Summary Judgment: A proposal for Procedural Reform in the Core Motion Context

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SUMMARY JUDGMENT: A PROPOSAL FOR PROCEDURAL REFORM IN THE CORE MOTION CONTEXT

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NO SPITTING, NO SUMMARY JUDGMENTS

-Sign in a federal courthouse in New Orleans.¹

This Article examines modern federal-style summary judgment practice and its antithesis, the current Virginia summary judgment rule. Both could stand improvement. Few models exist, however, because states have shown little innovation with respect to summary judgment.² Focusing on the strengths and weaknesses of the federal system is thus important. This Article proposes a new rule for Virginia summary judgment that, for a variety of reasons explained below, is calculated to be a modest, safe, and mainstream procedure. This rule would leave the traditional standards for granting the motion intact, but it reshapes the procedures of the motion in an effort to facilitate fair and expeditious decisions by trial courts. The safeguards we propose address principal criticisms of federal practice in the aftermath of the Supreme Court's 1986 trilogy of summary judgment cases,³ sometimes dubbed the "beast of burdens."⁴ These criticisms assert that the procedural thresholds are vague and that the pro-

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¹ Steven A. Childress, A New Era for Summary Judgments: Recent Shifts at the Supreme Court, 6 REV. LITIG. 263, 264 (1987).
² Indeed, we found fewer than ten articles on summary judgment in the state courts in law reviews and bar association publications from the past two decades.

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cess allows a movant unfairly to impose dramatic burdens on the responding party. The mechanisms discussed here deal with both aspects of concern by focusing on the legal requirements for consideration of summary adjudication and the guidelines provided by the procedural system for the responsive submissions.

The central concerns of this Article arise in the core summary judgment situation where the party without the burden of proof makes a motion asserting a lack of evidence sufficient to warrant a full hearing on some dispositive issue as to which the nonmovant has the burden of persuasion. To a large extent, the issues and procedural devices we explore are applicable to less common situations. For example, this Article addresses situations in which a moving defendant concedes that a plaintiff has cognizable evidence to support the focal issue on summary judgment but asserts that this evidence is insufficient to meet an enhanced burden of proof threshold applicable to the subject matter of an action; or in which a plaintiff who admittedly carries the burden of proof seeks summary judgment against a defendant who assertedly has entered only a sham defense. However, these and other, more esoteric contexts are of limited practical incidence, and there is very real resistance to more broadscale revision of summary procedure in Virginia. Nevertheless, the system should at least deal with the bread-and-butter situation adequately. Having worked through this study, it is not clear to the Authors that the federal approach addresses this problem today, and we know that the present Virginia rules do not. Hence, the stalking horse for our discussion in this Article is the capacity of the mechanisms to deal with the core case.

I. SUMMARY JUDGMENT PRACTICE—SOME CONTRASTS AND A LITTLE HISTORY

Thirty-five years ago, Charles Alan Wright saw in Virginia civil procedure "an unusual mixture of old and new."5 In many ways his observation remains an accurate description of Virginia civil procedure today. Early in Virginia's history, as a colony and a state, its courts and legislatures were innovative reformers of

common law procedural conventions. However, throughout this century, the conventional view of Virginia law, and particularly its procedural aspects, has been that the system is idiosyncratic, clinging to much of the symbolism—and the substance—of nineteenth-century American jurisprudence.

Nowhere are such observations more justified than in relation to pre-trial procedure for summary judgment. The Virginia summary judgment rule is a terse, bare-boned provision. Constructed piecemeal from old traditions and glosses from earlier in this century, the Virginia summary judgment rule has not undergone any systematic revision in forty years, despite criticism of, and proposals to reform, the present rule. Even as the volume of civil litigation has burgeoned in the modern era, and discovery tools have been extended to all civil cases, use of pretrial summary judgment in Virginia has been limited. In part, this reluctance stems from the absence of clear procedural directions in the rule itself, from the required and permissible range of steps by the parties in initiating and responding to a pretrial summary judgment motion, and from the burdens of production in supporting and opposing such motions. Limitations on the types of evidence that the trial court may consider in ruling on such an application

6. See, e.g., Robert W. Millar, Three American Ventures in Summary Civil Procedure, 38 Yale L.J. 193, 215 (1928) (recognizing Virginia as one of the first jurisdictions to implement summary proceedings by motion for judgment against certain classes of defendants for liquidated debts).

7. The continued separation of case filings into actions at law and suits in equity is one of the more prominent examples of Virginia's reluctance to make procedural changes too rapidly. See Wright, supra note 5, at 118.

8. Summary judgment in actions at law in Virginia is governed by Rule 3:18; the nearly identical Rule 2:21 governs cases in equity. VA. SUP. CT. R. 3:18, 2:21. The only subject matter distinction is the prefatory phrase in the equity rule, "[e]xcept in a suit for divorce or for the annulment of marriage," that effectively bars the use of the summary mechanism in those cases. VA. SUP. CT. R. 2:21. Because the remaining textual portions of the two Virginia summary judgment rules are identical, we will hereinafter refer to one or both rules as the "Rule."

9. Rule 3:18 consists of five sentences, and is only a few lines long. Thus, the Virginia rule is very different from the summary judgment provisions under the Federal Rules of Civil Procedure and those of the majority of states that have followed the federal model. Virginia is also the only jurisdiction that severely curtails by statute (the effect of which is reiterated in the rule) the types of discovery evidence which may be used to support a summary judgment motion. See infra parts III.B.2, III.B.3.
also have hampered the use of the summary judgment mechanism. As a result of these limitations, present Virginia courts rarely employ summary judgment as a general matter.\(^{10}\)

Developments in the "federal model" have little appeal for many in Virginia. In Part II.D, below, we analyze certain features of federal summary judgment practice with an eye toward distilling the most successful and uncontroversial aspects of that process, while isolating the perceived abuses of the federal regime. A few features of the federal structure appear well-calculated to assist in formulating a modern Virginia summary judgment doctrine. Moreover, the concerns voiced about some aspects of present-day federal practice suggest the means by which Virginia can recast its rule to obviate difficulties experienced elsewhere. The last thirty years of federal and state experience should be seen as a laboratory for Virginia summary judgment reform. The Commonwealth can employ provisions in fashioning its own rule that may, in turn, provide a model for other procedural systems nationwide in revamping summary judgment mechanisms.\(^{11}\)

In the federal system, summary judgment and related pretrial procedures have become useful tools for case and docket management in response to a growth in the volume of litigation and a perceived need for greater efficiency. Federal Rule of Civil Procedure 56 on summary judgment ("the federal rule" or "Rule 56") specifies the burdens of production on movants and opponents. The federal rule, as interpreted in a trio of celebrated cases,\(^{12}\) allows initiation of the motion in various contexts, and its structure assures that the nonmoving party responds to the motion appropriately.\(^{13}\)

The central explanation for the shape of federal summary judgment procedure today reflects the philosophies of judicial management at play. For at least two decades, the Federal Judi-

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10. See infra part III.B.
11. See infra parts III.C, III.D.
13. See, e.g., Celotex, 477 U.S. at 322-23 (requiring entry of summary judgment when the non-moving party failed to produce evidence when that party had the burden of proof).
cial Center has taught new federal judges that active judicial management—characterized by strict time deadlines and firm "control" of the litigation—shortens disposition times and lowers the pending docket of open cases. The Supreme Court's 1986 summary judgment decisions were fairly read as underscoring the propriety of summary adjudication as yet another facet of this management philosophy, one in which those cases that cannot present viable fact issues may be weeded from the litigation garden before the preparations fully ripen. Undoubtedly, the lower courts, at least in the initial months after the 1986 decisions, were conscious of the new-found legitimacy of summary dispositions. A modicum of post-1986 statistical evidence tenuously supports the view that the federal courts have increased somewhat their summary adjudication ratio following the clarion call of Celotex. However, this evidence is neither conclusive nor readily confirmable. In any case, it seems doubtful that the proportion of cases summarily determined could have declined in the past decade compared to the 1960s or 1970s.

On the other hand, neither summary judgment practice nor case management notions are much evident in Virginia jurisprudence. Use of summary judgment appears to be far more extensive in all types of cases in the federal courts than in Virginia courts. With the single exception of the movement to establish case disposition time standards, little evidence exists of any procedural reform responsive to the increases in filings. For example, pretrial conference practice in Virginia is very limited, and the Commonwealth possesses no analogue to the extensive provisions of Federal Rule 16 on this subject. Virginia summary

16. Our own overview of the statistical experience is set forth in the text accompanying infra notes 115-22.
17. 5 VA. LAW. WKLX., No. 53, May 27, 1991, at 1161.
18. Rule 16, combined with aspects of Rule 26(f), sets in motion a complex pattern of scheduling and planning orders in federal practice that are intended to be entered in all categories of cases, save those exempted by affirmative action of the local fed-
judgment doctrine is largely consistent with this "hands off" impression of the litigation landscape. Thus, a summary judgment motion is not invited by existing procedures, and almost no obligations are placed on a party opposing summary judgment as long as the party can defeat the motion by unsworn allegations in the pleadings.

Virginia's present summary judgment rule is most consistent with the view that a judge should be an umpire, not a manager. Whether such a policy should remain predominant in the face of serious docket pressures from litigation volume—factors that have led to more aggressive management approaches in other jurisdictions—is a question that must be resolved by those charged with shaping the evolution of the court system in the Commonwealth. This task falls principally to the Judicial Council, the Virginia Supreme Court, and the Legislature. Clearly, however, some sort of revision is needed in order to provide the parties with reliable bases for deciding how to proceed in the production of evidence in support of claims and defenses, how to aid the trial court in making intelligent decisions on the dispositional applications, and how to avoid the possibility of "forum shopping" by parties who are able to strategically opt out of the Virginia system.

This Article proposes a revision of the Virginia summary judgment rule along lines that differ significantly from both the federal model and the current rule. The purpose of the revision is to redress the growing gap in summary judgment utility between general court, and that deal with both discovery issues and general case scheduling and deadlines. See FED. R. CIV. P 16, 26(f). No such presumptions of regulation are evident in the analogous Virginia rules. For example, the Virginia "pretrial procedure" rule, VA. SUP CT. R. 4:13, leaves the question of whether to summon counsel for the creation of preparation plans wholly to the discretion of the trial court. Few Virginia reported cases even apply this rule, and all are from the circuit courts. See London Towne Homeowners Ass'n v. Greene, 27 Va. Cir. 504, 525 (1990); Gressman v. Peoples Serv. Drug Stores, Inc., 10 Va. Cir. 397, 411-12 (1988). Furthermore, Virginia Rule 4:1, which is largely modelled on the 1971 version of Rule 26 of the federal rules, omits the discovery planning conference portions of the federal rule entirely. See VA. SUP CT. R. 4:1. Neither the sanction provisions of the Virginia discovery scope rule, Rule 4:1(g), nor the broad discovery sanction doctrines and procedures of Rule 4:12 provide for enforcement of any planning requirement. See VA. SUP CT. R. 4:1(g), 4:12.
the Virginia courts and those of other jurisdictions, to regularize and formalize the burdens on parties in pretrial evidence production, and to avoid managerial "overreaching" by courts responding to summary judgment motions for which the federal regime has been criticized.

Part II of this Article analyzes the development of summary judgment in early American courts and the modern federal system up to the Supreme Court's strongly managerial interpretation of Rule 56 in a series of prominent decisions. Part II also addresses certain responses to this managerial approach to summary judgment practice.

Part III compares the development of Virginia summary judgment practices, shaped by an adversarial, "anti-managerial" view and a fear of the expansive reach of summary judgment in connection with other aspects of Virginia law. Several reported opinions will illustrate debilitating weaknesses besetting summary judgment in Virginia. As a result, Virginia summary judgment practice is more restricted as a litigation tool than in other jurisdictions, as the procedures and utilization statistics demonstrate. Some of the infirmities of the current Virginia rule operate as "traps for the unwary" that can affect both parties, whether movants or opponents, in summary judgment motions. Part IV suggests a model for legislative or judicial revision of Virginia's summary judgment rule. Using the preceding materials and analysis, this discussion outlines the policy choices and procedural characteristics that a functional summary judgment doctrine should embody in order to integrate seamlessly with other features of the Virginia litigation landscape. A carefully-tailored rule can empower trial courts to dispose of truly baseless cases before they consume an inappropriate share of the energies of the court and the parties, while at the same time avoiding the excesses that sometimes are thought to exist in "federal model" jurisdictions.
The principal function of a motion for summary judgment\textsuperscript{19} is to demonstrate, by reference to the available evidence, that an essential element of a claim or defense is not genuinely contestable and that the moving party is therefore entitled to judgment as a matter of law. Summary judgment has evolved from a circumscribed procedure in common law actions on debts and contracts into a widely-used pretrial motion permitted in all types of litigation.\textsuperscript{20}

The motion has also emerged as an integral element of case management under modern civil procedure systems. Summary judgment enhances judicial control over the litigation, promotes resolution of meritless claims at an early stage, and encourages judges to obviate unnecessary or protracted trials, sparing a heavily burdened court system from needless extra proceedings.

A. Roots and Development of Summary Judgment

The history of the modern summary judgment procedure began in 1855 with the passage of Keating's Act by the English Parliament.\textsuperscript{21} Keating's Act established a summary proceeding on the basis of affidavits for the collection of bills of exchange and promissory notes. Subsequently, a number of American jurisdictions adopted analogous statutes or judicially-created rules for summary judgment in claims for liability on contracts and debt-enforcement actions.\textsuperscript{22} These provisions were intended primarily to aid

\textsuperscript{19} "Summary judgment" is used in this Article to refer to the adjudication of a pretrial motion, supported by evidence, for judgment or dismissal of all or part of a claim.

\textsuperscript{20} Summary judgment may be sought in lawsuits of any subject matter in most jurisdictions, as is the case in both the federal courts and in almost all states. In Virginia, summary judgment is allowed except in suits for divorce or annulment of marriage. VA. SUP CT. R. 2:21. Based on the most recently published statistics, this means that summary judgment is available in approximately seventy percent of the civil cases pending in the circuit courts of Virginia. \textit{See} VIRGINIA STATE OF THE JUDICIARY REPORT 1992, at A-40-42 and Display 22 (1993).

\textsuperscript{21} Keating's Act (Summary Procedure on Bills of Exchange Act), 1855, 18 & 19 Vict., ch. 67 (Eng); \textit{see} WILLIAM D. QUARLES ET AL., \textit{SUMMARY ADJUDICATION: DISPOSITIVE MOTIONS AND SUMMARY TRIALS} 85-86 (1991).

\textsuperscript{22} \textit{See}, e.g., CONN. R. CIV. PRACT. § 14A(1) (1929) (authorizing summary judgments on contracts, statutes, and other liquidated claims). For a discussion of early
plaintiffs in the speedy recovery of liquidated debts from recalcitrant defendants who posed no genuine defenses but sought to delay repayment and impose the costs of collection on their claimants.\textsuperscript{23}

The development of summary proceedings was also a natural complement to pleading reform, as the charging instrument in civil practice became simpler and, to some extent, more opaque.\textsuperscript{24} In Virginia, the motion for judgment, containing a statement of allegations, gradually displaced the confusing variety of common law forms of pleading for different types of actions.\textsuperscript{25} Issue-specific pleading practice was clearly a welcomed reform. The simplified motion for judgment also obscured the legal bases, or lack thereof, for an action or defense because the absence of factual support for an essential allegation might not become clear until the evidence was produced at trial.\textsuperscript{26} In effect, the motion for summary judgment enabled a party to "pierce" fact pleadings and force the opposing party to outline conceivable theories of recovery or defense.\textsuperscript{27} In federal practice the motion for more definite statement\textsuperscript{28} and, in actions at law in Virginia, the bill of particulars\textsuperscript{29} offer an opportunity to seek statutes providing for summary judgment, see Charles E. Clark & Charles U. Samenow, \textit{The Summary Judgment}, 38 \textit{YALE L.J.} 423, 440-71 (1929).

\textsuperscript{23} See, e.g., Gehl v. Baker, 92 S.E. 552, 553 (Va. 1917) (observing that summary judgment procedure for recovery on contract is intended "to prevent delay caused to plaintiffs by continuances upon dilatory pleas when no real defenses exist").


\textsuperscript{26} See Marcus, \textit{supra} note 24, at 483 (discussing the difficulty judges face in making factual conclusions on the pleadings).

\textsuperscript{27} See FED. R. CIV. P 56(e) advisory committee's note (1963) ("The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.").

\textsuperscript{28} FED. R. CIV. P 12(e).

\textsuperscript{29} See VA. SUP. CT. R. 3:16(b) (providing for an amended bill of particulars when the first bill is unclear).
elucidation of the averments in some instances, but neither procedure is used often. More importantly for our purposes, these applications seek further statement of claims by the pleader but do not provide insight into the existence of evidentiary support for the claims, even when granted.

A key element of the summary judgment device—and the feature that distinguishes it from the motion to dismiss/demurrer phase of procedure—is its focus on the factual proofs that a party will assert at trial on a particular issue. Many summary judgment decisions amount to a taking of undisputed facts, followed by a resolution of legal issues raised in a fashion similar to the review of the sufficiency of a pleading's ability to state a claim.30 Thus, while the court may enter summary judgment on matters involving legal components,31 the principal role of a summary judgment review is to accelerate to the pretrial phase the obligation of the party bearing the burden of proof to demonstrate to the court that it has at least some evidence on one or more necessary points in the party's case-in-chief. The principal circumstances for the consideration and entry of summary judgment, therefore, are those cases where a party has literally "no evidence" to support one or more necessary elements of the affirmative case.32 If a party can demonstrate some evidence on each contested issue, the motion should be denied: A summary judgment motion will not properly provide an occasion for weighing the competing sets of evidence.33

33. "[A]t the summary judgment stage the judge's function is not himself to weigh
The development of a summary judgment procedure thus serves two purposes in liberalized pleading regimes. First, summary judgment preserves the "gatekeeping" function that common law courts had enforced by requiring issue-specific pleadings. This function enables judges to dismiss actions that lack legal merit under the operative facts. When the response to a motion reveals that the underlying legal issues may be resolved without a trial, both justice and judicial efficiency are furthered by an entry of summary judgment. Second, the summary judgment motion demands that the allegations contained in a pleading be developed and placed in a legal framework prior to trial. This "issue focusing" function of summary judgment occurs whether or not judgment is granted because the motion and response thereto put the parties and the court on notice of the nature of the factual matters genuinely in conflict.
B. Federal Rule 56 and Docket Management

An overarching goal of the first complete set of rules governing federal civil procedure was to facilitate dispositions that were not only just, but also "speedy and inexpensive." A summary judgment rule, adapted from the former common law practice, was included as Rule 56. The scope, structure, and elaboration of Rule 56 differs significantly from earlier state statutes. Rule 56 was the first summary judgment rule to extend the summary judgment motion to all civil actions, including those formerly in equity, and to all types of claims, defenses, and issues in such actions. By 1979, forty years after promulgation of the federal rules, a large proportion of the states had adopted, with some alterations, systems of civil procedure in the style of the federal rules. Many had established summary judgment rules, most of which were modelled on Rule 56.

The Federal Rules created an interlocking structure of pretrial procedures for the management and disposition of litigation. Discovery, summary judgment, and the pretrial conference form important parts of the foundation for "pretrial practice"—the litigation that occurs between the filing of simple notice pleading documents and trial—the aim of which is to expose facts and focus upon issues prior to a trial.

The procedures governing this pretrial process, especially under the current versions of these federal rules, invite active case
management by judges, especially in complex and time-consuming litigation. This invitation is evident not only in the incorporation of required schedules and planning orders, but also in some of the fundamental characteristics shared by each of the rules governing pretrial practice. The judge is empowered to refine and develop issues for trial, remove frivolous or unsupported claims and defenses, schedule and order proceedings and discovery, and enforce the mandates of pretrial practice with sanctions that include dismissal of a claim or defense.

In theory, summary judgment fulfills several important functions in this pretrial structure. A party almost always has a strong incentive to move for summary judgment in the hopes of foreclosing a claim or defense of the adversary (the core motion context). On the other hand, a party who wants to maintain its claim or defense must anticipate the motion and seek to develop an evidentiary theory during discovery and other preparations sufficient to establish a basis to proceed to trial on the essential parts of her case. Both parties also must anticipate that the

47. Summary judgment “is especially encouraged in complex cases in which issues of fact may metastasize if the court does not take action to confine the dispute and proscribe costly overextension of discovery and trial.” Samuel Issacharoff & George Loewenstem, Second Thoughts About Summary Judgment, 100 YALE L.J. 73, 74 n.9 (1990) (quoting FED. REV. CIV. P 56 advisory committee’s notes, Proposed Rules 170).

48. Note that Rule 56 states that either party may make a motion for summary judgment, but federal judges apparently have the power to enter summary judgment sua sponte if the losing party was on notice to come forward with opposing evidence. See Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986) (dictum); Page v. DeLaune, 837 F.2d 233, 238 (5th Cir. 1988).

The summary judgment motion may be considered and a ruling entered at a pretrial conference. Rule 16 provides that judges may take action at a pretrial conference with respect to pending motions and “the formulation and simplification of the issues, including the elimination of frivolous claims or defenses” and “such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.” FED. R. CIV. P 16(c).

49. FED. R. CIV. P 16(b).

50. See id. rule 16(f) (sanctions for failure to appear); id. rule 26(g) (sanctions for failure to certify discovery requests, responses, and objections); id. rule 30(g) (attorneys’ fees sanction for failure to attend subpoena deposition); id. rule 37 (discovery sanctions).

51. See William W. Schwarzer, Summary Judgment and Case Management, 56 ANTITRUST L.J. 213, 228 (1987) (“Summary judgment procedure is a means for cutting rapidly to the core issues of litigation.”).

52. See R. Harvey Chappell, Jr., The Discovery Process in Virginia, 37 VA. L. REV.
other party may have the opportunity at a pretrial conference to directly inform the judge of potentially dispositive issues and to shape the discovery in order to address their summary judgment theory. 53

Of course, participation in discovery and pretrial conferences is enforceable in federal practice through the powers of the court to sanction noncompliance. 54 However, mere participation in pretrial proceedings does not necessarily require a proactive or productive utilization of discovery tools to develop evidence. The likelihood of having to face a ruling on a summary judgment motion is an additional and positive incentive for active pretrial participation. 55

Of course, these interactive incentives to participate depend upon the real likelihood that each pretrial tool functions as described. In several related areas, the course of federal procedural reform reflects the fact that lawyers and judges have not been swift to embrace the proposed procedural improvements of the system's architects. Discovery devices, for example, were made available in all actions in the original federal rules. Some thirty years later, in 1969, the revisors undertook sweeping revisions, a major thrust of which was to eliminate the need for permission to engage in discovery activities. 56 A similar deafening silence at-

151, 160 (1951) (arguing that Virginia summary judgment procedure provides a potential source of discovery aid).

53. See Schwarzer, supra note 51, at 220-22 (discussing the strategic incentives of counsel under Rules 16 and 56, noting that "[a]ttorneys should therefore have Rule 56 in mind in nearly all cases from the outset of the litigation").

54. See, e.g., FED. R. CIV. P 16(f), 26(g).

55. Thus, summary judgment is both a carrot and a stick because as much as it is used to punish the recalcitrant party, it also rewards the party that best utilizes the pretrial procedures to either undermine or bolster a claim or defense. From the movant's point of view, summary judgment can be an opportunity to terminate litigation before trial. From the nonmovant's point of view, summary judgment can be an opportunity to validate the viability of a claim or defense and, in a sense, arm it for the "main event" before a jury.

56. See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 525-27 (1969) (dropping the former requirement of good cause to seek production of documents or physical evidence in proposed Rule 34). In large measure, this under-use was thought to flow from the requirement to obtain court permission for use of the devices. The 1969 revisions eliminated that requirement for the principal discovery devices. See id. at 508-13, 520-22, 525-26, 530-31 (proposed Rules 30, 33, 34 and 36). Only the personally intrusive features of the
tended original Rule 16. While some districts of the federal system utilized the process more than others, courts did not apply uniform pressure for regular conferencing and active dispute resolution and preparations management that such meetings facilitate. Only with the revision of Rule 16 in 1983, when a “mandatory” obligation to generate schedule orders was grafted onto the text, did the pretrial rule begin to pressure judges to assume a managerial posture. Similarly, owing in part to the restrictive attitudes of some appellate courts, the summary judgment provisions of Rule 56 did not lead to a significant number of summary dispositions in civil cases.


58. See Maurice Rosenberg, The Pretrial Conference and Effective Justice 5 (1964); cf William L. Walker & John W. Thibaut, An Experimental Examination of Pretrial Conference Techniques, 55 MINN. L. REV. 1113, 1114 (1971) (acknowledging the early enthusiasm for pretrial conferences, but recognizing “a growing and perhaps dominant point of view [that] pretrial procedures have resulted in useless, unnecessary, unprofitable, expenditures of time, effort and expense in the majority of litigation”).


60. See Shapiro, supra note 57, at 1984-86. A Virginia Circuit Court judge and supporter of pretrial practice has noted that absent a fairly rigorous conferencing regime, counsel allow many opportunities to simplify the case and agree on undisputed items to slip through their fingers:

The criticism that nothing is accomplished [at pretrial conference] which could not be done by the attorneys themselves, is readily answered by the observation that they probably could, but would not. Prior to pretrial conferences, I can recall few instances where the attorneys agreed to stipulate non-controversial facts or attempted to narrow the issues. In fact, the exact converse was true.


61. As noted below, it is not even clear that the 1986 decisions of the Supreme
At least today, after massive efforts in the 1960s and 1970s to expand discovery utilization and in the 1980s to improve pretrial conferencing, the shared and combined effects of these procedures is to channel litigation before the judge in a manner which facilitates case management. Thus, the judge has an opportunity—indeed, under some of the federal rules a positive duty—to discern the outlines of the ensuing litigation. The powers (and the obligations) of the judge to articulate default time limitations for motions and discovery compel participation by both judges and parties in pretrial practice, thus depriving litigants, some of whom may have incentives to delay adjudication, of their formerly almost absolute control over the pace of progress in an action. In some instances, the judges' powers may affect parties' freedom to file what are perceived by courts to be dilatory motions. In turn, when judges appropriately exercise their authority to adjudicate whole cases or issues in pretrial practice, docket efficiency is enhanced.

The movement toward an ethos of "managerial judging" reflects a number of premises about the general characteristics and effects of pretrial practice. These premises include an increased

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62. The 1969 revisions to the discovery rules were, as noted above, calculated to remedy under-use of the procedures. The perceived waves of "discovery abuse," defined as over-utilization of some of the procedures to the point of imposing unnecessary burdens on the adversary, were deemed only much later. See Fed. R. Civ. P advisory committee note, reprinted in 85 F.R.D. 521, 543 (1980); American Bar Ass'n, Second Report of the Special Committee for the Study of Discovery Abuse (1980); see also Arthur L. Liman, The Quantum of Discovery vs. the Quality of Justice: More is Less, 4 Litig. 8 (1977).

63. See, e.g., Fed. R. Civ. P 26(f); cf Arnstein v. Porter, 154 F.2d 464, 478 (2d Cir. 1946) (Clark, J., dissenting) (noting that "it seems quite likely that the record at trial will be the one now before us" on a summary judgment motion); Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 378 (1982) (noting that expansion of federal pretrial procedures, such as pretrial status and discovery conferences, enables judges to "learn more about cases much earlier than they did in the past").

64. See, e.g., Fed. R. Civ. P 16(b).

65. See also Fed. R. Civ. P 16(c) (unnumbered paragraph after subparagraph (16)) (requiring the presence of counsel who has power to enter into stipulations and permitting the court in appropriate situations to require the party or a representative to attend as well).

66. Id. rule 16 (advisory committee's notes to the 1983 amendments).
focus on the importance of the judicial prerogative—or the public’s right to efficient court processes and a relatively smoothly-running docket—to the extent that these factors now weigh in the assessment of judicial and policy options. Thus, docket delay and congestion have become concerns on a level comparable to those of party autonomy that previously characterized the umpireal view of the judicial function. 67 Managerial-judging approaches also evince concern for harms caused to a plaintiff by delay as well as those visited upon a defendant by the pendency of claims. 68 In addition, there is concern that the process of litigation itself should not be a strategic factor favoring either the plaintiff or defendant because of the costs of delay to overall judicial efficiency 69 In most jurisdictions, the present-day form of pretrial conference procedure in particular provides opportunity and incentive for the termination or settlement of cases at the earliest stages of litigation and with minimal expenditure


68. See FLANDERS, supra note 14, at vii (forward by the Hon. Walter E. Hoffman) (“For many, defendants as well as plaintiffs, justice delayed may be justice demed or justice mitigated in quality.”).

69. See supra notes 11-14 and accompanying text (discussing judicial efficiency); infra notes 85-89 and accompanying text (discussing Supreme Court’s affirmation of judicial efficiency goal in summary judgment procedure). The increasing volume and complexity of litigation has been cited frequently as a justification for the managerial approach to summary judgment under Rule 56. See, e.g., Martin B. Louis, Federal Summary Judgment Doctrine: A Critical Analysis, 83 YALE L.J. 745, 752 (1974).
In sum, pretrial procedure under the Federal Rules has long been intended to promote justice and judicial efficiency by encouraging and facilitating case management by judges. In recent years, mandatory scheduling systems and other reforms have pushed the reality closer to aspirations.

C. Federal Approaches to the Summary Judgment Process

As noted above, federal judges did not universally and instantaneously embrace the managerial role facilitated by the panoply of mechanisms of pretrial practice. Summary judgment fared no better than other devices, and some courts erected barriers against expansion of the motion. Rule 56, for all its innovation and exposition of the summary judgment procedure, was not self-implementing. Half a century passed before the Supreme Court directed lower courts to pursue summary judgment by harmonizing the policy and language of summary judgment with the managerial purpose underlying pretrial practice.

The primary obstacle to the expansion of federal summary judgment was a reluctance in some federal appellate circuits to accept the idea that selective dismissal of factually defective claims was an end to which much energy should be devoted.

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70. Rule 16 was amended in 1983 to recognize that facilitation of settlement and early resolution could be a goal of pretrial conference. Commentators who have questioned the managerial approach have suggested that one effect of these pretrial procedures is to inject "judicial control over all phases of litigation and thus infuse[] lawsuits with the continual presence of the judge overseer." Resnik, supra note 63, at 379. Pretrial issue development in the context of resolving discovery issues, with an eye towards facilitating settlement, alters the judge's role in litigation from that of an adjudicator into that of a mediator or negotiator—and thus undermines the traditional view of judicial impartiality. Id.

71. The reporter of the Federal Rules noted with pessimism the tendency of judges to frustrate the intended effect of procedural rules. Charles E. Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 VAND. L. REV. 493, 498 (1950) ("Unfortunately by a kind of Gresham's Law, the bad, or harsh, procedural decisions drive out the good, so that in time a rule becomes entirely obscured by its interpretive barnacles."). Judge Clark was a proponent, as a commentator and as a judge on the Second Circuit, for the liberal use of Rule 56 to dispose of factually deficient claims. See generally Michael E. Smith, Judge Charles E. Clark and The Federal Rules of Civil Procedure, 85 YALE L.J. 914, 927-33 (1976) (discussing Judge Clark's role in the drafting of Rule 56).

72. See infra notes 83-89 and accompanying text.

73. Indeed, prior to 1986, many of the most "managerial" trial judges (i.e., those
Federal trial judges could avoid reversal on summary judgment by allowing questionable claims and defenses to go to the jury and correcting any “wrong” verdicts during or after trial.\textsuperscript{74} Alternatively, they might well have relied on the thought that most cases settle anyway.\textsuperscript{75}

Judicial reluctance to utilize summary judgment found expression in restrictive constructions of Rule 56. The basic formulations of the “substantive standard” for granting summary judgment motions,\textsuperscript{76} which Rule 56 did not alter, and the “procedural standard” (that is, the rule’s mechanics and its allocation of burdens of production) are susceptible to varying interpretations.\textsuperscript{77} Accordingly, courts can give either broad or narrow readings to standards of production and sufficiency of the evidence requirements, depending on judicial views of the appropriateness of pretrial screening.

For example, in several celebrated cases during the 1940s, the Second Circuit applied a rigorous substantive standard to summary judgment motions, requiring that a movant’s supporting evidence eliminate the slightest factual doubt over the movant’s entitlement to judgment.\textsuperscript{78} The court justified the “slightest...
doubt\textsuperscript{79} test not by reference to the substantive standard of Rule 56, but rather by relying on the view that judges were not to deprive a party of a jury resolution of alleged, although as yet unsupported, factual disputes.\textsuperscript{80} To Judge Clark and other critics, however, the test was an unwarranted restriction on the clear imperative of Rule 56 and the policies of pretrial practice in general.\textsuperscript{81} To these critics, the "slightest doubt" debate was, in essence, an argument over the legitimacy of taking the case away from a jury \textsuperscript{82}

The famous trilogy of Supreme Court decisions handed down in 1986 resolved many of the questions about the effects and the policy of Rule 56.\textsuperscript{83} In each of these cases, the Supreme Court...
reinstated summary judgments for defendants by overturning restrictive circuit court interpretations of Rule 56. More significantly, perhaps, all of the opinions and dissents, to varying degrees, vouch for the legitimacy of the summary judgment motion, properly administered, as a favored method of litigation management by judges.

Celotex Corp. v. Catrett provided the most substantial and explicit endorsement of summary judgment. Justice Rehnquist, writing for the Court, characterized summary judgment procedure "not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole." The Court noted that Rule 56 replaced the common law pleading practice and


It is worth noting that much of the confusion over the treatment of summary judgment motions had been fostered by the Supreme Court's own prior opinions concerning the procedure of Rule 56. See, e.g., Mack v. Cape Elizabeth Sch. Bd., 553 F.2d 720, 722 (1st Cir. 1977) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-61 (1970)) ("A party moving for summary judgment assumes the burden of affirmatively demonstrating that there is no genuine issue of fact on every relevant issue raised by the pleadings -- even though, as a defendant, he would have no burden if the case were to go to trial."). Celotex, in fact, reversed a decision of the D.C. Circuit that was premised on the Adickes decision. Celotex, 477 U.S. at 318, rev'g Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 184 (D.C. Cir. 1985).

Celotex, 477 U.S. at 319 (holding that defendant's failure to support its motion with evidence negating the exposure of the decedent to defendant's asbestos product did not preclude summary judgment); Anderson, 477 U.S. at 249 (holding that summary judgment is appropriately granted "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party" under the applicable standard of clear and convincing proof); Matsushita, 475 U.S. at 586-88 (holding that nonmoving party must come forward with persuasive evidence to support its claim after the movant has shown that the claim is implausible).

Several post-1986 Supreme Court decisions have added important glosses on the doctrines there announced. See, e.g., Wyatt v. Cole, 112 S. Ct. 1827, 1835 (1992) (Kennedy, J., concurring) (stating that "the strength of factual allegations such as subjective bad faith can be tested at the summary judgment stage"); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883-85 (1990) (finding that summary judgment should be granted when the plaintiff fails to carry the burden of showing that he was harmed by agency action, regardless of whether the non-moving party files affidavit seeking to negate elements of the non-moving party's case).

Celotex, 477 U.S. at 327; Anderson, 477 U.S. at 249-50 (proper focus of Rule 56 inquiry is whether fact-finding is necessary); Towns, supra note 78, at 1020-21, 1023-27.


Id. at 327.
effectively provided the sole pretrial mechanism for dismissing claims or defenses on the merits.\textsuperscript{88} Thus, the procedural burdens of Rule 56 must be construed with due regard for parties' opposing claims and defenses and for the cost to judicial efficiency from unnecessary trials.\textsuperscript{89}

The Court's endorsement of summary judgment practice is best seen in light of how summary adjudication is restricted by the canons of construction. Summary judgment is appropriate under Rule 56 if the moving party establishes that there is no genuine issue of material fact that should be resolved at trial, and hence the party is entitled to judgment as a matter of law. Materiality is determined by the substantive law that governs the case.\textsuperscript{90} "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."\textsuperscript{91} Thus, fact issues on "immaterial facts" do not preclude summary judgment.\textsuperscript{92}

A dispute is genuine for summary judgment purposes only if a "reasonable jury could return a verdict for the nonmoving party."\textsuperscript{93} Thus, courts today are more willing to consider summary judgment where little or no evidence has been adduced by the nonmovant.\textsuperscript{94} If there is not sufficient evidence to permit a reasonable jury to find for the nonmoving party on the issue, then "a rational trier of fact would not be able to find for the nonmoving party, and the Court should enter summary judgment against it."\textsuperscript{95}

\textsuperscript{88} Id., see supra notes 12-16 and accompanying text.

\textsuperscript{89} Celotex, 477 U.S. at 327 (noting that under the Federal Rules, Rule 56 is the principal tool to avoid trials "with the attendant unwarranted consumption of public and private resources" on factually insufficient claims or defenses); see also Pierce v. Underwood, 487 U.S. 552, 568-69 (1988) ("At least where, as here, [a] dispute centers upon questions of law rather than fact, summary disposition proves only that the district judge was efficient.").

\textsuperscript{90} Anderson, 477 U.S. at 248.

\textsuperscript{91} Id.


\textsuperscript{93} Anderson, 477 U.S. at 248.


\textsuperscript{95} Id. at 1158 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).
Another way of expressing the same test is that the trial court
is not to weigh evidence in deciding summary judgment motions.
"[A]t 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."96 Where there is "no evidence" to support a claim, sum-
mary judgment is appropriate.97

The prescribed approach to accepting and construing the evi-
dence also demonstrates why a party who cannot make out a
viable claim given these advantages at the time of the motion
should be thrown out of court. For example, the nonmovant's
evidence is to be taken as fact for purposes of the motion.98 In-
ferences and construction of the facts are drawn in the light most
favorable to nonmovant.99 "Ambiguities" must be resolved in
favor of the nonmovant.100 All doubts are resolved in favor of
existence of triable issues of fact.101

Of course, some commentators have expressed fear that, even
with these safeguards, the approach embodied in Celotex con-
fers inordinate benefits. One aspect of Celotex's central holding was
that Rule 56 does not require a movant to provide proof suffi-
cient to negate a claim on which the opponent would bear the
burden of proof at trial.102 Indeed, other comments in the

96. Anderson, 477 U.S. at 249. But see Towns, supra note 78, at 1024, 1027 (argu-
ing that despite the trilogy, the trial judge may and indeed must assess the "quan-
tum and quality of proof").


   Ct. 1481 (1992); Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir.

100. Rosen v. Thornburgh, 928 F.2d 528, 533 (2d Cir. 1991); Poulsen v. City of N.


102. Justice Brennan, joined by Chief Justice Burger and Justice Blackmun, did not
disagree with the Court's analysis of the operation of Rule 56. Celotex Corp. v.
would have affirmed the denial of summary judgment because the movant had not
met its burden of production. Id. at 332 (arguing that, where the moving party
moves for summary judgment on the ground that the nonmoving party has no evi-
dence, the moving party must show affirmatively the absence of evidence in the re-
cord).
Celotex opinion have been read to suggest that a movant may discharge its procedural burden without providing any supporting materials.\(^{103}\) Justices White and Brennan explicitly declined to join in this interpretation, believing that Rule 56 should place some affirmative duty of production upon movants.\(^{104}\) This “burden shifting” aspect of the Celotex decision has generated criticism from some quarters.\(^ {105}\)

The Court’s 1986 trilogy of cases can be seen as an endorsement of the vision of pretrial practice under the Federal Rules that emphasizes decisive, articulated rulings.\(^ {106}\) Trial judges are directed to assess the evidence as they would on a motion for entry of judgment as a matter of law,\(^ {107}\) based upon the available record after sufficient discovery.\(^ {108}\) Reviewing judges are, in

\(^{103}\) Id. at 322-25.
\(^{104}\) Id. at 328 (White, J., concurring); id. at 329 n.1 (Brennan, J., dissenting).
\(^{105}\) See Issacharoff & Loewenstein, supra note 47, at 75 (arguing that the “eased standards for bringing summary judgment motions” after the 1986 trilogy fundamentally alter the balance of power between parties by increasing the costs and risks to plaintiffs in pretrial practice while diminishing both for defendants); D. Michael Risenger, Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court’s New Approach to Summary Judgment, 54 BROOK L. REV. 35, 38-42 (1988) (arguing that summary judgment after Celotex places unfair burdens on nonmoving plaintiffs and interferes with the nonmoving party’s constitutional right to a jury trial); Carl Tobias, Public Law Litigation and the Federal Rules of Civil Procedure, 74 CORNELL L. REV. 270, 334-35 (1989) (noting the especially burdensome effects on public law litigants).

In many instances, these critics echo prior arguments against managerial pretrial procedure, but they also raise questions about the economic and constitutional ramifications of the decision. Though it may be an overstatement to treat these arguments as a “counter-revolution,” it is true that the uncertainty of the defendant-movant’s burden after Celotex creates some potential for unfairness and inefficiency. See infra part III.B (analyzing analogous inefficiencies under uncertain application of Virginia’s summary judgment). To the extent, however, that such arguments assert the blanket illegitimacy of pretrial “record prediction,” see Risenger, supra note 105, at 41, they are on a collision course with federal pretrial practice, where some evaluation of the discovery record is not only inevitable, but intentional. Where the opposing party is on notice, however, of the requirements of the pretrial practice rules, it is hard to see how the “record prediction” argument has any constitutional implications. See Louis, supra note 69, at 757-58 (“[S]urely the efficacy of the summary judgment procedure should not be emasculated because trial courts sometimes err.”).

\(^{106}\) See Schwarzer, supra note 51, at 213-14 (arguing the proper use of summary judgment requires thorough analysis by judge and parties and clear identification of the issues to be decided on the motion).

\(^{107}\) The decisions refer to this as the standard for granting a directed verdict, as the process was known prior to 1991 when the terminology of Rule 50 was changed.

\(^{108}\) If there is not sufficient evidence to permit a reasonable jury to find for the
effect, encouraged by the Court's decisions not to adopt narrow constructions of Rule 56 by erecting higher thresholds than the text of the rule requires, such as approaches that require a trial on the mere possibility that the pretrial record could conceivably vary from ultimate trial evidence.\textsuperscript{109} Thus, trial judges are directed to pursue summary judgment aggressively in the name of efficiency,\textsuperscript{110} and appellate judges are not to hinder this docket management effort.\textsuperscript{111} A federal district judge wrote that the \textit{Celotex} decision moved "the summary judgment procedure into the mainstream of modern case management."\textsuperscript{112} Articulated roughly contemporaneously with congressional reforms, judicial and advisory group advocacy, as well as popular and academic proposals to reduce docket inefficiencies and delay,\textsuperscript{113} this vision of judicial roles in trial and intermediate appellate courts was an effort by a majority of the Court to encourage active policing of the docket, with surgical excision of cases unsupported by the facts or on the law.

The practical effect of these efforts to encourage the use of summary adjudication at the trial level remains unclear. There is some evidence that trial and circuit courts generally have taken non-moving party on the issue, then "a rational trier of fact would not be able to find for the non-moving party, and the Court should enter summary judgment against it." Paul v. F.W. Woolworth Co., 809 F. Supp. 1155, 1158 (D. Del. 1992) (citing Matsushita Elec. Indus Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

Though the Court in \textit{Anderson} was careful to state that the trial judge's task was not to "weigh the evidence and determine the truth of the matter[,]" \textit{Anderson} v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), the records in \textit{Anderson} and in \textit{Celotex} included factual allegations which, if developed into trial evidence, would tend to support essential elements of the plaintiffs' claims. The above disclaimer from \textit{Anderson} notwithstanding, the opinions strongly suggest that trial judges have a duty to evaluate a plaintiff's proof prospects from a fact-finder's point of view.

\textsuperscript{109} See supra note 105.

\textsuperscript{110} See \textit{Leading Cases}, 100 HARV. L. REV. 100, 250-58 (1986) (arguing that the trilogy is likely to increase the frequency with which courts grant summary judgment).

\textsuperscript{111} See Apex Oil Co. v. DiMauro, 822 F.2d 246, 252 (2d Cir. 1987) (noting Supreme Court's encouragement of use of summary judgment by district judges).

\textsuperscript{112} Schwarzer, supra note 51, at 213.

\textsuperscript{113} See Kim Dayton, \textit{Case Management in the Eastern District of Virginia}, 26 U.S.F. L. REV. 445, 445-46 (1992) (noting that Congress and the courts have grown more receptive to popular calls for greater judicial efficiency and are more determined to address "burdensome caseloads, docket delay, and unreasonable expense" in the federal courts).
the Celotex directive as a mandate for a more enthusiastic pursuit of summary judgment. Many decisions following Celotex reveal an aggressive, docket-clearing operation utilizing this aspect of pretrial practice. The number of cases regularly resolved summarily, however, has not been the subject of significant empirical research since the 1986 decisions.

Our computer research found that searchable summary judgment motions in the federal trial court have increased from 4339 in 1985, just prior to Celotex, to 7502 in 1990 and 8078

114. Celotex has been cited in thousands of cases. A LEXIS search uncovered only twelve cases where district judges questioned or purported to limit the views expressed by Justice Rehnquist. See Issacharoff & Loewenstein, supra note 47, at 88-91 (reviewing post-trilogy lower court decisions); Lawrence W. Pierce, Summary Judgment: A Favored Means of Summarily Resolving Disputes, 53 BROOK. L. REV. 279, 280-81 (1987) (arguing that even prior to the trilogy, the Second Circuit was already growing more receptive to summary judgment); Georgene Vairo, Through the Prism: Summary Judgment and the Trilogy, in 1 RESOURCE MATERIALS: CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS, part II.F.1, at 30 (ALI-ABA 1992) (observing that circuit and district courts are responding to Celotex and are actively encouraging summary judgment motions).

115. See Gagne v. Northwestern Nat’l Ins. Co., 881 F.2d 309, 315 (6th Cir. 1989) (“[A] party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts his earlier deposition testimony.”); Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1034 (D.C. Cir. 1988) (requiring the non-moving party to designate specific triable facts); Baab v. AMR Servs. Corp., 811 F. Supp. 1246, 1263 n.6 (N.D. Ohio 1993) (“On summary judgment, the trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.”); Winters v. FDIC, 812 F. Supp. 1, 2 (D. Me. 1992); Parsons v. United States, 811 F. Supp. 1411, 1414 (E.D. Cal. 1992) (“The Court is not obligated to consider matters not specifically brought to its attention.”); Gagne v. Carl Bauer Schraubenfabrick, 595. F. Supp. 1081, 1084 (D. Me. 1984) (the court should review the summary judgment motion even if the adversary fails to oppose it).

116. In the years before 1973, when LEXIS began service, there was no widely available database of reported or unreported decisions, simply the West reporter system. Since 1973, LEXIS and later Westlaw have made available decisions not officially reported in the paper advance sheets and bound volumes of the reporters. The vast majority of the summary judgment decisions found in searches of the electronic databases either are or will be officially reported. We made no effort to determine whether the outcomes reported in this segment of the Article would be different if the small fraction of unreported federal decisions were excluded, or used as a data universe itself.

117. Our perception is that almost all summary judgment motions are reported at the trial court level, and of course attrition of those cases through the phases of the appeal process is heavy. Hence the decision was made to confine our attention to decisions in the federal district court databases.
in 1993. Looking at nothing more, these numbers give the impression of a significant increase in summary judgment activity. However, summary judgment issues have been raised in ever-increasing numbers of cases from the 1950s to the present day. Taking representative years at five-year intervals, for example, the numbers of searchable cases in which summary judgment was raised are as follows:

**Federal Summary Judgment Discussed: 1955-1993**

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1955</td>
<td>268</td>
</tr>
<tr>
<td>1960</td>
<td>411</td>
</tr>
<tr>
<td>1965</td>
<td>573</td>
</tr>
<tr>
<td>1970</td>
<td>867</td>
</tr>
<tr>
<td>1975</td>
<td>1625</td>
</tr>
<tr>
<td>1980</td>
<td>3087</td>
</tr>
<tr>
<td>1985</td>
<td>4334</td>
</tr>
<tr>
<td>1990</td>
<td>7502</td>
</tr>
<tr>
<td>1993</td>
<td>8078</td>
</tr>
</tbody>
</table>

Viewed in this more complete light, the trilogy of 1986 Supreme Court summary judgment decisions apparently does not represent a watershed in the trend of volume for summary judgment applications. Even omitting the earlier periods to avoid the visually-jarring effect that they have on the scale, the period for the decade prior to *Celotex* and the eight years since shows a steady increase in raw numbers of cases discussing summary judgment. Indeed, examining the year-by-year search results for the period from 1985 to date (which includes, in effect, two base years before *Celotex* became part of the popular legal culture and the centerpiece of judicial education programs), the accessible cases do not show a marked change in volume:

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118. These figures were derived from searches in the LEXIS GENFED Library, DIST File. The figures, for example, for the year 1985 resulted from the search: "SUMMARY JUDGMENT" & DATE=1985.
FEDERAL SUMMARY JUDGMENT DISCUSSED: 1985-1993

<table>
<thead>
<tr>
<th>YEAR</th>
<th>CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td>4339</td>
</tr>
<tr>
<td>1986</td>
<td>5566</td>
</tr>
<tr>
<td>1987</td>
<td>5972</td>
</tr>
<tr>
<td>1988</td>
<td>6443</td>
</tr>
<tr>
<td>1989</td>
<td>6929</td>
</tr>
<tr>
<td>1990</td>
<td>7502</td>
</tr>
<tr>
<td>1993</td>
<td>8078</td>
</tr>
</tbody>
</table>

Clearly, the increase from 1985 to 1986, in percentage and absolute terms, exceeds the annual increases for the years after Celotex.

We attempted to determine whether the Celotex trilogy had any appreciable impact on the percentage of summary judgment motions granted. While hundreds of cases were read to assess this issue, the results are offered only as an approximation. With that disclaimer, the searchable database reveals the following percentage of motions being granted:

119. See supra note 118; infra note 120 (discussing our search methodology).

120. The procedure for estimating the proportion of cases in which a summary judgment application was granted was to search for the term “summary judgment” within three words of the word “granted,” and to conduct a like search for the same term within three words of the word “denied.” A large number of months within the test years were sampled on this basis. Some four-fifths of the cases in any given month fell into one or the other of these categories. Selected months were sampled, and it was determined by reading the full text of the opinions that 95% or more of the cases captured by the search algorithm were correctly counted as cases in which the motion was granted, at least in part, or denied. We did not manually review the approximately one-fifth of the summary judgment decisions in the databases which do not respond to the “within three words” query to allocate them; our hypothesis is that most of those cases involve passing mention of summary judgment (as in, “defendant may, if so advised, move for summary judgment”) and that, in any event, the fact that such a high proportion of the cases do use the stock terminology, especially in the decretal paragraphs at the end of the opinion (e.g., “for the foregoing reasons, defendant’s motion for summary judgment is hereby granted/denied”) means that as a rough measure of the effect of Celotex, this technique (consistently applied before and after 1986) should indicate whether the opinions affected the percentage of the movants who experienced success.
It thus appears that some increase in the movants' success rate has taken place. Superficially, this might be said to coincide with the period of time it took the message of Celotex (i.e., that summary judgment is legitimate) to seep into the litigation bar's mentality. Again, taking a more long-term perspective, however, it is apparent that it could be error to place significant weight upon these numbers. Although the absolute number of published summary judgment decisions in the 1950s and 1960s was much smaller (and hence the sample appear grossly affected by slight shifts in the numbers) the percentage of summary judgment motions granted has fluctuated significantly, reaching as high as sixty-six percent in 1975, eleven years before Celotex, and sixty-five percent in 1965, two decades before the trilogy.

When viewed in the long run, it does not appear that the proportion of summary judgment motions granted has increased significantly, at least on the estimated basis used to sample the outcomes.
One final perspective on these numbers arises from the fact that the once-inexorable growth in federal civil case filings has abated in recent years. *Celotex* 's call for expanded use of the summary judgment procedure came at the peak of a steady and dramatic increase in case filings at the district courts. Based on figures compiled by the Administrative Office of the United States Courts, the raw volume of federal civil case filings has declined somewhat in the statistical years following the summary judgment trilogy:

**FEDERAL CASE FILINGS: 1975-1992**

<table>
<thead>
<tr>
<th>YEAR</th>
<th>CASE FILINGS</th>
<th>PERCENTAGE CHANGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>117,320(^{123})</td>
<td>—</td>
</tr>
<tr>
<td>1980</td>
<td>168,789(^{124})</td>
<td>44%</td>
</tr>
<tr>
<td>1985</td>
<td>273,670(^{125})</td>
<td>62%</td>
</tr>
<tr>
<td>1990</td>
<td>217,879(^{126})</td>
<td>-20%</td>
</tr>
<tr>
<td>1991</td>
<td>207,742(^{127})</td>
<td>-5%</td>
</tr>
<tr>
<td>1992</td>
<td>229,119(^{128})</td>
<td>10%</td>
</tr>
</tbody>
</table>

To get a handle on the proportion of all civil cases in which the trial court considers a summary judgment application, we compared the results of the broad computer search\(^{129}\) for all cases in which summary judgment was discussed in any context (admittedly overinclusive, since it captures cases where the mechanism is mentioned but such a motion is not pending) with the reported gross volume of civil cases. This comparison suggests, at least, that the proportion of civil cases in federal court in which summary judgment is an issue has increased somewhat since *Celotex*, as the absolute frequency of the motions has continued its stepwise increase, but the filing volume has tapered off:

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122. Percentage increase or decrease from the prior listed year.
123. 1975 ADMIN. OFF. U.S. CTS. ANN. REP 208, tbl. 25.
126. Id.
127. Id.
129. See supra note 120 and accompanying text.
PERCENT CHANGE IN SUMMARY JUDGMENT MOTIONS AND CASE FILINGS: 1985-1990

<table>
<thead>
<tr>
<th>YEAR</th>
<th>SUMMARY JUDGMENT DISCUSSED</th>
<th>% CHANGE</th>
<th>CASE FILINGS</th>
<th>% CHANGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1985</td>
<td>4339</td>
<td></td>
<td>273,670</td>
<td></td>
</tr>
<tr>
<td>1986</td>
<td>5566</td>
<td>28%</td>
<td>254,828</td>
<td>-7%</td>
</tr>
<tr>
<td>1987</td>
<td>5972</td>
<td>7%</td>
<td>239,185</td>
<td>-6%</td>
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<tr>
<td>1988</td>
<td>6443</td>
<td>8%</td>
<td>239,634</td>
<td>0%</td>
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<tr>
<td>1989</td>
<td>6929</td>
<td>8%</td>
<td>233,529</td>
<td>-3%</td>
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<td>1990</td>
<td>7502</td>
<td>8%</td>
<td>217,879</td>
<td>-3%</td>
</tr>
</tbody>
</table>

Of course, it bears noting that the proportion of civil cases resolved on summary judgment, while small in percentage terms, should be measured in proportion to the cases that actually reach the trial stage. In the federal system, for example, only 3.5% of the civil cases filed reach trial. If summary judgment is granted in approximately 5,250 cases annually, when compared to the 8,038 civil trials conducted annually by the federal judiciary, this figure is significant. These figures mean that approximately as many cases are dispatched on such motions as are actually tried. Summary judgment plays a substantial role in disposing of pending matters in federal court.

D. Problems in Federal Style Summary Judgment Practice

Most states have adopted summary judgment rules modelled after Federal Rule 56. With so many American jurisdictions using similar guidelines, it is appropriate to inquire whether there are rampant problems with this model. Only a handful of state summary judgment reform issues have surfaced in the Index to Legal Periodicals in recent decades, even in the state bar journals where one might expect to see evidence of dissatisfaction.

130. See supra text accompanying note 119.
131. All figures in this column are taken from the 1991 annual report. See 1991 ADMIN. OFF. U.S. CTS. ANN. REP. 138, tbl. 5-4.
133. That is, 65% of the 8,078 decisions on such motions reported as determined by our LEXIS research, discussed supra notes 118-20 and accompanying text.
135. See infra app. B.
if generalized problems existed. Of the few issues discussed, many concern the adaptation of state judges and attorneys to newly-adopted state summary judgment rules based on the federal model.

Federal summary judgment, on the other hand, received widespread attention after Celotex and, to a lesser extent, subsequent Supreme Court decisions. One of the principal criticisms of the Court's 1986 summary judgment decisions argues that, rather than placing too much discretion in the hands of the trial judge, the process places too much power in the hands of a movant to launch the summary judgment inquiries "cost free." These critics attack the uncontroversial core function of summary judgment as a "gatekeeping" or screening device designed to eliminate baseless claims from the judicial forum. These critiques lack empirical validation and ignore the real world and the intersections of practice, doctrine, and intentions behind civil procedure mechanisms.

Another criticism of the effects of the trilogy extends to the summary judgment context Professor Resnik's concerns about the ascendancy of case management goals and the resulting behavior of aggressively managerial judges. These concerns also are misplaced: to the extent that active judicial participation in "issue focusing" or "issue narrowing" in federal pretrial procedures is a problem, blaming summary judgment places the cart before


137. See, e.g., Martinis, supra note 136, at 73-75 (introducing Oregon practitioners to the changes in state summary judgment procedure following the 1975 adoption of a rule analogous to Rule 56).

the horse. In this subsection we discuss a range of these concerns, both formal and normative, and preview how aspects of the proposed Virginia rule provide protections against the perceived sources of likely abuse.

1. The "No Proof" Summary Judgment Motion

Perhaps the most strident criticisms of current federal practice arise from anecdotal observations. On the apparent strength of a one-month effort responding to a single summary judgment motion, for example, one observer concluded that it is too easy to launch summary judgment motions, raising the specter of a one-page notice of motion requiring Herculean efforts in response.139

Part of the error of these critiques is the belief that review of summary judgment papers is essentially an exercise in predicting what the record will be like at trial.140 On the contrary, summary judgment is a device that advances the stage of proceedings at which the nonmoving party must meet a burden to demonstrate some evidence on an element of its claim.141

In order to understand this point, one must disregard cases in which the subject matter of the litigation will require proof at trial meeting a higher-than-normal standard of proof.142

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139. See Risanger, supra note 105, at 37 & n.15. 140. Id. at 38. There are, however, no reported cases espousing a view of the summary judgment enterprise that would support the prediction metaphor. Indeed, the only cases turned up in several LEXIS searches concerning summary judgment and concepts with the “predict!” root that bear on the question of trial proof all hold that prediction is not a permissible enterprise. See, e.g., Weber v. American Express Co., 994 F.2d 513, 517 (8th Cir. 1993) (Arnold, J., dissenting) (“[W]e need to recall that a motion for summary judgment is not an opportunity for the trial court to predict which party is going to win or ought to win.”); TransWorld Airlines, Inc. v. American Coupon Exch., Inc., 913 F.2d 676, 693 (9th Cir. 1990) (“Nor are motions for summary judgment to be used as an occasion for predicting at an early stage what the record would eventually show if the facts were adequately developed.”); Torres v. Goodyear Tire & Rubber Co., 901 F.2d 750, 758 (9th Cir. 1990) (court will “make no prediction as to the actual state of facts that may ultimately be established”). Several decisions refer to the task presented on some summary judgment motions of predicting what a state’s highest court would do with an as-yet unresolved issue of law, but that is a very different context. See, e.g., Wang v. Hsu, No. C-87-2981, 1990 U.S. Dist. LEXIS 7745 (N.D. Cal. Apr. 17, 1990).


142. See text accompanying infra notes 430-31 (discussing the Anderson standard).
"normal" cases, not subject to the heightened evidentiary requirements of the Supreme Court's holding in *Anderson v. Liberty Lobby, Inc.*,143 the "non-weighing" approach prevails. Case law both before and after the 1986 decisions mandates that trial courts should not "weigh" a single witness' testimony against a dozen witnesses' testimony proffered by the opposing party.144 If there is evidence on both sides, the balance tips in favor of the nonmovant.145

Many critics of summary judgment practice fail to comprehend that having a procedural device to identify holes in a party's necessary proofs is a very important element in maintaining a functional pretrial litigation system. Sanction rules notwithstanding, parties commence defective claims.146 Of course, failure to allege a key element is grounds for dismissal under Rule 12.147 Although the proportion of federal civil cases disposed of on Rule 12 motions is small,148 the motion plays an important role. The

144. For cases before 1986, see, for example, Pfeil v. Rogers, 757 F.2d 850, 863 (7th Cir. 1985); Turrill v. Life Ins. Co. of N. Am., 753 F.2d 1322, 1326 (5th Cir. 1985); Dragan v. L.D. Caulk Co., 625 F. Supp. 690, 692 (D. Del. 1985) ("[T]he Court's function for purposes of summary judgment is not to weigh competing facts, but merely to decide whether a factual dispute exists.").

For cases after 1986, see, for example, Aiken v. Policy Mgt. Sys. Corp., 13 F.3d 138, 141 (4th Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("The district court's function at the summary judgment stage 'is not itself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.")); Washington v. Garrett, 10 F.3d 1421, 1428 (9th Cir. 1993).


146. A recent survey revealed that only a few judges thought Rule 11 sanctions were very effective in deterring groundless pleadings: "These judges stated that other methods, such as prompt rulings on motions to dismiss, motions for summary judgment, Rule 16 status conferences, and warnings, were just as effective or more effective tools for managing groundless litigation." Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475, 481 (1991) (citing E. WIGGINS & T. WILLING, RULE 11 JUDGE SURVEY AND FIELD STUDY PRELIMINARY REPORTS § 4, at 13-14 (Federal Judicial Center 1991) (footnote omitted)).

147. FED. R. CIV. P. 12.

148. Mullenex, *supra* note 4, at 469 n.193 (quoting CHARLES WRIGHT, THE LAW OF FEDERAL COURTS § 66, at 432 (4th ed. 1983) ("A sampling made in 1962 for the information of the Advisory Committee on Civil Rules suggests that such motions are made in only about 5% of all cases, and that in fewer than 2% of all cases do such motions lead to a final termination of the action.").
motion for dismissal can be used early and can excise defective claims (usually, where an element made necessary by governing law is not pled). If the pleadings allege the necessary elements of a viable claim, however, a motion addressing the face of the pleadings will not lie.\textsuperscript{149}

The second circumstance an effective pretrial procedure system must address is where the pleadings aver the necessary elements, but the plaintiff lacks evidentiary support for one or more of the key points. This situation is the core, "gatekeeping" function of the summary judgment motion, and even if it played no other role, the fact that this motion provides an opportunity to screen doomed claims would be of tremendous importance.

The critics claim that summary judgment procedure is "asymmetrical, grossly favoring defendants over plaintiffs no matter which party is the movant."\textsuperscript{150} In reality, because the plaintiff is required to go forward with production of proof and meet various burdens of persuasion, the trial is where the asymmetry is manifest. A motion to dismiss under Rule 12 is also asymmetrical, and can be made fairly inexpensively by the movant. For example, if plaintiff brings a claim which has six elements under the governing law, and the defendant recognizes that one of the elements (e.g., notice to an employer) is not pled, the defendant's motion may be lodged without investment of significant resources.

Indeed, in the Anglo-American tradition, stating a viable claim is (and should remain) the pleader's burden.\textsuperscript{151} Most causes of action have multiple elements, and a plaintiff must plead and prevail on all of them in order to carry the day. The plaintiff may plead a detailed complaint stretching over dozens of pages, but if the defendant can locate a single, necessary element of the claim that the plaintiff has omitted, the motion to dismiss is appropriate.\textsuperscript{152} The Rule 12 motion operates to point out the defect (nor-
mally at an early stage) on the face of the pleading.

The "no proof" summary judgment motion operates in the same manner. Although the plaintiff has pled all of the prescribed elements for a viable claim, the defendant may recognize that there is literally "no proof" on one or more of the elements. Whether this circumstance arises innocently or as a result of thoughtless exuberance in stating a claim when the plaintiff should know better, the function of the summary judgment motion is to dispose of the defective claim.

The "no proof" summary judgment motion, therefore, accelerates the time at which the party with the burden of proof at trial must indicate that it has at least some evidence on the identified elements. If the burden of responding is not disproportionate, it is not unfair to require this showing before trial. Even the harshest critics of directed verdict practice admit that courts should terminate a case in which a discrete, required element is unproven.

Nor is the timing of the required showing unfair. The text of the summary judgment rule embodies formally the practical reali-

sense that the plaintiff has committed a technical drafting error, and can reframe the pleading to address the necessary points, or whether the plaintiff cannot ethically plead the crucial matter omitted in the prior filing.

153. Cf. FED. R. CIV. P 12(h)(2) (timing of raising a plaintiff's failure to state a claim upon which relief can be granted: "an objection may be made in any pleading or by motion for judgment on the pleadings, or at the trial on the merits").

154. For example, where plaintiff thinks that it will be demonstrated that defendant had notice of the events, and at the time of the commencement of the action Plaintiff has no access to information about defendant's internal operations. Discovery and other investigations into the facts after commencement of the action makes it clear that there was no such knowledge on defendant's part.

155. For example, where plaintiff herself must have taken prescribed steps to create or preserve a claim, and a moment's study would have disclosed that the requirement was not met.


157. And it is not. See supra notes 140-45 and accompanying text.

ty known to every litigator. The rules do not allow a movant to rush the party with the burden of proof by requiring response before a fair opportunity to gather proof on the identified issue. Although Rule 56 permits a motion at any time after the parties are fully at issue, Rule 56(f) provides an important safety valve by noting that a party may respond to a motion by stating the need for more exploration of the facts. The language suggests the gloss that one seeking to defer response to a pending motion should articulate some degree of specificity in discovery needs. Certainly, courts will be skeptical when the nonmoving party seeks additional preparation time to respond on an issue when that party controls the relevant facts. But the rule provides real protection against the abuse that would attend the determination of a proffered summary judgment motion before affording to the pleader with the burden of proof a fair opportunity to gather facts.

2. Managerial Summary Judgment

Given Chief Justice Rehnquist’s vigorous endorsement of efficiency goals in federal summary judgment, it is not surprising that some commentators have characterized the use of summary judgment as a facet of managerial judging. Because case management relies on increasing the efficiency of post-pleading, pretrial screening and focusing mechanisms, managerial judging would be impossible without something resembling the summary judgment device. The existence of a summary judgment de-

159. See FED. R. CIV. P 56(a).
160. Id. rule 56(f).
161. See sources cited supra note 67; see also Issacharoff & Loewenstein, supra note 47, at 89 (citing “evidence in the post-trilogy case law that summary judgment has been transformed into a mechanism to assess plaintiff’s likelihood of prevailing at trial” by weighing the available evidence); Schwarzer, supra note 51 (Celotex moving summary judgment into modern case management); Stempel, supra note 67, at 96-99 (tying case management trend to the Supreme Court trilogy). But cf. Paul Carrington, The Reporters Speak: Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Body of Non-Trans-Substantive Rules of Civil Procedure, 137 U. PA. L. REV. 2067, 2092 (1989) (viewing summary judgment “as an alternative both to sanctions and to managerial judging,” in which summary judgment provides more accountability for the dispositive impact decisions made by a trial judge owing, apparently, to the likelihood of a reported and appealable disposition).
162. See Resnik, Managerial Judges, supra note 67, at 402 n.115 (citing cases where
vice is an intrinsic force, shaping the incentives of parties in pretrial maneuvering. Nevertheless, utilization of the device as a management tool is dependent on a myriad of other incentives and assessments. Regardless of the imperative for efficiency, parties and judges make many choices in deciding how to pursue pretrial procedure which in turn define the function of summary judgment.

Initially, summary judgment practice is initiated by the parties. The one aspect of federal practice almost wholly within judicial prerogative is the power of the trial court to make factual findings even when the motion process does not lead to entry of a judgment. Very few cases undertake fact finding after an unsuccessful effort at summary judgment, and this lack of cases is perhaps the strongest evidence that judges do not use summary judgment as a managerial tool. Rule 56 expressly authorizes the trial judge to salvage some utility from the parties’ effort, and her own, in assessing a case on summary judgment, but only where full or partial summary judgment may not be entered. In the theory of Rule 56, the court is free to make detailed factual findings of those matters which the parties do not dispute, even though they fail to amount to sufficient elements warranting entry of judgment as a matter of law on a claim or defense.

163. See supra note 48 (discussing power of federal courts to enter summary judgment sua sponte). There are, however, almost no reported cases where summary judgment was entered without a motion by one of the parties. See generally Shapiro, supra note 57, at 1982 n.45 (collecting three reported cases which asserted that the court could summarily dismiss claims without a party-initiated summary judgment motion).

Of course, given that Rule 16 now provides for discussion of the elimination of frivolous claims during pretrial conferences, a judge may be able to ignore the inquiry and precipitate a discussion at which the prospective motion victor is encouraged to go forward with what is, in perspective, an invited motion. See FED. R. CIV. P 16.

164. On the face of the rule, engaging in such fact finding is a duty: the court “shall if practicable” determine material facts not subject to dispute. FED. R. CIV. P 56(d).

165. Id.

166. Indeed, commentators have argued on efficiency grounds that Rule 56 should be amended to change its focus from the disposition of entire claims to the pretrial adjudication of specific facts. E.g., DAVID S. HERR ET AL., MOTION PRACTICE 446-48 (1991).
A truly managerial judge would undertake Rule 56(d) practice in nearly all cases, so that proof issues preserved for adjudication might be streamlined.167 In fact, however, it is almost never undertaken.168 State reaction similarly appears to ignore this possible source of direction and control of the future course of a case.169 The relative lack of utilization of the "issue focusing" judicial function in Rule 56 suggests that the fears of overweening managerial judging are misplaced in the summary judgment context.170

Observation of the behavior of some of the most "managerial" courts also shows how managerial theory can conflict with summary judgment reality. The principal management tools employed by aggressively managerial courts are time deadlines and staging directions that require a specific sequence of preparation steps.171 In some courts, this approach takes a distinctly hostile flavor vis-a-vis motion practice. For example, in the Southern District of New York, one of the most hectic litigation centers in the federal system172 and a court known for active judicial management, several judges have subscribed to local rules,173 or "lo-

167. See Elliott, supra note 67, at 322 ("[M]anagerial judging was a response to a perceived need by judges to narrow issues if litigation was to be processed in a reasonably efficient fashion.").
168. While documenting this observation requires inferential use of support, it is perhaps sufficient to note that the number of reported cases reciting the use of facts found under Rule 56(d) is fewer than 250.
169. In Virginia, objections to the possibility of such "rampant" fact finding caused the draft rule on summary judgment to be re-written in 1993. At the Boyd-Graves conference in October 1992, strident opposition was voiced to the possibility that trial judges, not subject to an effective right of appeal in Virginia, would be empowered to "find facts" on the motion stage of the process. Since the disuse of the Rule 56(d) model was well known, the drafters of the proposed Virginia rule deleted the mechanism for such fact-finding from the discussion drafts in order to avoid needless controversy over insignificant aspects of the summary judgment process.
170. Of course, the lack of reported opinions does not eliminate the possibility that judges wield the power to shape the issues during pretrial conferences. See Resnik, Managerial Judges, supra note 67, at 400-02 n.115 (envisioning judicial coercion to settle cases through unreviewable "pre-decisions" communicated to counsel at pretrial conferences).
171. See Dayton, supra note 113, at 455.
172. For example, in a recent study, the Southern District of New York had almost 50% of all cases terminated by visiting judges and one of the highest weighted civil filings per judgeship. 1992 ADMIN. OFF. U.S. CTS. ANN. REP tbls. V-1, X-1A.
173. S.D.N.Y. Civ. R. 3(0).
cal, local rules," forbidding the filing of motions without first "applying for" a "pre-motion conference" and obtaining at such a session leave by the grace of the presiding judge to burden the court with the filing of a dispositive motion.175

Why would aggressive, management-oriented judges seek to avoid motion practice, especially post-Celotex? In part, the attitude may spring from a sense that defense counsel in major commercial cases may engage in summary judgment motion practice with blissful apathy about whether the practice has much chance of disposing of the case.176 Whether the thoughtless filing of major motions is undertaken in any appreciable proportion of the cases on the docket simply to achieve delay (while the motion is pending) or to burden the adversary (with the costs and effort of response) remains to be determined by statistical study. Nothing in the burgeoning sanction literature suggests that commencement of specious summary judgment motions is a prevalent problem.177

But in busy courts, particularly those of the federal system—in which the demands of the criminal case docket under the Speedy Trial Act178 are such that most working days are devoted to criminal, not civil, cases179—may be forgiven for feeling that they have literally "no time to waste" on motions that may not directly resolve the civil case.

A second reason why summary judgment may not be viewed as an effective management tool for trial courts is that the parties know better than the courts whether the evidence warrants a summary judgment motion. Modern courts do not require the

175. Nine of thirty-six judges in the Southern District of New York require a pre-motion conference for at least some motions. Id.
176. The high reversal rates for summary judgments which existed prior to Celotex actually made it more likely that the preemptive motion would be used strategically rather than substantively to narrow or eliminate claims before trial. However, post-Celotex, "[i]t is in the moving party's interest to ensure that adequate time [for discovery by the parties] is provided." Schwarzer, supra note 51, at 221.
regular filing of discovery fruits in most instances,\textsuperscript{180} and, even where transcripts and interrogatory answers are lodged, the documents produced under Rule 34 are not.\textsuperscript{181} Most importantly, trial judges do not routinely read the documents that are filed (or have a law clerk do so) in an effort to find a defect in a claim or defense that begs for summary adjudication.

Thus, whether the evidence is such that a summary judgment motion should be filed is almost exclusively a matter of attorney judgment because only the attorneys have a grasp of the plethora of facts during most of the pretrial preparation stages. Of course, on occasion a judge (perhaps, through detailed grappling with discovery disputes) comes to recognize that there is a narrow proof issue on which some or all of the case turns, and the party favored by the apparent state of the record may express or signal to the court that its adversary simply lacks the wherewithal to establish its claim or defense.

Summary judgment as a procedure always has rested uncomfortably in the context of managerial judging. There is a difference between the availability of a robust summary judgment mechanism as a legitimate screening or gatekeeping device to streamline a heavy litigation docket load and the concept of summary judgment as an issue-focusing, management tool.\textsuperscript{182} Summary judgment can play an important role in weeding out cases that are not viable. The capacity of this motion to eliminate a segment of the caseload, however, is not the equivalent of demonstrating that the motion is an efficient management technique.

III. SUMMARY JUDGMENT IN VIRGINIA PRACTICE

Modern procedural systems provide devices for reviewing pending civil cases at each stage of the law suit. The principal vantage points from which case sufficiency is assessed in modern legal systems begin immediately after the filing of the suit—when a motion to dismiss (in Virginia practice a demurrer) may be filed

\textsuperscript{180} See FED. R. CIV. P 5(d) (court may direct non-filing of discovery fruits).
\textsuperscript{181} See id. rule 34.
\textsuperscript{182} See Flanders, supra note 67, at 507 (cautioning against the confusion of genuinely questionable judicial approaches to case management with "established [pretrial] practices that are generally recognized as acceptable and even essential").
to challenge the sufficiency of the averments in the charging pleading. During the pretrial phases, summary judgment is the principal mechanism by which baseless cases may be stricken from the docket. During trial, a motion for judgment as a matter of law (in Virginia, the motion to strike followed by a motion for summary judgment) allows for dismissal of the case after the plaintiff has had an opportunity to present proof in the trial forum. These three mechanisms are broadly available in the state court systems¹⁸³ and in the federal courts. Each has a distinctive office.

A. Context: Pleading and Demurrer Practice in Virginia

The motion to dismiss entails a review of legal and factual sufficiency, although the former predominates in important ways. These attacks on the facial sufficiency of the plaintiff's pleading are reviewed under familiar principles. All of the averments in the pleading are treated as true for purposes of the review,¹⁸⁴ not only are facts expressly asserted in the pleading taken as true, but reasonable inferences springing from those facts are accepted for the purposes of the dismissal review¹⁸⁵

Most motions to dismiss and demurrers challenge the legal sufficiency of plaintiff's pleading.¹⁸⁶ Factual review is confined to the facts alleged,¹⁸⁷ and the demurrer is deemed to be an admission, for purposes of the motion, of the truth of the facts asserted.¹⁸⁸ The court may review any exhibit attached to, or mentioned in, the pleading.¹⁸⁹ The facts thus amassed are con-

¹⁸⁵. See CaterCorp, 431 S.E.2d at 279; Rosillo v. Winters, 367 S.E.2d 717, 717 (Va. 1988).
¹⁸⁸. CaterCorp, 431 S.E.2d at 279 (citing Rosillo, 367 S.E.2d at 717).
¹⁸⁹. Reistroffer v. Person, 439 S.E.2d 376, 378 (Va. 1994); see Fun v. Virginia Mili-
strued in the light most favorable to the party whose pleading is attacked. Typically, the question is whether the prescribed elements of a cause of action found in the prevailing law of the jurisdiction are included in the averments of the pleading. The necessary elements for the cause of action might be recited in decisions of the Supreme Court of Virginia for common law causes of action, and either in such decisions or in the statute for statutory claims. The dominant modality of motions to dismiss and demurrer practice, therefore, is the review of pleading paragraphs to look for allegations that touch upon each of the elements necessary to state a viable claim under the applicable law. Frequently, even conclusory allegations will suffice.

To a lesser extent, demurrer practice in Virginia reviews factual matters. As noted above, the facts asserted in the plaintiff's pleading are taken to be true for the purposes of the demurrer, and whether those facts will actually be proven is not properly measured at that stage of proceedings. Further, the doctrine of accepting reasonable inferences from the facts as true for purposes of the demurrer, while rarely evidenced in practice in any important respect, is routinely recited and serves the formalistic function of directing attention away from evaluating the underlying reality. Instead, the trial court is directed to assume the facts favorable to the plaintiff pleader, reducing the question on the demurrer to whether all of those assumed factual proposi-

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192. See, e.g., CaterCorp, 431 S.E.2d at 279-82.
194. As the court stated in CaterCorp, "[w]hen a motion for judgment or a bill of complaint contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer." 431 S.E.2d at 279 (citing Hunter v. Burroughts, 96 S.E. 360, 365 (Va. 1918)).
195. See, e.g., CaterCorp, 431 S.E.2d at 279.
tions would be sufficient to address the necessary elements of the claim.

As a result, an experienced pleader who does competent legal research into the governing law has little excuse for failing to draft a pleading that will withstand a demurrer. Indeed, one sanction decision decided by the Virginia Supreme Court in 1993 supports the proposition that, at some point, the failure to plead the obvious and required elements for a claim under Virginia law, necessitating demurrer and motion practice, can subject the pleader to monetary sanctions.197

One might expect, of course, that the development of sanctions jurisprudence in Virginia would need to be taken into account in assessing the role of a demurrer. After its enactment in 1987, Virginia Code section 8.01-271.1 198 has gradually become part of the legal culture in Virginia. It remains, however, a lightly used provision. While in federal practice thousands of decisions discuss the comparable provisions of Federal Rule 11, and full-length treatises catalog the thick body of law being developed to implement Rule 11,199 in Virginia there are only a half-dozen reported sanction decisions by the supreme court200 and only a small number of sanction decisions reported at the trial court level. In the most recent calendar year for which statistics are available, out of 105,962 circuit court civil dispositions,201 only six reported cases granted sanctions.202

The Supreme Court of Virginia deftly has selected for appellate review a collection of key subjects within the law of sanctions. Claims lacking in legal basis clearly may be the subject of sanctions under section 8.01-271.1.203 The court also has specified

197. The court approved multiple $3,500 sanctions where a motion for judgment asserted claims for which necessary elements were lacking. Nedrich, 429 S.E.2d at 207.
199. See, e.g., Vairo, supra note 177, at Supp. 1991; Joseph, supra note 177.
202. This figure was calculated from 1992 decisions reported and indexed in volumes 27-29 of the Virginia Circuit Court opinions.
203. VA. CODE ANN. § 8.01-271.1 (Michie 1993); see Tullidge, 391 S.E.2d at 289-90
that pleading claims for which the factual predicate has not been explored adequately, and which later proves to be lacking, may also be the basis for sanctions in Virginia.\textsuperscript{204}

Arguably, the one-sided factual assumptions made in demurrer practice, which accord full sway to the factual averments in the pleading and, indeed, also credit \textit{implied} facts flowing from those expressly stated, are not without bounds. Under this view, a pleader whose legal skills exceed his ethical compunctions would not be free to pepper a motion for judgment with artificial facts set forth simply to cover the elements needed to state a cause of action. Averring those facts without the good faith basis required by the pleading rules\textsuperscript{205} and the sanction statute would be improper.

One hopes the sanction rules have this effect. Certainly, the cries from some segments of the bar and some academic commentators about the fear of "chilling" advocacy in marginal cases, as a result of the specter of sanction proceedings, suggests that at least some members of the litigation community perceive that some deterrence may result from the heightened scrutiny of a pleading's factual basis.\textsuperscript{206}

It appears to us, however, that the combination of demurrer practice and sanction rules is not sufficient to assure that cases reaching the extended pretrial phase of civil litigation routinely have factual support for all of the points necessary to sustain a

\begin{itemize}
\item \textsuperscript{204} Oxenham, 402 S.E.2d at 4 (imposing sanctions).
\item \textsuperscript{205} See VA. SUP CT. R. 1:4.
\end{itemize}
cause of action. The major reason for this insufficiency is that Virginia, like most modern jurisdictions, relies on a version of the notice pleading doctrine. In the run-of-the-mill case it is not necessary to aver "evidentiary detail" in the plaintiff's initial pleading.\textsuperscript{207} For some subject matters, such as negligence, Virginia law permits a plaintiff to plead "generally," which results in highly opaque averments that are deemed sufficient as a matter of law.\textsuperscript{208} Although available techniques allow the defendant to elicit the more precise contours of the facts alleged in support of these general averments (e.g., bill of particulars practice)\textsuperscript{209} few contend that these devices seamlessly elucidate the factual lacunae in plaintiffs' pleadings.

Nor is the problem necessarily reflective of dilatory practice on the part of plaintiffs. In many instances a plaintiff will have some ethical, good faith basis for making averments about factual issues when the necessary information rests in the hands of the defendant. Internal processes or actions of a corporate defendant are one common arena where this situation obtains. Averments of a defendant's intent are also beyond the plaintiff's knowledge. The plaintiff may have a sufficient basis for inferring intent in the actions of third parties, satisfying the pleader that a non-sanctionable factual averment properly can be set forth.

In these instances, neither the facial review of a demurrer nor the possibility of looming sanctions will deter a plaintiff from making the factual allegations necessary to state a viable claim. The face of the pleading will thus be sufficient to withstand the test of a demurrer, and the case will proceed into the preparation stage. In some jurisdictions, the court may review the case at this stage after a motion for summary judgment.

B. Summary Judgment in Virginia Today: Hobbled at Best

Summary judgment practice is almost nonexistent in Virginia. Of the several thousand Virginia trial court decisions reported, only forty resulted in pretrial summary judgment disposi-
During the last twenty years, two million trial court dispositions were rendered in Virginia, only fifty-three summary judgment decisions reached appellate review.

We sought to compare the reported rulings on pretrial summary judgment motions in Virginia to a statistical analysis of the federal system. In 1977, William P McLauchlan sampled 535 reported federal cases, including 215 appellate and 320 trial court decisions, from 1938 to 1968. The Virginia summary judgment cases from 1954 to 1994 total ninety-three reported cases: forty circuit court opinions and fifty-three decisions of the Supreme Court of Virginia. Despite the variance in the sample size, we believe that the comparison is a useful way to study the evident restrictiveness of the Virginia summary judgment.

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210. Trial court decisions in Virginia are not officially reported, but are collected systematically in Va. Cir. Ct. Opinions (Butterworth 1993).

We offer the numbers recited in the text not as a claim of the absolute frequency of summary adjudication, but on the premise that the proportion of reported trial court decisions in which summary judgment figures is indicative of summary disposition in the larger body of unreported dispositions as well. Indeed, one could argue that there is a greater likelihood that cases interdicted pretrial with summary judgment would find their way into the volumes of reports, and hence the number of unreported decisions in which summary judgment is involved would be proportionately less.

211. Virginia's circuit courts are closing over 100,000 civil cases per year. See JUDICIARY'S YEAR IN REVIEW 1992, supra note 201, at A-47, tbl. 10. In the last ten statistical years, for example, over one million civil cases were filed in the circuit courts alone. Id.

212. Results of LEXIS and Westlaw searches, January, 1994. Mid-trial entry of judgment, which would be called a directed verdict in most systems, has been labelled summary judgment in several periods of Virginia legal history; these post-evidentiary dispositions have been excluded in the tabulation, which focuses on pretrial summary judgment in the form discussed throughout this Article.


214. Id. at 435.

215. Tabulations on file with the author. These cases were gathered from a LEXIS search and from published citations. The summary judgment decisions make up a very small portion of the reported cases since 1954: less than 0.5% of the circuit court opinions and less than 1% of the supreme court opinions. There were no summary judgment decisions in the Virginia Court of Appeals Reports index.

216. The Virginia cases are probably not statistically sufficient to generalize about Virginia summary judgment in isolation. See, e.g., McLauchlan, supra note 213, at 442 n.65 (criticizing a commentator's conclusions regarding the success rate of federal summary judgment motions due to the insufficiency of the commentator's sample). However, the dramatic difference between the Virginia and federal rates of success,
Win Ratios for Summary Judgment Categorized by Which Party Moved

<table>
<thead>
<tr>
<th>Movant</th>
<th>Virginia:</th>
<th>Federal:</th>
<th>217</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff</td>
<td>35%(^{218})</td>
<td>62.9%</td>
<td></td>
</tr>
<tr>
<td>Defendant</td>
<td>34%</td>
<td>73.9%</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>34%</td>
<td>70.9%</td>
<td></td>
</tr>
</tbody>
</table>

A comparison of win ratios indicates that a summary judgment motion is twice as likely to be granted (and subsequently sustained if appealed) in the federal courts than in the Virginia courts.\(^{219}\) The Supreme Court of Virginia reversed trial judges in 68% of the appellate cases, compared to a 49.6% reversal rate in the federal sample.\(^{220}\) Plaintiffs and defendants moved for

discussed above, cannot be accounted for by the probability of error resulting from unreported decisions; therefore, the data can support our comparative conclusions.

217. McLauchlan, supra note 213, at 443.

218. In our study, we have designated as plaintiffs those parties which asserted the claim or defense adjudicated in the motion. That is, in four cases we reconfigured the parties to reflect their true position in counterclaims and affirmative defenses: three times "plaintiffs" were redesignated defendants, and one "defendant" was numbered among the plaintiffs. Though McLauchlan does not state whether he reconfigured parties in a similar fashion, we believe that this is a more accurate way to reflect the reality of the cases. The possible variance does not, of course, affect the overall success rates.

219. It is true that, as McLauchlan noted, the study of the reported cases does not account for unreported rulings from trial courts. See McLauchlan, supra note 213, at 435. McLauchlan also conducted a docket study from an Illinois district court that showed some differences from the reported case sample. Id. at 449-56. The general success rates of parties making the motion, however, was consistent with the reported case sample. Id. at 450. One dramatic difference occurred in the success rates for plaintiffs: 62.8% in the reported case sample and 24% in the docket study. Id. at 453. This result is unsurprising, as a plaintiff whose motion for summary judgment has been denied may proceed to trial or settlement. Id. A subsequent verdict against that plaintiff usually confirms the trial judge's judgment that genuine issues existed. In contrast, a verdict for the plaintiff will foreclose an appeal of the trial judge's denial.

220. See McLauchlan, supra note 213, at 449. All but three of the thirty-six Virginia reversals reversed the granting of a summary judgment and remanded for trial. The other three were cases where the Supreme Court of Virginia could enter judgments for the nonmoving parties on the appeal record. See Bristol Sch. Bd. v. Quarles, 366 S.E.2d 82, 90 (Va. 1988) (finding sufficient facts to support administrative removal of state employee after reversing trial court's injunction of proceedings on due process grounds); White v. Blue Cross, 212 S.E.2d 64, 65 (Va. 1975) (ambiguity of insurance contract mandates a finding effectuating coverage for plaintiff); Nationwide Mut. Ins. Co. v. Clark, 194 S.E.2d 699, 702-03 (Va. 1973) (entering summa-
summary judgment in roughly the same proportion in both sets of data.\textsuperscript{221} Finally, although isolated generalizations from the Virginia cases are statistically suspect,\textsuperscript{222} the Virginia decisions do not tend toward any greater success rate over the period studied; in fact, the success rate is higher in the older cases—those before 1980—than the subsequent cases.\textsuperscript{223} Further reliance upon comparisons with the McLauchlan results is probably not useful due to the size of subsamples involved.\textsuperscript{224}

These comparisons\textsuperscript{225} lead to a number of duly qualified observations. Successful use of summary judgment in Virginia is rare relative to that in the federal courts. A party who appears to merit a speedy resolution of her liability or claim will find summary judgment an inefficient vehicle. Because the party would seek to avoid further delay of the case, she should wisely reconsider filing a summary judgment motion, even if she suspects that the outcome at trial is a foregone conclusion. The paucity of reported summary judgment cases in Virginia suggests that the motion is not often made.\textsuperscript{226} Whether the chicken or the egg came first, the evidence tends to reinforce the widely-held perception that the summary judgment motion is not very effective and that the motion is not frequently utilized.

Comparative statistics on the frequency of summary dispositions nationally are not available, but as described above, the Virginia procedural system’s capacity to screen out baseless

\begin{itemize}
\item \textsuperscript{221} In the federal sample, plaintiffs moved for summary judgment in 21.7\% of the cases, defendants in 58.1\%, and both parties in 16.3\%. McLauchlan, \textit{supra} note 213, at 442. In the Virginia sample, plaintiffs filed the motion in 25\% of the cases, defendants in 67\%, and both in 9\%.
\item \textsuperscript{222} See \textit{supra} note 210.
\item \textsuperscript{223} The success rate in pre-1980 Virginia reports was 41\%, or 16 out of 27 cases. The post-1979 success rate was 31\%, or 18 out of 26. The district court cases were excluded from this sample due to the insufficiency of pre-1980 reported cases.
\item \textsuperscript{224} McLauchlan breaks down his sample into subclasses determined by types of action, by the use of supporting materials, and other distinguishing factors. See McLauchlan, \textit{supra} note 213, at 438-41. Unfortunately, our sample becomes meaningless at such a scale. For example, we found no Virginia summary judgment cases which could be classified as “real property” cases.
\item \textsuperscript{225} See \textit{supra} notes 210-24 and accompanying text.
\item \textsuperscript{226} See \textit{supra} note 215.
\end{itemize}
claims is feeble by any measure. Five key factors make summary judgment under the current Virginia rules ineffectual. These factors are: (1) the doctrine that averments in the pleadings can preclude summary judgment, (2) the lack of express authority for the use of affidavits on summary judgment, (3) the lack of express authority for the use of other sources of proof on summary judgment, (4) the statute and rule barring the use of deposition testimony on summary judgment, and (5) the governing rule's absence of a procedural roadmap that could aid the court and the parties in formulating summary judgment issues. Each of these problem areas is discussed in turn.

1. Pleading Allegations and the "Duty" to Present Evidence

While some national commentators have lamented the alleged ease with which the federal system gives rise to an obligation on plaintiff's part to make this showing, no community of opinion doubts that after a proper showing by the movant, the plaintiff in some cases should be required to demonstrate—pretrial—the existence of at least some admissible evi-

227. Rule 3:18 now provides:

Either party may make a motion for summary judgment at any time after the parties are at issue. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in his favor. Summary judgment, interlocutory in nature, may be entered as to the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment shall not be entered if any material fact is genuinely in dispute. No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the action shall agree that such deposition may be so used.

VA. SUP CT. R. 3:18. Rule 2:21 contains an introductory limitation barring use of summary judgment in suits for divorce or annulment, but is otherwise identical to Rule 3:18. See id. rule 2:21. Efforts to inaugurate a Family Court in Virginia are underway as this Article goes to press. This development will affect the appropriateness of the domestic relations exemption. This Article proposes that if dual summary judgment provisions remain in the Rules of the Supreme Court, both rules should be amended in a similar fashion. For ease of reference, we hereinafter refer to the two provisions as a unitary Virginia "rule."

228. See sources cited supra note 105.
idence for each required element of the claim. If the review of summary judgment applications does not require the plaintiff to document the means by which facts will be proven, little differentiates summary judgment from demurrer practice. In Virginia, plaintiffs are spared the obligation to respond on the merits if the averments in the motion for judgment state a proposition counter to the focus of the summary judgment motion on their face.229

The federal court system recognized this problem in 1963. An amendment to Federal Rule 56 redressed the case law that had created the right of a plaintiff to defeat summary judgment by relying on the averments in the complaint.230 Many state court procedural systems have similarly amended their summary judgment rule to obviate this maneuver.231 Unless interdicted by rules revisions, the older case law doctrine effectively prevents summary judgment by reducing the practice to a motion to dismiss device in which the facial completeness of the charging pleading will be sufficient to preclude pretrial screening for unprovable cases.

As in other jurisdictions, Virginia case law has developed to allow plaintiffs to rely on averments in their own motions for judgment to defeat defendants' summary judgment applications.232 In several cases, the Virginia Supreme Court has held the denial in the responsive pleading suffices to bar summary judgment.233 Thus, the court has held that a party expressly denying a point in its answer "created an issue of fact which made summary judgment inappropriate."234 Another decision found summary judgment improper where a party reiterated its

229. See infra notes 232-54 and accompanying text.
230. See Advisory Committee's Note, 1963 Amendments to the Federal Rules of Civil Procedure, 31 F.R.D. 647 (1963). The Advisory Committee commentary which accompanied this reform indicated that the goal "of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Id. at 648.
233. See, e.g., id. at 716; George Robberecht Seafood, Inc. v. Maitland Bros., 255 S.E.2d 682, 684 (Va. 1979).
denial from the answer in response to a request for admissions. The court in that case indicated that the factual question "was drawn in issue" by this sequence of answer and refusal to admit. By implication, the state of the case law and rules in Virginia imposed no duty on the defendant to set forth a basis for the denial. Conversely, at least one decision suggests that the plaintiff's charges precluded summary judgment even when they had been denied in the answer, and all discovery had confirmed that denial was correct.

Thus, Virginia courts have described plaintiff as under "no duty" at the pretrial stage to fully develop evidentiary support for an essential allegation of his claim. The "no duty" formulation figured prominently in a pair of 1974 tort cases. In Owens v. Redd, the plaintiff sued a supermarket, a soft drink bottler, and a beverage distributor for injuries suffered when a bottle of cola fell and exploded in the store. In her pleading, the plaintiff alleged that the manufacturer and distributor had negligently stacked the bottles on an unsafe rack and that this negligence was a proximate cause of her injuries. Based on plaintiff's deposition testimony, the trial court entered summary judgment for the manufacturer and distributor on the ground that the sole proximate cause of plaintiff's injuries was the negligence of an unidentified man who knocked the bottle from the rack. The Supreme Court of Virginia reversed, finding that the plaintiff was under no duty to fully develop her alle-

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236. Id. at 486.
238. Winslow, Inc. v. Scaife, 299 S.E.2d 354, 357 (Va. 1983). The court did note that some key documents were not before the court, although a number of others had been submitted. Id.
239. O'Brien, 210 S.E.2d at 167; Owens, 205 S.E.2d at 671.
240. O'Brien, 210 S.E.2d at 167; Owens, 205 S.E.2d at 671.
241. Owens, 205 S.E.2d at 670.
242. Id. at 670-71.
243. The case occurred shortly before the Virginia legislature banned the use of depositions for summary judgment motions without the agreement of the parties. See VA. CODE ANN. § 8.01-420 (Miche 1992).
244. Owens, 205 S.E.2d at 670.
gations of negligence and proximate cause.\textsuperscript{245}

The \textit{Owens} formulation of the "no duty" rule may have been unnecessarily broad. Without comment, the court noted the existence of evidence in the record that could support an inference of the defendants' negligence.\textsuperscript{246} However, the court based its reversal on the defendants' inability to negate an essential allegation of the plaintiff's claim—an element for which the plaintiff would have the burden of production and proof at trial.\textsuperscript{247}

In \textit{O'Brien v. Snow},\textsuperscript{248} the defendant admitted liability for negligently causing damage to the plaintiff's property,\textsuperscript{249} but asserted that discovery had failed to show any malicious intent of the defendant, thereby precluding punitive damages as a matter of law.\textsuperscript{250} The defendant supported his motion with the plaintiffs' depositions and answers to interrogatories.\textsuperscript{251} The court held summary judgment inappropriate where the plaintiffs' pleading contained allegations of malicious conduct which, if proved, would support a verdict for punitive damages.\textsuperscript{252}

A logical difference separates the legal and ethical sufficiency of the pleading as a formal matter from the body of evidentiary material admissible at trial to sustain the necessary elements of

\textsuperscript{245} Id. at 671.
\textsuperscript{246} A photograph offered into evidence showed that the rack from which the bottle fell tilted forward slightly. \textit{Owens}, 205 S.E.2d at 670. The opinion does not state which party offered this evidence, or whether the plaintiff mentioned the photograph in her response to the motion.
\textsuperscript{247} Id. at 671. ("[T]here is nothing in plaintiff's deposition which shows as a matter of law that the negligence of [defendants], if any, was not a contributing or efficient cause of her injury."); cf. \textit{Celotex Corp. v. Catrett}, 477 U.S. 317, 319 (1986) (reversing appellate court holding that defendant must negate any inference supporting plaintiff's allegation of causation of injury).
\textsuperscript{248} 210 S.E.2d 165 (Va. 1974).
\textsuperscript{249} Id. at 166.
\textsuperscript{250} Id. at 167. The court noted that the record contained a suggestion that the defendant, who had fired a shotgun directed at the plaintiff's house, intended to frighten the plaintiffs' adult son who resided there. \textit{Id.} at 166-67. Unlike the status of the record in \textit{Owens}, however, this fact would not have supported the plaintiffs' recovery, even if proved. It may, in fact, have been submitted in the defendant's brief to show that no malicious intent was directed at the plaintiffs themselves. \textit{Id.} at 167.
\textsuperscript{251} Id. at 166-67. Contrary to \textit{Owens}, the deposition ban applied to this appeal. \textit{Id.} at 167-68.
\textsuperscript{252} Id. at 167.
proof.\textsuperscript{253} Most pleadings are not sworn but are signed by counsel. Virginia, like most other jurisdictions, is also uncomfortable with the prospect of counsel testifying on anything but uncontested or peripheral matters.\textsuperscript{254}

To put it bluntly, for the reasons noted above, if reliance on counsel’s averments in the pleadings can defeat summary judgment, a plaintiff who is artful, overly optimistic, or both, can assure the right to a trial disposition when in reality one or more essential factual elements of the plaintiff’s case have no support whatsoever. Although these considerations have persuaded the procedural advisory bodies in Virginia, the Supreme Court of Virginia has not elected to change the rule.\textsuperscript{255}

In sum, if there is to be summary judgment, and if it is to be more than a demurrer review under a different name, the obligation of a plaintiff to respond to a validly-initiated motion must include more than pointing to paragraphs of the charging pleading. It must require the plaintiff to identify at least some modicum of proof on the specific element asserted as lacking evidentiary support. The responding party should be required to identify the factual issues that preclude entry of judgment as a matter of law and to indicate whether any proof will make those fact issues a viable matter for trial. If no disputed facts on a disposi-

\textsuperscript{253} As noted above, sanctions are a fairly recent, and still lightly used, development in Virginia practice. See supra notes 197-204 and accompanying text. A summary judgment doctrine, which allows mere averments in pleadings to defeat summary judgment, is, perhaps, more defensible if active sanction review policed the integrity of pleading content in Virginia. When the early case law developed in the Commonwealth, giving cognizance to the allegations, no such sanction rule existed. See supra notes 197-204 and accompanying text.

\textsuperscript{254} See, e.g., VA. CODE OF PROF RESP DR 5-101 (1981) (expressing restrictions on accepting employment when counsel might testify); id. DR 5-102 (expressing restrictions on continuing representation when counsel may testify).

\textsuperscript{255} The Advisory Committee on Rules of Practice and Procedure in Virginia believes that it should not be sufficient for a party to rest on averments in the pleadings, putting aside those instances where they are sworn. Instead, a party should at least assist the trial judge by identifying the factual material that necessitates a hearing. See infra notes 388-89 and accompanying text. The Advisory Committee approved a plenary proposal to revise the summary judgment rules at its meeting in April, 1993, and the Judicial Conference of Virginia unanimously adopted the proposal at its June, 1993, meeting. See infra notes 388-89 and accompanying text. In September, 1993, however, the Supreme Court of Virginia declined to promulgate revised summary judgment rules. See infra note 390 and accompanying text.
tive issue remain, or if a party, after full and fair opportunity for
discovery, has no evidence whatsoever in support of a factual
proposition, summary judgment is appropriate and a rule requir-
ing a full trial would be an irresponsible waste of public resources
as well as an undue burden on the litigants and witnesses.

In two interesting decisions, the Supreme Court of Virginia has
taken an approach somewhat different from the bulk of the re-
ported cases.\textsuperscript{256} In \textit{Macaulay v. Home Beneficial Life Insurance
Co.},\textsuperscript{257} the court affirmed a summary judgment in an action to
recover on a life insurance policy issued by the defendant.\textsuperscript{258}
Applicable Virginia law disallowed recovery for loss if the insured’s
death indirectly resulted from an accident excluded from cover-
age.\textsuperscript{259} The court supported its decision with a letter written by
the plaintiff’s expert\textsuperscript{260} on the cause of the insured’s death,
which stated that the covered accident may have “exacerbated”
his preexisting epileptic condition.\textsuperscript{261} The court reasoned that
the expert had thus admitted that the plaintiff was not entitled
to recover under the policy\textsuperscript{262} A dissenting justice argued that
the plaintiff was under no duty to negate any indirect cause of
death at the pretrial stage, having alleged in her pleading that
the covered accident was the direct cause of death.\textsuperscript{263}

The plaintiff in \textit{Macaulay} would have been justified in expect-
ing to benefit from the Owens rule during the pretrial proceed-
ings. The statement in the letter certainly tended to support the
defendant’s position;\textsuperscript{264} however, the plaintiff asserted that the

\begin{footnotesize}
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\item \textsuperscript{256} Carson v. LeBlanc, 427 S.E.2d 189 (Va. 1993); Macaulay v. Home Beneficial
\textsuperscript{257} Life Ins. Co. 369 S.E.2d 420 (Va. 1988).
\textsuperscript{258} Id. at 420, 422.
\textsuperscript{259} Id. at 421.
\textsuperscript{260} In response to requests for admission, the plaintiff indicated that the insured’s
\textsuperscript{261} family physician was the only expert who would testify as to the cause of death. \textit{Id.}
\textsuperscript{262} at 421-22.
\textsuperscript{263} Id. at 422. The Supreme Court appeared to rely on two controlling cases in-
\textsuperscript{264} volving the same issue of insurance coverage. \textit{Id.} (citing Tanner v. Life Ins. Co., 227
\textsuperscript{265} S.E.2d 693 (Va. 1976); Crowder v. General Accident, Fire, & Life Assurance Corp., 21
\textsuperscript{266} S.E.2d 772 (Va. 1942)). In those cases, judgments were granted to insurers after the
\textsuperscript{267} plaintiffs’ presentation of expert testimony at trial. \textit{Tanner}, 227 S.E.2d at 694-95;
\textit{Crowder}, 21 S.E.2d at 774.
\textsuperscript{268} \textit{Macaulay}, 369 S.E.2d at 422 (Compton, J., dissenting).
\textsuperscript{269} Id. at 421-22.
\end{itemize}
\end{footnotesize}
expert would refute this implication at trial.\textsuperscript{265} As the dissent noted, while subject to impeachment at trial, the credibility of such testimony, is ordinarily an inappropriate issue for summary judgment.\textsuperscript{266} In effect, the Supreme Court of Virginia approved the trial court’s prediction of the effect of the expert’s testimony from the pretrial record. Based on that assessment, the court applied the same standard that would be applied at the trial stage, arguably without giving the plaintiff fair notice of the increased burden of production.\textsuperscript{267}

Subsequent cases have not uniformly followed Macaulay’s approach.\textsuperscript{268} In another case, however, the Supreme Court of Virginia reached a similar result. In Carson v. LeBlanc,\textsuperscript{269} the defendant used the deposition testimony of accident witnesses to formulate requests for admissions.\textsuperscript{270} The trial court granted summary judgment for the defendant on the basis of those admissions\textsuperscript{271} and the Supreme Court of Virginia upheld the result on appeal.\textsuperscript{272} Carson and Macaulay stand for an exception to the general “no duty” rule created when a respondent has identified its exclusive evidence and the court can assess that evidence from the pretrial record.

Enforcing an obligation to go beyond the face of the pleading could create a strategic device by which a defendant could file an early summary judgment application in order to “rush” the plaintiff.\textsuperscript{273} As noted earlier, most jurisdictions, but not Vir-

\textsuperscript{265} Id. at 422 (Compton, J., dissenting) (noting plaintiff’s response to a request for admissions, stating that at trial the physician would support plaintiff’s claim regarding the cause of death).
\textsuperscript{266} Id. at 422-23.
\textsuperscript{267} Although the court did not cite or discuss the Owens rule, the Macaulay case can be distinguished. First, one might argue that the plaintiff did, in fact, “fully develop” the essential allegation because expert testimony is determinative of the cause of death. Alternatively, one could argue that the plaintiff did not substantially or measurably develop his allegations and thus did not receive the Owens “no duty” protection. See supra notes 240-44 and accompanying text. The dissent in Macaulay effectively rebuts these possibilities. Macaulay, 369 S.E.2d at 422.
\textsuperscript{268} See, e.g., Renner v. Stafford, 429 S.E.2d 218 (Va. 1993).
\textsuperscript{269} 427 S.E.2d 189 (1993).
\textsuperscript{270} Id. at 190.
\textsuperscript{271} Id.
\textsuperscript{272} Id. at 193.
\textsuperscript{273} See Risinger, supra note 105, at 41.
\textsuperscript{274} See text accompanying notes 159-60.
Virginia, have dealt with this risk (which is little different from a defendant insisting on an immediate trial on the merits) by providing for the option to defer response to a summary judgment application in cases where discovery is needed. In some cases, of course, namely where the fact needed to defeat summary judgment is exclusively in the plaintiff's own possession, such a delay is unwarranted. Conversely, when a plaintiff can set forth by affidavit the matters that require discovery in order to address a summary judgment application, the rules of procedure should permit the trial judge to grant that application. Indeed, in appropriate cases the rules should encourage the trial court to tailor proceedings so that the discovery specifically directed to issues on the pending motion have temporal priority, allowing the motion to be brought to disposition more quickly. A modified version of this common form of timing provision should be incorporated into the Virginia rule.

2. Affidavits

Every American jurisdiction, state and federal, permits the use of affidavits on summary judgment motions, except Virginia. In many jurisdictions, case law requires that the affiants have


276. See, e.g., Gieringer v. Silverman, 539 F. Supp. 498, 503-04 (E.D. Wis. 1982) (asserting that plaintiffs had failed to show that information "not in their possession" would control the summary disposition), aff'd, 731 F.2d 1272 (7th Cir. 1984).


278. The modification arises by distinguishing between cases where the fact focused on is within plaintiff's own control, making discovery unnecessary, and those where it is not. See infra part IV

279. See infra app. B.
personal knowledge of the facts represented in the declaration.\textsuperscript{280} Many cases also comment on the limited role for attorney affidavits in summary judgment applications.\textsuperscript{281}

The existence of the oath and the concomitant availability of penalties for perjury make affidavits inherently more reliable than unsworn litigation papers. In addition, they compare favorably to unsworn transactional documents commonly utilized as evidentiary matter in most jurisdictions.\textsuperscript{282}

Affidavits have the additional advantage of precision. The trial judge's task lies in assessing whether there is in fact a "hole" in the proof available to the party with the burden of persuasion. This determination may be difficult when the assessment must be made solely on the basis of preexisting transactional documents or physical proof. It is not clear on the face of many such exhibits what their exact scope and application is, when and how they are prepared, and what the parties' intentions were when they were created. Where proof is submitted by affidavit, however, nothing impedes a judge from addressing the issues on which the motion focuses. If a witness with knowledge can supply the fact which the movant claims is nonexistent, the affidavit will end the summary judgment motion quickly, easily, and inexpen-

\textsuperscript{280} See, e.g., Pettigrew v. Harris, 631 So. 2d 839, 841 (Ala. 1993) (discussing state Rule 56(e) which requires the affidavit to show affirmatively that the affiant is competent to give the evidence presented); Brozo v. Shearson Lehman Hutton, Inc., 865 S.W.2d 509, 512 (Tex. Ct. App. 1993) (noting that TEX. R. CIV. P 169a(f) requires a showing of admissibility and witness competency).

Conclusory affidavits that do not show personal knowledge are inadequate. Casey v. Lewis, 4 F.3d 1516, 1527 (9th Cir. 1993) (Pregerson, J., concurring in part and dissenting in part); Catawba Indian Tribe v. South Carolina, 978 F.2d 1334, 1341-42 (4th Cir. 1992); Davis v. City of Chicago, 841 F.2d 186, 188-89 (7th Cir. 1988) (asserting that a lack of personal knowledge violates not only Rule 56 of the Federal Rules of Civil Procedure but also Rule 602 of the Federal Rules of Evidence).


\textsuperscript{281} See, e.g., Friedel v. City of Madison, 832 F.2d 965, 969-70 (7th Cir. 1987) (stating that the affidavit of counsel failed to satisfy Rule 56(e) because it did not cite to the record or to the attached documents and thus lacked any showing of personal knowledge).

\textsuperscript{282} An example of the latter might be letters said to provide notice of an event and attached to a pleading.
sively. Conversely, if the evidence is truly nonexistent and the party with the burden of proof and full access to the relevant information cannot supply an affidavit addressing the point highlighted by the movant, a trial judge can easily recognize that if proof on the point existed, the affidavit would supply it, and the defect in the proof of the party with the burden becomes apparent.

The federal rules and the rules of most states list affidavits as a prominent category of cognizable evidentiary material utilizable on summary judgment.283 This accords with the requirement generally enforced in these jurisdictions that the material set forth on summary judgment issues be susceptible to being reduced to an admissible form.284 The affidavit, with personal knowledge of the facts recited therein, constitutes a dress rehearsal for the oral testimony of that individual on direct examination. Indeed, some jurisdictions have express requirements that the affidavit set forth in its preliminary paragraphs the basis for the affiant's personal knowledge of the facts recited, a foundation requirement not unlike that typically applied in American courtrooms at the trial stage.285

The Virginia summary judgment rules do not mention affida-

283. See FED. R. CIV. P 56(c) (requiring judgment to be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue"); see also infra app. B (detailing the use of affidavits for summary judgment decisions in the states).


The substance of the rule is so skimpy, however, that one might argue that the absence of an affidavit provision is not the equivalent of a rule foreclosing their use. The rule does not even expressly authorize the use of any evidentiary matters. Instead, the only items expressly delineated in the rule are pleadings, orders, and admissions. Indeed, the Part Four discovery rule, providing for requests for admissions, is not cross-referenced in the summary judgment rule, where the concept of admissions is raised. That omission leaves it unclear whether other forms of party admissions and stipulations are appropriate or permissible for consideration on the motion.

The prevailing wisdom in Virginia is that affidavits are not admissible on summary judgment. Numerous trial court decisions recite this limitation, and Virginia Supreme Court authority supports the proposition. The proposition also has crept into the secondary authority. On the other hand, we have studied all reported Virginia appellate decisions involving summary judgment and have detected instances where a party’s affidavit was not only considered among the appropriate materials in a summary judgment analysis, but was crucial.

286. See supra note 227.
288. Id.
289. Id. rule 4:11 (modelled on FED. R. CIV. P 36).
290. Id. rules 2:21, 3:18.
291. See sources cited infra notes 292-94.
293. See Town of Ashland v. Ashland Inv. Co., 366 S.E.2d 100 (Va. 1988). Although the court in Ashland stated that the movant’s “self-serving assertions” in an ex parte affidavit were not “evidence” to support the motion, it did not suggest that it was outside the power of the trial judge to consider affidavits per se. Id. at 103. Rather, the divergent legal theories argued by the parties on summary judgment rendered the movant’s affidavit assertions insufficient to support the granting of summary judgment. Id.
294. The Virginia trial judge’s handbook states that the rule does not permit the use of affidavits. See JOHN F. DAFFRON, VIRGINIA CIRCUIT JUDGES BENCHBOOK, CIVIL 94 (Supp. 1994).
Several cases have treated affidavits filed by a party as among the proper materials for consideration on a summary judgment motion. In one such instance, a court found affidavits of the parties sufficient to raise factual issues, even against constitutional presumptions such as the "full faith and credit" normally accorded to a sister state judgment. In fact, the same decision which reached that conclusion took cognizance of an affidavit of counsel, where the subject matter was within the personal knowledge of the attorney in the professional role. Affidavits of third parties not before the court also have been used and approved.

There is no principled argument against the use of affidavits on summary judgment. The most telling point is that the alternative is to allow a party to rely on an unsworn pleading, perhaps even a pleading in very general terms. Clearly, an affidavit from a person with personal knowledge of the facts is superior to the unsworn, often cryptic draftmanship of counsel in a pleading if the goal is to determine whether sufficient facts will be available to make a triable issue for full hearing at trial.

Admittedly, affidavits also are routinely drafted by lawyers. But unless we indulge the assumption that perjury is rampant in the legal system, both in litigation matters and non-litigated transactions, the dignity and rigor of the oath provide important assurances of reliability, close to those afforded at the trial itself. Impeachment at trial adds another safeguard to deter false affidavits because changes in the witness' position will be damaging.

At public bar meetings that have discussed summary judgment

296. See Stone, 392 S.E.2d at 486.
297. Bloodworth, 267 S.E.2d at 98.
298. Id. at 96 (describing the affidavit as addressing whether a client was present in court during court proceedings).
300. This is the rule in Virginia. See supra notes 232-54 and accompanying text.
301. Cf. VA. CODE ANN. § 18.2-434 (Michie 1950) (classifying perjury as a Class 5 felony).
reform in Virginia, plaintiffs' bar representatives have voiced the loudest opposition. Thus, it should be noted that a rule change authorizing the use of affidavits is essentially a pro-plaintiff alteration of the rules. In the paradigm case, where the defendant has asserted that there is no proof on a particular issue or set of issues, one would perhaps be comforted by having this representation be made in the form of an affidavit. In those circumstances, an attorney's affidavit might even be appropriate. Such an affidavit might assert, for example, that a review of the deposition transcripts and documents produced has been conducted in preparation for the litigation, and that no support for a particular proposition has been discerned. The most important use of an affidavit would be on behalf of the party with the burden of proof, who must set forth some reason for the court to recognize a triable issue on the topic identified by the movant. Authorizing the use of affidavits permits the plaintiff in those circumstances to seek out any witness with personal knowledge of the requisite facts and to craft an express statement addressing the issue attacked in the motion. Thus a common, and perhaps the most important, function of permitting affidavits would be to allow, at the time of summary judgment, a surrogate for items which will be proven at trial through oral testimony as opposed to exhibits.

Affidavits also may be helpful with respect to exhibits. An affidavit that lays the foundation for the admissibility of exhibits, and that may deal with any apparent objections that appear applicable on the face of the document, would be an important addition to the mix of information provided to the trial judge on summary judgment.

Thus, the criticism that affidavits are lawyers' documents, created expressly for the purposes of the motion on which they are submitted, completely misses the point. In comparison to review of the case on the face of the pleadings, affidavits present substantial advantages. True, the affiant's demeanor is not subject to review by the trier of fact. The function of the summary judgment screen on pending cases is not, however, to weigh the evidence submitted by the parties. Rather, its function is to determine whether a factual controversy exists on the issue or issues identified by the movant. On occasion, an affidavit will overstate an evidentiary point in a fashion that can be corrected
only at trial through cross-examination, impeachment, and review of other proofs. The fact remains, however, that in assessing whether a trial is necessary, the record is significantly more reliable if the parties are encouraged by the rules routinely to attest to the existence of disputed facts through the submission of sworn statements at the summary judgment stage than if the court were to rely on unsworn papers.

A search of federal and state databases for cases discussing abuse of the affidavit mechanism in summary judgment applications reveals no evidence whatsoever that the provisions of other jurisdictions, which routinely allow affidavits, have led to practices which favor one side or the other in the litigation arena, or which mislead the court in reviewing summary judgment motions. The Supreme Court of Virginia also has demonstrated that it will not be misled by self-serving affidavits. In light of the development of early summary judgment statutes, which approved the use of plaintiff affidavits to prove liquidated claims, it indeed would seem illogical that the current rule would prohibit the moving party—or the responder—from “speaking for himself” as to the issues raised by the motion.

3. Depositions

One of the most perplexing features of Virginia summary judgment practice is the fact that the use of deposition transcripts in the review of summary judgment applications is foreclosed by statute and a correlative rule unless the parties stipulate in advance that such transcripts will be cognizable on the motion.

In Leslie v. Nitz the Supreme Court of Virginia held that summary judgment could be entered based on facts adduced by discovery depositions “when it plainly appears from such depositions that there remains no material fact genuinely in dispute.” Unfortunately, the General Assembly barred this practice eighteen months later by adopting the predecessor of Code

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303. See infra text accompanying notes 357-62 (describing Town of Ashland v. Ashland Inv. Co., 366 S.E.2d 100 (Va. 1988)).
304. See supra notes 21-23 and accompanying text.
305. 184 S.E.2d 755 (Va. 1971).
306. Id. at 756-57.
section 8.01-420. This statute precludes the use of depositions in support of a summary judgment motion unless both sides have consented to that procedure. Strangely, by its terms the statute is very one sided: it precludes the use of deposition transcripts to support a summary judgment application but does not bar their use to oppose the motion.

Other than Virginia, every American jurisdiction, state and federal, permits the use of deposition transcripts on summary judgment applications. Yet no legislative study report accompanied the enactment of what is now codified as section 8.01-420 of the Code of Virginia to explain its rationale. Since the section's enactment, the Rules of Court have been amended to implement the restriction imposed by the statute by restating it in the summary judgment provisions.

Although it may be apocryphal, the same story about the origins of section 8.01-420 circulates at every professional gathering that discusses summary judgment. According to this explanation, a lawyer representing a personal injury plaintiff lost a case when his client made an admission at deposition—an admission that was later quoted in summary judgment papers. The lawyer, a member of the General Assembly, sponsored a bill in the next session of the legislature to preclude this from happening again.

Some would say, of course, that if sworn testimony of the plaintiff indicates that he has no claim, the case should be dismissed on summary judgment. Treating the concern of the plaintiff's bar evidenced in the statute more charitably, one might note that Virginia has a fairly well-known doctrine that

308. Id. Section 8.01-420 provides:
Depositions as basis for motion for summary judgment or to strike evidence.—No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used.

Id.
309. See infra app. B.
310. This limitation is repeated in both VA. SUP CT. R. 3:18 and 2:21. See supra note 227 (text of Rule 3:18).
311. For example, this story was recounted at the annual Boyd-Graves conference on Virginia civil procedure in 1992 and 1993, and at a meeting of the Council of the Litigation Section of the Virginia Bar Association in September, 1993.
may have once made this fear plausible. The doctrine is known as the rule of Massie v. Firmstone, and it stands for the prominently enunciated proposition that in litigation, a party's conclusive admission limiting his case will have effect. A party's case, it was said, can rise no higher than her statements.

The Massie doctrine may reflect concerns that prevailed prior to the prevalence of pre-trial preparation through discovery and other procedures. In an earlier era, before sanctions and the fuller exposition of facts that characterize modern litigation, the weapons of cross-examination and impeachment were much weaker because the underlying facts had been explored far less completely. As a result, the risk that a party would perjure herself at trial, in order to contradict statements made in unguarded moments before the proceeding reached the adjudicatory stage, was greater than it is today.

The binding admissions doctrine of Massie v. Firmstone persists as a part of Virginia law, despite the fact that discovery devices are now available on both sides of court. Those who fear that this doctrine will cause untoward results on summary judgment applications have failed to read the decisions implementing the doctrine over the last fifteen years. At the time of the enactment of Code section 8.01-420, it may have appeared that a single slip of the tongue could doom a party's case regardless of the circumstances of the litigation. Whether or not that was a legitimate fear in 1973, when the Code section was enacted, it has become crystal clear in recent years that the Massie doctrine will not have that effect.

First, the doctrine applies only to unqualified admissions. The Massie approach is limited to flat statements of fact in contexts where the declarant must have had direct personal knowl-

312. 114 S.E. 652 (Va. 1922).
313. Id. at 656; see also Charlton v. Craddock-Terry Shoe Corp., 369 S.E.2d 175, 177 (Va. 1988) (citing trial court in Massie v. Firmstone).

Some cases have implied that evidence other than the litigant's own statements may limit the claim in this fashion. See, e.g., Yellow Cab Co. v. Gulley, 194 S.E. 683, 686 (Va. 1938) (finding that "Mrs. Gulley is bound by the admissions of herself and the chauffeur").

314. See VA. SUP. CT. R. 4:0 (stating that discovery rules "apply in civil cases in both actions at law and suits in equity").
Several cases have shown that any interpretation that could characterize a party's statement as shaded with opinion will mean that the purported admission is not binding. Second, the Massie doctrine is limited to party statements, and thus has no effect on the propriety of using non-party depositions on summary judgment. Third, and more importantly, it applies only to admissions of fact, not opinion. Fourth, and equally important, is the strong emphasis in recent case law on treating the testimony of a party as a whole. The Supreme Court of Virginia has made it clear that the totality of a party's proof, rather than isolated statements from a deposition or other statement taken alone or out of context, determines whether a point is conceded. If one response seems to make an admission, but other answers support a contrary view, the Massie doctrine does not cause the concession to be adopted. Thus, the Massie v. Firmstone doctrine cannot selectively isolate a party's statements if there is evidence elsewhere in the transcript that supports a contrary inference. Under this rule, as presently applied by the Supreme Court of Virginia, improvident pieces of testimony cannot foreclose a party's proof on summary judgment or at trial.

Given these striking cases, which all but eliminate the impact of Massie, the Supreme Court of Virginia is signaling clearly that a party's improvident statements will not be used to strike a case

317. The doctrine is said to relate to statements of a "litigant." Austin v. Jewell, 349 S.E.2d 113, 115 (Va. 1986); Bartholomew, 297 S.E.2d at 680.
318. See Ravenwood Towers, 419 S.E.2d at 629-30 (construing the elderly victim's statement of what she probably could have seen if she had looked down before stepping into an elevator as inherently speculative for purposes of the Massie rule).
319. TransiLift Equip., Ltd. v. Cunningham, 360 S.E.2d 183, 189 (Va. 1987); see Austin, 349 S.E.2d at 115.
320. TransiLift, 360 S.E.2d at 189.
precipitously. Indeed, the only case upholding the use of the Massie doctrine in recent decades involved the statement of a party plaintiff who had personally observed the defendant’s vehicle during a car accident. The testimony related to where the vehicles impacted on the roadway and called for no other gloss on the direct evidentiary report.

Massie is essentially a trial doctrine, and if deposition transcripts will be used at trial, which they will, there is every reason to consider them during pretrial motions as well. When the binding admissions doctrine applies, a party who has made an admission in a deposition will lose at trial. If that is so, in those rare Virginia cases in which the doctrine of binding admissions still applies, there is no rationale for failing to allow those statements to be utilized on summary judgment motions.

Depositions are at least as reliable as affidavits, and may represent a more trustworthy form of proof in summary judgment adjudications. A review of decisions in other state and federal courts, which use deposition transcripts on summary judgment, discloses no suggestion of abuse. In fact, a deposition provides greater protection than does an affidavit. In the normal case, a deponent appears in person for the taking of testimony, is placed under oath, and gives the testimony in the presence of the stenographer and counsel. The testimony is not only more spontaneous than that given in affidavit form, but it is also subject to follow-up questions, giving the party an opportunity to probe and inquire repeatedly in order to elicit relevant information. Finally, the opportunity is accorded to the witness’ counsel to conduct “cross” examination of the witness.

Although it is used sparingly in practice, this option provides a contemporaneous opportunity for the opposing party to cure possible misstatements and to elicit testimony placing other statements in context. The availability of supplemental questioning on depositions means that no party should fear that an inad-

322. Id. at 126.
324. See Va. SUP CT. R. 4:5.
325. Id. rule 4:5(c).
326. Id.
tent slip by an unsophisticated deponent will doom her case because the Massie v. Firmstone doctrine is clearly inapplicable when the totality of the transcript includes contrary positions. In contrast to the rigidity of affidavit submissions, during a deposition, counsel can interpose objections and ask follow-up questions, giving alternative versions of facts covered by the initial questions.

Depositions are not used as preclusive admissions under discovery rules and under court decisions applying those rules. These transcripts are merely permissible evidence. The Supreme Court of Virginia made it very clear, in TransiLift Equipment and other cases, that depositions are not the equivalent of a formal legal admission. Instead, the transcript is admissible as “some evidence” on the points it addresses. Contrary proof is recognized and permitted.

Another way to view the problem, however, is to recognize that depositions are used at trial. A second irony arises from the present statute’s ban on the use of depositions to support a summary judgment motion. Under the Rules of Court and prevailing case law, deposition transcripts may be used at trial for a variety of purposes, including impeachment. They also may be used as proof on the merits in three significant circumstances: (1) in equity, (2) where the witness is more than 100 miles from the trial, and (3) where the deponent is a party. In the case of party depositions, the transcript may be used for any purpose. It is stunningly illogical that a deposition transcript has such extensive use at the trial stage, yet is wholly unusable when considering a potentially dispositive summary judgment motion that might obviate the trial or a portion of the issues.

Before the enactment of section 8.01-420, the Supreme Court

327. TransiLift Equip., Ltd. v. Cunningham, 360 S.E.2d 183, 188 (Va. 1987); see Horne, 306 S.E.2d at 895.
328. TransLift, 360 S.E.2d at 188.
329. Id.
331. VA. SUP CT. R. 4:7(a)(2).
332. Id.
of Virginia evaluated the use of depositions on summary judgment and found such transcripts appropriate for this purpose.\textsuperscript{334} When depositions could be used at the summary judgment phase, they helped resolve a wide variety of issues, including whether a plaintiff was contributorily negligent.\textsuperscript{335} Even when the use of deposition testimony for summary judgment was cognizable in Virginia, however, the doctrine required adequate development of an issue before the testimony could resolve a factual issue.\textsuperscript{336}

Bar support for a complete abolition of Code section 8.01-420 is widespread.\textsuperscript{337} Only the Virginia Trial Lawyers Association, or at least its leadership, has opposed the abolition of the provision.\textsuperscript{338}

4. Other Exhibits: Use at Trial and on Motion

As noted in passing above, the Virginia summary judgment rule inexplicably fails to acknowledge the propriety of using contractual documents, notices, and other contemporaneous exhibits arising from the litigated transaction as part of the summary judgment motion procedure. The rule also fails to permit expressly the use of interrogatory answers. In our view, interrogatory responses, which, in Virginia, are signed by the responding party,\textsuperscript{339} are as reliable as affidavits, and should be included in the provisions of the rule for similar reasons.

\textsuperscript{334} Leslie v. Nitz, 184 S.E.2d 755 (Va. 1971).
\textsuperscript{335} See, e.g., Reed v. Carlyle & Martin, Inc., 202 S.E.2d 874 (Va. 1974).
\textsuperscript{336} See, e.g., Marion v. Terry, 184 S.E.2d 761 (Va. 1971); Paytan v. Rowland, 155 S.E.2d 36 (Va. 1967).
\textsuperscript{337} The Council of the Litigation Section of the Virginia Bar Association (VBA) met in 1992 and discussed the proposal to abolish § 8.01-420, voting fifteen-to-one in favor of abolition. The Executive Committee of the VBA later endorsed the proposal as well.

Legislation to abolish Code § 8.01-420 was introduced at the VBA's behest in the 1993 session of the General Assembly, but was not enacted.

\textsuperscript{338} Members of the Virginia Trial Lawyers Association (VTLA), solicited by the Virginia State Bar's (VSB) Litigation Section, voted overwhelmingly in favor of abolition of this code provision. The VSB Litigation Section voted 248-to-12 in favor of abolishing § 8.01-420 (95%), and even among VTLA members the vote was 57-to-8 (88%). See Judicial Council of Virginia, Agenda Materials, June 28, 1993, at 53-55 (Letter from James P Wheeler, Mar. 17, 1993).

The VSB Litigation Section's Board of Governors voted Mar. 26, 1993, to support repeal of § 8.01-420 by an almost unanimous vote.

\textsuperscript{339} VA. SUP. CT. R. 4:8(d).
One of the most poignant ironies of the present state of Virginia’s summary judgment rules flows from the rule’s failure to achieve the advance assessment function of which it is capable. The summary judgment process, when properly implemented, can provide pretrial review of a key issue, obviating cases in which the factual insufficiency of a claim is not discovered until mid-trial, and eliminating the attendant waste, delay, and costs inherent in such a late revelation.

At trial, discovery fruits are admissible along with properly authenticated documents and other exhibits. TransiLift Equipment, Ltd. v. Cunningham[340] is the leading case on the use and effect of discovery fruits at trial, clearly articulating the mechanics and logic of their use.[341] Admissions elicited under Rule 4.11 are conclusive if they are properly offered by the party benefitted thereby, and if that party makes timely objection to his adversaries’ efforts to offer additional proof which may contradict or vary the thrust of the admissions.[342] However, the court also established that interrogatory answers and deposition statements can be used at trial when the presenting party lays a proper foundation.[343] Such statements are not conclusive, but they are admissible as pertinent evidence on the propositions they address.[344] It is therefore odd that the summary judgment rule does not appear to contemplate the use of these statements.

5. The Admissibility Focus

The Virginia rule also fails to spell out the goal, which every other state articulates, that materials used on summary judgment should be admissible at trial or should appear in a form that plausibly can be reduced to admissible evidence at trial.[345] This requirement is key to making the accelerated determination that is the hallmark of summary judgment—whether the party with the burden of proof will have any admissible evidence on the

341. Id. at 183.
342. Id. at 188.
343. Id.
344. Id.
345. See app. B.
issues identified by the movant as lacking support.

6. Procedural Roadmap

Formalistic features and substance of summary judgment procedure merge. The present Virginia rule, unlike that in most other states, contains almost no procedural provisions. It prescribes the timing of such applications only to the extent of requiring that the parties be at issue prior to filing the motion. As a result, there is a vacuum of authority and guidance on the question of how to appropriately commence a summary judgment motion and what the obligations of responding parties are.

The existing rule's failure to provide procedural guidance debilitates summary judgment review in at least three ways. First, the Supreme Court of Virginia's decisions seemingly indicate that trial judges often fail to grapple appropriately with the issues on summary judgment. Second, the rule's failure to provide for the common situation in which cross-motions for summary judgment are filed has led to at least one case in which the parties have abused the summary judgment system. Third, the absence of procedural directions foments mistakes and fears about both the extent of the moving party's burden to identify issues on summary judgment and the opposing party's parallel obligation to equip the trial court with the information needed to evaluate the motion fairly.

The Supreme Court of Virginia has commented, more than once in recent years, about a trial court's improvident entry of summary disposition. Our analysis of these instances, and related reversals in which the court held that summary judgment was improvidently entered (with or without comment by the reviewing court), suggests that the present rule contributes to reversals to some extent by failing to provide for the identification of specifically enumerated fact issues on which summary judgment will turn.

The present Virginia rule, in contrast to most modern proce-

346. See infra notes 357-62 and accompanying text (discussing Town of Ashland v. Ashland Inv. Co., 366 S.E.2d 100 (Va. 1988)).
dural systems' summary judgment provisions, merely restates a general test to the effect that "[s]ummary judgment shall not be entered if any material fact is genuinely in dispute." No provision is made, however, to assist the trial judge in focusing on the material facts, disputed or otherwise.

Numerous federal district courts, grappling with the need for summary adjudication to dispose of a huge volume of civil filings, have developed local rules of court that assist trial judges by requiring the parties to specify the key material facts. Some states, such as California, have incorporated such a provision into their summary judgment statute or their rule.

Typically, jurisdictions adopting this approach require a statement of material undisputed facts. Because the movant is the first to propose that the adversary's case lacks proof on a necessary element, courts with these rules require the movant to support the notice of motion with a statement of undisputed facts. The responding party must then include a counter statement of material facts in dispute as part of the responsive papers, alleging that the disputed issues are sufficient to preclude summary judgment.

349. See text accompanying notes 180-81.
350. See, e.g., S.D.N.Y. Civ. R. 3(g).
351. See CAL. CIV. PROC. CODE § 437(c) (West 1973).
353. See Bush v. Parents Without Partners, 17 Cal. App. 4th 322, 325 n.1 (1993) (stating that response is not a separate statement of undisputed facts under California Code of Civil Procedure § 437(c) but is a statement indicating agreement or disagreement with the movant's statement).

If no response is filed, the court likely will find that the movant has demonstrated the existence of undisputed facts. See, e.g., Williams v. Davenport Communications Ltd. Partnership, 438 N.W.2d 855, 856 (Iowa 1989); Guiggey v. Bombardier, 615 A.2d 1169, 1170 (Me. 1992) (granting summary judgment under ME. R. CIV. P 7(d)(2)).
These rules have a generally salutary effect but fail to precisely serve their purpose; the goal is to identify factual issues that will be resolved against the party with the burden of proof at trial. These issues may be evidenced in two different ways. They may be propositions for which the movant has evidentiary material and the plaintiff has none, or they may be propositions on which only the plaintiff would have evidentiary material, and the movant commences the motion by pointing out the absence of apparent support for the proposition that the plaintiff must prove. Thus the "material fact statement" requirement should focus the movant, and later the adversary, on those factual issues that are asserted to be dispositive. This limitation is essential in avoiding the specter, decried by some critics, of huge burdens that would require the responding parties to present their entire case in response to a terse motion. Part IV of this Article sets forth such a rule, appropriately focused.

7 Cross-Motions.

Frequently, both parties file motions for summary judgment. These cases commonly involve construction of a written instrument, applicability of a statute or other legislative action, or stipulated facts. The law is clear, however, that the mere filing of opposing motions does not warrant the trial court in assuming that summary judgment is appropriate. As the Supreme Court of Virginia has said, "merely because both litigants believed [that] the evidence was sufficiently complete to decide the case does not relieve the trial judge of the responsibility and duty to make an independent evaluation of the record on that issue." Instead, the judge must evaluate each of the competing applications to determine whether either side is entitled to judgment as a matter of law. A prominent case in the modern era,

356. On the other hand, if the parties stipulate to undisputed facts that each argues will warrant judgment, the court may find that there are no questions precluding the entry of judgment. Some cases on stipulated facts, however, have been deemed inappropriate for summary adjudication because the legal issues, properly understood, were not completely addressed by the facts to which the parties agreed in the stipu-
Town of Ashland v. Ashland Investment Co.,357 demonstrates that the parties may abuse these rules through the filing of cross-motions that deprive the trial court of responsive material on either of them.

When there are cross-motions on different legal theories, the possibility of failing to address the adversary's legal claim or defense always exists. The Supreme Court of Virginia reviewed such a case in Ashland, finding that the parties' arguments "rush[ed] past each other without meeting, like trains on parallel tracks."358 The court vindicated the party who had lost on a summary judgment, by remanding the case for further proceedings.359

A party should have the obligation to respond to a summary judgment motion, but the articulation of that requirement in Virginia remains to be achieved. Indeed, the outcome of the Ashland decision arguably undermines that requirement. In Ashland, the municipality failed to respond to the legal and factual theory advanced by the landowner 360. When the municipality's own theory was rejected by the trial court, the municipality requested the opportunity to cross-examine the landowner's witnesses on the issues framed. The court held that entry of judgment without permitting that examination "deprived the town of its right to present its case."351 The court observed that the town had elected against opposing the adversary's application, resting instead on its own theory in a parallel application.362 Just as cross-motions do not obviate the trial judge's obligation to study the facts needed for judgment, neither should a cross-motion or different view of the legal theory immunize a party from the need to respond to a pending summary judgment motion directly and indicate which material facts are disputed that preclude entry of judgment. With the rules in their present form, there is little alternative to such results. However, it is

358. Id. at 103.
359. Id. at 104.
360. Id. at 103.
361. Id.
362. Id.
clear that efficient and fair procedure would require a party who believes that a cross-motion will be successful to respond to the initial motion and advance the cross-motion separately. To do otherwise deprives the trial judge of the adversarial arguments that permit an intelligent ruling on whether summary adjudication is appropriate.\footnote{363}

C. The Need for Effective Docket Management.

The appellate-filing crisis has caused most jurisdictions to enact procedural reforms and court system expansions over the last twenty to forty years.\footnote{364} In recent years, Virginia has renewed its focus upon the impact of an appellate filing volume which has nearly doubled in the last ten years.\footnote{365} Efforts are underway to study and address the results of that increase.\footnote{366} By comparison, the increasing caseload visited upon the trial judges in the Commonwealth of Virginia is staggering. Total dispositions in the Virginia trial courts are up from 129,000 in 1980 to 216,000 in 1992.\footnote{367} The number of civil case filings facing Virginia trial judges is among the highest in the nation on a per capita basis,\footnote{368} averaging 9,728 per judge in the district courts and 813 per judge in the circuit courts.\footnote{369} Some metropolitan circuits have a much higher than average share of this case load.\footnote{370}

\footnote{363. For an example of the simple rule provisions that would be sufficient to achieve this result, see infra text immediately following note 438.}
\footnote{364. See NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATS. ANN. REP. 1991, at 49-61 (1993) [hereinafter STATE COURT CASELOAD STATISTICS].}
\footnote{365. The caseload of the Court of Appeals of Virginia has grown from 1,641 filings in 1985, to 2,611 in 1992, and the proportion of criminal appeals that the court hears has dropped to approximately one-fifth of the applications for a hearing. JUDICIARY'S YEAR IN REVIEW 1992, supra note 201, at A36-37.}
\footnote{366. See APPELLATE REVIEW IN VIRGINIA, A REPORT OF THE VIRGINIA BAR ASSOCIATION (1994).}
\footnote{367. JUDICIARY'S YEAR IN REVIEW 1992, supra note 201, at A47.}
\footnote{368. STATE COURT CASELOAD-STATISTICS, supra note 364, at 11, Chart 1.6; see also id. at 9 (showing that Virginia ranks third among all states in general civil case filings).}
\footnote{369. JUDICIARY'S YEAR IN REVIEW 1992, supra note 201, at A52, A73.}
\footnote{370. In the general district court, the per-judge case load ranges from 2,090 per judge in the 30th District, to 22,506 in the 13th District. In the circuit courts, the case load ranges from a low of 508 per judge in the 11th Circuit, to a high of 1,178
Despite this volume explosion in Virginia, the "reform direction" of the summary judgment rule has been, if anything, more restrictive. In the last twenty years, the rule has been amended to exclude depositions, the "no duty" formulation was born, and proposals to comprehensively reform the rule have divided the bar and have failed to be successful. This combination causes untoward incentives, forum shopping, and inefficiency and provides little protection for parties. No reason exists why the rule should not be reformed to meet current needs.

1. Criticism and Efforts to Reform the Summary Judgment Rule

Concern about the restrictive nature of summary judgment in Virginia is not a phenomenon of recent origin. Almost immediately after the adoption of Rule 3:18 and other rules governing pretrial procedures in 1950, commentators noticed the distinctive qualities of the Virginia system. Some of these writers have advocated restrictive or expansive utilization of the rules in anticipation of interpretative case law. Using the federal model as a benchmark for comparison, these commentators sought to explain or justify the relative lack of emphasis on pretrial procedure and the terse terminology of the rules as resulting from a strictly adversarial jurisprudence that underlies Virginia...
procedural law. These responses to the rules recognized the interrelation between the three elements of pretrial practice—summary judgment, discovery, and the pretrial conference. In 1950, attention focused particularly upon the discovery rules due to the limitations they placed upon the scope and use of depositions, interrogatories, and requests for documents and admissions. The 1971 revision of the discovery rules followed the then-existing federal model. The summary judgment rule, however, was only amended marginally to allow partial summary judgments on liability. Controversy surrounding the adoption of a pretrial conference rule was also the source of comment. Commentators reacted most strongly to the restrictive nature of the types of evidentiary materials that could be used to support a motion for summary judgment under the rule. Observers predicted that

374. See Chappell, supra note 52, at 160 (noting restrictive strain of Virginia law); Kuykendall, supra note 372, at 149 (arguing that participation by judge in pretrial conference procedures may call impartiality into question and that attorney control of cases is appropriate); Terry, supra note 25, at 373 (restrictions on use of evidentiary materials in summary judgment “is not inconsistent with long established Virginia ideas on the importance of the adversary system of administering the law”).

375. Chappell, supra note 52, at 160 (arguing that availability of summary judgment may act to promote discovery); Marshall, supra note 372, at 143 (noting that pretrial conference provides an opportunity for judge to use summary judgment when the record discloses no relevant facts in issue); Terry, supra note 25, at 358 (“[S]uccess of summary judgment in achieving those ends which it is designed to achieve is closely related to the existence of other ‘code’ procedures of discovery, pretrial practices, and related provisions similar to those in the Federal Rules.”).

376. See generally Chappell, supra note 52, at 153-60.

377. See Survey of Developments in Virginia Law: Practice and Pleading 58 VA. L. REV. 1309, 1323-25 (1972) [hereinafter Virginia Law Survey]. Ironically, a 1951 commentary had expressed the hope that summary judgment would aid discovery under the restrictive rules of 1950. See Chappell, supra note 52, at 160 (“Of the adopted rules of practice and procedure, Rule [3:18] provides a potential source of discovery aid in the form of summary judgment. This procedure, testing the genuineness of issue, forces the party against whom it is requested to produce sufficient proof to demonstrate that there is a genuine dispute.”). Instead, the broad federal discovery rules were adopted while summary judgment grew more firmly entrenched in its unreformed state, growing even more restrictive when Virginia banned depositions and adopted a “no duty” rule. See supra parts III.B.1, III.B.3.


379. See Kuykendall, supra note 372, at 147-53; Marshall, supra note 372, at 141-47.

380. Terry, supra note 25, at 373 (finding that the omission of a comprehensive list
the restrictions would promote the under utilization of summary judgment and inefficiencies in pretrial procedure.381

Although they accepted, to various degrees, Virginia’s choice not to base reforms upon the widely-followed federal model,382 the early commentators recognized some of the problems likely to flow from the lack of integration between the modern concepts of summary judgment and Virginia’s pretrial system. Foreshadowing the restrictive interpretations that would follow in subsequent supreme court applications of Rule 3:18, these early analyses provided persuasive recognition that the text of the rule serves as a hindrance to the efficient use of summary judgment in the modern motion context. They also showed that the restrictiveness of Virginia summary judgment could be predicted from a strain of jurisprudential conservativeness underlying the law.

In recent years, the focus of reform has shifted from the academy to the organized bar, which has grappled with the rule in an effort to propose amendments for consideration by the judiciary.383 The Boyd Graves Conference considered summary judgment proposals at its Fall, 1992, meeting in Charlottesville, Virginia. The Conference voted sixty-six-to-thirty in favor of the central thrust of the proposal to abolish Code section 8.01-420, the section which restricts use of depositions on summary judgment.384 Subsequently, at a meeting of the Board of Governors of the Litigation Section of the Virginia Bar Association,
attendees unequivocally endorsed the statutory revision. After discussions with several plaintiffs’ lawyers, the Board also altered the rule revision proposal, eliminating the requirement that the party opposing a summary judgment motion must come forward with “significant probative evidence,” in order to avoid any implication that a greater than normal showing is required to avoid summary judgment. Instead, the proposal focuses on whether a party has established the existence of a factual dispute that should be tried. This language is in accord with the decisions of the Supreme Court of Virginia. The Litigation Section leaders voted fifteen-to-one in favor of the proposal thus adjusted in light of the concerns of the plaintiffs’ bar, which was also endorsed by the Executive Committee of the VBA.

Advocates also have advanced rule revisions in legislative and judicial rulemaking forums. Rule changes can be made by the Supreme Court of Virginia, even with the Code unchanged. After discussion at its April, 1993, meeting, the Advisory Committee unanimously recommended to the Judicial Council that the Supreme Court take action with respect to a comprehensive reform of the summary judgment rule. The Judicial Council approved the concept of abolishing the code limitations on summary judgment and approved a draft summary judgment rule similar to the one we propose below. The court thereafter declined to promulgate the rule revision, and the legislature continues to consider the abolition of the deposition ban provision.

385. See supra note 338.
386. Notes on file with authors.
387. The Advisory Committee is appointed by the Chief Justice of the Supreme Court of Virginia to assist the Judicial Council of Virginia.
388. See Judicial Council of Virginia, agenda materials, June 28, 1993, items III-B and III-D, on file with authors.
389. Notes of June 28, 1993 meeting of the Judicial Council of Virginia, on file with authors.
390. Notes of report by Robert N. Baldwin, Executive Secretary of the Supreme Court of Virginia, at meeting of the Advisory Committee on Rules of Practice, Sept. 22, 1993, on file with Authors.
2. Traditional or "Anti-managerial" Qualities of Rules Governing Virginia Summary Judgment and Pretrial Procedure

As discussed above, Rule 3:18 does not specify the procedure to be followed nor the evidentiary materials permitted in support of, and in opposition to, motions.391 Under the rule, a judge may not enter "partial summary judgments," in the form of a pretrial order, or otherwise, on issues that do not fully resolve a claim of, or defense to, liability392 The rule also fails to provide time guidelines for the parties.393 Most importantly, it fails to specify what satisfies the movant's burden of production on "no proof" motions394 or the motion respondent's burden of production once a movant has "supported" the motion.395

The effects of these and other characteristics of Virginia pretrial practice are fairly predictable. There are two primary effects. First, control over the range of pretrial preparation steps, and their pace, is largely in the discretion of the parties.396 A plaintiff does not have to engage in significant discovery to bolster a claim against summary judgment because the plaintiff may, in many cases, rely on the pleadings.397 Conversely, a defendant who is aware of the plaintiff's advantage is less likely to undertake the substantial effort required to attack a plaintiff's claim at the pretrial phase, which would reveal much of the defendant's evidence and theory of defense. In addition, either party may file a "late" motion for summary judgment, which delays the trial proceedings while a motion is considered.

A second effect of Virginia's pretrial practice weakness is that trial remains the only available forum for testing a claim or defense. In other words, a party is left with virtually no screening

391. See supra part III.B.6.
393. See id. It should be noted that, unlike Federal Rule 16, Virginia does not provide a rule mandating pretrial scheduling orders or pretrial conferences. See generally VA. SUP CT. R. 4:13 (leaving the requirement of a pretrial conference to the discretion of the court).
394. See supra part III.B.1.
396. See id.
397. See supra part III.B.1.
mechanism in some cases. In the twentieth century, for example, there are more reported instances of mid-trial dismissals for lack of evidentiary sufficiency than there are pretrial summary judgments, with the attendant social and economic costs that arise from allowing half a trial before the court assesses whether the proof is so lacking that further proceedings are unwarranted.

These two effects severely undermine the dual functions of summary judgment motions—gatekeeping and issue focusing.

In Virginia, the summary judgment device is simply too weak to act as a catalyst for sufficient evidence production, which is necessary in order to predict reliably the existence of triable issues, or to define their scope.

Although the rulemakers did not provide the bar with any extensive underlying policy for Virginia’s present summary judgment rules, one can surmise that Virginia has followed a deliberate policy in pretrial practice. This policy is not so much a positive policy as a negative or reactionary one. Virginia summary judgment procedure is “antimanagerial” because it neither recognizes nor effectuates judicial efficiency aims. If an affir-

398. See supra note 212 and accompanying text.
399. See supra text accompanying notes 34-37.
400. When present Rules 3:18 and 2:21 were adopted, it was not the practice of the Advisory Committee or the Judicial Council to publish any commentary or explanation. Cf. FED. R. CIV. P 56 (providing advisory committee note with commentary on summary judgment rule). But see JUDICIAL COUNCIL FOR VIRGINIA, PROPOSED MODIFICATIONS OF PRACTICE AND PROCEDURE 27-29 (1949) (describing the intended operation of proposed discovery and summary judgment rules).
401. Requiring the procedure to be managerial, elevates judicial efficiency considerations to a level roughly equal to that of fairness and justice considerations. The court’s duty to do justice is thus a dual responsibility—to protect the parties and to manage correctly the institution for the maximum social benefit. This role involves controlling several aspects of preparation, timing, and application of discretionary rules, with an eye toward reaching a speedy resolution in the interests of extrinsic values. The courts’ role is “referee-like” in that it requires more than just calling balls or strikes; it also entails monitoring time use, regulating parties’ strategic decisions, and imposing sanctions for failure to follow well-established, clear, and minimum procedures. The court must strike a balance between justice in the case, including a recognition of the parties’ relative bargaining positions and judicial efficiency.

Traditional judicial roles were non-managerial and did not elevate judicial efficiency as a value at all. See supra text accompanying notes 71-77. The traditional approach is largely responsive, viewing the judge’s dominant function to be the Solomonic resolution of issues selected, prepared, and presented as the parties may
mative description for Virginia policy exists, it is that Virginia policy is "adversarial" or "traditional" because it dissuades trial judges from using pretrial procedures to resolve disputes or issues. Either party may rely on the weakness of summary judgment to provoke a full-blown trial, where even a weak claim or defense may, against the odds, survive a motion to strike and convince a jury.

3. Untoward Incentives of the Present Situation

It is evident to any observer of the legal system that, in comparison to the current Virginia practice, the federal courts provide a more fully articulated summary judgment mechanism. The comparative weaknesses of Virginia's approach has reached such a level of public recognition that the Virginia Board of Bar Examiners made it the subject of its Civil Procedure question on the 1993 Bar Exam.

wth.

402. See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1282-84 (1976) (noting that in a "traditional" litigation model, the "process is party-initiated and party-controlled"); see also Chappell, supra note 52, at 151, 160 (noting school of thought that discovery in Virginia should be restricted and tying it to old common law adversarial concept); Kuykendall, supra note 372, at 147-53 (subscribing to Virginia's "adversary system"); Terry, supra note 25, at 373 (commenting that the course of restricting evidentiary material available in summary judgment is "not inconsistent with long-established Virginia ideas on the importance of the adversary system of administering the law").

403. See supra part III.B.

404. Va. Bar Exam, July 27, 1993, § 1, Question 1. The question read as follows:

1. Lindy Lawyer, counsel for Paula Plaintiff, filed a motion for judgment in the Circuit Court of Fairfax County, alleging that Dan Defendant's negligent operation of his automobile on Duke Street in Alexandria, Virginia, was the sole proximate cause of personal injuries and property damage sustained by Paula.

Dan Defendant, a forty year old college professor who lives and works in Fairfax County, retains Able Attorney. Able timely files grounds of defense on Dan's behalf, denying all material allegations, but admitting that the posted speed limit all along Duke Street in Alexandria, Virginia, is 25 miles per hour.

Without any discussion or agreement about discovery or evidentiary matters, Lindy and Able thereafter exchange interrogatories, requests for the production of documents, and notices of deposition. Lindy and Able each believe that inquiries about the occurrence of an accident such as
One positive aspect of the disparity is that a defendant who can satisfy the diversity jurisdiction requirements may elect to remove from a Virginia court to a federal court. After removal, plaintiffs lose the protection of the "no duty" rule and must produce evidence to survive a summary judgment motion.

In the course of Dan's deposition, Dan states under oath that his automobile was travelling at a speed of 35-40 miles per hour at the time of the collision with Paula's vehicle. Dan also states, during his deposition, that at the time of the collision Paula's automobile was stopped properly with its turn signal on, waiting to make a right hand turn.

Lindy Lawyer is so delighted with this development that, immediately following the conclusion of the deposition without any discussion with Able, he returns to his office and files a motion for summary judgment on the issue of liability.

(a) You are the Circuit Court judge. How do you rule on Lindy's motion for summary judgment?

(b) Assume instead that Lindy properly files a complaint in the Alexandria Division of the United States District Court for the Eastern District of Virginia and that Able timely files an answer; all other facts are as stated above. You are the Federal District Court judge. How do you rule on the motion for summary judgment?


406. See, e.g., Akers, 1992 U.S. App. LEXIS 18583, at *2 (holding that plaintiff failed to make a sufficient showing that defendant had any notice of dangerous condition on business premises); RGI, 963 F.2d at 661-62 (finding that trial judge appropriately refused to accept supplemental affidavit of plaintiff/respondent after granting summary judgment for defendant based on plaintiff's absence of proof of damages);
The federal trial judge will examine attached depositions and affidavits, rendering judgment on this evidence. Virginia federal trial judges also are required by the Fourth Circuit to fulfill an "affirmative obligation to prevent 'factually unsupported claims and defenses' from proceeding to trial." Two other factors make removal to federal court an attractive option for defendants seeking summary judgment. First, the Eastern District of Virginia is one of the leading managerial courts in the federal system. Summary judgment motions are frequently made, and there is no evidence that the Eastern District disfavors such applications. Pretrial case resolution is an express goal of local court rules and procedures, which carefully control the pace and scope of discovery and involve the judge in pretrial procedure. Second, the Fourth Circuit rarely reverses summary judgment decisions by the trial courts. Once resolved, the judgment most likely will stick, creating less fear of protracted appeal, the full costs of trial on remand, and the divulgence of the movant's theory of the case.

Thus, the present Virginia posture encourages litigants to make strategic forum choices due to the disparities between state and federal procedural systems. Forum shopping is encouraged because some defendants will perceive that they can quickly

Stewart, 1993 U.S. Dist. LEXIS 19951, at *6-11 (stating that "this Court can only consider the claims and evidence before it"); Holden, 1992 U.S. Dist. LEXIS 1995, at *9-13 (holding that plaintiff had presented no affidavits or other evidence to substantiate essential allegation of libel claim).


409. See Dayton, supra note 113, at 449.

410. Using the same LEXIS computer searching procedure discussed, supra note 120, we have found that the post-1985 success rate of summary judgment motions in the Eastern District of Virginia trial courts is approximately 69% (259 granted/117 denied). The success rate for the years 1975-1985 was approximately 64% (128 granted/71 denied). Cf. supra text accompanying notes 213-27 (discussing studies of summary judgment success rates in Virginia courts and in federal courts generally).


412. In McLauchlan's study, the Fourth Circuit had the lowest reversal rate of summary judgments of any circuit. See McLauchlan, supra note 213, at 449 (showing a 26.7% reversal rate in the Fourth Circuit between 1938 and 1977, compared to a federal average of 49%).
reach and resolve the merits of a claim in the federal forum, while Virginia procedure will require a trial in virtually all instances. At the same time, removal cannot significantly reduce Virginia's volume problem; the restrictions on diversity jurisdiction ensure that any reduction is marginal at best.

4. Has the Time Come for More Effective Tools in the Trial Court?

Several recent developments suggest that the time has come to review the tools we provide to Virginia trial courts in order to aid them in dealing with their dockets. First, the sheer volume of the case load, in the aggregate and on a per judge basis, is a key consideration.

Second, there is a clearly-recognized Virginia policy that crowded dockets are not an excuse for delaying the adjudication of pending cases. In 1991, with the active support of the Judicial Council and Chief Justice Harry Carrico, Virginia adopted time standards for the disposition of cases.413

Third, interested parties have increasingly recognized the need for new techniques for diverting cases that should not languish on the circuit court docket pending a full trial. The Virginia Legislature adopted the modern Uniform Arbitration Act in 1986,414 and in 1991, the Supreme Court of Virginia took a very expansive view of the process by which parties consent to submission of their disputes to this alternative forum.415 In 1991, the Supreme Court of Virginia also established an Office of Dispute Resolution Services within its own staff, to encourage the diversion of cases to dispute resolution projects of various sorts.416

This emphasis on shunting a proportion of the pending cases to mediation and other ADR programs led to the 1993 enactment of a statutory scheme that empowers all Virginia courts to refer

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414. VA. CODE ANN. §§ 8.01-577, 8.01-581.01 to .16 (Michie Supp. 1994).
civil cases to a program of early neutral evaluation, by persons trained and qualified by the court.\textsuperscript{417}

Fourth, the Judicial Council's ongoing effort to assure that the mechanisms of pretrial discovery work efficiently in the Commonwealth also suggests the need for better summary judgment procedures. The discovery tools are designed to explore facts and to nail them down. Of course, the goals of this process are reducing "surprise" at trial and permitting more efficient proofs at trial. It is stunning, however, to consider that a procedural system that authorizes and encourages that level of investment in the pretrial exploration of the facts fails to provide adequately for that minority of cases in which the factual exegesis makes it clear that a claim or defense is doomed for lack of any cognizable proof. Discovery should not simply provide more evidence to the parties; it should lead to more efficient dispositions at trial and during the pretrial phase if the case meets traditional summary judgment standards.

Fifth, the Virginia Legislature's enactment of sanctions in Code section 8.01-271.1,\textsuperscript{418} and the Supreme Court of Virginia's careful explanation of that Code provision's application,\textsuperscript{419} should be seen as a statement that the system must pay greater attention to marginal claims and defenses. An effective summary judgment rule reflects the same assessment: that in a small share of the cases, out of optimism, lack of complete information, or error, a party may have advanced a claim or defense for which there is not sufficient factual support to warrant a trial. A viable summary judgment procedure provides a crucial alternative to a stark two-choice regime, in which the truly egregious cases warrant sanctions while all other cases are tried. Clearly, the largest class of cases will have at least "some evidence" warranting presentation to the trier of fact at trial. An effective summary judgment device, however, gives the system a tool that a court may employ in reviewing factually questionable claims, assuring that cases having no triable issue do not clog the trial docket.

\textsuperscript{417} See VA. CODE ANN. §§ 8.01-576.4 to -.12 (Miche Supp. 1994).
\textsuperscript{418} See id. § 8.01-271.1.
\textsuperscript{419} See Tullidge v. Board of Supervisors, 391 S.E.2d 288 (Va. 1990).
IV PROPOSED REVISION OF SUMMARY JUDGMENT IN VIRGINIA. TOWARD MORE EFFECTIVE MANAGEMENT OF THE CIVIL DOCKET

This section sets forth a proposed revision of the Virginia summary judgment rule that ameliorates the difficulties articulated above. The standard for summary judgment would not be changed by this revision, but the practical utility and fairness of the device, and the feasibility of trial court task management, would be aided greatly. For ease of reference, the rule is presented as a whole in Appendix A to this Article, and is reprinted in segments for discussion purposes.

Basic standards and applicability The goal of summary judgment rule revision is not to increase significantly the share of cases disposed of by this mechanism. Because neither case law nor commentators have identified any defect in the statement of the basic summary judgment test in Virginia, the proposed rule revision preserves the language and approach of existing practice in these respects:

(a) AVAILABILITY; TIMING. Either party may make a motion for summary judgment at any time after the parties are at issue.

(b) STANDARD. The court shall grant summary judgment where there is no genuine dispute as to one or more material questions of fact, such that the moving party is entitled to judgment as a matter of law on one or more dispositive issues in the case.

(c) PARTIAL SUMMARY JUDGMENT. The court may grant partial summary judgment as to one or more issues. Existence of disputed questions as to damages or other relief shall not preclude summary judgment on issues of liability.

These provisions are intended to preserve the core of the presently articulated Rules of Court in Virginia. Inztiating a Summary Judgment Motion. Much of the academic

420. See supra part II.C.
422. See VA. SUP CT. R. 3:18.
criticism of present federal practice, and a large share of the plaintiffs' bar's concern about Virginia summary judgment practice improvements, appears to center on the issue of how a party commences the motion. The guiding concern is that a party may initiate a motion with a boilerplate notice generated from an all-purpose text file residing on the computer for use on unsuspecting adversaries. In reviewing models of rules that articulate the movant's obligations, the goal has been to respect these concerns, while also assuring that the papers actually focus on potentially dispositive issues, and that the motion and response process equips the trial judge with the informational ammunition needed to deal effectively with the issues. Thus, this Article advances a provision that looks unlike any federal or state rule we have yet located, as it suggests a relatively unburdensome means of requiring the movant to keep the motion focused tightly upon dispositive matters.

(d) SUPPORTING THE MOTION. The movant shall support a motion for summary judgment by submitting:

(i) a statement of material facts not genuinely in dispute, set forth in numbered paragraphs. This statement shall present a limited number of factual or fact/law issues which the movant represents will be dispositive of all or part of a claim or defense. For each such issue the statement shall identify illustrative sources of the legal rule that makes the point essential to the claim or defense being challenged, and any evidence on which the movant relies to negate or establish the material fact. If the movant contends that there is no admissible evidence supporting a material fact on which the nonmovant has the burden of proof, the statement shall describe the steps taken by the movant to review discovery materials and other available sources of information for evidence to negate or establish that material fact; and

(ii) such other materials permitted by law as the moving party may elect, including memoranda of law, affidavits from

423. See, e.g., Risinger, supra note 105, at 37 & n.15.
424. One participant at the 1993 Boyd-Graves Conference on Virginia Procedure commented that a move to more highly articulated summary judgment procedures could cause Virginia litigators accustomed to fairly gentle motion practice habits to face aggressive motions. Linda Laibstain, former Virginia State Bar Litigation Section Chair, Remarks at the 1993 Boyd-Graves Conference on Virginia Procedure.
persons with personal knowledge of pertinent facts, documents, interrogatory answers, responses to requests for admissions, and other matter.

In effect, this approach modifies existing "statement of material facts" rules found in many local courts in other jurisdictions, and incorporates them into the Virginia summary judgment rule. The proposed provision requires the movant to identify the factual and legal issues on which the adversary has the burden of persuasion, specifying the factual showings contended to be necessary to plaintiff's success. The rule then would require that the movant identify any supporting proof on which it intends to rely when negating the fact issue on which the plaintiff has the burden, and to state specifically whether a review of the pretrial record and other appropriate sources of information fail to disclose evidence sufficient to meet the burden.

Note that this proposal also addresses one of the most vociferously expressed concerns about federal court summary judgment that arose after the U.S. Supreme Court's 1986 trilogy of decisions. This concern is that a movant may, with the expenditure of very little effort, time, or expense, assert the absence of proof on a variety of issues, placing a great burden upon the plaintiff to do substantial research and drafting in order to demonstrate enough proof to make the assailed issues viable topics for fact finding at trial. The proposed rule, on the other hand, requires the movant to provide a detailed list of each individual fact issue or fact/law issue on which the plaintiff's claim assertedly founders. Because the movant must articulate evidence that establishes her view of the identified issues, or must recite affirmatively the nature of the record search used to ascertain whether any conceivable proof on the matter favorable to the plaintiff exists, making such a motion is not "cost free" to the movant. The approach here advocated is calculated to undermine any incentive for movants to make broad motions with the dilatory purpose of burdening the other side. Although this deterrent value in requiring specificity in the movant's papers will be attractive to some commentators, the more important consequence

425. See Risninger, supra notes 105, at 37-42.
of adopting such a requirement should probably be the process of identifying specific issues for the trial court.

It would be possible to curtail the burdens generated by summary judgment applications even further. We believe that the court should experiment with a rule that requires the movant to limit herself to claiming a specified number of fatal defects in the plaintiff's case. It would be instructive, for example to gain experience under a rule, which would restrict summary judgment applications that are available as a matter of right to the identification of three fatal issues. As to each issue, the movant would identify the legal basis and evidentiary support or record review described above. This approach would vastly reduce the specter of burdens imposed upon the plaintiff and would require the movant to select those legal or factual/legal errors that are the most likely to be dispositive. Indeed, such an approach could be buttressed by an official form promulgated by the Judicial Council, requiring, through a fill-in-the-blanks approach, both the movant and the responding party to supply a succinct identification of the source of the burden of proof and the nature of the evidentiary support, or lack thereof, with respect to the elements identified.

The Responding Party's Submission. The key to effective use of summary judgment is to require that the movant's submissions pinpoint the alleged holes in plaintiff's case, whether in the form of adverse facts or a total absence of supporting proof on a point as to which plaintiff bears the burden of persuasion. The near hysteria with which some academic commentators and some plaintiffs' lawyers view the obligations borne by the party with the burden of proof revolves around the extent of the submission that the burdened party must produce in response to a summary judgment motion. The underlying aim, therefore, is to advance the goal of requiring the plaintiff to demonstrate enough to give the trial judge a basis for recognizing a triable issue without allowing the plaintiff's obligation to respond to become a burdensome surrogate for other discovery devices or a test of pretrial evidence management. Our proposal uses the concept of illus-
(e) RESPONDING TO THE MOTION. Where a summary judgment motion has been made and supported as set forth in subparagraph (d)(i) and (d)(ii) of this Rule, the party against whom the motion has been filed may not rely upon averments or denials in the pleadings, whether general or specific, to demonstrate the existence of material questions of fact, but shall respond to the motion by submitting:

(i) a statement of expected proof on the dispositive issues as to which summary judgment has been sought, set forth in paragraphs numbered to correspond to the statement accompanying the moving papers. The statement of expected proof shall include a written proffer of illustrative evidence, reasonably expected to be admissible at trial, to address the issues on which summary judgment has been sought, supported by affidavits of persons with personal knowledge of pertinent facts, and/or other competent proof, presenting examples of testimony, documents, interrogatory answers, responses to requests for admissions, or other specifically identified evidence, sufficient to show that there is a triable question of fact as to each of the material issues set forth in the moving papers; and

(ii) such other materials permitted by law as the party opposing summary judgment may elect.

This portion of the proposed rule adopts the summary judgment approach exemplified in most jurisdictions, which requires that the party against whom the motion is made must come forward with some specific facts that show that there is a triable issue.427 The proposed rule proceeds from the premise that in order for summary judgment to serve as a useful tool for trial courts, it must be a means to ferret out the existence or nonexistence of factual disputes, avoiding needless trials and preventing baseless claims or defenses from clogging the courts and burdening litigants. This approach provides that a mere averment or denial in the pleadings is not sufficient to preclude summary judgment. Thus, where a summary judgment motion is made and properly supported under this rule, the opponent is required to

427. See, e.g., FED. R. CIV. P 56(e) (mandating that the adverse party "must set forth specific facts showing that there is a genuine issue for trial").
identify evidence that it will offer at a trial, presenting a bona fide issue, on which reasonable persons might differ, for the trier of fact.

The term "illustrative proof" expresses the notion that a plaintiff has discretion to select which items will be submitted in response to the motion: summary judgment is not an occasion where all proof is required, where proof on issues not raised by the motion is needed, or where failure to advance alternative items of proof will result in their being inadmissible.

Rather, a plaintiff should be required to submit enough evidence to demonstrate that there will be a triable issue on each of the material facts upon which the motion focuses. This requirement may mean that the plaintiff chooses to proffer one or two elements of proof on the contested dispositive issues, but withholds other proof until the anticipated trial. If the shaping of the motion papers achieves a narrowly-focused application, the response can be kept short. With the proof submission issues defined and delimited, a plaintiff who shoulders a greater response burden does so voluntarily, for strategic or other purposes, such as bolstering settlement discussions by intimidating the adversary or indoctrinating the judge on the strength of her case by stressing certain items of proof. No summary judgment rule can foreclose such extra submissions, but a workable rule makes them elective rather than necessary.

The draft section on the response of the nonmoving party is also calculated to focus the response on evidence "expected" to be admissible.

By addressing the movant's obligation to identify evidence and, more importantly, the respondent's obligation to oppose the motion through a demonstration that a triable fact issue exists, the proposed rule seeks to make the key evidential point without creating extra burdens on the plaintiff. The federal model requires the plaintiff to put forth "significant probative evidence" that supports the fact issues on which the plaintiff has the burden of proof. Essentially, this test has the effect of implying a specific threshold of proof necessary to create a triable issue of fact. The more crucial function that the rule should perform is to force parties to focus on the admissibility of the evidentiary matter on which the burdened party will rely.
Thus, two issues must be separated. The first is whether the plaintiff in an ordinary case (i.e., one in which a normal preponderance of the evidence standard will apply at trial) is able to identify any arguably admissible evidence that supports those points that the movant has identified as lacking support. Those cases that require a higher burden of proof also require a second level of analysis in federal practice.

Under the doctrine announced in Anderson v. Liberty Lobby, Inc., when a plaintiff must meet a higher-than-normal burden of proof at trial, federal rules permit the trial court to assess whether the evidence identified in a response to a summary judgment motion could conceivably meet that higher standard. This development does not appear to have thrown the federal courts into turmoil, although several academic commentators have joined Justice Brennan in assailing the logical integrity of this approach when it is presented as being consistent with traditional summary judgment standards. In 1994, the Supreme Court of Virginia decided an appeal that can be read as adopting the approach of Anderson sub silencio.

For simplicity, and to avoid the plaintiffs' bar's potentially legitimate fear that this second level approach invites a judge to weigh the evidence at a pretrial stage, the threshold of "some evidence" should be codified in rule form in Virginia, at least at the beginning. Admittedly, this approach would mean that some defamation cases, paternity actions, or other proceedings that require a higher than normal burden of proof, may survive summary judgment challenge if the plaintiff can identify any cognizable evidence that supports the required elements. The reported frequency of these actions that require higher standards of proof, however, is small. Presently, the absence of an evidentiary focus in the rule's procedure results in the absence of a

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429. Id. at 254-56.
430. See id. at 257-68 (Brennan, J., dissenting).
431. See Carstensen v. Chrsland Corp., 442 S.E.2d 660 (Va. 1994) (applying at the summary judgment stage the heightened "clear and convincing proof" standard governing the merits of an easement claim).
433. See id.
viable summary judgment procedure in all cases.

To further minimize the nonmovant's burden to identify evidence expected to support issues for which summary judgment is sought, the proposed rule speaks in terms of illustrative evidentiary matter. In part, this language is adopted to avoid the sometimes-voiced criticism that summary judgment can be used as an elaborate discovery device by forcing a party to catalogue all of its supporting evidence that will be argued at trial. The proposed rule's approach is more narrowly circumscribed to meet directly the goal of summary judgment. That goal is to assess the specific dispositive factual propositions on which the movant asserts that the adversary cannot prevail. This approach requires the plaintiff to identify only “illustrative” evidentiary support, leaving to the responding party the discretion to determine the proportion of its evidence needed to defeat the summary judgment motion. Some attorneys, no doubt, will be enticed to present a large volume of information for the purpose of impressing the trial judge with the strength of their case. But where that is not a dominant motivation, the proposed rule would impose only that level of obligation which the summary judgment standard itself necessitates—demonstration that there is at least “some evidence,” arguably admissible, on which a rational juror could find for the plaintiff on that issue. Thus the proposed rule avoids suggesting a high threshold of proof and limits the plaintiff's burden to selection of items sufficient to demonstrate a triable issue, yet achieves the goal of assuring that the trial judge will receive submissions directed to individual points. Accordingly, it will be easier for a court to determine whether there are any triable issues of material fact.

(f) USE OF DEPOSITIONS. A party making or responding to a motion for summary judgment may make use of discovery depositions except to the extent prohibited by statute.

In light of the extensive discussion of the problem of depositions in Virginia summary judgment practice set forth earlier in this
(g) INABILITY TO RESPOND. When a party against whom a motion for summary judgment has been filed demonstrates that, despite due diligence, affidavits or other materials essential for opposition to the motion have been unavailable, the court may in the exercise of discretion grant a continuance to permit an opportunity to obtain responsive material, through discovery or otherwise. Where pertinent factual material needed in responding to the motion is in the possession of the party against whom the motion has been filed, no extension of time to respond to the motion will be granted except upon a showing of good cause for the delay.

This paragraph provides for circumstances in which a summary judgment application is arguably made before the adversary has had a fair opportunity to conduct discovery or otherwise locate potentially admissible evidence on key points. It empowers the trial court to defer consideration of the application in contemplation of specific discovery, or to delay hearing the motion for a specified period of time in order to allow a fair opportunity to develop responsive information from any other source.

Virginia trial judges may already have this power inherently, although it is not explicit in Rule 3:18. In general, it would seem that most trial judges today would deny the motion and give the plaintiff an opportunity at trial instead of ordering further discovery.

(h) CROSS-MOTIONS. A party against whom a motion for summary judgment has been made may make a cross-motion for summary judgment, subject to the other provisions of this rule; the making of a cross-motion, whether based on matters of fact or legal theory, does not relieve a party of the obliga-

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434. See supra part III.B.3.
This paragraph clarifies the parties' obligations when cross-motions are filed. It provides that each party must respond to the merits of the adversary's summary judgment motion, filing the materials provided in the rule in order to demonstrate whether material, factual questions exist on the matters identified in each motion. It is not permissible, under this rule, for a party to lodge a cross-motion on a different factual or legal theory as a form of response to a pending summary judgment motion. Such a procedure precludes resolution of the competing motions and may deny a party judicial resolution on the facts presented. Under the proposed rule, each summary judgment motion would be resolved on its own merits. If the cross-motions are on different factual or legal theories, they would be addressed. If the cross-motions revolve around essentially the same facts, no greater work would be required for the parties in casting their responsive materials.

V Conclusion

In the preceding sections, we identified certain characteristics of Virginia summary judgment that hinder its effectiveness and render it virtually useless: the doctrine that averments in the pleadings can preclude summary judgment, the statute and rule barring the use of deposition testimony on summary judgment, the absence of express authority for the use of affidavits and other sources of proof, and the absence of a procedural roadmap in the text of the governing rule, which could aid the court and the parties to formulate summary judgment issues.

Each of these problems has its roots in the text of the rule itself; some of the limitations are positive qualities of the

437. See supra part III.B.1.
438. See supra part III.B.3.
439. See supra part III.B.2.
440. See supra part III.B.6.
SUMMARY JUDGMENT REFORM

rule—such as the statutory ban on the use of depositions—and some are problems of negative implication—such as the absence of a duty to develop pleading allegations and the uncertainty of the use of affidavits and other discovery material. In former times, a policy implicitly discouraging judicial management has sustained these limitations.441

Together, these limitations render Virginia summary judgment an extremely ineffective procedure. Virginia trial judges grant fewer summary judgments to plaintiffs or defendants than do their federal counterparts.442 When summary judgment is granted, the lack of procedural guidelines often leads to errors. The Supreme Court of Virginia is more likely to reverse those trial courts which dispose of cases on summary judgment than are the federal appellate courts.443

Despite the flavor of "plaintiffs versus defendants" in some of the organized bar's discussions of summary judgment reform, the motion's ineffectiveness actually poses potential risks to both plaintiffs and defendants. The limitations of the present rule cast doubt upon the usefulness of pretrial discovery and create various inefficient incentives. The availability of removal to federal court undercuts the Virginia preference for trial adjudication by providing a strongly managerial alternative forum.444

The weakness of Virginia's summary judgment motion is consistent with an antimanagerial, or hands-off, philosophy of the courts' role.445 Fewer pretrial dispositions, however, result in more cases going to trial. Of course, the value of a system that stresses a party's autonomy to state a claim and arrogate the right to a full hearing is that it favors the preservation of the jury trial function. However, the wisdom of reflexively favoring the trial forum, without the benefit of some effective pretrial screening function that goes beyond the facial review of demurrer practice, is questionable in the face of the complexity and volume of modern Virginia litigation. Sanctions alone cannot assure that there is a factual basis for a claim or defense sufficient to war-

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441. See supra part II.C.
442. See supra text accompanying notes 214-15.
443. See supra text accompanying notes 216-19.
444. See supra text accompanying notes 405-12.
445. See supra part II.C.
rant the cost to the parties and the investment of public resources that a full trial entails.

At bottom, given the stringent standards for granting summary judgment on the merits (at least in the core, "no proof" model of the motion) the applicable dichotomy is not between the right to a full trial and the efficiency costs of a high volume caseload. When one party has shown, through a procedurally-fair summary judgment process, that there are no material facts that present any genuine issue, and that a party is entitled to judgment as a matter of law on a claim or defense, the court’s adjudicative task is ended, and its services are more properly preserved for deserving plaintiffs and defendants in other cases waiting on the docket.
APPENDIX A


(a) AVAILABILITY; TIMING. Either party may make a motion for summary judgment at any time after the parties are at issue.

(b) STANDARD. The court shall grant summary judgment where there is no genuine dispute as to one or more material questions of fact, such that the moving party is entitled to judgment as a matter of law on one or more dispositive issues in the case.

(c) PARTIAL SUMMARY JUDGMENT. The court may grant partial summary judgment as to one or more issues. Existence of disputed questions as to damages or other relief shall not preclude summary judgment on issues of liability.

(d) SUPPORTING THE MOTION. The movant shall support a motion for summary judgment by submitting:

(i) a statement of material facts not genuinely in dispute, set forth in numbered paragraphs. This statement shall present a limited number of factual or fact/law issues which the movant represents will be dispositive of all or part of a claim or defense. For each such issue the statement shall identify illustrative sources of the legal rule that makes the point essential to the claim or defense being challenged, and any evidence on which the movant relies to negate or establish the material fact. If the movant contends that there is no admissible evidence supporting a material fact on which the nonmovant has the burden of proof, the statement shall describe the steps taken by the movant to review discovery materials and other available sources of information for evidence to negate or establish that material fact; and

(ii) such other materials permitted by law as the moving party may elect, including memoranda of law, affidavits from persons with personal knowledge of pertinent facts, documents, interrogatory answers, responses to requests for admissions, and other matter.

(e) RESPONDING TO THE MOTION. Where a summary judgment motion has been made and supported as set forth in subparagraph (d)(i) and (d)(ii) of this Rule, the party against whom the motion has been filed may not rely upon averments or denials in the pleadings, whether general or specific, to demonstrate the existence of material questions of fact, but shall respond to the
motion by submitting:

(i) a statement of expected proof on the dispositive issues as to which summary judgment has been sought, set forth in paragraphs numbered to correspond to the statement accompanying the moving papers. The statement of expected proof shall include a written proffer of illustrative evidence, reasonably expected to be admissible at trial, to address the issues on which summary judgment has been sought, supported by affidavits of persons with personal knowledge of pertinent facts, and/or other competent proof, presenting examples of testimony, documents, interrogatory answers, responses to requests for admissions, or other specifically identified evidence, sufficient to show that there is a triable question of fact as to each of the material issues set forth in the moving papers; and

(ii) such other materials permitted by law as the party opposing summary judgment may elect.

(f) USE OF DEPOSITIONS. A party making or responding to a motion for summary judgment may make use of discovery depositions except to the extent prohibited by statute.

(g) INABILITY TO RESPOND. When a party against whom a motion for summary judgment has been filed demonstrates that, despite due diligence, affidavits or other materials essential for opposition to the motion have been unavailable, the court may in the exercise of discretion grant a continuance to permit an opportunity to obtain responsive material, through discovery or otherwise. Where pertinent factual material needed in responding to the motion is in the possession of the party against whom the motion has been filed, no extension of time to respond to the motion will be granted except upon a showing of good cause for the delay.

(h) CROSS-MOTIONS. A party against whom a motion for summary judgment has been made may make a cross-motion for summary judgment, subject to the other provisions of this rule; the making of a cross-motion, whether based on matters of fact or legal theory, does not relieve a party of the obligation to respond in accordance with this rule to the adversary party’s motion.
Because the use of sworn submissions is important to making summary judgment a workable tool, we conducted a survey of all 50 states to determine whether other jurisdictions permit use of depositions and affidavits. All states, the District of Columbia, and the federal courts, except Virginia, include affidavits among the items to be considered on summary judgment, along with depositions.

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