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Why Denials of Summary Judgment Should Be Appealable

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WHY DENIALS OF SUMMARY JUDGMENT SHOULD BE APPEALABLE

BRADLEY SCOTT SHANNON*

Following the Supreme Court’s recent decision in Ortiz v. Jordan, the appealability of denials of motions for summary judgment generally seems to have been foreclosed, at least as a positive matter. But should this necessarily be true as a normative matter? Should denials of summary judgment be appealable, even after a trial? The purpose of this Article is to provide an answer to this question. This Article will conclude that, for a number of reasons, denials of summary judgment should be appealable, as the arguments favoring appealability outweigh those against. Though successful appeals of denials of summary judgment should be rare, the erroneous denial of a properly-made motion for summary judgment represents serious error with respect to an important event in the procedural life of an action. Moreover, because grants of summary judgment are appealable, allowing appeals of denials of summary judgment would bring symmetry and integrity to all aspects of this decisional process. Allowing appeals from denials of summary judgment also would be consistent with the practice of allowing appeals of the denial of dispositive pretrial motions generally, appeals that usually occur after trial. Finally, consideration should be given to the fact that the primary purpose of summary judgment is to determine whether there should be a trial, and that this is, in a real sense, the parties’ “day in court,” all of which raises questions as to the relevance of the outcome in a later trial, even a trial at which the movant at summary judgment failed to prevail and that cannot be appealed on the basis of the trial record.

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INTRODUCTION

Much has been made of the problems associated with erroneous grants of motions for summary judgment.¹ Most significantly, erroneously granting summary judgment in favor of one of the parties denies the losing party its opportunity to present its case at trial. To a large extent, though, such problems are allayed by the fact that a grant of summary judgment, being a “final decision,” is immediately appealable by the losing party,² thus ensuring the possibility of a reversal of the district court’s judgment.³

But what about erroneous denials of summary judgment? Such decisions do not raise precisely the same concerns as do erroneous grants of summary judgment, for denials of summary judgment, being interlocutory, generally are not immediately appealable, meaning that the action will proceed towards trial.⁴ But do erroneous denials of summary judgment, like erroneous grants of summary judgment, nonetheless raise significant problems? And if so, does the losing party—in this situation, the moving party—similarly have the opportunity to appeal the trial court’s erroneous decision after an adverse judgment at trial?⁵

² See 28 U.S.C. § 1291 (2006) (“The court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .”); 11 JAMES W. MOORE, MOORE’S FEDERAL PRACTICE § 56.130[1], at 56-325 (3d ed. 2011) (“When summary judgment is granted as to all pending claims and parties and complete disposition of the case has been made, the district court’s decision is final and ripe for appeal.”).
⁴ See 19 JAMES W. MOORE, MOORE’S FEDERAL PRACTICE § 205.08[2], at 205-82 (3d ed. 2011) (“In most cases, denial of summary judgment is a non-appealable, interlocutory order.”).
⁵ It should be clear that by “appeal,” this Article means successfully appeal, in the sense of obtaining a reversal of the lower court’s judgment.
Though these questions have received little attention by academics,\(^6\) the appealability of a denial of summary judgment was precisely the issue recently before the Supreme Court of the United States in *Ortiz v. Jordan*.\(^7\) According to the *Ortiz* Court, the answer to this question, at least as a positive matter, appears to be “no.”\(^8\) But that decision notwithstanding, might there nonetheless be sound *normative* reasons why erroneous denials of summary judgment should be appealable, reasons that heretofore might have been under-appreciated and that weigh in favor of allowing this practice?

The exploration of these questions is, broadly speaking, the purpose of this Article. The remainder of the Article will proceed as follows: Part I consists of a brief discussion of the two opinions in *Ortiz*. Then in Part II, the Article discusses the many reasons why denials of summary judgment should be appealable, *Ortiz* notwithstanding. The Article will conclude that, on balance, appeals of denials of summary judgment, though perhaps currently foreclosed by Supreme Court precedent, are sound as a matter of federal judicial policy.

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\(^6\) It appears that only one legal scholar has considered the appealability of denials of summary judgment in any detail. See Jesse Leigh Jenike-Godshalk, Comment, *Appealed Denials and Denied Appeals: Finding a Middle Ground in the Appellate Review of Denials of Summary Judgment Following a Full Trial on the Merits*, 78 U. Cin. L. Rev. 1595 (2010). Most of the leading treatises in this area seem to dismiss the notion of an appeal of a denial of summary judgment almost out of hand. See, e.g., Edward J. Brunet & Martin H. Redish, *Summary Judgment: Federal Law and Practice* § 11.3, at 488 (3d ed. 2006) (“It should come as no surprise that the loser of a summary judgment motion cannot seek judicial review of the order following a plenary trial. The issue of the propriety of the ruling on summary judgment becomes moot following a trial.”) (footnote omitted); 11 Moore, *supra* note 2, § 56.130[3][c][i], at 56-332 (“When a district court denies summary judgment on grounds of a genuine factual dispute, the denial order is not reviewable on appeal from a final judgment in the case.”). A contrary view is found in 10A Charles Alan Wright et al., *Federal Practice & Procedure* § 2715, at 264-66 (3d ed. 1998), in which the authors write:

[T]he denial of a Rule 56 motion is an interlocutory order from which no appeal is available until the entry of judgment following the trial on the merits. At that time, the party who unsuccessfully sought summary judgment may argue that the trial court’s denial of the Rule 56 motion was erroneous.

(footnote omitted). It is unclear, though, whether this view, which does not address more recent federal court decisions, reflects a normative as well as a positive assessment, and arguably it conflicts with another portion of the same treatise. See infra note 18.

\(^7\) 131 S. Ct. 884 (2011).

\(^8\) Id. at 888-89 (“May a party . . . appeal an order denying summary judgment after a full trial on the merits? Our answer is no.”) (footnote omitted).
I. SETTING THE STAGE: *Ortiz v. Jordan*

Though summary judgment has been an integral part of federal civil procedure for more than 70 years, the appealability of denials of motions for summary judgment had not been considered generally by the Supreme Court until 2011, when it decided *Ortiz v. Jordan*.

A. Procedural History

*Ortiz* involved a civil rights action by an Ohio state prisoner (Ortiz) against certain prison officers commenced in the United States District Court for the Southern District of Ohio pursuant to 42 U.S.C. § 1983.9 The defendants moved for summary judgment on the ground of qualified immunity, which was denied.10 The case then proceeded to trial, at which a jury found in favor of Ortiz.11

Though the defendants moved for judgment as a matter of law prior to the submission of the case to the jury, they failed to renew that motion posttrial or move for a new trial.12 Instead, the defendants appealed the district court’s judgment to the United States Court of Appeals for the Sixth Circuit, arguing that “the District Court should have granted them summary judgment on their defense of qualified immunity.”13 The court of appeals reversed the judgment of the district court.14

Ortiz then filed a petition for a writ of certiorari in the Supreme Court, which was granted on the issue “whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits.”15

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9 See id. at 888.
10 See id.
11 See id.
12 See id. at 889.
13 Id. at 891. The defendants also argued that the verdict was “against the weight of the evidence.” Id. (internal quotation marks omitted).
14 See id.
15 Id.
B. The Supreme Court’s Opinion

In an opinion delivered by Justice Ginsburg and joined by Chief Justice Roberts and Justices Breyer, Alito, Sotomayor, and Kagan, the Supreme Court reversed the judgment of the court of appeals.\(^16\) According to the Court, denials of summary judgment, being interlocutory, are “simply a step along the route to final judgment.”\(^17\) “Once the case proceeds to trial,” the Court continued, “the full record developed in court supersedes the record existing at the time of the summary judgment motion.”\(^18\) And “[a]fter trial, if defendants continue to urge qualified immunity, the decisive question, ordinarily, is whether the evidence favoring the party seeking relief is legally sufficient to overcome the defense.”\(^19\) In Ortiz, though, the defendants failed to “avail themselves of Rule 50(b), which permits the entry, postverdict, of judgment for the verdict loser if the court finds that the evidence was legally insufficient to sustain the verdict.”\(^20\) “Absent such a motion, we have repeatedly held, an appellate court is ‘powerless’ to review the sufficiency of the evidence after trial.”\(^21\)

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16 See id. at 887.
17 Id. at 889.
18 Id. The Court further stated: A qualified immunity defense, of course, does not vanish when a district court declines to rule on the plea summarily. The plea remains available to the defending officials at trial; but at that stage, the defense must be evaluated in light of the character and quality of the evidence received in court.
Id. Accord id. (“Once trial has been had,’ however, ‘the availability of official immunity should be determined by the trial record, not the pleadings nor the summary judgment record.’”) (quoting 15A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3914.10, at 684 (2d. ed. 1992)).
19 Id.
20 Id. at 891-92.
21 Id. at 892 (quoting Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 405 (2006)). Accord id. at 889 (observing that the “failure to renew their motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) left the appellate forum with no warrant to reject the appraisal of the evidence by ‘the judge who saw and heard the witnesses and had the feel of the case which no appellate printed transcript can impart’”) (quoting Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216 (1947)).
C. *The Concurrence*

Justice Thomas, in an opinion joined by Justices Scalia and Kennedy, concurred in the judgment of the Court.\(^{22}\) Though Justice Thomas agreed with the Court’s answer to the question presented,\(^{23}\) he was, if anything, more emphatic in his belief that the defendants were not entitled to prevail.

Justice Thomas began by observing that most orders denying summary judgment “are not appealable at all, because they neither qualify as ‘final decisions’ capable of appeal under 28 U.S.C. § 1291 nor come within the narrow class of appealable interlocutory orders under § 1292(a)(1).”\(^{24}\) “And for those that are appealable,” Justice Thomas argued, “the time for filing an appeal will usually have run by the conclusion of the trial.”\(^{25}\) Accordingly, Justice Thomas returned to the proposition advanced by the Court: that “a party ordinarily cannot appeal an order denying summary judgment after a full trial on the merits.”\(^{26}\) And because “[t]his case is the ordinary case,” the court of appeals “lacked jurisdiction to review the order.”\(^{27}\) But unlike the Court, Justice Thomas believed it sufficient to reverse the court of appeals’ judgment “on that ground alone.”\(^{28}\) He chided the Court for reaching the Rule 50 issue “and the questions that follow,” questions he described as “difficult and far-reaching” and that (in his view) were first raised by the defendants in their responsive brief on the merits, and therefore were not addressed by the court of appeals.\(^{29}\)

\(^{22}\) See id. at 887.

\(^{23}\) See id. at 893 (Thomas, J., concurring) (“We granted certiorari to decide the narrow question whether a party may appeal an order denying summary judgment after a full trial on the merits. I agree with the Court that the answer is no.”).

\(^{24}\) Id. at 894. Justice Thomas conceded that “some orders denying summary judgment constitute ‘final decisions’ under the collateral order doctrine.” Id. n.* (citing Mitchell v. Forsyth, 472 U.S. 511 (1985)).

\(^{25}\) Id. at 894.

\(^{26}\) Id.

\(^{27}\) Id.

\(^{28}\) Id.

\(^{29}\) Id. at 894-95.
D. Ortiz and the Appealability of Denials of Summary Judgment

In many ways, Ortiz was a poor vehicle for announcing a general rule regarding the appealability of denials of summary judgment. For one thing, both the “unpublished” decision of the court of appeals and the Brief for Respondent in the Supreme Court seemed to merge the record at summary judgment with that produced at trial. Absent any sort of crisp distinction along this line, it is difficult to determine the extent to which the evidence admitted at trial deviated from that presented at summary judgment, and therefore whether district court was correct in denying summary judgment in the first instance and whether the jury’s verdict was in fact supported by sufficient evidence. Moreover, because this was, according to the Supreme Court, an “ordinary” case that could not have been appealed even as an interlocutory matter, we are left without guidance as to the extent of any exceptions to the Court’s otherwise blanket prohibition of appeals of denials of summary judgment following trial.

In hindsight, the petition for a writ of certiorari in this case probably should have been dismissed as improvidently granted.

The lack of unanimity in Ortiz raises further questions. For example, the Court’s extended discussion of Rule 50, along with Justice Thomas’s reaction to that discussion, might lead one to wonder whether the defendant’s failure to renew their motion for judgment as a matter of law had some special significance in this context. If the defendants had renewed that motion, would that have changed the Court’s analysis with respect to the appealability of summary judgment? And then there is Justice Thomas’s extended discussion of interlocutory

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30 See, e.g., id. at 889 (opinion of the Court) (“In the case before us, the Court of Appeals, although purporting to review the District Court’s denial of the prison officials’ pretrial summary-judgment motion, several times pointed to evidence presented only at the trial stage of the proceedings.”) (citations omitted); id. at 894 (Thomas, J., concurring) (“It was not until Jordan and Bright’s response brief in this Court, in which they argued that they had not actually appealed the order denying summary judgment, that the Rule 50 issues were addressed at any length.”).

31 See id. at 892 (“We need not address this argument, for the officials’ claims of qualified immunity hardly present ‘purely legal’ issues capable of resolution ‘with reference only to undisputed facts.’”).
appeals. Does (or should) the appealability of denials of summary judgment after a trial really turn on whether the denial was appealable pretrial? And does (or should) it matter that the time for making an interlocutory appeal has expired?

Finally, as was noted in the Brief for Petitioner, this action was litigated during the three-year period in which Federal Rule of Civil Procedure 56 provided that summary judgment, if appropriate, only “should,” rather than “shall,” be granted.\textsuperscript{32} Does this make a difference or otherwise explain the Court’s ruling in this case?

At least one thing seems clear: regardless of the extent to which the appealability of denials of summary judgment has been foreclosed as a matter of Supreme Court precedent, the answer to this question is essentially a matter of policy. There is no statute or rule that resolves the issue. As a result, it might be beneficial to consider whether, on balance, this practice is desirable as a normative matter. That is the subject of the next Part.

\textsuperscript{32} See Brief for Petitioner at 10, 11 n.1, \textit{id.} (No. 09-737).
II. WHY DENIALS OF SUMMARY JUDGMENT SHOULD BE APPEALABLE

Rather than confront Ortiz directly—for as discussed previously, it was, in many ways, an untidy case—this Part will start with what might be regarded as a paradigmatic example of when a denial of summary judgment arguably ought to be appealable: Assume, in an action involving a single plaintiff, a single defendant, and a single claim, that the defendant has moved for summary judgment. Relying on the Supreme Court’s decision in Celotex Corp. v. Catrett, the defendant has shown, through discovery responses and/or other appropriate materials, that the plaintiff cannot prevail as to an element of its claim. Though Rule 56 commands that such a motion be granted, assume further that the motion, for reasons stated or unstated, is nonetheless denied, and thus that the action proceeds toward trial. At trial, the plaintiff somehow is able to proffer evidence—evidence that was either unavailable or undisclosed at summary judgment—

33 The fact that the defendant is the moving party in this hypothetical example has no essential significance, for either party may seek a summary judgment. As an empirical matter, though, summary judgment motions are much more often made by defendants. See Joe S. Cecil et al., A Quarter-Century of Summary Judgment Practice in Six Federal District Courts, 4 J. EMPIRICAL LEGAL STUD. 861, 886 (2007). Moreover, because plaintiffs generally bear the burden of proof, a motion by that party on rare occasions properly may be denied even in the absence of a response by the defendant, meaning that a motion by a defendant tends to set forth the issues here more clearly.

34 See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) ("[R]egardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied.").

35 Rule 56 provides only that the district court “should state on the record the reasons for granting or denying the motion,” FED. R. CIV. P. 56(a), apparently meaning there is no firm requirement of this nature. Though there arguably are valid reasons for and against giving reasons in support of judicial decisions, see Frederick Schauer, Giving Reasons, 47 STAN. L. REV. 633 (1995), appellate court review probably is made more difficult when reasons are not provided by the district courts. See, e.g., In re Shell Oil Co., 966 F.2d 1130, 1132 (7th Cir. 1992) (Easterbrook, J.) (“Appellate judges are no better than average mind readers, which creates difficulties in reviewing unexplained acts.”) (internal quotation marks omitted). See also Pub. Serv. Comm’n of Wis. v. Wis. Tel. Co., 289 U.S. 67, 69 (1933) (“We have repeatedly emphasized the importance of a statement of the grounds of decision, both as to facts and law, as an aid to litigants and to this Court.”).

36 Some might be wondering whether this actually happens in practice, and if so, why. As for the first question, regrettably, anecdotal evidence suggests that proper summary judgment motions are sometimes denied (and certainly, that was the view of the defendants in Ortiz). As for the reasons why, the answers are varied. Sometimes district court judges, being human, simply make mistakes. Some judges dislike being reversed on appeal, even if wrongly, and certainly a grant of summary judgment, which in the minds of some denies the losing party of its “day in court,” sets up this possibility. Some judges might not want to put in the time—which can be significant—to consider the motion, perhaps in the hope that the case will settle prior to trial. And some judges believe that summary judgment is ultimately discretionary, and therefore that for “appropriate” reasons, they have the power to deny a motion that otherwise should be granted. For more on this last point, see infra Part II.C.
sufficient to avoid a judgment as a matter of law in favor of the defendant.\textsuperscript{37} The case then goes to the jury, which finds in favor of the plaintiff. Though the defendant timely renews its motion for judgment as a matter of law and moves in the alternative for a new trial, those motions are properly denied, meaning that an appeal of the verdict itself would be unavailing. Should a defendant in this situation nonetheless be able to appeal the earlier denial of summary judgment?

\textsuperscript{37} This is not as difficult as one might think, for the Supreme Court appears to have interpreted Rule 50(a) as conferring substantial discretion on the district courts in this context. As the Court stated in \textit{Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.}:

While a district court is permitted to enter judgment as a matter of law when it concludes that the evidence is legally insufficient, it is not required to do so. To the contrary, the district courts are, if anything, encouraged to submit the case to the jury, rather than granting such motions. 546 U.S. 394, 405 (2006). Whether this practice is appropriate as a normative matter is questionable. \textit{See} Bradley Scott Shannon, Should \textit{Summary Judgment Be Granted?}, 58 Am. U. L. Rev. 85, 116-18 (2008) (challenging this practice from a historical and pragmatic perspective). Nonetheless, it is probably true that an otherwise proper preverdict motion for judgment as a matter of law is, if anything, more likely to be denied than is a proper motion for summary judgment.
A. Clearing the Deck of Red Herrings

Before delving into the question of the appealability of denials of summary judgment, notice that by using this hypothetical example we have swept away many of the problems that might have distracted the Court in Ortiz. For one thing, we have removed what might be called the interlocutory appeal problem. Most federal district court orders are appealable (if at all) only after trial.\(^{38}\) Interlocutory appeals are relatively rare.\(^{39}\) Though the class of permissible interlocutory appears to include some denials of summary judgment,\(^{40}\) most denials of summary judgment do not fall into this category.\(^{41}\) Thus, for the sake of simplicity, and because of the problems associated with piecemeal appeals generally, this Article will assume that denials of summary judgment are not appealable as an interlocutory matter.\(^{42}\) In any event, whether a

\(^{38}\) See Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (describing the “general rule” “that a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated”).

\(^{39}\) See Johnson v. Jones, 515 U.S. 304, 309 (1995) (observing that “interlocutory appeals—appeals before the end of district court proceedings—are the exception, not the rule”).

\(^{40}\) See, e.g., Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011) (recognizing that an “immediate appeal from the denial of summary judgment on a qualified immunity plea is available when the appeal presents a ‘purely legal issue’”) (quoting Johnson, 515 U.S. at 313).

\(^{41}\) See id. (“However, instant appeal is not available . . . when the district court determines that factual issues genuinely in dispute preclude summary adjudication.”). Incidentally, this appears to have been the situation in Ortiz, at least according to the Court. See id. (observing that the defendants had “sought no immediate appeal from the denial of their motion for summary judgment. In light of Johnson, that abstinence is unsurprising.”).

\(^{42}\) A few comments are in order here, though. First, by imposing this assumption, this Article does not mean to foreclose the possibility of an interlocutory appeal of a denial of summary judgment through “traditional” means (such as through the use of the collateral order doctrine) where appropriate. Rather, the use of this assumption is simply a nod to the reality that, currently, an interlocutory appeal in this context is not going to be an option in most cases.

Second, this Article does not mean to concede that the current distinction between those denials of summary judgment that are appealable and those that are not is entirely coherent. For example, in Ortiz, the Court recognized that certain denials of summary judgment relating to the defense of qualified immunity are immediately appealable. See id. at 891. The reason traditionally given for this exception, though, is that “qualified immunity can spare in official not only from liability but from trial.” Id. But is this not the purpose of summary judgment generally? See infra Part II.D. Moreover, this exception is available only when the appeal presents a “‘purely legal issue,’” and is not available “when the district court determines that factual issues genuinely in dispute preclude summary adjudication.” Id. (quoting Johnson, 515 U.S. at 313). Indeed, some courts have taken this distinction beyond the qualified immunity context and have applied it to summary judgment motions generally. See, e.g., HK Systems, Inc. v. Eaton Corp., 553 F.3d 1086, 1089 (7th Cir. 2009) (Posner, J.) (observing that “an appellate court will generally refuse to review the denial of a motion for summary judgment after the case has been tried,” though concluding that “the justification for refusing fails when the motion is denied because of a ruling on a pure question of law rather than on the adequacy of the evidence presented in opposition to the motion”). But it is long been established that there is no meaningful distinction between law and fact. See Ronald J. Allen & Michael S. Pardo,
denial of summary judgment is (or should be) appealable after trial seemingly should not depend upon whether the same order was appealable pretrial or, if so, whether that right to appeal immediately was exercised.\footnote{See Spalding v. Mason, 161 U.S. 375, 381 (1896) (holding, notwithstanding the failure to exercise an interlocutory appeal, that “upon an appeal to this Court from a final decree of the general term, the entire record is brought up for review”) (citation omitted). Though this might not be true with respect to those interlocutory orders that fall within the collateral order doctrine, and for that reason constitute “final decisions,” see Mohawk Indus., Inc. v. Carpenter, 130 S. Ct. 599, 603 (2009) (“Although ‘final decisions’ [for purposes of 28 U.S.C. § 1291] typically are ones that trigger the entry of judgment, they also include a small set of prejudgment orders that are ‘collateral to’ the merits of an action and ‘too important’ to be denied immediate review.”) (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)), such orders are, by definition, effectively unreviewable at the conclusion of the action and (again) collateral to the merits, seemingly making them inappropriate for summary adjudication. In any event, it appears that the Ortiz Court probably also did not consider this problem to be significant with respect to a denial of summary judgment. For example, though the “question presented” in the petitioner’s brief on the merits was “May a party appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial?” (see Petitioner’s Brief on the Merits at i), both the Court and the concurrence dropped any reference to the latter limitation in their description. See Ortiz, 131 S. Ct. at 889; id. at 893 (Thomas, J., concurring).}

Second, the hypothetical example assumes that the losing party at summary judgment—here, the defendant—has properly made and renewed a motion for judgment as a matter of law at trial. Though compliance with Rule 50 seems to have everything to do with the appealability of a verdict,\footnote{See Fed. R. Civ. P. 50(a)(1) (describing the purpose of Rule 50 as to determine, once “a party has been fully heard on an issue,” whether “a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue”).} it is not entirely clear (at least as a normative matter) why this procedure has anything to do with the appealability of an earlier denial of summary judgment. The appealability of pretrial matters generally is not precluded by the failure to comply with Rule 50, and though Rule 50 is part of the Rule 12(b)(6)/Rule 12(c)/Rule 56 continuum, whether the denial of such motions properly should be assessed based on the record established at trial, as opposed to the record at the time such rulings were made, is precisely the issue. Be that as it may, the Supreme
Court has repeatedly stated that a federal appellate court is unable to review the sufficiency of the evidence after trial in the absence of a properly-made and renewed motion for judgment as a matter of law, and certainly this procedure, like so many other obligations in life, is easily complied with, its questionable utility notwithstanding.

And so we are back to the hypothetical example. Should a defendant in that situation be able to appeal the earlier denial of summary judgment after trial?

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45 See Ortiz, 131 S. Ct. at 892 (citing Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006)). Indeed, few things in modern civil procedure are clearer.
B. The Rule 11/Rule 56 Framework

In order to determine whether denials of summary judgment should be appealable, it might be helpful to review the procedural framework that underlies this scenario.

It all begins at the inception of the action, and starts with the plaintiff’s complaint. As most lawyers are aware, Federal Rule of Civil Procedure 11 more or less requires that a complaint (and every other paper that is presented to the court) be “warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.”\(^{46}\) But seemingly less well known—though more important for our purposes—is the further requirement that a plaintiff’s allegations “have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”\(^{47}\)

The vast majority of plaintiffs are not looking to establish new law, nor are they invoking the “if specifically so identified” exception to the general requirement that the allegations in the complaint have evidentiary support. Thus, if plaintiffs were to take Rule 11 seriously and comply with its requirements—as they must—summary judgment should be a very rare event.\(^{48}\) Of course, merely having evidence in support of one’s allegations does not mean that such a plaintiff is entitled to win at trial; the defendant might have equal (or better) contrary evidence, and even if not, the jury might be entitled to reject the plaintiff’s evidence as insufficient. At

\(^{46}\text{Fed. R. Civ. P. 11(b)(2). The defendant, of course, is under a similar obligation. See id.}\)

\(^{47}\text{Fed. R. Civ. P. 11(b)(3). Similarly, the defendant’s denials of the plaintiff’s factual contentions must be “warranted on the evidence, or, if specifically so identified, [must be] reasonably based on belief or lack of information.” Fed. R. Civ. P. 11(b)(4).}\)

\(^{48}\text{See Bradley Scott Shannon, I Have Federal Pleading All Figured Out, 61 Case Western Reserve L. Rev. 453, 491 n.155 (2011) (“[I]f plaintiffs truly had evidentiary support for their claims at commencement (and defendants truly had evidentiary support for their denials), there would be little need for summary judgment, as any such motion (at least to the extent it turned on the evidence) would have to be denied.”).}\)
summary judgment, though, the district court is not entitled to weigh the evidence, but rather must deny the motion whenever there exists “a genuine dispute as to any material fact.”

Accordingly, the assumption in our hypothetical example that the motion for summary judgment should have been granted means that the plaintiff very likely has done something quite improper from the beginning.

And there is more. Federal Rule of Civil Procedure 56—the rule governing summary judgment—gives the nonmoving party (here, the plaintiff) every opportunity to survive such a motion. For starters, Rule 56 provides: “If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” This subdivision virtually assures that a plaintiff will get the time necessary to amass the information that it needs to avoid an adverse ruling (assuming such information exists). If that were not enough, Rule 56 further provides: “If a party fails to properly support an assertion of fact or fails to properly address another party’s assertion of fact as required by Rule 56(c), the court may: (1) give an opportunity to properly support or address the fact; . . . or (4) issue any other appropriate order.”

Given this rule, how a plaintiff with a legitimate claim could lose at summary judgment is almost unfathomable.

49 See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (“[A]t the summary judgment stage the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”).
51 Whether a plaintiff in this situation should be sanctioned under Rule 11 in addition to or in lieu of whatever might happen at summary judgment is an issue that is beyond the scope of this Article, though the tentative answer to both questions would seem to be yes, and one can imagine certain collateral benefits that might flow from proceeding along that line. Either way, though, the probable result should be essentially the same.
52 Fed. R. Civ. P. 56(d). Incidentally, the denial referred to in Rule 56(d)(1) cannot mean a permanent denial; there must eventually be a day of reckoning.
There is, therefore, nothing unfair about rendering summary judgment against a plaintiff that fails or is unable to avail itself of these procedures—procedures it probably should not have needed in the first instance.\textsuperscript{54} Indeed, it is the \textit{defendant}—not the plaintiff—that suffers an injustice in this context, for the defendant has been forced to make a motion it probably should not have had to make, in an action it probably should not have had to litigate in that it probably should never have been commenced.

\textsuperscript{54} This does not necessarily mean, of course, that the system \textit{itself} is fair. For example, many have questioned whether Rule 11 in its current form imposes too high a burden on plaintiffs that are unable to obtain the evidence they need to proceed prior to commencement. It seems, though, that any problems along this line should be rectified via the usual channels, rather than through a misreading or disregard of clear rule language.
C. The Mandatory Nature of Summary Judgment

Another consideration here relates to the nature of summary judgment. Rule 56 currently provides that if a motion for summary judgment is properly made and supported by the moving party, and inadequately opposed by the nonmoving party, it “shall” be granted.\(^{55}\) The only reasonable interpretation of the term “shall” as used in Rule 56 is “must”—i.e., for both textual and normative reasons, the granting of a proper motion for summary judgment must be read as mandatory. As the Supreme Court stated in *Celotex*:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a 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.\(^{56}\)

There might have been a brief period of time when that was not true, but that time has now passed.\(^{57}\) This means that a district court should be regarded as having no discretion to deny an proper summary judgment motion.\(^{58}\)

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\(^{55}\) *Fed. R. Civ. P.* 56(a). Once again, it might be more accurate to say that the motion shall be granted if no reasonable juror could find in favor of the nonmoving party, for summary judgment need not necessarily be granted in favor of a plaintiff even if the purported “facts” are undisputed. *See id.* (providing specifically that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).


\(^{57}\) From December 1, 2007 to December 1, 2010, Rule 56 provided only that summary judgment, if appropriate, “should” be granted. *See* 11 MOORE, supra note 2, § 56.07[3][d], at 56-50 to -53. Prior to December 1, 2007, the rule read (essentially) as it does today—that summary judgment, if appropriate, “shall” be granted. *See id.*

Incidentally, this change in Rule 56 from “shall” to “should” and back does not appear to raise any issues with respect to the Court’s decision in *Ortiz*. The summary judgment motion at issue in *Ortiz* was denied on March 29, 2002. *See Ortiz v. Voinovich*, 211 F. Supp. 2d 917, 922 (S.D. Ohio 2002), *rev’d*, 316 Fed. Appx. 449 (6th Cir. 2009), *rev’d*, 131 S. Ct. 884 (2011). As noted previously, the change from “shall” to “should” did not take effect until December 1, 2007. Though the court of appeals’ decision was rendered on March 12, 2009, *see* Ortiz v. Jordan, 316 Fed. Appx. 449 (6th Cir. 2009), *rev’d*, 131 S. Ct. 884 (2011), the governing summary judgment standard presumably remained the same, *see* Fed. R. Civ. P. 86(a) (providing that rule amendments govern “proceedings in an action commenced after their effective date” and “proceedings after that date in an action then pending unless . . . the court determines that applying them in a particular action would be infeasible or work an injustice”), and there is nothing in the court of appeals’ opinion to suggest otherwise. Of course, as “shall” was restored to Rule 56 effective December 1, 2010, any summary judgment rulings made after that date presumably would utilize the current standard, regardless of when the underlying action was commenced. *See* Fed. R. Civ. P. 86(a).
As a result, the denial of a proper summary judgment must be regarded as error. Thus, given that the motion for summary judgment in our hypothetical example should have been granted—indeed, it must have been granted—and yet it was denied, our defendant has now suffered a third injustice—it has wrongfully been denied a victory with respect to a motion it should not have even had to make. The plaintiff, meanwhile, is improperly and unjustly rewarded for having abused the system.

58 Though recently amended Rule 56(e) now provides, in the event a party “fails to properly address another party’s assertion of fact as required by Rule 56(c),” that the district court “may,” as an alternative to granting the motion, “issue any other appropriate order,” this phrase cannot be interpreted as giving the court the discretion to deny the motion, for that would be flatly contrary to the clear command of Rule 56(c).

It bears mentioning that some disagree with this conclusion, and believe instead that district court judges possess some discretion in this regard, the plain language of the rule notwithstanding. See, e.g., Steven S. Gensler, Must, Should, Shall, 43 AKRON L. REV. 1141 (2010). But even if that is true, such discretion must have its limits, meaning any such denial would be reviewable for abuse of that discretion. See Shannon, Should Summary Judgment Be Granted?, supra note 37, at 104 (discussing this proposition and the problems associated therewith). At least as a hypothetical, if not also an empirical, matter, then, there still must be at least some denials of summary judgment that fairly may be characterized as improper.
D. The Purpose of Summary Judgment

A further consideration in this situation relates to the purpose of summary judgment. The primary reason for making a motion for summary judgment is, of course, to win. But the underlying purpose of summary judgment is to avoid an unnecessary trial.\(^{59}\) If one were to assume that, just prior to the start of the trial, the district court judge were to inquire as to the nature and extent of the plaintiff’s evidence, and if the plaintiff were to respond with nothing, there would seem to be no justification for proceeding further. Judgment should be entered in favor of the defendant, and there would be nothing unfair about it. This is essentially what happens at summary judgment. Summary judgment, then, is perhaps best thought of as an early, accelerated trial. If a plaintiff is unable to present its case in a manner such that a reasonable juror could find in its favor, a full trial on the merits would result in a pointless and unnecessary waste of resources.

When a motion for summary judgment is wrongfully denied, the defendant therefore suffers a fourth injustice: it is forced to litigate an unnecessary trial. Fortunately for our defendant, there are finally some things working in its favor. For one thing, the district court judge has been alerted as to the weakness of the plaintiff’s case. More importantly, though, it is as a practical matter very unlikely that such a plaintiff will prevail. The reason is that a plaintiff, after having been given the opportunity to engage in discovery and to enhance its case under

\(^{59}\) As one leading treatise states:

The summary-judgment procedure authorized by Rule 56 is a method for promptly disposing of actions in which there is no genuine issue as to any material fact or in which only a question of law is involved. Thus, parties need not wait until a case is fully tried but may seek a final adjudication of the action by a motion under Rule 56. In this way, dilatory tactics resulting from the assertion of unfounded claims or the interposition of specious denials or sham defenses can be defeated, parties may be accorded expeditious justice, and some of the pressure on court dockets may be alleviated.

10A WRIGHT ET AL., supra note 6, § 2712, at 198. Accord BRUNET & REDISH, supra note 6, § 1:1, at 1-2 (“As the primary procedure used to avoid unnecessary civil trials, summary judgment is probably the single most important pretrial devise used today.”). See also Ortiz, 131 S. Ct. at 889 (“When summary judgment is sought . . . the court inquires whether the party opposing the motion has raised any triable issue barring summary adjudication.”)
Rule 56, that is still unable to amass sufficient evidence to withstand the defendant’s motion for summary judgment is very unlikely to amass sufficient evidence to persuade a reasonable juror to find in its favor at trial. Thus, although our defendant will be forced to litigate an unnecessary trial, that should be the end of it, and so at least in that sense, no appeal of the denial of summary judgment should be necessary.

But sometimes the unthinkable happens. Sometimes a plaintiff, after (unjustifiably) surviving a motion for summary judgment, is somehow able to amass just enough evidence between summary judgment and trial not only to survive a Rule 50 motion, but also to persuade that jury to find in its favor. Such was the case in our hypothetical example. In that situation, the defendant has suffered yet another injustice: it has lost a case it never should have had to try. Assuming further that such a verdict would be upheld on appeal, the only way to remedy these many injustices is to allow the defendant to appeal the earlier denial of summary judgment.

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60 This assumes that such evidence was not subject to pretrial disclosure or that the failure to disclose was substantially justified. See Fed. R. Civ. P. 26(e) (imposing on parties a general obligation to supplement prior discovery disclosures and responses). Otherwise, this also might prevent a plaintiff in this situation from prevailing. See Fed. R. Civ. P. 37(c) (“Failure to Disclose, to Supplement an Earlier Response, or to Admit”) (describing the sanctions that may be imposed in this context).

61 As one legal scholar put it:

If a party deserved to win its summary judgment motion, but lost the motion, then the party has suffered an injustice. This party deserved to win the case at summary judgment and to avoid all the costs and inconveniences of trial. If this party subsequently loses at trial, the party then suffers the additional wrong of having to pay a judgment that perhaps unjustly enriches the opposing party.

Jenike-Godshall, Comment, supra note 6, at 1615 (citation omitted). It also might be observed that, if summary judgment had been properly granted, the plaintiff likely would not have found the additional evidence needed to prevail at trial.
E. The Appealability of Denials of Dispositive Motions Generally

Before turning to the appealability of erroneous denials of summary judgment, it might be helpful to consider the appealability of erroneous denials of dispositive motions more generally.

There are, of course, a number of pretrial motions that, if granted, result in the disposition of an action. As with summary judgment, erroneous denials of such motions generally are not immediately appealable. But such denials generally are appealable following the entry of a final judgment. And if the moving party ultimately prevails in its appeal, that final judgment—even if entered after an adverse outcome at trial—will be reversed. Thus, though certain parties in those situations likewise will suffer the injustice of having to endure an unnecessary trial, their rights will be vindicated in the end, at least in the sense that a judgment eventually will

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63 As the Supreme Court stated in Lauro Lines s.r.l. v. Chasser, 490 U.S. 495 (1989), with respect to a motion to dismiss for enforcement of a contractual forum-selection clause:
   If it is eventually decided that the District Court erred in allowing trial in this case to take place in New York, petitioner will have been put to unnecessary trouble and expense, and the value of its contractual right to an Italian forum will have been diminished. It is always true, however, that there is value in triumphing before trial, rather than after it, and this Court has declined to find the costs associated with unnecessary litigation to be enough to warrant allowing the immediate appeal of a pretrial order.
   Id. at 499 (citations and internal quotation marks omitted). See also id. at 500 (“[W]e have declined to hold the collateral order doctrine applicable where a district court has denied a claim, not that the defendant has a right not to be sued at all, but that the suit against the defendant is not properly before the particular court because it lacks jurisdiction.”).
64 See id. at 501 (“Petitioner’s claim that it may be sued only in Naples, while not perfectly secured by appeal after final judgment, is adequately vindicable at that stage—surely as effectively as a claim that the trial court lacked personal jurisdiction over the defendant . . . .”). See also Van Cauwenbergh v. Bard, 486 U.S. 517, 526 (1988) (recognizing that “the right not to be subject to a binding judgment may be effectively vindicated following final judgment”).
65 See id. at 502-03 (Scalia, J., concurring) (“While it is true, therefore, than the ‘right not to be sued elsewhere than in Naples’ is not fully vindicated—indeed, to be utterly frank, is positively destroyed—by permitting the trial to occur and reversing its outcome, that is vindication enough because the right is not sufficiently important to overcome the policies militating against interlocutory appeals.”). Indeed, some of the most famous cases in civil procedure involved similar scenarios. See, e.g., Republic of the Philippines v. Pimentel, 128 S. Ct. 2180 (2008) (reversing the denial of a motion to dismiss for failure to join a party under Rule 19); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978) (reversing a denial of a motion to dismiss for lack of subject-matter jurisdiction). This also includes, of course, unsuccessful motions for judgment as a matter of law. See, e.g., Weisgram v. Marley Co., 528 U.S. 440 (2000) (affirming the reversal of the district court’s judgment, which was entered following a verdict for the plaintiff and a denial of the defendant’s motion for judgment as a matter of law).
be entered in their favor. In those situations, the fact that the opposing party’s case was tried on the merits and a verdict was rendered in its favor is of no consequence.
F. The Appealability of Denials of Summary Judgment

Alas, though denials of dispositive motions generally are appealable, the same does not appear to be true with respect to summary judgment, at least according to the Supreme Court in *Ortiz*. In *Ortiz*, the Court refused to acknowledge any general right to appeal a denial of summary judgment. The only thing that may be appealed in this context is the sufficiency of the evidence supporting the jury’s verdict, an issue that must be analyzed pursuant to Rule 50. This means that there is no review of the erroneous summary judgment ruling, at least not based on the record as it stood at the time of that ruling.

Though this regime might be tolerable in those situations where the record at summary judgment and at trial are essentially identical, what about those situations, such as was presented in our hypothetical example, in which they are not? Such a regime essentially eliminates the possibility of any meaningful review of the erroneous denial of motions for summary judgment.

Why should this be? Should not an erroneous denial of summary judgment be amenable to vindication on appeal, just as (e.g.) an erroneous denial of a motion to dismiss for enforcement of a contractual forum-selection clause may be vindicated? And assuming the answer to that question is “yes,” should not the relevant record be that as it existed at summary judgment—i.e., at the time of the erroneous ruling, just as it presently is with other dispositive motions?

The primary difficulty lies in this last question. Regrettably, the *Ortiz* Court failed to explain why there is generally no right to appeal a denial of summary judgment after a trial, and

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67 See, e.g., *Ortiz* v. Jordan, 131 S. Ct. 884, 892 (“Questions going to the sufficiency of the evidence are not preserved for appellate review by a summary judgment motion alone,” Jordan and Bright acknowledge; rather, challenges of that order “must be renewed posttrial under Rule 50.”); id. at 893 (“To the extent that the officials urge Ortiz has not proved her case, they were, by their own account, obliged to raise that sufficiency-of-the-evidence issue by postverdict motion for judgment as a matter of law under Rule 50(b).”). Of course, the relevant standard here is not the issue, for the standards for summary judgment and for judgment as a matter of law are essentially the same. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (observing that the standard for summary judgment “mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)”)

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thus that vindication for the erroneous denial of an assertion of this defense (essentially, failure to state a claim upon which relief can be granted) may be sought only pursuant to Rule 50 and based on the record adduced at trial. Implicitly, though, the Ortiz Court’s answer appears to be essentially this: Both summary judgment and trial are designed to determine which party ought to prevail on the merits—i.e., who should win with respect to the parties’ claims. But whereas summary judgment is decided largely on the basis of discovery responses and affidavits or declarations, trials are decided based on evidence (primarily witness testimony and exhibits) admitted in open court and subject to the opportunity for cross-examination. Moreover, whereas summary judgment is determined by a judge, the outcome at trial is frequently determined by a jury, at least in part. For all of these reasons, it is the record at trial, and not at summary judgment, that should be considered when deciding whether a plaintiff ought to prevail with respect to its claim.

This argument undoubtedly has some visceral and even logical appeal. But its major flaw is found in its first premise. The purpose of summary judgment (again) is not to determine which party ought to prevail on the merits; that is but a byproduct of a court’s ruling on any such motion. The purpose of summary judgment, rather, is to determine whether there is “genuine dispute as to any material fact” such as would warrant a trial. Thus, whether there ought to have been a trial must be evaluated based on the record as it existed at the time that decision was made. There is no other way to fully vindicate the erroneous denial of summary judgment and all the injustices such a ruling encompasses. That the plaintiff won at trial, though seemingly important, is actually somewhat beside the point, and in any event there is little reason to think

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68 FED. R. CIV. P. 56(a).
69 See supra Part II.D.
70 We do not, for example, ask, with respect to the appeal of a grant of summary judgment, whether the nonmoving party would have prevailed at trial if tried today. Moreover, that a reasonable juror could have found in favor of the
that the records at summary judgment and at trial—a trial that never should have occurred—were the same.\textsuperscript{71}

Denials of motions for summary judgment motions also should be appealable as a matter of symmetry. Just as denials of other dispositive motions are appealable, so should be denials of summary judgment. Moreover, just as erroneous grants of summary judgment are appealable, so should be erroneous denials. The damage done in each instance is essentially the same.\textsuperscript{72}

A final consideration relates to the integrity of the federal judiciary. District court judges need to know that because needless trials waste enormous amounts of time and money, improperly denying motions for summary judgment has consequences. They need to know that they will get overturned. Moreover, the practicing bar needs to know that judges know that. It needs to know that summary judgment remains a valuable arrow in the procedural quiver, and that a motion that should be granted will be granted. For these reasons also, denials of summary judgment should be appealable.

Arguments against the appealability of denials of summary judgment seem, on balance, unpersuasive. For example, one leading treatise argues that the \textit{Ortiz} Court’s holding makes sense because a denial of summary judgment on the basis of factual disputes is essentially a prediction that the evidence will be sufficient to support a verdict in favor of the nonmovant. Once the trial has taken place, the focus of the

\textsuperscript{71} Incidentally, logic dictates that the same should be true of other merits-based dispositive motions. Just as a motion for judgment as a matter of law should be assessed on appeal as it was by the district court—based on the record as it existed at trial—and (as argued here) a motion for summary judgment, based on the record as it existed at summary judgment, a motion to dismiss for failure to state a claim upon which relief can be granted, see \textit{Fed. R. Civ. P.} 12(b)(6), should be assessed based solely on the complaint; a motion for judgment on the pleadings, see \textit{Fed. R. Civ. P.} 12(c), based solely on the pleadings; etc.

\textsuperscript{72} In addition, as mentioned previously, “[s]ome circuits hold that if the material facts are not in dispute, and the denial of summary judgment was based on the interpretation of a purely legal question, the denial is appealable after final judgment.” 11 \textit{MOORE, supra} note 2, § 56.130[3][c][ii], at 56-334. But if that is true with respect to “purely legal” questions, then it must also be true with respect to purely factual questions (and everything in between), given the lack of any meaningful distinction between these concepts. \textit{See supra} note 42.
court of appeals is appropriately on the evidence actually admitted, not on the
earlier summary judgment record.\textsuperscript{73}

A denial of a motion for summary judgment, though, is not supposed to be based on a prediction that the evidence at trial will be sufficient to support a verdict in favor of the nonmoving party. Rather, it is supposed to be a determination, based on the record at summary judgment, that there is a genuine dispute as to a material fact. An erroneous denial of a motion for summary judgment means that there was no genuine dispute as to any material fact—meaning that there never should have been a trial. Thus, to the extent that summary judgment is regarded as a prediction of what would happen at trial, that prediction must be cabined by the evidence as it exists at summary judgment. The district court judge is not allowed to speculate as to what might happen between summary judgment and trial. For the same reason, the nonmoving party should not be allowed to reap the benefit of any differences between the records at summary judgment and at trial in this context.

The same treatise further states:

“To be sure, the party moving for summary judgment suffers an injustice if his motion is improperly denied. This is true even if the jury decides in his favor. The injustice arguably is greater when the verdict goes against him. However, we believe it would be even more unjust to deprive a party of a jury verdict after the evidence was fully presented, on the basis of an appellate court’s review of whether the pleadings and affidavits at the time of the summary judgment motion demonstrated the need for a trial.”\textsuperscript{74}

It does not appear, though, that this analysis represents an accurate balancing of the injustices that have occurred in this setting. On the one hand, an erroneous denial of summary judgment likely means that the moving party has been forced to litigate an action it should not have had to litigate; made a motion it should not have had to make; and wrongfully lost that motion, forcing it to proceed towards a trial that never should have occurred. If that moving party then loses at

\footnotesize{\textsuperscript{73} 11 MOORE, supra note 2, § 56.130[3][c][i], at 56-332 to -333.}

\footnotesize{\textsuperscript{74} Id. at 56-334 (quoting Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1359 (9th Cir. 1987)).}
trial, it will only be because the nonmoving party—likely for the wrong reasons—was able to cobble together just enough evidence post-motion to eke out a victory that can withstand appeal. On the other hand, we have a narrow victory at trial for the nonmovant. All things considered, the balance of injustices seems to tip in favor of the moving party. This seems particularly true when one considers that the reversal of the denial of a motion for judgment as a matter of law also will “deprive a party of a jury verdict after the evidence was fully presented”—as will the reversal of the denial of a number of other dispositive motions—and few seem overly concerned with the “injustice” that results from that.

Another leading treatise states:

It should come as no surprise that the loser of a summary judgment motion cannot seek judicial review of the order following a plenary trial. The issue of the propriety of the ruling on summary judgment becomes moot following a trial. The trial loser can, of course, appeal the result of the trial. The opposite result, that of permitting the appeal of a Rule 56 order and potentially remanding for another trial, would be nonsensical because it would call for a trial—a result that had already been completed and would unjustly deprive the verdict or judgment winner of a result that should be respected. The Eleventh Circuit characterized this problem aptly when it asserted that “summary judgment was not intended to be a bomb planted within the litigation at its early stages and exploded on appeal.”

It is unclear, though, why the reversal of a denial of summary judgment would result in a second trial; the more sensible result, it seems, would simply be the entry of judgment in favor of the moving party. As for the Eleventh Circuit’s analogy, it seems unlikely that a party would move for summary judgment (or anything else) simply to plant a “bomb” that could be “exploded” on appeal. And how is a motion for summary judgment any more of a “bomb” than any other appealable, pretrial motion? The answer to this question likewise is unclear.

75Brunet & Redish, supra note 6, § 11.3, at 488-89 (footnotes omitted) (quoting Holley v. Northrup Worldwide Aircraft Serv., Inc., 835 F.2d 1375, 1377 (11th Cir. 1988)).
Finally, should there be any concerns about the docket, it does not appear that allowing appeals of denials of summary judgment will overwhelm the appellate courts with arguments of this nature. It is true that hundreds, if not thousands, of motions for summary judgment are filed and denied every year. But the vast majority presumably are properly denied, meaning that it is probably the rare summary judgment motion that should have been granted but was not. And as discussed previously, in most cases, the party that wrongfully loses at summary judgment very likely will prevail at trial. Thus, the number of wrongful denials of summary judgment in need of appeal should be quite small. Though this fact alone would not prevent losing parties from wrongfully appealing proper denials of motions for summary judgment, that is but a subset of a larger problem of appellate practice that is by no means confined to this context. Moreover, even a party with a valid denial of summary judgment argument would have to compare the value of that argument with all others that might be advanced on appeal. The bottom line is that allowing appeals of denials of summary judgment almost certainly would not result in any untoward problems for appellate courts, or cause more harm than good.

76 Of course, it this statement is not true, that is an additional argument for, not against, appeals of denials of summary judgment.
77 See supra Part II.D.
78 Some might argue that the relative rarity of a successful appeal of a denial of summary judgment actually cuts the other way, for why are we in need of a procedure (particularly one as novel as this) that might be applied only infrequently? A similar argument in fact was made in opposition to discretionary denials of summary judgment. See Shannon, Should Summary Judgment Be Granted?, supra note 37, at 103 n.89. But whereas discretionary denials of summary judgment results in error, allowing appeals of wrongful denials of summary judgment corrects error.
CONCLUSION

The general desire to uphold jury verdicts, as well as the preference to appraise the merits of the parties’ claims and defenses based on the evidence admitted at trial, are understandable. But serious errors occurring prior to trial should be amenable to correction on appeal, and this should be particularly so as to errors that go to the merits, such as erroneous denials of motions for summary judgment, for such motions involve the issue whether there even ought to be a trial.

As the Supreme Court reminded us in Celotex:

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’ . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis. 79

And if this statement is true with respect to the construction of Rule 56, it should be all the more true with respect to its operation. Admittedly, allowing appeals of denials of summary judgment would require a reevaluation of the current procedural landscape and a reconsideration of recent Court precedent. It does seem, though, to be an idea worthy of further study.