence in the pretrial record exists to allow the plaintiff to win at trial or survive a motion for directed verdict, were one based on the facts in the pretrial record." Second, the Court's reference to plausibility suggests that a trial judge may weigh the inferences that can be drawn from the evidence, "at least for their absolute reasonableness or persuasiveness," and thus engage in "a certain amount of qualitative review beyond a minimum quantitative sufficiency-of-the-evidence test." As Judge Pierce has put it, summary judgment "may be granted in the face of equally plausible explanations of the same evidence."

The parallel between the motions for summary judgment and directed verdict was drawn even more clearly three months later in Anderson v. Liberty Lobby, Inc. In that case, a lobbying group and its founder brought a defamation action against columnist Jack Anderson and his associates on the basis of three magazine articles. After discovery, the defendants moved for summary judgment, arguing that the plaintiffs were "public figures" who had not met their burden of showing that the offending articles were published with "actual malice," that is, reckless disregard for the truth or knowledge of falsity. The district court granted the motion, but the Court of Appeals for the District of Columbia Circuit reversed with respect to some of the allegedly defamatory statements. Central to the court's ruling was its conclusion that the heightened standard of proof applicable in libel cases of this type — i.e., a public official or public figure must prove actual malice with "convincing clarity" — was irrelevant for purposes of summary judgment. The Supreme Court disagreed, holding in a six to three decision that the "convincing clarity" standard applies at the summary judgment stage as well as at trial.

26. Childress, supra note 1, at 268.
27. Id.
28. Pierce, supra note 2, at 285. However, at least one court has interpreted Matsushita as applying only to the plausibility of inferences, not direct evidence. McLaughlin v. Liu, 849 F.2d 1205, 1206-08 (9th Cir. 1988). With respect to the impact of Matsushita on the problem of inconsistent inferences, see Schwarzer et al., supra note 17, at 493-95.
31. 746 F.2d 1563 (D.C. Cir. 1984).
Anderson makes plain that, in ordinary civil cases as well as in actions for defamation, a trial judge considering a motion for summary judgment must take into account who has the burden of persuasion at trial and the applicable standard of proof, usually the familiar "preponderance of the evidence" standard. As the Court put it, "the judge must view the evidence presented through the prism of the substantive evidentiary burden."\(^3\)

Moreover, the Court flatly stated that the test for evaluating a motion for summary judgment "mirrors [that] for a directed verdict under Federal Rule of Civil Procedure 50(a)" and that the difference in the two motions lies largely in their timing.\(^3\) Thus, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient," and the inquiry in the typical case is "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict."\(^3\) Trial judges must determine whether the record on summary judgment "presents a sufficient disagreement" or "is so one-sided that one party must prevail as a matter of law."\(^3\) In making this determination, judges must "bear in mind the actual quantum and quality of proof necessary to support liability," and summary judgment is proper if the evidence is of "insufficient caliber or quantity" to allow a jury to decide the issue.\(^3\)

At the same time, however, the Court cautioned that summary judgment is not a substitute for trial: "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."\(^3\) Elaborating on this point later in the opinion, the Court said:

Credibility determinations, the weighing of the evidence, and the

\(^32\). 477 U.S. at 254.
\(^33\). Id. at 250. As the Court observed, "summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on evidence that has been admitted." Id. (quoting Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745 n.1 (1983)).
\(^34\). Id. at 252. Put another way, "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 249. "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. at 249-50 (citations omitted). On the other hand, "summary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248.
\(^35\). Id. at 251-52.
\(^36\). Id. at 254.
\(^37\). Id. at 249.
drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.38

The Celotex case, handed down on the same day as Anderson, dealt primarily with the process by which a summary judgment motion is brought before the court. While the decision centered on the shifting burdens within summary judgment procedure, its message as to the role of summary judgment is unmistakable. As noted in the opening paragraph of this article, the Court emphasized that summary judgment is not a "disfavored procedural shortcut," but rather an "integral part" of the rules of civil procedure.39 Indeed, the Court said that summary judgment is now the principal tool by which "factually insufficient claims or defenses [can] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources."40

A products liability case, Celotex stemmed from the exposure of the plaintiff's late husband to asbestos. After more than a year of discovery, the district court granted defendant Celotex's motion for summary judgment on the ground that the plaintiff had failed to produce evidence connecting her husband's death to any of the company's products. The Court of Appeals for the District of Columbia Circuit reversed, holding that Celotex's failure to support its summary judgment motion with evidence tending to negate such causation precluded summary judgment in its favor.41 Rejecting this view of the moving party's initial burden in seeking summary judgment, the Supreme Court reversed and remanded the case for reconsideration in light of the proper standard. Again the Court was divided, this time five to four; however, three of the four dissenters were in basic agreement with the majority regarding summary judgment procedure.

Under Rule 56(e), a motion for summary judgment is to be "made and supported as provided in this rule." Prior to Celotex, this ambiguous requirement was taken to mean that the moving party has "the burden of showing the absence of a genuine issue as to any material fact," with any supporting materials "viewed in the light most

39. 477 U.S. at 327.
40. Id.
favorable to the opposing party."\(^{42}\) Thus, it was generally thought that the moving party must "foreclose the possibility" that his opponent might prevail at trial.\(^{48}\) As applied to the facts of *Celotex*, this burden would have made summary judgment virtually impossible. Because the plaintiff's claim was based on the alleged exposure of her deceased husband to asbestos products made by Celotex, the company would have had "to prove nonexposure at any point in the decedent's life in order to foreclose the possibility of a plaintiff's verdict at trial."\(^{44}\)

In *Celotex*, however, the Supreme Court eased the moving party's initial burden at the summary judgment stage when the opposing party has the burden of persuasion at trial.\(^{45}\) While the movant may still produce affirmative evidence negating an essential element of the opposing party's claim, he may also satisfy this burden by "pointing out" to the trial court that "there is an absence of evidence to support the nonmoving party's case."\(^{46}\) Thus, a defendant who moves for summary judgment stands in the same procedural posture as a defendant who moves for directed verdict at trial. No matter which option is employed, the burden then shifts to the nonmoving party to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'"\(^{47}\) Under *Matsushita* and *Anderson*, of course, this means that the nonmoving party must identify evidence sufficient for a reason-

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43. Board of Educ. v. Pico, 457 U.S. 853, 875 (1982) (summary judgment was improper where defendant had not foreclosed possibility that removal of books from school library was unconstitutionally motivated). See generally Nelken, *supra* note 17, at 63-64.
44. Issacharoff & Loewenstein, *supra* note 17, at 80.
45. The majority did not address the burden of production of a moving party who has the burden of persuasion at trial, as is typically the case when the plaintiff seeks summary judgment. Justice Brennan, however, observed in dissent that the plaintiff in such a situation must support the motion with "credible evidence . . . that would entitle [him] to a directed verdict if not controverted at trial." 477 U.S. at 331 (Brennan, J., dissenting) (citation omitted). If this heavy burden is satisfied, the defendant must counter with "evidentiary materials that demonstrate the existence of a 'genuine issue' for trial or to submit an affidavit requesting additional time for discovery." *Id.* (citations omitted). See also Nelken, *supra* note 17, at 81.
46. 477 U.S. at 325. There was disagreement among the Justices as to the precise nature of the moving party's obligation when the "pointing out" option is chosen. Writing for a plurality of four, Justice Rehnquist described the requirement as simply "informing" the trial court of the absence of facts in dispute. *Id.* at 323. Concurring in the judgment, Justice White said that a "conclusory assertion" that no evidence supports an element of the nonmoving party's claim is insufficient. *Id.* at 328 (White, J., concurring). Justice Brennan, in a dissent joined by two other Justices, agreed with Justice White that a "conclusory assertion" is not enough and took the position that the moving party must "affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party." *Id.* at 332 (Brennan, J., dissenting).
47. *Id.* at 324 (quoting FED. R. CIV. P. 56(e)).
able trier of fact to find in his favor.

The Court also spoke in *Celotex* to the obligation of the nonmoving party once the movant has satisfied his initial burden. Prior to this decision, the generally accepted view was that the evidence offered by the nonmoving party in opposition to a summary judgment motion had to be admissible at trial. In *Celotex*, however, the Court took a different approach: "We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment." Rather, the question is "whether [the nonmoving party's] showing, if reduced to admissible evidence, would be sufficient to carry [that party's] burden of proof at trial." Thus, the nonmoving party need only present evidence that is "reducible" to admissible form.

On remand, a divided panel of the District of Columbia Circuit again held that summary judgment was inappropriate. Given the Supreme Court's conclusion that *Celotex* had met its initial burden on summary judgment by "pointing out" the lack of evidence as to causation, the court of appeals focused on the adequacy of the plaintiff's response to the motion. The evidence relied upon by the plaintiff consisted of three documents tending to establish that the plaintiff's husband had been exposed to Celotex products during the course of his employment: a transcript of her late husband's testimony in a worker's compensation hearing; a letter from one T.R. Hoff, an officer of the

48. As the authors of a leading treatise wrote three years before *Celotex*:

Rule 56(e) requires the [nonmoving party] to set forth facts that would be admissible in evidence at trial. Material that is inadmissible will not be considered on a motion for summary judgment because it would not establish a genuine issue of material fact if offered at trial and continuing the action would be useless.

WRIGHT ET AL., supra note 12, § 2727, at 156 (footnotes omitted).

The authors also observed:

Turning to the requirements for affidavits used on summary judgment motions, the first question ... is whether the information they contain (as opposed to the affidavits themselves) would be admissible at trial. Thus, ex parte affidavits, which are not admissible at trial, are appropriate on a summary judgment hearing to the extent they contain admissible information.

Because the policy of Rule 56(e) is that the judge should consider any material that would be admissible at trial, the rules of evidence and the exceptions thereto determine what averments the affidavit may contain.

*Id.* § 2738, at 470-74 (footnotes omitted).

49. 477 U.S. at 324.

50. *Id.* at 327.

51. For criticism of this aspect of *Celotex*, see Nelken, *supra* note 17, at 69-77.

company that had employed the plaintiff's husband, to an insurance agent; and a letter from the insurance agent to the plaintiff's lawyer restating the contents of Mr. Hoff's letter. 53

Celotex argued that the documents were inadmissible hearsay that should not be considered in connection with the summary judgment motion. Over a strong dissent, the majority held that the letter from Mr. Hoff was sufficient to avoid summary judgment. 54 Even if the letter would not be admissible at trial, 55 its substance was "reducible" to admissible evidence in the form of trial testimony, because the plaintiff, in response to interrogatories, had listed Mr. Hoff as a trial witness. Moreover, the majority emphasized that Celotex had failed to object to the trial judge's consideration of the letter. 56

In light of Matsushita, Anderson, and Celotex, summary judgment practice in the federal courts can be described as follows. 57 When the nonmoving party has the burden of persuasion at trial, the movant has two options in meeting his initial burden under Rule 56. First, he may produce affirmative, admissible evidence 58 to negate an essential element of the nonmoving party's claim. Second, the movant may "point out" to the trial court, after reasonable time for discovery, that

53. Id. at 35.

54. The court held that the transcript of the worker's compensation hearing was not admissible under Fed. R. Evid. 804(b)(1), which provides an exception to the hearsay rule for testimony in a prior proceeding if the declarant is unavailable and the opposing party had opportunity and motive to develop the testimony. Similarly, the insurance agent's letter was to no avail. Because it merely restated the substance of Mr. Hoff's letter, it offered "no independent evidence of a genuine issue of material fact." Id. at 39 n.13.

55. The letter was arguably admissible under the business records exception to the hearsay rule, see Fed. R. Evid. 803(6), but the court did not resolve the issue. 826 F.2d at 37.

56. Id. at 37-38. In dissent, Judge Bork argued that Mr. Hoff's letter and the plaintiff's intent to call him as a witness at trial were insufficient to avoid summary judgment, since there was no indication that Mr. Hoff had personal knowledge of any asbestos exposure. Thus, it was possible that the content of Mr. Hoff's anticipated trial testimony could be inadmissible. Judge Bork also contended that the letter itself was inadmissible and therefore could not be considered by the trial judge in ruling on the summary judgment motion. Moreover, he disputed the majority's claim that Celotex had failed to object to the trial court's consideration of the letter. Id. at 41-42 (Bork, J., dissenting).

57. The procedural aspects of this summary are taken largely from Justice Brennan's Celotex dissent, in which he elaborated upon the framework set forth by the majority while disagreeing with its application. 477 U.S. at 330-33 (Brennan, J., dissenting). See also Nelken, supra note 17, at 81-84; Schwarzer et al., supra note 17, at 477-83; Eric K. Yamamoto et al., Summary Judgment at the Crossroads: The Impact of the Celotex Trilogy, 12 U. Haw. L. Rev. 1, 35-36 (1990).

58. In Celotex, the Supreme Court addressed only the evidence presented by the nonmoving party. Nothing in the decision indicates that the Court intended to permit the movant to support his motion with inadmissible evidence.
there is an absence of evidence in the record to support an essential element of that claim. If the first option is employed, the nonmoving party may argue that the moving party's evidence is not sufficient to meet its initial burden, counter with "reducible" evidence sufficient to withstand a motion for directed verdict at trial, or move for a continuance under Rule 56(f) to obtain more evidence. If the movant uses the second option, the nonmoving party may attempt to demonstrate that the moving party has not met his initial burden by showing the court that the record does in fact contain sufficient evidence to support his claim. As is the case if the moving party employs the first option, the nonmoving party may also seek a continuance under Rule 56(f) or produce additional evidence, which, if reduced to admissible form at trial, would be sufficient to withstand a directed verdict.

If both parties satisfy their respective burdens, the question becomes whether, on the basis of the summary judgment record, a reasonable jury could find in favor of the nonmoving party at trial. The moving party bears the ultimate burden of persuasion on this issue, and the court must take into account the applicable standard of proof, e.g., preponderance of the evidence. Although weighing the evidence remains impermissible, the court may consider its persuasiveness and plausibility in deciding whether the proof is sufficient to permit a jury verdict for the nonmoving party. The evidence and the inferences that can be drawn therefrom are to be viewed in a light most favorable to the nonmoving party.

Matters are less complex when the moving party has the burden of persuasion at trial. In this situation, the movant must produce admissible evidence of sufficient strength that a reasonable jury could not find in favor of the nonmoving party. This, of course, is the same standard that must be applied when the party with the burden of persuasion moves for a directed verdict. In response, the nonmoving party must argue that the movant has not satisfied his initial burden, counter with "reducible" evidence sufficient to withstand a directed verdict, or seek a continuance under Rule 56(f). The moving party has the ultimate burden of persuading the court that summary judgment is appropriate.

II. THE TRADITIONAL ARKANSAS APPROACH

In 1961, the Arkansas General Assembly adopted a summary judgment statute that tracked Rule 56 of the Federal Rules of Civil
Although the Arkansas Supreme Court described this provision as "a salutary measure, designed to prevent unnecessary trials where the record shows that there is no genuine issue of fact to be litigated," it stressed in the same opinion that summary judgment is an "extraordinary remedy." This attitude persists today under Rule 56 of the Arkansas Rules of Civil Procedure, which superseded the statute.

As Justice Newbern has aptly put it, the supreme court "looks askance" at summary judgment. Because it considers summary judgment to be an "extreme remedy," the court has warned that a motion


for summary judgment is to be denied if there is "any doubt whatever." The purpose of such a motion, the court has emphasized, "is not to try issues, but to determine if there are issues to be tried." This view of summary judgment corresponds to that of most federal courts prior to the three 1986 cases discussed above.

Not surprisingly, the summary judgment principles set out in the Arkansas case law also mirror those found in pre-1986 federal decisions. The burden of proving that there is no dispute as to the material facts rests with the party who moves for summary judgment. Evi-

State Nat'l Bank, 258 Ark. 54, 57, 522 S.W.2d 187, 189 (1975); Harvey v. Shaver, 247 Ark. 92, 95, 444 S.W.2d 256, 257 (1969); Deltic Farm & Timber Co. v. Manning, 239 Ark. 264, 266, 389 S.W.2d 435, 437 (1965).


dence submitted in connection with the motion must be viewed in a light most favorable to the nonmoving party, with any doubts and inferences resolved against the movant. Even if the facts are undisputed, summary judgment is not proper if the evidence "reveals aspects from which inconsistent hypotheses might reasonably be drawn." The


trial court cannot weigh the evidence in deciding a summary judgment motion, and cases presenting issues of intent are “particularly inappropriate” for summary judgment.

As an initial matter, the moving party must make a *prima facie* showing of entitlement to summary judgment by offering proof on a controverted issue; if he fails to do so, the motion for summary judgment must be denied. However, once the movant has satisfied this requirement, the burden shifts to the nonmoving party, who must “discard the shielding cloak of formal allegations and meet proof with proof by showing a genuine issue as to a material fact.” The nonmoving party “may not rest upon the mere allegations or denials of his pleadings” but “must set forth specific facts showing that there is a genuine issue for trial.” If the nonmoving party cannot produce such


73. ARK. R. Civ. P. 56(e).
evidence, summary judgment is obviously proper; for example, in a recent case the supreme court affirmed a summary judgment where the nonmoving party "offered nothing" in response to the motion.\footnote{74}

However, the quantum of evidence that the nonmoving party must produce does not appear to be particularly great, since a summary judgment motion must be denied if there is "any doubt whatever."\footnote{75} Thus, the nonmoving party's burden does not, in practice, appear to be a heavy one. According to the supreme court, "[a]ll that [is] required of the [nonmoving party] to avoid the entry of summary judgment against him [is] to show that there [is] a justiciable issue. . . ."\footnote{76} As discussed below, it appears that summary judgment is improper so long as the nonmoving party offers some evidence, even a mere scintilla, in opposition to the motion.\footnote{77} Moreover, the nonmoving party need not "establish [his] case by a preponderance of the evidence or by any other standard of proof," but must only "establish that there was a genuine issue for trial."\footnote{78}

Both the moving party and his opponent must produce admissible evidence in support of their respective positions. For example, in \textit{Organized Security Life Insurance Co. v. Munyon},\footnote{79} the supreme court held that the moving party's affidavit was deficient because it did not indicate that the stated facts were within the affiant's personal knowledge.\footnote{80} By way of comparison, the court concluded in \textit{Dixie Insurance}


\footnote{75. See cases cited supra note 64.}

\footnote{76. Lee v. Westark Inv. Co., 253 Ark. 267, 271, 48S S.W.2d 712, 715 (1972).}

\footnote{77. See infra text accompanying notes 98-110.}

\footnote{78. Chick v. Rebsamen Ins., 8 Ark. App. 157, 159-60, 649 S.W.2d 196, 197 (1983). In this case, the nonmoving party apparently did not have the burden of proof at trial. The plaintiff insurance company brought suit against defendants on an alleged open account, claiming nearly $15,000 for premiums due on insurance policies. On plaintiff's motion, the trial court granted summary judgment, but the court of appeals reversed, holding that defendants' responsive affidavits were sufficient to establish a genuine issue of material fact. \textit{Id.} at 159, 649 S.W.2d at 197.}

\footnote{79. 247 Ark. 449, 446 S.W.2d 233 (1969).}

\footnote{80. \textit{Id.} at 456, 446 S.W.2d at 237. The court stated: It must be affirmatively shown, or appear from statements contained in any affidavit supporting or opposing a summary judgment, that it is based upon personal knowledge of the affiant, that the facts stated therein would be admissible in evidence and that the affiant is a witness competent to state these facts in evidence.}
Co. v. Joe Works Chevrolet, Inc.\textsuperscript{81} that the trial court properly considered the moving party's affidavits, which contained statements that were admissible under an exception to the hearsay rule.\textsuperscript{82} The court also made plain in that case that once the moving party has satisfied his initial burden, the nonmoving party "must respond showing facts which would be admissible in evidence to create a factual issue."\textsuperscript{83} Because the nonmoving party had not done so, summary judgment was proper.\textsuperscript{84}

III. Post-Celotex Developments in Arkansas

In the six years since Celotex and its companion cases, the Arkansas Supreme Court has continued to describe summary judgment as an "extreme remedy."\textsuperscript{85} Indeed, the court has recently suggested that


\textsuperscript{81} 298 Ark. 106, 766 S.W.2d 4 (1989).
\textsuperscript{82} Id. at 109-11, 766 S.W.2d at 6.
\textsuperscript{83} Id. at 111, 766 S.W.2d at 7 (citing DAVID NEWBERN, ARKANSAS CIVIL PRACTICE & PROCEDURE \textsection{} 26-6, at 255). Accord, Diebold v. Vanderstek, 304 Ark. 78, 80, 799 S.W.2d 804, 805 (1990); Turner v. Baptist Medical Ctr., 275 Ark. 424, 427, 631 S.W.2d 275, 277 (1982); Miskimins v. City Nat'l Bank, 248 Ark. 1194, 1205, 456 S.W.2d 673, 679 (1970). See also Brewington v. St. Paul Fire & Marine Ins. Co., 285 Ark. 389, 392, 687 S.W.2d 838, 840 (1985) (trial court properly disregarded nonmoving party's affidavit, which was "generally hearsay"); Pruitt v. Cargill, Inc., 284 Ark. 474, 477, 683 S.W.2d 906, 908 (1985) (assertion in affidavit of plaintiff, the nonmoving party, that he "thought" he was buying a water tank from defendant, was not sufficient); Hughes Western World, Inc., v. Westmoor Mfg. Co., 269 Ark. 300, 301-02, 601 S.W.2d 826, 827 (1980) (nonmoving party's affidavit, with qualification "as Affiant understands it," was insufficient, since it did not assert the required personal knowledge).


\textsuperscript{85} E.g., Thruston v. Little River County, 310 Ark. 188, 190, 832 S.W.2d 851, 852 (1992);
summary judgment is improper even if the same evidence, when presented at trial, would result in a directed verdict for the nonmoving party. On the other hand, the court has cited Anderson approvingly with respect to the standard of proof issue and has approved use of the Celotex "pointing out" method by which the moving party may satisfy his initial burden. While these are welcome developments, other cases indicate that the court has stopped considerably short of adopting the federal approach to summary judgment.

A. The Directed Verdict Analogy

As early as 1963, the Arkansas Supreme Court recognized that "the theory underlying a motion for summary judgment is the same as that underlying a motion for a directed verdict." In that case, as well as in subsequent decisions, the court suggested that the similarity lies in the fact that evidence submitted with either motion "must be viewed in the light most favorable to the party resisting the motion, with all doubts and inferences being resolved against the moving party." At least one case indicates that the similarity extends further, in that a motion for summary judgment, like a motion for directed verdict, should be entered "only if the proof . . . presents no issue for the jury . . . ." It now seems clear, however, that the standards for passing on the two motions are not identical.

Nearly sixty years ago, the supreme court described the rule pertaining to motions for directed verdict as follows:

It is a rule of universal application that, where the testimony is undisputed and from it all reasonable minds must draw the same conclusion of fact, it is the duty of the court to declare as a matter of law the conclusion to be reached; but, where there is any substantial evi-
This standard, commonly known as the "substantial evidence rule," is expressed in varying language in numerous cases decided both before and after adoption of the Arkansas Rules of Civil Procedure. 90 From time to time, the supreme court has employed virtually the same standard in summary judgment cases, holding that summary judgment is not proper if reasonable persons could differ from the evidence or the inferences drawn therefrom. 91 In fact, the court has on occasion used the words "substantial evidence" in connection with a motion for summary judgment. For example, in Arnold v. All American Assurance Co., 92 the court said that when the moving party has the burden of persuasion at trial, the question is whether a reasonable fact-


92. 255 Ark. 275, 499 S.W.2d 861 (1973).
finder "could draw only one conclusion" from the facts; if there is "any substantial evidence on which a contrary result could be reached, the [summary] judgment should be denied." Under these circumstances, a directed verdict for the party with the burden of persuasion is also improper.

More recently, the court has indicated that summary judgment is a different animal. In Sanders v. Banks, for instance, the court affirmed a summary judgment for the defendants in a slip-and-fall case. The defendants, in support of their motion, produced evidence that none of their employees had seen a foreign substance on the floor the day of the accident. For her part, the plaintiff "could only speculate" as to the nature of the substance that allegedly caused her fall and "had no idea" how the substance came to be on the floor. "Viewing the evidence in the light most favorable to the [plaintiff]," the court said, "we cannot say there was any evidence whatever as to how the foreign matter came to be present or that [the defendants'] personnel had any knowledge of its presence." This statement suggests that the court would have reversed the summary judgment had the plaintiff been able to come up with "any evidence whatever" in support of her claim. Had the Sanders case involved a motion for directed verdict rather than one for summary judgment, the issue would have been whether there was substantial evidence; "any evidence" would clearly not have been sufficient.

The difference between the two motions is highlighted in Thomas

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93. Id. at 279, 499 S.W.2d at 864. See also Lee v. Doc, 274 Ark. 467, 471, 626 S.W.2d 353, 355 (1981); Akridge v. Park Bowling Ctr., Inc., 240 Ark. 538, 540, 401 S.W.2d 204, 205 (1966).

94. E.g., Swafford Ice Cream Co. v. Sealtest Foods Div., 252 Ark. 1183, 1193, 483 S.W.2d 202, 209 (1972); Beard v. Coggins, 249 Ark. 518, 522-23, 459 S.W.2d 791, 793 (1970); Spink v. Mourton, 235 Ark. 919, 922, 362 S.W.2d 665, 667 (1962); Woodmen of the World Life Ins. Soc'y v. Reese, 206 Ark. 530, 537, 176 S.W.2d 708, 712 (1943). As the court observed in Spink, a directed verdict for the party with the burden of persuasion is a "rarity." 235 Ark. at 922, 362 S.W.2d at 667.

95. 309 Ark. 375, 830 S.W.2d 861 (1992).

96. Id. at 379, 830 S.W.2d at 863. As a matter of substantive law, the plaintiff could also have prevailed by showing that the substance had been on the floor of the premises for such a length of time that the defendants knew or reasonably should have known of its presence and failed to use ordinary care to remove it. With respect to this issue, the court held that there was "no evidence that the substance which was allegedly on the floor had been there long enough that store personnel should have had notice of it." Id. at 380, 830 S.W.2d at 864.

97. See also Howard v. Hicks, 304 Ark. 112, 113, 800 S.W.2d 706, 707 (1990) (emphasizing that case "involves a directed verdict and not a summary judgment").
v. *Sessions*, a wrongful death case based on claims of medical malpractice. Suit was brought by the administrator of the decedent's estate against two physicians (Drs. Sessions and Bell) and a hospital, alleging that the doctors had misdiagnosed the decedent's heart attack as symptoms related to alcohol abuse and had declined to admit him to the hospital. The trial court entered summary judgment in favor of Dr. Bell and the hospital, and the jury subsequently returned a defendant's verdict for Dr. Sessions. On appeal, the supreme court affirmed with respect to the hospital but otherwise reversed and remanded.

For present purposes, our concern is the portion of the court's opinion dealing with the summary judgment entered on the claim against Dr. Bell, who had not been present at the hospital when the decedent arrived. Dr. Bell contended that his involvement had been limited to a single telephone conversation with Dr. Sessions, who examined the decedent at the emergency room but who had no authority to admit patients. During the phone call, Dr. Bell said, he agreed to admit the decedent for detoxification. Dr. Sessions and an emergency room nurse confirmed that Dr. Bell had authorized admission and stated that the decedent had refused and left the hospital against medical advice. On the basis of this evidence, the trial court granted Dr. Bell's motion for summary judgment.98

The supreme court reversed, pointing out that the trial court had improperly "presume[d] the credibility of interested parties and focus[ed] on the proof of the movant while disregarding opposing proof, exactly the reverse of how the proof should be weighed in deciding a motion for summary judgment."100 The court added:

Some courts apply the "scintilla of evidence" rule which requires a court considering summary judgment to admit the truthfulness of all evidence favorable to the nonmovant, thereby removing all issues of credibility from the case, and determine if there are any facts from which a jury could reasonably infer ultimate facts upon which a claim depends; if so, the case must be decided by the factfinder. *Schoen v. Gulledge*, 481 So.2d 1094 (S.Ct. Ala. 1985). Our own rule is similar: The object of summary judgment proceedings is not to try the issues, but to determine if there are any issues to be tried, and if there is any doubt whatsoever, the motion should be denied.101
It seems clear that summary judgment was improper in this case. As the court pointed out, the evidence that the decedent refused an offer of admission to the hospital came from interested witnesses. While the nonmoving party may not simply argue that the jury should be allowed to "consider the credibility of a witness whose testimony is uncontroverted," summary judgment is inappropriate if the nonmoving party can show some reason why the witness might be disbelieved at trial, as would be the case when he has a financial interest in the outcome of the case. Moreover, there was other evidence that cast doubt on the assertion that the decedent had been offered admission to the hospital. For example, hospital records were silent on the matter, though they mentioned that he had refused a transfer to a detoxification facility in Little Rock. In addition, the decedent’s neighbor, who had driven him to the hospital, testified that she was told by emergency room personnel to take him home because “there was nothing the hospital could do for him.”

While the court reached the correct result, its apparent approval of the scintilla rule is troubling. For support, the court relied on Schoen v. Gulledge, an Alabama case decided two years before that state abolished the scintilla rule in favor of the more widely accepted substantial evidence standard. Although Schoen does not actually use the term “scintilla,” it cites an earlier decision, Ryan v. Charles Townsend Ford, Inc., that clearly sets forth the former Alabama approach: “It is a long-established rule in this state that on motions for

103. See Cameron v. Frances Slocum Bank & Trust Co., 824 F.2d 570, 575 (7th Cir. 1987); Lundeen v. Cordner, 354 F.2d 401, 408 (8th Cir. 1966); Evans v. Fort Worth Star Telegram, 548 S.W.2d 819, 820 (Tex. Ct. App. 1977); Louis, supra note 25, 83 YALE L.J. at 749.
104. 307 Ark. at 208, 818 S.W.2d at 943. On deposition, a doctor testifying on the plaintiff's behalf described the emergency room records as “grossly incomplete” and opined that they “believe the contention that [the decedent] was offered admission . . . .” Id. at 209, 818 S.W.2d at 943. The supreme court held that the trial judge erred in excluding this testimony. Id. at 209-10, 818 S.W.2d at 943-44.
105. Id. at 208, 818 S.W.2d at 943.
106. 481 So. 2d 1094 (Ala. 1985).
summary judgment, the movant has the burden of negating the existence of any issue of material fact, and if there is a scintilla of evidence supporting the non-moving party, summary judgment is inappropriate." As one commentator observed, this rule "led to a reluctance to grant [summary judgment] in all but the most obvious cases."

A scintilla of evidence is not very much; as the Alabama Supreme Court observed in a 1976 case, it is "a mere gleam, glimmer, spark, the least bit, [or] the smallest trace" of evidence. In , the scintilla was in the form of testimony from the plaintiff, the nonmoving party. The issue was whether her action for fraud had been brought within one year of its discovery, as required by the statute of limitations. Not surprisingly, the plaintiff testified that she had discovered the fraud less than a year before the suit was filed, thus making the action timely. This testimony, the court said, was sufficient to avoid the defendant's motion for summary judgment. Similarly, the court held in that the plaintiffs' own testimony as to when they discovered the alleged fraud was adequate to create a genuine issue of material fact with respect to the statute of limitations question.

The Arkansas Supreme Court has soundly rejected the scintilla rule in the directed verdict context. As early as 1893, the court observed that "the scintilla doctrine has never prevailed in this State" and held that a directed verdict is proper if "the evidence is not legally sufficient to sustain a verdict." A few years later, the court referred to the "settled rule" that a directed verdict is justified when "it is plain that the plaintiff has not made out a case sufficient in law to entitle him to recover." Put another way, there must be "substantial evidence

109. Id. at 786 (citations omitted).
110. Coleman, supra note 107, at 9.
112. 409 So. 2d at 786-87.
113. 481 So. 2d at 1097 (citing Ryan). For a similar Arkansas case, see Hickson v. Saig, 309 Ark. 231, 828 S.W.2d 840 (1992).
114. Catlett v. Railway Co., 57 Ark. 461, 467-68, 21 S.W. 1062, 1063 (1893). See also Metropolitan Life Ins. Co. v. Gregory, 188 Ark. 516, 520, 67 S.W.2d 602, 604 (1934) ("[T]his court has not adopted the scintilla of evidence rule, but it has adopted the rule that, if there is any substantial evidence to support the verdict, it will be permitted to stand."); Henry Wrape Co. v. Cox, 122 Ark. 445, 450, 183 S.W. 955, 957 (1916) ("We have never adopted the scintilla rule in this State, but have uniformly held that there must be some evidence of a substantial character to uphold a verdict of the jury."); St. Louis, I.M. & S. Ry. Co. v. Fuqua, 114 Ark. 112, 120, 169 S.W. 786, 788 (1914) ("We have not adopted the rule that a scintilla of evidence is sufficient to support a verdict . . . .").
... about which fair-minded men might differ, and not a mere scintilla.”\footnote{116} On the other hand, “[i]f there is any substantial evidence it is the duty of the court to submit the matter to the jury.”\footnote{117}

The court has defined the term “substantial evidence” as follows:

“Any” evidence is not substantial evidence. ... “Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. ...

“Substantial evidence ... is of sufficient force and character that it will, with reasonable and material certainty and precision, compel a conclusion one way or the other. It must force or induce the mind to pass beyond a suspicion or conjecture ... [and furnish] a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences.\footnote{118}

\footnote{116} Missouri Pac. R.R. Co. v. Skipper, 174 Ark. 1083, 1103, 298 S.W. 849, 857 (1927), cert. denied, 276 U.S. 629 (1928). See also Baldwin v. Wingfield, 191 Ark. 129, 136, 85 S.W.2d 689, 692 (1935) (“When there is a total defect of evidence as to any essential fact, or a spark, a ‘scintilla,’ as it is termed, the case should be withdrawn from the consideration of the jury.”); Missouri Pac. R.R. Co. v. Remel, 185 Ark. 598, 607, 48 S.W.2d 548, 551, cert. denied, 287 U.S. 634 (1932) (“if there is substantial evidence, it is then a question for the jury,” and that a verdict will not be sustained “where there is only a scintilla of evidence”).


On occasion, of course, there is a "twilight zone where a scintilla of evidence meets substantial evidence, and where they sometimes blend," in which case "jurors and judges alike find a realm of uncertainty." Despite any such difficulties in line-drawing, the court has clearly held that a "mere scintilla" of evidence is not sufficient to withstand a motion for directed verdict. Yet in the _Thomas_ case, the court seemed to embrace the scintilla rule with respect to summary judgment. Consequently, it is possible that a plaintiff will survive a defense motion for summary judgment only to suffer a directed verdict at trial or judgment notwithstanding the verdict. Such a result makes little sense, particularly in light of the desirability of disposing of meritless claims prior to trial and wisely allocating judicial resources.

As noted previously, the _Anderson_ case makes clear that, in the federal courts, the test for evaluating a motion for summary judgment mirrors that for a directed verdict; as a result, the "mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." Some commentators, however, have criticized the Supreme Court for correlating the summary judgment standard with the standard for directed verdict, in part because a summary judgment motion is decided on a documentary record that may differ markedly from the trial evidence that serves as a backdrop for a directed verdict motion. It has also been argued that the Court's new view of summary judgment works to the advantage of defendants, transfers power from juries to judges, impedes settlement, and may actually exact a higher total cost.
to the judicial system than it saves that system and its participants. Nonetheless, the federal approach seems basically sound. As the authors of a leading treatise on civil procedure have observed:

Operatively, the notion of a "genuine issue of fact" refers to an issue that properly can be submitted to a jury. If the nonmoving party cannot show that the evidence is sufficient to be submitted to a jury, then there is no justification for a trial, and the purpose of summary judgment is satisfied.

Despite the unfortunate reference to the scintilla rule in Thomas, there is some indication in the case law that the Arkansas Supreme Court adheres to this view. However, the key decisions — which are discussed in the following sections — are neither cited nor discussed in the more recent Thomas case. Moreover, they also appear to have been undercut by another recent ruling.

B. The Standard of Proof

The Anderson case also holds that a trial court passing on a motion for summary judgment must take into account the applicable standard of proof at trial. As noted previously, an Arkansas case decided prior to Anderson indicates that this evidentiary "prism" is irrelevant at the summary judgment stage. The supreme court subsequently followed Anderson in a defamation case, holding that the heightened "convincing clarity" standard must be employed at the summary judgment stage. More recently, however, the court stated that a nonmoving party who has the burden of persuasion at trial need not establish his case by a preponderance of the evidence or by another standard of proof to defeat a motion for summary judgment.

In the defamation case, Drew v. KATV Television, Inc., a lawyer who served as chairman of a county hospital’s board of governors sued a Little Rock television station on the basis of news broadcasts that allegedly linked him to a drug investigation at the hospital and reported, erroneously, that he had been charged with a felony. The trial

122. See, e.g., Issacharoff & Loewenstein, supra note 17; Stempel. supra note 17.
123. FLEMING JAMES ET AL., CIVIL PROCEDURE § 4.16, at 219 (4th ed. 1992). The authors recognize that there is some difficulty with the notion of "comparing evidence submitted in documentary form prior to trial (as in summary judgment) with evidence submitted by live testimony (as at trial) . . . ." Id. There is considerable scholarly commentary supporting the Supreme Court's approach. See articles cited supra note 25.
124. 477 U.S. at 254-55.
125. 293 Ark. 555, 739 S.W.2d 680 (1987).
court granted the defendant’s motion for summary judgment, and the
supreme court affirmed. After concluding that the plaintiff was a public
official who must, as a matter of constitutional law, prove actual malice
in order to recover, the court held that there was insufficient evidence
of malice to withstand the defendant’s motion for summary judg-
ment. With respect to the latter issue, the court rejected the plain-
tiff’s argument that the actual malice question should have been sub-
mitted to the jury:

[I]n Anderson v. Liberty Lobby, Inc. the United States Supreme
Court held that on a motion for summary judgment, in a case involv-
ing the actual malice standard, the Court must determine whether the
evidence presented could support a reasonable jury finding that actual
malice was shown by clear and convincing evidence. Clearly, the evi-
dence in this case could not support such a finding, and the trial judge
was correct in granting summary judgment.

On its face, this passage seems to suggest that the court considered
itself bound by Anderson, just as it is bound by the long line of Su-
preme Court decisions that have constitutionalized the law of defama-
tion. It is clear, however, that Anderson is bottomed on Rule 56 of
the Federal Rules of Civil Procedure, not the First Amendment doc-
trine that governs libel cases; as a result, state courts are not com-
pelled to follow it. Accordingly, the Drew decision is best viewed as
adopting, as a matter of state law, the principle that a summary judg-
ment motion must be evaluated in light of the standard of proof —
whether it be preponderance of the evidence, clear and convincing evi-

126. Id. at 556-57, 739 S.W.2d at 681.
127. Id. at 557, 739 S.W.2d at 681-82 (citation omitted).
Arkansas Primer, 42 ARK. L. REV. 915, 942-74 (1989) (discussing constitutional doctrine and its
impact on state defamation law).
129. The Court expressly held in Anderson that “the determination of whether a given fac-
tual dispute requires submission to a jury must be guided by the substantive evidentiary standards
that apply to the case,” whether the motion is one for summary judgment or directed verdict. 477
U.S. at 255. The First Amendment simply determines when the more stringent “clear and con-
vincing evidence” standard applies; when it does, “the trial judge’s summary judgment inquiry as
to whether a genuine issue exists will be whether the evidence presented is such that a jury apply-
ing that evidentiary standard could reasonably find for either the plaintiff or the defendant.” Id.
As Justice Brennan observed in his dissenting opinion, the Court’s holding “is not, of course,
confined in its application to First Amendment cases” but “changes summary judgment procedure
for all litigants, regardless of the substantive nature of the underlying litigation.” Id. at 257-58,
n.1 (Brennan, J., dissenting).
dence, or some other standard — applicable at trial.\textsuperscript{130} This approach is consistent with that taken in Arkansas with respect to motions for directed verdict.\textsuperscript{131}

Unfortunately, however, the court’s subsequent decision in \textit{Baggett v. Bradley County Farmers Cooperative}\textsuperscript{132} suggests that \textit{Drew} is limited to defamation actions. In \textit{Baggett}, the owners of a hog-feeding operation brought suit after several of their hogs became ill after eating feed purchased from the defendants. Some of the hogs died, while others suffered stunted growth. The plaintiffs alleged that the hogs’ illness was caused by ingestion of cattle feed, which the defendants had negligently mixed with hog feed sold to the plaintiffs. While apparently admitting that they had mixed some dairy pellets for cattle in the hog feed, the defendants contended that these pellets were not the cause of the hogs’ problems. This argument formed the basis of the defendants’ motion for summary judgment, which was supported by a nutritionist’s affidavit that the tainted feed did not cause the illness and the deposition testimony of a veterinarian who stated that he could not be sure that ingesting the cattle feed caused the illness without knowing how much of it the hogs had eaten. Previously, however, the nutritionist had not been so definite, having stated in a letter to the plaintiffs that it was “highly unlikely” that the cattle feed caused the illness. Moreover, the veterinarian, who had treated the hogs, also testified that cattle feed could produce enough change inside the hogs’ intestines to cause the illness.\textsuperscript{133} The trial court entered summary judgment for the defendants, but the supreme court reversed.

First, the court held that summary judgment was improper because the trial judge had granted the motion before the day it was set for hearing. Citing its previous decision in \textit{Ragar v. Hooper},\textsuperscript{134} the court said that “a motion for summary judgment should not be granted before the day scheduled for a hearing unless it clearly appears that the

\textsuperscript{130} Generally, the familiar preponderance of the evidence test is employed. \textit{See Hess v. Treece}, 286 Ark. 434, 445, 693 S.W.2d 792, 798 (1985); \textit{McWilliams v. Neill}, 202 Ark. 1087, 1093, 155 S.W.2d 344, 347 (1941).

\textsuperscript{131} \textit{See First Nat’l Bank v. Leonard}, 289 Ark. 357, 360-61, 711 S.W.2d 798, 800 (1986) (noting applicable standard of proof in reviewing trial court’s refusal to grant defense motion for directed verdict). \textit{See also Wilson Safety Prods. v. Eschenbrenner}, 302 Ark. 228, 231, 788 S.W.2d 729, 732 (1990) (explaining that question on a directed verdict motion at close of plaintiff’s case is “whether the plaintiff has met the burden of establishing a prima facie case”).

\textsuperscript{132} 302 Ark. 401, 789 S.W.2d 733 (1990).

\textsuperscript{133} \textit{Id}. at 402-03, 789 S.W.2d at 734.

\textsuperscript{134} 298 Ark. 353, 767 S.W.2d 521 (1989).
nonmoving party could not produce proof contrary to the moving party’s proof.” Here, the court said it was “not clear that [the plaintiffs] could produce no further proof.”

Second, the court held that the evidence before the trial judge was sufficient to create a genuine issue of material fact with respect to causation. Although this holding was plainly not necessary to the court’s decision in light of its ruling on the timing issue, it cannot easily be dismissed as ill-considered dicta. On the sufficiency question, the court concluded that “[a] reasonable inference . . . can be drawn from the affidavits and depositions . . . that the hogs’ ingestion of the cattle feed could have triggered the illness by changing the environment in their intestines and activating the latent organisms which were already present.” Because “any doubts concerning a question of fact are to be resolved against the moving party,” the court held that summary judgment was error.

At this point of the opinion, the court turned to the burden of the nonmoving party:

It is enough for purposes of resisting the motion for summary judgment that [the plaintiffs] had put before the court sufficient evidence from which an inference of causation could be drawn. It was not necessary for appellants to establish their case by a preponderance of the evidence or by any other standard of proof. They were only required to establish that there was a genuine issue for trial.

135. 302 Ark. at 403, 789 S.W.2d at 734-35.
136. Id. at 404, 789 S.W.2d at 735.
137. Id. To the same effect is the supreme court’s recent decision in Dwiggins v. Propst Helicopters, Inc., 310 Ark. 62, 832 S.W.2d 840 (1992). There the plaintiff sued various defendants, alleging among other things that aerial spraying of a herbicide contaminated a pond used for irrigation of his tomato crop; that, as a result, he was forced to discontinue watering the crop; and that the plants subsequently died. The trial court granted summary judgment on this count of the complaint because there was “no proof of any chemicals involved in the spraying operation being in the pond water.” Id. at 65, 832 S.W.2d at 842.

The supreme court reversed. Summarizing the evidence, the court noted that subsequent tests on the pond water did not reveal the presence of herbicides and that three of the plaintiff's expert witnesses “testified by deposition that they were not able to state that the pond was contaminated by the spraying.” Id. Nonetheless, the court held that the plaintiff had enough evidence to defeat the motion for summary judgment:

[T]he plaintiff testified by deposition that vegetation to the edge of the pond was killed by the spraying. Gerald King, an employee of the State Plant Board, deposed that he saw hormone-type herbicide damage to brush growing in the edge of the pond, and Ron Beaty, the local County Agent, testified that common sense would indicate that if the chemicals were sprayed by a helicopter to the very edge of the pond, then some of the herbicides would have gotten into the water. Thus, there is some doubt about the factual issue, and it was error to decide it by summary judgment.
The court did not cite any authority for this proposition and did not mention the Drew case. Obviously, the two cases cannot be reconciled, unless Drew is distinguished as a defamation action in which a heightened standard of proof applies. As noted previously, however, this distinction is not valid in light of the Supreme Court's decision in Anderson, which Drew follows and cites with approval.

C. Celotex and the Movant's Initial Burden

In Collyard v. American Home Assurance Co., the Supreme Court held that a defendant who moves for summary judgment must offer proof on a controverted issue in order to shift to the plaintiff the burden of producing evidence establishing a genuine issue of material fact. This case made plain that a party moving for summary judgment cannot satisfy his initial burden by pointing out the absence of proof on an element of the nonmoving party's claim. However, in Short v. Little Rock Dodge, Inc., the court followed Celotex in approving this alternative method of satisfying the moving party's initial burden.

A comparison of the two cases is instructive. In Collyard, the defendant insurer was sued directly after the plaintiff slipped and fell at the Hot Springs YMCA, a charitable organization. Rather than supporting its motion for summary judgment with evidence that the YMCA was not negligent, the defendant cited excerpts from the plaintiff's deposition to the effect that she did not know how long the floor had been wet or how it had gotten that way. The trial court granted the motion, reasoning that the plaintiff had failed to produce evidence that the YMCA had negligently put the water on the floor or had acted negligently in allowing it to remain there. The supreme court reversed:

The [defendant] and trial judge mistakenly presumed that the burden was on [the plaintiff] to come forward with additional proof on this issue. The burden in a summary judgment proceeding is on the moving party; it cannot be shifted when there is no offer of proof on a

Id. at 65-66, 832 S.W.2d at 842.

On these facts, it seems unlikely that a reasonable jury could find by a preponderance of the evidence that the herbicides had contaminated the pond, particularly in light of the tests performed on the water and the testimony of the plaintiff's own experts. Although there may well be "some doubt about the factual issue," that is not the relevant inquiry under Anderson.

138. 271 Ark. 228, 607 S.W.2d 666 (1980).
140. 271 Ark. at 229, 607 S.W.2d at 667-68.
controverted issue.

Whether the YMCA was negligent remained a fact in issue. If [the defendant] had offered proof that the YMCA was not negligent, then [the plaintiff] would have had to produce a counter-affidavit or proof refuting the offer. But that was not the case. The [defendant] based its motion only on the deposition of . . . the plaintiff.141

Short arose from a one-vehicle automobile accident in which the driver, the only eyewitness, was killed. The decedent’s mother, acting on her own behalf and as administratrix of the estate, brought suit against Chrysler Corporation, the manufacturer of the automobile, and the dealer from whom the car had been purchased. She alleged strict liability for the manufacture and sale of a defective product, as well as negligence on the part of the dealer in failing to correct a stalling problem.142 The defendants moved for summary judgment. Like the insurance company in Collyard, they apparently did not offer proof to counter the plaintiff’s allegations, but instead suggested to the trial court that the summary judgment record did not contain evidence of causation.143 The trial court entered summary judgment on the ground that the plaintiff, in response to the defendants’ motion, “was unable to produce evidence that a defect in the car or [the dealer’s] negligence in failing to repair it caused the accident.”144

In affirming the judgment, the supreme court observed that the plaintiff had presented neither an “affidavit or other statement by any expert or other person to the effect that the stalling problem caused the accident” nor evidence “which would have negated other possible causes of the accident.”145 Under these circumstances, the court held, summary judgment was proper. Without discussing Collyard, the court said:

141. Id. at 230, 607 S.W.2d at 668.
142. 297 Ark. at 105, 759 S.W.2d at 553.
143. The court’s opinion is not crystal clear on this point; it states only that the trial judge “had before him depositions and responses to requests for admissions and interrogatories.” 297 Ark. at 105, 759 S.W.2d at 553. However, the court’s summary of those materials indicates that the defendants attempted to show that the plaintiff had no proof of causation and did not offer their own evidence tending to negate that element of the plaintiff’s claim. According to the court, the record revealed that the car had been prone to stalling, had stalled earlier on the day of the fatal accident, had been returned to the dealer for repair, and was a model that Chrysler had recalled for replacement of a carburetor part to remedy a stalling problem. This evidence came from the decedent’s father, people who had ridden in the car with her, and an experienced mechanic. Id. at 105-06, 759 S.W.2d at 553-54.
144. Id. at 105, 759 S.W.2d at 553.
145. Id. at 106, 759 S.W.2d at 553.
In *Celotex* the Supreme Court interpreted F.R.C.P. 56, which is identical to our rule in every material respect, as permitting a summary judgment when a plaintiff cannot offer proof of a material element of the claim. We agree with the Supreme Court’s rationale that when a party cannot present proof on an essential element of her claim there is no remaining genuine issue of material fact, and the party moving for summary judgment is entitled to judgment as a matter of law.\(^{146}\)

In light of *Short*, a defendant moving for summary judgment in an Arkansas court may satisfy his initial burden by producing evidence negating the plaintiff’s claim\(^{147}\) or by “pointing out” to the trial court that there is no evidence with respect to an essential element of that claim.\(^{148}\) The burden then shifts to the plaintiff to go beyond the pleadings and produce evidence with respect to the element in question. Under the court’s decision in *Drew*, this evidence must be sufficient, in light of the standard of proof applicable at trial, to convince a reasonable jury to find in the plaintiff’s favor. If, as in *Short*, the plaintiff cannot carry this burden, summary judgment is proper.

Taken together, *Short* and *Drew* offer strong support for the proposition that the Arkansas test for evaluating a motion for summary judgment mirrors that for a directed verdict. Indeed, the court cited a directed verdict case in *Short* while discussing the plaintiffs’ failure to produce evidence in response to the summary judgment motion.\(^{149}\) However, this view of the two cases is clearly undercut by subsequent decisions. As noted previously, *Thomas* was decided after both *Short* and *Drew* and does not cite either case. More importantly, the court’s statement in *Baggett* to the effect that the standard of proof is immate-

\(^{146}\) *Id.* at 106, 759 S.W.2d at 554 (citation omitted).

\(^{147}\) *See*, e.g., Irvin v. Jones, 310 Ark. 114, 118-19, 832 S.W.2d 827, 829 (1992); Sanders v. Banks, 309 Ark. 375, 377-78, 830 S.W.2d 861, 862 (1992). As the court observed in Akridge v. Park Bowling Ctr., Inc., 240 Ark. 538, 401 S.W.2d 204 (1966):

> [T]here are undoubtedly instances in which the defendant's motion should be granted simply because the accompanying proof shows conclusively that some fact essential to the plaintiff's causes of action is wanting. A commonplace example is the situation in which the only fault chargeable to the defendant is the negligence of its asserted agent. If the defendant proves beyond question that no agency existed, and the plaintiff is unable to offer substantial evidence to the contrary, a summary judgment is proper.

*Id.* at 540, 401 S.W.2d at 205.


\(^{149}\) 297 Ark. at 106, 759 S.W.2d at 554 (citing *Higgins v. General Motors Corp.*, 287 Ark. 390, 699 S.W.2d 741 (1985)). *See also* Sanders v. Banks, 309 Ark. 375, 379, 830 S.W.2d 861, 863 (1992) (citing directed verdict decision in holding that summary judgment was appropriate in slip and fall case).
rial in the summary judgment context indicates that *Drew* is limited to defamation cases or, more generally, to cases in which a heightened standard of proof applies. Unfortunately, the *Baggett* opinion does not mention *Drew*, and it cites *Short* only for a proposition that goes to proof in tort actions, not basic summary judgment principles.\(^\text{150}\)

**IV. Conclusion**

Despite some encouraging developments, summary judgment in Arkansas remains an extreme remedy rather than a useful tool for disposing of cases without trial. While the *Short* opinion relies on *Celotex* and points out that Rule 56 of the Arkansas Rules of Civil Procedure is "identical . . . in every material respect" to the corresponding federal rule,\(^\text{151}\) the supreme court has not adopted the federal attitude toward summary judgment so clearly reflected in *Celotex, Anderson, and Matsushita*. To be sure, the federal courts do not have a monopoly on wisdom with respect to procedural matters. In this instance, however, the federal approach is sound, and there is a great deal to be said for uniformity in the interpretation of a state summary judgment rule that tracks its federal counterpart.\(^\text{152}\) From time to time, the Arkansas Supreme Court has looked to federal decisions in construing Rule 56 of the Arkansas Rules of Civil Procedure.\(^\text{168}\) It should now take the next

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\(^\text{150}\). In *Baggett*, the trial court ruled that the plaintiffs, in order to avoid summary judgment, were required to offer proof that would have negated all other possible causes of the hogs' illness. Citing *Short*, the supreme court held that this ruling was error because "[t]hat standard applies to product liability cases, . . . not to simple negligence cases." 302 Ark. at 404, 789 S.W.2d at 735. While the court's reference to *Short* and its use of the term "standard" may be somewhat confusing, this statement means simply that, as a matter of substantive tort law, a plaintiff claiming negligence is not required to negate all other causes of his injury. The trial court in *Baggett* apparently misread *Short*, which states only that a plaintiff alleging strict liability on the basis of product defect may seek to prove causation either by direct proof or by circumstantial evidence that negates other causes. 297 Ark. at 106, 759 S.W.2d at 553-54. A more detailed discussion of this point appears in *Higgins v. General Motors Corp.*, 287 Ark. 390, 392-93, 699 S.W.2d 741, 743 (1985), a case cited in *Short*.

\(^\text{151}\). 297 Ark. at 106, 759 S.W.2d at 554.

\(^\text{152}\). As the Mississippi Supreme Court has observed with respect to summary judgment, "[a] disparity in interpretation [of identical state and federal rules] would inevitably lead to forum shopping, which has been a perceived evil for at least half a century." *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 364 n.1 (Miss. 1983). A recent survey offers some support for this conclusion. *See Neal Miller, An Empirical Study of Forum Choices in Removal Cases under Diversity and Federal Question Jurisdiction, 41 AM. U. L. REV. 369, 418-19 (1992)* (stating that defense lawyers who removed cases to federal court reported that availability of summary judgment was an "important factor" in forum selection in nearly half of the cases).

step and recognize, consistent with *Celotex*, that summary judgment is not a "disavored procedural shortcut."

36, 663 S.W.2d 742, 744 (1984); Turner v. Baptist Medical Ctr., 275 Ark. 424, 427, 631 S.W.2d 275, 277-78 (1982).