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The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little

Linda S. Mullenix*

I. INTRODUCTION

The twenty-fifth anniversary of the Supreme Court's famous summary judgment trilogy¹ provides an excellent opportunity to reflect on the legal profession's ability to overstate, overhype, and overinflate the impact of Supreme Court decisions. This certainly would seem to be true for predictions concerning summary judgment practice that were issued in the immediate aftermath of the Court's 1986 decisions in *Celotex*, *Anderson*, and *Matsushita*.

Famously, members of the academy and other legal seers opined that the Supreme Court, in issuing the summary judgment trilogy, was telegraphing a message to federal judges to make enhanced usage of summary judgment to expedite legal proceedings and to intercept and dismiss factually deficient litigation before trial. The not-so-veiled purpose of the summary judgment trilogy, then, was to nudge federal judges out of their normal predisposition against summary judgment. Consequently, a number of procedural wags predicted that federal courts would witness a surge of summary judgment dismissals in the wake of the trilogy.

However, as the Federal Judicial Center's ("FJC") numerous empirical studies have shown, the summary judgment trilogy has had scant impact on judicial reception to enhanced utilization of summary judgment as a means to streamline litigation.² Simply stated, the trilogy

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1. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–27 (1986) (clarifying the shifting allocations of burdens of production, persuasion, and proof at summary judgment); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (applying heightened evidentiary standard of proof in libel action to judicial assessment of propriety of summary judgment); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596–98 (1986) (holding antitrust plaintiff with an inherently implausible claim was subject to dismissal at summary judgment).

2. See JOE CECIL & GEORGE CORT, FED. JUDICIAL CTR., REPORT ON SUMMARY JUDGMENT

has not resulted in federal judges granting or denying summary judgment in statistically significant ways than before the trilogy. Although the courts did experience a brief uptick in summary judgment dismissals in the immediate aftermath of the trilogy, things soon settled back to the summary judgment relative equilibrium that existed prior to the trilogy.

Arguably, the summary judgment trilogy had its greatest impact on the way in which first year civil procedure professors teach summary judgment. As the now reigning interpretation of Rule 56,³ *Celotex* has become the standard teaching decision on summary judgment. Conventionally, *Celotex* is presented as the case in which the Court attempted two things: (1) to clarify the burdens of production, persuasion, and proof at summary judgment, and (2) to rectify a misapprehension of the Court's previous decision in *Adickes v. S.H. Kress & Co.*,⁴ often misunderstood as requiring that a summary judgment plaintiff prove up the absence of a genuine issue of material fact—that is, prove up a negative proposition.⁵

The usual presentation of *Celotex*, then, focuses on Justice Rehnquist's attempts to clarify the proper application of Rule 56,⁶ followed by consideration of Justice Brennan's dissent which attempts

PRACTICE ACROSS DISTRICTS WITH VARIATIONS IN LOCAL RULES 1–2 (2008) (concluding that there is minimal differentiation in the rate of filing and granting summary judgment motions across federal district courts); JOE CECIL ET AL., FED. JUDICIAL CTR., TRENDS IN SUMMARY JUDGMENT PRACTICE: 1975–2000, at 23–24 (2007) [hereinafter CECIL ET AL., TRENDS] (finding that the rate of filing and granting summary judgment motions “generally changed very little after the trilogy” except in tort cases, which the authors contend is caused by other factors); JOE CECIL & GEORGE CORT, FED. JUDICIAL CTR., ESTIMATES OF SUMMARY JUDGMENT ACTIVITY IN FISCAL YEAR 2006, at 1–2 (2007) (analyzing summary judgment activity in 179,969 cases terminated in the seventy-eight federal district courts that had fully implemented the CM/ECF reporting system in Fiscal Year 2006, and concluding that summary judgment activities varied greatly within the circuits, due in part to differences in the caseloads of each district); Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 882 (2007) [hereinafter Cecil et al., *Quarter-Century*] (finding that the percentage of cases containing one or more motions for summary judgment increased from twelve percent in 1975 to seventeen percent 1986, increased to nineteen percent in 1988 and remained fairly steady ever since—a finding that “would be unexpected by many legal commentators”).

3. FED. R. CIV. P. 56.

4. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), *overruled in part by Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

5. *Id.* at 157.

6. See *Celotex*, 477 U.S. at 322–27 (noting that the Court of Appeals relied on *Adickes* in interpreting Rule 56 to require that the party opposing a motion for summary judgment respond only after the moving party proved the absence of any genuine issues of material fact, and explaining why this view is “inconsistent with the standard for summary judgment set forth in [Rule 56]”).

to reclarify Justice Rehnquist's alleged ingenuous articulation of the burdens at summary judgment, at least according to Justice Brennan.⁷ Teaching the combined Rehnquist–Brennan “clarified” Rule 56 standards now requires a visual scorecard through labyrinth prose, thusly:⁸

II. BURDENS OF PRODUCTION AND PERSUASION ON SUMMARY JUDGMENT

A. Party Moving for Summary Judgment: Initial Burden of Production

Movant carries burden of
persuasion at trial

Must show:

(1) Credible evidence to support
negating directed verdict at trial

Nonmovant carries burden of
persuasion at trial

Must show:

(1) Affirmative evidence
essential.

(2) Nonmoving party's evidence
is absent or insufficient to
establish essential element of
nonmoving party's claim

B. Party Opposing Summary Judgment: Shifted Burden of Production (Rule 56(e))

Movant carries burden of
persuasion at trial

Must show:

(1) Evidentiary materials
demonstrating existence of
genuine issue for trial

Nonmovant carries burden of
persuasion at trial

Must show:

(1) Sufficient evidence to make
out its existence of genuine issue
for trial claim, or

(2) Affidavit requesting additional
time for discovery (Rule 56(f))

7. *Id.* at 329–37 (Brennan, J., dissenting).

8. This chart is reproduced from Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433, 464 (1987).

C. Party Moving for Summary Judgment: Ultimate Burden of Persuasion

Evaluate:

- (1) Entire setting of case; entire record and summary judgment materials
- (2) Whether it is clear that trial is unnecessary
- (3) Whether there is any doubt as to existence of genuine issue for trial (to be resolved against moving party)

Teaching *Celotex*, then, is not for the faint-hearted civil procedure professor and one always comes away with the vague impression that no matter how brilliant the academic presentation, there is hardly any way in which first-year law students can begin to comprehend how summary judgment actually works in practice. In short, teaching summary judgment through *Celotex* and the trilogy has not proven to be one of civil procedure's finer moments.

In a similar vein, after many years of reading post-*Celotex* summary judgment decisions, one begins to form a somewhat fixed, though completely unsubstantiated impression, that any number of federal courts are not faring any better with the *Celotex* decision. Although many courts routinely cite *Celotex* at the outset of their summary judgment decisions, one often searches in vain for the court's analysis of all those *Celotex*-style shifting burdens of production, persuasion, and proof.⁹

Even more vexing is the trilogy's second leg: *Anderson v. Liberty Lobby*.¹⁰ Although the Court makes the arguably valid point that a claim's underlying evidentiary standard ought to apply with equal force at summary judgment (e.g., the heightened libel standard in *Anderson*), one cannot help but wonder how many other examples—apart from a libel claim—have come within *Anderson*'s orbit in the past twenty-five years. More on this later.¹¹

Finally, there is the trilogy's third leg: *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,¹² the landmark case in which the Court finally gave the green light to summary judgment dismissal of an antitrust suit based on implausible pleading and proof at summary

9. See *id.* at 459–66 (discussing inapposite evidentiary standards and differing burdens of production and persuasion at summary judgment).

10. 477 U.S. 242 (1986).

11. See *infra* notes 49–90 and accompanying text (providing examples of federal cases involving *Anderson*'s discussion of heightened evidentiary burdens at summary judgment).

12. 475 U.S. 574 (1986).

judgment.¹³ Perhaps the only interesting question concerning *Matsushita*, after twenty-five years, is the extent to which this decision largely has been swallowed by the Court's 2007 additional foray into antitrust pleading in *Bell Atlantic Corp. v. Twombly*.¹⁴ Indeed, what need do we have of *Matsushita* when we now have *Twombly*?¹⁵

The purpose of this Article is to attempt to substantiate at least two propositions about the great summary judgment trilogy after twenty-five years in federal jurisprudence. The first testable proposition centers on the inquiry concerning the extent and nature of citation to *Celotex* among federal judges and the ways in which courts have actually followed the *Celotex* burden-shifting analytical framework.

The working presumption guiding this inquiry is that although many, if not most, federal courts cite *Celotex*, a substantial number of federal courts do not actually apply the Court's articulation of the shifting burdens of production, persuasion, or proof. If this is true, then *Celotex* has had an "impact" in name (and citation) only, and not in practical application. In other words, federal judges may instead be deciding summary judgment motions the old-fashioned way—according to some gestalt sense—not unlike what federal judges were doing before *Celotex*.

13. *Id.* at 596–98.

14. 550 U.S. 544 (2007).

15. In *Matsushita*, an antitrust action brought under section 1 of the Sherman Antitrust Act, the Supreme Court reversed a Third Circuit decision denying the defendants' summary judgment motion. *Matsushita*, 475 U.S. at 598. The Third Circuit had held that there was both direct and circumstantial evidence of an antitrust conspiracy to allow the case to go to trial. *Id.* at 580. The Supreme Court disagreed, holding that the direct evidence on which the Third Circuit had relied had little relevance to the predatory pricing conspiracy, and that the appellate court failed to consider the absence of a plausible motive to engage in predatory pricing. *Id.* at 596–97. Presaging the Court's 2007 decision in *Twombly*, the Court in *Matsushita* concluded that when the claims are implausible and make no economic sense, then plaintiffs must offer more persuasive evidence to support their claims than would otherwise be necessary. *Id.*; see also 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2732.1 (3d ed. 1998) (discussing *Matsushita*). Significantly, since 1986, no lower federal court cases have relied on *Matsushita* in the antitrust context. See *id.* § 2732.1 n.24.

The Court's *Matsushita* decision and its language requiring plausible evidence at the summary judgment stage, pre-saged the Court's 2007 decision in *Twombly*. In that case, the Court had to consider the appropriateness of a threshold Rule 12(b)(6) dismissal of an antitrust conspiracy lawsuit based on alleged insufficient allegations in the pleadings. *Twombly*, 550 U.S. at 552. Famously, the Court held that a Rule 12(b)(6) dismissal was appropriate because a plaintiff's offer of conspiracy evidence had to rise above the level of mere possibility, and must present enough factual matter that, when taken as true, present plausible grounds to infer that a conspiratorial agreement existed. *Id.* at 570. *Twombly*'s "plausible pleading" standard is the direct lineal descendant of *Matsushita*'s plausibility standard at summary judgment, and because a section 1 Sherman antitrust complaint is now subject to the *Twombly* plausible pleading standards on a threshold Rule 12(b)(6) motion to dismiss, this would seem to winnow the number of antitrust complaints that will now survive the *Matsushita* scrutiny at summary judgment.

And second, *Anderson* has not had “legs” in the Hollywood sense: apart from libel claims, there are not very many other examples where judges have recognized and applied a differential evidentiary standard of proof at summary judgment. Furthermore, if one discounts *Matsushita* as a *Twombly*-impaired ruling, then inexorably one is led to the conclusion that the summary judgment trilogy, at twenty-five, has been much ado about very little.

III. A VERY MODEST EMPIRICAL STUDY OF *CELOTEX*

The FJC has preempted and occupied the entire field of empirical study of summary judgment in the post-*Celotex* era.¹⁶ So complete and thorough are these studies that it is humbling to even attempt to venture in this field. Nevertheless, the multitude of FJC studies have largely focused on various bean-counting exercises, plotting the incidence of summary judgment grants or denials, in several different judicial arenas, in varying types of cases, over periods of time.¹⁷ The general purpose of the FJC studies has been to ascertain whether the summary judgment trilogy has indeed contributed to greater judicial flexing of its summary disposition authority.¹⁸

The FJC studies, however, have left unexamined and unanswered a series of questions that are unrelated to their bottom line tallies of summary judgment dispositions. Thus, this study modestly focused on answering the question not of “how many” but of “how.” This, then, is an analysis of how courts have been reading, interpreting, and applying the *Celotex* decision, not how many courts have granted or denied summary judgment motions.

The aim of this research was to determine if federal courts are applying the burden-shifting framework of motions for summary judgment the Court announced in *Celotex*.¹⁹ The study centered on examining three primary questions: In those cases where a court considered a summary judgment motion, did the court (1) cite *Celotex*, (2) discuss the *Celotex* standards as articulated by the Supreme Court

16. See *supra* note 2 and accompanying text (listing numerous studies conducted by the Federal Judicial Center analyzing the topic of summary judgment post-*Celotex*).

17. See generally CECIL ET AL., TRENDS, *supra* note 2, at 1 (stating that this particular study was comprised of information from “six federal district courts during six time periods over twenty-five years (1975–2000)”).

18. See *id.* (“[T]he likelihood of a case containing one or more motions for summary judgment increased *before* the Supreme Court trilogy, from approximately 12% in 1975 to 17% in 1986, and has remained fairly steady at approximately 19% since that time.”).

19. See *supra* note 8 and accompanying chart (depicting the burden-shifting framework adopted by the Court in *Celotex*).

(either in Justice Rehnquist or Brennan's decisions), and (3) consciously apply those *Celotex* standards to reach its conclusion about granting or denying summary judgment? In addition, the study further attempted to examine how courts that did not cite *Celotex* evaluated summary judgment motions. Finally, the study focused on a subset of summary judgment motions in insurance cases, to ascertain the extent to which the *Celotex* burden-shifting standards have had an impact on contract-type cases.

IV. METHODOLOGY

As the FJC has repeatedly documented, and as is generally well known, courts routinely render thousands of summary judgment motions annually.²⁰ Moreover, courts dispose of a large percentage of summary judgment motions in unreported and unpublished actions.²¹ Over a twenty-five year span, then, the sheer volume of summary judgment activity presents a daunting task for assessing the impact of *Celotex*'s jurisprudence on the way in which courts actually consider and decide summary judgment motions.

Instead, for the purpose of obtaining a snapshot of *Celotex*'s impact on judicial application of summary judgment procedure, this study analyzed all published and unpublished Circuit Court of Appeals decisions in 2010, a universe of 222 cases.²² Appellate decisions were selected as the basis for study because the LexisNexis and Westlaw databases indicated in excess of 10,000 reported and unreported district court summary judgment decisions in 2010 alone, a database too large for the reading and parsing every district court summary judgment disposition.²³ Similar to the FJC studies, routine high-volume

20. See, e.g., Cecil et al., *Quarter-Century*, *supra* note 2, at 869 (summarizing the number of cases involving motions for summary judgment this study sampled from six district courts between 1975 and 2000).

21. See *id.* (arguing that the "denial of a summary judgment motion may not generate a formal opinion that meets standards for publication or inclusion in a computerized legal reference system," and that these unpublished rulings on summary judgment motions often "escape the notice of scholars who rely on only published opinions").

22. The data was obtained using the Westlaw and LexisNexis databases; cases were located using the search phrases "Celotex" and "summary judgment." The search excluded cases in which Celotex was a party or which cited a different case in which Celotex was a party.

23. See Brooke D. Coleman, *The Celotex Initial Burden Standard and an Opportunity to "Revivify" Rule 56*, 32 S. ILL. U. L.J. 295, 309 (2008) (analyzing the impact of the *Celotex* standards on district court decisions in the Federal District Court for the Northern District of California). Professor Coleman's findings with regard to the impact of the *Celotex* standards on district court summary judgment decisions largely agree with the findings of this study of appellate summary judgment decisions. *Id.* at 319.

categories of cases such as social security actions were excluded from the study.

Within the universe of appellate decisions, then, summary judgment decisions were sorted based on three different criteria:

- (1) Did the court correctly cite the burden-shifting framework of *Celotex*? These cases were categorized as “correctly citing the burdens.”
- (2) If the court did cite the burden-shifting framework, then did the court correctly apply the burden-shifting framework to the particular facts and parties of the case? These cases were categorized as “correctly applying the burden.”
- (3) If the court did not specifically cite or apply *Celotex*, did the court’s decision contain any discussion of a party presenting evidence or failing to present evidence to create a genuine issue of material fact (as opposed to simply stating, on the merits, that a party’s claim failed or did not fail)? These cases were categorized as “presenting some evidence” without specifically citing or applying *Celotex*.

Appendix A to this Article provides further detail describing how the database cases were categorized according to a court’s legal and factual analysis of the motion.²⁴

V. RESULTS AND TENTATIVE CONCLUSIONS

The analysis of the 2010 database of circuit court summary judgment decisions seems to support the thesis that courts more widely ignore than honor the *Celotex* burden-shifting analytical framework so elaborately set forth in the *Celotex* opinions. Furthermore, in the subset of cases where the appellate courts have cited *Celotex*, application of the Supreme Court’s carefully crafted articulation of shifting burdens of production, persuasion, and proof often seems sketchy, incomplete, or less-than-rigorous, at best.

The threshold inquiry centered on the simple examination of how many courts minimally cite the *Celotex* decision as the leading Rule 56 precedent governing summary judgment dispositions. Surprisingly, analysis of the 2010 database cases as shown in Figure 1 indicates that in more than half of the reported appellate decisions where courts reviewed summary judgment decisions—118 decisions—the appellate court unexpectedly did not even cite *Celotex*, now the leading Supreme Court Rule 56 precedent.²⁵

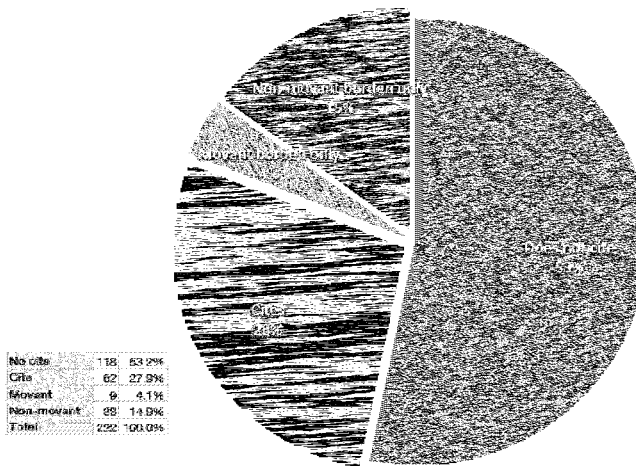
24. The Excel spreadsheet categorizing all 222 appellate decisions, with quoted exemplary language from each decision, is on record with the *Loyola University Chicago Law Journal*.

25. See, e.g., *Wilcox v. Homestake Mining Co.*, 619 F.3d 1165, 1166–74 (10th Cir. 2010)

As indicated in Figure 1, courts did make some reference to *Celotex*, then, in the remaining 104 decisions in the database, even though a particular court's reference to *Celotex* might not have been direct citation of the case, but rather some description capturing at least partial recognition of *Celotex*'s articulation of burden-shifting requirements.²⁶ As we shall see, evaluating judicial "citation" to *Celotex* embraces a somewhat nuanced problem that involves parsing and interpreting a court's description of the basis for its legal analysis.

FIGURE 1

Does the case cite the summary judgment burden-shifting framework of *Celotex*?



Thus, courts cited *Celotex* only in slightly greater than a quarter of the cases—sixty-two decisions. In the remaining universe of approximately 15% of cases—thirty-three decisions—courts elliptically cited *Celotex*-type standards when referring to the nonmovant's burden,²⁷ and in fewer than 5% of the cases—nine decisions—the court focused on the problem of the movant's burden.²⁸ Thus, courts made

(failing to cite the *Celotex* decision entirely in affirming summary judgment in favor of the movant).

26. See, e.g., *Evans Cabinet Corp. v. Kitchen Int'l, Inc.*, 593 F.3d 135, 140 (1st Cir. 2010) (describing the *Celotex* burden-shifting framework as requiring the moving party to "put the ball in play," and stating that the nonmoving party must then "come forward with competent evidence to rebut the assertion of the moving party").

27. See, e.g., *Warf v. Bd. of Elections of Green Cnty., Ky.*, 619 F.3d 553, 558 (6th Cir. 2010) (describing that the nonmoving party must show "sufficient evidence to create a genuine issue of material fact," but failing to apply this rule to the facts of the case).

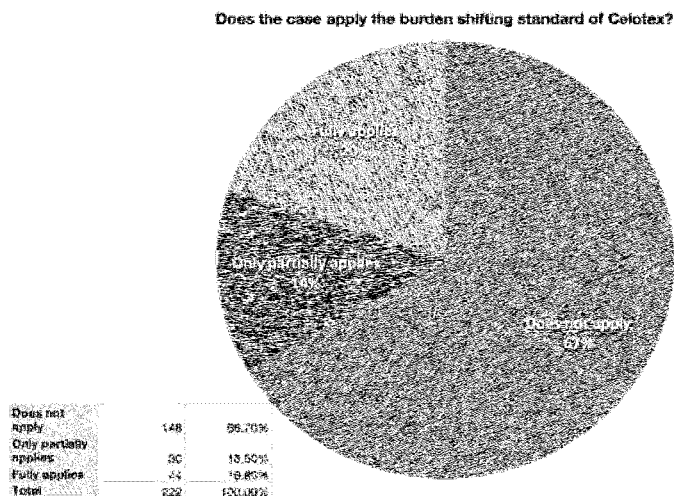
28. See, e.g., *Baribeau v. City of Minneapolis*, 596 F.3d 465, 485 (8th Cir. 2010) (citing the portion of the *Celotex* opinion describing the movant's burden and applying only that portion of

some reference, either fully or partially, to *Celotex*-style analysis in a total of 104 database cases.

* * *

The study's second inquiry then addressed the extent to which courts actually applied or attempted to apply the *Celotex* standards relating to burden-shifting. Figure 2 illustrates the somewhat surprising results in the 222 cases forming the database:

FIGURE 2



As the data in Figure 2 indicates, in the two-thirds of appellate decisions considering the propriety of a summary judgment motion, courts failed to apply the *Celotex* standards in 148 cases. Courts fully applied the *Celotex* burden-shifting standards in only 20% of cases—forty-four decisions—and partially applied the *Celotex* burden-shifting framework in less than 15% of decisions—thirty decisions.

* * *

Having determined that in 104 of the database cases courts directly or elliptically made reference to the *Celotex* standards,²⁹ the study further investigated the ways in which courts in those 104 decisions actually applied the *Celotex* burden-shifting framework. Do courts understand

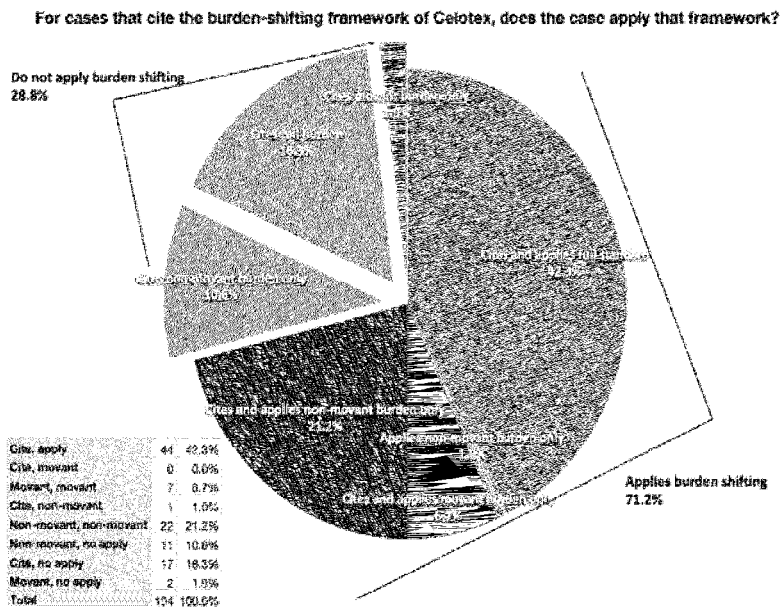
the *Celotex* burden-shifting test to the facts).

29. See *supra* note 26 and accompanying text (describing the 104 cases where courts have at least partially recognized the burden-shifting framework set out in *Celotex*).

and embrace the Supreme Court's nuanced articulation of Rule 56 shifting burdens of production, persuasion, and proof? This inquiry sought to ascertain the extent to which courts completely—or incompletely—followed the *Celotex* framework; specifically, whether the court's analysis focused initially on identifying the party seeking summary judgment; whether the court identified which party carried the burden of proof on issues at trial; and whether the court applied those relative burdens in assessing the offers of proof and burden-shifting on the summary judgment motion.

Examining courts' legal analyses to evaluate the extent to which judges actually walked through the *Celotex* burden-shifting framework revealed that, among the subset in which courts attempted to apply *Celotex*, a fairly small percentage of judges actually deployed the *Celotex* standards to full effect. This is illustrated in Figure 3:

FIGURE 3



It should be kept in mind that each chart represents an increasingly narrower subset of the database cases. Thus, the data indicated that federal judges have varying perceptions and understandings of how to apply the *Celotex* analytical framework, once a court chose to venture beyond mere citation of *Celotex* as the reigning Rule 56 standard.

As Figure 3 illustrates, in nearly one-third of cases where courts cited *Celotex*'s burden-shifting language, courts made no attempt to actually

apply *Celotex*'s burden-shifting framework in 30 decisions out of 104 reported cases.³⁰ The chart also indicates the interesting ways in which judges characterized *Celotex*'s burden-shifting language, even though the court ultimately did not apply the burden-shifting standard.

Thus, in slightly greater than 16% of cases—seventeen decisions—the court correctly cited the burden-shifting framework entirely but did not apply it to the facts,³¹ in another 11% of cases—eleven decisions—the courts referred to *Celotex*'s description of the non-movant's burden only without applying it to the facts of the case,³² and in less than 2% of cases—two decisions—judges referred to *Celotex*'s characterization of the movant's burden only without applying it.³³ What this suggests, perhaps, is that judges have a decidedly mixed appreciation for the entire *Celotex* burden-shifting framework, coupled with some corresponding level of ennui about applying that framework partially, completely, or at all.

However, the 104 database cases represented in Figure 3 also indicate that in approximately 71% of decisions where courts cited *Celotex*—seventy-four cases, federal judges made some attempt to apply the *Celotex* burden-shifting paradigm. However, this relatively high percentage does not indicate how courts applied the burden-shifting paradigm—that is, whether courts followed through the entire exercise of identifying whether the movant or nonmovant carried the burden of production, when and how that burden was shifted, and whether shifting burdens had an impact on the ultimate summary judgment disposition.

As Figure 3 illustrates, within the universe of cases where judges actually applied the full burden-shifting analytical framework set forth at the outset of this Article,³⁴ they did so in fewer than half (42.3%) of their decisions. The charts further elucidate the various ways in which courts citing *Celotex* actually then apply those standards to the facts

30. See, e.g., *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 228–29 (5th Cir. 2010) (neglecting to correctly cite the burden-shifting test from *Celotex* and failing to apply this test to the facts of the case as a result).

31. See, e.g., *H&R Block E. Enters., Inc. v. Morris*, 606 F.3d 1285, 1290 (11th Cir. 2010) (citing the full burden-shifting framework adopted in *Celotex* without any application of the test to the facts of the case).

32. See, e.g., *Cole v. Homier Distrib. Co.*, 599 F.3d 856, 864–65 (8th Cir. 2010) (citing *Celotex* only as it applied to the nonmovant's burden, but neglecting to apply *Celotex* to the facts of the case).

33. See, e.g., *Harris v. New Werner Holding Co.*, 390 F. App'x 395, 399–400 (5th Cir. 2010) (describing only the movant's burden contained in the *Celotex* burden-shifting framework, while failing to apply this test to the facts).

34. See *supra* note 8 and accompanying chart (explaining the burden-shifting framework adopted by the majority in *Celotex*).

presented on the summary judgment motion. Hence, in 21.2% of decisions—twenty-two cases—the courts cited and applied only the *Celotex* burden-shifting framework as it pertains to the nonmovant's burden;³⁵ in 6.7% of cases—seven decisions—courts cited and applied the *Celotex* framework with regards to the movant's burden only;³⁶ and in 1% of cases—one decision—the court cited the full *Celotex* burden-shifting framework but applied the nonmovant burden only.³⁷

Figure 3 perhaps partially addresses the question: If judges are not entirely working their way through a complete *Celotex* analysis, then what are judges doing after they cite *Celotex*? In one-fifth of cases, judges cited to *Celotex* and determined the summary judgment burden on the nonmovant only, and in less than 7% of cases, courts cited and determined the burden on the movant only. This is an interesting finding, given that the core problem raised by the facts in *Celotex* centered on whether the party moving for summary judgment—*Celotex*—satisfied its initial burden of production to trigger burden-shifting to the nonmoving party.

VI. WHAT, THEN, ARE FEDERAL JUDGES ACTUALLY DOING IN SUMMARY JUDGMENT CASES?, OR SUMMARY JUDGMENT, I KNOW IT WHEN I SEE IT

As the above analysis suggests, federal courts in a surprising number of cases do not cite *Celotex*, or if they do, then they do not apply the *Celotex* burden-shifting standards (or if they attempt to apply *Celotex*, apply it partially or haphazardly). This inexorably leads to the highly interesting question: How, then, are courts evaluating summary judgment motions if they are not citing, relying on, or applying the *Celotex* standards? What are those federal courts doing instead? Figure 4 offers at least some data to hypothesize an answer to this riddle.

The 2010 decisions indicate that in just over 60% of cases where courts did not cite *Celotex* or its burden-shifting framework—118 cases—courts nonetheless noted that some party either had presented, or failed to adduce, sufficient evidence upon which the court could dispose

35. See, e.g., *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 399–403 (discussing *Celotex* only as it applies to the nonmovant's burden to show "sufficient evidence to create a genuine issue of material fact," and concluding that the facts of the case indicate the nonmoving party has failed to meet his requirement under *Celotex*).

36. See, e.g., *Parkey v. Sample*, 623 F.3d 1163, 1165 (7th Cir. 2010) (stating that a moving party's motion for summary judgment "may succeed by showing an absence of evidence to support the non-moving party's claims," and applying only this test to the facts of the case).

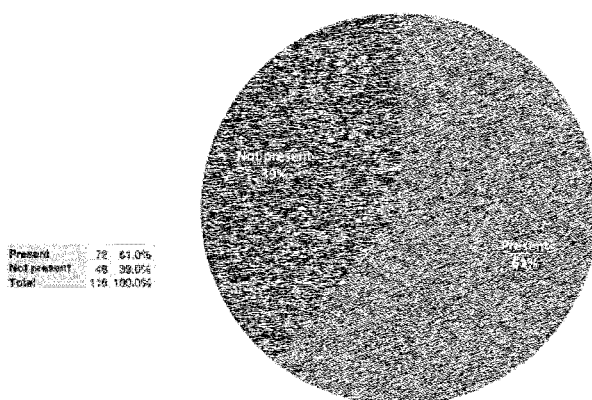
37. See, e.g., *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 234–50 (5th Cir. 2010) (citing the entire *Celotex* burden-shifting framework, but applying only the nonmovant's burden to the facts of the case).

of the summary judgment motion. Because the courts decided the summary judgment motion without the aid of articulated *Celotex* analysis, this universe of cases perhaps may be characterized as representing the “gestalt” or “seat of the pants” school of judicial evaluation of whether summary judgment is appropriate, unmoored from the complicated *Celotex* burden-shifting exercise.³⁸

Perhaps the most perplexing cohort of decisions—forty-six appellate decisions where *Celotex* is not cited or relied upon—embraced decisions where the court disposed of the summary judgment motion, but made no mention at all whether the parties presented evidence sufficient to grant or deny the summary judgment motion. Because courts in these cases nevertheless decided the motion, one may only observe that there is an entire universe of summary judgment dispositions where it is difficult to ascertain both the factual or legal basis on which the court has decided the motion, twenty-five years after *Celotex* and the Supreme Court trilogy.

FIGURE 4

For cases that neither cite nor apply the burden shifting framework of *Celotex*, does the case note that a party has produced or failed to produce evidence that would affect a motion for summary judgment?



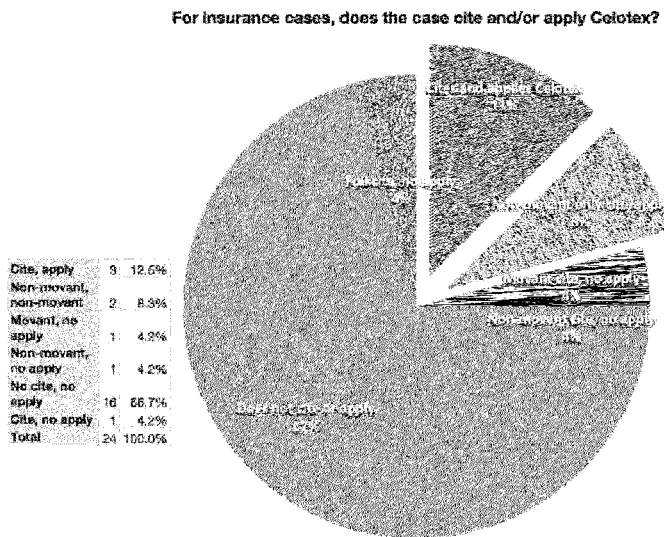
VII. *CELOTEX* AND THE SUBSET OF CONTRACT CASES

The research also examined the sub-universe of cases involving summary judgment motions in insurance contract cases, comprising twenty-four decisions. Historically, pre-*Celotex*, the conventional

38. In fairness, it also could mean that the judge or judges in these cases had an internalized version of *Celotex* in their consciousness, which they applied to the facts but chose not to memorialize *verbatim* in the summary judgment opinion.

wisdom was that contract cases embraced a type of substantive case most suitable for easy summary disposition, because courts could readily determine the motion based on the four corners of the contractual agreement and without much further ado.³⁹ The study examined whether the *Celotex* burden-shifting framework has made significant inroads on judicial evaluation of summary judgment motions in insurance contract cases, illustrated in Figure 5:

FIGURE 5



The 2010 database cases represented in Figure 5 indicate that in two-thirds of summary judgment motions based on insurance contract claims, courts failed to cite or apply the *Celotex* decision (representing sixteen out of twenty-four cases).⁴⁰ And in the one-third of cases where courts cited *Celotex*—similar to the larger universe of all summary judgment decisions—the insurance contract cases presented a mixed bag of *Celotex* deployment.

Thus, 4% of the insurance contract cases courts fully cited *Celotex*, but then simply did not apply it.⁴¹ In this vein, courts cited and fully

39. See generally WRIGHT, MILLER & KANE, *supra* note 15, § 2730.1 (describing summary judgment procedure in cases involving insurance contracts).

40. See, e.g., *Travelers Lloyds Ins. Co. v. Pac. Emp'rs Ins. Co.*, 602 F.3d 677, 677–87 (5th Cir. 2010) (failing to cite *Celotex* entirely, and including no discussion of burden-shifting in reviewing a motion for summary judgment that was granted in an insurance case).

41. See, e.g., *Versai Mgmt. Corp. v. Clarendon Am. Ins. Co.*, 597 F.3d 729, 735–41 (5th Cir.

applied *Celotex* in only 13% of the insurance contract cases—three decisions⁴²—and in scattered smaller percentages cited the relative shifting burdens on the movant and nonmovant, but then failed to apply those burdens to the facts presented in the motion.⁴³

It would not be entirely unfounded to suggest that *Celotex* decision seems to be somewhat largely ignored in the subset of summary judgment motions grounded in underlying insurance contract claims. Perhaps the simplest explanation for this subset of cases is that courts are behaving in nearly the same way they did pre-*Celotex*: courts continue to recognize that contract cases are relatively easy cases for summary judgment determination, and do not need an elaborate burden-shifting apparatus to permit a court to make a decision about whether to grant or deny the motion.

VIII. SPECIAL ISSUES: SUMMARY JUDGMENT BURDENS THAT THE *CELOTEX* COURT DID NOT CONTEMPLATE

As is undoubtedly true in the wake of many landmark Supreme Court decisions, lower federal courts often identify new issues not contemplated by the Court in issuing definitive clarifications to guide the lower courts. This apparently has occurred in the aftermath of the Court's authoritative clarification of Rule 56 burdens in *Celotex*, as some federal courts grapple with summary judgment motions and consequently further elaborate doctrine concerning relative burdens on summary judgment seekers.

An interesting post-*Celotex* development, then, has been the emergence of competing jurisprudence concerning who carries what duty *to point to*, or *to present*, or *call to the court's attention* the presence of evidence in the record to support or oppose a summary judgment motion. This might be characterized as a "no sifting by the court" rule (or an anti-lazy advocate penalty). At least one circuit court has characterized this additional burden as a fair gloss on *Celotex*.⁴⁴

2010) (citing the full burden-shifting framework established in *Celotex*, but neglecting to apply any facet of this framework in reviewing the motion for summary judgment in this insurance case).

42. See, e.g., *Bayle v. Allstate Ins. Co.*, 615 F.3d 350, 355–63 (5th Cir. 2010) (citing the *Celotex* burden-shifting framework in its entirety and applying the full framework to the specific facts of this insurance case).

43. See, e.g., *Beckley Mech., Inc. v. Erie Ins. Prop. & Cas. Co.*, 374 F. App'x 381, 383 (4th Cir. 2010) (citing the *Celotex* burden-shifting framework only as it pertains to the nonmoving party, while failing to apply any part of the *Celotex* framework to the facts of the case).

44. See *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988):

We find the Fifth Circuit's discussion of this issue in *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988), to be persuasive. After rejecting appellant's

As astonishing as this sounds, some circuit courts appear to have suggested that a court does not have to grant or deny summary judgment, even if there is evidence in the record to support or oppose the motion, if the court has to “sift through the record” to make a summary judgment finding. Instead, these courts suggest that, even if evidence exists in the record before the court, a party has to specifically *point to* or *present* that evidence in order to satisfy the party’s burden at summary judgment.⁴⁵

In contrast, at least one federal circuit has suggested mitigation of this harsh approach through a literal construction of Rule 56 language, which mandates evaluation of summary judgment motions based on “the record as a whole.”⁴⁶ Construing this language, the Tenth Circuit has indicated that courts have some duty to sift through the record, and if a court *could* find evidence to support a motion for summary judgment, then a court should grant it, even if the moving party doesn’t *specifically point out* the evidence to the court.⁴⁷

argument that the district court erred in failing to consider an unsworn affidavit in opposition to a properly supported motion for summary judgment, the *Kline* court ruled that the trial court had no duty to consider certain deposition testimony in the record *that appellant failed to bring to the court’s attention*. Relying on *Celotex*, the court held that appellant’s failure to designate facts evidenced in the deposition that would support her case was fatal. In reaching this decision, the court rejected the incorrect assumption that the entire record in the case must be searched and found bereft of a genuine issue of material fact before summary judgment may be properly entered. We similarly reject appellant’s claim that the district court should have examined the entire record when considering Mr. Willoughby’s summary judgment motion. *Appellant’s failure to designate and reference triable facts was, in light of the language of Rule 56(c) and governing precedent, fatal to its opposition.*

Id. (emphasis added) (citations omitted) (internal quotation marks omitted).

45. See *Parsons v. FedEx Corp.*, 360 F. App’x 642, 646 (6th Cir. 2010):

A district court need only consider the evidence presented to it when considering a motion for summary judgment, regardless of whether other potentially relevant evidence exists somewhere in the record. A district court has no duty to shift through the record in search of evidence to support a party’s opposition to summary judgment. *Thus, rule 56 allocates that duty to the opponent of the motion, who is required to point out the evidence, albeit evidence that is already in the record, that creates an issue of fact.*

Id. (emphasis added) (citations omitted) (internal quotation marks omitted).

46. See *Odum v. Potter*, 379 F. App’x 740, 743–44 (10th Cir. 2010):

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Although the court may not make credibility determinations or weigh evidence at the summary judgment stage, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.

Id. (internal citations omitted) (internal quotation marks omitted).

47. *Id.*

Finally, some federal courts that have acknowledged the *Celotex* burden-shifting framework have further suggested that this analytical framework may be relaxed in certain causes of action. For example, the *Celotex* burden-shifting framework has been relaxed in instances where prison officials have asserted claims for qualified immunity from suit.⁴⁸

IX. THE NON-IMPACT OF *ANDERSON V. LIBERTY LOBBY, INC.*

Anderson v. Liberty Lobby, Inc., the second decision of the Court's summary judgment trilogy, established the principle that a court evaluating a summary judgment motion must take into account the substantive evidentiary burden that the court will apply at trial.⁴⁹ *Anderson* involved a suit for libel brought by Liberty Lobby, Inc.⁵⁰ The defendants, including journalist Jack Anderson, moved for summary judgment and the Supreme Court ruled that because the party opposing the summary judgment would have to prove its libel claim by clear and convincing evidence at trial, the district court had to evaluate the summary judgment motion in light of that higher evidentiary standard.⁵¹ In other words, the usual civil trial standard of "preponderance of the evidence" did not apply to the court's summary judgment assessment.⁵²

The Court's *Anderson* decision raised some questions about the appropriateness of requiring a higher, differential evidentiary standard

48. See *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 419 (5th Cir. 2008):

In the summary judgment context, a government official need only plead qualified immunity, which then shifts the burden to the plaintiff. The plaintiff must rebut the defense by establishing that the official's allegedly wrongful conduct violated clearly established law and that genuine issues of material fact exist regarding the reasonableness of the official's conduct.

Id. (internal citations omitted); see also *Thayer v. Adams*, 364 F. App'x 883, 889 (5th Cir. 2010):

We approach summary judgment differently when qualified immunity is at issue. In this context, the moving party is not required to meet its summary judgment burden for a claim of immunity. Rather, the movant need only plead her good-faith entitlement to qualified immunity, whereupon the burden shifts to the plaintiff to rebut it.

Id. (internal citations omitted) (internal quotation marks omitted).

49. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

50. *Id.* at 244.

51. *Id.* at 252 ("[W]e are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.").

52. See *WRIGHT, MILLER & KANE, supra* note 15, § 2727 (discussing how the clear and convincing standard, and not the preponderance of the evidence standard, applied in *Anderson*). In addition, in order to rebut a properly supported motion filed by a moving party, the opposing party needs to indicate how the nonmovant will support the argument that fact issues remain for trial, and Rule 56(e) requires the opposing party to set forth facts that would be admissible at trial. *Id.*

for certain substantive cases, in light of the purported trans-substantive nature of the federal rules. In addition, as reflected in Justice Brennan's dissent in *Anderson*, the Court's majority decision raised at least some concern that *Anderson*'s holdings would lead to "trial by affidavit," imposing onerous evidentiary burdens at the pretrial summary judgment stage of proceedings.⁵³

Whatever concerns or doomsday predictions the *Anderson* decision may have inspired, the core *Anderson* holding on evidentiary burdens has had a negligible effect on the thousands of summary judgment decisions courts have rendered in the past twenty-five years. Indeed, examining the entire corpus of federal district court and appellate decisions over a twenty-four year span, only *three* reported district court decisions cite and rely on the *Anderson* holdings. This may be partially explained by the fact that there are few claims with deferential evidentiary standards, so *Anderson*'s impact may be cabined by this reality. However, perhaps the only noteworthy observation about the *Anderson* decision is to suggest that it seems to have had scant impact on the overwhelming majority of summary judgment dispositions.

Furthermore, the three subsequent *Anderson* cases are entirely unremarkable. For the record, the three instances in which federal district courts have invoked and applied *Anderson* involved underlying claims for lease reformation based on New York state law,⁵⁴ an ERISA claim,⁵⁵ and a patent infringement action.⁵⁶ All three courts, in considering the summary judgment motions, indicated that a court must view the evidence submitted on the motion through the prism of the underlying substantive evidentiary burden. In two of the three cases the courts denied the summary judgment for failure of the moving parties to satisfy the differential evidentiary burden;⁵⁷ in one instance a summary judgment movant prevailed based on the application of the higher

53. *Anderson*, 477 U.S. at 266–67 (Brennan, J., dissenting) (stating that the summary judgment procedure adopted by the majority could "transform what is meant to provide an expedited 'summary' procedure into a full-blown paper trial on the merits").

54. *Khezrie v. Greenberg*, No. 98–CV–3638(ERK), 2001 WL 1922664 (E.D.N.Y. Dec. 11, 2001).

55. *Wasson v. Media Gen., Inc.*, 446 F. Supp. 2d 579, 581 (E.D. Va. 2006).

56. *Mass. Inst. of Tech. v. Harman Int'l Indus. Inc.*, 584 F. Supp. 2d 297, 300 (D. Mass. 2008).

57. *See Wasson*, 446 F. Supp. 2d at 602 (denying the movant's motion for summary judgment because the evidence supporting the movant's motion did not meet the heightened evidentiary burden under ERISA); *see also Mass. Inst. of Tech.*, 584 F. Supp. 2d at 316 (holding that the movant's motion for summary judgment should be denied, as the movant had "failed to adduce sufficient evidence as measured by the clear and convincing standard").

evidentiary standard and the nonmovant's failure to satisfy that higher evidentiary standard.⁵⁸

In the New York lease case, *Khezrie v. Greenberg*, Khezrie entered into a commercial lease agreement with Greenberg.⁵⁹ Khezrie subsequently assigned the lease to a corporation, which ceased payment with a remaining four-year term.⁶⁰ Greenberg then sued Khezrie for payment in New York state court.⁶¹ While this case was pending, Khezrie sued Greenberg in federal court, seeking reformation of the lease agreement based on theories of mutual mistake, or unilateral mistake by fraud.⁶² Khezrie (the plaintiff) contended that when he assigned the lease, Greenberg (the defendant) orally agreed that Khezrie was relieved of any further obligations under the lease.⁶³ Greenberg sought summary judgment on Khezrie's reformation claim.⁶⁴

The court granted the defendant's motions for summary judgment on Khezrie's reformation claim and on his counterclaim and denied the plaintiff's motion for summary judgment related to the defendant's counterclaim.⁶⁵ The court held that under New York law a party must show by "clear and convincing evidence" that a lease should be reformed because of mutual mistake or unilateral mistake or fraud.⁶⁶ Thus, state law imposed the same higher standard of proof for lease reformation claims as for libel claims in *Anderson*.⁶⁷

In considering the defendant's motion for summary judgment, the court, citing *Anderson*, stated that it must view the evidence presented through the prism of the substantive evidentiary burden, with the burden being by "clear and convincing evidence" in this case.⁶⁸ Since the plaintiff presented only bald and self-serving allegations of an oral agreement at odds with a written agreement, summary judgment was appropriate on the reformation claim.⁶⁹

58. See *Khezrie*, 2001 WL 1922664, at *6 (stating that granting the movant's motion for summary judgment is appropriate where the nonmovant fails to meet "the substantive evidentiary standard that would apply at trial").

59. *Id.* at *1.

60. *Id.*

61. *Id.*

62. *Id.* at *3.

63. *Id.*

64. *Id.*

65. *Id.* at *9.

66. *Id.* at *6.

67. *Id.*

68. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

69. *Id.* at *7.

In the ERISA case, *Wasson v. Media General, Inc.*, the plaintiff Wasson was injured on her job working for Media General, Inc.⁷⁰ She applied for long-term disability benefits with the newspaper's benefits plan, which were denied.⁷¹ She then sued in federal court alleging that the benefits plan violated ERISA and the plan abused its discretion in denying her claim.⁷² The parties filed cross-motions for summary judgment on the issue of whether the plaintiff was entitled to long-term disability benefits.⁷³

The substantive law underlying an ERISA claim indicates that an ERISA plan administrator's decision will not be disturbed if it is supported by "substantial evidence"—which may be somewhat less than a preponderance of the evidence—and if the decision was the result of a deliberate, reasoned process.⁷⁴ Again, citing to *Anderson*, the court indicated that in evaluating a summary judgment motion, the court must view the evidence through the lens of substantive evidentiary standards.⁷⁵ The court asked whether no reasonable juror could find that the defendant's benefit plan made its decision supported by "substantial evidence" and was the result of a reasoned, deliberate process.⁷⁶

The court denied both cross-summary judgment motions and remanded the case to administrative proceedings.⁷⁷ The defendant's motion was denied because the administrator's decision to deny benefits was not supported by substantial evidence and the result of a deliberate, reasoned process.⁷⁸ Somewhat illogically, the court further suggested that in these circumstances, the plaintiff's summary judgment motion also was denied because no analysis was needed when denying both motions if the court already denied one of them.⁷⁹

70. *Wasson v. Media Gen., Inc.*, 446 F. Supp. 2d 579, 582 (E.D. Va. 2006).

71. *Id.*

72. *Id.* at 584.

73. *Id.*

74. *Id.* at 590.

75. *Id.* at 589 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) ("[T]he Supreme Court is clear that 'the judge must view the evidence presented through the prism of the substantive evidentiary burden.'")).

76. *Id.* at 589–90.

77. *Id.* at 602–03.

78. *Id.* at 602.

79. *Id.* at 603. The court further suggested that even if the Appeals Board decision was based on substantial evidence and the result of a deliberate and reasoned process, it is possible that the plaintiff might not be entitled to benefits. *Id.* At any rate, in remanding the case to administrative proceedings, the court clearly was signaling its distaste for having to resolve the matter. *See id.* ("[I]t is preferable that the Appeals Board be required to do its job correctly, to act in accord with this opinion and *Wasson*, and then reasonably explain its reasons so that meaningful judicial

The final case citing and applying *Anderson, Massachusetts Institute of Technology v. Harman International Industries, Inc.*,⁸⁰ involved a patent infringement claim by MIT against Harman Industries.⁸¹ Harman moved for summary judgment claiming that the patent was invalid under two patent law doctrines, resulting in no infringement by Harman.⁸² MIT filed a cross-motion for summary judgment, claiming the patent was valid.⁸³

The Patent Act holds that patents are presumptively valid and places the burden on the party challenging a patent's validity to prove by clear and convincing evidence that the patent is invalid.⁸⁴ Hence, this MIT patent action shared the same enhanced evidentiary standard as the *Anderson* and *Khezrie* litigations.⁸⁵ Applying the applicable patent doctrine⁸⁶ and the *Anderson* heightened evidentiary standard,⁸⁷ the court denied the summary judgment cross-motions.⁸⁸ The court held that the defendant had not shown by clear and convincing evidence that no reasonable juror could fail to find the patent invalid under the public use doctrine.⁸⁹ Moreover, the plaintiff had not shown by clear and convincing evidence that no reasonable juror could find the patent invalid under public use doctrine.⁹⁰

review of the substantive decision can be had").

80. *Mass. Inst. of Tech. v. Harman Int'l Indus., Inc.*, 584 F. Supp. 2d 297 (D. Mass. 2008).

81. *Id.* at 300.

82. *Id.*

83. *Id.*

84. *Id.* at 307 (citing 35 U.S.C. § 282 (1994)).

85. See *supra* notes 51 and 68 and accompanying text (discussing the heightened evidentiary burden of "clear and convincing evidence" involved in *Anderson* and *Khezrie*, respectively).

86. The alleged patent invalidity claim involved the so-called "public use" patent doctrine. See *Mass. Inst. of Tech.*, 584 F. Supp. 2d at 309 (quoting 35 U.S.C. § 102(b) (1994) ("A patent for a particular invention will be held invalid if the 'invention was . . . in public use . . . in this country, more than one year prior to the date of the application for patent in the United States.'")). Using the five-factor test for determining the validity of a patent, the court found that while some factors favored the validity of the patent, other factors showed that the patent was invalid. See *id.* at 309–14 (analyzing the five factors to be considered under the "public-use" doctrine and concluding that Harmon had not established, by clear and convincing evidence, the invalidity of the patent in question). Because there was not clear and convincing evidence that the patent was invalid, the court refused to grant the summary judgment motion. *Id.* at 314.

87. See *supra* note 51 and accompanying text (discussing *Anderson*'s holding that courts must evaluate summary judgment motions in light of the evidentiary standard that would otherwise be applicable at trial).

88. *Mass. Inst. of Tech.*, 584 F. Supp. 2d at 314.

89. *Id.*

90. *Id.* The MIT case also embodies a fairly admirable understanding and application of the shifting burdens of *Celotex*. In another summary judgment motion—declaring a patent invalid under the printed publication doctrine—the judge granted the plaintiff's motion for summary judgment. *Id.* at 316. The defendant pointed out that the plaintiff had produced no evidence to

X. CONCLUSIONS AND POSSIBLE IMPLICATIONS

It is always dangerous to assert sweeping—or less-than-sweeping—jurisprudential conclusions based on small empirical databases, especially when the purported database is complicated by elements of subjective interpretation of judicial decisions, as is the case with the database in this study. In addition, it is more than a fair complaint that evaluating appellate summary judgment decisions in order to ascertain how such motions are decided, provides either an inapt or inaccurate reflection of how in-the-trenches district court judges actually consider and dispose of such motions. Thus, because district court dispositions of summary judgment motions were not the basis for this analysis, it is possible that district court judges may be carefully parsing the *Celotex* burden-shifting paradigm, and carefully walking through that detailed, analytical framework.

Nonetheless, cabined with all these varied and numerous limitations, the 2010 appellate summary judgment decisions reflect *something* about the *culture* of summary judgment adjudication in federal courts, twenty-four years distant from the Court's announcement of its famous trilogy. And, it is not too far-fetched to suggest that at least some district court judges take their cues on summary judgment standards from the appellate courts overseeing their districts.

This study set out to answer a few relatively simple questions: Are federal courts doing anything more than citing *Celotex* as the leading Rule 56 precedent, and if so, are they indeed following the analytical burden-shifting framework so carefully and elaborately set out by both Justices Rehnquist and Brennan? A subtextual inquiry was: Do federal judges understand *Celotex* any more than our largely confused and confounded first year law students? In addition, this study also researched the extent to which the trilogy's second leg, *Anderson v. Liberty Lobby, Inc.*, has resulted in numerous trial-by-affidavit nightmares suggested by Justice Brennan in his dissent.⁹¹

The results of this study seem to suggest that in a surprising number of summary judgment cases, federal courts do not even cite *Celotex*.⁹²

support its motion, but the court noted that since the plaintiff did not carry the burden at trial of proving the patent's validity, the plaintiff did not need to introduce affirmative evidence to support its motion. *Id.* at 315–16.

91. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 266–67 (1986) (Brennan, J., dissenting) (describing Justice Brennan's concerns with the cumbersome burden-shifting framework); see also *supra* note 53 and accompanying text (discussing the potential for summary judgment motions to become small-scale trials on the merits of the underlying case after *Celotex* and *Liberty Lobby*).

92. See *supra* note 25 and accompanying text (concluding that over 50% of the cases involved

If this were not shocking enough, in the remaining universe of decisions where courts do cite *Celotex*, some federal judges do not seem to acknowledge, understand, or apply the elaborate *Celotex* conceptual framework.⁹³ The data also seems to suggest that in at least as many cases, federal judges—as they did pre-*Celotex*—continue to decide summary judgment motions on a kind-of gestalt “tennis match” mode of analysis.

The various FJC studies of post-trilogy summary judgment practice have demonstrated that the disposition rates (that is, favorable grants of summary judgment motions) have not increased in statistically significant ways in the aftermath of the trilogy.⁹⁴ Along with the FJC studies, this very modest study further suggests that the trilogy’s central *Celotex* decision likewise has had small impact on the ways in which judges analyze and decide summary judgment motions. In addition, *Anderson*’s core evidentiary holding has been replicated in exactly *three* other somewhat anomalous contexts in the past twenty-five years, clearly averting any substantial judicial crisis.⁹⁵

Surveying these realities, it is difficult not to conclude that the Court’s summary judgment trilogy, along with its attendant hype, has been much ado about very little. Against this backdrop, practitioners who must file summary judgment motions may take some comfort in realizing that in most instances in federal court, at least, the lawyers need not overly fret over shifting burdens of production, persuasion, and proof, so long as the attorneys proffer something in the record for a judge to consider (except in those outlying federal courts that have chosen to dun attorneys who *do not point* to the specific evidence).⁹⁶ And while some erudite judges on the federal bench may justifiably take pride in wending their way through a recitation and application of the

in this analysis unexpectedly failed to cite *Celotex* at all). In addition, see Figure 1 for a graphical representation of the results of this empirical analysis of cases involving motions for summary judgment.

93. See *supra* notes 26–43 and accompanying text (describing the various ways in which federal courts have cited and applied *Celotex*’s burden-shifting framework). Additionally, see Figures 1, 2, 3, 4 and 5 for a detailed breakdown of how federal courts have cited and applied the burden-shifting framework adopted by the Supreme Court in *Celotex*.

94. See Cecil et al., *Quarter-Century*, *supra* note 2, at 891 (describing the statistical analysis conducted in this study and concluding that the study “reveals no meaningful change in motion rates in the termination years immediately following the summary judgment trilogy in 1986”).

95. See *supra* notes 54–56 and accompanying text (introducing the three post-*Anderson* federal cases that substantially mirrored the issue of heightened evidentiary standards central to the holding in *Anderson*).

96. See *supra* notes 44–45 and accompanying text (discussing the post-*Celotex* development whereby certain federal circuit courts require a party to specifically point to or present evidence to satisfy a party’s burden at summary judgment).

Celotex standards, judges also may take comfort in knowing that they largely will not be dunned by their appellate courts for failure to recite or properly apply *Celotex*.

One would ordinarily suggest that summary judgment is not a field ripe for irony, but Justice Sandra Day O'Connor—a member of the *Celotex* majority opinion—has indeed dished up one delightful example of post-*Celotex* irony. Pursuant to federal statute, in 2010 the Seventh Circuit designated retired Justice O'Connor to sit on its appellate bench,⁹⁷ where she had the opportunity to rule on a summary judgment appeal.⁹⁸

In considering the lower court's summary judgment disposition, not only did Justice O'Connor neglect to apply the burden-shifting standards of *Celotex*, but she also failed to cite the appropriate *Celotex* standard.⁹⁹ Instead, her opinion simply notes that: "Summary judgment is appropriate 'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law,'"¹⁰⁰ which is a good regurgitation of Rule 56 (and the beginning of a solid "B" exam answer). Justice O'Connor's decision similarly failed to discuss anything about the burdens of the plaintiff or defendant, or whether they presented or failed to present evidence for a motion for summary judgment.¹⁰¹

It is perhaps a tad egocentric to conclude this survey with a reflection of the implications of this study for first-year civil procedure professors, but the law school teaching of Rule 56 provided the initial inspiration for this enterprise. As indicated in the Introduction, the Court's trilogy reshaped the first-year teaching of Rule 56 summary judgment, requiring civil procedure professors to engage students in complicated explications of shifting burdens of production, persuasion, and proof

97. See 28 U.S.C. § 294(a) (2006) ("Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.").

98. *Spivey v. Adaptive Mktg. LLC*, 622 F.3d 816 (7th Cir. 2010).

99. See *id.* at 822 (asserting when summary judgment is appropriate but not mentioning the burden shifting standards of *Celotex*).

100. *Id.* (quoting FED. R. CIV. P. 56(c)).

101. See *id.* (quoting Rule 56 but failing to discuss the burdens and evidentiary standards crucial to *Celotex*). In commenting on Justice O'Connor's decision, my research assistant appended the following note: "I mention it because I think it makes a good case to single out as an example of federal courts not applying the burden shifting framework of *Celotex*, to say, 'Hey, if members of the majority who wrote *Celotex* are getting it wrong today, should we be surprised if current federal judges get it wrong as well?'"

(and, to run through this mind-expanding exercise largely in absence of mastery of most substantive law).

Thus, while there is a great deal to be said in favor of raw intellectual challenge, game-playing, and puzzle-solving, one nonetheless wonders at the utility of requiring students to master a complicated analytical framework that courts themselves more often than not do not apply, including one Supreme Court Justice who was at least an endorser of that challenging framework.

XI. APPENDIX A: SOME FURTHER NOTES ON METHODOLOGY

Categorization of the 2010 appellate summary judgment decisions required exercise of considerable subjective, discretionary judgment in accurately characterizing a court's analysis of the motion, in light of the Court's *Celotex* decision. This appendix provides additional explanation and illustrative examples of how summary judgment decisions were parsed and categorized for counting purposes.

A. The Threshold Question: Do Courts Accurately Recite the Celotex Burden-Shifting Framework?

The threshold question in this study examined whether a court's decision accurately recited the burden-shifting framework of *Celotex*. There were four possible answers to this question: (1) Yes, the court correctly cited or described the burden-shifting framework of *Celotex*; (2) No, the court did not correctly recite or describe the burden-shifting framework of *Celotex*; (3) The court cited the movant's burden only; and (4) The court cited the nonmovant's burden only. The latter two possible responses represent a kind of partial-credit *Celotex* analysis.

Examples of court decisions reflecting each of these possible responses is illustrated by the following excerpts from summary judgment decisions in the 2010 database:

- (1) YES, THE COURT CORRECTLY DESCRIBED THE BURDEN-SHIFTING FRAMEWORK OF *CELOTEX*:

Example: "The moving party bears the initial burden of showing there is no genuine issue of material fact. Once the moving party has met its burden, the burden shifts to the non-moving party to 'designate specific facts showing there is a genuine issue for trial.'"¹⁰²

102. H&R Block E. Enters., Inc. v. Morris, 606 F.3d 1285, 1290 (11th Cir. 2010) (quoting

- (2) NO, THE COURT DID NOT CORRECTLY CITE OR DESCRIBE THE BURDEN-SHIFTING FRAMEWORK OF *CELOTEX*:

Example (a): The decision makes no mention of the burden-shifting framework of *Celotex*, but simply recites the language of Rule 56:

“Summary judgment is appropriate if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”¹⁰³

Example (b): The decision mentions a burden for the movant, but only in the sense of broadly quoting the language of Rule 56:

“Under this standard, the movant must demonstrate that ‘there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law.’”¹⁰⁴

“[T]he movant has the burden of showing this court that summary judgment is appropriate[.]”¹⁰⁵

“The moving party bears the burden of establishing a lack of genuine issue of fact.”¹⁰⁶

- (3) PARTIAL REFERENCE TO *CELOTEX* CONCEPTS, WITHOUT CITATION TO *CELOTEX*: THE COURT CITES TO THE MOVANT’S BURDEN ONLY, OR STATES THAT THE MOVANT HAS TO PRODUCE EVIDENCE OR TO MERELY SHOW THAT THE NONMOVANT’S CLAIMS ARE INSUFFICIENT

Example: “Though we construe all facts and make all reasonable inferences in the nonmoving party’s favor, . . . the moving party may succeed by

Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)) (internal citations omitted).

103. *R & J Enters. v. Gen. Cas. Co. of Wis.*, 627 F.3d 723, 726 (8th Cir. 2010) (citing FED. R. CIV. P. 56(a)).

104. *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 267 (3d Cir. 2010) (quoting FED. R. CIV. P. 56(c)(2)).

105. *Irons v. Aircraft Serv. Int’l, Inc.*, 392 F. App’x. 305, 311 (5th Cir. 2010) (citing *Celotex*, 477 U.S. at 323).

106. *Brunsting v. Lutsen Mountains Corp.*, 601 F.3d 813, 820 (8th Cir. 2010) (citing *Celotex*, 477 U.S. at 323).

showing an absence of evidence to support the non-moving party's claims."¹⁰⁷

- (4) PARTIAL REFERENCE TO *CELOTEX* CONCEPTS, WITHOUT CITATION TO *CELOTEX*: THE COURT CITES TO THE NONMOVANT'S BURDEN ONLY, INDICATING THAT THE NONMOVANT HAS TO PRODUCE ADDITIONAL EVIDENCE (E.G., MAKE A SHOWING SUFFICIENT TO ESTABLISH THE EXISTENCE OF AN ELEMENT ESSENTIAL TO THAT PARTY'S CASE, AND ON WHICH THAT PARTY WILL BEAR THE BURDEN OF PROOF AT TRIAL)

Example: "[W]here the non-moving party fails to establish 'the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,' no genuine issue of material fact can exist."¹⁰⁸

B. Has the Court Correctly Applied the Celotex Burden-Shifting Framework to the Facts in the Motion?

The second question examined in the decisions examined those cases in which the court correctly identified and described the *Celotex* burden-shifting framework, and further asked whether the court correctly applied that framework to the facts presented in the summary judgment motion. Court decisions were categorized as either correctly or not correctly applying the *Celotex* framework.

- (1) YES, THE COURT CORRECTLY APPLIED THE *CELOTEX* BURDEN-SHIFTING FRAMEWORK TO THE FACTS

Example (a): The court describes the burden meeting by both parties:

"[S]ummary judgment was appropriate because the government established by a preponderance of the evidence that the money was subject to forfeiture as drug proceeds. . . . Okwuosa did not come forward with any evidence to refute the government's declarations . . . In opposing the government's

107. *Parkey v. Sample*, 623 F.3d 1163, 1165 (7th Cir. 2010) (citing *Celotex*, 477 U.S. at 325) (internal citations omitted).

108. *Apache Corp. v. W & T Offshore, Inc.*, 626 F.3d 789, 793 (5th Cir. 2010) (quoting *Nichols v. Enterasys Networks, Inc.*, 495 F.3d 185, 188 (5th Cir. 2007)).

motion, Okwuosa failed to carry his burden of going beyond the pleadings and presenting competent evidence designating ‘specific facts showing that there is a genuine issue for trial.’”¹⁰⁹

Example (b): The rule describes burden-shifting with regard to presenting evidence, but in the application of the rule, one party does or does not show evidence:

Upon careful review of the record, we agree with the District Court that summary judgment for defendants was appropriate. Jackson failed to provide any evidence to support the elements of his claims.¹¹⁰

(2) NO, THE COURT DID NOT CORRECTLY APPLY THE *CELOTEX* ANALYTICAL FRAMEWORK TO THE FACTS

Example (a): The decision does not describe that either party meets the burden:

“Section 508 requires school board approval for any services valued above \$100 or ‘any subsequent modifications of a contract that would increase the school district’s indebtedness under [the] contract.’ It is undisputed that the School Reform Commission did not authorize the \$830,071.68 claimed by Wayne Moving. Therefore, Wayne Moving’s claim of unjust enrichment is barred by Section 508.”¹¹¹

109. *United States v. \$183,791.00 in U.S. Currency*, 391 F. App’x 791, 794–95 (11th Cir. 2010) (citing *Celotex*, 477 U.S. at 323–24).

110. *Jackson v. Beard*, 365 F. App’x 332, 333 (3d Cir. 2010) (citing *Celotex*, 477 U.S. at 323).

111. *Wayne Moving & Storage of N.J., Inc. v. Sch. Dist. of Phila.*, 625 F.3d 148, 155 (3d Cir. 2010) (citing *Hazleton Area Sch. Dist. v. Krasnoff*, 672 A.2d 858, 862 (Pa. Commw. Ct. 1996) (internal citation omitted)).

Example (b): Simply states no genuine issue as to material fact exists, or makes decision “on the basis of all the evidence” (or similar language):

“Considering these facts together, and drawing all reasonable inferences from them in favor of the plaintiffs, we are convinced that the constitutional right at issue was clearly established as of the time of the relevant conduct, such that a reasonable supervisory official would have known that his actions were unlawful.”¹¹²

Example (c): Discussing substantive burden-shifting, rather than summary judgment burden shifting:

“Because Boyland produced no other evidence to show that a causal connection existed between his 2004 charge and his termination, he has failed to meet his burden of establishing a prima facie case of retaliation. Accordingly, we affirm the district court’s grant of summary judgment on Boyland’s claim that he was unlawfully fired in retaliation for his 2004 charge.”¹¹³

C. Apart From Celotex Standards, Does the Court Cite to Presentation of Any Evidence in Support or Opposition to the Summary Judgment Motion?

The study also examined whether the decision discussed or mentioned a party “presenting evidence” to support its motion for summary judgment. These cases suggest that even if the court does not mention or apply the burden-shifting framework of *Celotex*, the court at least has some sense of the spirit of the burden-shifting framework—namely, that the disposition of a motion for summary judgment relies on the evidence parties have presented in a sort of “tennis match” of evidence.

112. Langford v. Norris, 614 F.3d 445, 462 (8th Cir. 2010).

113. Boyland v. Corrs. Corp. of Am., 390 F. App’x 973, 975 (11th Cir. 2010).

- (1) YES, THE COURT DISCUSSED THE PROFFER OF EVIDENCE IN SUPPORT OR OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT, IN ABSENCE OF REFERENCE TO *CELOTEX*:

Example: “Apart from its amorphous allegations, White Oak fails to explain adequately how the challenged provisions permit arbitrary and discriminatory enforcement. Accordingly, White Oak’s attempt to void the Zoning Resolution, or portions thereof, for vagueness fails. . . . White Oak assumes, without any evidentiary support, that minorities will be adversely affected. . . . In addition, White Oak cites no authority that a zoning prohibition against multi-family developments, particularly in a rural area, constitutes a per se Equal Protection violation, and no such authority exists. . . . As discussed previously, White Oak had no protected property right in its proposed development or in the TIF District. Accordingly, the district court properly granted summary judgment to the Township on White Oak’s federal civil conspiracy claim.”¹¹⁴

114. White Oak Prop. Dev., LLC v. Wash. Twp., Ohio, 606 F.3d 842, 850–52, 855 (6th Cir. 2010).