Summary Judgment in Pennsylvania: Time for Another Look at Credibility Issues

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I. INTRODUCTION

Historically, courts and commentators in the United States have recognized that the stereotypical plenary jury trial wastes judicial resources and unnecessarily delays resolution of the underlying legal dispute in many civil cases.¹ Prosecuting a case to a jury verdict can also be a frustrating and expensive experience for litigants. Many lawsuits are characterized by either minor or non-existent disputes over relevant facts, and such cases may be appropriately resolved by a more summary process than a full-blown jury trial.² In recognition of this phenomenon, courts and administrators have attempted, since at least the eighteenth century, to fashion procedures that expedite civil litigation. Default judgments, judgments on the pleadings, summary judgments and directed verdicts allow courts to enter judgments at various points during the course of the proceedings prior to submitting the case to the jury. The most recent of these

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1. Complaints about legal delays have been voiced since at least the eighteenth century. See, e.g., Richard B. Morris, Studies in the History of American Law 48 (1930) (noting that during the eighteenth century, "business men frequently expressed impatience with . . . the long, involved, and expensive character of lawsuits"). In 1889, David Dudley Field termed the delays in the administration of justice "scandalous." David Dudley Field, Address at the Annual Meeting of the American Bar Association (August 30, 1889), in Report of the Twelfth Annual Meeting of the American Bar Association, 1889, at 229. The delays have often been attributed to the right to trial by jury. See, e.g., Simeon E. Baldwin, The American Judiciary 367 (1905).

2. "Summary" in this sense refers to any process that resolves a legal dispute without going through a full-blown jury trial. Some summary procedures are more truly summary than others. In fact, modern summary judgment allows the submission to a court of all evidence that would be available at trial except for testimony. Even this evidence, however, is often submitted in the form of affidavits or transcripts of depositions. Modern summary judgment may therefore embody a process that is more "semi-plenary" than truly summary.
procedural devices to achieve trans-substantive application is summary judgment.³

The summary judgment procedure allows any party in litigation to file a motion with the court seeking an entry of judgment in its favor. The court may grant the motion when there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law.⁴ Proponents of summary judgment view it as a speedy, inexpensive vehicle for the resolution of lawsuits. Although the procedure may achieve this goal in many instances, it has also been roundly criticized, with most of the criticism focusing on the expense, delay and potential for an improper denial of a plenary jury trial.⁵

Despite the criticisms of summary judgment, courts and commentators have strenuously advocated its use as a means to alleviate pressures on court dockets.⁶ Formerly characterized as "an extreme and treacherous remedy"⁷ in the federal fora, the summary judgment motion is, in fact, now praised by the Supreme Court as "not . . . a disfavored procedural shortcut, but rather . . . an integral part of the Federal Rules as a whole."⁸

In the state court arena, some courts have happily joined in the movement to expand the usage of summary judgment,⁹ while

³. Summary judgment did not find widespread usage in American courts until the twentieth century. See infra notes 66-73 and accompanying text. By contrast, the demurrer, another procedural mechanism for keeping a case from the jury, was recognized by William Blackstone. 3 WILLIAM BLACKSTONE, COMMENTARIES 314 (date). The directed verdict existed during the eighteenth century, although it was not until 1943 that the Supreme Court passed on its constitutionality. Galloway v. United States, 319 U.S. 372 (1943).


⁵. The fact that a procedure designed to alleviate delay and expense has been criticized for exacerbating those very evils is somewhat bemusing. The problem arises because an unsuccessful motion for summary judgment adds an additional layer to the judicial process. As recently as 1992, a justice of the Mississippi Supreme Court called for the abolition of summary judgment, writing: "In the amount of time it takes the parties to file a summary judgment motion, respond to it, and have the court review it, the matter could have been disposed of by a full trial . . . . This writer feels that [the Mississippi summary judgment rule] should be abolished . . . ." Allen v. Mayer, 587 So. 2d 255, 262 (Miss. 1991)(McRae, J., concurring).


⁹. Most of the recent movement in the state court arena has been the affirmation of the Supreme Court's holding in Celotex. See, e.g., Lawson State Community College v. First Continental Leasing Corp., 529 So. 2d 926 (Ala. 1988); Irwin v. Jones, 832 S.W.2d 827 (Ark. 1992); Thoms v. Idaho Ins. Agency, 887 P.2d 1034 (Idaho 1994).
others have either refused to follow the federal lead or simply ignored the situation. Pennsylvania appears to be in the latter category, as it employs a more exacting summary judgment standard than the federal courts without explicitly rejecting the approach taken to this procedure by the Supreme Court.

In Pennsylvania, the standard for granting a summary judgment motion has remained static since the first rule of civil procedure authorizing the use of the motion came into existence in 1966. Pennsylvania's standard for granting the motion is stringent in comparison to the standards of other states, which may be a result of the liberalization in the use of summary judgment that has taken place elsewhere. The first hurdle that an advocate seeking summary judgment in Pennsylvania must overcome comes from the so-called Nanty-Glo rule, which prohibits an award of summary judgment when the movant's supporting evidence is testimonial in nature.

In Borough of Nanty-Glo v. American Surety Co., borough auditors accused the tax collector for the Borough of Nanty-Glo of embezzling a sum of money in excess of three thousand dollars. The borough brought suit against the collector and surety com-

10. See, e.g., Denver v. Block 173 Assoc., 814 P.2d 824 (Colo. 1991). In Denver, the plaintiff landowners filed suits against various state and local officials in both state and federal courts. Id. at 824. The suits alleged a conspiracy by the officials to deny the plaintiffs their rights under state and federal law. Id. at 828. The federal suit was dismissed on the defendants' motion for summary judgment. Id. The defendants then sought to have the state action dismissed, arguing that the federal court's determination should act as res judicata in state court. Id. The Colorado Supreme Court refused to give the federal summary judgment decision res judicata effect, noting that the holding of the Supreme Court in Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), creates a standard for deciding summary judgment motions that "differs from the standard applied to summary judgment motions in federal [sic] and Colorado state court . . . ." Id. at 834 n.11.

11. The Pennsylvania Supreme Court first promulgated a summary judgment rule in 1966. 3 Goodrich-Amram 2d § 1035:2 (1991). Prior attempts to introduce the procedure to Pennsylvania practice had been rebuffed because of the lack of formalized discovery procedures in Pennsylvania and because of a belief that the "modest amounts in controversy" in state court litigation did not justify wide-spread use of the procedure. Id.

12. While it is difficult to produce empirical proof showing that courts are granting summary judgment motions more frequently, commentators certainly believe that the federal courts are moving in that direction. See Marcy J. Levine, Comment, Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court, 37 Emory L. J. 171, 214 (1988)(noting the "liberal summary judgment attitude expressed by the [Supreme] Court"). Reported state court decisions also justify a conclusion that the motion is being granted with somewhat greater frequency. See, e.g., Kidd v. Early, 222 S.E.2d 392 (N.C. 1976)(permitting trial courts to give greater weight to testimonial evidence in ruling on summary judgment motions).


15. Nanty-Glo, 163 A. at 524.
pany that bonded the collector after the tax collector failed to fully reimburse the borough for the loss. At trial, the borough called as witnesses both the tax collector and clerk of the borough council. The tax collector testified that he had collected the tax money, failed to turn it over to the borough and used it for his own purposes. The clerk of the borough council testified that the bonding company had been promptly notified of the loss. The trial court found the cumulative effect of the two witness' testimony adequate to establish a prima facie case for the borough, and at the conclusion of the trial, directed a verdict for the borough.

On appeal, the Pennsylvania Supreme Court held that the trial court improperly directed the verdict. The court, quoting from Reel v. Elder, stated the following:

However clear and indisputable may be the proof when it depends upon oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial if they should deem the verdict contrary to the weight of the evidence.

Nanty-Glo, therefore, stands for the proposition that a court may never direct a verdict or grant summary judgment when any necessary element of the plaintiff's case is proven solely by testimonial evidence. The Nanty-Glo court mentioned no exceptions to the rule, with the apparent intention that the rule should be followed regardless of whether the witnesses had an interest in the outcome of the litigation.

16. Id. The borough initially filed suit against only the surety company, and subsequently joined the tax collector as an additional defendant. Id.
17. Id.
18. Id.
19. Id.
20. Nanty-Glo, 163 A. at 524. In Pennsylvania, a trial court may direct a verdict "only in a case where the facts are all clear, and there is no room for doubt." Stephens v. Carrara, 401 A.2d 821, 822 (Pa. Super. Ct. 1979). In ruling on the motion, the court must accept as true all testimony offered by the party opposing the motion. Id.
A grant of a directed verdict effectively eliminates the jury's role as fact-finder as the judge literally directs the jury to return a specific verdict. The jury is then duty-bound to return a verdict as directed. Cherniak v. Prudential Ins. Co., 14 A.2d 334 (Pa. 1940).
23. Nanty-Glo, 163 A. at 524.
25. See Nanty-Glo, 163 A. at 523. If the Nanty-Glo court believed that directed verdicts could be based on the testimony of interested parties, it neglected to mention that fact. Such an omission is curious, given the fact that the tax collector whose testi-
The *Nanty-Glo* rule is apparently bottomed on two beliefs that currently receive less unquestioned acceptance than they received in the American jurisprudence of the nineteenth century. The first belief is that the determination of whether a witness is credible is a matter properly left to the finder of fact.\(^{26}\) During the nineteenth century, courts granted the jury almost unfettered liberty in making this determination.\(^{27}\) Even if a witness was uncontradicted, the jury was at liberty to disbelieve the witness’s testimony.\(^{28}\)

The second belief is the belief in the efficacy of cross-examination as a means of attacking the credibility of a witness.\(^{29}\) A witness who is unimpeached by extrinsic evidence might still be disbelieved because of answers that are elicited from him or her during cross examination. Disbelief in a witness’s credibility may result from either the content of the witness’s answers or the demeanor of the witness while providing the answers. Nineteenth century practitioners commonly believed that it was, in fact, the rigors of cross-examination in open court that were necessary to evoke behaviors that a witness might otherwise be able to conceal.\(^{30}\)

The Pennsylvania prohibition against granting summary judgment when the motion is based on testimonial evidence applies...
even when the adversary does not oppose the motion.\textsuperscript{31} This rule is certainly contrary to federal summary judgment jurisprudence,\textsuperscript{32} however it is not unique in American law.\textsuperscript{33} Virtually all jurisdictions have recognized that a grant of summary judgment (or the direction of a verdict) based on testimonial evidence involves some theoretically troubling issues, including the important issue of when a court may legally prohibit a jury from disregarding an unimpeached witness' testimony.\textsuperscript{34}

While the \textit{Nanty-Glo} rule generally disallows summary judgment in instances where the motion is supported by testimonial evidence, over the years Pennsylvania courts have carved out two basic exceptions to the rule. The first exception applies when the testimonial evidence is merely cumulative and in addition to documentary evidence supporting the same contention.\textsuperscript{35} In this situation, summary judgment may be granted.\textsuperscript{36} Second, testimonial evidence may form the basis for a grant of summary judgment where the evidence takes the form of a party admission.\textsuperscript{37} This exception clearly applies in cases where the admissions are elicited from a party-opponent who is also the respondent to the motion.\textsuperscript{38} When the admissions come from a non-respondent


\textsuperscript{32} \textit{See}, e.g., Walter v. Fiorenzo, 840 F.2d 427, 434 (7th Cir. 1989)(noting that "[a] motion for summary judgment cannot be defeated by an opposing party's incantation of lack of credibility over a movant's supporting affidavit").


\textsuperscript{34} This issue may arise in either the summary judgment or directed verdict context. Not all jurisdictions have addressed the issue in each of these situations, and very few have reported decisions addressing both situations. Courts that have decided the question in either the summary judgment or the directed verdict context may, however, be broken down into three major categories:

1) The group of states that allow a court to grant summary judgment (or direct a verdict) based on any uncontradicted testimonial evidence, including testimonial evidence given by a party. This group includes Texas (Collora v. Navarro, 574 S.W.2d 65 (Tex. 1978)); Kansas (Walborn v. Stockman, 706 P.2d 465 (Kan. Ct. App. 1985)); and Oklahoma (Geschwind v. Brorsen, 258 P.2d 619 (Okla. 1953)).

2) The group of states that allow a court to grant summary judgment (or direct a verdict) based on uncontradicted testimonial evidence only if the evidence comes from a disinterested witness. South Carolina appears to fall within this category, (Green v. Greenville County, 180 S.E. 471 (S.C. 1935)), as does Arkansas (Bullock v. Miner, 286 S.W.2d 328 (Ark. 1956)).

3) The group of states that does not allow the court to grant summary judgment based on uncontradicted testimonial evidence irrespective of the source of the testimony. \textit{See} Martino v. Palladino, 123 A.2d 872 (Conn. 1956).


\textsuperscript{36} \textit{Dillon}, 497 A.2d at 341-42.


\textsuperscript{38} \textit{See} Rivoli Theater Co. v. Allison, 162 A.2d 449 (Pa. 1959).
party, the admissions will only support a grant of summary judgment if the interests of the party making the admissions are adverse to those of the party making the motion.\textsuperscript{39} To the extent that decisional law allows the admission of a non-respondent to sustain a grant of summary judgment, the exception has clearly been created post-\textit{Nanty-Glo}, for some of the testimony elicited at trial in that case was in the nature of an opposing party admission and thus might have supported a directed verdict.\textsuperscript{40}

Notwithstanding these minor exceptions, the \textit{Nanty-Glo} rule is firmly entrenched in Pennsylvania jurisprudence. A party wishing to obtain summary judgment must therefore support the motion with documentary evidence or the admissions of a party opponent. If the moving party fails to do so, the court should deny the motion regardless of the respondent's action or inaction. The \textit{Nanty-Glo} rule applies irrespective of whether the party making the motion will carry the burden of proof at trial.\textsuperscript{41}

While the courts' concern for the role of the jury in credibility determinations has been a constant in Pennsylvania jurisprudence for many years, recent scholarship has cast doubt on the jury's ability to adequately perform that function.\textsuperscript{42} Given the increasing awareness of the jury's limitations in credibility determinations, recent federal developments in summary judgment practice and the promulgation of new Pennsylvania rules governing summary judgment practice, it seems an appropriate time for the Pennsylvania courts to re-examine the \textit{Nanty-Glo} rule.


\textsuperscript{40} An interesting variation on this theme may be found in \textit{Garcia v. Savage}, 586 A.2d 1375 (Pa. Super. Ct. 1991). In \textit{Garcia}, the movant was a defendant who had been sued for personal injuries allegedly suffered as a result of the negligence of his employees. \textit{Id.} at 1376. After suit was filed, the defendant joined the employees as additional defendants. \textit{Id.} The employees eventually prevailed on their own motions for summary judgment. \textit{Id.} Thereafter, the original defendant filed a motion for summary judgment supported by the deposition testimony of the employees. \textit{Id.} The motion was denied, at least in part, because of the \textit{Nanty-Glo} rule. \textit{Id.} at 1380. The court held that because the employees were no longer parties to the litigation, their interests could not be adverse to the employer's and therefore their deposition testimony did not fall within an exception to the \textit{Nanty-Glo} rule. \textit{Id.} If the employees had not already succeeded on their own summary judgment motions, perhaps the case would have been decided differently.


The remainder of this article examines the historical antecedents to modern Pennsylvania summary judgment practice and suggests that the courts’ concerns about the jury’s role in credibility determinations may be adequately met by a modified Nanty-Glo rule. The article proposes that the present practice regarding credibility issues in the summary judgment context should be modified by the creation of a bifurcated policy with different standards depending on whether the motion is made by the party who will bear the burden of persuasion at trial or the party who will not bear that burden. When the summary judgment movant will not carry the burden of persuasion at trial, questions of credibility simply should not enter into the courts’ decision making process. When the movant will carry the burden, summary judgment should be granted on testimonial evidence unless the respondent demonstrates the existence of an adequate basis to doubt the credibility of a witness. An adequate basis to doubt a witness’ credibility exists when: 1) the witness is the movant or has an interest in the outcome of the litigation that would be advanced by the grant of summary judgment in favor of the movant; or 2) the respondent submits impeaching evidence to the court that provides a reasonable basis to doubt the credibility of a witness. The proposed rule would have the benefit of providing greater flexibility to trial judges in deciding summary judgment motions, while safeguarding the litigants’ right to jury trial. While the rule would not provide as liberal a basis for the grant of summary judgment as the current federal standard, in that most federal courts seem willing to grant summary judgment based on testimonial evidence of the moving party, it would liberalize Pennsylvania practice while maintaining the courts’ concern for the role of the jury in credibility determinations.

43. This proposal is hardly original. Learned Hand hinted at such a rule in Radio City Music Hall Corporation v. United States, 135 F.2d 715 (2d Cir. 1943), when he said: When a party presents evidence on which, taken by itself, it would be entitled to a directed verdict if believed, and which the opposite party does not discredit as dishonest, it rests upon that party at least to specify some opposing evidence which it can adduce and which will change the result. Radio City, 135 F.2d at 718. This also seems to be the rule presently used by some state courts. See Kidd v. Early, 222 S.E.2d 392 (N.C. 1976). A similar test has also been proposed by commentators, most notably David A. Sonenshein in State of Mind and Credibility in the Summary Judgment Context: A Better Approach, 78 Nw. U.L. Rev. 774 (1983).

44. Commentators generally agree on the need for flexibility in the application of trans-substantive rules. Their reasoning is that when a rule is applied to a variety of cases, some flexibility must be provided so that the rule can be fairly applied to all the possible fact scenarios that arise. See Paul D. Carrington, Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure, 137 U. Pa. L. Rev. 2067, 2081-85 (1989).

45. See, e.g., Lundeen v. Cordner, 354 F.2d 401 (8th Cir. 1965).
II. FEDERAL SUMMARY JUDGMENT PRACTICE

Most commentators agree that the origins of modern summary judgment can be traced to eighteenth century England. Although the common law pleading used in the eighteenth century contained no direct counterpart to summary judgment, English courts of that time developed a procedure that enabled plaintiffs in contract cases to circumvent the filing of "sham defenses" by defendants. While an in-depth analysis of common law pleading is beyond the scope of this article, some explanation of dilatory pleading is necessary to an understanding of how the modern summary judgment motion developed.

The common law countenanced, and in some cases approved, certain pleas that were interposed by defendants primarily for the purpose of delay. Chief among these pleas was the *imparlance*, a plea whose sole purpose was to delay the proceedings. To some extent, such a plea was encouraged because it gave the parties an opportunity to discuss their dispute and attempt to reach a resolution without direct court intervention. Other pleas, such as *oyer*, *jurisdiction* and *abatement* were also often pled for the purpose of delaying the proceedings, although these pleas may have had other purposes as well. In addition to these accepted pleas, however, it became a common practice for defendants to plead "sham defenses" - defenses that were factually untrue. Defendants were able to make these false pleas with relative impunity because the statements in the pleadings were not made under oath and it was considered the sole province of the jury to determine the truth of factual matters asserted.

46. In this article, the term "summary judgment" is most frequently used to refer to a judgment entered after a motion filed pursuant to Pa.R.C.P. 1035 et seq. or the correlative rule of another jurisdiction. The term has often been used, however, to describe judgments obtained without the benefit of plenary judicial proceedings, regardless of the procedural mechanism involved.

47. See, e.g., ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE (1952). In all fairness, there is some disagreement regarding the roots of modern summary judgment. Some commentators, if not most, trace the history of summary judgment to Keating's Act. See Louis, supra note 6. Others find the roots of modern summary judgment in earlier English pleading practices, particularly the motion to strike sham defenses. See D. Michael Risinger, Honesty in Pleading and its Enforcement: Some "Striking" Problems with FRCP 11, 61 MINN. L. REV. 1 (1976).

48. See Risinger, supra note 47 at 17-29; MILLAR, supra note 47 at 237-38. The first English legislation in the area limited the procedure to cases involving bills of exchange. The Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. c.67 (1855).

49. HENRY JOHN STEPHEN, PRINCIPLES OF PLEADING IN CIVIL ACTIONS (2d ed., 1901).

50. RICHARD R. PERRY, COMMON LAW PLEADING: ITS HISTORY AND PRINCIPLES 187 (1897).

51. See Stephen, supra note 49.

52. See Perry, supra note 50 at 432.
in pleadings. Therefore, there was little possibility that the truth of a "sham defense" would ever be judicially determined, and even if it was, the defendant would not be punished for the false statement since it was not made under oath. Over time, these "sham defenses" took on a stylized form that all practitioners came to recognize: the defenses were all based on the same, or substantially similar, facts. While the common sham defenses were not met with approbation, attempts at creating new factual bases for sham defenses were simply not permitted.

English courts eventually lost their tolerance for the delay attendant on sham defenses, and the practice of allowing plaintiffs to enter judgment on their own behalf by filing an affidavit swearing to the falsity of the defense commenced. "In this case, if the court had reason to believe that the plea was not interposed in good faith, it would proceed summarily to set it aside on affidavit of its untruth and allow judgment to go forthwith for the plaintiff." This procedure was originally confined to cases involving suits based on debt and seems to have been the earliest form of summary judgment. It was an extremely limited procedure, available only to plaintiffs in contract cases, and only as a response to the filing of a sham defense. Nonetheless, this procedure provided a party with a means to obtain judgment without trial.

The early summary judgment procedures were justified as a means for allowing creditors to obtain judgments against recalcitrant debtors without enduring the delays associated with the normal common law pleading process. Thus, the rationale for summary judgment was primarily to assist individual litigants,

54. Id. at 44.
55. J.C. Perkins, Chitty's Treatise on Pleading and Parties to Actions (17th ed. 1879). Some of the more common sham defenses were that the plaintiff had already recovered a judgment in another court or that there had been an accord and satisfaction. Id. at 697-98.
56. See Stephen, supra note 49 § 258.
57. See Millar, supra note 47 at 238.
58. Id.
59. See Risinger, supra note 47 at 26.
60. See Millar, supra note 47 at 237-39.
61. See John A. Bauman, The Evolution of the Summary Judgment Procedure, 31 Ind. L.J. 329, 329 (1956)(noting that demand for summary judgment procedure came "not from the legal profession . . . but from laymen and in particular the newly ascendant mercantile group that found the delays and technicalities of common law procedure unendurable").
and only secondarily, if at all, to alleviate stress on the judicial system.\textsuperscript{62}

The English summary judgment practice was transplanted to the American colonies and continued by the individual states after independence.\textsuperscript{63} Although, like today, the process allowed plaintiffs to obtain judgments in a summary manner, there are substantial differences between the procedure used by the English and early American courts and the modern summary judgment procedure. For example, unlike the modern practice, the early summary judgment practice did not allow the use of discovery to "pierce the pleadings" of either party.\textsuperscript{64} Additionally, in contrast to the perception of modern summary judgment as a defendant's motion,\textsuperscript{65} the procedure was only available to the plaintiff.\textsuperscript{66} Perhaps the most significant difference is the early restriction of the procedure to specified areas of substantive law.\textsuperscript{67} While the early summary judgment procedures were not always limited to a single substantive category, they were virtually all confined to a few areas, such as debt or contract, that experience had shown were characterized by relatively simple fact patterns and proof largely documentary in nature.\textsuperscript{68} By the beginning of the twentieth century, however, these restrictions on summary judgment use were viewed as unnecessary.\textsuperscript{69} Reformers had called for changes in the rule to allow for summary judgment use by plaintiffs and defendants, and for the motion to be supported by materials extraneous to the record.\textsuperscript{70}

The twentieth century expansion of summary judgment into a trans-substantive procedure may have begun with a New Jersey summary judgment rule adopted in 1912.\textsuperscript{71} This rule, together with the English rule in effect at the time,\textsuperscript{72} provided the models

\begin{itemize}
\item \textsuperscript{62} Id. at 333 (providing: "No doubt some of the delay in the disposition of litigation could be attributed to the increased business of the courts, but there were defects in the prescribed procedure which contributed substantially to this result.").
\item \textsuperscript{63} See Friedenthal, supra note 4 § 7.1.
\item \textsuperscript{64} Discovery was not readily available in civil litigation until the twentieth century. See Friedenthal, supra note 4 § 7.1.
\item \textsuperscript{65} This belief is supported by empirical evidence in the federal courts. William P. McLauchlan, An Empirical Study of the Federal Summary Judgment Rule, 6 J. OF LEGAL STUDIES 427, 441 (1977)(revealing that 58.1% of summary judgment motions are filed by defendants, 21.7% by plaintiffs, and 16.3% by both parties).
\item \textsuperscript{66} See Risinger, supra note 47 at 28.
\item \textsuperscript{67} See Charles E. Clark & Charles U. Samenow, The Summary Judgment, 38 Yale L.J. 423 (1929).
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} 2 N.J. Comp. Stat. §§ 291, 292 (Supp. 1915); N.J. Practice Act 239-241 (1916).
\item \textsuperscript{72} English Order III, Rule 6 and Order XIV (1873).
\end{itemize}
for a New York rule adopted in 1921. While commentators characterized these rules as among the most liberal summary judgment procedures in use in American jurisdictions, their reach does not seem to have greatly exceeded that of the older rules. These rules were, however, indicative of the movement afoot in American courts in the 1920's to adopt new summary judgment rules expanding the reach of the procedure. The movement culminated with the adoption in 1938 of Rule 56 as part of the new Federal Rules of Civil Procedure.

Rule 56 completed summary judgment's metamorphosis into a trans-substantive rule. The new rule applied to all forms of actions and provided that the motion for summary judgment could be supported by virtually every conceivable form of evidence. Summary judgment thus became the federal courts' preferred weapon for dealing with unsubstantiated claims. Rule 56, at the time of its adoption, marked a major, if not revolutionary, change in summary process in American law.

As might be expected, the federal bench was, by and large, lukewarm to the new rule. Part of the judiciary's reluctance to

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73. N.Y R. CIV. PRACTICE 113 (October 1, 1921).
74. Clark and Samenow credit Connecticut with having the most advanced summary judgment procedure. See Clark & Samenow, supra note 67 at 423.
75. Indeed, an article extolling the virtues of New York's new summary judgment procedure drew a response from a Pennsylvania lawyer implying that the new rule was no more liberal than "the rugged common-sense" of Pennsylvania's affidavit of defense practice. Ira Jewell Williams, Letter to the Editor, 10 ABA J. 212 (1924).
76. The movement toward the adoption of new summary judgment procedures can be seen as part of a general trend toward the adoption of procedures designed to give greater power to judges at the expense of juries. The trend is well documented in Stephen H. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. PA. L. REV. 909 (1987).
78. In this sense, Rule 56 is typical of most of the federal rules of civil procedure. See Cover, For James Wm. Moore: Some Reflections on a Reading of the Rules, 84 YALE L. J. 718 (1975).
79. Rule 56, in its original form, did not specifically authorize the use of answers to interrogatories in support of the motion. This oversight was corrected when the rule was amended in 1963. The present rule now allows the motion to be supplemented with almost every conceivable form of evidence. Testimonial evidence is explicitly allowed if it is rendered in the form of affidavits, depositions, or answers to interrogatories. Fed. R. CIV. P. 56.
80. Rule 12 is, of course, available as a replacement for the old common law demurrer. With the introduction of notice pleading as part of federal practice, however, the importance of pre-discovery dismissal motions has diminished. At least one commentator has noted that "[t]he 1938 rulemakers placed primary reliance on Rule 56 providing for summary judgment as the means to extinguish unfounded allegations, claims, and defenses." See Carrington, supra note 44 at 2090. See also Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)(providing that summary judgment has taken place of motion to dismiss).
81. Judge Clark noted that "[s]eemingly the procedure is not to be generally favored" and accused the other members of the Second Circuit bench of having a "dislike
embrace the rule may have been caused by a lack of familiarity with the workings of a trans-substantive rule of summary process. While general trepidation to apply the rule may have been reasonably anticipated, there were also expressed concerns over the rule's potential reallocation of the duties of judge and jury.\textsuperscript{82} The jury was the traditional and constitutionally mandated trier of fact. Rule 56, at least in some instances, seemed to require the usurpation of the traditional jury role by the court. The grant of summary judgment meant that the party opposing the motion would never have the opportunity to present evidence to a jury nor attack the movant's evidence before a jury. Thus, in some sense, a grant of summary judgment (like the direction of a verdict) deprived the respondent of a constitutionally guaranteed right. It is hardly surprising that a new rule with the potential to so seriously affect the parties' constitutional rights received a cautious welcome.

While there were few, if any, constitutional challenges to summary judgment procedures at the federal level,\textsuperscript{84} the courts were certainly aware of the potential problem and took pains to remain well inside constitutional boundaries.\textsuperscript{85} Adumbrated within the jury trial dilemma was the issue of witness credibility. If the Constitution mandated that the jury retain its function as the trier of fact, could a grant of summary judgment ever be constitutionally permissible if the movant's case relied on testimonial evidence? Even if the Constitution would allow summary judgment in such cases, the question remained whether such a

\textsuperscript{82} See, e.g., Whitaker v. Coleman, 115 F.2d 305, 306 (5th Cir. 1940)(providing that Rule 56 "cannot deprive a litigant of, or at all encroach upon, his right to a jury trial. Judges in giving its flexible provisions effect must do so with this essential limitation constantly in mind.").

\textsuperscript{83} The Seventh Amendment to the United States Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved .... " U.S. CONST. amend. VII. While the Seventh Amendment does not apply to the states, see Pearson v. Yewdall, 95 U.S. 294 (1877), almost all state constitutions contain jury trial guarantees. See Friedenthal et al., supra note 64 at § 11.1 n.1 (1985)(noting that only the Constitutions of Colorado, Louisiana, Utah, and Wyoming lack constitutional guarantees of civil jury trial).

\textsuperscript{84} Wright and Miller note the dearth of constitutional challenges to Rule 56 and attribute the lack of activity to earlier state court decisions upholding summary judgment rules. Wright & Miller, Federal Practice § 2714 (1995).

\textsuperscript{85} See Bauman, supra note 61 at 352 (noting the "extreme caution exercised by courts in the application of the rule").
grant would be advisable as a policy matter. The best known debate on this question occurred in the high-profile Second Circuit Court of Appeals, where Judges Frank and Clark wrote a series of opinions on the issue.

Judge Clark championed an expansive interpretation of the rule, arguing that summary judgment was clearly appropriate when the motion was supported by unimpeached testimonial evidence. In his dissent in *Arnstein v. Porter*, he argued against allowing the case to proceed to trial when the respondent's hopes (in Clark's view) rested on "the virtues of cross-examination."

Judge Frank, on the other hand, argued that when the movant's case hinged on testimonial evidence, and hence on the credibility of the witness giving that evidence, summary judgment should rarely, if ever, be granted. In such a situation, the case should be tried and the jury allowed to weigh the credibility of the witnesses subject to the court's power to comment on the evidence and, if necessary, grant a new trial. "If evidence is 'of a kind that greatly taxes the credulity of the judge, he can say so, or, if he totally disbelieves it, he may announce that fact, leaving the jury free to believe it or not." To Judge Frank, the need to have testimonial evidence presented in open court existed even though the respondent adduced no evidence in opposition to the motion bringing the affiant's credibility into doubt. In such a case, demeanor becomes all important. "[I]t has been said that a witness' demeanor is a kind of 'real evidence;' obviously such 'real evidence' cannot be included in affidavits."

Commentators, for the most part, sided with Judge Clark. The Supreme Court never specifically addressed the issue, however decisions from the Court also certainly seemed to indicate

86. See Charles E. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 578-579 (1952)(noting: "What is needed is the application of common sense, good judgment, and decisive action, on the one hand, not to shut a deserving litigant from his trial.").

87. Of course, other circuits also tussled with the problem. See, e.g., United States v. United Mkts. Assn., 291 F.2d 851 (8th Cir. 1961)(stating that grant of summary judgment is inappropriate where issues of credibility exist; such issues may only be resolved at trial).

88. See *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

89. *Arnstein*, 154 F.2d at 475-80.

90. 154 F.2d 753 (2d Cir. 1955).

91. *Arnstein*, 154 F.2d at 478.


93. *Arnstein*, 154 F.2d at 469 (quoting *Post v. United States*, 135 F. 1, 11 (5th Cir. 1905)).

94. *Subin*, 224 F.2d at 758.

95. Id.

its acceptance of Judge Clark's views.\textsuperscript{97} By the 1980's, few, if any, federal courts refused to grant summary judgment when the movant's case rested on testimonial evidence.\textsuperscript{98} Any residual doubts as to the correctness of this view were eliminated in 1986.

In 1986, the Supreme Court decided three cases involving the propriety of grants of summary judgment under Rule 56.\textsuperscript{99} The decisions generated numerous scholarly comments, with some disagreement as to the full implications of the Court's decisions.\textsuperscript{100} While an in-depth discussion of the decisions is both beyond the scope of this article and needlessly repetitious, a brief overview of two of the decisions, \textit{Celotex Corp. v. Catrett}\textsuperscript{101} and \textit{Matsushita Electric Industrial Co. v. Zenith Radio Corp.},\textsuperscript{102} is enlightening as the cases highlight the modern federal approach to summary judgment.

\textit{Celotex} involved a suit filed by the surviving spouse of Louis Catrett, whose 1979 death was caused by exposure to asbestos-containing products.\textsuperscript{103} The complaint named fifteen defendants, all of whom either manufactured or distributed the products.\textsuperscript{104} After discovery, several of the defendants, including Celotex Corporation, filed motions for summary judgment.\textsuperscript{105} Celotex did not support its motion with any evidence, but simply asserted that the plaintiff had "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged."\textsuperscript{106} The district court granted the motion (as well as the motions filed by the other defendants) and the plaintiff appealed.\textsuperscript{107}

\textsuperscript{97} Id. at 786-91.
\textsuperscript{98} Of course, no one can say with complete certainty that no federal trial court of the 1980's would have denied a summary judgment motion because it was supported by testimonial evidence if presented with such a situation. There seems to be no such reported cases, however, while there are many cases in which courts granted summary judgment motions based on testimonial evidence. \textit{See, e.g.}, Corrugated Paper Products, Inc. v. Longview Fibre Co., 868 F.2d 908, 913-15 (7th Cir. 1989)(providing that it is appropriate for trial court to consider testimonial evidence in granting motion for summary judgment); \textit{Losch v. Borough of Parkesburg}, 736 F.2d 903, 909 (3d Cir. 1984)(stating: "[S]ummary judgment may be based on affidavits.").
\textsuperscript{101} 477 U.S. 317 (1986).
\textsuperscript{102} 475 U.S. 574 (1986).
\textsuperscript{103} \textit{Celotex}, 477 U.S. at 319.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} Id. at 319-20.
\textsuperscript{107} Id. at 320.
Court of Appeals for the District of Columbia reversed the trial court's decision, finding summary judgment inappropriate because the defendant/movant had "[m]ade no effort to adduce any evidence, in the form of affidavits or otherwise, to support its motion."\textsuperscript{108}

The Supreme Court, in a plurality opinion, reversed the court of appeals.\textsuperscript{109} The opinion, authored by Justice Rehnquist, supported the proposition that when the summary judgment movant will not have the burden of persuasion at trial, the filing of the motion shifts to the respondent the burden of producing adequate evidence to demonstrate an ability to prove a prima facie case.\textsuperscript{110} The Court noted that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact."\textsuperscript{111} While the movant needs to expose the respondent's asserted inability to prove an essential element of its case, however, the movant is clearly not required to support the motion with affidavits or other evidence expressly negating the existence of that essential fact.\textsuperscript{112}

Justice White, in an attempt to clarify the movant's burden, authored a concurring opinion in \textit{Celotex} that provided the fifth vote in the decision. Justice White asserted that "[i]t is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."\textsuperscript{113} While Justice White's concurrence informed the reader that a "conclusory assertion" would be inadequate to support a defendant's motion for summary judgment,\textsuperscript{114} the opinion provided no guidance on what evidentiary materials would be minimally adequate to support a summary judgment motion filed by that party. In a dissent joined by two other justices, Justice Brennan noted that "the Court has not clearly explained what is required of a moving party seeking summary judgment on the ground that the non-moving party cannot prove its case."\textsuperscript{115} Justice Brennan suggested that the movant must have a burden of "affirmatively"

\begin{itemize}
\item \textsuperscript{108} \textit{Celotex}, 477 U.S. at 321.
\item \textsuperscript{109} \textit{Id.} at 328.
\item \textsuperscript{110} \textit{Id.} at 322-23.
\item \textsuperscript{111} \textit{Id.} at 323.
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{Celotex}, 477 U.S. at 328.
\item \textsuperscript{114} \textit{Id.}
\item \textsuperscript{115} \textit{Id.} at 329.
\end{itemize}
demonstrating that there is no evidence to support the respondent's case.\textsuperscript{116}

While considerable confusion still surrounds the issue of what the burden of production is for a summary judgment movant when that party will not carry the burden of persuasion at trial,\textsuperscript{117} Celotex makes clear what many courts had already understood: such a movant is not required in the summary judgment motion to prove the non-existence of all possible fact scenarios that could provide the respondent with a basis for recovery.\textsuperscript{118} Instead, when the movant files the motion, the burden shifts to the respondent to produce evidentiary material adequate to demonstrate an ability to meet its burden of persuasion at trial.

Matsushita, another summary judgment case decided by the Court in 1986, announced no new doctrines regarding the grant of summary judgment. The case is interesting, rather, for the attitude that the Court displayed toward summary judgment: an aggressive attitude favoring the grant of the motion whenever possible even if such action necessitates a weighing of evidence by the court.\textsuperscript{119}

Matsushita was an extraordinarily complex antitrust case filed by two American companies against Japanese manufacturers of consumer electronic products ("CEPs").\textsuperscript{120} The plaintiffs alleged, \textit{inter alia}, that the defendants had violated antitrust laws by engaging, over a twenty year period, in a conspiracy designed to drive American companies out of the American market for CEPs.\textsuperscript{121} The conspiracy was carried out through a price

\textsuperscript{116} Id. at 331.

\textsuperscript{117} See, e.g., D. Michael Risinger, Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment, 54 Brooklyn L. Rev. 35, 42 (1988) (noting that "the implications of the Supreme Court's newest pronouncements have not yet fully percolated into practice"). See also Friedenthal, supra note 99 at 771 ("ultimate effect [of Supreme Court decisions] is uncertain and could prove to be limited").

\textsuperscript{118} See, e.g., Food Fair, Inc. v. Mock, 199 S.E.2d 820 (Ga. Ct. App. 1973). In Food Fair, the plaintiff filed a "slip and fall" suit against the defendant grocery store. Id. at 820. The grocery store employees filed affidavits stating that they were not aware of any hazardous condition existing at the time of the plaintiff's fall, and that they did not thereafter find any slippery floors in the area where the plaintiff had fallen. Id. at 821. The court held the affidavits to be adequate to "pierce the pleadings" of the plaintiff, and thereby shift the burden to her to come forward with evidentiary material showing that she might be able to prove negligence at trial. Id. at 821-22. See also Fontenote v. UpJohn Co., 780 F.2d 1190 (5th Cir. 1986)(holding that when defendant is summary judgment movant, motion need not be supported by evidence disproving all elements of plaintiff's claim).

\textsuperscript{119} Matsushita, 475 U.S. at 597.

\textsuperscript{120} Id. at 577-78.

\textsuperscript{121} Id.
fixing arrangement pursuant to which the defendants had allegedly agreed among themselves that they would engage in predatory pricing. According to the plaintiffs, the Japanese manufacturers conspired to charge artificially high prices for products that they sold in Japan. The excess profits generated by these artificially high prices enabled the defendants to undercut the prices of American manufacturers in the American market. The conspirators hoped that, eventually, the American manufacturers would be driven out of the market, and the Japanese would be able to reap monopoly profits.

During the course of the litigation, the parties amassed a record that, at the Supreme Court, was distilled to a forty volume appendix. Included in this record were the affidavits of numerous experts in the antitrust field. The defendants argued that the behavior attributed to them by the plaintiffs was irrational. The plaintiffs countered with expert testimony, asserting that the alleged behavior was entirely plausible given the attitude of Japanese businesses, and eventually moved for summary judgment. The district court granted the motion.

On appeal, the circuit court reversed the district court's grant of summary judgment, in part because the district court had erroneously excluded much of the evidence submitted in opposition to the motion. The appellate court felt that with the admission of the plaintiffs' experts' affidavits, the conflicting opinions of the expert witnesses produced a genuine issue of material fact.

The Supreme Court, in turn, reversed the court of appeals and remanded the case for further proceedings. The Court stated that the issue on appeal was "whether the Court of Appeals..."
applied the proper standard in evaluating the District Court's decision to grant petitioners' motion for summary judgment.\footnote{Id. at 582.}

In analyzing the issue, the Court first reiterated the standards set forth in Rule 56 for a grant of summary judgment: the movant must demonstrate a lack of a "genuine" issue of material fact and must be entitled to judgment as a matter of law.\footnote{Id. at 587.} Once the movant has produced evidence meeting these standards, the burden shifts to the respondent to "come forward with 'specific facts' showing that there is a genuine issue for trial."\footnote{Id.} The Court then went on to say that if the "factual context renders respondents' claim implausible . . . [they] must come forward with more persuasive evidence . . . than would otherwise be necessary."\footnote{Id.} Read literally and out of context, this statement can be interpreted as nothing more than a restatement of existing summary judgment law. While the Court obviously meant to authorize some weighing of the conflicting evidence submitted on the summary judgment motion, many courts had engaged in that practice for some time.\footnote{See, e.g., Letson v. Liberty Mut. Ins. Co., 523 F. Supp. 1221 (D.C. Ga. 1981) (providing that respondent must produce "significant probative evidence" to defeat motion for summary judgment).} Judge Clark would certainly agree that some weighing of the evidence is proper in the summary judgment setting. The respondent must produce more than a "scintilla" of evidence in opposition to the motion.

The Court went on to hold, however, that even though it used this standard, the court of appeals had erred in determining that there was a genuine issue of material fact because it "failed to consider the absence of a plausible motive to engage in predatory pricing."\footnote{Matsushita, 475 U.S. at 595.} The Court extensively examined not only the record before it, but also the literature relating to predatory pricing schemes to ascertain whether the defendants lacked a "plausible motive" for a price fixing conspiracy.\footnote{Id. at 589-91.} After its examination, the Court concluded that the alleged price fixing scheme was economically irrational and the plaintiffs' experts were simply wrong in concluding that the defendants might have behaved in the manner alleged by the plaintiffs.\footnote{Id. at 594-95.} The Court therefore held that the denial of summary judgment was improper, and remanded the case for further consideration.\footnote{Id. at 598.}
The remarkable aspect of *Matsushita* is not so much the standard used by the Court, but the manner in which it was applied. While the Court did not grant summary judgment, it clearly encouraged the lower court to be more aggressive in weighing the evidence presented on the motion.\(^{143}\) The Court suggested that a grant of summary judgment is appropriate where the evidence produced by the respondent raises only a "metaphysical doubt."\(^{144}\) Thus, while the opinion does not produce any doctrinal changes in federal summary judgment practice, it indicates an increasing willingness by the federal courts to weigh the evidence and grant summary judgment in cases where one side's evidence is weak.

Although ten years have passed since *Matsushita* and *Celotex*, the ramifications of these decisions are still unclear. While the decisions do not explicitly permit federal courts to make credibility determinations based on the strength of opposing affidavits, they may be read to implicitly grant such authority. If a judge is permitted to grant summary judgment when the evidence produced by the respondent is "unlikely," the potential exists for some federal tribunals to grant summary judgment when it appears that the respondent will have difficulty impeaching the testimonial evidence offered by the movant in support of the motion.\(^{145}\) A grant of summary judgment when the respondent has produced no evidence in opposition to a motion supported by testimonial evidence is even more likely.

Many states have used the federal rules as a model when crafting their own rules of civil procedure.\(^{146}\) The federal courts' interpretation of the federal rules carries great weight in those states engaged in such crafting.\(^{147}\)

The Supreme Court's encouragement of federal courts to be more aggressive in granting summary judgment motions is almost certain to trickle down to the state level. This "trickle down" effect of *Matsushita* and other summary judgment deci-

\(^{143}\) *Id.* at 597-98.

\(^{144}\) *Matsushita*, 475 U.S. at 586.

\(^{145}\) Most federal courts, if not all, still insist that summary judgment is inappropriate when the parties submit contradictory affidavits. *See* Jackson *v*. Duckworth, 955 F.2d 21, 22 (7th Cir. 1992)(providing that "summary judgment is not a procedure for resolving a swearing contest."). Other courts have read *Matsushita*, however, as imposing a requirement on the respondent to place on the record direct evidence that would put the credibility of the movant's witnesses in issue. *See* Rand *v*. CF Industries, Inc., 42 F.3d 1139 (7th Cir. 1994)(noting that respondent is required to produce "specific facts" placing credibility of movant's witnesses in issue).


sions of the Supreme Court is particularly likely in light of the continued perception of court dockets as being overcrowded with frivolous litigation and a belief that summary judgment is the best available procedure to ease this congestion.

While some individual states, such as Pennsylvania, are certainly at liberty to remain aloof from the federal summary judgment trend, they should not do so unless there are strong policy reasons to follow a different course. The remainder of this article analyzes the historical basis of Pennsylvania's summary judgment jurisprudence and examines the current policy considerations behind that jurisprudence.

III. PENNSYLVANIA SUMMARY JUDGMENT

Although summary judgment is a relatively recent procedural development in Pennsylvania, its historical antecedents existed at least as early as the eighteenth century. Furthermore, many characteristics of those antecedents survive in the present-day courts' interpretation and application of summary judgment.

Pennsylvania was typical of most colonial jurisdictions in adopting the English practice of allowing plaintiffs to secure judgments in cases when the defendant did not plead a bona fide defense. The first post-revolutionary use of the practice appears to have resulted from an agreement between members of the Supreme Court bar, in which the members agreed to confess judgment against defendants in cases where they represented plaintiffs unless the defendants filed affidavits of defense. By its terms, the agreement applied to all types of cases and not only to those based on debt or contract. Thus, it expanded the reach of the English practice.


149. In Pennsylvania, the motion for summary judgment was first established in 1966. The Pennsylvania Procedural Civil Rules Committee had considered adoption of a summary judgment procedure in 1946, but elected not to enact such a rule in part because of its perception that the procedure was not needed in the state system, where there is a predominance of smaller amounts in controversy. 3 GOODRICH-AMRAM 2D § 1035:2 (1991).

150. Id.

151. Id.

152. See supra notes 53-60 and accompanying text for a discussion of the English practice of permitting plaintiffs to obtain judgment without trial when the defendant raised a "sham defense."


154. See id.
Similar agreements were later adopted by other courts. In 1809, the Philadelphia Common Pleas Court promulgated a rule requiring defendants to file affidavits of defense only in cases involving a debt or contract, returning the rule to its original English application. 155 The rule also created a subtle change in summary judgment practice, as it placed the burden on the defendant to swear that there was a valid defense to the action, instead of on the plaintiff to come forward with a sworn document stating that the defense was groundless. The allegations required to be in the defendant's affidavit were conclusory in nature, as the defendant was not required to state either the basis of the defense or the facts upon which the defense was grounded. No documents supporting the defense were required in addition to the affidavit, and there was no procedural mechanism available to the plaintiff to attack the affidavit. Possibly the greatest difference between the affidavit of defense and a typical common law pleading was that the defendant had to make the affidavit of defense under oath. 156

The Pennsylvania Supreme Court approved the use of the affidavit of defense in the 1811 case of Vanatta v. Anderson. 157 In Vanatta, the defendant attacked the affidavit of defense rule on the basis that the rule could, in some instances, deprive a defendant of the constitutionally guaranteed right to a jury trial. 158 The defendant argued that the Pennsylvania Constitution forbade the establishment of any judicial procedures limiting access to a trial by jury. 159 Since the affidavit of defense rule was adopted after the enactment of the Constitution and required defendants

155. The rule provided as follows:
   It is ordered that in all actions brought or to be brought in this court, of debt or contract, the plaintiff shall be at liberty to direct judgment of course to be entered at the third term, unless the defendant or some person for him or her, shall make affidavit and previously file the same in the clerk's office, that to the best of his or her knowledge and belief there is a just defence in the said cause.

156. While this may not seem to be a great distinction to modern practitioners accustomed to verified pleadings, the requirement that a pleading be made under oath was considered novel, if not onerous, to early nineteenth century lawyers. The attorney for the defendant in Vanatta wrote of the requirement: "It is a snare for the consciences of men. Where you sow oaths, you reap perjuries." Vanatta, 3 Binn. at 419.

157. 3 Binn. 417 (1811).

158. Vanatta, 3 Binn. at 481. Vanatta involved a two pronged attack on the rule. The defendant's first argument was that the rule was unconstitutional because it deprived him of a right to a jury trial. Id. The second argument, that the courts of common pleas lacked the power to promulgate such a rule, received more serious attention from the court although the court eventually decided that the Pennsylvania trial courts were invested with such power. Id. at 424.

159. Id. at 418.
to swear to the validity of a defense as a prerequisite to a jury trial, the defendant urged that the rule was unconstitutional.\(^{160}\)

The court did not find the defendant's argument persuasive, analogizing the affidavit of defense rule to the common law requirement that a dilatory plea must be made under oath to preserve the right to jury trial.\(^ {161}\) Since the requirement that certain defenses be made under oath predated the enactment of the Constitution, the court found the slight expansion of the requirement created by the Philadelphia rule to be constitutionally permissible.\(^ {162}\)

After Vanatta diminished the constitutional concerns surrounding the affidavit of defense procedure, the use of this practice spread. By 1835, the Pennsylvania Legislature, in establishing the District Court for the County of Philadelphia, required that affidavits of defense filed in that court state the "nature and character" of the defense.\(^ {163}\) The Pennsylvania Supreme Court later construed this rule to require that defendants plead a defense with some reference to facts in order to enable plaintiffs to ascertain the nature of the defense.\(^ {164}\)

This requirement gave plaintiffs in contract actions a new weapon. Not only could they obtain judgment without trial in cases where the defendant failed to file an affidavit of defense, but they could also avoid trial by arguing that the affidavit was insufficient because it failed to set forth a legal defense. While plaintiffs were forced to accept the facts stated in an affidavit of defense as true (the procedure provided no means of attacking the sufficiency of a defendant's evidence), they were able to attack the legal sufficiency of the defense asserted in the affidavit. Thus, by 1835, Pennsylvania procedure provided a primitive means of "piercing the pleadings."

Throughout most of the nineteenth century, Pennsylvania courts were repeatedly confronted with the question of whether an affidavit of defense was alone sufficient to require the underlying legal dispute to be resolved through plenary trial.\(^ {165}\) In virtually all cases, courts focused on the legal sufficiency of the proposed defense and accepted the facts stated in the affidavit as

\(^{160}\) Id. at 418-19.

\(^{161}\) Id. at 422.

\(^{162}\) Id. at 422-23.


\(^{164}\) See West v. Simmons, 2 Wharton 261, 265 (Pa. 1837). In its opinion, the court noted that only "[h]is own affidavit, or that of others conusant of facts, disclosing any ground of defense in matter of fact, entitles him to a trial by jury in the usual manner." Id. at 265 (emphasis added).

\(^{165}\) See Mellor v. Negley, 1 Pitts. 110 (Allegheny Co. 1854); Potter v. Price, 3 Pitts. 136 (Allegheny Co. 1869); Bentzel v. Pfalzgraf, 1 York 202 (York Co. 1880).
true. 166 Credibility and sufficiency of evidence were simply not issues before the courts. By the beginning of the twentieth century, however, some courts began to use language indicating that a plaintiff might successfully move for summary judgment if the defendant’s affidavit failed to set forth facts necessary to prove the alleged defense. 167 There are, however, no reported cases in which a court granted summary judgment because an affidavit of defense failed to set forth an adequate factual basis for the defense.

During the latter half of the nineteenth century, courts began to use the phrase “summary judgment” to refer to the judgment that plaintiffs could obtain in cases where defendants either filed no affidavit of defense or an insufficient affidavit of defense. 168 While the term “summary judgment” is familiar today, the procedure that was being described was markedly different than the modern summary judgment procedure. The process was not available to defendants, and plaintiffs did not need to submit any evidence in support of the motion. 169 Furthermore, the summary judgment rule was categorical in scope: affidavits of defense were only required in actions sounding in debt or assumpsit, where the proof was frequently documentary in nature. 170

Summary judgment began its gradual expansion into a trans-substantive procedure in 1887. In that year, the Pennsylvania legislature enacted a new summary judgment practice act 171 that combined the actions of debt, assumpsit and covenant into one.

166. See Noble v. Kreuzkamp, 2 A. 419 (Pa. 1885) (noting that court “must assume” facts set out in affidavit of defense are true).
167. See, e.g., Andrews v. Blue Ridge Packing Co., 55 A. 1059 (Pa. 1903) (stating: “An affidavit of defense should set forth fully and fairly facts sufficient to show prima facie a good defense, and if it fails to do so, either from omission of essential facts or manifest evasiveness in the mode of statement, it will be insufficient to prevent judgment.”) (emphasis added).
168. See, e.g., Byrne v. Hayden, 16 A. 750, 753 (Pa. 1889) (stating: “the affidavit of defense is sufficient to prevent a summary judgment for plaintiff”). This seems to be one of the earliest uses of this phrase in Pennsylvania jurisprudence.
169. See, e.g., Knerr v. Bradley, 105 Pa. 190 (1889). In Knerr, the plaintiff filed a statement of claim accompanied by a copy of the lease on which the claim was founded. Id. at 191. The defendant filed an affidavit of defense alleging that the plaintiff’s copy of the lease was “incomplete and inaccurate.” Id. at 192. The plaintiff moved for judgment for want of a sufficient affidavit of defense. Id. at 191. The court refused to grant the motion, noting that “[a]s the question here presented is upon the sufficiency of the affidavit, we must assume that all its material averments are true.” Id. at 193. See also Fritz v. Hathway, 19 A. 1011, 1012 (Pa. 1890) (noting: “A judgment for want of a sufficient affidavit of defense is, in effect, a judgment on demurrer, and, like all such judgments, must be self-sustaining on the face of the record.”).
170. See Osborn v. First Nat. Bank, 26 A. 289 (Pa. 1893) (noting that even after Act of 1887, affidavit of defense was only required in actions based on contracts or other written instruments).
action known as an action in assumpsit. The Act further provided that "[i]n the action of assumpsit, judgment may be moved for want of an affidavit of defense, or for want of a sufficient affidavit . . . in accordance with the present practice in actions of debt and assumpsit."172 While this legislation did not introduce any sweeping changes in Pennsylvania practice, it did require a plaintiff's statement of claim to be accompanied by "all notes, contracts, book entries . . . upon which the plaintiff's claim is founded . . . ."173 The Pennsylvania Supreme Court, in construing this language, stated:

The plain inference from the language of both sections is that it was the intention of the legislature to limit this remedy to causes of action which were either actually in writing or contracts the whole details of which could be plainly set down in writing, with particular terms and limitations, so that a liability for the payment of a definite sum of money could be expressed.174

This nascent summary judgment procedure existed only in cases where documentary proof was likely to be found and where the plaintiff was required to provide that documentary evidence.

From 1887 to 1947, the affidavit of defense remained in common usage in Pennsylvania pleading with little change.175 In 1915, however, the legislature enacted the "Practice Act, nineteen fifteen,"176 which created significant changes in other areas of Pennsylvania practice. This act extended the requirement of filing the affidavit of defense to all actions in trespass and assumpsit, excepting only libel and slander actions.177 While extending this filing requirement to actions in trespass may seem significant, the legislation placed restrictions on its use in this area as it only required a defendant in trespass actions to deny certain allegations relating to ownership, agency and the

172. Id. § 5.
173. Id. § 3.
175. In 1901, the legislature required the filing of an affidavit of defense in actions in replevin. Act of April 19, 1901, Pa. Pub. L. No. 61. The plaintiff in such actions was also required to verify the statement of claim. Id.
177. Id. While the Practice Act required a defendant in a trespass action to file an affidavit of defense, Pa. Pub. L. No. 202 § 13, the Act did not permit a plaintiff to obtain summary judgment if a defendant failed to comply with the requirement. See Wilson v. Adams Express Co., 72 Pa. Super. Ct. 384, 389 (1919) (noting that: "There is no provision made for a summary judgment for the failure to file such an affidavit").
like. All other allegations were "deemed to be put in issue unless expressly admitted." The affidavit of defense continued in use until 1947, when it was replaced by responsive documents such as the answer and preliminary objections. Pennsylvania did not, however, promulgate a rule allowing the filing of a motion for summary judgment until 1966, almost thirty years after the promulgation of the federal rule. Interpretation of the summary judgment rule adopted in 1966 has been affected in several ways by its procedural history.

First, the procedural progenitor of the motion for summary judgment, the affidavit of defense, had traditionally been available only in cases where the plaintiff's proof was documentary. Originally a plaintiff's weapon, the motion for judgment based on an insufficient (or no) affidavit of defense could only be used, at least after 1835, in actions sounding in contract or debt. Furthermore, plaintiffs in these cases were required to file all documents necessary to prove their cases with their statement of claim. Cases in which the proof often consisted principally of testimony, such as actions sounding in trespass, were not covered by the affidavit of defense rule prior to 1915. Even after 1915, the affidavit of defense rule had only limited applicability.

178. Act of May 14, 1915, Pa. Pub. L. No. 202 § 13. In this regard, the Act provided: "the averments . . . of the person by whom the act was committed, the agency or employment of such person, the ownership or possession of the vehicle, machinery, property or instrumentality involved, and all similar averment, if not denied, shall be taken to be admitted . . ." Id.

179. Id. The averments that a defendant was required to specifically deny in order to put allegations at issue are interesting. Many of the averments relate to facts that might be difficult for the plaintiff to prove. For instance, in many cases, the plaintiff would have difficulty proving that an individual was acting as an employee of the defendant at the time an accident occurred as the evidence on that point would, in all probability, be within the control of the defendant. The effect of the rule was to actually relieve a plaintiff from having to prove those matters.


181. See supra notes 168-72 and accompanying text.

182. See Borlin v. Commonwealth ex rel Hillis (Pa. 1881)(providing that "these . . . rules . . . have always been limited to obligations and contracts for the payment of money").

183. Act of March 28, 1835, Pa. Pub. L. No. 63 § 2. The Act provided that: "no judgment shall be entered . . . unless the said plaintiff shall . . . file in the office of the prothonotary . . . a copy of the instrument of writing, book entries, record or claim, on which action has been brought." Id.

184. See Corry v. Pennsylvania R.R. Co., 194 Pa. 516, 520 (1900)(stating that "we think an examination of the act of 1887 clearly shows that it was the intent of the legislature to confine the remedy by judgment for want of an affidavit of defense to actions ex contractu alone . . . and not to extend this remedy to actions ex delicto . . . .").
to trespass actions.\textsuperscript{185} Thus, a long tradition developed among Pennsylvania jurists to allow motions for summary judgment only in instances where a plaintiff could prove its case by documentary evidence. While nothing in the language of either the original Pennsylvania rule governing summary judgment\textsuperscript{186} or the new rules governing summary judgment\textsuperscript{187} distinguishes between testimonial and documentary evidence, the embedded historical preference for documentary evidence continues in practice.

Second, the affidavit of defense rule never allowed either party to use additional materials in support of or in opposition to the affidavit.\textsuperscript{188} As a result, Pennsylvania courts never developed a body of law with respect to issues of credibility in the summary judgment setting. Plaintiffs were forced to accept the allegations contained in the affidavit of defense as true.\textsuperscript{189} The courts generally addressed only the legal sufficiency of the defense presented in the affidavit.\textsuperscript{190} While some courts may have suggested that the plaintiff might have successfully attacked bona fides of the affidavit,\textsuperscript{191} there were no reported cases in which such an attack actually occurred. Thus, in 1966, when Pennsylvania adopted a rule governing motions for summary judgment allowing evidence extraneous to the pleadings to support the motion, the jurisprudence that had developed with the affidavit of defense procedure provided little guidance as to issues of credibility or sufficiency of the evidence. For direction on these issues, Pennsylvania courts had to look to decisions from directed verdict cases.\textsuperscript{192}

The directed verdict had been a doctrine with trans-substantive application almost from its inception, and thus it naturally fit in with the trans-substantive summary judgment procedure. In early Pennsylvania cases, the standard for granting a motion

\textsuperscript{185} See supra note 175.
\textsuperscript{187} Pa. R. Civ. P. 1035.1-1035.5.
\textsuperscript{188} See supra notes 165-67 and accompanying text.
\textsuperscript{189} See Young v. Miller, 34 A. 210, 210 (Pa. 1896)(providing: “Affidavits procured . . . could not be resorted to for the purpose of disproving or nullifying the averments [contained in the affidavit of defense]. On that question of fact defendant was entitled to a trial by jury.”). See also Morrison v. Shearman, 46 A. 1030 (Pa. 1900).
\textsuperscript{191} See supra note 165.
\textsuperscript{192} In many jurisdictions, the legal standard for the directed verdict differs from the legal standard for summary judgment. See Stempel, supra note 99. The two motions produce such similar effects that similar standards, if not identical, are probably well advised. The drafters of neither the Pennsylvania nor the federal summary judgment rule, however, have mandated such a result. Pennsylvania courts have clearly stated, though, that the legal standards, at least with respect to the sufficiency of evidence, are identical for the two motions.
for directed verdict was that the non-moving party had to produce any evidence on which the jury could base a verdict in that party's favor.\textsuperscript{193} Although Pennsylvania courts employed somewhat different terminology, this standard seems to have been virtually identical to the now disfavored "scintilla" standard,\textsuperscript{194} and its use undoubtedly kept the number of directed verdicts low.

During the first half of the nineteenth century, Pennsylvania courts did not concern themselves with the credibility of the movant's witnesses\textsuperscript{195} in assessing whether a respondent's evidence was adequate to prevent the entry of a directed verdict. Nothing in these early decisions indicates that a case needed to be submitted to the jury solely because the plaintiff's case had been proved through testimonial evidence, and directed verdicts appear to have in fact been granted in cases involving proof by testimony.\textsuperscript{196}

Early in the second half of the nineteenth century, however, Pennsylvania courts joined a nationwide trend of allowing parties to lawsuits to testify on their own behalf,\textsuperscript{197} and almost immediately issues of credibility came to the forefront. Courts began to hold that questions of credibility were jury matters and that directed verdicts could not be granted in cases where the proof was testimonial in nature.\textsuperscript{198} By 1871, the Pennsylvania

\textsuperscript{193} See, e.g., Repsher v. Wattson, 17 Pa. 365, 369 (1851)(noting: "It is not our business to say whether the evidence of negligence was sufficient to call for the verdict which was rendered. There was, however, some which the court could not lawfully prevent the jury from passing upon.") (emphasis in original).

\textsuperscript{194} The "scintilla" standard was formerly used by many courts in deciding motions for directed verdicts. Under this standard, the respondent only needed to produce a "scintilla" of evidence in opposition to such a motion in order to defeat it. See, e.g., Huff v. Vulcan Life & Acc. Ins. Co., 206 So. 2d 861 (Ala. 1956). The rule has been abandoned in most jurisdictions, including Pennsylvania. See Howard Express Co. v. Wile, 64 Pa. 201, 205 (1870)(noting that the doctrine "has not stood the test of experience"); but see Ritmanich v. Jonnel Enterprises, 280 A.2d 570 (Pa. Super. Ct. 1971)(noting that testimonial evidence provides the "required scintilla" necessary to place fact in dispute). In place of the "scintilla" standard, most jurisdictions now require the introduction of "substantial" evidence to support a verdict from a "reasonable" jury. See Edward H. Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn. L. Rev. 903, 921 (1971).

\textsuperscript{195} Only one reported Pennsylvania decision before 1863 explicitly states that the direction of a verdict is improper because the assessment of credibility is the exclusive domain of the jury. See Bank v. Donaldson, 6 Pa. 169 (1847). In Bank, the court noted that "the jury were to judge of the credibility of the witnesses, and might possibly have disbelieved every word of their testimony . . . ." Id. at 186.

\textsuperscript{196} See, e.g., Koons v. Steele, 19 Pa. 203 (1852). Determining whether oral evidence was used to prove a claim is somewhat difficult as the courts did not often provide a full recitation of the evidence presented at the trial level in early decisions.

\textsuperscript{197} Act of April 15, 1869, Pa. Pub. L. No. 31 § 1.

\textsuperscript{198} See, e.g., Reel v. Elder, 62 Pa. 308 (1869)(holding that even uncontradicted oral testimony could not support granting of directed verdict).
Supreme Court was able to state "that since the Act of 1869, making parties witnesses in their own causes, their credibility has become a question of great importance in settling controversies . . . and a jury must determine their relative credibility to arrive at a verdict." 199

Although credibility of the parties themselves had clearly become a matter for the jury, there remained some residual doubt as to the need for the jury to make credibility determinations as to the testimony of disinterested witnesses. 200 Some decisions implied that a directed verdict could be granted in favor of a party whose case was based on the uncontradicted testimony of third parties; 201 however, the distinction between the two types of testimonial evidence never became firmly rooted in Pennsylvania law. When the Supreme Court decided Nanty-Glo 202 in 1923, it simply ignored, or inadvertently disregarded, the fact that the plaintiff at least partly proved his case by the testimony of an adverse party. 203

Reported Pennsylvania decisions on directed verdicts make clear that Pennsylvania courts have always been extremely reluctant to grant the motion. The state was among the last to recognize the directed verdict as a legitimate procedural device, 204 and while other states have liberalized the standards for granting directed verdicts, Pennsylvania courts continue to give extreme deference to the jury as the ultimate finder of fact.

In many senses, summary judgment practice in Pennsylvania is the product of the confluence of two procedures. The first, the affidavit of defense, provided summary judgment practice with a preference for situations involving documentary evidence. The second, the directed verdict, infused summary judgment with a strong preference for submitting factual issues to the jury, espe-

200. See Lonzer v. Lehigh Valley R.R. Co., 46 A. 937 (Pa. 1900), where the court stated: "When the testimony is not in itself improbable, is not at variance with any proved or admitted facts, or with ordinary experience, and comes from witnesses whose candor there is no apparent ground for doubting, the jury is not at liberty to indulge in a capricious disbelief." Id. at 938. The court felt obliged to clarify this statement eleven years later, stating "by 'candor' the learned justice who wrote the opinion unquestionably meant 'credibility,' and the credibility of a witness is always more or less affected by his interest in the matter in controversy." Second Nat'l Bank of Pittsburgh v. Hoffman, 78 A. 1002, 1004 (Pa. 1911).
201. See Lanzer, 46 A. at n.199.
203. The Borough's case rested, at least in part, on the testimony of the tax collector who had been joined as an additional defendant after the commencement of the suit.
204. See ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 304-05 (1952)(noting that early Pennsylvania cases did not recognize directed verdict).
cially questions of credibility. Combined, both procedures created an atmosphere in which courts ruling on summary judgment motions exhibit excessive reluctance to enter judgment without plenary court proceedings, and in which courts will grant such motions only in cases where the proof is documentary. This history provides an explanation for the evolution of summary judgment practice in Pennsylvania. At the same time, this history should not prevent Pennsylvania courts from recognizing the weaknesses of the present jurisprudence and responding accordingly.

A. Present Summary Judgment Standards

From 1966 until 1996, Rule 1035 of the Pennsylvania Rules of Civil Procedure governed the procedure for summary judgment motions in Pennsylvania. As is true of almost every other summary judgment rule in the United States, Pennsylvania’s rule was modeled after the federal summary judgment rule, Rule 56. In fact, Rule 1035 was a virtual verbatim copy of the federal rule, the differences being both minor and unimportant for purposes of this article. 205

Although Pennsylvania courts decided soon after Rule 1035 was promulgated that state courts should look to federal law under Rule 56 when interpreting Rule 1035, 206 Pennsylvania summary judgment practice has continually diverged from the federal practice. The federal courts have almost continually expanded the availability of summary judgment, with this trend culminating in the Supreme Court’s trilogy of summary judgment decisions in 1986. 207 To the contrary, Pennsylvania courts’ interpretation of the rule has undergone little change since its promulgation.

205. The operative language of rule 1035 provided, inter alia:

(b) ... The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issues of liability alone although there is a genuine issue as to the amount of damages.


The corresponding section of the federal rule, Rule 56(c), is virtually identical, containing only an additional sentence relating to the timing of the motion. See FED. R. CIV. P. 56(c).

206. Shortly after Pennsylvania’s summary judgment rule took effect, the superior court noted that the federal courts’ summary judgment decisions should be used to guide Pennsylvania courts in their interpretation of the new rule. Schacter v. Albert, 230 A.2d 841 (Pa. Super. Ct. 1968).

The promulgation of Rule 1035 radically changed summary judgment practice in Pennsylvania. Substantive restrictions on the motion were removed. Instead of being limited to actions sounding in debt or contract, the motion became available in virtually all civil actions, including those where motive, intent and state of mind were at issue. This change expanded the procedure’s domain from actions where the proof usually consisted entirely of documentary evidence, to actions where the proof may even include substantial testimonial evidence.

Unlike the bare-bones summary judgment procedure of the nineteenth century that consisted of an affidavit of defense and a motion testing the legal sufficiency of the asserted defense, Rule 1035 provided for a summary judgment procedure by which a court could preview virtually all of the evidence that the parties might present at trial. Rule 1035 allowed the summary judgment motion to be supported by every bit of evidence that would be adduced at trial, except for the actual in-court testimony of witnesses. The effect of this change made the procedure far less “summary” than it had been during the nineteenth century.

Finally, Rule 1035 removed the nineteenth century rule’s restriction on summary judgment to a plaintiff’s motion. The procedure became available to all parties, including the defendant, regardless of who would carry the burden of persuasion at trial. Furthermore, the standard for summary judgment would be the same regardless of whether the moving party or respondent would have the burden of proof at trial. To some degree, use of the same standard for both the movant who will bear the burden of proof at trial and the movant who will not makes sense. In both instances, the motion for summary judgment (and supporting documents) should demonstrate the lack of a genuine issue of material fact. Nonetheless, the failure of the rule to describe the means by which the party who will not bear the burden of proof at trial should demonstrate the absence of a

208. See Pa. R. Civ. P. 1035(a) (rescinded 1996), which provided: “After the pleadings are closed, but within such time as not to delay trial, any party may move for summary judgment . . . .” Id.


210. See id.

211. Id.

212. Id.


214. Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 486-89 (Pa. 1979)(providing that “moving party has the burden of proving the nonexistence of any genuine issue of fact”).
genuine issue of material fact caused confusion in many courts.\textsuperscript{215} The problem is particularly acute in Pennsylvania because of the perceived interplay between the burden placed on the summary judgment movant who will not bear the burden of persuasion at trial and the restrictions imposed on summary judgment by the \textit{Nanty-Glo} rule.

One would suspect that when the party moving for summary judgment will not bear the burden of persuasion at trial, this party would not need to "prove" the existence of any material facts. This is a logical assumption since the movant in such a situation would not need to prove any material facts at trial. Instead, the movant could simply await the presentation of the burdened party's evidence, and if that evidence failed to prove a material fact, move for a directed verdict. That motion should then be granted, and issues regarding the credibility of the movant's witnesses would never arise, particularly if the moving party has not called any witnesses. Even if the party moving for the directed verdict has called witnesses, their credibility should not be an issue if the party with the burden of persuasion has failed to carry that burden through its own evidence. This result should be obtained even if the witnesses called by the party without the burden of persuasion are disbelieved. The party with the burden of persuasion can only carry that burden through the production of affirmative evidence.\textsuperscript{216}

There seems to be no valid reason why this same logic should not prevail in the summary judgment context. If the party moving for summary judgment will not bear the burden of persuasion at trial, he or she should not be required to produce evidence to support a motion for summary judgment. If the movant does produce evidence in support of the motion, even testimonial evidence, the motion should still be decided based on the evidence provided by the party with the burden of persuasion, the respondent. If the respondent fails to produce any evidence in opposition to the motion, then the credibility of the movant's witnesses

\textsuperscript{215} This confusion also exists in the federal system despite (or perhaps because of) the Supreme Court's \textit{Celotex} decision.

\textsuperscript{216} Although no reported Pennsylvania case explicitly accepts this proposition, there is virtual unanimity among the courts that have addressed the issue that a fact finder may not base its finding of fact on disbelief of a witness. The party with the burden of proof must introduce affirmative evidence to sustain its burden. \textit{See}, e.g., Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984). \textit{But see}, Fleming James, Jr., \textit{Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict}, 47 U. Va. L. Rev. 218, 224 (1961). Professor James generally accepts the rule, but notes that "demeanor evidence 'may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story.'" \textit{Id.} (citing Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952)).
should not concern the court. This logical approach, however, has not always prevailed in the Pennsylvania courts. Under these circumstances, Pennsylvania courts have reached inconsistent results, sometimes granting the motion, while at other times citing the Nanty-Glo doctrine as a basis for denying the motion. Godlewski v. Pars Mfg. Co. is typical of the cases where a Pennsylvania court denied such a summary judgment motion.

In Godlewski, a former employee of Foster-Wheeler Energy Corporation, together with his wife, filed an action against several manufacturers and distributors of asbestos-containing products. The employee alleged that he had been injured by long-term job exposure to the asbestos-containing products, which were either manufactured or distributed by the defendants. Following discovery, several of the defendants moved for summary judgment. One of the defendants, Pars Manufacturing Company, based its motion on the assertion that the employee would be unable to prove that Pars sold asbestos-containing products to Foster-Wheeler during the time that the employee worked with the company. The only evidence that Pars submitted in support of its motion was the affidavit of its former chairman and chief executive officer. The Godlewski decision does not reveal whether the employee produced any evidence in opposition to the motion.

The trial court granted Pars' motion, prompting an appeal by the employee. The superior court reversed the trial court and held that "since Pars relied solely on an affidavit of a witness to demonstrate ... Godlewski's inability to establish an element of their causes of action, the trial court erroneously entered judgment on its motions." The court stated that granting summary judgment in such a situation is inappropriate "due to the factual

220. Godlewski, 597 A.2d at 108.
221. Id.
222. Id.
223. Id. at 109.
224. Id.
225. Godlewski, 597 A.2d at 110.
issue [the affidavit] raises concerning the credibility of its maker."\(^{226}\)

The use of the *Nanty-Glo* doctrine in this situation is puzzling. The superior court's opinion explicitly mentions the ability of a defendant to obtain summary judgment by "pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action,"\(^{227}\) thus seemingly recognizing that when a defendant files a motion for summary judgment, the burden of production shifts to the respondent to come forward with some evidence that it will be able to carry its evidentiary burden at trial. Such a shift in the burden of production is entirely appropriate in the summary judgment context,\(^{228}\) particularly when the motion is filed by the party that will not carry the burden of persuasion at trial. Once a party has moved for summary judgment, the respondent may safely rest on his or her pleadings only if the movant both bears the burden of persuasion on the cause of action and if the materials submitted in support of the motion are inadequate to prove the existence of all elements of that cause of action.\(^{229}\) If the movant submits adequate evidentiary materials to prove a prima facie case, or if the respondent and not the movant bears the burden of persuasion on an issue, the respondent should be required to come forward with some evidence in the form of affidavits, deposition testimony or other documents beyond the pleadings to show that there is a genuine issue of fact regarding that issue. If the court denies the motion without requiring the respondent to produce some material in opposition to the motion, it is, in effect, allowing the respondent to "rest on its pleadings."

The *Godlewski* result is not always reached by Pennsylvania courts, particularly when the element of a plaintiff's case placed in issue by the summary judgment motion involves state of mind. If a plaintiff is required to prove the defendant's state of mind as an element of its case, then one would expect the courts to deny a defendant's motion for summary judgment supported only by testimonial evidence that the defendant lacks the requisite state of mind for the same reason given by the *Godlewski* court: the credibility of the affiant is a matter for the jury. Certainly, credibility is as much an issue when the defendant denies having the

\(^{226}\) Id.


\(^{228}\) See supra notes 211-14 and accompanying text for a discussion of why such a shift in the burden of production is appropriate.

required state of mind as when the defendant denies having failed to repay a loan. Yet, this has not always been the case.

Many cases where state of mind issues have predominated concern first amendment issues.\textsuperscript{230} The typical case involves a public figure who takes exception to statements regarding him or her printed in the news media. The public figure sues the news media for libel. In such a case, the public figure must prove that the statements were made with “malicious intent,”\textsuperscript{231} i.e., that the reporter either knew the statements to be false or had the statements printed with reckless disregard of their falsity. A typical case of this nature is \textit{Brophy v. Philadelphia Newspapers}.\textsuperscript{232}

In \textit{Brophy}, the defendant newspapers printed a story regarding the plaintiff’s participation in the shooting of a youngster who was participating in what appeared to be an attempted burglary.\textsuperscript{233} The story revealed that there was animosity between the plaintiff and the victim’s father,\textsuperscript{234} and that some residents of the area believed that the shooting was not entirely accidental.\textsuperscript{235} The plaintiff subsequently sued the newspaper for libel.\textsuperscript{236}

After discovery, the defendant newspapers moved for summary judgment\textsuperscript{237} and submitted the deposition testimony of the reporter who wrote the story in support of their motion.\textsuperscript{238} The reporter stated within this testimony “that he did not write the article with the intention of implying that the shooting was in any way intentional.”\textsuperscript{239} The trial court granted the defendants’ motion.\textsuperscript{240}


\textsuperscript{232} 422 A.2d 625 (Pa. Super. Ct. 1980). \textit{Brophy} is typical of cases where the motion has been granted. As noted, Pennsylvania courts have not been consistent in handling this issue, and some have denied defendant’s motions. \textit{See, e.g., Raffensberger v. Moran}, 485 A.2d 447 (Pa. Super. Ct. 1984) (holding that libel defendant’s denial of malicious intent could not provide adequate basis for summary judgment).

\textsuperscript{233} \textit{Brophy}, 422 A.2d at 625.

\textsuperscript{234} \textit{Id.} The plaintiff was the police commissioner of Pottsville, and the father of the victim was the chief of police of that town. \textit{Id.}

\textsuperscript{235} \textit{Id.} at 628.

\textsuperscript{236} \textit{Id.} at 627.

\textsuperscript{237} \textit{Id.} at 630.

\textsuperscript{238} \textit{Brophy}, 422 A.2d at 641.

\textsuperscript{239} \textit{Id.} at 633.

\textsuperscript{240} \textit{Id.} at 627.
On appeal, the Superior Court of Pennsylvania affirmed the grant of summary judgment, holding that based on the record the plaintiff would not be able to prove that the defendant acted maliciously. In its ruling, the court relied on both the reporter’s testimony and the evidence in the record supporting the plaintiff’s case. The court concluded that “the record does not disclose sufficient evidence from which a jury could infer that appellees engaged in highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”

Nowhere in the opinion did the court mention Nanty-Glo or suggest that a jury should pass on the credibility of the reporter. The court did suggest that “mere professions of good faith are insufficient” to support a motion for summary judgment, but, after making that observation, continued to examine the record evidence supporting the plaintiff’s case—a step that the Godlewski court was unwilling to make.

The Brophy court utilized a type of analysis that all courts should employ when faced with a summary judgment motion filed by a party who will not have the burden of persuasion at trial. In particular, the court properly discounted the deposition testimony submitted by the defendant in ruling on the motion. This action is appropriate because under the Nanty-Glo rule, the deposition testimony could not be used to prove the non-existence of a material fact any more than it could be used to prove the existence of a material fact. Allowing the testimony to serve this purpose would ignore the credibility issue raised by the use of testimonial evidence.

The filing of a summary judgment motion by a party who will not have the burden of persuasion at trial has a secondary effect, however, which is one that was considered by the Brophy court but apparently not by the Godlewski court. This effect is to shift the burden of production to the respondent. Specifically, after the party without the burden of persuasion moves for summary judgment, the respondent must place some evidence on record demonstrating its ability to carry the burden of production at trial. A court should therefore inspect the record before it to determine whether the nonmoving party has met the burden of

241. Id. at 634.
242. Id.
243. Brophy, 422 A.2d at 633.
244. Id. at 634.
245. Id.
246. Id.
247. Id. at 633-34.
production by producing evidence beyond the pleadings before it grants the summary judgment motion. The court in *Brophy* properly used this analysis, as it granted the defendant's summary judgment motion even though the motion was only supported by testimonial evidence since the respondent was unable to adduce any evidence tending to prove its case. Unfortunately, this type of analysis has seldom been employed by Pennsylvania courts when state of mind is not in issue.

At least two plausible explanations exist for the *Godlewski* decision (and others like it) beyond a misapplication of the *Nanty-Glo* rule. The first explanation involves the ability of a party to respond to a summary judgment motion by "rest[ing] on his pleadings." The former Pennsylvania summary judgment rule mirrored the federal rule in allowing a court to rely on the "pleadings, affidavits, answers to depositions, and admissions on file" in determining whether there was an issue of fact. While the rule did not specifically proscribe evidentiary hearings, such proceedings were contrary to the purpose of the rule and any evidence adduced at such a hearing could not be considered by the court in deciding the motion. Thus, in passing on a motion for summary judgment, the court was essentially surveying a paper record.

Once a movant provided the court with evidence adequate to support a finding that there was no genuine issue concerning either the existence or non-provability of a material fact, the

249. The court may, however, consider evidence introduced at other courtroom proceedings held throughout the course of the litigation. See Pa. Dutch, Inc. v. Pa. Amish, Inc., 63 D.&C. 2d 702 (Cumberland Co. 1973) (relying on testimony provided in hearing on preliminary injunction).
250. Whether the movant will assert the existence or non-existence of a material fact is a function of the allocation of the burden of proof. If, at trial, the movant will bear the burden of proof on the issue, the movant will assert the disputed material fact's existence. If the respondent will bear the burden of proof, the movant will assert the non-existence of that fact, or, at least, the fact that the respondent will be unable to prove the fact's existence.

Following the Supreme Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), there has been considerable confusion regarding the amount of documentation that the party asserting the non-existence of a fact must provide to the court. Pennsylvania courts have not specifically addressed this issue. While there is no requirement that the motion be supported by documentation, see *Laspino v. Rizzo*, 398 A.2d 1069 (Pa. Commw. Ct. 1979), it is often in the movant's best interest to provide some support for the motion beyond the allegations of the pleadings. In *Laspino*, the plaintiff filed a motion for summary judgment without any supporting evidentiary materials, relying solely on the allegations contained in her complaint. Id. at 1072. The defendant, in responding to the motion, likewise looked to its answer to establish that there was a genuine issue of material fact. Id. The court noted that if the plaintiff had filed evidentiary materials with her motion, the defendants' answer would have been inadequate to raise an issue of material fact. Id.
burden shifted to the respondent to file appropriate opposing documentation. In this regard, the former rule provided that:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.251

In construing this provision, Pennsylvania courts reached surprisingly confusing and inconsistent results regarding the effect the court should give to the respondent's pleadings.252 The rule clearly assigned a "bursting bubble" role to the respondent's pleadings, however, in that if the respondent could not "rest" upon the allegations or denials of his or her pleading, the court, in ruling on the motion for summary judgment, should have ignored the allegations or denials contained in those documents. The court should have decided the motion without reference to the pleadings, except to the extent that the allegations were beneficial to the moving party or to the extent the allegations were not controverted. Some courts so construed the rule, and, in fact, the Pennsylvania Supreme Court seems to have definitively interpreted the rule in this manner.253 A significant number of courts stated in dicta, however, that the trial court must accept as true all well-pleaded facts in the non-moving party's pleadings and also give the non-moving party the benefit of all reasonable inferences that may be drawn from those allegations.254

The notion that the non-moving party might rely on its pleadings to thwart a summary judgment motion found its earliest expression in Schacter v. Albert,255 where the court cited early


[1]If the non-moving party does not oppose a properly supported motion for summary judgment with affidavits, depositions, of the like, he may not rely upon his pleadings to controvert those facts presented by the moving parties' depositions. [S]upporting affidavits, after a motion for summary judgment, are acceptable as proof of facts. Pleadings are not.

Id. at 250.

253. See Phaff v. Gerner, 303 A.2d 826, 829 (Pa. 1973) (providing: "In considering a motion for summary judgment under Rule 1035, a court may rely on the pleadings for uncontroverted facts but must ignore the pleadings as to controverted facts.").


federal summary judgment cases to support this proposition. At the time Schacter was decided, the Third Circuit Court of Appeals had interpreted the federal rule to allow respondents to rely on allegations contained in the pleadings to defeat a motion for summary judgment. Rule 56 was amended in 1963, at least in part as a response to these decisions, by the addition of two sentences to Rule 56(e). This change made it clear that a respondent may not rest on his or her pleadings in opposing a summary judgment motion. When Pennsylvania's summary judgment rule was adopted in 1966, the new language of the federal rule was incorporated into the state rule. The Schacter court apparently overlooked these developments, however, and relied on outdated federal decisions.

Some Pennsylvania courts unfortunately continue to cite Schacter as valid authority for the proposition that pleadings may be adequate to raise factual issues in the summary judgment setting. The Godlewski court, for instance, in summarizing the standards for summary judgment, included a statement that "the record must be examined in the light most favorable to the non-moving party, accepting as true all well pleaded facts in its pleadings and giving that party the benefit of all reasonable inferences drawn therefrom." This statement illustrates that the court conceivably may have felt that Nanty-Glo was implicated because the allegations in the plaintiff's complaint were adequate to raise a question of credibility. This reasoning is not explicitly utilized by the court, however, and is still faulty.

One problem with this interpretation is that it does not comport with the objectives of summary judgment because it does not further the mission to "pierce the pleadings." A historical purpose of summary judgment is to allow the movant to force the hand of the non-moving party and compel the party to show his or her proof prior to trial. Clearly this can be done only if the non-moving party is denied the right to rely on the pleadings in


259. Friedenthal noted that "[a]lthough the main purpose of summary judgment is to avoid useless trials . . . the device may also be used to . . . better prepare for trial." See Friedenthal et al., supra note 4 at § 9.1, 434-35. See also 10 Wright, Miller & Kane, supra note 84 § 2712.
opposing a summary judgment motion. Such a requirement also furthers the rule’s purpose as a vehicle for limited discovery.260

When a party without the burden of persuasion moves for summary judgment, and, whether by testimonial evidence or no evidence at all,261 controverts the burdened party’s ability to prove an essential element of his or her case, the burden should shift to the respondent to produce evidence demonstrating the existence of a genuine issue of material fact. If the respondent fails to produce such evidence, the credibility of the movant’s witnesses simply becomes a non-issue.

While the new Pennsylvania summary judgment rules do not provide the necessary clarity on this issue, they do seem to lend support to the decisions that disregarded the non-moving party’s pleadings in summary judgment proceedings. Unlike former Rule 1035 and the federal rule, the new rules do not catalog materials that may be used to support a summary judgment motion. Instead, Rule 1035.1 contains a definition of the term “record” that is substantially similar to the former rule’s catalog of materials and includes, inter alia, the pleadings.262 Rule 1035.3 provides that “[t]he adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response . . . identifying . . . (1) one or more issues of fact arising from evidence in the record . . . or (2) evidence in the record . . . .”263 This language, while retaining the former rule’s prohibition against resting on the pleadings in support or opposition to a summary judgment motion, may cause confusion because it specifically permits the respondent to rely on evidence in the “record.” As the “record,” in turn, is defined to include the pleadings, the rules leave room for an argument that while they prohibit a respondent from “resting on the pleadings” in response to a sum-

260. Limiting discovery is a less important role for summary judgment to serve in Pennsylvania than in the federal system. The system of notice pleading used in the federal system accentuates the need for discovery. In Pennsylvania, where fact pleading prevails and where pleadings are verified, the need for extensive discovery is less. Nonetheless, a motion for summary judgment may still perform an important function by forcing the respondent to “preview his or her evidence” prior to trial.

261. The suggestion that a defendant might force a plaintiff to produce his or her entire case in defense of a summary judgment motion supported by no evidentiary material triggered Justice Brennan’s dissent in Celotex Corp. v. Catrett, 477 U.S. 317 (1986). While allowing a defendant to so “force the hand” of a plaintiff does create the potential for “harassment,” the burden on a plaintiff should not be too onerous as it is only necessary for the plaintiff to prove the existence of a genuine issue of material fact and not to prove his or her case by a preponderance of the evidence. At any rate, the question of what burden should be placed on the movant in such a situation is entirely different than the question of whether credibility determinations should always be left to the fact finder.

262. PA. R. CIV. P. 1035.1.

263. PA. R. CIV. P. 1035.3.
mary judgment motion, a respondent may still defeat the motion by filing a response that does no more than bring the pleadings to the attention of the court. The respondent could thus avoid the burden of “previewing” its evidence for the court.

Of course, the new rules should not be construed in this manner. When a party will bear the burden of proof at trial, the court should require that party to respond to a summary judgment motion with more than a simple recantation of the pleadings. Both the court and moving party deserve some preview of the evidence that the respondent will present at trial. The reference in the new rules to “evidence” in the record indeed recognizes this need. Since the pleadings are not evidence, their use should not satisfy the respondent’s burden.

The second plausible explanation for the Godlewski decision involves the policy question of what the appropriate burden of production is to be placed on a summary judgment movant who will not carry the burden of persuasion at trial. This is certainly a reasonable concern, and one that divided the Supreme Court in Celotex Corp. v. Catrett and has yet to be addressed by Pennsylvania courts. Requiring the summary judgment movant who will not bear the burden of persuasion at trial to support his or her motion with more than conclusory affidavits may be appropriate, and suggestions have also been made that the movant in such a situation should at least point to specific weaknesses in the respondent’s case. Masking a concern about such matters under the rubric of Nanty-Glo, however, does nothing to enlighten the bar. If courts feel a need to place upon summary judgment movants a burden to produce more than a simple motion devoid of evidentiary support, and there are certainly strong policy reasons to do so, then this is the message that

264. Id.
265. A clever advocate might respond to this argument by pointing out that nothing in the record is evidence until it is presented in court. While this is true, deposition testimony, affidavits, answers to interrogatories and other matters may be admitted into evidence following proper authentication. Pa. R. Civ. P. 4005(c) (governing interrogatories); Pa. R. Civ. P. 4020 (governing depositions). The same may not be said of the pleadings. See Buehler v. U.S. Fashion Plate Co., 112 A. 632 (Pa. 1921) (stating: “pleadings in case determine the issues, primarily they are not evidence for any purpose”).
268. The manner in which a movant places the burdened party’s ability to prove his or her case in issue is a matter about which reasonable people may differ. Justice Brennan’s suggestion in Celotex that allowing a movant to “force the hand” of the burdened party by filing an unsupported motion for summary judgment results in the possibility of
should be sent. Neither *Godlewski* nor the cases cited by that court, however, provide any guidance as to what materials a movant must provide to a court to effectively shift the burden. The *Godlewski* court simply asserts that affidavits are insufficient for this purpose because of the "factual issue" they raise concerning the credibility of the affiants. In reality, there is no such factual issue since the credibility of affiants would never be tested at an actual trial. Finding credibility issues where none exist, therefore, only conceals the problem.

The new summary judgment rules do somewhat clarify this issue. Initially, the new rules make it absolutely clear that the party who will not bear the burden of proof at trial may move for summary judgment. The rules also make clear that if such a motion is made, the respondent must identify "evidence in the record establishing the facts essential to the cause of action which the motion cites as not having been produced." What is unclear under the new rules, however, is what materials the movant who will not bear the burden of persuasion at trial must produce in support of the motion. Neither the rules nor the official comments give any suggestion as to what nature of materials (if any) are appropriate. Regardless of the resolution of this issue, the use of testimonial evidence by the movant should not implicate *Nanty-Glo*.

Finally, the different results in *Godlewski* and *Brophy* might be explained by the different standard of proof placed on the public figure plaintiff in each case. The plaintiff in *Brophy* was required to prove his case with "convincing clarity" rather than the standard civil burden of the preponderance of the evidence that was utilized in *Godlewski*. Taking this higher burden into account when deciding a motion for summary judgment may well be appropriate, and such a burden naturally increases the movant's chance for success. What is unclear, however, is whether the *Brophy* court indeed took the higher evidentiary standard into account when ruling on the propriety of the summary judgment award.

Harassment may be well taken. *Celotex*, 477 U.S. at 332. But see Levine, supra note 12 at 205-06.

269. *Godlewski*, 597 A.2d at 110.
271. Id. 1036.3(a)(2).
275. Pennsylvania courts have not articulated a single, clear statement of how a summary judgment motion is affected by the burden of proof that the plaintiff will face at trial. In *Curran v. Philadelphia Newspapers, Inc.*, 395 A.2d 1342 (Pa. Super. Ct. 1978),
When a summary judgment movant will bear the burden of persuasion at trial, the analysis used when the movant would not carry that burden cannot be employed. In such a situation, even if the respondent filed nothing in opposition to the motion and the court ignored the pleadings of the non-moving party, the Pennsylvania former rule permitted entry of summary judgment only “if appropriate.”276 The new rules do not appear to change this practice, as they provide that summary judgment “may” still be entered in such a situation.277 Therefore, the supporting documents filed with the motion must prove every element necessary to entitle the moving party to judgment. Proof may take the form of the materials included in the “record;” thus, a party may prove the existence of a material fact by the use of affidavits, depositions or answers to interrogatories.278 These forms of testimonial evidence standing alone, however, have never before supported a grant of summary judgment as the Pennsylvania courts’ have continually adhered to the Nanty-Glo rule. The courts have believed that testimonial evidence may only form the basis for a judgment after the witness has appeared in open court and provided the fact finder with an opportunity to observe his or her demeanor and make a credibility determination based on that observation.

While the advantages or disadvantages of leaving the credibility determination to the jury are certainly subject to debate,279 even if the jury is assumed to be the best entity for credibility determinations, the Pennsylvania courts’ adherence to the Nanty-Glo rule prevents summary judgment from achieving its designed goals because it unduly restricts summary judgment use to instances where the proof is almost entirely documentary. Furthermore, with slight modifications, the Nanty-Glo rule could be applied in such a way as to allow the jury to make credibility determinations.

the court stated that “[i]t is not enough for the plaintiff, in resisting summary judgment to argue that there is a jury question as to malice; he must make a showing of facts from which malice may be inferred . . . . Such an inference must be clear.” Id. at 1348 (emphasis added). The Brophy court, after disavowing Curran, stated the standard to be “viewing the evidence and all inferences arising therefrom in the light most favorable to the plaintiff, there appears a genuine issue of fact from which a jury could reasonably find actual malice with convincing clarity.” Brophy, 422 A.2d at 632. The difference between the two standards is unclear. Furthermore, the use of the higher burden of persuasion should not, logically, affect the roles of judge and jury in credibility determinations. The Nanty-Glo rule is based on the premise that the jury is the appropriate entity to make credibility determinations. If the rule is accepted, the jury remains the appropriate entity irrespective of the burden of proof imposed on the plaintiff.

277. Id. 1035.3(d).
278. Id. 1035.1.
279. See sources cited supra at note 42.
determinations in situations where credibility is an issue, while at the same time allowing courts to grant summary judgment in cases where the proof is testimonial. Arguably, the new summary judgment rules permit the courts to do so because they specifically permit the use of testimonial evidence in support of summary judgment motions. Pennsylvania courts typically deny summary judgment in this situation, however, due to the belief that the credibility determination of all witnesses, even disinterested ones, is for the jury. Pennsylvania courts, therefore, hold that even an unopposed summary judgment motion supported by testimonial evidence must be denied, as the movant has not proved its case since the credibility of the witnesses has not been demonstrated.

Burdening the movant with the need to prove the credibility of the witness may be inappropriate for several reasons. When a motion for summary judgment is supported by testimonial evidence, that evidence may be elicited from the movant itself or from witnesses who have no interest in the outcome of the litigation. In its present formulation, the Nanty-Glo rule makes no distinction between these different sources of testimonial evidence. While there is some historical support for Nanty-Glo's treatment of all testimonial evidence as equal regardless of the source, the support is relatively weak. As previously noted, Pennsylvania courts evinced little concern for the credibility of witnesses until the latter part of the nineteenth century, when parties to the litigation were first allowed to testify. Only after the change in practice allowing parties to be witnesses on their own behalf did Pennsylvania courts begin to stress that questions of credibility should be left to the jury. While it is true that nineteenth century Pennsylvania courts never drew a bright line between the testimony of parties and disinterested witnesses, they almost invariably accorded greater weight to the testimony of disinterested witnesses. From a historical per-

280. PA. R. Crv. P. 1035.1. At the same time, the rules do not directly prohibit a grant of summary judgment based on testimonial evidence, although Nanty-Glo is cited in the comments to Rule 1035.2. See id. 1035.2.
283. See supra notes 191-92 and accompanying text.
284. See supra notes 194-95 and accompanying text.
285. Statements to the effect that the testimony of disinterested witnesses is entitled to greater weight than the testimony of the parties are common in court opinions. See, e.g., Lonzer v. Lehigh Valley R.R. Co., 46 A. 937, 938 (Pa. 1900) (stating: "When the testimony is not improbable . . . and comes from witnesses whose candor there is no apparent ground for doubting, the jury is not at liberty to indulge in a capricious disbelief.").
spective, therefore, Nanty-Glo arguably misinterpreted pre-existing Pennsylvania law. The seventy-plus years that have passed since Nanty-Glo was decided, however, have reinforced the courts’ tendency to treat all testimonial evidence equally in deciding summary judgment motions.

Outside the summary judgment setting, Pennsylvania courts continue to give greater weight to the testimony of disinterested witnesses than to the testimony of the parties themselves.\(^{286}\) Although the deference is not great, and the testimony of disinterested witnesses is not conclusive if contradicted by the testimony of the opposing party, or if the witnesses are impeached,\(^{287}\) giving credence to the uncontradicted, unimpeached testimony of the disinterested witness comports with common sense. Employing the same test for both summary judgment and trial also makes sense, and for these reasons the practice of according greater deference to the testimony of a disinterested witness should be followed in the summary judgment setting.

Beyond the issue of the historical validity of Nanty-Glo in the disinterested witness situation, the rule also raises procedural concerns. Summary judgment requires a movant who will bear the burden of persuasion at trial to prove two things in the papers submitted to the court.\(^{288}\) First, the movant must produce evidence in support of the motion that proves every element of the \textit{prima facie} case.\(^{289}\) If the supporting documents fail to prove an essential element of the movant’s case, the motion should be denied even if unopposed.\(^{290}\) Second, the movant must demonstrate that there is no genuine dispute regarding the veracity of

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\(^{286}\) See Lowery v. Pittsburgh Coal Co., 235 A.2d 805, 807 (Pa. 1967)(stating it improper for Workmen’s Compensation Board to disregard “uncontradicted testimony which was substantiated by another, disinterested witness”); Walters v. Am. Bridge Co., 82 A. 1103 (Pa. 1912)(affirming trial court’s grant of judgment n.o.v. when verdict contrary to unimpeached testimony of disinterested witnesses).

\(^{287}\) See Linsenmeyer v. Straits, 166 A.2d 18 (Pa. 1960)(holding testimony of disinterested witnesses inconclusive when contradicted by testimony of opposing party and impeached by prior inconsistent statements).

\(^{288}\) Both federal Rule 56 and former Pennsylvania Rule 1035 require a summary judgment movant to demonstrate a lack of a genuine issue of material fact and an entitlement to judgment as a matter of law. \textit{FED. R. CIV. P. 56(c)}; \textit{PA. R. CIV. P. 1035(b)} (rescinded 1996). The new rules incorporate the same requirement: “[a] party may move for summary judgment ... as a matter of law (1) whenever there is no genuine issue of any material fact.” \textit{PA. R. CIV. P. 1035.2}.

\(^{289}\) See Dorohovich v. West American Ins. Co., 589 A.2d 252, 256 (Pa. Super. Ct. 1991) (stating: “Summary judgment is only appropriate where ... the moving party is entitled to judgment as a matter of law.”).

\(^{290}\) See Amabile v. Auto Kleen Car Wash, 376 A.2d 247, 250 (Pa. Super. Ct. 1977) (holding it improper to grant defendant’s motion for summary judgment when supporting documents “do not either 1) refute a material allegation in plaintiff’s complaint ... or 2) present a complete defense to the action”).
his or her proof.\textsuperscript{291} If the respondent submits no evidence in opposition to the motion, documentary evidence is adequate to perform this task.\textsuperscript{292} There is a working presumption that documents submitted in support of the motion are authentic and prove what they purport to show.\textsuperscript{293} The filing of documentary material sufficient to prove a movant's \textit{prima facie} case shifts the burden of production to the respondent to come forward with evidence placing the movant's proof in doubt.\textsuperscript{294} While a movant who supports a summary judgment motion with documentary evidence may fail the first part of the summary judgment test even if the respondent files nothing in opposition to the motion,\textsuperscript{295} the same movant should never fail the second part of the test unless the respondent files material in opposition to the motion.\textsuperscript{296}

The \textit{Nanty-Glo} rule effectively changes these procedural rules when the movant's proof is testimonial in nature. In such cases, the burden on the respondent to produce materials contravening the evidence in support of the motion is removed. At least under the former rule, the respondent had the option of remaining passive in this situation since the effect of the \textit{Nanty-Glo} rule was to create an irrebuttable presumption that the credibility of the movant's witnesses might be successfully attacked at trial.\textsuperscript{297} No matter how straightforward or facially compelling the testimonial evidence might be, \textit{Nanty-Glo} required the respondent to be afforded the opportunity to cross examine the witness in court.\textsuperscript{298}

\begin{itemize}
\item \textsuperscript{291} Id. at 249-50.
\item \textsuperscript{292} Id. at 250.
\item \textsuperscript{293} Id.
\item \textsuperscript{294} See supra notes 249-51 and accompanying text.
\item \textsuperscript{295} Failure could occur because the evidence submitted in support of the motion simply does not prove a material element of the movant's case.
\item \textsuperscript{296} For instance, assume a simple breach of contract case in which A sues B alleging that B has failed to pay sums due under a contract. If A files a motion for summary judgment supported by a copy of a contract signed by A and C, A should not prevail because there has been no proof of a \textit{prima facie} case, i.e., no proof that A and B ever entered into a contract. If, however, A submits a contract signed by B, the truth of the matters stated in the contract (the dates, the consideration, and other terms) will be accepted as true unless B files material in opposition to the motion. This procedure effectively resolves any credibility issues relating to the document, such as whether it has been altered, and places the burden on the respondent to put those credibility concerns back in issue.
\item \textsuperscript{297} See Ritmanich v. Jonnel Enterprises, Inc., 280 A.2d 570, 574 (Pa. Super. Ct. 1971) (noting that affidavits "even if uncontradicted will not afford sufficient basis for the entry of summary judgment").
\end{itemize}
While there may be some theoretical bases for this dissimilar treatment of the two types of evidence, there was nothing in the language of former Rule 1035 supporting such a result as the rule made no distinction between documentary and testimonial evidence. The plain language of the rule mandated that both documentary and testimonial evidence have the same procedural effect when used to support a summary judgment motion. More specifically, if the evidence would be adequate to prove a prima facie case, under former Rule 1035 the burden of production would shift to the respondent to produce evidence showing the existence of a genuine issue of material fact.

The new Pennsylvania summary judgment rules may change this outcome. The note accompanying Rule 1035.2 recognizes Nanty-Glo and restates the holding that oral testimony alone is insufficient to establish the absence of a genuine issue of fact. Rule 1035.3 explicitly permits an adverse party to respond to a summary judgment motion by "identifying . . . a challenge to the credibility of one or more witnesses testifying in support of the motion." The form of this challenge is unstated. The courts, however, should not permit this challenge to consist of nothing more than an assertion that because the evidence supporting the motion is testimonial, credibility is automatically at issue.

Finally, the two assumptions that underlie Nanty-Glo, which are (1) that cross examination is an effective tool for uncovering defects in a witness; and (2) juries are well equipped to utilize the information gleaned from cross-examination to make accurate determinations regarding a witness' credibility, have come under increasingly effective attacks in recent years. The nineteenth century faith in the efficacy of cross-examination flourished at a time when discovery in civil cases was quite limited. Restrict-
tions on the use of discovery often prompted a witness' bias, character or the inconsistencies and contradictions within the witness's testimony to be revealed for the first time during cross examination. Under such circumstances, cross examination naturally played an important role in credibility determinations. With the twentieth century expansion of the availability of discovery, however, few commentators still believe that cross-examination, at least impromptu cross-examination, consistently exposes inconsistencies or other internal weaknesses in witness testimony. Instances where cross-examination does work to reveal weaknesses in witness testimony almost invariably result from the effective use of material found during the course of discovery, which should be available to the respondent in time to be included in a response to a summary judgment motion.

The ability of an untrained lay juror (or a judge lacking appropriate psychological training) to use demeanor evidence to make accurate credibility determinations has also been seriously questioned. Increasingly, the physical indicia used by most observers to assess credibility appear to be untrue indicators of the veracity of the witness. While some observers may sometimes discover mendacity through demeanor evidence, the instances where this occurs are probably uncommon.

While assessment of witness credibility is the stated justification for Nanty-Glo's requirement that testimonial proof be presented at trial, few, if any, of the decisions applying the rule speak of credibility assessments in anything more than the most general of terms. Opinions founded on Nanty-Glo generally do not address the means by which credibility is attacked at trial, nor do they consider whether these means of attack are available to the respondent at the summary judgement stage. This is unfortunate because attacks on a witness' credibility are conducted using certain well recognized tactics. Recognizing that

306. See id.
308. See Wellborn, supra note 42 at 1075. Professor Wellborn notes that "[a]ccording to the empirical evidence, ordinary people cannot make effective use of demeanor in deciding whether to believe a witness. On the contrary, there is some evidence that the observation of demeanor diminishes rather than enhances the accuracy of credibility judgments." Id.
these methods of impeachment are available to a respondent at the summary judgment stage seriously undermines the need to strictly apply the Nanty-Glo rule.

Authors have not always reached the same result in attempting to catalog the number of bases on which a witness' credibility may be impeached.\textsuperscript{309} MCCORMICK ON EVIDENCE recognizes the five bases of impeachment listed below.\textsuperscript{310}

1) \textit{Contradiction}. Although courts often use this term to describe what is more properly termed impeachment by prior inconsistent statements, impeachment through contradiction is accomplished when evidence contrary to a witness' testimony is elicited from other sources.\textsuperscript{311} Contradiction may be established through documentary evidence\textsuperscript{312} or through the testimony of another witness.\textsuperscript{313} Thus, when during direct examination a plaintiff testifies that he or she never suffered back pains prior to an auto accident involving the defendant, the contradictory testimony of a physician who treated the plaintiff for back pain prior to the accident is admissible as a form of impeachment.\textsuperscript{314}

2) \textit{Inconsistency}. This form of impeachment is often referred to as impeachment by prior inconsistent statements.\textsuperscript{315} Witnesses may be impeached if they previously made statements that are contrary to their current testimony.\textsuperscript{316} Such statements may occur during the course of the pending litigation or during prior proceedings.\textsuperscript{317} Pennsylvania law allows the introduction of prior inconsistent statements for the purpose of impeachment regardless of the hearsay status of the statements.\textsuperscript{318}

3) \textit{Partiality}. Witnesses may be impeached by showing that they have an interest in the outcome of the case.\textsuperscript{319} This form of

\textsuperscript{309} Professor Uviller counts six means of impeachment. See Uviller, supra note 39. McCormick lists five. JOHN W. STRONG ET AL., 1 MCCORMICK ON EVIDENCE § 33 (4th ed. 1992). Some earlier writers acknowledge even fewer methods, see, e.g., JAMES P. GORTER, LAW OF EVIDENCE 224 (1916) (finding that there are three methods of impeachment), although modern writers may separately list methods that were previously subsumed in other categories. For instance, GORTER states that a witness may be impeached by "general evidence affecting his credit for veracity." See id. Modern writers might subdivide this "general evidence" into matters of partiality, character, or incoherence.

\textsuperscript{310} See STRONG, supra note 308 at § 33.

\textsuperscript{311} Id. § 45 at 62-63.

\textsuperscript{312} Id.

\textsuperscript{313} Id.


\textsuperscript{315} See STRONG, supra note 308 § 38 at 50-52.

\textsuperscript{316} See, e.g., Commonwealth v. Thomas, 329 A.2d 277 (Pa. 1974).


\textsuperscript{318} Commonwealth v. Waller, 444 A.2d 653 (Pa. 1982).

\textsuperscript{319} See STRONG, supra note 308 § 39 at 52-53.
impeachment may occur either when a witness wishes to ensure the victory of one party or the defeat of another. 320

4) Character. Witnesses may be impeached by showing that they have a general reputation for being untruthful. 321 Character impeachment is generally accomplished by calling other witnesses who are able to testify as to the primary witness' reputation for truthfulness. 322 A witness' character may also be placed into question by evidence of prior criminal conviction(s). 323

5) Incoherence. Incoherence is often attributable to defects in witnesses' perceptive abilities. 324 The internal inconsistencies, omissions and implausibility of witness testimony can provide a basis for impeachment. 325 Thus, a witness who testified that he or she overheard a conversation in a crowded airport could be impeached during cross examination by questions revealing that the witness has a hearing impairment. 326

Other authors have also added demeanor to the list of bases for impeachment, 327 and this addition seems appropriate as demeanor is certainly one factor for the factfinder to consider in determining the credibility of a witness.

Assuming that the prior list represents a complete compilation of methods by which the credibility of witnesses may be impeached, it is readily apparent that a respondent to a summary judgment motion should often know, at least by the end of discovery, whether there is any likelihood of impeaching the movant's witnesses at trial. With the exception of demeanor, each means of impeachment involves using material that the respondent should become aware of during the investigation of the case. If a respondent to a summary judgment motion is aware of all plausible grounds for impeachment, and if an unimpeached witness is entitled to a presumption of truthfulness, then denying summary judgment so that an advocate can engage in an unfounded attack on the credibility of that witness makes little sense. If a party has a basis for doubting a witness' credibility, this basis should be revealed to the court at the summary judgment stage so that the court's assessment of the motion is rational and informed. An irrebuttable presumption that a witness' credibility may be successfully attacked at trial,

321. See Strong, supra note 308 § 41 at 54-55.
322. Id. § 43 at 59-60.
323. Id. § 42 at 55-59.
324. Id. § 44 at 60-62.
325. Id.
326. See Strong, supra note 308 § 44 at 60-62.
327. See, e.g., Uviller, supra note 42.
such as that embodied in Nany-Glo, should only rarely usurp
the motion judge's discretion in such matters.

The four recognized bases for impeachment known as contra­
diction, inconsistency, bias and character should be easily
demonstrable to the court by a party wishing to oppose summary
judgment. The motion for summary judgment should not be
made before the close of discovery, and if the party opposing
summary judgment wishes to have more time to complete discov­
ery, he or she may request the time from the court. Assuming
that a respondent has completed discovery, he or she should have
every piece of evidence that will be available at trial to contradict
a witness' statement at the time of a summary judgment motion.
In fact, the production of contradictory evidence may be the most
common method of demonstrating to a court the existence of a
genuine dispute of material fact. If a respondent to a summary
judgment motion is unable to provide the court with such evi­
dence, there seems to be little point in allowing the case to pro­
cceed unless the respondent provides the court with some other
assurance that the witness' credibility might be impeached at
trial.

Inconsistency in the form of prior inconsistent statements
should also be demonstrable at the summary judgment stage. In
the post-discovery setting, a respondent should possess every
inconsistent statement made by a witness that would be avail­
able at trial. Certainly if a respondent submits to the court a
prior inconsistent statement from an individual whose testimony
forms the basis of a summary judgment motion, the submission
should raise a genuine issue of material fact and provide a basis
for denying the motion. If a respondent is unaware of any prior
inconsistent statements, then attempted impeachment on this
basis at trial would seem both pointless and unethical.

A respondent should also be aware of any bias held by an affi­
ant when a summary judgment motion is filed. If the testimonial
evidence in support of the summary judgment motion comes
from a party to the action, then indeed the motion should be
denied without ever requiring the respondent to make any bias
evaluations. Any interest in the outcome of the litigation held

328. PA. R. Civ. P. 1035.3(b).
329. See ROBERTO ARON ET AL., EXAMINATION OF WITNESSES, § 5.11 (1989) (sug­
gest ing that cross-examination should be limited to questions having a "reasonable foun­
dation in fact or in admissible evidence"). See also STEVEN LUBET, MODERN TRIAL
ADVOCACY, 109 (1993) (noting that cross examination may not be based on "rumors,
uncorroborated hearsay, or pure speculation").
330. Professor Sonenshein has argued that a witness' interest in the outcome of litig­
ination, standing alone, should not constitute an adequate basis for denying summary
by an affiant should either be uncovered by the respondent during the course of discovery or during informal investigation of the claim. As with the previously discussed bases of impeachment, if a respondent makes the existence of bias known to the court, then credibility becomes an issue and denial of the motion is proper.

Character evidence should also be known by a respondent at the time a summary judgment motion is made. If a respondent presents the court with an affidavit from a witness willing to testify that a movant's witness has a reputation for mendacity, denial of the motion should result. Denial of the summary judgment motion should likewise ensue if a respondent presents the court with evidence of a prior criminal conviction of a movant's witness. 331

The fifth basis of impeachment, incoherence, may be more difficult to demonstrate at the summary judgment level. The problem here arises not when the witness' incoherence is caused by physical limitations, but when the witness' testimony just does not make sense. This is a form of incoherence that a carefully tailored affidavit may also conceal. For instance, if a witness previously testified that he or she was at point A at 10:00 a.m. and drove to point B by 10:15 a.m., and subsequently under cross-examination the witness estimates the distance between points A and B to be 50 miles, the witness is effectively impeached because of the incoherence of the testimony. A carefully drafted affidavit, however, may delete all references to point A, or, alternatively, fail to mention the times at which the witness claims to have been at the different places. If the affidavit is

judgment. See Sonenshein, supra note 95. Sonenshein supports this argument by use of a hypothetical involving a contract between two parties for the painting of a house. Id. at 801. In that hypothetical, if one of the parties files an affidavit asserting the existence of a contract, there would seem to be no reason to proceed to trial unless the other party can provide the court with contradictory evidence. Id. at 802. Sonenshein then hedges his argument by asserting that summary judgment based on a party's affidavit is only appropriate if the respondent "must" be aware of contradictory evidence. Id. The problem with this approach lies in the difficulty of ascertaining when a party "must" know of contradictory evidence. Laziness, ineptitude, and perhaps most important, lack of resources, may hinder a party's ability to obtain contradictory evidence. Although one may not have much sympathy for the party whose problems are caused by the first two matters, penalizing the litigant who simply cannot afford to conduct depositions seems unfair.

331. Sonenshein also argues that this situation should not provide a basis for denying summary judgment. See Sonenshein, supra note 95. He asserts that while witnesses may be impeached on this basis, the "fact does not prove objectively that their testimony is untrue." Id. at 708. This argument would seem to carry as much weight at the trial stage as at the summary judgment stage. Cases can, however, be won solely through impeachment without the introduction of contradictory evidence. While such instances may be unusual, parties should at least be afforded the opportunity to make the attempt, provided they have some reasonable basis for impeachment.
so carefully constructed, then the incoherence of the testimony may not be apparent from the affidavit’s face. Only when the witness is subject to cross-examination will the weaknesses in the proffered testimony become apparent. At least from the traditional viewpoint, a witness should be forced to run the gauntlet of cross-examination before his or her testimony may be used to form the basis for a judgment.

While there may be some reasons to suggest that a party responding to a summary judgment motion should have the right to cross-examine the movant’s witnesses and attempt to impeach them through the incoherence of their testimony, there are also reasons to suggest that the respondent should be required to show the court that the cross-examination has a reasonable chance of success before being accorded this opportunity. We no longer live in an age when the expense and delay of cross-examination can be ignored, and as previously noted, modern commentators generally devalue the worth of impromptu cross-examination as a means of assisting in credibility determinations. Additionally, without some foreknowledge that a witness credibility attack might be successful, ethical concerns are implicated when an advocate makes the attack even on the basis of incoherence.

Furthermore, while a respondent may not have the opportunity to cross-examine a witness in court prior to a decision on the summary judgment motion, it should have the opportunity to depose a witness prior to the disposition of that motion. Admittedly, depositions usually lack the sometimes fiery nature of courtroom cross-examination, but obvious inconsistencies in the witness’ testimony should be discoverable through this technique. Moreover, when an attorney attempts to impeach a wit-

332. In addition to the authority cited supra in note 308, see also Strong, supra note 308 at § 31 (noting that cross-examination has “its own hazards of producing errors”).

333. Many attorneys would prefer to avoid the expense of depositions and simply await trial for the opportunity to seek out inconsistencies in testimony. The proposed change in the Nanty-Glo rule may cause these attorneys some inconvenience. A more troublesome problem arises when a litigant is simply unable to pay for depositions. In light of inability to proceed in forma pauperis to obtain deposition testimony, carving out an exception to the proposed rule denying the summary judgment motion maybe appropriate when a respondent demonstrates to the court that it reasonably believes the testimony embodied in the movant’s affidavit to be suspect and that it is unable to pay for depositions. Rules 1035.3(b) and (c), permitting the court to “make such other order as is just” when the respondent sets “forth the reasons why the party cannot present evidence essential to justify opposition to the motion,” could be interpreted to achieve this result.

334. See Radio City Music Hall Corp. v. United States, 135 F.2d 715 (2d Cir. 1943). In Radio City, the plaintiff filed suit seeking a return of taxes that had been erroneously paid. Id. at 716. After depositions, the plaintiff moved for summary judgment and supported the motion with transcripts of the deposition testimony. Id. at 717. The defendant
ness by showing inconsistencies in testimony, he or she usually has some basis for suspecting that the testimony is incomplete or otherwise suspect. There is little point in cross-examining an adverse witness at length unless the advocate entertains some suspicion that the testimony will not hold together. Mandating that a respondent reveal the bases for these suspicions to the court at the summary judgment stage should not be too onerous a requirement.

Thus, while there is some reason to believe that a successful attack on witness credibility based on inconsistencies may be made at trial, there are also countervailing indications that a respondent should have some articulable basis for suspecting that a witness' testimony contains inconsistencies at the time a motion for summary judgment is made. If a respondent wishes to cross-examine a witness in an attempt to impeach through inconsistencies, he or she should be forced to reveal the basis for believing in the success of such cross-examination at the summary judgment stage. If a respondent is unable to articulate a basis for the perceived need to cross-examine a witness, the court should not permit a trial simply so the respondent can engage in a "fishing expedition."

The sixth basis for impeachment, demeanor, is obviously a matter that cannot be demonstrated to the court at the time of a motion for summary judgment. Demeanor is a matter over which a respondent has little foreknowledge and hence little control. Requiring an unimpeached, disinterested witness to testify in open court so that the fact finder might have an opportunity to observe the witness' demeanor is justifiable only if (1) the court believes that there is a reasonable chance the fact-finder will disbelieve an otherwise unimpeached witness because of that witness' demeanor, and (2) the court further believes that the fact-finder will correctly use demeanor evidence in reaching this disbelief.

opposed the motion, at least in part because of a contention that it should be given the opportunity to cross examine the deponents before the fact finder. Id. at 718. In rejecting this argument the court noted:

There would be much force in this, if the motion had been heard merely upon affidavits; the right to cross examine [the deponents] was almost the defendant's only protection. But it did full cross-examine them, and did not shake their testimony ... it does not even suggest that [their] recollection was in fact mistaken ... [t]hat does not make a 'genuine issue'.

Id. The court went on to suggest that the respondent had a duty "at least to specify some opposing evidence which it can adduce" to contradict the deposition testimony. Id. Under the rule proposed in this article, the burden on a respondent would be even less. Instead of specifying evidence that would be produced at trial, the respondent would only be required to point to specific matters in the deposition transcript that could bring the deponent's credibility into question.
Historically, courts have given great weight to a jury’s use of demeanor evidence in assessing the credibility of a witness. Judge Frank’s opinion in *Arnstein v. Porter* contains numerous citations to cases where courts have spoken favorably of the value of observing a witness’ demeanor when determining the truthfulness of testimony. Nonetheless, there is mounting evidence that fact-finders (whether judge or jury) are incapable of using demeanor evidence accurately in assessing the credibility of witnesses.

Demeanor consists of the witness’ body language, manner of dress, accent, manner of speech and other intangibles, and has been called the “touchstone” of credibility. Courts have long cherished the belief that a lay jury can use these visual and auditory clues to accurately assess witness credibility. Recent studies, however, suggest that demeanor evidence used by jurors in making credibility determinations often leads to inaccurate results.

Commentators have suggested that this inaccuracy of credibility determinations is caused, at least in part, by the typical juror's focus on body language as the primary indicator of truthfulness; a focus often reinforced by the court’s instructions on credibility determinations. But body language is relatively easy for the dissembling witness to control and may thus lead to inaccurate credibility determinations. In fact, more accurate credibility determinations may be made by focusing on auditory clues, such as tone of voice and hesitant speech. Some studies

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335. 154 F.2d 464 (2d Cir. 1947). The *Arnstein* court quoted extensively from other courts, and stated that “the demeanor of witnesses is recognized as a highly useful, even if not an infallible, method of ascertaining the truth and accuracy of their narratives.” *Arnstein*, 154 F.2d at 470.

336. Olin G. Wellborn III, *Demeanor*, 76 Cornell L. Rev. 1075 (1991). While much literature addressing the jury's ability to detect mendacity through observation of demeanor is recent, there have been murmurs of doubt for quite some time. Even Judge Frank, an apparent advocate of the jury's right to make credibility determinations, questioned the ability of jurors to perform this function. Jerome Frank, *Courts on Trial*, 118-20 (1949).


340. See id.

341. In Pennsylvania, the problem is compounded by the lack of a standard jury instruction regarding credibility assessments. This lack of an instruction leaves jurors free to use their own common sense standards in credibility determinations. These sorts of determinations, however, are frequently inaccurate, particularly in the courtroom setting where a witness' normal mannerisms may be affected by the environment.

have suggested that a confident yet untruthful witness is more likely to be believed than an honest but nervous witness.\textsuperscript{343}

Scholars have suggested that the accuracy of credibility determinations could be improved by revising the typical jury instruction on the use of demeanor evidence,\textsuperscript{344} or by the use of an expert witness.\textsuperscript{345} While these suggestions may result in more accurate credibility determinations in the future, however, we are nonetheless presently employing a system of credibility determinations that has dubious chances for success. Even if this system was cost-free (which it most assuredly is not), we would be well advised to question the wisdom of a rule that requires every witness to present his or her testimony in open court before a judgment is entered, even in instances where the opponent cannot point to any basis for suspecting that the witness is being less than truthful and accurate.

Under the rule proposed by this article, a respondent would be required to raise the credibility of a witness in responding to a motion for summary judgment unless the witness was a party to the litigation. Raising the credibility issue could be accomplished through using any of the materials mentioned in Rule 1035, or, in an appropriate case, simply through a brief filed in opposition to the motion.\textsuperscript{346} If a respondent fails to raise the issue of credibility, then the court should be entitled to assume that credibility is not a concern and thus grant the summary judgment motion. In cases where the testimonial evidence originated with a party to the litigation, the potential bias of the witness would be obvious to the court and opposition by the respondent would be unnecessary.

This result is clearly justifiable under the new rules. Those rules require a “challenge” to the credibility of the witness, and that challenge should take the form of something more meaningful than a simple incantation of the \textit{Nanty-Glo} rule.

\textsuperscript{343} This observation reinforces what many courtroom observers have long suspected. \textit{See} STRONG, supra note 308.

\textsuperscript{344} \textit{See} Blumenthal, supra note 42 at 1201. \textit{But see} Friedland, supra note 42 at 188.

\textsuperscript{345} \textit{See} Friedland, supra note 42 at 169 (suggesting that expert testimony in aid of credibility determinations should generally be excluded, but concluding that exceptions may be necessary).

\textsuperscript{346} This procedure would comport with the language in Rule 1035.3(a)(1) requiring a “challenge” to the credibility of the witness. \textit{See} PA. R. Civ. P. 1035.3 (a)(1). Of course, it would be well to provide evidentiary material if available.
IV. Conclusion

When viewed from a historical perspective, the problems encountered by courts in resolving credibility disputes in the summary judgment context are not surprising. Summary judgment's procedural antecedents worked extremely well when employed in matters that involved, almost exclusively, documentary evidence. So long as summary judgment was restricted to cases involving debt and contract, credibility issues were minimal or non-existent. As the procedure enjoyed such great success in those areas, the temptation to expand its reach was irresistible. The graduation to trans-substantive applicability, however, brought with it questions about the appropriate resolution of credibility issues.

At the federal level, initial concerns over the propriety of granting summary judgment based on testimonial evidence seem to have subsided. Given the Supreme Court's "marching orders" to the lower federal courts to be more liberal in granting summary judgment, it seems that credibility issues, for the foreseeable future, will be of little concern in that system. This may not be an unsound development on the federal level, but it does not necessarily follow that Pennsylvania courts should abandon their own jurisprudence and follow the federal lead.

Pennsylvania courts have a long history of according great deference to the fact finder's credibility determinations, and there is no reason to completely abandon that deference in summary judgment proceedings. The courts can, however, demand some assurance from the summary judgment respondent that credibility will be an issue at trial. If a respondent is unwilling or unable to provide the assurance, then deference to the fact finder should not mandate a plenary trial proceeding.

Evidentiary issues in the summary judgment context inevitably involve a balancing of the need for a full plenary examination of the evidence and a speedy resolution of the legal conflict. In every case brought before a court, some new evidence, or some nuance about known evidence, will be uncovered during the course of an evidentiary hearing. The decision to allow summary judgment in any instance indicates a belief by the court that the additional evidence to be disclosed at a hearing is simply not worth the cost and effort necessarily expended to draw out that information. Thus, courts that deny summary judgment where the non-moving party has produced a "scintilla" of evidence in opposition to the motion have placed a higher value on the benefits of a plenary hearing than the courts that use a "reasonable jury" standard in passing on such motions. The question that
must be faced, therefore, is whether requiring the jury to pass on the credibility of disinterested third party witnesses, as mandated by Nanty-Glo, elicits sufficient additional information to warrant the time and expense of the resultant plenary hearing. While Nanty-Glo may have been justifiable originally, increasing pressures on court dockets, expanded discovery procedures and changes in summary judgment jurisprudence at the federal level make this an appropriate time to reexamine the use of the rule. While unquestioned acceptance of the federal summary judgment jurisprudence is not necessary, a critical reexamination of the assumptions underlying Nanty-Glo may result in a revised rule that will both preserve the fact finder's role in credibility determinations and simultaneously speed up the administration of justice.