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THE EFFECTIVE USE OF SUMMARY JUDGMENT

by
Roy W. McDonald*

The assigned topic, by its wording, piqued my curiosity. It suggested that all was not at ease with summary judgment procedure in the Texas state practice. To test this hunch, I wrote each Texas district judge. Those who replied—and some fifty did—confirmed my doubts. Affirmatively, nearly three fourths of the answers indicated a generally favorable attitude toward the practice. One fourth expressed a profound skepticism, and several who favored in principle were disturbed by abuses in practice. One judge summed up with the flat statement that he considered such motions "a waste of time."

In this atmosphere, I doubt the present demand for another review of the history of summary judgment† or a repetitious gloss on the provisions of Rule 166-A.‡ Rather, a bit of candid analysis seems indicated. Procedure is not excluded from Cardozo's observation that: "Jurisprudence will be the gainer in the long run by fanning the fires of mental insurrection instead of smothering them with platitudes."

This Article will be limited to a discussion of motions for summary judgment which are supported by affidavits or other extrinsic evidentiary material. My correspondence does not suggest that any troublesome problems have arisen with motions which merely challenge the opponent's pleading, and hence fall into routine thought

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§ Cardozo, The Paradoxes of Legal Science 3 (1928).
patterns conditioned by familiarity with special exceptions. Of the evidentiary type of motion, I shall advance six factors which (while not purporting to be exhaustive) appear to contribute to present uncertainties.

I. THE TRADITIONAL INERTIA OF THE BENCH AND THE BAR

History teaches that procedural innovations normally do not receive immediate and universal acceptance. This is not unique to the summary judgment. The omission of a summary judgment provision in the Texas Rules of Civil Procedure of 1940, deplored by commentators, in part reflected the inertia to which I refer. The Advisory Committee which assisted the Supreme Court in formulating the Rules was cognizant of the long struggle which had preceded the grant of the rule-making power to the Supreme Court, and possibly over-apprehensive that rules departing from accustomed channels might be rejected. The changes which it recommended, therefore, were largely confined to areas of glaring need.

Not until 1950 did the summary judgment rule become effective. After only eleven years, we need not be apologetic because we still stumble, and only now are smoothing away some of the rough spots. We are in the position aptly described by Rebecca West:

The law, like art, is always vainly racing to catch up with experience. . . . By a gross inappropriateness judges . . . are described always as sitting; . . . in fact, they run fast as the hands of the clock, reaching out to the present with one hand, that they may knot it to the past which they carry in their other hand. There are always lapses in time when the present and the past are not joined.

No doubt our younger lawyers, trained in modern law schools, are more familiar with this motion than some who have been long at the bar. But we cannot wait. We must do our best today. And if we are to do that effectively, we must work along lines that will not bring us into excessive conflict with the tradition of conservatism.
which from time immemorial has been characteristic of the mass of the bar.

II. DISCRIMINATION IN THE SELECTION OF CASES IN WHICH TO MOVE FOR SUMMARY JUDGMENT

Trial judges are critical at this point in two respects. Some assert that an excessive number of motions for summary judgment are filed, often in actions where the procedure is inappropriate; others indicate that motions are not filed in proper cases, needlessly cluttering the trial docket. Though the criticisms point in opposite directions, the common element is a lack of discrimination.

Selectivity is essential because in only a relatively small minority of actions will a motion for summary judgment be indicated. We have no statistics from the state courts. Through the courtesy of the Administrative Office of the United States Courts, however, we do have figures covering federal cases disposed of in fiscal 1960. In fifty thousand cases terminated in that year, only 1,433 motions for summary judgment were decided, and only 890 were granted. Nearly two thirds were granted to defendants.

It must be clear, therefore, that the summary judgment motion is not an all-embracing panacea which will sweep our trial dockets clear of over-age litigation. In the terms of a hackneyed metaphor, it is not a blunderbuss; it is a rifle. No motion should ever be made "just because"; indiscriminately pressing motions which are not warranted increases both the expense and delay of litigation. Every motion should represent the outcome of an intellectual exercise in selectivity.

In Texas state courts, selection must be made with recognition of the state's extraordinary faith in trial by jury. Since 1845 the state constitution has protected this right in substantially all civil actions, whether of a legal or an equitable nature. Moreover, this enthusiasm is almost unrivalled elsewhere in this country. And there are skeptics; one recalls the late Judge Frank's comment: "Many ex-
experienced persons believe that of all the possible ways that could be devised to get at the falsity or truth of testimony, none could be conceived that would be more ineffective than trial by jury.”

But in deference to our first point—conservatism—we reject the skeptics. We are enamored with jury trial, and this passion colors our decisions.

Into a practice thus oriented, the supreme court chose to insert a rule which purported to make summary judgment available in any action. But obviously there are some types of cases in which, as a matter of public policy, summary judgment should not be rendered. Suits for divorce are perhaps the most conspicuous examples. Such exceptions excluded, however, the motion may be urged in any civil action, whether based upon legal or equitable theories, and whether seeking legal or equitable relief. The facts of the case, rather than the nature of the controversy, determine the propriety of summary judgment.

Manifestly, a motion is most likely to succeed where the controversy is relatively uncomplicated. This may be true where the claim or defense turns on the interpretation or applicability of a statute. A motion should also be considered where the claim or defense rests upon tangible proof, such as written documents. Here, there is less latitude for extravagance of affidavits, and correspondingly, a more solid foundation for the judicial conclusion that there is no genuine issue of fact.

Acuteness is essential in considering the possibility of a motion for summary judgment in actions sounding in tort. Especially here does our professional conservatism raise its head. It has been said that actions “which turn largely on parol evidence and inferences to be drawn therefrom . . . in their very nature tend, in justice to all parties, to require the full development of all the facts on a jury trial, including examination in court of all available witnesses, whether friendly, impartial, or adverse.” It has also been asserted that summary judgment will not:

be awarded where the issue is inherently one for a jury or judge trial, as generally in instances of intent; exercise of judgment, of discretion,

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13 Frank, Courts on Trial 20 (1949).
of reasonable care; res ipsa situations; uncertainty; reasonable amount; unliquidated damages; or the like. 17

These caveats may be accepted as general rules, but they are not absolutes. Summary judgment is proper, and frequently is granted, in tort actions when the showing establishes undisputed facts which would compel all reasonable men, exercising sound and impartial judgment, to draw inferences and conclusions which could lead only to a judgment for the movant. Such judgments have been sustained in cases involving charges of ordinary or gross negligence, conspiracy, libel, and other torts. 18

III. IMPLICATIONS OF A DECISION TO MOVE FOR SUMMARY JUDGMENT

A motion for summary judgment should not be advanced unless counsel has determined the theories on which he will rely; and deems his position so strong that he is willing fully and comprehensively to reveal to the court (and his opponent) the evidentiary support for those theories.

This is an important strategic decision, although it does not imply that all theories must be advanced on the motion. Of numerous grounds of recovery or defense, only one may appear sufficiently incontrovertible to warrant the motion, while others may be reserved for full development should trial be required. But having chosen the grounds for the motion, “grapple them to thy souls with hoops of steel,” or, in colloquial terms, give them the full treatment.

Trial judges here note two deficiencies:

A. Counsel fail to satisfy the requirements of Rule 166-A. The concern is the formal sufficiency of the papers; no question of credibility is involved. Many reported decisions appear in which, through carelessness, ignorance, or inattention, motions for sum-

mary judgment fail due to lack of formal support. The requirements of the rule are simple; there can be no excuse for failing to meet them. "Supporting and opposing affidavits . . . should show affirmatively the affiant's competence to testify to the facts stated . . . [and] that such facts are personally known to the affiant. . . . The facts stated must be [so worded that] . . . if the testimony were given . . . during trial [it would be admissible]." Thus, hearsay, conclusions, opinions, and generalizations which would be excluded at the trial are not sufficient on a motion. It should also be noted that an acknowledgment is not a verification and that documents or other tangible evidence must be authenticated to establish evidential admissibility.

B. Counsel fail to anticipate and cover the full range of fact issues. To avoid this risk in a complex case requires sharp analysis. The attorney must marshal his evidence in a logical chain to sustain the ultimate fact propositions essential to his position. Having done so, he must make an all-out effort to place before the court (by affidavits, depositions, admissions, and exhibits) the strongest possible demonstration of each of his basic fact propositions.

There can be merit in deliberation. Often the motion must be deferred until discovery is advanced: until gaps in proof are filled, corroboration obtained, protection erected against counter-attack. One judge says: "[S]ummary judgments at times cannot be granted because facts which could have been easily procured by requests for admissions and which are essential . . . either have been omitted or the affiant does not have personal knowledge."

In New York there has been considerable discussion of a short opinion handed down recently in the Southern District Court. In a private antitrust action, paying damages of $109,000,000 (after trebling), one defendant moved for summary judgment. The court concluded that the naming of this defendant "when the complaint was drawn was based only on suspicion and on a gossamer inference drawn from the mere sequence of events." The trial judge stated he would have granted summary judgment but for the "prevailing strict policy in this circuit." The court adjourned the motion pending completion of pre-trial discovery. At that point, the court will decide the motion on the record then available.

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We may find a giant step forward in a local rule recently promulgated in the United States District Courts for the Southern and Eastern Districts of New York. These courts handle the heaviest case loads in the federal judiciary, and have had their difficulties with fuzzily conceived motions for summary judgment. Effectuating the ancient counsel of Anaxagoras that "those who have occasion for a lamp supply it with oil," the judges have supplemented Federal Rule 56 with a local provision:

Upon any motion for summary judgment . . . there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.\(^*\)

In Texas there is authority for similar local rules.\(^{25}\) If the quoted rule is enforced, it should impose upon the lawyers a more perceptive approach to these motions. No lawyer can satisfy the rule unless he has first determined the theory of his claim or defense. The extrinsic evidence supporting his motion may run to hundreds of pages, but the annexed statement of basic facts will provide a map for the judge as he traverses the maze.

IV. COORDINATION OF SUMMARY JUDGMENT AND OTHER PRE-TRIAL PROCEDURES

Maximum utility of the summary judgment procedure requires recognition that it is an integral part of pretrial practice. It is essentially a pretrial inquiry as to whether any genuine fact issue exists.\(^{24}\) This suggests three comments:

A. Some judges question the use of such motions to secure the "evidence" of the other side. While discovery is not the principal function of motions for summary judgment, incidental enlightenment from their use is not a detriment. One of the purposes of summary judgment "is to force parties to present their causes."\(^{25}\)

Modern procedure is dedicated to the desirability of broad discovery.

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Our rules contain techniques intended to permit each party to un-earth his opponent’s position. Depositions may do it, but often at great cost. In one five month period I spent 52 days taking depositions (with daily copy) in a single case, and discovery had only started. Interrogatories and production for inspection may gain enlightenment, usually at less expense. Yet in one case tried in Texas a few years ago, the plaintiff obtained some 10,000 photostats from defendants’ records, and used only a handful on trial. If a motion for summary judgment can obtain some or all of the information at a minimum outlay, that can not be a drawback.

B. Some judges identify cases at the pretrial conference in which a summary judgment may be proper, and suggest that a motion be filed. “Naturally,” one judge hastens to add, “there is no promise that [the motion] is certain to be granted.” His point is intensely practical: “I should much rather deal with the legal problems . . . at that stage of the case than in connection with a motion for an instructed verdict, or later.” He can decide with a deliberation which is impossible under the pressure of trial, when an impatient jury pants for his charge; and with far less expense than a motion for judgment non obstante veredito after trial.

C. Every trial judge should salvage what he can from a motion which does not dispose of the action. Rule 166-A(d) contemplates that in such instances the court “shall if practicable ascertain what material facts exist without substantial controversy.” On the trial these are taken as admitted, thus narrowing the issues that remain.26

A recent Texas case illustrates the utility of partial summary judgment.27 In complex litigation growing out of performance under a gas sales contract between a producer and a pipeline, the petition and the answer posed issues as to fraud in the inception, contract interpretation, ratable take formula, claimed discrimination in gas purchases over a period of years, and the validity of arbitration of the seller’s reserves. Weeks might have been consumed in a full trial. Both parties moved for summary judgment and the plaintiff-buyer’s motion was granted. The Beaumont court affirmed, save for one issue: it limited the remand to the issue of the amount of gas reserves. The trial of that issue should be relatively short.

If the recent New York rule succeeds, the required enumeration

26 If later developments warrant relief, the order stating the facts taken as admitted may be modified: Dyal v. Union Bag-Camp Paper Corp., 263 F.2d 387 (5th Cir. 1959); Coffman v. Federal Laboratories, 171 F.2d 94 (3d Cir. 1948), cert. denied, 336 U.S. 913 (1949).
of propositions will simplify the judge's task of isolating uncon-troverted facts. Once these are determined, it should be an almost mechanical task to include them in the court's pretrial order.

V. PREDISPOSITION OF SOME TRIAL JUDGES TO DENY MOTIONS FOR SUMMARY JUDGMENT

Some trial judges come to a motion for summary judgment reluctantly, predisposed to its denial. As one wrote: "The average judge approaches one with the feeling that he is going to overrule it as soon as the movant comes to a period." There seem to be two main reasons:

A. Some judges believe that the lawyers do not give adequate help, and so consider excessive the labor necessary to decision. This calls only for improved proficiency in advocacy. The lawyer can help by a sound selection of cases in which to move, and by adopting procedures adequate to provide the court with the benefit of the counsel's analysis. Even without a local rule, the motion can be accompanied by a clear statement of the facts asserted to be undisputed and controlling. A memorandum of law will guide the court to the legal points. Afforded these aids, the judge should find no undue burden in ruling upon these motions.

B. Some judges have a highly developed fear of reversal. This dread, not susceptible of mechanical insulation, should be recognized and examined. For a trial judge, as for a trial lawyer, risk of reversal is an occupational hazard, for anyone who decides may err. To the timid, one may commend a passage from "All's Well that Ends Well":

Our remedies oft in ourselves do lie,
Which we ascribe to heaven; the fated sky
Gives us full scope; only doth backward pull
Our slow designs when we ourselves are dull.

But the bruises of a reversed judge cannot be salved with balm from Shakespeare. As one judge stated: "I have been reversed so many times on . . . summary judgment that I have concluded the rule is of no value and am ready to surrender."

This fear (while not groundless) surely is exaggerated. We do not know what proportion of summary judgments are appealed, but the percentage, I suspect, must be low. By physical count, we can ascertain how appeals fare. A mere statistical tabulation, however, without analysis of individual records, would afford little basis for inference. One judge has suggested that the number of reversals in the early years of the practice reflected a lack of understanding of
the procedure by the bar and the trial courts, which time now is relieving. Insofar as a count sheds any light, we may note that during the past year, Texas appellate courts affirmed about sixty per cent of the summary judgments on which they passed. A few were reversed and rendered, based on errors found in the application of the law to the undisputed facts, so that a full trial still was unnecessary. Of those remanded, several would have been reversed with equal celerity had the same outcome followed a full scale trial. This leaves about one fifth which were reversed and remanded because of asserted fact issues which had not been recognized by the trial court.

This last percentage is too large and can be reduced by greater clarity at both the trial and the appellate levels. The points which I have already advanced, if adopted locally, should contribute to this.

An aid would be to amend the Rules to require that the trial court, on granting a summary judgment, file findings of fact and conclusions of law. This is not presently required in either the state or federal practice. It has been said, in a Texas case where findings were filed upon granting a motion, that they "are in no manner controlling."

In determining the motion, however, the trial judge makes decisions with respect to fact questions. Since he must ascertain the material fact propositions which are undisputed or conclusively established, there is no reason why he should not state these. After a contested non-jury trial, a well drafted set of findings of fact includes material facts which are beyond dispute as well as findings on disputed issues. I disagree with the federal treatise which says:

Logically, findings of fact should not be made in disposing of motions for summary judgment. Findings are appropriate only in deciding issues of fact.

In the federal courts, aid is available through written opinions. Moreover, federal decisions recognize that a trial judge may make such findings, and that the clues provided as to the basis of decision may aid on appeal.

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31 But refusal of findings on facts which are shown by pleading or by undisputed evidence have been held not to be error. Brumley v. Neeley, 207 S.W.2d 931 (Tex. Civ. App. 1947) error ref. n.r.e.
33 Gurley v. Wilson, 219 F.2d 917 (D.C. Cir. 1956), citing Filson v. Fountain, 171 F.2d 999 (D.C. Cir. 1948), rev'd on other grounds, 336 U.S. 681 (1949); Lindsey v. Leavy, 149 F.2d 899 (9th Cir. 1945), cert. denied, 326 U.S. 783 (1946).
If findings of fact and conclusions of law are required, the parties must assist the trial judge by filing written proposals. If this were not done, the added labor imposed on the judge would become another makeweight against the motion. But given the adoption of the suggestions previously made for clarification, the drafting of suggested findings would be a minimal chore. I believe it would be rewarding.

VI. APPELLATE DECISIONS FINDING FACT ISSUES WHICH WERE NOT EVIDENT TO TRIAL JUDGE

One trial judge, writing without inhibition about appellate review, states:

They go over it with a fine tooth comb to find any possible jury question (no matter how remote) that could possibly be submitted. If they can find one . . . they reverse the case, saying . . . in effect: “Although you are probably correct, nevertheless you should submit this remote issue and then if the jury makes a finding with no evidence . . . you should grant a judgment non obstante veredicto.”

Here I might take refuge in the caveat of Herodotus, who said: “I am under obligation to tell you what is reported, but I am not obliged to believe it.” I shall not.

From a pragmatic standpoint, the important fact is that nearly one third of the answering judges explicitly indicated concern over reversals. One judge summed up thusly: “As it is, even a scintilla of evidence makes the rule of no value.”

The so-called “scintilla rule,” to which the judge referred, usually is mentioned when a court is deciding whether the evidence at trial raises an issue, or any issue, for jury determination. To quote a recent writer:

It is a judicial legend, that there once was a “scintilla rule” under which a verdict could be directed only when there was literally no evidence for proponent, but if there ever was such a notion all that remains of it today is its universal repudiation.4

On a motion for instructed verdict the trial court accords every liberality of construction in favor of the adverse party, indulges every reasonable inference which may be drawn in his favor, and discards all contradictory evidence favorable to the movant. But here is the difficulty: if the evidence, so viewed, amounts to no more than a “scintilla”—“no more than a mere suspicion or speculation

that the fact propositions asserted by the opponent might be true or that those urged by the movant might be false"—an issue of fact is not raised.\textsuperscript{5} A showing that amounts to no more than a "scintilla" is regarded as no evidence at all.\textsuperscript{6}

The appellate courts say that on a motion for summary judgment based on evidence, the trial court should apply tests analogous to those used in resolving a motion for directed verdict.\textsuperscript{7} Analogy is not identity and the situations are not the same. The motion for directed verdict is urged at a point in the trial when the movant's showing has been subjected to the ordeal of cross-examination, and to the illumination of so-called demeanor evidence generated in testimony given live before the jury. At the summary judgment stage, there can be no demeanor evidence, and the impact of cross-examination is dulled when found only in the written transcript of a deposition.

These differences probably contribute to the admonitory aphorisms glossed upon Rule 166-A. Neither the motion for instructed verdict nor the motion for judgment non obstante verdicto has accumulated such a miasma of verbal reservations. The motion for summary judgment has been classed as an "extreme remedy"\textsuperscript{8} and is said to be a rule to be "cautiously invoked."\textsuperscript{9} It has been said that "the power to pierce the flimsy and transparent factual veil should be temperately and cautiously used lest abuse reap nullification."\textsuperscript{10}

The decision on a summary judgment motion, therefore, cannot always track the potential resolution of a motion for directed verdict. This has been noted recently by the Court of Appeals for the Fifth Circuit. That court reversed, in a personal injury action, a summary judgment granted upon the defense of assumption of risk. The court agreed that ordinarily summary judgment may be viewed as a virtual forecast of the decision on a motion for instructed verdict. But it viewed the instant action as one in which a determination that there is a "reasonable doubt" . . . about the existence of a genuine controversy does not foreclose a [later]

\textsuperscript{5} MacDonald, op. cit. supra note 2, at § 11.28 and cases cited.
\textsuperscript{8} Armco Steel Corp. v. Realty Inv. Co., 273 F.2d 483 (8th Cir. 1960); Warner v. First Nat'l Bank, 236 F.2d 853, 857 (8th Cir.), cert. denied, 352 U.S. 927 (1956).
\textsuperscript{10} Avrick v. Rockmont Envelope Co., 155 F.2d 568, 571 (10th Cir. 1946).
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directed verdict if on the evidence as it is actually and finally adduced on a trial reasonable minds could not reach a contrary conclusion. . . . To require a trial which will (or may) end in the very same judgment . . . which we here reverse may appear to be an unnecessary and waste-
ful expenditure of precious limited judicial resource. Of course, [asserts the judge] it is not. What it is, is a recognition that at times the issues may be such that only after the agony of a full-blown trial may it authoritatively be determined that there was never really the decisive issue of fact at all.41

This reads smoothly, but to me it suggests the language of a writer who has a basic distrust of summary judgment. The trial judges advance firmly the opinion that some appellate courts go too far. They contend that a mere scintilla of evidence has been accepted as sufficient, in the minds of some appellate judges (and especially those who oppose summary judgment on principle) to defeat a motion. They assert, with justification, that the rule contemplates a genuine issue of material fact, one which can be maintained and opposed by substantial evidence.42 This implies identification of the issue and an evidentiary situation which rises above suspicion, speculation, or surmise. A definitive appraisal of these complaints would require an effort of scholarship suitable for a graduate thesis. It would involve a study of the records in appealed cases which is impossible within the limitations of this Article.

As an illustration of the possibility of ambiguity even in our highest court, the recent decision of the Supreme Court in James T. Taylor & Son v. Arlington Independent School Dist. is a case in point.43 The trial court granted summary judgment for defendant. The Court of Civil Appeals reversed. The Supreme Court disagreed with the intermediate court on the law, but sustained the reversal.

The facts were these: the district sued to recover on a bond after the low bidder declined to execute a construction contract. The bidder refused to sign because it claimed an error of $100,000 in its bid. The bidder-defendant's motion for summary judgment was supported by the deposition of its estimator, corroborated by work sheets which established the mistake. The Court of Civil Appeals said, "We believe that the record before us unquestionably shows that an honest mistake had been made. . . ."44 It held, however,

43 160 Tex. 617, 335 S.W.2d 371 (1960), noted, 15 Sw. L.J. 344 (1961).
that the contractor must show (1) the mistake was not due to ordinary negligence, and (2) the district knew or had reason to know of the mistake before accepting the bid. It found fact issues on both points.

The nine justices of the Supreme Court produced three opinions. One justice agreed with the Court of Civil Appeals.

Five justices held that the Court of Civil Appeals had erred on both the negligence and the knowledge holdings. They concluded that the contractor would be barred from relief only if his carelessness was akin to gross negligence. The reversal was affirmed, however, on the ground that the estimator was an interested witness. The five justices sent the case back with the admonition that the trial court guided by the principles herein stated, should determine from the facts and circumstances under which the mistake was made whether there is raised such issue of negligence that should be submitted to the jury.

The other three justices, with jet precision, zeroed in upon this sentence. Their approach was logical: they concluded that two issues of fact were raised: first, whether a mistake was made (although the Court of Civil Appeals had no doubt as to this); and secondly, whether the mistake was caused by negligence rising to a degree barring recovery. Their criticism was:

As I construe the majority, it says the second issue might be raised upon the trial. Under the record . . . I think the issue was raised; and if like evidence be adduced on another trial, the issue should be submitted.

A respectable argument can be made for the contention that the five judges applied the scintilla rule to defeat the motion. If we do not accept a surmise or a suspicion or a speculation as sufficient to warrant submission of an issue to the jury, we should not use the mere possibility of a fact issue to sustain reversal.

The genesis of the problem lies in the cliche, "Summary judgment cannot be granted where the slightest doubt remains." This seductive phrase flows with insidious fluency from the judicial pen. There is danger that it may emerge as a solving formula applied with inadequate discrimination. Two questions need to be given answers sufficiently precise to make them tools of decision at the trial court

46 Bliss v. Ft. Worth, 288 S.W.2d 518 (Tex. Civ. App. 1956) error ref. n.r.e., quoting Doehler Metal Furniture Co. v. United States, 149 F.2d 130 (2d Cir. 1945).

46 It has been noted that the "slightest doubt" rule has greatly restricted summary judgment in some jurisdictions. Clark, The Summary Judgment, 36 Minn. L. Rev. 567, 576 (1952).
level: First, “doubt” as to what? Secondly, do we really, literally, mean “slightest”? The “doubt” should be limited to the truth of the material fact propositions on which the movant relies. The burden is on the movant to put before the trial court a convincing evidentiary showing, against the tests applicable to motions for instructed verdict, sustaining the truth of his crucial fact propositions. This burden should not be whittled away. It accords with “a basic postulate of the procedural law that [true] issues of fact shall be resolved only after a trial.” Given a motion supported by a sufficient showing to escape the pitfall of questions of credibility which must be resolved by a jury—given a motion thus supported, the burden shifts to the opponent to establish plausible reasons for a trial. A party resisting a motion should not be allowed to hold back his evidence and defeat summary judgment upon the vague contention that at a trial something may turn up. “The burden rests upon him to meet the moving party’s evidence with a showing of facts, in detail and with precision, sufficient to raise a [genuine] issue of material fact.” The determination of the existence of such an issue must rest upon something more tangible than mere speculation.

The practice is unduly restricted when a court, despite the strength of the showing on the motion, denies the motion or reverses because of “doubt” as to whether at a trial a fact issue may arise from some presently unforeseen development or some presently unknown evidence. The following quotation from a Texas decision overstates the burden on the movant:

We are unable to hold that the record shows conclusively it will be impossible for plaintiffs, on a full hearing, to make issues to go to the jury on the actionable negligence of the defendants . . . .

If that were the norm, it is difficult to visualize a case in which a
party could sustain such a burden, i.e., establishing conclusively the impossibility of some issue developing at trial.

In the same family of unfortunate language, we find statements that summary judgment is improper where, on moving papers which are uncontradicted, the appellate court is in doubt as to whether conflicting inferences might be drawn from the undisputed facts. I am not questioning the doctrine that a motion shall be overruled when the court can see that there is a fact basis on which reasonable men could differ as to the ultimate conclusions. What I do contend is that it seems improper to compel a trial when the opponent has brought forward no evidence, and when the court cannot conclude that conflicting inferences would be reasonable; but at the most can only say that it has doubt as to whether they might be reasonable.

I appreciate that here we also encounter the rule that ordinarily the truth of the uncorroborated testimony of an interested witness as to facts favorable to the party with whom he is identified, concerning an issue upon which such party has the burden of proof, must be left to the jury. The important point is to recognize that this is a general—not invariable—rule, that it has its limitations, and that the cry "interested witness" should not become a magic incantation to make motions for summary judgment dissolve in thin air.

We have lived with this doctrine in the field of instructed verdicts, and we can cohabit with equal felicity at the summary judgment level. There is no reason why a summary judgment should not be granted when the support, even though from an interested witness, pertains to matters reasonably capable of exact statement, and is clear, direct, and positive, is internally devoid of inconsistencies and contradictions, and is uncontradicted either by the testimony of other witnesses or by circumstances—in short, when there is nothing to cause any reasonable suspicion of its truth. This is especially indicated where it is clear that the opposing party has it in his power to contradict the supporting showing if it be false.

As a minimum, the opponent should be required to come forward with something that raises a doubt as to the facts advanced by the interested witness, or which satisfies the court that because of the

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52 See Braniff v. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523 (5th Cir. 1960) (Hutcheson, J., dissenting). Brown, J., for the majority, asserted that "conflicting inferences were open upon the moving papers." The additional reference to "reasonable doubt" was unnecessary.


55 3 McDonald, op. cit. supra note 2, at § 11.28.
nature of the particular action such a showing is impractical. Only very rarely will an opponent have nothing upon which to rely save an attack upon the witness’ credibility. Indeed, here again Texas carries its enthusiasm for jury trial beyond that of others:

A majority of the courts . . . have announced . . . the view that it is not a reasonable thing to say, in general, that a witness has . . . testified falsely, either intentionally or unintentionally, merely because of an interest in the case, where his testimony is not contradicted, is not opposed to general human experience, is not inherently improbable, and not put in question by other circumstances appearing in the case . . . .

And finally, how slight is the “slightest doubt”? This question skirts the edge of metaphysics, and the answer given by a particular judge is swayed by many factors within his personal philosophy. Thus we find the sharp cleavage which existed on the Court of Appeals of the Second Circuit between Judges Jerome Frank and Charles Clark. Without mentioning individuals, I sense a somewhat similar conflict of approach developing today on the Court of Appeals for the Fifth Circuit, and on at least one of the Texas Courts of Civil Appeals. At the trial court level, one district judge says: “We . . . never grant [a summary judgment] . . . unless it is impossible for us to conceive of some imaginary defense or if there is any doubt whatsoever about what is in issue.”

When any witness undertakes to reconstruct an observed event, there are many sources of potential error. Among others, the witness may observe defectively, recall faultily, or testify obscurely. Jurors or judge may be uncertain in reception or equivocal in the integration of multiple facts. As was stated years ago in the Texas Law Review:

If a proposition can only be proved probable to some degree, there is always a slight doubt, never certainty. Thus the test, if logically applied, would preclude a [summary] judgment in every contested case. The test must therefore be applied practically and must mean that the proof offered by the movant must establish his claim or defense with a very high degree of probability.

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6 Jerke v. Delmont State Bank, 54 S.D. 446, 223 N.W. 585, 591-92 (1929), citing, Wigmore, Evidence § 2495 (2d ed. 1923). In this opinion, Massachusetts, Texas, and Indiana are noted as going far toward barring an instructed verdict for the party having the burden of proof when the testimony of an interested party is involved. See also James, supra note 34, at 226, citing an excellent review of the point in Ferdinand v. Agricultural Ins. Co., 22 N.J. 482, 126 A.2d 123 (1956).
"[A]ll proof requires some process of inference, before it can be translated into an actual decision by the trier." The degree involved varies from the minimum required on the exhibition of real evidence to the maximum evoked by the evaluation of circumstantial evidence. But one thing is certain: there is always room for the "slightest doubt" as to whether any given testimony—or any fact finding—or indeed any "fact" stated in an appellate opinion—portrays what really occurred.

The doubt which will defeat a motion for summary judgment should be one which rises above surmise, speculation, or suspicion. It should be grounded on some identifiable basis, such as a conflict of affidavits, an internal inconsistency in the supporting evidence, or even a lack of correlation between testimonial assertions and recognized physical facts. Absent sources of doubt such as these, it may on occasion arise out of questions as to credibility of the supporting proof, especially where coming from an interested witness and the party opposing the motion lacks access to the source of testimony, e.g., where the facts relied upon are peculiarly within the knowledge of the litigant. But if the summary judgment procedure is to be effective, the instances where denial is attributed to questions of credibility must be held to a minimum. Thus we come full scale: the doubt should rest on more than a scintilla.

When a summary judgment is reversed, the appellate court should indicate for the guidance of the trial court what issues of fact it has found. This is not a burdensome obligation; if summary judgment is to be effective, there should not be a reversal based upon no more than a vague idea that there are some unidentifiable fact issues in dispute. The opinion should state specifically what the fact issues are. While the trial record after remand may differ from the showing on the motion, the trial judge is warranted in asking at least that he have this much guidance as to the appellate court's reasoning.

VII. Conclusion

Through my several comments upon the summary judgment there runs a single theme which, above all others, will conduce to the more effective use of this technique. It is the importance of sharp analysis at each stage of the practice: in the selection of cases; in the preparation of supporting and opposing affidavits; in the judicial appraisal by the trial court of the showing; and in the appellate review of motions which have been granted. The summary judgment motion

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is a precision tool and cannot be handled roughly. It is not an instrument for the clumsy, whether they stand before or sit upon the bench. In any but the run of the mill cases, it calls for a high degree of professional application to be successful. Given the attention and the skill which it deserves, the motion can be a most useful weapon in the advocate's arsenal.
## APPENDIX

### The Effective Use of Summary Judgment

Table showing civil cases terminated in 86 United States District Courts in Fiscal Year 1960

<table>
<thead>
<tr>
<th>Nature of Suit</th>
<th>Total cases terminated</th>
<th>Total</th>
<th>Pitfs., motion granted</th>
<th>Defsts., motion granted</th>
<th>Pitfs., motion denied</th>
<th>Defsts., motion denied</th>
<th>Both parties made motion</th>
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