

RESPONDING TO SUMMARY JUDGMENT



BRADLEY SCOTT SHANNON*

I. INTRODUCTION

Professor Adam N. Steinman's recent article, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*,¹ makes a substantial contribution to an important area of the law: the law of summary judgment.² More specifically, Steinman offers a provocative interpretation of what is arguably the most significant summary judgment decision to date, *Celotex Corp. v. Catrett*.³

According to Steinman, *Celotex* has been misinterpreted, resulting in the imposition of a strict standard with respect to the admissibility of factual materials presented by parties (particularly plaintiffs) responding to motions for summary judgment.⁴ Steinman argues that *Celotex* is best interpreted as imposing only a minimal standard with respect to the admissibility of such materials; in his view, the opposing (or adverse) party's materials need only be "reducible" to admissible evidence.⁵ In this Essay, though, I will argue that both positions are incorrect, at least in a sense. I will argue first that, as a matter of precedent, *Celotex* has nothing to say about an adverse party's burden in response to a motion for summary judgment. Thus, any reliance placed on that decision in support of anyone's position on this issue is misplaced. Second, I will argue that, regardless of the relevance (or irrelevance) of *Celotex*, Steinman's position regarding an adverse party's burden in this context cannot be correct. Rather, I will argue that Federal Rule of Civil

* Associate Professor of Law, Florida Coastal School of Law. B.A., J.D., University of Washington. I thank the Florida Coastal School of Law faculty for their many suggestions regarding this Essay.

1. Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81 (2006).

2. Indeed, Steinman himself demonstrates the importance of this subject through his observation that the three most cited decisions in the federal courts, and the two most cited decisions in all United States courts, are Supreme Court summary judgment decisions. *See id.* at 86–88, 142–45.

3. 477 U.S. 317 (1986).

4. Steinman, *supra* note 1, at 110.

5. *Id.* at 131.

Procedure 56,⁶ the rule that governs summary judgment in the federal district courts, is best interpreted as imposing a strict standard with respect to the admissibility of materials presented by parties at summary judgment, a standard that approximates a party's evidentiary burden at trial. Though my interpretation might place an insuperable burden on some—meaning summary judgment motions might well be granted more often than under Steinman's interpretation—no other interpretation seems practicable.

The next part of this Essay consists of a brief discussion of the *Celotex* decision. I will then discuss Steinman's methodology for interpreting judicial decisions, and, like Steinman, apply that methodology to *Celotex*. But unlike Steinman (and apparently many others⁷), I will conclude that *Celotex* is essentially irrelevant insofar as ascertaining the nature of the adverse party's burden at summary judgment. I will then discuss what I believe is, or should be, the adverse party's burden in this context, irrespective of *Celotex*, and will conclude that Rule 56 is best interpreted as imposing a fairly strict evidentiary standard with respect to materials presented in response to a motion for summary judgment. I will also conclude, contrary to Steinman, that the nature of those materials generally is limited to those items described in Rule 56, and that there is very little relationship between an adverse party's obligations in response to a motion for summary judgment and in response to a request for discovery.⁸

II. THE *CELOTEX* DECISION

Celotex involved an action commenced by Mary Catrett on behalf of her deceased husband who allegedly died as a result of exposure to

6. For the reader's reference, former Federal Rule of Civil Procedure 56 is reproduced in Appendix A. Though the Federal Rules of Civil Procedure recently were "restyled" for ease of readability, no change in meaning was intended. See Memorandum from Joseph Kimble, Style Consultant, Advisory Comm. on Civil Rules (Feb. 21, 2005) (on file with author), available at http://www.uscourts.gov/rules/Prelim_draft_proposed_pt1.pdf. Whether this is true with respect to Rule 56 is debatable. See Bradley Scott Shannon, *Should Summary Judgment Be Granted?* (forthcoming). But even if the meaning of this rule has been changed, those changes do not affect the analysis here, and the same is true of the other rules cited herein. Thus, for ease of comparison with prior authorities, as well as with the many state procedural rules that have been patterned after the federal rules, this Essay continues to use the former language. Hereinafter, references to the Federal Rules of Civil Procedure in the main text will simply be referred to as "the Rules."

7. See Steinman, *supra* note 1, at 107–21 (discussing various interpretations of *Celotex*).

8. A summary of my conclusions in this area, juxtaposed to those of Steinman, can be found in Appendix B.

products containing asbestos manufactured or distributed by the fifteen named corporate defendants.⁹ One of those defendants, Celotex Corp., moved for summary judgment on the ground that Catrett, in response to a discovery request directed to this issue, failed to identify any witnesses who could testify as to her husband's exposure to Celotex's products.¹⁰ In response to Celotex's motion, Catrett "produced" three documents: a transcript of a deposition of the decedent from an earlier worker's compensation proceeding; a letter from T.R. Hoff, a former supervisor of the decedent, describing the products to which the decedent had been exposed; and a letter from an insurer of a different defendant describing the same.¹¹ Catrett also then indicated her intent to call Hoff as a witness at trial.¹² In reply, Celotex "argued that the three documents [produced by Catrett] were inadmissible hearsay and thus [should] not be considered in opposition to [its] motion."¹³

The district court granted Celotex's motion for summary judgment,¹⁴ but a divided panel of the court of appeals reversed.¹⁵ A majority of the court of appeals, over a strong dissent by Judge Robert Bork, held that Celotex's motion was rendered defective by the fact that it had "made no effort to adduce *any* evidence, in the form of affidavits or otherwise, to support its motion."¹⁶ As a result, the court of appeals "declined to consider [Celotex's] argument that none of the evidence produced by [Catrett] in opposition to the motion for summary judgment would have been admissible at trial."¹⁷

The Supreme Court reversed the judgment of the court of appeals.¹⁸ Rejecting the reasoning of the court of appeals, the Supreme Court held:

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a

9. *Celotex*, 477 U.S. at 319.

10. *Id.* at 319–20.

11. *Id.* at 320; *id.* at 335 (Brennan, J., dissenting).

12. *Id.* at 336 (Brennan, J., dissenting).

13. *Id.* at 320 (opinion of the Court).

14. *Id.*

15. *Id.* at 321.

16. *Id.* (quoting *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184 (D.C. Cir. 1985)).

17. *Id.* at 322.

18. *Id.* at 319.

showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.¹⁹

More specifically, the Court held that there is "no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim."²⁰ Thus:

In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."²¹

With respect to the nature of the adverse party's response to a properly "made and supported" motion for summary judgment, the Court continued:

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. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.²²

19. *Id.* at 322.

20. *Id.* at 323.

21. *Id.* at 324 (quoting FED. R. CIV. P. 56).

22. *Id.*

But the Court then reiterated that the court of appeals “declined to address either the adequacy of the showing made by [Catrett] in opposition to [Celotex’s] motion for summary judgment, or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry [Catrett’s] burden of proof at trial.”²³ The Court therefore remanded, having concluded that the court of appeals “with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.”²⁴

III. CELOTEX AND SUMMARY JUDGMENT BURDENS

What conclusions may we draw from *Celotex* regarding the parties’ respective burdens at summary judgment? To reach his interpretation of *Celotex*, Steinman first articulates a methodology for interpreting judicial decisions generally. Steinman posits that when seeking to understand a decision, we should consider those “values that are traditionally employed when interpreting a case: (1) consistency with prior Supreme Court cases; (2) consistency with the governing textual sources; and (3) coherence with other parts of the opinion and relevancy given the case’s factual and procedural posture.”²⁵ According to Steinman, “[t]hese simple values are consistent with basic principles of interpretation” and therefore “should not be controversial.”²⁶

I agree that consistency with prior cases, consistency with governing textual sources, and internal coherence are important interpretive values. Nonetheless, there are aspects of Steinman’s interpretive values with which I respectfully disagree. For one thing, I disagree with their order.²⁷ In fact, I would like to *reverse* the order. (Actually, if it was up to me, I would make the second value, “consistency with the governing textual sources,” the first value, for I cannot see how the Court, in the

23. *Id.* at 327.

24. *Id.* Incidentally, on remand, the court of appeals—again over a strong dissent by Judge Bork—held that the materials submitted by Catrett showed a genuine issue of material fact concerning the plaintiff’s exposure to Celotex’s products. See *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987). The court of appeals reached its decision largely on the ground that “Celotex never objected to the District Court’s consideration of the Hoff letter.” *Id.* (emphasis omitted).

25. Steinman, *supra* note 1, at 122.

26. *Id.* at 107; see also *id.* at 107–09 (describing the bases for these values).

27. It might be more accurate to say that I disagree with the order in which they are presented, for, to be fair, I cannot find any express indication that they have been presented in any particular order. Of course, if they have not been presented in any particular order, that also might be a basis for criticism, unless one believes that each of these values should be given equal weight.

course of one of its decisions, can change the meaning of a Federal Rule of Civil Procedure.²⁸ I understand, though, that once the Court interprets a governing textual source, it is that interpretation that controls, regardless of how difficult it might be for others to square that interpretation with the text so interpreted.²⁹) Certainly, a case's "internal coherence with other parts of the majority opinion and with the case's factual and procedural posture"³⁰ (the third value) is a more important interpretive value than is consistency with prior cases (the first value), for the Court may overrule itself,³¹ and need not even say that it is doing so.³²

Be that as it may, Steinman then proceeds to apply these interpretive values to *Celotex* in an attempt to dispel a number of "myths"³³ associated with that decision, and in doing so, he reaches several conclusions purportedly deriving from that decision. For example, Steinman disputes the notion (advanced by some) that a defending party seeking summary judgment bears "essentially no burden at all."³⁴

28. See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."); cf. *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment) (concluding that because "the Constitution does not change from year to year[,] . . . it does not conform to our decisions, but our decisions are supposed to conform to it").

29. See, e.g., Allan Ides, *Judicial Supremacy and the Law of the Constitution*, 47 UCLA L. REV. 491, 500 (1999) ("[T]he judiciary possesses a recognized authority to interpret laws, and the product of those interpretations is law . . . even if the interpretation is somehow deemed incorrect . . ."). But see Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994) (arguing that, at least in constitutional cases, the practice of following precedent is unconstitutional, at least where the decision in question is inconsistent with the constitutional text being interpreted).

30. Steinman, *supra* note 1, at 107.

31. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("[T]he Court has during the past 20 Terms overruled in whole or in part 33 of its previous constitutional decisions.").

32. See, e.g., *Hudgens v. NLRB*, 424 U.S. 507, 518 (1976) (recognizing the implicit overruling of *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), by *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972)); see also *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."). (emphasis added).

33. As my colleague, Professor Gerald Moran, astutely observed, the use of the term "myth" here is intended to indicate that the interpretation in question is not based on the written decision to which the interpretation is attributed, and thus that the interpretation is in the nature of a myth. The reading of the decision itself, of course, is a fact, but the argument is that the abstraction, the interpretation, is wholly unrelated thereto. In this sense, the interpretation may be said to be a myth, or the source of a myth.

34. Steinman, *supra* note 1, at 109.

Rather—and surely he is quite correct on this point—Steinman concludes that a party (including a defending party) bears a considerable burden in establishing that its motion for summary judgment truly has been “made and supported”³⁵ as provided in Rule 56(c).³⁶

Yet, it is the application of these same interpretive values that leads to a more serious disagreement I have with Professor Steinman’s article: his argument regarding the nature of the adverse party’s burden in response to a motion for summary judgment, particularly as it relates to the plaintiff’s response in *Celotex*. Steinman argues that the misinterpretation of the last portion of the Court’s opinion in *Celotex*—that dealing with the nature of the adverse party’s response—has led, in part, to what he calls the “paper trial myth.”³⁷ According to this “myth,” the adverse party’s evidence “must meet a strict standard with respect to admissibility—one that mirrors the rules for admissibility at trial.”³⁸

Steinman argues that this aspect of the paper trial myth “fails to provide a sensible account of what the *Celotex* majority meant when it said that a plaintiff does not have to use materials that are ‘in a form that would be admissible at trial.’”³⁹ Instead, Steinman argues that the

35. FED. R. CIV. P. 56(e).

36. See Steinman, *supra* note 1, at 122–26.

37. *Id.* at 109–13. I say “in part” because there is another aspect of this myth: that dealing with the nature of the *moving* party’s burden. See *supra* notes 34–36 and accompanying text (describing that aspect of the “paper trial myth”). But as indicated previously, I agree with Steinman that “[a] defendant who seeks summary judgment on the basis that the plaintiff will lack sufficient evidence to prove her case at trial must be able to point to some Rule 56(c) document that would be expected to contain an identification or description of evidence that the plaintiff could use at trial, but does not.” See Steinman, *supra* note 1, at 131–32.

38. Steinman, *supra* note 1, at 110. As Steinman explains it:

It is not enough for the plaintiff to identify witnesses she plans to call at trial, even if the plaintiff indicates how she expects those witnesses to testify. Likewise, it is not enough to present information via deposition transcripts, interrogatory responses, or affidavits when the witness, signatory, or affiant would not be competent to testify to such information at trial. The plaintiff must provide . . . “trial-quality” evidence—sworn statements, via affidavits, depositions, or interrogatory answers, by a swearer with personal knowledge of the facts stated.

Id. at 110–11 (citations omitted).

39. *Id.* at 112 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). According to Steinman:

The standard account that proponents of this view give is that the majority was simply recognizing that affidavits may be considered for purposes of

term “depose” “frequently refers not only to the taking of a deposition as provided for in the federal rules, but also to the swearing of an affidavit.”⁴⁰ Thus, according to Steinman, the *Celotex* Court’s statement that “Rule 56 does not require the nonmoving party to depose her own witnesses”⁴¹ “may plausibly be read as rejecting the notion that a plaintiff must obtain affidavits of her witnesses in order to avoid summary judgment.”⁴² “Moreover,” Steinman continues, “the view that the majority intended only to carve out an [admissibility] exception for affidavits cannot be reconciled with the factual posture of *Celotex* itself.”⁴³

In his attempt to formulate a more coherent interpretation of *Celotex*, Steinman then asks two questions with respect to an adverse party’s response to summary judgment: (1) under what circumstances may a court consider materials other than those described in Rule 56(c)? and (2) to what extent may a court consider materials that are not in a form that would be admissible at trial?⁴⁴

Regarding the first question, Steinman suggests that “[o]ne potential answer is that some materials are the substantial equivalent of the documents enumerated in Rule 56(c),” in that “the federal rules deem information to be equivalent to a supplemental answer to an interrogatory if it is provided in a seasonable manner and with

summary judgment, even though affidavits (which by definition have not been cross-examined) are not admissible at trial. They note that the very next sentence in the opinion states that “Rule 56 does not require the nonmoving party to depose her own witnesses,” and they infer that Rule 56 *does* require the nonmoving party to obtain affidavits of her witnesses.

Id. at 112 (citations omitted) (quoting *Celotex*, 477 U.S. at 324).

40. *Id.*

41. *Celotex*, 477 U.S. at 324.

42. Steinman, *supra* note 1, at 112–13.

43. *Id.* at 113. As Steinman explains:

Catrett had not relied on affidavits in opposing *Celotex*’s motion. Rather, she presented copies of two letters (from the insurer and the assistant secretary of Mr. Catrett’s employer) and the decedent’s own deposition testimony from an earlier proceeding to which *Celotex* was not a party. If affidavits are the only materials that courts may consider on summary judgment despite being inadmissible at trial, the majority would have had no need to remand the case. There certainly would have been no need to remand the case out of deference to the D.C. Circuit’s “superior knowledge of local law.”

Id. (citations omitted) (quoting *Celotex*, 477 U.S. at 327).

44. *See id.* at 127–31.

substantial justification for the party's failure to provide the information in its initial answer."⁴⁵ "When material containing such information satisfies the federal rules in this way," Steinman continues, "it is reasonable to treat that information as tantamount to 'answers to interrogatories' for purposes of Rule 56(c) and, therefore, to consider that information for purposes of a summary judgment motion."⁴⁶

The second question relates to the suggestion in *Celotex* that a court may consider materials in response to a motion for summary judgment even though they are not "in a form that would be admissible at trial."⁴⁷ Steinman begins by arguing that although Rule 56 sets forth a strict standard with respect to affidavits,⁴⁸ "Rule 56 imposes no general standard of admissibility," in that it "does not impose this requirement on the other categories of documents listed in Rule 56(c)."⁴⁹ Steinman further observes that if the information provided by Catrett in response to Celotex's motion instead had been provided in response to Celotex's original discovery request, Celotex (utilizing an "absence of evidence" theory of summary judgment) would not have been able to satisfy its initial burden under Rule 56(c).⁵⁰ Steinman then asks "whether the result should be different simply because the plaintiff identified the witness in a supplemental interrogatory answer."⁵¹ Steinman says no, for "[i]n both situations, the information before the court is exactly the same."⁵² But Steinman quickly adds: "Obviously, the plaintiff's response

45. *Id.* at 127–28.

46. *Id.* at 128. Steinman then argues:

This reading of Rule 56(c) makes sense in light of the facts facing the Court in *Celotex*. Among the materials Catrett presented in opposition to Celotex's summary judgment motion were letters from Mr. Catrett's employer's insurer and assistant secretary. These documents contained information relating to the asbestos products Catrett's husband might have handled while on the job. Thus they contained information that could be deemed supplemental answers to Celotex's interrogatories, which had asked Catrett to describe and identify evidence and witnesses relating Mr. Catrett's exposure to any Celotex product.

Id. (citations omitted).

47. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

48. *See* FED. R. CIV. P. 56(e) (providing that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein").

49. Steinman, *supra* note 1, at 128.

50. *Id.* at 131.

51. *Id.*

52. *Id.* Thus, according to Steinman:

is sufficient only if her materials are ‘reducible to admissible evidence.’ So materials that do not indicate that there will be evidentiary support usable at trial would not suffice since they would not indicate a genuine issue for trial.”⁵³

This is all a very interesting take on *Celotex*. But again, I disagree.

For one thing, to the extent Steinman is arguing that his view regarding the nature of the adverse party’s response is dictated by *Celotex*, he seems to be disregarding his third interpretive value: relevancy given the case’s procedural posture.⁵⁴ For as Steinman himself recognized, the issue before the *Celotex* Court was confined strictly to the sufficiency of the *defendant’s* motion.⁵⁵ As for the *plaintiff’s* (i.e., the *adverse party’s*) burden, Steinman concedes that “the majority did not decide whether Catrett had made a ‘sufficient showing’ in response to *Celotex’s* summary judgment motion.”⁵⁶

It is true, as indicated previously, that the Supreme Court

To conclude that summary judgment should be granted in the first instance but not in the second would create not only an intuitive inconsistency but also a textual anomaly. We would be requiring courts to conclude that the same materials are enough to create a “genuine issue” in one situation but not in another. If Rule 56(c)’s standard is to have an ascertainable meaning, it should at least yield consistent results when applied to identical records.

Id.

53. *Id.* (citation omitted). Steinman offers the following hypothetical:

Suppose, for example, that Catrett had produced only Mr. Catrett’s deposition from his workers’ compensation proceeding. The transcript would not be admissible at trial because *Celotex* was not a party to the earlier proceeding, and it could not be “reduced to admissible evidence” because Mr. Catrett was deceased by that point in time. This hypothetical showing would be insufficient not because such a deposition is “inadmissible” for purposes of summary judgment, but because it fails to show a “genuine issue” as to the material fact of exposure.

Id. (citation omitted).

54. See *supra* note 25 and accompanying text (discussing Steinman’s three “values” for interpreting judicial decisions).

55. See Steinman, *supra* note 1, at 98 (“As for the specific issues presented in *Celotex*, the majority rejected the D.C. Circuit’s premise that *Celotex* had to present affirmative evidence that Mr. Catrett had not been exposed to its asbestos products.”).

56. *Id.* at 106–07. As Steinman explains: “The D.C. Circuit did not address that issue in its initial opinion because it concluded that *Celotex* had not met its initial burden. Thus, the Supreme Court remanded the case for the D.C. Circuit to determine whether Catrett had made a sufficient showing of exposure to *Celotex’s* products.” *Id.* at 107 (citations omitted); see also *id.* at 100 (“[O]ne cannot infer whether Catrett’s showing was, in the Supreme Court’s view, sufficient to avoid summary judgment.”).

nonetheless spoke briefly as to the nature of the adverse party's response.⁵⁷ Why did the Court do so? One cannot say for sure, though certainly the Court was aware that this issue would arise on remand.⁵⁸ Regardless, there is no doubt that anything the Court might have said with respect to the *adverse* party's burden was dicta, for it had nothing to do with the Court's judgment.⁵⁹ As such, it is not binding upon the parties in that case or anyone else, however persuasive or influential it might appear.⁶⁰ Such dicta, then, cannot provide substantial support for anyone's view as to the nature of the adverse party's response to a motion for summary judgment. Supreme Court decisions are not like papal bulls; not everything the Court says matters.

For similar reasons, one cannot reasonably conclude, based on *Celotex*, that a party responding to a motion for summary judgment properly may submit materials, other than affidavits, that would not be admissible at trial. Again, Steinman argues that if summary judgment materials were so limited, there would have been no need to remand the case.⁶¹ One difficulty with this argument, though, is that the Court routinely refuses to decide issues that were not decided below.⁶² And in *Celotex*, the Court expressly recognized that the court of appeals "declined to address either the adequacy of the showing made by [the plaintiff] in opposition to [the defendant's] motion for summary judgment, or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry [the plaintiff's] burden of proof at trial."⁶³ Moreover, if the Supreme Court *had* decided these issues, there would have been nothing for the court of appeals to do on remand but further remand the case to the district court. Yet, the court of appeals in fact discussed these issues at length, and ultimately decided them primarily on a basis not even mentioned by the Supreme Court.⁶⁴

57. See *supra* note 22 and accompanying text.

58. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

59. Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005) ("A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta.").

60. See *id.* at 957.

61. Steinman, *supra* note 1, at 113.

62. See, e.g., *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

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

64. *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987) (holding inadmissible materials, such as the Hoff letter, may be considered in response to *Celotex*'s motion in the absence of a timely objection thereto). This rather mundane basis for the court of appeals' decision on remand also might explain (at least in part) why the Supreme Court

So one is forced to conclude that *Celotex* really has nothing definitive to say about an adverse party's response to a motion for summary judgment.

IV. THE NATURE OF THE ADVERSE PARTY'S RESPONSE TO SUMMARY JUDGMENT

The fact that *Celotex* has nothing to say about the nature of the adverse party's response to a motion for summary judgment does not mean that everything Steinman writes on this subject is for naught. Certainly, he is entitled to express his views as a prescriptive matter, at least to the extent those views are consistent with Rule 56. The question, now, though, becomes somewhat more normative: What *should* be required of an adverse party in response to a motion for summary judgment?

Again, using the materials presented by Catrett in response to *Celotex*'s motion as an example, Steinman argues that factual materials presented in response to a motion for summary judgment need not be limited to those items listed in Rule 56(c), and indeed need not even be considered as a response *per se*, but rather may be considered an amended response to a prior request for discovery.⁶⁵ Steinman further argues that, as with discovery responses generally,⁶⁶ such materials need not be in a form that is admissible at trial, at least so long as they are "reducible" to admissible evidence.⁶⁷

Here also, I must disagree. Regarding the *type* of materials that may be considered in response to a motion for summary judgment, Rule 56(e) specifies "affidavits or as otherwise provided in this rule"—meaning "pleadings, depositions, answers to interrogatories, and admissions."⁶⁸ No other materials are prescribed.⁶⁹ Given the clarity of this language, one should be chary in presuming that any *other* materials

denied *Celotex*'s second petition for writ of certiorari. See *Celotex Corp. v. Catrett*, 484 U.S. 1066 (1988).

65. Steinman, *supra* note 1, at 127–28. Though Steinman uses the term "supplemental," rather than "amended," see, e.g., *id.* at 127, the former now appears to be limited to corrections to required disclosures made pursuant to Rule 26(a), whereas the latter is used with respect to corrections to other discovery responses. See FED. R. CIV. P. 26(e), 37(c)(1).

66. See FED. R. CIV. P. 26(b)(1) ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

67. See Steinman, *supra* note 1, at 131.

68. FED. R. CIV. P. 56(c).

69. *But see* 28 U.S.C. § 1746 (2000) (providing generally for the use of declarations in lieu of affidavits in federal proceedings).

may be presented.

This is not to say, of course, that documents other than those described in Rule 56 (such as letters) may not be presented at summary judgment; they may, though typically only through an affidavit, just as exhibits at trial typically are admitted through witnesses.⁷⁰ Indeed, Rule 56(e) expressly provides that “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit *shall* be attached thereto or served therewith.”⁷¹ Though some (like Catrett) might try to avoid this rule by failing to refer to such papers in their affidavits (or by failing to present affidavits at all), it seems unlikely that this requirement may be circumvented in this fashion; the negative implication here is simply too strong.⁷² And if this reading of Rule 56 is correct, what need is there for exceptions? Virtually anything a party might want to present already has been included.

Steinman rests his argument that a court properly could consider bald, unauthenticated documents at summary judgment in part on the *Celotex* Court’s statement that “Rule 56 does not require the nonmoving

70. As one leading treatise explains:

Documentary and other substantive evidence—whether obtained in disclosure and discovery or outside those processes—may be presented to support or oppose a summary judgment motion when the evidence is properly authenticated and constitutes admissible evidence. Unauthenticated documents, once challenged, cannot be considered by a court in determining a summary judgment motion. In order to authenticate materials not yet part of the court record so that they may be considered on summary judgment, the party generally must meet a two-prong test: (1) the materials must be attached to and authenticated by an affidavit or declaration that complies with Rule 56(e)(1); and (2) the affiant or declarant must be a competent witness through whom the materials could be received into evidence at trial.

11 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 56.14[2][c], at 56–218 (3d ed. 2007) (citations omitted); *accord id.* § 56.10[4][c][i][3], at 56–70 (“Unless [an] extra-record document is self-authenticating and intrinsically trustworthy on its face (a rare situation), this type of document must be introduced by affidavit to ensure its consideration by the court.”); 10A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2722, at 382–84 (3d ed. 1998) (“To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.”) (footnotes omitted); *id.* at 379 (“Exhibits that have been properly made a part of an affidavit also may be considered.”).

71. FED. R. CIV. P. 56(e) (emphasis added).

72. It also might be observed that although documents may be attached to pleadings, *see* FED. R. CIV. P. 10(c), reliance by the adverse party upon its pleading alone is insufficient. *See* FED. R. CIV. P. 56(e).

party to depose her own witnesses.”⁷³ According to Steinman, this statement “may plausibly be read as rejecting the notion that a plaintiff must obtain affidavits of her witnesses in order to avoid summary judgment.”⁷⁴ But this interpretation does not strike me as plausible (or at least it seems far less plausible than the “standard account” that generally requires evidence to be proffered through a testifying witness).⁷⁵ For when the Court used the word “depose,” it surely meant “[t]o examine a witness in a deposition.”⁷⁶ Coupled with more general concerns about admissibility,⁷⁷ any other meaning seems quite implausible. At a minimum, any other meaning of this word would have to be regarded as unintentional. Conversely, if Steinman is correct—i.e., if the Court indeed intended that “depose” include affidavits—then this language must be regarded as ill-considered, if for no other reason than that it seems to be contrary to the text of Rule 56.⁷⁸

But even if materials other than those described in Rule 56 properly may be considered, a more serious problem arises with respect to Steinman’s argument that the materials presented by a responding party might be regarded as an amended or supplemental discovery response or disclosure. The problem is that once a motion for summary judgment is properly made, responses to *discovery requests* become largely irrelevant. (I say largely because, as Steinman points out,⁷⁹ the adverse party *also* might well have to explain why those materials were not disclosed previously.⁸⁰) Rather, what the adverse party must now do is

73. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

74. Steinman, *supra* note 1, at 112–13.

75. See *supra* note 39 and accompanying text; see also FED. R. CIV. P. 56(f) (requiring an adverse party needing additional time to respond to a motion for summary judgment to state, by affidavit, the reasons it cannot “present by *affidavit* facts essential to justify the party’s opposition”) (emphasis added).

76. BLACK’S LAW DICTIONARY 471 (8th ed. 2004) (parentheses omitted).

77. See *infra* notes 89–96 and accompanying text (discussing the evidentiary standard to be applied at summary judgment to a party’s factual materials).

78. This is but one reason why dictum is not considered binding. See Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL’Y 811, 849 (2003).

Incidentally, a similar explanation may be given with respect to the Court’s statement that “it is from this list”—i.e., “the kinds of evidentiary materials listed in Rule 56(c)” —“that one would normally expect the nonmoving party to make the showing to which we have referred.” *Celotex*, 477 U.S. at 324. Though some (like Steinman) might be tempted to cite this statement in support of the proposition that non-Rule 56(c) materials properly may be considered in this context, it seems more likely that the Court was simply exercising caution, this precise issue having not yet been raised.

79. Steinman, *supra* note 1, at 127–28.

80. See FED. R. CIV. P. 37(c)(1), which provides:

respond to the *motion*—that is, it must “set forth specific facts showing that there is a genuine issue for trial.”⁸¹ Discovery is not an end in itself; it is, instead, but a *means* to an end, the end being the resolution of the underlying dispute, whether by trial or, if appropriate, summary judgment. When compelled to make one’s case (or to respond to the opposing party’s case), what matters are facts, not responses to discovery. Though one might have a duty to amend or supplement one’s discovery responses or disclosures,⁸² this alone is not an adequate response in the summary judgment context.

This distinction between a response to a discovery request and to a motion for summary judgment is demonstrated by Rule 56 itself. Under Rule 56(f), a party opposing a motion for summary judgment, upon a showing of good cause, may be given additional time to conduct additional discovery—though not for the purpose of revising some earlier discovery response, but rather for the purpose of “present[ing] by affidavit facts essential to justify the party’s opposition.” This distinction also supplies the answer to Steinman’s question as to why providing the name of a witness in discovery should be treated differently from a similar response to a motion for summary judgment.⁸³ Though providing the name of a potential witness in discovery might well compel an adverse party *contemplating* a motion for summary judgment to depose that witness, such a response is inadequate once the

A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a *motion* any witness or information not so disclosed.

(emphasis added).

81. FED. R. CIV. P. 56(e); cf. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990) (“[T]he purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side’s case to demand at least one sworn averment of that fact before the lengthy process of litigation continues.”). Incidentally, though later cases might not be of aid to the interpretation of prior ones, they can be helpful in ascertaining the current state of the law—understanding that with respect to summary judgment, the Supreme Court could do a lot more in this regard.

82. See FED. R. CIV. P. 26(e) (providing that a party has a duty to amend or supplement a prior discovery response or disclosure “if ordered by the court” or if the party learns that “in some material respect” the response or disclosure is “incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing”). Of course, even if material, a party need not do anything if the corrective information has “otherwise been made known to the other parties during the discovery process or in writing.” *Id.*

83. See *supra* notes 47–53 and accompanying text.

motion has been *filed*, just as a witness list (as opposed to witness testimony) is inadequate at trial. The “records” in these two situations, therefore, are far from “identical.”⁸⁴ Indeed, giving such a response this sort of retroactive effect would be subversive to the entire summary judgment process.

Steinman attempts to temper his approval of a Catrett-type response by arguing that, in the summary judgment context, such a response “is sufficient only if [the adverse party’s] materials are ‘reducible to admissible evidence.’”⁸⁵ But there are problems with this argument as well. For one thing, the reference by the Supreme Court to materials “reduced to admissible evidence”⁸⁶—which related to questions that continued to surround Catrett’s materials in *Celotex*—clearly referred only to the “adequacy of the showing made by [Catrett] in opposition to [Celotex’s] motion for summary judgment.”⁸⁷ In other words, this phrase related to whether Catrett’s materials even could be considered in this context—i.e., whether they were of the *type* permitted under Rule 56.⁸⁸

More significantly, mere *reducibility* to admissible evidence is not the proper standard for assessing the adequacy of the materials presented by the adverse party at summary judgment. Rather, the adverse party must present materials that are *themselves* admissible.⁸⁹ And this statement regarding the *nature* of the adverse party’s materials is true regardless of the *form* such materials might take—i.e., regardless of which materials identified in Rule 56(c) are utilized.⁹⁰ Admittedly,

84. Steinman, *supra* note 1, at 131.

85. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

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

87. *Id.*

88. *See supra* notes 68–72 and accompanying text.

89. *See* EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 8:6, at 220 (3d ed. 2006) (“It is clear that the evidence submitted by the parties to support or oppose a motion for summary judgment must be admissible under the Federal Rules of Evidence.”); MOORE ET AL., *supra* note 70, § 56.13[4], at 56-180 (concluding that Rule 56(e) requires a showing of “competent summary judgment evidence in the record that can be produced at trial and qualify as substantial evidence”).

90. *See, e.g.*, WRIGHT ET AL., *supra* note 70, § 2722, at 371–72 (“Only that portion of a deposition that would be admissible in evidence at trial may be introduced on a summary-judgment motion”); *id.* at 374 (recognizing the use of interrogatory answers in connection with a motion for summary judgment “as long as they satisfy the other requirements in Rule 56 and contain admissible material”). Actually, this appears to be true as well with respect to those materials *not* identified in Rule 56(c), to the extent such materials properly may be presented. *See id.* at 361 (“The court may consider any material that would be admissible or usable at trial.”).

Rule 56(e) permits a party to present affidavits in connection with a motion for summary judgment, and as Steinman observes, affidavits themselves generally are not admissible at trial.⁹¹ But Rule 56(e) does require that the *contents* of the affidavit consist of admissible evidence,⁹² and it makes little sense to impose this requirement on affidavits and not on anything else that might be presented in response.⁹³ It also makes little sense to permit a party to avoid summary judgment—the purpose of which is to avoid a needless trial⁹⁴—with materials that would not be admissible at trial. How may one determine whether there is a genuine issue for trial other than by the consideration of that evidence that would be admissible at trial?⁹⁵ An exception (as to form) has been

91. Steinman, *supra* note 1, at 112.

92. See also MOORE, *supra* note 70, § 56.14[1][d], at 56-192 to 56-193 (concluding that summary judgment affidavits “must consist of admissible evidence in order properly to be considered in connection with the motion”); *id.* at 56-193 (“To be acceptable at [the] summary judgment stage, the evidence presented in the affidavit must be evidence that would be admissible if presented at trial through the testimony of the affiant as a sworn witness.”); 10B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2738, at 330 (3d ed. 1998) (similarly concluding that “the first requisite [of affidavits presented in connection with a motion for summary judgment] is that the information they contain (as opposed to the affidavits themselves) would be admissible at trial”); *id.* at 330-33 (“[E]x parte affidavits, which are not admissible at trial, are appropriate on a summary-judgment hearing to the extent they contain admissible information.”).

93. See BRUNET & REDISH, *supra* note 89, § 8:6, at 222-23 (“It would seem illogical to single out affidavits that are clearly contemplated for use by Rule 56(e) for testing under the rules of evidence, yet simultaneously not require that items of proof that are not embraced by Rule 56(e) meet the requirements of the rules of evidence.”); see also MOORE, *supra* note 70, § 56.14[2][b], at 56-216 (“Interrogatories used in connection with a summary judgment motion are bound by the same rules of admissibility as affidavits.”). Certainly, the other items described in Rule 56(c)—pleadings (at least to the extent the claimant’s allegations have been admitted), depositions (which are taken under oath, see, e.g., FED. R. CIV. P. 30(c)), answers to interrogatories (which are also made under oath, see FED. R. CIV. P. 33(b)(1)), and admissions—are (or might be) admissible at trial without further foundation. Conspicuously absent from this list, though, are documents (such as might be obtained in connection with a formal request for production of documents). But as discussed previously, see *supra* note 70 and accompanying text, this does not mean that documents may not be presented in connection with a motion for summary judgment; they may, though typically only through a testifying witness, just as they would be proffered at trial.

94. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

95. See BRUNET & REDISH, *supra* note 89, § 8:6, at 223 (“Rule 56 is designed to avoid a trial that would be unnecessary. The motion could not serve that function if, in deciding whether issues exist for trial, courts were to consider evidence that could not subsequently be admitted at trial.”); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (“[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (“When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.”) (footnote omitted). Compare FED. R. CIV. P. 56(d) (“Case Not Fully

created for affidavits so as to permit a party to present non-deposition testimony on paper.⁹⁶ There are no other exceptions.

And even aside from its incongruity with governing textual sources, there is a more practical problem with Steinman's approach. One might know with some certainty what will *not* be admissible at trial; an example might be the deposition transcript from Catrett's worker's compensation proceeding.⁹⁷ What *will* ultimately be admissible, though also knowable with some certainty, is somewhat harder to predict, for one cannot know for sure whether any particular item of evidence will be admitted at trial until it is proffered. Even relevant evidence may be excluded if deemed cumulative or unfairly prejudicial,⁹⁸ and some evidence may be admissible if proffered by one party, but not the other.⁹⁹ But admissibility at trial is a *much* more certain standard than that proposed by Steinman: *reducibility* to admissible evidence. For example, Steinman apparently believes that a court may consider unauthenticated documents at summary judgment, so long as those documents are accompanied by the name of a witness who the presenting party "thinks" will eventually be able to provide a sufficient

Adjudicated on Motion"), which provides:

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings *and the evidence before it* and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. . . . Upon the trial of the action the facts [determined to be without substantial controversy] shall be deemed established, and the trial shall be conducted accordingly.

(emphasis added).

96. It is well-established that summary judgment "mainly involves a paper process rather than the live presentation of proof." BRUNET & REDISH, *supra* note 89, § 8:1, at 207. In part this is because "[t]he summary judgment process provides a method to conserve judicial resources." *Id.* § 8:4, at 212. "Moreover, since witness credibility is generally not a relevant factor to the rendering of decision on a summary judgment motion, little is likely to be gained by the use of live testimony, rather than affidavits." *Id.* at 213; *see also* FED. R. CIV. P. 43(e) ("When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties"); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 n.11 (1983) ("The primary difference between . . . motions [for summary judgment and for judgment as a matter of law] is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while [motions for judgment as a matter of law] are made at trial and decided on the evidence that has been admitted.").

97. *See supra* note 53 and accompanying text.

98. *See* FED. R. EVID. 403.

99. *See, e.g.,* FED. R. EVID. 803(5) (regarding recorded recollections).

evidentiary foundation therefor.¹⁰⁰ But how does one know whether that witness will appear at trial? How that witness will testify? Though some of these same problems accompany affidavits, the level of speculation here seems unacceptably high.¹⁰¹

Of course, as *Celotex* itself demonstrates, any objection to materials presented in connection with a motion for summary judgment, whether within or without the scope of Rule 56, will be waived if not made in a timely manner.¹⁰² Again, what is true at trial is generally true here also,¹⁰³ and in this limited sense Steinman might be correct. But that which may be considered absent a timely objection should be distinguished from that which is proper in the first instance.¹⁰⁴

V. CONCLUSION

Professor Steinman's article is an impressive piece. Indeed, because Professor Steinman's article makes so substantial a contribution to the law of summary judgment, I am loath to criticize. But his views regarding the nature of the adverse party's response should be a cause

100. See *supra* notes 50–53 and accompanying text.

101. See also BRUNET & REDISH, *supra* note 89, § 8:6, at 228–29 (discussing the problems associated with such “will-call” witnesses).

102. See *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37–38 n.10 (D.C. Cir. 1987), *on remand from Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); see also FED. R. EVID. 103(a)(1) (providing that “[e]rror may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected” and “a timely objection or motion to strike appears of record”); WRIGHT ET AL., *supra* note 70, § 2722, at 384–85 (“As is true of other material introduced on a summary-judgment motion, uncertified or otherwise inadmissible documents may be considered by the court if not challenged. The objection must be timely or it will be deemed to have been waived.”) (footnotes omitted).

103. Cf. BRUNET & REDISH, *supra* note 89, § 8:1, at 206 (“Although the functions served by summary judgment and trial are of course different, the procedures used in assessing summary judgment so closely approximate a trial that in a certain sense the Rule 56 process might be appropriately described as a type of ‘mini-trial’ or a ‘trial by paper.’”)

104. While on this subject, just a brief note on what it means for something to be “in the record,” a subject of considerable debate in *Celotex*. Whatever this phrase might mean, it surely cannot mean simply that something has been presented to a court, for there is little preventing a party from presenting virtually anything, at least as an initial matter. Cf. FED. R. CIV. P. 5(e) (“The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.”). Rather, it seems that something may only be regarded as “in the record” if it has been proffered and admitted (implicitly if not explicitly) by that court with respect to the resolution of some issue in that case—and even then, that which is “in the record” for one purpose might not be “in the record” for all subsequent purposes, regardless of their nature. The bottom line is that the mere presentation of materials to a court does not mean that those materials are “in the record” (other than as a docketing matter) or that the court must or even may consider that item in any later proceeding.

for concern among those who favor the use of this procedure. For Steinman's arguments notwithstanding, this aspect of the "paper trial myth"¹⁰⁵ is, in fact, no myth, or at least it is not nearly as mythical as Steinman might believe.

When a motion for summary judgment is properly "made and supported," the adverse party must respond with "specific facts showing that there is a genuine issue for trial."¹⁰⁶ Those facts generally must be of the type described in Rule 56(c), and must consist of admissible evidence. This is the best reading of Rule 56, and no Supreme Court holding (including *Celotex*) is to the contrary. This view of summary judgment also makes normative sense and is consistent with what better lawyers in fact do. Does this mean that some parties, unable to meet this standard, will lose their "right" to a trial? Perhaps, though I would posit that most of the concerns along these lines can be dealt with through a judicious use of the procedure described in Rule 56(f). But this result—the elimination of needless trials—is precisely what Rule 56 was designed to accomplish.¹⁰⁷ If that is "unfair," then the abolition of this procedure would seem to be the better solution.¹⁰⁸

Of course, it might be that my take on *Celotex* and the law of summary judgment, not Steinman's, is incorrect. Or the truth might lie somewhere in between. Regardless, my hope is that, through dissent, the truth might someday be revealed.¹⁰⁹ And perhaps, as Rule 56 evolves—and it will¹¹⁰—that truth might be made more manifest.

105. See *supra* notes 37–39 and accompanying text.

106. FED. R. CIV. P. 56(e).

107. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). This assumes, though, that summary judgment is itself constitutional. Arguably, it is not. See Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).

108. Some, it might be observed, have advocated precisely that. See, e.g., John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007).

109. On the value of dissent generally, see Arthur J. Jacobson, *Publishing Dissent*, 62 WASH. & LEE L. REV. 1607 (2005).

110. The Advisory Committee on Civil Rules currently is considering substantial amendments to Rule 56. See Memorandum from the Honorable Mark R. Kravitz, Chair, Advisory Comm. on Federal Rules of Civil Procedure, to the Honorable Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure (Dec. 17, 2007), available at www.uscourts.gov/rules/Reports/CV12-2007.pdf. Though the precise form of any such amendments is still somewhat unclear, it appears likely that proposed amendments to Rule 56 will be formally published for public comment sometime during 2008.

APPENDIX A
FEDERAL RULE OF CIVIL PROCEDURE 56**

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action

** The version of Rule 56 reproduced here is the version that was in effect immediately prior to the effective date of the restyle amendments, December 1, 2007. *See* Supreme Court Order, April 30, 2007. To the extent current Rule 56 is deemed inapplicable, this version presumably would control. *See id.* (providing that the restyle amendments "shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending").

as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. 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 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. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits Are Unavailable. 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.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX B
RESPONDING TO SUMMARY JUDGMENT: TWO VIEWS

ASPECT	STEINMAN	SHANNON
Nature of adverse party's factual materials	Essentially anything	Generally limited to materials described in Rule 56
Relationship between adverse party's factual materials and rules governing discovery	Such materials may be regarded as an amended or supplemental discovery response or disclosure	Possible discovery sanctions aside, no relationship
Admissibility of adverse party's factual materials	Need only be reducible to admissible evidence at trial	Generally must be admissible, as if at trial

* * *

,