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A WELL-TREAD, DISFAVORED SHORTCUT: A HISTORY OF SUMMARY JUDGMENT IN NEW MEXICO

Nicholas M. Sydow*

INTRODUCTION

In *Romero v. Philip Morris*, the New Mexico Supreme Court expressed the role and purpose of the state's summary judgment rule.[1] For the first time, the court explicitly broke with federal summary judgment law, declaring that New Mexico would enforce its "traditional" standard for summary judgment rather than follow federal law.[2] The court explained that unlike federal courts, New Mexico courts view summary judgment with disfavor, and refuse to allow the procedure to infringe on the jury's function as the trier of fact and arbiter of witnesses' credibility.[3] To understand what the court in *Romero* meant when it declared that courts should only grant summary judgment where it has traditionally been available in New Mexico, it is necessary to examine the history of summary judgment in New Mexico. This article offers such a history, describing the nuanced, complex past of summary judgment in this state. Although rhetoric persists to this day that summary judgment is a disfa-

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1. Romero v. Philip Morris, 2010-NMSC-035, ¶¶ 7–11, 242 P.3d 280, 287–88.
2. The court held:

> We continue to refuse to loosen the reins of summary judgment, as doing so would turn what is a summary proceeding into a full-blown paper trial on the merits. We do not wish to grant trial courts greater authority to grant summary judgment than has been traditionally available in New Mexico. Permitting trial courts a license to quantify or analyze the evidence in a given case under whatever standard may apply. . .would adversely impact our jury system and infringe on the jury's function as the trier of fact and the true arbiter of the credibility of witnesses. By our refusal to align our state's approach with that of the federal courts, we do not intend to imply that summary judgment is never appropriate.

Id. ¶ 9, 242 P.3d at 288 (internal quotation marks and citations omitted).

3. *Id.* ¶¶ 8–9.

vored remedy, a careful study of New Mexico courts' handling of summary judgment reveals that this rhetoric does not match reality. Since before summary judgment was fully fledged, caution in its use has been balanced by an appreciation of the benefits of summary judgment and a willingness to resolve disputes before trial.

Part I recounts the origins of New Mexico's summary judgment rule, describing precursors to New Mexico Rule of Civil Procedure 56.[4] Before 1941, statutes provided for summary procedures in specific types of disputes where expedited adjudications were seen as particularly important. These procedures were viewed as valuable tools for deciding cases where delay was harmful and where parties were prone to obstruct the judicial process. Following the success of these limited summary procedures, New Mexico adopted the federal courts' newly enacted summary judgment rule.[5] This rule was transsubstantive, applying to all civil cases regardless of their subject matter.[6] Part II describes the adoption of this rule and its early application by New Mexico courts. Part III traces the development of summary judgment in New Mexico up until the United States Supreme Court's 1986 trilogy (the "*Celotex* trilogy") of cases on summary judgment.[7] During the preceding decades, the use of summary judgment had become widespread, as courts began to apply summary judgment in straightforward, obvious cases. Understanding the state of summary judgment law during this period is crucial, given the New Mexico Supreme Court's recent statement that such "traditional" summary judgment law helps to form our summary judgment standards today. Part IV recounts New Mexico courts' reaction to the *Celotex* trilogy, the 1986 federal cases often described as loosening the reins on summary judgment and encouraging the use of summary judgment as a procedural remedy.[8] The *Celotex* trilogy contains a number of different holdings and dicta, which have

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4. In this article, I will generally refer to New Mexico's Rule of Civil Procedure 56 as "Rule 1-056" or "New Mexico Rule 56" and Federal Rule of Civil Procedure 56 as "Federal Rule 56."

5. NMSA § 19-101(56), 1941 Comp. (1953 Supp.).

6. Transsubstantive rules are those that apply to all types of cases, regardless of their "substance." Stephen N. Subrin, *The Limitations of Transsubstantive Procedure: An Essay on Adjusting the "One Size Fits All" Assumption*, 87 DEN. U. L. REV. 377, 378 (2010). The term apparently was first used by Robert M. Cover in "For James Wm. Moore: Some Reflections on a Reading of the Rules," 84 YALE L.J. 718, 718 (1975). *Id.* at 377 n.1

7. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

8. *See infra* notes 180–206; *see e.g.,* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (promoting summary judgment as a procedural remedy).

been partly embraced and partly rejected by New Mexico courts. Part V analyzes the supreme court's curious opinion in *Romero v. Philip Morris*, in which it denounced summary judgment at the same time as it used the procedure to dismiss a complex antitrust lawsuit. Given *Romero*, the article assesses the state of summary judgment law in New Mexico, including the role that historical notions of summary judgment play in defining today's summary judgment law. This current law includes invective rhetoric about the dangers of summary judgment—language that has a long genealogy in New Mexico. Yet never, even today, has summary judgment been as disfavored as this rhetoric suggests.

I. SUMMARY ADJUDICATIONS BEFORE THE ENACTMENT OF NEW MEXICO RULE OF CIVIL PROCEDURE 56

The origins of summary judgment in New Mexico predate statehood. Although New Mexico did not enact the first version of its modern summary judgment rule until 1941,[9] summary proceedings—whereby parties could bypass the burdensome and lengthy process of formal pleadings and a jury trial—were available in limited circumstances from the founding of New Mexico's territorial courts.[10] Such summary proceedings were employed in a number of actions where the governing statutes permitted expedited adjudications.[11] However, these statutory procedures allowing for summary adjudication were limited to particular categories of disputes. Most significant among these, and the precursor to our modern summary judgment rule, was a law allowing plaintiffs to collect debts on the basis of the parties' affidavits and without trial.[12] Not until the New Mexico Supreme Court adopted the modern Rules of Civil Procedure in 1941 would summary judgment be generally available, without limitation based on the type of action at issue.

A. The Kearny Code

In September 1846, only weeks after Santa Fe was captured by the United States from Mexico during the Mexican-American War, General Stephen Kearny ordered that a set of laws be drafted to govern the land

9. NMSA § 19-101(56), 1941 Comp. (1953 Supp.).

10. *See infra* text accompanying notes 25–28 (defining summary proceedings).

11. Summary adjudications did not exist at common law, only where statutorily created. *See* Cassidy v. M'Aloon, 32 L.R.Ir. 368, 369 (1893) ("By the common law a plaintiff has no right to obtain a judgment summarily, and if he wants to avail himself of the statutory jurisdiction, he is bound to comply strictly with the requirements of the Rules.").

12. An Act to Simplify Procedure in Civil Cases, ch. 73, 1897 N.M. Laws C.B. 11.

that his soldiers had conquered. These laws, the Kearny Code, were cobbled together from the existing laws of Mexico, Texas, Coahuila y Tejas, Missouri, and the Livingston Code.[13] When word of the Kearny Code reached Washington, D.C., members of Congress criticized General Kearny for enacting the laws without legislative action, an act beyond his authority as a soldier.[14] Nonetheless, the Kearny Code remained the law of the New Mexico Territory, except for those provisions deemed contrary to the laws of the United States.[15]

The Kearny Code contained a section setting forth the procedure for the handling of civil lawsuits.[16] While the laws were impressively elaborate for having been implemented by army officers during the middle of the Mexican-American War, the section on procedure in civil suits was only seventeen paragraphs long.[17] It contained no provision for the summary adjudication of civil actions.[18]

B. Summary Procedures in Territorial New Mexico

While the Kearny Code did not provide for a statutory procedure by which civil lawsuits could be decided on a summary basis, New Mexico's territorial courts still employed summary adjudications in limited cases. In fact, the very first published case in New Mexico, *Bray v. United States*, was decided on a summary basis.[19] Although *Bray* was a criminal case,[20] the New Mexico Supreme Court explained its rationale for deciding certain cases on a summary basis.[21] The court reasoned that having justices of the peace, rather than district courts, decide cases regarding minor crimes would "insur[e] to the community an ample and speedy punish-

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13. *See* Letter from General S.W. Kearny to the Adjutant General (Sept. 22, 1846), *reprinted in* COMPILED LAWS OF NEW MEXICO 65 (New Mexican Printing Co., ed., 1897).

14. *See* ROGER D. LAUNIUS, ALEXANDER WILLIAM DONIPHAN: PORTRAIT OF A MISSOURI MODERATE 115 (William E. Foley ed., 1997).

15. *See*, Agnesa Reeve, *New Mexico*, *in* 2 THE UNITING STATES: LOUISIANA TO OHIO 843, 847 (Benjamin F. Shearer ed., 2004).

16. Kearny Code of Laws, Practice at Law in Civil Suits (1846), *reprinted in* NMSA 1978, Pamphlet 3: Territorial Laws and Treaties 4–17.

17. See *id.*

18. See *id.*

19. 1 N.M. 1, 3 (1852).

20. *Bray* was an appeal from a conviction for assault. *Id.* at 1–2. The supreme court held that the district court did not have jurisdiction over actions for common assault, because, under the Kearny Code, justices of the peace had exclusive jurisdiction over such actions. *Id.* at 3 (citing Kearny Code, art. 3, §§ 8, 11, Crimes and Punishments, at 54, 55; CONG. REP. 1848, at 200 (General Kearny's report to Congress regarding the Kearny Code); Kearny Code, § 33, at 8).

21. *See id.* at 3.

ment of all offenders. . .and reliev[e] the higher courts of a burden of cases which would only increase the cost to the public, and in a manner trammel up and clog the wheels of justice in these courts."[22] These dual rationales for summary judgment—speeding up the decision of cases and conserving judicial resources—would persist in New Mexico opinions promoting summary judgment.[23]

Summary adjudications were not limited to criminal cases like *Bray*. In the nineteenth and early twentieth centuries, a number of actions were regularly the subject of summary proceedings where specially authorized by statute.[24] Referencing the authoritative treatises of Sir William Blackstone and Simon Greenleaf,[25] the New Mexico Supreme Court described summary proceedings by noting the longstanding distinction between plenary causes—where all legal formalities were respected, including trial—and summary causes, in which the "order and solemnity" of the law "are dispensed with."[26] In summary proceedings, the court could try the cause "without the observance of the technical rules and forms in practice,"[27] including, in some cases, even the opportunity to appeal the court's judgment.[28] One example of such summary proceedings existed in actions to challenge the election of a sheriff, justice of the peace, or constable, which were "heard and determined in a summary manner, by the probate court."[29] As with prosecutions for minor crimes, the rationale for the sum-

22. *Id.*

23. *See infra* text accompanying notes 81, 107–108, 162.

24. In *Arrellano v. Chacon*, 1 N.M. 269, 274 (1859), the New Mexico Supreme Court recognized a summary proceeding as having a well-established, technical definition under New Mexico law: "[T]he phrases, summary manner, summary proceeding, and summary convictions, when employed in statutes, have a distinct, well-defined technical meaning. . .."

25. *Id.* at 275–76 (discussing plenary causes and summary causes, with reference to Simon Greenleaf's *Treatise on the Law of Evidence* and Sir William Blackstone's *Commentaries on the Laws of England*).

26. *Id.*

27. *Id.* at 277.

28. *See id.* at 274 (stating there was no right to appeal in cases decided in a "summary manner," in "summary proceeding[s]," or in "summary convictions"); *id.* at 277 (stating that there was no right to appeal from summary proceedings unless "granted and permitted in the particular act directing the summary proceeding"). *See also In re* Morrow's Estate, 41 N.M. 117 (1937) (discussing lack of right to appeal in some "special proceedings" as opposed to "civil actions," including summary of New Mexico cases denying appeal in such "special proceedings").

29. *Arrellano*, 1 N.M. at 269.

mary adjudication of election disputes was to "put a speedy and certain end to litigation."[30]

Other provisions called for the summary adjudication of particular types of disputes. Like election disputes, these provisions existed in types of cases where resolving the dispute quickly was of paramount importance. These included actions for the collection of taxes,[31] garnishment proceedings to execute a judgment,[32] the appointment of a receiver in bankruptcy,[33] and actions in the probate court.[34] Such cases were deemed to be "specifically exempted from the operation of the new and liberal Code of Practice"—the Code of Civil Procedure enacted in 1897—and

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30. *Id.* at 278. It was especially important to resolve promptly disputes regarding the election of sheriffs, justices of the peace, and constables, because such officials only served for a one-year term. *See id.* at 270. *See also* NMSA 1876, § 1239 (in cases regarding contested elections, judgment shall be rendered by the judge "as shall be most convenient, and in furtherance of a speedy trial and determination of the case"); Bull v. Southwick, 2 N.M. 321, 363 (1882) (object of statutory provision for summary proceeding in election disputes "is to afford, and at the same time to compel, the observance of a speedy mode for conducting and determining such cases") (adopting holding of the district judge); Vigil v. Pradt, 5 N.M. 161, 167 (1889) ("Promptness in commencing and prosecuting the proceedings is of the utmost importance, to the end that a decision may be reached before the term has wholly or in great part expired." (internal quotation marks and citation omitted)); Gonzales v. Gallegos, 10 N.M. 372, 401–402 (1900) ("Experience has demonstrated that, without some compulsory mode as to the time of making up issues and their trial in contested election cases, subterfuges and delays might and would be successfully resorted to, so that a final determination could not be reached before the term of office would expire." (internal quotation marks omitted)).

31. Conklin v. Cunningham, 7 N.M. 445, 474 (1894) (Freeman, J., dissenting) (summary proceedings exist for collection of taxes, among other things); *see also* NMSA § 5475, 1915 Code (describing summary procedure for challenging tax assessments).

32. *See* N.M. Nat'l Bank v. Brooks, 9 N.M. 113, 126 (1897) (holding that the plaintiff was not entitled to jury trial in garnishment action, because the action was intended to be inexpensive and a speedy supplemental proceeding on the execution of a judgment).

33. *See* Department Store Co. v. Gaus-Langenberg Hat Co., 17 N.M. 112, 121 (1912) (affirming denial of amendment to answer in bankruptcy action, because "the hearing, in this class of cases is a summary one at which the parties are at liberty to make such showing by way of affidavits, proofs and allegations as they see fit" and "is necessarily a final hearing and the judgment is final. . .."); Sacramento Valley Irrigation Co. v. Lee, 15 N.M. 567, 576–77 (1910).

34. *See Arrellano*, 1 N.M. at 272 (stating that the probate court has power only to try action in a summary proceeding, not by jury). Also, the New Mexico Supreme Court, after citing to cases from around the United States regarding "special proceedings founded upon statute," listed cases involving special or summary proceedings as including annexation, abatement of taxes, divorce, and election proceedings. State v. Rosenwald Bros. Co., 23 N.M. 578, 580.

therefore permitted "summary remedies wholly inconsistent with the liberal provisions of the code practice and the delay incident thereto."[35]

C. A Precursor to Summary Judgment: Summary Proceedings to Collect Debts

The most direct precursor to Rule 1-056 among these statutory provisions allowing for summary adjudications in specific types of cases was a law allowing for summary proceedings in actions to collect debts.[36] In 1897, New Mexico's legislature adopted a code system of pleading to replace the unwieldy common-law system of pleading.[37] Although not included within the same legislative bill, the same day that the legislature approved a code of civil procedure it also approved a bill providing for an abbreviated, summary procedure in collection actions.[38] Both laws offered the benefit of simplifying the arcane practices of common-law pleading and their attendant delay and obfuscation.

The new procedure for collection cases allowed a plaintiff to obtain a judgment on the basis of the parties' affidavits, without a full trial. The plaintiff would file an affidavit setting forth the amount due and owing by the defendant under a contract, after which the defendant could file an affidavit rebutting the plaintiff's affidavit.[39] If, from the parties' affidavits,

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35. *Gonzales* 10 N.M. at 401 (describing summary procedure for resolving election disputes).

36. An Act in Relation to Pleadings and Practice in All the Courts, ch. 51, 1897 N.M. Laws, H.B. 39 (enacted at NMSA § 2935, C.L. 1897).

37. An Act to Simplify Procedure in Civil Cases, ch. 73, 1897 N.M. Laws, C.B. 11; *see also In re* Morrow's Estate, 41 N.M. 117, 118–19 (1937) ("By chapter 73, N.M. Sess. Laws 1897, the code system of pleading was adopted, most of which is the law today."); Charles E. Clark, *The Reply*, 1 S. CAL. L. REV. 116, 116–17 (1928) (describing the difference between common law and code pleading). The code system of pleading created one form of civil action, such that plaintiffs did not have to plead their claims with the particular, applicable common law form and that plaintiffs could bring their legal and equitable causes of action in one lawsuit. *See* NMSA § 2685, C.L. 1897.

38. An Act in Relation to Pleadings and Practice in All the Courts, ch. 51, 1897 N.M. Laws, H.B. 39 (enacted at NMSA § 2935, C.L. 1897).

39. NMSA § 2935, C.L. 1897. The text of this section provides, in relevant part:

> If the plaintiff at any action at law, arising on any contract, either express or implied, shall file with his declaration, or shall file at any time before the return day in such cause, an affidavit setting forth a brief statement of the cause of action and showing therein in such affidavit, the amount due and owing to the plaintiff by the defendant, after deducting all just credits and set-offs and shall serve a copy of such affidavit on such defendant, or on his attorney of record, then the said defendant shall within ten days after the service of a copy of such affidavit on him, or on his attorney, file in the clerk's office, where the declaration is filed, an affidavit denying that he is indebted to the plaintiff, as stated in the plaintiff's affidavit and also exhibiting briefly the

the court could determine that the defendant was indebted to the plaintiff for some or all of the amount claimed, it would summarily enter a judgment against the defendant.[40] If, on the other hand, there was a "*bona fide* dispute between the parties," the action would go to trial, as any other action in law.[41] While this statute differs substantially from our modern summary judgment rule, both provisions reflect a similar intent.[42] Under both rules, claims without material factual disputes are filtered out and adjudicated quickly, without trial, while claims with disputed facts proceed to trial.

New Mexico's statute providing for the summary adjudication of collection actions can be traced to similar summary procedures for the collection of debts that existed in other jurisdictions.[43] The first of these

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> facts which constitute his defense to the plaintiff's action and showing either, that he is not in debt to the plaintiff in any sum whatever, or if he is indebted to the plaintiff in a part only of the sum named by the plaintiff in his affidavit, then the defendant shall show the amount that he is so indebted, and shall deny the remainder of the plaintiff's claim. Defendant shall cause to be served within ten days, a copy of the said affidavit on the plaintiff or his attorney. At the expiration of ten days allowed the defendant by this act to file and serve copies of his affidavit, if it shall appear from the affidavit filed, or from the failure of the defendant to file and serve his affidavit as herein required, the defendant is indebted to the plaintiff on account of the matters sued on, in any sum whatever, the court shall summarily render judgment against defendant for such amount; but if it shall appear from such affidavits that the defendant is indebted to the plaintiff in part only of the sum sued for and that there is a *bona fide* dispute between the parties as to a part of the amount claimed by the plaintiff, then in such case the court shall render judgment summarily, for the amount not disputed, and the remainder of the claim which is denied by the defendant in his affidavit, shall stand for pleading and trial under the ordinary rules and practice of the court, or if it shall appear from such affidavit that there is a *bona fide* dispute between the parties, as to the whole of plaintiff's claim, the amount so in dispute shall stand for hearing and be governed by the ordinary rules of practice, in cases of law.

The law was amended two years later to provide twenty, rather then ten, days to file an affidavit. Ch. 80, 1899 N.M. Laws, § 10. Later versions of this statute were codified at: NMSA § 4206, 1915 Code; NMSA § 105–822, Comp. St. 1929 (1938 Supp.) (identical to the 1915 rule).

40. NMSA § 2935, C.L. 1897.

41. *Id.*

42. Even the differences between the 1897 rule allowing for the summary adjudication of collection actions and our modern Rule 1-056 are not as great as they may seem. The language of the original version of Rule 1-056 suggested that affidavits would be a central tool in obtaining and refuting summary judgment, just as they were under the letter of the 1897 rule. *See infra* text accompanying notes 73–76.

43. *See, e.g.*, The Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67 (Eng.) (English debt collection statute); Ill. Laws 1872, 338, § 36; Rules of the District of Columbia, Rule 73, § 1 (1873). *See also* Hon. Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U.L. REV. 231,

laws was an 1855 English statute that allowed for the expedited collection of debts on certain commercial instruments.[44] Similar laws were subsequently enacted in Illinois[45] and the District of Columbia,[46] as part of a slow adoption of increasingly broad summary judgment procedures in many states.[47]

In addition to the goals of expediting litigation and clearing courts' dockets, New Mexico's summary procedure for the collection of debts may reflect a fear that juries would refuse to enforce claims against debtors. In the earliest days of our nation, creditors feared jury nullification of their collection actions and battled against the populist Anti-Federalists who promoted jury trials, an institution that the Anti-Federalists saw as likely to oppose creditors and other metropolitan interests.[48] When the New Mexico legislature singled out collection actions for summary adjudication with their own provision in the 1897 Code of Civil Procedure,[49] the legislature may have been motivated to protect the interests of unpopular creditors, as were the drafters of laws similar to the New Mexico statute.[50] While many other actions could potentially have been resolved

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233–34 (2011) (describing procedures for collection cases as the origin of summary judgment).

44. The Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67 (Eng.). *See also* 10A WRIGHT, MILLER, & KANE, FED. PRACTICE & PROCEDURE: CIVIL 3D § 2711 n.4 (West Group ed., 1998) (identifying this law as the origin of summary judgment). "The object of the rule was. . .expedition and economy in obtaining a judgment where the circumstances of the case lent themselves to a shortened procedure." Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 424 (1929).

45. Ill. Laws 1872, 338, § 36.

46. Rules of the District of Columbia, Rule 73, § 1 (1873).

47. *See generally* Clark & Samenow, *supra* note 44, for a description and history of the summary procedures available in England, Canadian provinces, and U.S. states in 1929, nine years before the adoption of the Federal Rules of Civil Procedure. *See also* Robert Wyness Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L.J. 193 (1929) (discussing precursors to federal summary judgment rule in several states). Interestingly, neither of these articles, like most of the other literature of which I am aware regarding the history of summary judgment in the United States before the Federal Rules, discusses the New Mexico statute.

48. *See* William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1658 n.19 (2008) (discussing the potential for juries to refuse to enforce debts where no bona fide legal defense exists and the Anti-federalists' enthusiasm for juries as a result).

49. *See supra* text accompanying notes 38–41.

50. England's 1855 Summary Procedure on Bills of Exchange Act was motivated by defendants' frivolous defenses to actions on promissory notes, which would often delay collection actions. Clark & Samenow, *supra* note 44, at 424. The 1873 Supreme Court of Judicature Act that broadened the availability of the 1855 Act was very

with competing affidavits, collection actions were singled out and afforded their own, specific statutory vehicle for avoiding a jury trial.

Like other states,[51] New Mexico's early experiments with summary adjudication served as a precursor to a transsubstantive summary judgment rule that applied to all civil actions. Although these first summary procedures only applied to limited categories of cases, their fundamental purpose was the same as the purpose of the general, federal summary judgment rule that New Mexico would ultimately adopt: to decide cases quickly and efficiently where possible, and to dispose of meritless claims and defenses.[52] As the New Mexico Supreme Court recounted in 1859, the legislature's intent in allowing for summary proceedings was "to put a speedy and certain end to litigation between parties."[53] Unsurprisingly, then, the first summary proceedings were implemented in types of cases where delay was particularly harmful, such as election disputes.[54] And while the rationales behind these early summary procedures could have applied to all types of civil cases, summary adjudications were not available in ordinary actions, but only in particular categories of cases.[55] Until New Mexico adopted its modern Rules of Civil Procedure, courts in general actions were not free to decide on a case-by-case basis whether the action was suited to being decided without a jury.

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similar to Section 2935. *See* Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, Order III, Rule 6, Order XIV (Eng.). New York would also later pass a summary judgment statute aimed at preventing debtors from interposing purportedly frivolous defenses and delaying collection actions. WILLIAM E. NELSON, THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980, at 32–34 (Thomas A. Green & Hendrik Hartog eds., 2001) (summary judgment originated in New York with procedure to collect debts on the basis of affidavits, without trial).

51. *See* Millar, *supra* note 47 (discussing precursors to federal summary judgment rule in several states).

52. Charles Clark, one of the drafters of Federal Rule of Civil Procedure 56, described the benefits of summary judgment before its adoption as follows:

> The reform is usually advocated because of its effectiveness in preventing delays by defendants, and in securing speedy justice for creditors. But its advantages would seem to be more than merely these. Because of its simplicity it is available for the prompt disposition of bona fide issues of law as well as of sham defenses. Except where a trial is necessary to settle an issue of fact, the whole judicial process is, by this procedure, made to function more quickly and with less complexity than in the ordinary long drawn out suit.

Clark & Samenow, *supra* note 44, at 423.

53. Arrellano v. Chacon, 1 N.M. 269, 278 (1859).

54. *See supra* note 30.

55. The law allowing for summary procedures in collection actions under a contract exemplifies a category of cases being deemed suitable for summary adjudication. *See supra* text accompanying notes 38–41.

II. NEW MEXICO'S ADOPTION OF A TRANSSUBSTANTIVE SUMMARY JUDGMENT RULE

Although New Mexico was one of the earlier states to enact summary procedures in collection actions and some other types of cases, New Mexico did not adopt a general summary judgment rule until after the implementation of the Federal Rules of Civil Procedure.[56] New Mexico's first general summary judgment rule[57]—the precursor the current New Mexico Rule of Civil Procedure 1-056—was copied directly from the federal summary judgment rule that had been enacted in 1938. It was transsubstantive, expanding the availability of summary adjudications from a few, specific actions to civil actions generally. And because New Mexico's rule had been copied from the federal rule, New Mexico courts relied heavily on federal summary judgment cases in interpreting the new summary judgment rule.

A. The Creation of New Mexico's Rules of Civil Procedure

In 1933, one year before Congress passed the Rules Enabling Act,[58] New Mexico's legislature passed its own law stating that the New Mexico Supreme Court shall promulgate rules to regulate pleading, practice, and procedure in New Mexico courts.[59] The law was "apparently modeled after" a similar Wisconsin law,[60] one of several states' laws that allowed

56. By 1938 when the Federal Rules of Civil Procedure were enacted, England, Illinois, Michigan, and New York had already adopted summary judgment procedures that were much broader than the early rules allowing summary adjudications of liquidated damages actions. *See* FED. R. CIV. P. 56, 1937 notes of advisory committee on rules. For general histories of state summary judgment laws before the enactment of the Federal Rules of Civil Procedure, see Ilana Haramati, *Procedural History: The Development of Summary Judgment as Rule 56*, 5 N.Y.U.J.L. & LIB. 173, 175–84 (2010); Clark & Samenow, *supra* note 44; Millar, *supra* note 47.

57. NMSA § 19-101(56), 1941 Comp. (1953 Supp.).

58. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2072(a)–(b)). For a comprehensive history of the Rules Enabling Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). Interestingly, unlike the Rules Enabling Act, New Mexico's rule allowing the supreme court to promulgate procedural rules does not require legislative review of new rules. Ultimately, the New Mexico Supreme Court would hold that it holds the exclusive, constitutional power to promulgate such rules. *See* Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 312, 551 P.2d 1354, 1359 (1976).

59. S.B. 130, (N.M. 1933), Laws 1933, ch. 84, § 1, codified at NMSA § 34-501, Comp St. 1929 (1938 Supp.).

60. State v. Roy, 40 N.M. 397, 418, 60 P.2d 646, 659 (1936).

courts to promulgate their own procedural rules.[61] The law stated that the purpose of the rules to be promulgated by the supreme court was "simplifying [judicial proceedings in all courts of New Mexico] and. . .promoting the speedy determination of litigation on the merits."[62]

Although the New Mexico Supreme Court had been directed by the legislature to create new rules of pleading, practice, and procedure a year before federal courts were expressly authorized to do so by the Rules Enabling Act, the court waited to enact its Rules of Civil Procedure until after the Federal Rules of Civil Procedure went into effect in 1938.[63] The court appointed an advisory committee to study whether New Mexico should adopt the Federal Rules of Civil Procedure, and if so, what changes should be made to the Federal Rules before they were adopted in New Mexico.[64] The committee's recommendations were sent in a pamphlet to all members of the New Mexico Bar for feedback, before being adopted by the New Mexico Supreme Court.[65] The court adopted the vast majority of the Federal Rules with minimal changes. This included Federal Rule 56 which, as had been recommended by the advisory committee, was adopted wholesale.[66] The court simply transplanted the federal summary judgment rule into the New Mexico Rules of Civil Procedure, with the expectation that New Mexico would adopt federal law to help

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61. *See* Burbank, *supra* note 58, at 1086–87, 1089 n.324. It was also understood that, at least to some extent, appellate courts had an inherent "power of superintending control" or "supervisory control" to provide procedural rules for trial courts. *See Roy*, 40 N.M. at 422, 646 P.2d at 662 (discussing rules promulgated by New Mexico's Territorial Supreme Court in holding that Chapter 84 of the 1933 Session Laws allowing the supreme court to promulgate such rules was constitutional).

62. S.B. 130, (N.M. 1933), Laws 1933, ch. 84, § 1, codified at NMSA § 34-501, Comp St. 1929 (1938 Supp.).

63. *See* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C.L. REV. 691, 729 (1998) (describing enactment of Federal Rules of Civil Procedure).

64. *See* Report of Committee to Supreme Court: Proposed Rules of Civil Procedure for District Courts of New Mexico, introductory note (Sept. 15, 1941); Rules of Civil Procedure for the District Courts, *per curiam* note (1942). The members of the advisory committee were E.R. Wright, M.C. Mechem, Quincy D. Adams, Carl H. Gilbert, and J.O. Seth.

65. *See* Report of Committee to Supreme Court: Proposed Rules of Civil Procedure for District Courts of New Mexico (Sept. 15, 1941).

66. *See id.*, Rule 56; NMSA § 19-101(56) (a)–(g), 1941 Comp. (1953 Supp.), compiler's notes (stating that each "paragraph of the rule is derived from Rule 56. . .of the Federal Rules of Civil Procedure, and is identical therewith").

interpret its new Rules, including the federal case law applying summary judgment.[67]

Mirroring the federal rule,[68] New Mexico's Rule 56 was transsubstantive, allowing for summary judgment without regard to the type of civil action, including whether the action was one in law or in equity.[69] The rule allowed either a claimant or a defending party to move for summary judgment in its favor, on all or any part of a claim.[70] Notably, the rule already incorporated our contemporary standard for granting summary judgment. The original Rule 56(c) provided that summary judgment "shall be rendered forthwith if. . .there is no genuine issue as to any material fact and. . .the moving party is entitled to a judgment as a matter of law."[71]

New Mexico's summary judgment rule provided that judgment could be made on the basis of a number of different evidentiary sources, including pleadings, depositions, and admissions.[72] However, the language of the rule reveals that its drafters believed that the primary basis for summary judgment motions would be the parties' affidavits. Throughout the rule there are many references to affidavits,[73] including three subsections entirely devoted to them.[74] This emphasis on the use of affidavits is a (still somewhat visible[75]) remnant of the precursor to summary judgment in which parties in collection actions could obtain expedited adjudications on the basis of competing affidavits.[76]

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67. *See* NMSA § 19-101(56), 1941 Comp. (1953 Supp.) (containing many annotations of cases interpreting Federal Rule of Civil Procedure 56).

68. The notes of the 1937 Advisory Committee on the Federal Rules of Civil Procedure explain that Rule 56 intended to follow the successful examples of summary judgment procedures in England and various states that had broadened the use of summary judgment from narrow categories of cases to a generally applicable procedure. FED. R. CIV. P. 56, 1937 notes of advisory committee on rules.

69. *See* 10A WRIGHT, MILLER, & KANE, *supra* note 44, § 2711, at n.11 (discussing scope of identically-worded federal rule).

70. NMSA § 19-101(56)(a), (b), 1941 Comp. (1953 Supp.).

71. *Id.*, § 19-101(56)(c).

72. *See id.*

73. *See, e.g., id.*, § 19-101(56)(a) (may move "with or without supporting affidavits"); 56(b) (same); 56(c) (nonmoving party "prior to day of the hearing may serve opposing affidavits").

74. *Id.*, § 19-101(56)(e) (affidavits shall set forth facts as would be admissible in evidence); 56(f) (where affidavits are unavailable, court may order continuance to allow party to obtain affidavit); 56(g) (affidavit presented in bad faith or solely for purpose of delay justifies sanctions).

75. *See* NMSA 1986, § 1-056 (1989) (still containing most of this language regarding affidavits).

76. *See supra* Part I(C).

Altogether, the basic elements of New Mexico's summary judgment rule, as it exists today, were present in the 1941 rule. Either party could move for summary judgment in any type of civil action. A party could move for partial summary judgment on a particular claim, or part of a claim. Parties could submit any admissible evidence in the record for or against a summary judgment motion. Then, the court would decide if a genuine issue of material fact existed and if a party were entitled to judgment as a matter of law.

While the structure and concept of summary judgment was much the same in 1941 as it is today, judicial attitudes about the purpose and value of summary judgment were once more optimistic. New Mexico courts hoped that summary judgment would allow cases to be decided more quickly and prevent parties from using baseless objections and formalities to draw out litigation where they had no valid case or defense. Rule 56 was one in a set of Rules of Civil Procedure that had been promulgated under Section 34-501, a statute that allowed for rules to be enacted to simplify and expedite litigation.[77] Summary judgment was part of a larger project to expedite and simplify civil litigation.

B. Early New Mexico Cases Interpreting Rule of Civil Procedure 56

Benson v. Export Equipment Corp.[78] is the first published New Mexico case addressing summary judgment.[79] In *Benson*, the New Mexico Su-

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77. *See supra* text accompanying note 62. Although New Mexico's original Rules of Civil Procedure omitted the now-familiar language in New Mexico Rule of Civil Procedure 1 that the Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action," this language was likely omitted because it was deemed redundant of that already in Section 34-501. *See* Fort v. Neal, 79 N.M. 479, 482, 444 P.2d 990, 993 (1968) ("We attach no significance to the fact these words [in Federal Rule of Civil Procedure 1] were omitted when we adopted the rules. Section 21-3-1, NMSA 1953, provides for promulgation by the supreme court of rules to regulate pleading, practice and procedure for the purpose, among others, of 'promoting the speedy determination of litigation upon its merits.' This we interpret as indicating the end to be sought by our rules to be no different from that of the federal rules." (internal citations and quotation marks omitted)). Indeed, in the first published New Mexico case addressing summary judgment, the court quoted a federal case for the proposition that Rule 1 of the Federal Rules of Civil Procedure require "that the Rules be construed to secure the just, speedy, and inexpensive determination of every action." Benson v. Export Equip. Corp., 49 N.M. 356, 361, 164 P.2d 380, 383 (1945) (quoting Gallup v. Caldwell, 120 F.2d 90, 93 (3d Cir. 1941)) (internal quotation marks omitted).

78. 49 N.M. 356, 164 P.2d 380 (1945).

79. *Benson* was a case involving a motion to dismiss that relied upon facts outside the face of the complaint. *Id.* at 358, 164 P.2d at 381. However, the court concluded that it did not matter whether the motion was considered a motion to dismiss or a

preme Court affirmed that the purpose of the New Mexico Rules of Civil Procedure was to simplify and expedite civil litigation. The court explained:

> The prime purpose of the new rules is to eliminate delays resulting from reliance upon pure technicalities and generally to streamline and simplify procedure so that the merits of the case might be reached and the issues determined without lengthy or costly preparation for a trial on the merits, which trial might never be necessary, and without the many irritating delays which accompanied the old practice.[80]

The court had a clear idea as to the purpose of the New Mexico Rules of Civil Procedure, and of summary judgment in particular. The rules were intended to simplify New Mexico's previous code pleading system, and allow the merits of a case to be reached more quickly, especially when parties were delaying the resolution of the case with procedural technicalities.[81] On the other hand, nothing in the early case law interpreting summary judgment suggests that the procedure was intended as a means of avoiding "incorrect" decisions by juries.[82]

Because the language of New Mexico's Rule 56 was identical to the federal rule, the New Mexico Supreme Court relied upon federal cases to flesh out the mechanics and standards for summary judgment.[83] Indeed, the court, recognizing the substantial change effected by the Rules of Civil Procedure, chose to rely upon federal cases rather than its own cases that predated the adoption of the New Mexico Rules.[84] During the first years that New Mexico had a general summary judgment rule, the courts viewed it as identical to the federal rule—the rules were not only worded identically, but also were interpreted interchangeably, with New Mexico

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motion for summary judgment, because affidavits could be considered under either motion. *Id.* at 361, 164 P.2d at 383.

80. *Id.* at 359, 164 P.2d at 382.

81. *See* Agnew v. Libby, 53 N.M. 56, 58, 201 P.2d 775, 776 (1949) ("The obvious purpose to be served by the rule is to hasten the administration of justice and to expedite litigation by avoiding needless trials and to enable one promptly to obtain a judgment by preventing the interposition of frivolous defenses for purpose of delay.").

82. Perhaps summary judgment was not seen as necessary for this purpose because other tools existed to prevent or correct jury mistakes, including directed verdict and appeal.

83. *See, e.g.*, *Benson*, 49 N.M. at 359–62, 164 P.2d at 382–83 (quoting at length and relying upon several federal cases). *See also* NMSA § 19-101(56), 1941 Comp. (1953 Supp.) (collecting federal cases in annotation).

84. *See Benson*, 49 N.M. at 362, 164 P.2d at 383.

courts relying upon interpretations of Federal Rule 56 in deciding summary judgment.[85]

Relying on these federal cases and the language of New Mexico Rule of Civil Procedure 56 itself, the New Mexico Supreme Court established a standard for summary judgment that is remarkably close to the basic standard for summary judgment that exists today.[86] The court explained,

> In the consideration of a motion for summary judgment it is the function of the trial court to determine whether there is a genuine issue of material fact for trial. All doubt as to the existence of such an issue must be resolved against the moving party; and, unless the court is convinced from a consideration of the pleadings, depositions, admissions on file, and affidavits, that such party is entitled to judgment as a matter of law it should be denied.[87]

The inquiry as to whether a genuine issue of material fact exists was taken directly from the language of Rule 56.[88] The interpretive instruction that all doubt as to the existence of an issue of material fact be resolved against the moving party—which would later be altered to require only

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85. *See, e.g., id.*, at 359–62, 164 P.2d at 382–83; Ades v. Supreme Lodge Order of Ahepa, 51 N.M. 164, 170, 181 P.2d 161, 165 (1947); *Agnew*, 53 N.M. at 57, 201 P.2d at 776; McLain v. Heley, 53 N.M. 327, 328–29, 207 P.2d 1013, 1014 (1949). These cases also, to a lesser extent, cite to state court cases (or federal cases applying state law) from states that had adopted summary judgment rules before the federal rule was adopted.

86. Compare the following standard with, for example, the summary judgment standard recently expressed by the New Mexico Supreme Court in *Romero v. Philip Morris*:

> "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Where reasonable minds will not differ as to an issue of material fact, the court may properly grant summary judgment. All reasonable inferences are construed in favor of the non-moving party."

2010-NMSC-035, ¶ 7, 242 P.3d 280, 287 (quoting Montgomery v. Lomos Altos, Inc., 2007-NMSC-002, ¶ 16, 150 P.3d 971, 977).

87. *McLain*, 53 N.M. at 328; 207 P.2d at 1014 (citing Rule of Civil Procedure 19-101(56), *Agnew*, 53 N.M. 56, 201 P.2d 775, and four federal cases); *see also Agnew*, 53 N.M. at 57, 201 P.2d at 776 (citing eight federal cases to hold that summary judgment is only proper where "[a]n examination of the pleadings, affidavits and deposition[s] shows that there is [no] genuine issue as to a material fact" with "the benefit of reasonable inferences to be drawn therefrom. . .given to the [non-movant], and any doubt existing as to the right of summary judgment. . .resolved against the moving parties.").

88. NMSA § 19-101(56)(c), 1941 Comp. (1953 Supp.).

that all *reasonable* doubt be resolved against the moving party[89]—originated in federal cases relied upon by the New Mexico Supreme Court.[90] Finally, the requirement that reasonable inferences from the evidence submitted to the court be made in the nonmovant's favor[91] also appears to have been taken from federal summary judgment law.[92] Just as New Mexico's Rule 56 was copied from the federal rule,[93] in crafting its standards for the new summary judgment rule, the New Mexico Supreme Court leaned heavily on the standards that had already been applied by federal courts.

Because the first New Mexico appellate cases involving summary judgment were relatively straightforward cases,[94] the supreme court did

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89. *See infra* Part III(C)(2).

90. Clair v. Sears Roebuck & Co., 34 F. Supp. 559, 559 (W.D. Mo. 1940) (cited in *Agnew*, 53 N.M. at 57, 201 P.2d at 776); Toebelman v. Mo.-Kan. Pipe Line Co., 130 F.2d 1016, 1018 (3d Cir. 1942) (cited in *Agnew*, 53 N.M. at 57, 201 P.2d at 776, and in *McLain*, 53 N.M. at 329, 207 P.2d at 1014). *See also McLain*, 53 N.M. at 329, 207 P.2d at 1014 (quoting Peckham v. Ronrico Corp., 7 F.R.D. 324, 328 (D.D.C. 1947) (right to trial where *slightest* doubt as to the facts)).

91. *See supra* note 87 (quoting *Agnew*, 53 N.M. at 57, 201 P.2d at 776).

92. Ramsouer v. Midland Valley R.R. Co., 135 F.2d 101, 106 (8th Cir. 1943) (cited in *Agnew*, 53 N.M. at 57, 201 P.2d at 776).

93. In 1949, the New Mexico Supreme Court amended Rule 56. The changes were reasonably minor and mirrored, in large part, changes made to Federal Rule of Civil Procedure 56. The amendments tried to resolve practical problems that had arisen in the first years of Federal Rule 56. One amendment allowed a plaintiff to bring a motion for summary judgment within thirty days of a defendant's motion for summary judgment, rather than having to wait until after the defendant filed its answer. NMSA 1953, § 19-101(56)(a), and notes thereto. This prevented a plaintiff from having to respond to a summary judgment motion while being barred from bringing her own motion. *See* 10A WRIGHT, MILLER & KANE, *supra* note 44, § 2711, at n.12. New Mexico's rule required a plaintiff to wait thirty days, as opposed to twenty days in the federal rules, a change that was recommended in several other instances when New Mexico first adopted the Federal Rules of Civil Procedure. *See generally* Report of Committee to Supreme Court: Proposed Rules of Civil Procedure for District Courts of New Mexico (Sept. 15, 1941) (noting in several places that federal rules allowing for twenty days should be amended to allow thirty days in New Mexico rules). The second amendment to Rule 56 in 1949 was the addition of a sentence in Rule 56(c) that made clear that parties could bring motions for summary judgment on the issue of liability, even if the amount of damages remained in dispute. NMSA 1953, § 19-101(56)(c). This amendment was identical to an amendment to the rule's federal counterpart the year before, which was implemented to cure confusion about whether the rule allowed summary judgment motions when a dispute as to damages remained. *See id.*, notes thereto; 10A WRIGHT, MILLER & KANE, *supra* note 44, §2711, at nn.13–14.

94. For a discussion of "hard" and "easy" cases, see Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975).

not confront some of the more intractable debates about summary judgment that persist to this day. In particular, the New Mexico Supreme Court did not address the crucial questions of whether disputed facts were "material" or a dispute as to facts was "genuine." For example, in *Benson*, the parties agreed as to the material facts, and the only question was a question of law: whether the Workmen's Compensation Act applied.[95] *Ades v. Supreme Lodge Order of Ahepa* was a somewhat closer case. In *Ades*, the court affirmed summary judgment on the basis that the statute of frauds' requirement that a writing identify the parties to a contract was not met where one of the parties' names appeared in a letter between the parties, but only in a tangential reference.[96] *Agnew v. Libby* unsurprisingly reversed summary judgment where the parties had submitted conflicting affidavits about what had happened on the day of a fire.[97] Finally, in *McCain v. Heley*, the court reversed summary judgment for the defendant in a negligence action, where the defendant admitted to the violation of a statute that constituted negligence per se.[98] In none of these cases, except perhaps *Ades*, did the supreme court confront the difficult questions of whether a disputed question of fact is "material," or whether a dispute as to a material fact is "genuine." The development of summary judgment law beyond its basic tenets would have to wait.

In the first years of New Mexico's summary judgment rule, the rule was seen as a straightforward tool to improve the courts' efficiency. It would be used to resolve cases where the parties agreed to the facts or the court faced a pure question of law. Where the parties genuinely dis-

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95. Benson v. Export Equip. Corp., 49 N.M. 356, 362–63, 164 P.2d 380, 384 (1945). *Hughes v. City of Carlsbad* was a similar case in which summary judgment turned on a pure question of law. In a dispute regarding Carlsbad's annexation of land, the parties had both moved for summary judgment and the court affirmed the defendant's motion, after determining that the parties agreed to the material facts. 53 N.M. 150, 203 P.2d 95 (1949). The opinion in Hughes is somewhat confusing, however, in that the trial court apparently waited until after trial before granting defendant's summary judgment motion. *Id.* at 153, 203 P.2d at 997. Also confusing is the court's statement that it would not reverse the decision below unless "so far as issuable facts are concerned. . .we can say as a matter of law" that Carlsbad's annexation was improper. *Id.* at 154–55, 203 P.2d at 998. Although the court suggested that its ruling turned on "issuable facts," it never confronted any dispute as to such facts; it was deciding a question of law with the facts agreed to by the parties.

96. Ades v. Supreme Lodge Order of Ahepa, 51 N.M. 164, 171–72, 181 P.2d 161, 165–66 (1947). Bruskas, the party in question, was not mentioned in the telegram making an offer or the letter in response. He was only mentioned in a later letter as a person to whom the seller had told that he was sending a representative with the power to enter into a contract with other parties.

97. *Agnew*, 53 N.M. at 57, 201 P.2d at 776.

98. McLain v. Heley, 53 N.M. 327, 332–34, 207 P.2d 1013, 1016–17 (1949).

puted the material facts in a case—and could present evidence of their version of the facts—summary judgment was improper. The gray area in between, of marginal cases in which a dispute might not be material or genuine, remained largely uncharted territory.[99] At the same time, the summary judgment rule and cases interpreting it hewed to the federal rule and federal summary judgment law. If summary judgment were to live up to its promise as a vehicle to expedite litigation, simplify disputes, and clear the courts' dockets, it would have to find a foothold outside the easiest cases.

III. CREATING A TRADITION: NEW MEXICO'S DEVELOPMENT OF SUMMARY JUDGMENT LAW BEFORE THE *CELOTEX* TRILOGY

After its first decade in New Mexico, summary judgment grew in prominence with more and more summary judgments reaching the New Mexico Supreme Court.[100] In its handling of these cases, the supreme court (and later, the court of appeals) developed a doctrine for deciding motions for summary judgment. However, the standards and principles articulated by New Mexico's appellate courts have often been vague and in tension with one another. This lack of clarity is the result of the courts' attempt to accommodate the twin goals at stake in summary judgments:

99. There were few appellate cases even mentioning summary judgment in the rule's first ten years. From 1941 to 1951, twenty one published cases mention summary judgment, and very few of these cases address the procedure in any detail.

100. Cases granting summary judgment at the trial court level are overrepresented and cases denying summary judgment at the trial court level are underrepresented in appellate opinions, because generally, only orders granting summary judgment are appealable final orders. One must be careful not to extrapolate from the proportion of cases granting summary judgment on appeal that a certain percentage of motions for summary judgment were granted by trial courts. However, despite the skewed sample of summary judgment motions that are appealed, it is possible to draw useful conclusions from appellate opinions regarding summary judgment. These opinions express the standards that lower courts are to apply in deciding summary judgment motions. By reviewing appellate opinions, one can discern the appellate courts' directions as to which types of cases were suitable for summary judgment and which were not. Presumably, most of the time, trial courts followed these directions in deciding motions for summary judgment. Therefore, even though appellate opinions overrepresent the number of cases in which summary judgment is granted, they are still a useful tool in determining how motions for summary judgment were handled by trial courts in New Mexico.

speedy and efficient justice that protects parties from having to litigate meritless claims and defenses;[101] and parties' right to a civil jury trial.[102]

Over time, New Mexico courts grew more willing to grant summary judgment, particularly in cases where the parties disputed some facts. Two developments in particular left courts less hesitant to issue summary judgment: a 1969 amendment to Rule of Civil Procedure 56 establishing a burden-shifting mechanism for summary judgment motions;[103] and the supreme court's 1972 decision in *Goodman v. Brock* requiring a reasonable doubt, rather than the slightest doubt, of material fact to defeat summary judgment.[104] At the same time, courts retained their rhetoric emphasizing that summary judgment was to be granted with caution and reined in trial courts when they went too far in deciding issues that should be left to a jury. A pragmatic, case-by-case handling of motions for summary judgment resulted, in which courts tried to balance the interest in quickly disposing of meritless claims and defenses with the right to a jury trial. New Mexico courts viewed summary judgment as a drastic remedy with all issues of fact resolved in the nonmovant's favor; but disputes of fact were required to be material and doubts as to material facts to be reasonable. It is especially important to understand this balancing act—the state of affairs before the *Celotex* trilogy of cases on summary judgment in 1986—because the New Mexico Supreme Court has recently suggested that this "traditional" summary judgment law remains the law today.[105]

A. Crafting a Summary Judgment Doctrine

During the 1950s and 1960s, the New Mexico Supreme Court handled more appeals involving summary judgment than it had before. In these cases, the court affirmed the importance and purpose of summary judgment.[106] Rule 56 was described as enabling " 'trial courts to bring litigation to an end at an early stage when it clearly appeared that one of the parties was entitled to a judgment in the case as made out by the plead-

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101. *See supra* notes 62, 79 (purpose of New Mexico Rules of Civil Procedure was to promote speedy determination of litigation on the merits).

102. *See* N.M. CONST., art. II, § 12 ("The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate.").

103. NMSA 1953, § 21-1-1(56)(e) (1969 Supp.), and annotator's notes thereto.

104. 83 N.M. 789, 498 P.2d 676 (1972).

105. *See infra* text accompanying notes 286–288.

106. *See, e.g.*, Pederson v. Lothman, 63 N.M. 364, 367, 320 P.2d 378, 379 (1958) ("Summary judgment provides a method whereby it is possible to determine whether a genuine claim for relief or defense thereof exists and whether there is a genuine issue of fact warranting the submission of the case to the jury. In a case where the facts are not in dispute, but only the legal effect of the facts is presented for determination, summary judgment may be properly granted." (internal citations omitted)).

ings and the admissions of the parties.'"[107] In articulating the purpose of summary judgment as quickly disposing of claims and defenses that are not meritorious, the court relied upon federal cases and treatises and cases from other states.[108]

The supreme court also established standards for summary judgment motions that helped to enable and promote summary judgment as a tool for resolving suitable cases before trial. It encouraged courts to conduct an active, searching inquiry of the parties' claims and defenses beyond the pleadings.[109] This investigative role for courts deciding summary judgment motions was viewed as necessary, because motions to dismiss—which had previously been used to resolve unsustainable claims—had lost much of their effectiveness with the advent of notice pleading.[110] The court also held that a party responding to a motion for summary judgment could not defeat the motion by simply contending that a question of fact existed, but was required to come forward with affirmative evidence rebutting the movant's showing that there was no genuine issue of material fact.[111] Most fundamentally, the supreme court encouraged courts to

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107. Buffington v. Continental Cas. Co., 69 N.M. 365, 370, 367 P.2d 539, 542 (1961) (quoting Kasco Mills, Inc. v. Ferebee, 197 Va. 589, 593, 90 S.E.2d 866, 870 (1956)). *See also* Aktiengesellschaft v. Lawrence Walker Co., 60 N.M. 154, 162, 288 P.2d 691, 696 (1955); S. Union Gas Co. v. Briner Rust Proofing Co., 65 N.M. 32, 40, 331 P.2d 531, 536 (1958); Baca v. Britt, 73 N.M. 1, 4, 385 P.2d 61, 63 (1963).

108. *See, e.g.*, Aktiengesellschaft, 60 N.M. at 162, 288 P.2d at 696 (1955) (quoting MOORE'S FEDERAL PRACTICE, at length, for its description of the purpose of summary judgment); *Buffington*, 69 N.M. at 370, 367 P.2d at 542 (quoting a case from the Supreme Court of Appeals of Virginia in stating the purpose of summary judgment).

109. *See Pederson*, 63 N.M. at 369, 320 P.2d at 381 ("The court goes beyond the allegations of the complaint and determines whether a claim can in reality be supported on the grounds alleged, and whether a controversy as to an issue of fact exists as to the statements of the complaint."); Morris v. Miller & Smith Mfg. Co., 69 N.M. 238, 243, 365 P.2d 664, 668 (1961) (stating that in considering a motion for summary judgment, the court goes beyond pleadings).

110. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U.L. REV. 982, 1018–19 (2003) (discussing how federal summary judgment rule was enacted at same time as notice pleading to check some of the ambiguous, broad, and frivolous complaints permitted by notice pleading); Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (describing that with notice pleading summary judgment replaced motions to dismiss and motions to strike as the principal tool by which factually insufficient claims or defenses could be isolated and prevented from going to trial).

111. *Aktiengesellschaft*, 60 N.M. at 163–64, 288 P.2d at 697 ("When on the basis of established facts, the plaintiff is entitled to summary judgment as a matter of law, the defendant contending and arguing that there is a genuine issue of material fact cannot and will not make it so."). Although this was the law in most courts in the United

grant summary judgment by emphasizing the language of the summary judgment rule itself: that summary judgment shall be granted if "there is no *genuine* issue as to any *material* fact."[112] The court began to distinguish between any factual dispute and facts as to which "reasonable minds" could differ; only the latter created a genuine issue that could defeat summary judgment.[113] Likewise, a dispute as to any fact was not enough to defeat summary judgment; only if that fact were material should summary judgment be denied.[114]

At the same time as the supreme court was employing standards that made summary judgment available in cases other than those involving a pure question of law or where the parties agreed to the facts, it was also using strong rhetoric cautioning trial courts from granting summary judgment and touting the importance of jury trials. Summary judgment was first called "drastic" in a 1955 case,[115] a description that is still used in the most recent summary judgment cases.[116] As well, the court warned that summary judgment should not be viewed as a substitute for trial or be used to resolve any disputed questions of fact.[117]

In addition to this amorphous rhetoric discouraging courts from granting summary judgment, the supreme court established more concrete standards making it difficult for parties to obtain summary judgment. The court held that summary judgment should be denied where

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States at the time, the Third Circuit had held that a motion for summary judgment could be defeated by the nonmovant's plain assertions that a question of material fact existed. This line of cases from the Third Circuit resulted in a 1963 amendment to Federal Rule of Civil Procedure 56, clarifying that a party could not rest on its pleadings in responding to a motion for summary judgment. *See infra* text accompanying notes 143–144.

112. NMSA 1953, § 19-101(56)(C) (emphasis added).

113. *See* Giese v. Mountain States Tel. & Tel. Co., 71 N.M. 70, 74, 376 P.2d 24, 27 (1962) ("While ordinarily a question of negligence is one for the jury, it becomes a matter of law to be decided summarily when reasonable minds cannot differ as to facts and inferences to be drawn therefrom. If established facts do not give rise to a permissible inference of actionable negligence, summary judgment is appropriate.").

114. *See* Gallegos v. Wallace, 74 N.M. 760, 765, 398 P.2d 982, 986 (1964) ("We do not mean to say that every inconsistency in affidavits, statements or depositions of parties or witnesses prevents a determination of these issues upon the motion.").

115. Zengerle v. Commonwealth Ins. Co., 60 N.M. 379, 384, 291 P.2d 1099, 1102 (1955) ("The summary judgment statute is drastic and its purpose is not to substitute for existing methods in the trial of issues of fact.").

116. *See, e.g.*, Romero v. Philip Morris, Inc., 2010-NMSC-035, ¶ 8, 242 P.3d 280 (quoting Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 756, 568 P.2d 589, 592 (1977)).

117. *See, e.g.*, Michelson v. House, 54 N.M. 197, 202, 218 P.2d 861, 863 (1950).

there is the *slightest* doubt as to the facts,[118] a standard in some conflict with cases holding that summary judgment only be denied where *reasonable* minds differ as to the facts.[119] Courts were required to interpret facts in the light most favorable to the nonmovant,[120] presumably with the limitation that inferences from facts be reasonable.[121] Therefore, the court explained that even where the parties agreed as to the facts at issue, summary judgment should be denied if different inferences could be drawn from the undisputed facts.[122]

As well, in *Harp v. Gourley*, the supreme court clarified that even if the parties stipulated that there were no issues of fact, a court had a duty to deny summary judgment where the court itself determined that there were genuine issues of material fact.[123] This holding—that a court can *sua sponte* determine that factual issues exist necessitating a jury trial—reflects the full scope of the right to a jury trial at stake in summary judgment determinations. Not only do litigants have a constitutional right to a jury trial, but even where the parties agree that a case should be decided on summary judgment, the court should deny summary judgment if it determines that there are factual questions that must be resolved at trial. *Harp* suggests that the court felt that the public and the judicial system had an independent interest in a trial on the merits, regardless of the parties' interests, that should be considered in deciding summary judgment motions.

All told, both the rhetoric and standards regarding summary judgment during the 1950s and 1960s were mixed and conflicting. The supreme court vacillated between encouraging the quick resolution of seemingly meritless claims and defenses and protecting parties' rights to a

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118. *Id.* at 202, 218 P.2d at 863; Ginn v. MacAluso, 62 N.M. 375, 378, 310 P.2d 1034, 1036 (1957); *Gallegos*, 74 N.M. at 765, 398 P.2d at 986.

119. *See supra* note 113.

120. *Ginn*, 62 N.M at 378, 310 P.2d at 1036 ("In resolving this question we must view the testimony in the most favorable aspect it will bear in support of the plaintiff's claim of right to go to the jury. One contesting the right bears a heavy burden.").

121. *See supra* note 113. *See also* Coca v. Arceo, 71 N.M. 186, 193, 376 P.2d 970, 975 (1962); Baca v. Britt, 73 N.M. 1, 4, 385 P.2d 61, 63 (1963); Shipman v. MAACO Corp., 74 N.M. 174, 175–76, 392 P.2d 9, 10 (1964).

122. Hewitt-Robins, Inc. v. Lea Cnty. Sand & Gravel, Inc., 70 N.M. 144, 148, 371 P.2d 795, 797 (1962) ("[E]ven in a case where the basic facts are undisputed, it is frequently possible that equally logical, but conflicting, inferences may be drawn from these facts which would preclude the granting of summary judgment.").

123. Harp v. Gourley, 68 N.M. 162, 172, 359 P.2d 942, 949 (1961). *See also* Giese v. Mountain States Tel. & Tel. Co., 71 N.M. 70, 72, 376 P.2d 24, 25 (1962). It is unclear whether this is still good law. *See* N.M. Right to Choose/NARAL v. Johnson, 1999-NMSC-005, ¶ 24, 975 P.2d 841 (filed 1998) (where parties stipulate to facts, no question of fact and summary judgment is proper).

jury trial, in an effort to reconcile two ultimately incompatible goals. To help make sense of summary judgment, the court compared it to other procedures. It compared summary judgment to a directed verdict, describing that in both motions for summary judgment and a directed verdict the court is to make all reasonable inferences in favor of the nonmovant and that the motions place similar burdens of persuasion on the movant.[124] The court also compared summary judgment to a motion for a new trial, explaining that summary judgment should be granted where, if a jury were to find for the nonmovant at trial, the court would have to grant a motion for a new trial.[125] Still, comparisons between summary judgment and other procedures did not afford a clear, universal guideline that informed lower courts whether summary judgment should be granted in any particular case.

B. Applying Summary Judgment in Particular Types of Cases

Whether a party could obtain summary judgment often turned on the type of case. While in some types of cases summary judgment was very difficult to obtain, in other types of cases it was relatively freely granted. The supreme court declared that certain categories of cases were ill-suited for summary judgment. The most prominent of these was negligence actions. As the court stated, "It is the general proposition that issues of negligence, including such related issues as contributory negligence are ordinarily not susceptible of summary adjudication. . .."[126] As well, breach of contract cases were deemed incompatible with summary judgment, except where the case turned on the language of a writ-

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124. *See Ginn*, 62 N.M. at 378, 310 P.2d at 1036. However, the court was cautious in this comparison. The fact that a judge *thinks* he might have to grant a directed verdict at trial is not enough to grant summary judgment. *Coca*, 71 N.M. at 194, 376 P.2d at 976 ("Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other. . .he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented." (quoting Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir. 1951))).

125. S. Union Gas Co. v. Briner Rust Proofing Co., 65 N.M. 32, 41, 331 P.2d 531, 537 (1958).

126. *Coca*, 71 N.M. at 193, 376 P.2d at 976 (alterations omitted) (quoting 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.17 (2d ed. 1953)). The court did admit that some wiggle room exists; summary judgment may be proper where the party seeking summary judgment "could in no sense have been determined responsible," or where the plaintiff admitted that the defendant was not negligent or admitted that the accident happened in a manner as to show a lack of negligence. *Id.* at 193–94, 376 P.2d at 976.

ten contract.[127] Issues such as express and implied warranties[128] or contractual defenses like mutual mistake[129] were also left to a jury.

In other types of cases, summary judgment was much more common and not treated as the drastic remedy it was sometimes labeled. Courts were willing to grant summary judgment in breach of contract cases where the case could be resolved by looking at a written contract[130] or where the statute of frauds barred a party's claim.[131] Courts also regularly granted summary judgment in collection actions,[132] perhaps a legacy of New Mexico's pre-summary judgment statute allowing for expedited adjudications in such suits.[133] While summary judgment was not available in

127. *See infra* text accompanying notes 130–131.

128. *See* Hewitt-Robins, Inc. v. Lea Cnty. Sand & Gravel, Inc., 70 N.M. 144, 148, 371 P.2d 795, 798 (1962) ("It is difficult, if not impossible, to properly apply the various rules with respect to express or implied warranties in a case such as this, without a complete trial.").

129. *See* Zengerle v. Commonwealth Ins. Co., 60 N.M. 379, 384, 291 P.2d 1099, 1102 (1955) (despite both parties moving for summary judgment, reversing summary judgment for plaintiff in action seeking coverage for fire from insurer, because factual question as to a mutual mistake existed regarding the parties' contract).

130. *See, e.g.*, Ginn v. MacAluso, 62 N.M. 375, 378, 310 P.2d 1034, 1036 (1957) (affirming summary judgment for defendant, refusing to bind her to contract where her name did not appear on contract, despite fact that she signed husband's name to contract and plaintiff argued she was signing for her and her husband); Hamilton v. Hughes, 64 N.M. 1, 322 P.2d 335 (1958) (affirming summary judgment for defendant where written contract attached to motion for summary judgment did not support plaintiff's claims).

131. *See, e.g.*, Pederson v. Lothman, 63 N.M. 364, 320 P.2d 378 (1958) (affirming summary judgment for defendant on basis of statute of frauds where plaintiff's claimed interest in mineral claims based on oral contract and admitted facts did not support the grubstake contract exception to statute of frauds); Hubbard v. Mathis, 72 N.M. 270, 383 P.2d 240 (1963) (affirming summary judgment where alleged oral contract fell within statute of frauds and court held that equitable exceptions did not apply as a matter of law).

132. *See, e.g.*, Aktiengesellschaft v. Lawrence Walker Co., 60 N.M. 154, 165–66, 288 P.2d 691, 698–99 (affirming summary judgment for plaintiff in collection action where plain language of the contract supported plaintiff's contentions); Gen. Acceptance Corp. of Roswell v. Hollis, 75 N.M. 553, 408 P.2d 53 (1965) (affirming summary judgment for plaintiff where defendants admitted that they executed promissory note and failed to pay money owed). In *Hollis*, the court affirmed summary judgment for plaintiff even though defendants raised an affirmative defense and counterclaim for fraud: "While recognizing that ordinarily claims of fraud present an issue of fact which cannot be determined on motion for summary judgment, on the face of the claim it is clear that the facts could not support a conclusion of fraud or of reliance." *Id.* at 555, 408 P.2d at 55 (citation omitted).

133. *See supra* Part I.C.

most negligence actions,[134] it was granted in negligence cases that could be resolved based on the scope of the defendant's duty and where the scope of duty was a question of law.[135] Cases where the defendant was immune from suit were another category of cases in which summary judgment was routinely granted.[136] Finally, although not a substantive area of law, summary judgment was more freely granted in cases where the movant could point to undisputed facts based on the nonmovant's deposition testimony, admissions, or pleadings.[137] Summary judgment was decided on a case-by-case basis, but depending on the type of case it was much more or less likely to be granted.

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134. *See supra* note 126.

135. *See, e.g.*, S. Union Gas Co. v. Briner Rust Proofing Co., 65 N.M. 32, 331 P.2d 531 (1958) (affirming summary judgment for third-party defendant where it had no duty to inspect gas pipe that exploded); Bogart v. Hester, 66 N.M. 311, 347 P.2d 327 (1959) (in a questionable decision over a dissent, affirming summary judgment for defendant on the basis that plaintiff was a volunteer on company property to whom defendant only owed a duty not to act wantonly or willfully, and that the plaintiff assumed the risk of any injury); Baca v. Britt, 73 N.M. 1, 385 P.2d 61 (1963) (affirming summary judgment for defendant on the basis that defendant had no duty to repair a broken traffic light); Perry v. Color Tile of N.M., 81 N.M. 143, 464 P.2d 562 (Ct. App. 1970) (affirming summary judgment for defendant because defendant had no duty to warn or protect plaintiff from tripping over display in store, which was an open and obvious danger).

136. *See, e.g.*, Valdez v. City of Las Vegas, 68 N.M. 304, 361 P.2d 613 (1961) (affirming summary judgment on the basis of statutory immunity for city where employee did not act under authority or direction of city, and not considering whether plaintiff could amend to allege such); Mahona-Jojanto, Inc. v. Bank of N.M., 79 N.M. 293, 296, 442 P.2d 783, 786 (1968) (affirming summary judgment for defendant in libel case on the basis of qualified immunity, where the "record indicates no basis upon which reasonable men can differ on the question of" whether the privilege was abused); *see also* Marchiondo v. N.M. State Tribune Co., 98 N.M. 282, 283–84, 648 P.2d 321, 322–23 (Ct. App. 1981) (summary procedures especially important in defamation cases given First Amendment interests).

137. *See, e.g.*, Morris v. Miller & Smith Mfg. Co., 69 N.M. 238, 243, 365 P.2d 664, 668 (1961) (affirming summary judgment for defendant when plaintiff was only entitled to 2 percent commission, rather than 4 percent commission, because plaintiff's actions did not meet requirements for 4 percent commission based on plaintiff's own deposition testimony); Giese v. Mountain States Tel. & Tel. Co., 71 N.M. 70, 376 P.2d 24 (1962) (affirming summary judgment for defendant in negligence action where plaintiff tripped over curb because plaintiff's testimony was conflicting as to whether other persons obscured her view of the curb); Elec. Supply Co. v. U.S. Fid. & Guar. Co., 79 N.M. 722, 726, 449 P.2d 324, 328 (1969) (affirming summary judgment for defendant because whether accord and satisfaction existed could be determined based on pleadings and admissions). These cases suggest a common practice of defendants taking the deposition of plaintiffs and then moving for summary judgment based on the plaintiff's deposition testimony. *See, e.g.*, Coca v. Arceo, 71 N.M. 186, 376 P.2d 970 (1962).

C. *Broadening the Availability of Summary Judgment*

1. The 1969 Amendments to New Mexico Rule of Civil Procedure 56

In 1969, the New Mexico Supreme Court amended Rule of Civil Procedure 56 for the first time since 1953.[138] These amendments mirrored changes that had been made to Federal Rule of Civil Procedure 56 six years earlier.[139] Having been inadvertently omitted from the original version of Rule 56,[140] "answers to interrogatories" were added as a type of document upon which parties could rely in supporting and opposing motions for summary judgment.[141] More significantly, New Mexico Rule of Civil Procedure 56(e) was amended to incorporate a burden-shifting procedure for summary judgment motions:

> 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. . .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.[142]

This new part of Rule 56 placed an added burden on parties opposing a motion for summary judgment. Once the movant came forward with a prima facie showing entitling her to summary judgment, the burden shifted to the nonmovant to come forward with affirmative evidence—"specific facts"—showing that there was a genuine issue for trial.[143] This amendment was a response to a line of cases in the Third Circuit holding that summary judgment could be defeated simply by relying upon one's own pleadings.[144] Although this had never been the law in New Mexico,[145] the adoption of the burden-shifting procedure in Rule 56(e) provided a vehicle by which courts could grant summary judgment in cases where the

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138. NMSA 1953, § 21-1-1(56) (1969 Supp.).

139. *Compare id.*, § 21-1-1(56)(c), (e), annotator's notes *with* FED. R. CIV. P. 56, advisory committee notes (1963).

140. FED. R. CIV. P. 56, advisory committee notes (1963).

141. *See* NMSA 1953, § 21-1-1(56)(c), (e) (1969 Supp.) annotator's notes.

142. *Id.*, § 21-1-1(56)(e).

143. *See id.*

144. FED. R. CIV. P. 56, advisory committee notes (1963).

145. *See, e.g.*, S. Union Gas Co. v. Briner Rust Proofing Co., 65 N.M. 32, 40–41, 331 P.2d 531, 536–37 (1958) (granting summary judgment where nonmovant failed to refute prima facie showing by movant, on the basis that a party cannot defeat summary judgment by bare contention that question of fact exists).

nonmovant could not come forward with evidence to support a necessary element of her claim or defense.[146]

2. *Goodman v. Brock*

The supreme court took another step towards making summary judgment easier to obtain in *Goodman v. Brock*. There, the court held that a party opposing summary judgment must show a *reasonable* doubt, rather than the *slightest* doubt, as to a material fact to defeat summary judgment.[147] As with the 1969 amendments to Rule 56, *Goodman* adopted federal summary judgment law as New Mexico law to expand the availability of summary judgment.[148] Until *Goodman*, New Mexico courts had continued to use the "slightest issue of material fact" standard in deciding motions for summary judgment: if the nonmovant could show the slightest issue as to a material fact, summary judgment was improper.[149] In *Goodman*, a negligence and product liability case arising out of a car accident caused by a blown tire, the New Mexico Supreme Court rejected this standard, reasoning that the courts' equation of "'genuine issue as to any material fact' with a 'slight doubt' or the 'slightest doubt'. . .[had] resulted in a disregard of the clear language and a departure from the meaning and purpose of Rule 56(c). . .."[150]

The court's ratcheting up in *Goodman* of the standard to defeat summary judgment came in the wake of a concurring opinion by Judge Lewis Sutin of the New Mexico Court of Appeals that criticized summary judgment and the use of a "reasonable minds" standard in summary judgment in particular.[151] Judge Sutin had described summary judgment as "a

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146. *See, e.g.*, Rekart v. Safeway Stores, Inc., 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970) (affirming summary judgment for defendant after defendant submitted deposition testimony and affidavit refuting plaintiff's theory of causation and plaintiff failed to rebut with anything but an "inference from an inference"); Williams v. Herrera, 83 N.M. 680, 496 P.2d 740 (Ct. App. 1972) (affirming summary judgment for defendant where plaintiff failed to refute prima facie showing based on defendant's affidavit that he had exercised reasonable care in inspecting ladder).

147. Goodman v. Brock, 83 N.M. 789, 792–93, 498 P.2d 676, 679–80 (1972).

148. *See id.* at 792, 498 P.2d at 679 (relying upon a treatise on federal practice and procedure in adopting reasonable doubt standard).

149. *See* Perry v. Color Tile of N.M., 81 N.M. 143, 464 P.2d 562 (Ct. App. 1970); *Rekart*, 81 N.M. at 492, 468 P.2d at 893.

150. *Goodman*, 83 N.M. at 792, 498 P.2d at 679. The "slightest doubt" standard, which had also been used by some federal courts, had been criticized by some civil procedure scholars. *See* Charles E. Clark, *The Summary Judgment*, 36 MINN. L. REV. 567, 576, & nn.31–32 (1952).

151. Tapia v. McKenzie, 83 N.M. 116, 119, 489 P.2d 181, 184 (Ct. App. 1971) (Sutin, J., specially concurring). The "reasonable minds" standard had been espoused by the supreme court in Giese v. Mountain States Tel. & Tel. Co., 71 N.M. 70, 74, 376 P.2d

dangerous instrument in the administration of justice when it denies a party the right to trial based upon factual issues."[152] Offering a questionable history of summary judgment,[153] he claimed that in practice, summary judgment had failed to serve its "obvious purpose" of hastening the administration of justice and expediting litigation by avoiding needless trials, and that trial courts granted summary judgment in cases where they should not to clear their dockets.[154] Judge Sutin then criticized the standard that summary judgment should be granted where "reasonable minds cannot differ as to the facts and inferences to be drawn therefrom," because "'reasonable minds' is an indefinite phrase" and it should be left to the jury to see whether their "reasonable minds" differ as to the facts at issue.[155]

In *Goodman*, the supreme court rejected Judge Sutin's reasoning, concluding that if summary judgment required refuting every slight or unreasonable doubt, it would be a useless procedure. Judge Sutin, also writing the court of appeals' opinion in *Goodman*, had held that the defendants failed to make a prima facie showing that the tire they sold to plaintiffs was free of defects, despite testimony from the plaintiffs that they had not noticed any problem with the tire, testimony that the tire was inspected when sold, and that plaintiffs had no expert to testify that the tire caused their accident, because "a slight issue of fact remain[ed]."[156] Judge Sutin also distinguished a motion for summary judgment from a directed verdict, and suggested that if plaintiffs failed to

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24, 27 (1962), but was in conflict with the "slightest doubt" standard for summary judgment. *See supra* text accompanying notes 89–90, 117.

152. *Tapia*, 83 N.M. at 120, 489 P.2d at 185 (Sutin, J., specially concurring).

153. Although Judge Sutin wrote that he "ha[d] reviewed all of the New Mexico cases on summary judgment," he erroneously describes summary judgment as originating in New Mexico in 1949. *Id.* Judge Sutin also describes that, "in the vast majority of summary judgments appealed, reversals occurred, and trial denied was trial delayed." *Id.* My review of New Mexico's summary judgment case law from the establishment of summary judgment in New Mexico in 1941 to 1971 when Judge Sutin's opinion was written hardly suggests that the vast majority of summary judgments on appeal were reversed. *See supra* text accompanying notes 130–137 (listing and describing cases in which summary judgments were affirmed). To the contrary, if most summary judgments during this period were not affirmed, at the least affirmances were not rare occurrences.

154. *Tapia*, 83 N.M. at 120, 489 P.2d at 185 (Sutin, J., specially concurring).

155. *Id.*

156. Brock v. Goodman, 83 N.M. 580, 581, 494 P.2d 1397, 1398 (Ct. App. 1972). *See also id.* at 582, 494 P.2d at 1399 (Cowan, J., dissenting) (describing evidence supporting defendants' prima facie case for summary judgment).

come forward with evidence to support their claim at trial, as they had on summary judgment, a directed verdict would be entered against them.[157]

The supreme court reversed the court of appeals, rejecting the court of appeals' holding that a "slight doubt" as to the cause of plaintiffs' accident was sufficient to defeat summary judgment. The court explained that the defendants could rely on a lack of evidence that there were problems with plaintiffs' tire before the plaintiffs ran off the road, rather than having to come forward with direct evidence that the tire was free of defects.[158] Applying the burden-shifting standard adopted in Rule 56(e), the court held that this showing of an absence of evidence establishing problems with the tire was sufficient to make a prima facie case for summary judgment, after which the plaintiffs had to show some evidence that their accident was caused by a faulty tire.[159] The court also explicitly rejected the "slightest doubt" standard for summary judgment, relying on a federal treatise for the reasoning that:

> Though it has been said that summary judgment should not be granted if there is the "slightest doubt" as to the facts, such statements are a rather misleading gloss on a rule which speaks in terms of "genuine issue as to any material fact," and would, if taken literally, mean that there could hardly ever be a summary judgment, for at least a slight doubt can be developed as to practically all things human. A better formulation would be that the party opposing the motion is to be given the benefit of all reasonable doubts in determining whether a genuine issue exists. If there are such reasonable doubts, summary judgment should be denied. A substantial dispute as to a material fact forecloses summary judgment.[160]

Similarly, the court reiterated that all inferences drawn from facts must be *reasonable* for them to be considered on summary judgment.[161]

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157. *See Goodman,* 83 N.M at 581–82, 494 P.2d at 1398–99.

158. *Id.* at 791, 498 P.2d at 678.

159. *Id.* at 792–93, 498 P.2d at 679–80 ("The burden on the movant does not require him to show or demonstrate beyond all possibility that no genuine issue of fact exists.. . .To place this burden upon him would be contrary to the express provisions of Rule 56(e), supra, and would make Rule 56 almost, if not entirely, useless." (citations omitted)).

160. *Id.* at 792, 498 P.2d at 679 (quoting 3 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE, § 1234, at 124–26 (1958)).

161. *Id.* at 793, 498 P.2d at 680. *See also supra* notes 87, 117. Although earlier cases had held as much, *Goodman* was the first New Mexico case to clearly describe the "reasonable inference" rule as a limit on a nonmovant's ability to defeat summary judgment.

Having adopted this new, heightened standard for a nonmovant to defeat summary judgment, the court emphasized that Rule 56 served a "worthwhile purpose" of disposing of groundless and unprovable claims without the burden and expense of trial.[162] Altogether, *Goodman* was a reaffirmation of the value of summary judgment, adopting standards to ensure that litigants could use the procedure unconstrained by some of the limits suggested by earlier cases.

Following *Goodman*, courts recognized that parties opposing summary judgment faced a higher bar than in years past, and were seemingly more willing to grant summary judgment in cases which previously would have gone to trial. Courts acknowledged that the standard for defeating summary judgment had changed: only *substantial* disputes, *reasonable* doubts, and *material* facts should go to trial,[163] while a "mere scintilla of an issue [was deemed in] sufficient to create a genuine issue of material fact. . .."[164] The supreme court described a judge as playing an active role in summary judgment, engaging in at least some evaluation of the parties' evidence and the merits of the case:

> The function of the summary judgment motion. . .is to sift the proofs pro and con as submitted in the various affidavits and exhibits attached thereto, so that a determination may be made, without the expense and delay of a trial, that there are or are not real, as distinct from mere fictitious or paper issues, which must be disposed of in the traditional manner by trial to the court or jury.[165]

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162. *Id.* (citing to four federal cases and MOORE'S FEDERAL PRACTICE, as well as New Mexico cases).

163. *See* Goffe v. Pharmaseal Labs., Inc., 90 N.M. 764, 766, 568 P.2d 600, 602 (Ct. App. 1976) (internal citation omitted), *rev'd in part on other grounds*, 90 N.M. 753, 568 P.2d 589 (1977) (relying on Goodman for summary judgment standard).

164. Nat'l Adver. Co. v. State ex rel. State Highway Comm'n, 91 N.M. 191, 194, 571 P.3d 1194, 1197 (1977); *see also* Galvan v. City of Albuquerque, 85 N.M. 42, 46, 508 P.2d 1339, 1343 (Ct. App. 1973) ("We are aware that summary judgments are no longer to be reversed on the basis of slight issues of fact."). Although the "slightest doubt" standard was used at least once by the supreme court after *Goodman*, the court of appeals reasoned that this was inadvertent and was not intended to change the holding in Goodman. Henning v. Parsons, 95 N.M. 454, 461, 623 P.2d 574, 581 (Ct. App. 1980) (discussing Fischer v. Mascarenas, 93 N.M. 199, 201, 598 P.2d 1159, 1161 (1979)).

165. Becker v. Hidalgo, 89 N.M. 627, 629, 556 P.2d 35, 37 (1976) (quoting Irving Trust Co. v. United States, 221 F.2d 303, 305 (2d Cir. 1955)), and commenting that the court agrees with *Irving Trust's* reasoning). *See also Goffe*, 90 N.M. at 768, 568 P.2d at 604 (describing a similar role of the court on summary judgment).

Likewise, courts continued to compare summary judgment with directed verdict,[166] another procedure in which the judge makes at least a basic evaluation of the parties' evidence. New Mexico's appellate opinions in the years following *Goodman* not only encouraged courts to employ summary judgment in the easiest cases, but also to examine purported factual disputes and determine whether a genuine issue of material fact existed.[167]

3. Cases Following the 1969 Amendments and *Goodman v. Brock*

Following the 1969 amendments to Rule 56 and *Goodman*, courts used the burden-shifting procedure in Rule 56(e) and *Goodman*'s reasonable doubt standard to grant summary judgment in cases where summary judgment likely would have previously been denied. For example, in *Vaca v. Whitaker*, the court of appeals relied upon Rule 56(e)'s burden-shifting procedure and *Goodman*'s reasonable doubt standard in reversing the trial court's denial of summary judgment and distinguishing an Arizona opinion using the "slightest doubt" standard as "contrary to the New Mexico rule."[168] In many of these cases, speculative inferences from the facts were deemed insufficient to create a reasonable doubt as to a material fact.[169] Also, where a party could not present evidence supporting a necessary element of her case, courts would use the burden-shifting procedure to grant summary judgment by holding that the nonmovant had

166. *See* Marchiondo v. N.M. State Tribune Co., 98 N.M. 282, 293, 648 P.2d 321, 332 (Ct. App. 1981).

167. *See* Carter v. Burn Constr. Co., 85 N.M. 27, 32, 508 P.2d 1324, 1329 (Ct. App. 1973) (describing summary judgment as having taken "a turn to the right" with *Goodman*).

168. Vaca v. Whitaker 86 N.M. 79, 84, 519 P.2d 315, 320 (Ct. App. 1974).

169. *See, e.g.*, *Carter*, 85 N.M. 27, 508 P.2d 1324 (affirming summary judgment for defendant employer, over a dissent from Judge Sutin discussing the difficulty of determining what constitutes a reasonable doubt, on the basis that the employee was acting outside the scope of employment when involved in car accident after responding to a call at a bar that the plaintiff speculated could have been from his employer); *see also* Matney v. Evans, 93 N.M. 182, 185, 598 P.2d 644, 647 (Ct. App. 1979) (affirming summary judgment for plaintiff in personal injury action stemming from a car accident because plaintiff made a prima facie showing that he was entitled to summary judgment and the defendants failed to meet the "burden of elevating their speculation about entry into the path of the car into a fact issue"); Silva v. City of Albuquerque, 94 N.M. 332, 610 P.2d 219 (Ct. App. 1980) (affirming summary judgment for defendant in case arising from a police chase, where plaintiff speculated that decedent killed during the chase might have offered testimony contrary to that of the police were he still alive); Martinez v. Metzgar, 97 N.M. 173, 637 P.2d 1228 (1981) (affirming summary judgment where the only testimony offered to defeat the summary judgment motion was speculation as to what may have happened in the car accident, and witness testified that he "didn't hardly know" what happened).

failed to rebut a prima facie showing entitling the movant to summary judgment.[170]

Nonetheless, summary judgment certainly still had its limits. The supreme court continued to describe summary judgment as a "drastic remedy to be used with great caution."[171] In cases where the supreme court felt that the lower courts had gone too far, it reversed grants of summary judgment and in some cases even broke from precedent supporting summary judgment.[172] As well, the court continued to describe certain types of cases as ill-suited for summary judgment,[173] including cases involving

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170. *See, e.g.*, Oschwald v. Christie, 95 N.M. 251, 620 P.2d 1276 (1980) (affirming summary judgment for defendants and reversing the New Mexico Court of Appeals, where plaintiff's identification of inconsistencies in defendants' evidence failed to rebut prima facie showing); Livingston v. Begay, 98 N.M. 712, 717, 652 P.2d 734, 739 (1982) (affirming summary judgment for third-party defendant where third-party plaintiff failed to present evidence that a heater was defective after the third-party defendant had shown that the heater had been tested for defects). The court in *Livingston* even suggested—as the United States Supreme Court would later hold in *Celotex v. Catrett*, 477 U.S. 317 (1986)—that a party could move for summary judgment by simply pointing out that the nonmovant lacked essential evidence, rather than affirmatively proving such a lack of evidence. The court stated that "[t]his improper attempt to require Montgomery Ward to prove a negative is essentially the same requirement which we expressly disapproved in *Goodman v. Brock*." *Id.* In contrast, Judge Sutin lamented in a series of opinions that the burden-shifting rules were rarely followed. *See, e.g.*, Rickerson v. State, 94 N.M. 473, 477, 612 P.2d 703, 707 (Ct. App. 1980) (Sutin, J., specially concurring); Harmon v. Atlantic Richfield Co., 95 N.M. 501, 623 P.2d 1015 (Ct. App. 1981); Begay v. Livingston, 99 N.M. 359, 362, 658 P.2d 434, 437 (Ct. App. 1981), *rev'd* 98 N.M. 712, 652 P.2d 734 (1982).

171. Pharmaseal Labs., Inc. v. Goffe, 90 N.M. 753, 756, 568 P.2d 589, 592 (1977). *See also Marchiondo*, 98 N.M. at 293, 648 P.2d at 332 ("Summary judgment is admittedly a drastic device since its effect when exercised cuts off a party's right to present his case to the jury or fact finder.").

172. *See, e.g.*, Chevron Oil Co. v. Sutton, 85 N.M. 679, 515 P.2d 1283 (1973) (reversing summary judgment on the basis that sufficient facts existed to create a question of fact as to whether an agency relationship existed between Chevron and gas station, despite agreement that Chevron did not have a right to control the gas station and reversed the court's earlier opinion in Shaver v. Bell, 74 N.M. 700, 397 P.2d 723, which affirmed summary judgment on similar facts); Rodriguez v. State, 86 N.M. 535, 525 P.2d 895 (1974) (reversing summary judgment on the basis of conflicting testimony by single witness); *Pharmaseal Labs.*, 90 N.M. 753, 568 P.2d 589 (reversing summary judgment and court of appeals by determining that expert testimony was sufficient to establish the required standard of care); Fidelity Nat'l Bank v. Tommy L. Goff, Inc., 92 N.M. 106, 583 P.2d 470 (1978) (reversing summary judgment for the plaintiff in collection action because of the movant's failure to make prima facie showing as to why the nonmovant's affirmative defenses fail, in addition to prima facie showing on its own claims, and thus overruling court of appeals' opinion in *Kassel v. Anderson*, 84 N.M. 697, 507 P.2d 444 (Ct. App. 1973)).

173. *See supra* text accompanying notes 126–129.

equitable determinations.[174] Although the substantive procedures and standards for summary judgment in Rule 56(e) and *Goodman v. Brock* had made summary judgment easier to obtain, New Mexico courts continued to employ strong rhetoric discouraging summary judgment and were quite willing to deny motions for summary judgment or reverse summary judgments on appeal.

Presumably when the New Mexico Supreme Court speaks of the state's "traditional summary judgment standards"[175] it is referring to the standards that were employed by New Mexico courts during this period before the United States Supreme Court decided the *Celotex* trilogy of cases on summary judgment. The court's description of summary judgment as being traditionally disfavored and difficult to obtain[176] overlooks much of the nuance in New Mexico's summary judgment case law from these decades.

In their opinions on summary judgment, New Mexico courts sought to balance the interest in resolving cases quickly and disposing of meritless claims and defenses with the right to a jury trial. Although at times the appellate courts emphasized that summary judgment was a drastic procedure and reversed grants of summary judgment, they also promoted summary judgment as an important tool and routinely affirmed summary judgments, particularly in certain types of cases. After the 1969 amendment to Rule 1-056 establishing a burden-shifting procedure for summary judgments and the holding in *Goodman v. Brock* that a reasonable doubt, rather than the slightest doubt, was needed to defeat summary judgment, summary judgment became easier to obtain. Ultimately, motions for summary judgment were decided on a case-by-case basis, in which courts would describe summary judgment as drastic but apply standards that made summary judgment available in a substantial number of cases. Summary judgment in New Mexico before *Celotex* was not a rare, disfavored remedy, but a regularly used procedure that was often denied, but also often granted.

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174. *See* Cunningham v. Gross, 102 N.M. 723, 726, 699 P.2d 1075, 1078 (1985) ("Because of the broad range of factors bearing on equitable relief which must be considered in this dispute, summary judgment is clearly an even more drastic remedy in equity than at law.").

175. *See* Romero v. Philip Morris, Inc., 2010-NMSC-035, ¶¶ 7, 9, 242 P.3d 280, 287–88. *See also* Bartlett v. Mirabal, 2000-NMCA-036, ¶¶ 36, 39, 999 P.2d 1062, 1069–70, *cert. granted*, 129 N.M. 208, 4 P.3d 36, *writ quashed*, 130 N.M. 154, 20 P.3d 811.

176. *See Romero*, 2010-NMSC-035, ¶¶ 7–9, 242 P.3d at 287–88.

IV. NEW MEXICO'S (PARTIAL) DIVERGENCE FROM FEDERAL SUMMARY JUDGMENT LAW

Until 1986, New Mexico had reliably followed federal summary judgment law.[177] That year, the United States Supreme Court decided three cases—the *Celotex* trilogy—that were perceived to make summary judgment substantially easier to obtain.[178] New Mexico courts responded tentatively to these cases, eventually adopting some but not all of their holdings. New Mexico courts also rejected language in the *Celotex* trilogy that summary judgment was not a disfavored procedural shortcut. Thus, despite *Celotex*, summary judgment law remained largely unchanged in New Mexico, with the biggest result of the trilogy being a clarification that parties could move for summary judgment by simply showing that the nonmovant lacked evidence to support a necessary element of a claim or defense.[179]

A. *The* Celotex *Trilogy*

The *Celotex* trilogy is three United States Supreme Court cases from 1986, in which the Court discussed summary judgment: *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[180] *Anderson v. Liberty Lobby,*

177. New Mexico had borrowed Federal Rule of Civil Procedure 56 as its own summary judgment rule, *see supra* text accompanying notes 66–71; it relied upon federal cases in its early interpretations of Rule 56, *see supra* text accompanying notes 83–85; it twice adopted federal amendments to Rule 56, *see supra* note 93 and Part III(C)(3); it relied upon federal authority when articulating the purpose of summary judgment, *see supra* text accompanying notes 106–108; and it followed federal law in holding that a reasonable doubt, rather than the slightest doubt, was needed to defeat summary judgment, *see supra* text accompanying note 160.

178. *See* Miller, *supra* note 110, at 984, 1048–57 (stating that the *Celotex* trilogy "transformed summary judgment from an infrequently granted procedural device to a powerful tool for the early resolution of litigation" and discussing studies of summary judgment motions before and after *Celotex* was decided). *See also* Stephen B. Burbank & Stephen N. Suprin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 399–400 (2011) (arguing that the greater use of summary judgment predated *Celotex*, with judicial attitudes changing to become more favorable towards summary judgment before 1986.); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 162–63 (2000) (stating that the *Celotex* trilogy merely consolidated a preexisting trend towards summary judgment).

179. By arguing that the *Celotex* trilogy did not substantially change New Mexico summary judgment law, I do not mean to suggest that the *Celotex* trilogy had a dramatic effect on federal summary judgment. Whether *Celotex* made a large difference in the actual outcomes of summary judgment motions in federal court is a topic for another article.

180. 475 U.S. 574 (1986).

Inc.,[181] and *Celotex Corp. v. Catrett*.[182] The trilogy is generally seen as having made summary judgment easier to obtain in federal courts and promoting summary judgment as a means of adjudication.[183] Although it is difficult to precisely pin down summary judgment law by reading the *Celotex* trilogy given the shifting composition of the Court's majorities across the three cases,[184] the trilogy made summary judgment easier to obtain in three primary ways. First, the Court held that the evidentiary standard that applied at trial (for example, that a party needs to prove its claim by clear and convincing evidence) should be considered at the summary judgment stage.[185] Second, the Court held that a party could move for summary judgment by showing to the court that the nonmoving party does not have evidence to support its claim or defense, rather than having to come forward with affirmative evidence in support of summary judgment.[186] Finally, the Court emphasized that summary judgment was not a disfavored remedy, but served a valuable role in civil procedure.[187]

1. *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*

Matsushita Electric Industrial Co. v. Zenith Radio Corp. was an antitrust case in which Japanese television manufacturers were alleged to have conspired to sell televisions at a loss to monopolize the market.[188] The Supreme Court reversed the Third Circuit Court of Appeals and affirmed summary judgment in the manufacturers' favor.[189] In so holding, the Court did not change black-letter summary judgment law,[190] but granted summary judgment in the type of large, complex case that many

181. 477 U.S. 242 (1986).

182. 477 U.S. 317 (1986) (plurality opinion).

183. *See* 11 MOORE'S FEDERAL PRACTICE, § 56.50 (3d ed. 2011) ("Collectively, the trilogy engendered a stronger and more aggressive approach to summary judgment practice that reduced the movant's burden, increased the nonmovant's burden, and generally expanded the circumstances under which summary judgment could be granted."). In addition, there was a "collective sense in the profession" that for much of the mid-twentieth century, courts were too willing to let weak or frivolous claims go to trial. *Id.*, § 56.51[1], at n.5.

184. Different Justices were in the majority (or plurality in *Celotex*) in each case, and no five Justices endorsed all three opinions.

185. *See Anderson*, 477 U.S. at 252–54.

186. *See Celotex*, 477 U.S. at 322–25.

187. *See id.* at 327.

188. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 576–77 (1986).

189. *Id.*

190. *See* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468 (1992) (describing *Matsushita* as not inventing, but merely articulating the standard that a nonmoving party's inferences be reasonable).

thought could not be resolved on summary judgment.[191] The standards for granting summary judgment that the Court applied in *Matsushita*, however, did not differ from those already enacted by New Mexico courts. The *Matsushita* Court held that more than "some metaphysical doubt as to the material facts" was required to defeat summary judgment.[192] It also applied a burden-shifting procedure, holding that once the moving party has made a prima facie showing under Federal Rule 56, the "nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*'"[193]

2. *Anderson v. Liberty Lobby*

In *Anderson v. Liberty Lobby*, the Court considered whether the "clear and convincing" evidentiary standard required to prove libel at trial should be considered on a motion for summary judgment.[194] The Court concluded that this evidentiary standard must be considered.[195] It reasoned that to determine whether a genuine issue exists as to material facts one must address the same question considered with a directed verdict: whether a reasonable jury could return a verdict for the nonmoving party.[196] To determine whether a reasonable jury could return a verdict for the nonmoving party, the Court continued, one must ask whether the nonmovant's evidence could meet the applicable substantive evidentiary standard. In *Anderson* this meant whether the plaintiff could prove that the defendant acted with actual malice by clear and convincing evidence.[197]

In dissent, Justice Brennan criticized the majority's standard that an issue is genuine if a reasonable jury could find for the nonmovant, as

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191. *See* 11 MOORE'S FEDERAL PRACTICE, § 56.50, at n.3 (3d ed. 2011) (*Matsushita* "opened the door for summary judgments in large, complex cases and cases involving a defendant's state of mind."). *See also* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 599 (1986) (White, J., dissenting) (criticizing the majority for invading the factfinder's province and deciding genuine issues of material fact).

192. *Matsushita*, 475 U.S. at 586. *Cf.* Goodman v. Brock, 83 N.M. 789, 792–93, 498 P.2d 676, 679–80 (1972) (holding that slightest doubt is insufficient to defeat summary judgment).

193. 475 U.S. at 587 (emphasis in original) (quoting FED. R. CIV. P. 56(e)). *Cf.* Rule 1-056(E) SCRA (1986 Pamp.) (containing identical language as its federal counterpart at the time).

194. Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

195. *Id.* at 254 ("Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.").

196. *Id.* at 248–51.

197. *See id.* at 252.

supported by no direct authority.[198] Justice Brennan also wrote that the standard was confusing and difficult for trial courts to follow, since it is ambiguous what a "fair-minded" jury could "reasonably" decide.[199] This standard, he feared, would "transform what is meant to provide an expedited 'summary' procedure into a full-blown paper trial on the merits."[200] Justice Brennan did acknowledge that a court on summary judgment should look to the underlying substantive law to determine whether a genuine issue of material fact exists, but argued that a court should not apply any heightened evidentiary burden contained in the substantive law at that stage.[201]

3. *Celotex Corporation v. Catrett*

Celotex Corp. v. Catrett was an asbestos case in which the defendant asbestos manufacturer moved for summary judgment on the basis that the plaintiff had no evidence that the decedent was exposed to its brand of asbestos products.[202] The Court reversed the District of Columbia Circuit Court of Appeals and affirmed the district court's grant of summary judgment, rejecting the contention that the moving party had to present evidence negating plaintiff's claim.[203] The Court held that, when the nonmoving party bears the substantive burden of proof on a claim or defense, the movant may make a prima facie showing that it is entitled to summary judgment by demonstrating to the court that there is an absence of evidence to support the nonmovant's case.[204] The Court concluded its

198. *See id.* at 258–65 (Brennan, J., dissenting). (Brennan described the Court's recital of the summary judgment standard as follows: "In my view, the Court's result is the product of an exercise akin to the child's game of 'telephone,' in which a message is repeated from one person to another and then another, after some time, the message bears little resemblance to what was originally spoken. In the present case, the Court purports to restate the summary judgment test, but with each repetition, the original understanding is increasingly distorted.").

199. *Id.* at 258, 265–66 (Brennan, J., dissenting).

200. *Id.* at 266–67 (Brennan, J., dissenting).

201. *Id.* at 268 (Brennan, J., dissenting) (Brennan's proposed standard—that a court consider the underlying substantive law but not any heightened evidentiary burden on summary judgment—is very close to current New Mexico law.). *See infra* note 244.

202. Celotex Corp. v. Catrett, 477 U.S. 317, 319 (1986).

203. *Id.*

204. *Id.* at 322–25. The controlling opinion is Justice White's concurrence as the fifth vote, explaining that the movant's showing must consist of more than a conclusory assertion that the nonmovant lacks evidence for its claim or defense. *Id.* at 328 (White, J., concurring). Curiously, the Court also held that the nonmovant does not need to present evidence that would be admissible at trial to defeat summary judgment. *Id.* at 324. However, this latter statement is not the law in New Mexico, which

opinion by expressing the importance of summary judgment: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"[205] Justice Brennan wrote a dissent, which agreed that a party could move for summary judgment on the basis of the nonmovant's lack of evidence, but criticized the plurality for failing to explain what exactly the movant must show.[206]

B. New Mexico's Response to the Celotex *Trilogy*

1. Early Reactions to the *Celotex* Trilogy

Initially, the *Celotex* trilogy was favorably cited by New Mexico courts.[207] Perhaps this was unsurprising given that New Mexico traditionally followed federal law on summary judgment.[208] Among these early cases, the most attention to the *Celotex* trilogy was given in *Goradia v. Hahn Co.*[209] In *Goradia*, the New Mexico Supreme Court affirmed summary judgment for a defendant lessor in a suit brought by its tenant, alleging discrimination in the lessor's rental practices.[210] In so holding, the court cited to *Celotex* and *Anderson* extensively for the standard and purpose of summary judgment.[211] Included among these citations was a quotation from *Celotex* endorsing the use of summary judgment "'to isolate

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requires the nonmovant to come forward with admissible evidence. *See* Archunde v. Int'l Surplus Lines Ins. Co., 120 N.M. 724, 729, 905 P.2d 1128, 1133 (Ct. App. 1995) (nonmovant must come forward with affidavits or other properly admissible evidence to defeat summary judgment); Ciup v. Chevron U.S.A., Inc., 1996-NMSC-062, ¶ 7, 928 P.2d 263, 266 (nonmovant must come forward with admissible evidence); Guest v. Berardinelli, 2008-NMCA-144, ¶ 22, 195 P.3d 353, 359 (the nonmovant must come forward with admissible evidence). Federal Rule 56 would eventually be amended to make clear that summary judgment motions in federal court must be supported by admissible evidence. *See infra* text accompanying note 308.

205. *Celotex*, 477 U.S. at 327 (quoting FED. R. CIV. P. 1).

206. *See id.* at 329 (Brennan, J., dissenting).

207. *See* Bartlett v. Mirabal, 2000-NMCA-036, ¶¶ 9–24, 999 P.2d 1062, 1064–67, *cert. granted*, 129 N.M. 208, 4 P.3d 36, *writ quashed*, 130 N.M. 154, 20 P.3d 811. The court of appeals in *Bartlett* would ultimately attempt to distinguish many of these early cases citing to *Celotex* and *Anderson*. *Id.* While the court in *Bartlett* was correct that many of these cases did not explicitly address the holdings in the *Celotex* trilogy, it was not happenstance that New Mexico courts cited to federal summary judgment cases, as they had done since the establishment of summary judgment.

208. *See supra* note 177.

209. 111 N.M. 779, 810 P.2d 798 (1991).

210. *See id.*

211. *Id.* at 781–82, 810 P.2d at 800–801.

and dispose of factually unsupported claims or defenses. . ..'"[212] In another case, the New Mexico Court of Appeals even went as far as rejecting the contention that federal and state summary judgment standards were different, and thus held that claim preclusion barred the plaintiff's later state court action following summary judgment for the defendant in federal court.[213]

However, as New Mexico courts confronted the specific holdings of the *Celotex* trilogy, they began to depart from federal summary judgment law at least in some areas. *Matsushita* did not alter the substantive standards for summary judgment, but instead was notable for its liberal grant of summary judgment in a large, complex case.[214] Therefore, it is not surprising that New Mexico courts did not discuss whether they should adopt any summary judgment standard set forth in *Matsushita*; indeed, no published cases in New Mexico address *Matsushita*'s summary judgment holdings.[215]

There were some reasons to believe that *Anderson v. Liberty Lobby*'s holding that evidentiary burdens apply at the summary judgment stage would be favorably received by New Mexico courts. Not only had New Mexico courts traditionally followed federal summary judgment law,[216] but they had also analogized summary judgment to directed verdict,[217] as the Court in *Anderson* did in basing its judgment.[218] Indeed, the New Mexico Court of Appeals did, in *Furgason v. Clausen,* cite to *Anderson* for the proposition that "[a] motion for summary judgment. . .necessarily involves determination of the substantive evidentiary standard of proof that would apply at a trial on the merits."[219] Both were

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212. *Id.* at 781, 810 P.2d at 800 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986)).

213. *See* Wolford v. Lasater, 1999-NMCA-024, ¶¶ 6–11, 973 P.2d 866, 868–69. Because this case primarily concerned whether a slight or reasonable doubt was needed to defeat summary judgment, the court was correct that—at least as to this issue—New Mexico and federal summary judgment law did not differ. *See supra* text accompanying note 160.

214. *See supra* text accompanying notes 190–191.

215. *Matsushita* has occasionally been cited for its holdings regarding substantive antitrust law. Notable among these cases is *Romero v. Philip Morris*, in which, like *Matsushita*, the court affirmed summary judgment in a large, complex antitrust case.

216. *See supra* note 177.

217. *See supra* text accompanying note 124. Some of these comparisons continued after *Anderson*. *See, e.g.*, Moongate Water Co., Inc. v. State, 120 N.M. 399, 406, 902 P.2d 554, 561 (Ct. App. 1995) (when considering summary judgment, court should consider whether the jury could return verdict for the plaintiff on the evidence presented) (citing Smith v. Maschner, 899 F.2d 940, 949 (10th Cir. 1990)).

218. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

219. Furgason v. Clausen, 109 N.M. 331, 339, 785 P.2d 242, 250 (Ct. App. 1989).

defamation cases, but the only difference between *Furgason* and *Anderson* was that the evidentiary standard applied in *Furgason* was one of plain negligence, rather than the clear and convincing standard applied in *Anderson*.[220]

Over time, however, hints emerged that New Mexico would not follow the Supreme Court's holding in *Anderson*. In *Eoff v. Forrest*, the defendants moved for summary judgment on the plaintiffs' fraud claim arising out of an informal probate.[221] The court reversed the district court's grant of summary judgment, holding that the defendants failed to make a prima facie showing entitling them to summary judgment.[222] The court clarified that in denying summary judgment it was not holding that the nonmovants' evidence established their fraud claim by clear and convincing evidence.[223] In response to this language, Justice Ransom wrote a special concurrence suggesting that the New Mexico Supreme Court adopt the *Anderson* holding and consider evidentiary burdens at the summary judgment stage.[224] While the concurrence received two votes, the other three members of the Court, at least implicitly, declined to adopt Justice Ransom's invitation to adopt *Anderson*.

2. *Bartlett v. Mirabal*

In 2000, the New Mexico Court of Appeals finally addressed *Anderson* directly in *Bartlett v. Mirabal*, holding that New Mexico had not and would not follow federal summary judgment law and consider evidentiary burdens of proof on summary judgment.[225] In coming to the conclusion that New Mexico had not adopted *Anderson*, the court relied on a dubious account of the state's prior summary judgment cases.[226] New Mexico

220. *See id.; Anderson,* 477 U.S. at 254.

221. Eoff v. Forrest, 109 N.M. 695, 696, 789 P.2d 1262, 1263 (1990).

222. *See id.* at 701, 789 P.2d at 1268.

223. *See id.* This seems to be dicta, because only if the court had decided that the movants had made a prima facie case would it need to consider whether the nonmovants needed to establish a reasonable doubt that they could prove their claim by clear and convincing evidence or by a preponderance of the evidence. Therefore, the court did not need to reach—and did not address directly—the holding in *Anderson*.

224. *See id.* at 702–703, 789 P.2d at 1269–70 (Ransom, J., specially concurring).

225. Bartlett v. Mirabal, 2000-NMCA-036, 999 P.2d 1062, *cert. granted*, Sup. Ct. No. 26,253, 4 P.3d 36 (2000), *writ quashed*, Sup. Ct. No. 26,253, 20 P.3d 811 (2001). The New Mexico Court of Appeals took up on interlocutory appeal the issue of whether New Mexico courts followed *Anderson*. *Bartlett*, 2000-NMCA-036, ¶ 3, 789 P.2d at 1063.

226. *See Bartlett*, 2000-NMCA-036, ¶ 41, 789 P.2d at 1070 (Alarid, J., specially concurring) (disagreeing with the majority on the basis that New Mexico courts had tended to treat federal and state summary judgment standards as interchangeable). *See also* Christopher David Lee, *Summary Judgment in New Mexico Following* Bart-

had long analogized summary judgment and directed verdicts,[227] but the court asserted that "[o]ur Supreme Court. . .has clearly distinguished between summary judgment proceedings and motions for directed verdict."[228] To demonstrate that New Mexico had not adopted *Anderson*'s summary judgment standards, the court then strained to distinguish the long list of cases cited in Judge Alarid's concurrence in which New Mexico courts had cited to *Celotex* and *Anderson*.[229] Having dismissed these

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lett v. Mirabal, 33 N.M.L. REV. 503, 521–23 (2003) (arguing that the majority in *Bartlett* incorrectly described the supreme court's holding in *Eoff v. Forrest*).

227. *See supra* text accompanying note 124.

228. *Bartlett*, 2000-NMCA-036, ¶ 7, 999 P.2d at 1064.

229. *Id.*, ¶¶ 9–16, 999 P.2d at 1064–65. Many of the court's descriptions of and conclusions from the cases in Judge Alarid's concurrence are misleading or incorrect. For example, *Furgason v. Clausen* was a defamation case in which the court reasoned that summary judgment necessarily involved determination of the substantive evidentiary burden of proof. *See supra* text accompanying note 219. The court tried to criticize *Furgason* for relying upon a case "steeped in the traditional approach to summary judgment," but the 1968 case in question was merely cited for the general, uncontroversial standard for summary judgment, in a different section of the opinion than that citing to *Anderson*. *See Bartlett*, 2000-NMCA-036, ¶ 12, 999 P.2d at 1065; *Furgason v. Clausen*, 109 N.M. 331, 339–40, 785 P.2d 242, 250–51 (Ct. App. 1989). Next, the court dismissed the conclusion in *Wolford v. Lasater* that state and federal summary judgment standards do not differ substantively by claiming, without explanation, that the opinion in *Wolford* "clearly recognized that the standards were different." *Bartlett*, 2000-NMCA-036, ¶ 13, 999 P.2d at 1065. Most questionable was the court's dismissal of *Goradia v. Hahn*, a case in which the supreme court quoted from *Celotex* and *Anderson* extensively in setting forth the basic standard for summary judgment. *See* Goradia v. Hahn Co., 111 N.M. 779, 781–82, 810 P.2d 798, 800–801 (1991). The fact that *Goradia* involved undisputed facts—with disputed factual inferences—hardly made it an unusual summary judgment case, let alone one that could not establish precedent as the court suggested. *See Bartlett*, 2000-NMCA-036, ¶¶ 14–15, 999 P.2d at 1065. Although the court's ultimate conclusion that New Mexico had not yet adopted *Anderson*'s rule that courts should consider evidentiary standards on summary judgment was correct, these slanted interpretations of summary judgment cases color the court's determination that the New Mexico Supreme Court likely would not follow *Anderson* were it to consider the question. Unfortunately, the supreme court has not yet addressed the issue on point.

The majority's opinion in *Bartlett* also quotes *Eoff* out of context to mischaracterize summary judgment law following *Celotex*. The court stated that the nonmovant only show that one factual issue is disputed to defeat summary judgment. *Bartlett*, 2000-NMCA-036, ¶ 17, 999 P.2d at 1065–66 (quoting language from *Eoff* that was not used to describe the standard for granting summary judgment). This statement in *Bartlett* describes the standard backwards: if the *movant* can show that one factual issue is *undisputed*, summary judgment is proper. *See* Rule 1-056(a) NMRA. To make matters worse, this language in *Bartlett* was cited several times in later cases, leading to further confusion. *See* Juneau v. Intel Corp., 2006-NMSC-002, ¶ 25, 127 P.3d 548, 555 ("Plaintiff is not required to show disputed issues of fact for every ele-

cases, the court concluded that New Mexico had not moved towards adopting the *Anderson* standard.[230]

Having concluded that New Mexico had not adopted *Anderson*, the court in *Bartlett* determined that New Mexico should not adopt *Anderson*.[231] Closely following the logic of Justice Brennan's dissent in *Anderson*, the court explained that adopting *Anderson* would confuse lower courts by blurring the roles of the judge and jury, and would risk converting summary judgment into a "full-blown paper trial on the merits" that would usurp the role of the jury.[232] The court also argued that it is unclear what the benefits of adopting *Anderson* would be[233]and that *Anderson* would replace "the traditional manner in which our courts have conceptually viewed summary judgment proceedings" with the "potentially chaotic universe of the federal rule."[234] This invocation of a "traditional" summary judgment practice in New Mexico, coupled with the court's slanted descriptions of earlier summary judgment cases, sought to

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ment of the claim. . .."); City of Rio Rancho v. Amrep Sw., Inc., 2010-NMCA-075, ¶ 14, 238 P.3d 911, 914 ("The nonmoving party need not convince the district court that he has evidence to support all the elements of his case; rather, the nonmoving party must merely show that one or more factual issues are contested."). This line of authority is simply incorrect. If the nonmoving party cannot establish an essential element of her case, summary judgment is proper. Therefore, the nonmoving party cannot defeat summary judgment by showing that a factual dispute exists as to a single element of the case, so long as another element of the case remains undisputed in the movant's favor. The standard only differs where the movant bears the burden of proof at trial (such as, typically, where the plaintiff moves for summary judgment); there, the moving party must establish a lack of factual disputes on all essential elements. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986) (absence of evidence of essential element only supports summary judgment where nonmovant bears burden of proof at trial). None of the cases cited above involves a movant with the burden of proof at trial.

230. *Bartlett*, 2000-NMCA-036, ¶ 16, 999 P.2d at 1065.

231. *Id.* ¶ 39, 999 P.2d at 1070.

232. *Id.* ¶¶ 31–32, 999 P.2d at 1068. The court's criticism misstates the holding in *Anderson*—and New Mexico law—as requiring a party opposing summary judgment to show that "disputed facts could *possibly* meet the appropriate standard" or that the "evidence could allow a jury to conclude that the nonmovant's claim is true." *Id.* ¶ 29, 999 P.2d at 1068 (emphasis added). Rather, a nonmovant must come forward with evidence establishing that a *reasonable* doubt exists as to a material fact. *See supra* text accompanying notes 160–161.

233. *Id.*, ¶ 35, 999 P.2d at 1068. Presumably, the benefit of *Anderson* would be the early resolution of claims where the nonmovant did not have the evidence necessary to meet a heightened evidentiary standard.

234. *Id.* ¶ 36, 999 P.2d at 1069. The court overstated how difficult *Anderson* would have been to apply. Federal courts manage to apply *Anderson*, and New Mexico courts were already considering evidentiary standards on directed verdict. *See* Chavez v. Manville Prod. Corp., 108 N.M. 643, 648, 777 P.2d 371, 376 (1989).

portray *Anderson* as a frightening departure from current summary judgment law.[235] Yet, *Anderson* would not have been a dramatic departure from "traditional" New Mexico summary judgment law; it would have followed the state's practice of following federal summary judgment law and comparing summary judgment with directed verdicts.[236]

In a special concurrence, Judge Alarid disagreed with the majority's account of New Mexico's summary judgment law, and summarized those cases where New Mexico courts had relied on *Celotex* and *Anderson*.[237] He concluded that these cases indicated "a tendency to treat federal and state summary judgment standards as interchangeable."[238] He described *Goradia v. Hahn*, in particular, as a significant move towards the adoption of *Anderson*, because it used reasonable doubt and "fair-minded factfinder" standards that mirrored the standards applied on directed verdict.[239] Judge Alarid also defended *Anderson*, arguing that given liberal discovery, it is fair to evaluate the case at the motion for summary judgment stage, and that the difficulty of implementing *Anderson* is overstated because New Mexico courts already consider evidentiary burdens of proof on directed verdict and in other contexts.[240] However, Judge Alarid ultimately concurred, rather than dissented, in *Bartlett* because he felt that *Anderson* should only be adopted by the express directive of the New Mexico Supreme Court.[241]

The supreme court granted certiorari in *Bartlett*, promising that New Mexico would have a final answer as to whether the state had adopted *Anderson* and courts should consider evidentiary burdens of proof on

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235. *See Bartlett*, 2000-NMCA-036, ¶¶ 35–36, 999 P.2d at 1069 (describing dramatic changes that *Anderson* would render).

236. *See supra* text accompanying notes 124, 177. *Cf. Bartlett*, 2000-NMCA-036, ¶ 36, 999 P.2d at 1069 (noting that "at this juncture. . .procedural law in New Mexico is not merely a mirror image of federal law").

237. *See Bartlett*, 2000-NMCA-036, ¶¶ 41–46, 50, 999 P.2d at 1070–72 (Alarid, J., specially concurring).

238. *Id.* ¶ 41, 999 P.2d at 1070 (Alarid, J., specially concurring).

239. *See id.* ¶ 46, 999 P.2d at 1071 (Alarid, J., specially concurring). The "reasonable doubt" standard is that if, from the facts presented, but one reasonable conclusion can be drawn, then summary judgment must be granted. *Id.* (Alarid, J., specially concurring). As discussed above, comparison of summary judgment and directed verdict, including the use of reasonable doubt standards on summary judgment, existed in New Mexico before the *Celotex* trilogy. *See supra* text accompanying notes 124, 163–167.

240. *See Bartlett*, 2000-NMCA-036, ¶¶ 48–49, 999 P.2d at 1072 (Alarid, J., specially concurring). Judge Alarid also explained that considering evidentiary burdens of proof on summary judgment was useful in providing content to the term "genuine issue" in Rule 1-056. *See id.* ¶ 48, 999 P.2d at 1072 (Alarid, J., specially concurring).

241. *Id.* ¶ 50, 999 P.2d at 1072 (Alarid, J., specially concurring).

summary judgment.[242] But after the parties fully briefed the appeal and the court held oral argument, the court quashed its writ of certiorari.[243] The supreme court has not addressed *Anderson*'s holding since, and presumably by quashing certiorari in *Bartlett*, it has tacitly approved *Bartlett*'s holding that heightened evidentiary burdens of proof should not be considered at the summary judgment stage.[244]

3. New Mexico Courts' Response to the Holdings and Rhetoric of *Celotex*

Although New Mexico ultimately did not adopt *Anderson*, it did adopt *Celotex*'s holding that a party may move for summary judgment by showing to the court that there is an absence of evidence to support the nonmovant's case.[245] New Mexico cases before *Celotex* had suggested that parties could move for summary judgment based on the nonmovant's lack of evidence.[246] Then, in *Goradia v. Hahn*, the New Mexico Supreme Court, while not adopting *Celotex*'s holding explicitly, quoted *Celotex*'s rationale underlying *Goradia*'s holding: that "'a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'"[247]

Eventually, in *Blauwkamp v. University of New Mexico Hospital*, the court of appeals explicitly held that a party moving for summary judg-

242. Bartlett v. Mirabal, *cert. granted*, Sup. Ct. No. 26,253, 4 P.3d 36 (2000).

243. Bartlett v. Mirabal, *writ quashed*, Sup. Ct. No. 26,253, 20 P.3d 811 (2001); Lee, *supra* note 226, at 503 & nn. 9–10.

244. The fact that courts should not consider evidentiary burdens does not mean that the underlying substantive law is irrelevant on summary judgment. New Mexico courts, as Justice Brennan advocated in his dissent in Anderson, have held that even though the evidentiary burden at trial is not considered on summary judgment, the court does consider underlying substantive law to determine what is material. *See* Guest v. Berardinelli, 2008-NMCA-144, ¶ 23, 195 P.3d 353, 359; Martin v. Franklin Capital Corp., 2008-NMCA-152, ¶ 6, 195 P.3d 24, 26 ("An issue of fact is 'material' if the existence (or non-existence) of the fact is of consequence under the substantive rules of law governing the parties' dispute."); Parker v. E.I. Du Pont de Nemours & Co., 121 N.M. 120, 124, 909 P.2d 1, 5 (Ct. App. 1995) ("A fact is material for the purpose of determining whether a motion for summary judgment is meritorious if it will affect the outcome of the case."). *See also supra* note 201 (discussing Justice Brennan's dissent in Anderson).

245. Perhaps it was not surprising that New Mexico adopted this holding, because all the Justices in *Celotex* except Justice Stevens, who did not address the issue in his dissent, agreed that a party could move for summary judgment on the basis of an absence of the nonmovant's evidence. *See supra* text accompanying note 206; Celotex Corp. v. Catrett, 477 U.S. 317, 337 (1986) (Stevens, J., dissenting).

246. *See supra* note 170.

247. Goradia v. Hahn Co., 111 N.M. 779, 781, 810 P.2d 798, 800 (1991) (quoting *Celotex*, 477 U.S. at 322–23).

ment can base its motion on the nonmovant's lack of evidence to support its claim, without having to come forward with affirmative evidence disproving the nonmovant's claim.[248] Interestingly, the court in *Blauwkamp* not only relied upon *Celotex* for its ruling, but explained that existing New Mexico law also permitted summary judgment motions based on the nonmovant's lack of evidence.[249] Under either *Celotex* or existing New Mexico law, the court concluded, a party could move for summary judgment by pointing out the nonmovant's failure to come forward with evidence supporting its claim.[250] Following *Blauwkamp*, New Mexico courts continued to grant motions for summary judgment where the movant pointed out[251] the absence of evidence necessary to support the nonmovant's claim, and the nonmovant failed to come forward with evidence in response.[252]

While New Mexico courts followed this holding in *Celotex*, they did not approve of *Celotex*'s rhetoric that summary judgment was an integral part of the rules of civil procedure, rather than a disfavored procedural shortcut.[253] As they had since the 1950s,[254] New Mexico courts continued to describe summary judgment as a drastic measure and extreme rem-

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248. Blauwkamp v. Univ. of N.M. Hosp., 114 N.M. 228, 232, 836 P.2d 1249, 1253 (Ct. App. 1992) (Rule 1-056(C) "does not require a moving party to support its motion with affidavits. . .or other sworn testimony affirmatively disproving Plaintiffs' claims"). Affirmative defenses are treated similarly; the party asserting the defense must have evidence to support each essential element. *See* Galef v. Buena Vista Dairy, 117 N.M. 701, 706, 875 P.2d 1132, 1137 (Ct. App. 1994).

249. *See Blauwkamp*, 114 N.M. at 232, 836 P.2d at 1253.

250. *See id.* The court ultimately denied summary judgment, finding that the plaintiff had successfully refuted the defendant's prima facie showing entitling it to summary judgment, because the plaintiff had expert testimony supporting her claims. *See id.* at 233, 836 P.2d at 1254.

251. This showing was held to require something more than a bare assertion that the nonmovant lacked evidence to support its claim. *See* Diaz v. Feil, 118 N.M. 385, 388, 881 P.2d 745, 748 (Ct. App. 1994).

252. *See, e.g.*, Mayfield Smithson Enters. v. Com-Quip, Inc., 120 N.M. 9, 12, 896 P.2d 1156, 1159 (1995) (granting summary judgment where nonmovant failed to present evidence establishing each element of equitable estoppel); Lopez v. Reddy, 2005-NMCA-054, ¶ 26, 137 N.M. 554, 113 P.3d 377 (citing to *Celotex*, affirming summary judgment for defendant in medical malpractice case after plaintiff's standard of care expert was excluded from trial, because plaintiff had no evidence to establish the standard of care as a result); McElhannon v. Ford, 2003-NMCA-091, ¶ 7, 73 P.3d 827, 830 ("The [movant's] assertion that the record contained no evidence of an affirmative misrepresentation. . .was sufficient to make out a prima facie case of entitlement to summary judgment." (citing to *Celotex* and *Blauwkamp*)).

253. Celotex Corp. v. Catrett, 477 U.S. 325, 327 (1986).

254. *See supra* note 115.

edy.[255] But just as this anti-summary judgment rhetoric obscured courts' willingness to grant summary judgment before *Celotex*,[256] after *Celotex*, summary judgment was often criticized and often used.

The standards for obtaining summary judgment in New Mexico remained largely unchanged after *Celotex*. Courts continued to use a burden-shifting procedure, where once the movant made a prima facie showing of summary judgment, the nonmovant was required to come forward with evidence showing a reasonable doubt, rather than a slight doubt, as to this prima facie showing.[257] The burden-shifting procedure was bolstered in 1989 by amendments to Rule 1-056—the first amendments to New Mexico's summary judgment rule not to mirror federal amendments—requiring the moving party to list material facts where it believes no genuine issue exists, citing to evidence in support of each, and requiring the nonmoving party to do the same as to material facts where a genuine issue does exist.[258] If the nonmovant failed to specifically refute these listed, material facts, summary judgment could be granted in the

255. *See, e.g.*, Pollock v. State Highway & Transp. Dep't, 1999-NMCA-083, ¶ 5, 984 P.2d 768, 770 ("We generally disfavor this drastic measure and use it with extreme caution."); Blauwkamp v. Univ. of N.M. Hosp., 114 N.M. 228, 231, 836 P.2d 1249, 1252 (Ct. App. 1992) ("drastic remedial tool"); Furgason v. Clausen, 109 N.M. 331, 340, 785 P.2d 242, 251 (Ct. App. 1989) (extreme remedy); Knapp v. Fraternal Order of Eagles, 106 N.M. 11, 12–13, 738 P.2d 129, 130–31 (Ct. App. 1987) (summary judgment is drastic measure and not a substitute for trial).

256. *See supra* text accompanying notes 130–137.

257. *See* Ciup v. Chevron U.S.A., Inc., 1996-NMSC-062, ¶ 7, 928 P.2d 263, 266. *See also* Cates v. Regents of N.M. Inst. of Mining & Tech., 1998-NMSC-002, ¶ 9, 954 P.2d 65, 68 (applying reasonable doubt standard); Fikes v. Furst, 2003-NMSC-033, ¶ 11, 81 P.3d 545, 549 (reasonable, rather than slight doubt, needed to defeat summary judgment). Although the supreme court did use a "slightest doubt" standard in two cases, *Ocana v. American Furniture Co.*, 2004-NMSC-018, ¶ 22, 91 P.3d 58, 68, and *Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, ¶ 7, 16 P.3d 1084, 1088, the court of appeals suggested that the standard expressed in these cases was likely a mistake, based on the court's reliance on cases from before New Mexico altered its standard in *Goodman v. Brock*. Guest v. Berardinelli, 2008-NMCA-144, ¶ 7, 195 P.3d 353, 356.

258. *See* Rule 1-056(D)(2) NMRA 1989 and annotator's notes thereto. These added requirements were a simpler precursor to proposed amendments to Federal Rule of Civil Procedure 56 in 2010 that were ultimately rejected. *See* FED. R. CIV. P. 56(c), Committee Notes on Rules-2010 Amendment. The 1989 amendments also included new timing provisions. *See* Rule 1-056(D)(2) NMRA 1989 and annotator's notes thereto. According to some scholars, this "point-counterpoint" procedure makes summary judgment easier to obtain. *See* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 521–22 (2010). Thus, in at least one respect, New Mexico summary judgment law is more favorable to summary judgment than federal law.

movant's favor.[259] Other standards remained unchanged: inferences made from undisputed facts were still required to be reasonable,[260] and conclusory allegations were insufficient to defeat (or support) summary judgment.[261]

New Mexico courts after *Celotex* continued both to grant and deny summary judgment with regularity. While a party's success on summary judgment often turned on the specific facts of the case,[262] there remained categories of cases where summary judgment was more freely and less freely granted.[263] Courts were still reluctant to grant summary judgment in negligence cases,[264] and even warned against defining the defendant's duty of care as a question of law in a way that subsumed the factual issue of negligence.[265] In other types of cases, courts were more favorably dis-

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259. *See* Richardson v. Glass, 114 N.M. 119, 121–22, 835 P.2d 835, 837–38 (1992). *But see* Brown v. Taylor, 120 N.M. 302, 304–305, 901 P.2d 720, 722–23 (1995) (stating that even where facts are deemed admitted, movant must still make prima facie case).

260. *Pollock*, 1999-NMCA-083, ¶ 17, 984 P.2d at 774 (defining a reasonable inference as "a logical deduction from facts admitted or established by the evidence, when such facts are viewed in the light of common knowledge or common experience") (internal quotation marks and citation omitted).

261. *See* Galef v. Buena Vista Dairy, 117 N.M. 701, 706, 875 P.2d 1132, 1137 (Ct. App. 1994) (conclusory allegations cannot defeat summary judgment); Trujillo v. Treat, 107 N.M. 58, 752 P.2d 250 (Ct. App. 1988) (reversing summary judgment where affidavit submitted on movant's behalf was conclusory). Summary judgment can, however, be defeated by the nonmovant's own testimony. *See* Ocana v. Am. Furniture Co., 2004-NMSC-018, 91 P.3d 58 (reversing grant of summary judgment, in part, in employment discrimination case even though nonmovant's only evidence was her own testimony, which was incorrect in one instance).

262. *See, e.g.*, Koenig v. Perez, 104 N.M. 664, 726 P.2d 341 (1986) (affirming summary judgment for one defendant and reversing for another, based on parties' different duties of care and differences in proximate cause between the parties, even though the same assumption of risk issues existed as to both defendants).

263. *See supra* Part III(B) (discussing how summary judgment was more or less likely to be granted in particular types of cases before *Celotex*).

264. *See, e.g.*, Knapp v. Fraternal Order of Eagles, 106 N.M. 11, 13–14, 738 P.2d 129, 131–32 (Ct. App. 1987) (reversing summary judgment where disputed inferences from facts regarding extent of negligence attributable to plaintiff and defendant); *Trujillo*, 107 N.M. at 60, 752 P.2d at 252 ("Negligence and proximate cause are, likewise, generally questions of fact for the jury, unless reasonable minds cannot differ.").

265. Marquez v. Gomez, 116 N.M. 626, 631, 866 P.2d 354, 359 (Ct. App. 1991) ("The existence and scope of duty, as questions of law, should not be scrutinized with such specificity that the factual issue of negligence is subsumed."). The risk here was that a legal duty to exercise ordinary care would be defined with greater precision—for example, listing the particular duties that a city had in controlling traffic: posting stop signs, clearing bushes, etc.—in a way that subsumed the factual question of whether the defendant had acted reasonably. *See* Bober v. N.M. State Fair, 111 N.M. 644, 649–51, 808 P.2d 614, 619–21 (1991) (discussing this division of decision-making

posed towards summary judgment, including cases involving statutes of limitation (even where a tolling argument is made),[266] defamation cases,[267] cases against government actors,[268] and cases involving written contracts.[269] Although New Mexico adopted parts of the *Celotex* trilogy and rejected others, summary judgment did not appear to change much in practice after 1986, with the same standards applied and the same types of cases resolved on summary judgment.[270]

The 1986 *Celotex* trilogy of cases has been understood as triggering a dramatic change in federal summary judgment practice.[271] But the cases'

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between judge and jury); *Pollock*, 1999-NMCA-083, ¶ 20, 984 P.2d at 775 ("Although the existence of a duty is decided as a matter of law by the court, the extent of that duty in the factual context of a given case is a question for the factfinder."). *But see Marquez*, 116 N.M. at 631, 866 P.2d at 359 (holding that, while foreseeability is ordinarily a question for the jury, it can be decided as a matter of law "where the resulting injury is clearly unintended and unforeseeable"); Cain v. Champion Window Co. of Albuquerque, LLC, 2007-NMCA-085, ¶ 26, 164 P.3d 90, 98 ("Plaintiffs are correct that the issue of proximate cause is usually a question of fact for the jury. However, it is only a question of fact if reasonable minds could differ on the issue. . ..When reasonable minds cannot differ, proximate cause is not a question of fact.") (internal citations omitted).

266. *See, e.g.*, Roscoe v. U.S. Life Title Ins. Co. of Dallas, 105 N.M. 589, 734 P.2d 1272 (1987).

267. *See, e.g.*, Paca v. K-Mart Corp., 108 N.M. 479, 775 P.2d 245 (1989) (affirming summary judgment on basis, among others, that defendant's alleged statements were not slanderous); Fikes v. Furst, 2003-NMSC-033, 81 P.3d 545 (reversing court of appeals and affirming summary judgment on defamation claims, because no genuine issue of material fact that recipients of statements understood them to be defamatory). *See also* Furgason v. Clausen, 109 N.M. 331, 348, 785 P.2d 242, 259 (Ct. App. 1989) (Hartz, J., dissenting) ("In defamation cases courts cannot justifiably resolve all doubts against use of summary procedures because the important interests are not all on the side of preserving jury trial.") (internal quotation omitted).

268. *See* Moongate Water Co., Inc. v. State, 120 N.M. 399, 406, 902 P.2d 554, 561 (Ct. App. 1995) ("Our past cases echo the concern of the Supreme Court that many insubstantial claims should be resolved at the summary judgment stage to avoid excessive disruption of government.") (internal quotation omitted).

269. *See, e.g.*, Peck v. Title USA Ins. Corp., 108 N.M. 30, 766 P.2d 290 (1988) (affirming summary judgment on the basis of an exclusionary clause in contract because interpretation of the contract is a question of law).

270. Other states have moved much further from federal law following *Celotex*. For example, Indiana and Utah have expressly rejected *Celotex*'s holding that a party can move for summary judgment by pointing out the absence of evidence to support the nonmovant's claim or defense, and Kentucky only permits summary judgment where it appears *impossible* for the nonmovant to produce evidence warranting a judgment in its favor at trial. *See* Adam N. Steinman, *What is the* Erie *Doctrine? (And What Does it Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 279 nn.219–20 (2008).

271. *See supra* note 178.

effect on summary judgment practice in New Mexico was muted. New Mexico courts recognized that *Celotex*'s holding that a party could move for summary judgment by simply pointing out the nonmovant's lack of evidence to support its claim or defense was already New Mexico law, and therefore approved the federal holding. However, they rejected *Anderson*'s holding that courts should consider evidentiary burdens of proof on summary judgment and refrained from disclaiming prior dicta that summary judgment is a disfavored remedy, as the United States Supreme Court did in *Celotex*.

Therefore, summary judgment practice in New Mexico continued largely unchanged after *Celotex*. The burden-shifting procedure used to resolve summary judgment motions and the standard that a nonmovant had to show a reasonable doubt as to a genuine issue of material fact remained unchanged. As well, courts appear to have granted and denied motions for summary judgment in the same types of cases that they had in the past. This "traditional summary judgment law" that New Mexico applied before and after *Celotex* did not treat summary judgment as an extreme remedy. Despite rhetoric that New Mexico viewed summary judgment with disfavor,[272] its courts routinely granted summary judgment, using procedures that made summary judgment an effective and available remedy.

V. *ROMERO V. PHILIP MORRIS* AND THE CURRENT STATE OF SUMMARY JUDGMENT IN NEW MEXICO

New Mexico's summary judgment standards have drawn greater attention following the New Mexico Supreme Court's opinion in *Romero v. Philip Morris*.[273] There, the court assessed the state of summary judgment law in New Mexico, concluding that New Mexico's law differs from federal law and that in New Mexico summary judgment is disfavored. Yet, having emphasized the difficulty of obtaining summary judgment, the court proceeded to reverse the court of appeals and affirm summary judgment in favor of all defendants. This seeming irony actually exemplifies the historical and contemporary state of summary judgment in New Mexico: ardent rhetoric against summary judgment that obscures standards and practice far more favorable. As well, the court's reliance in *Romero*

272. I suspect that much of the rhetoric describing summary judgment as extreme and disfavored is often inserted into opinions once the court has already determined that it will deny summary judgment. While this proposition is difficult, if not impossible, to test, I believe that a healthy skepticism that rhetoric against summary judgment affects courts' decisions is warranted.

273. Romero v. Philip Morris Inc., 2010-NMSC-035, 242 P.3d 28.

upon a history of summary judgment demonstrates the danger of using legal history to support a judicial opinion. The history of summary judgment in New Mexico is much more nuanced and conflicted than the court described.

A. Romero v. Philip Morris

Romero v. Philip Morris was a large, complex antitrust action, not unlike *Matsushita v. Zenith*.[274] The trial court had granted summary judgment for all defendants, finding that there was no genuine issue of fact that the defendant cigarette manufacturers had not conspired to change cigarette prices.[275] On appeal, the parties disputed whether New Mexico's summary judgment standards differed from federal standards, and therefore, whether *Romero* should be treated differently from *Matsushita*.[276] The court of appeals concluded that federal and state standards differed, describing New Mexico as having more stringent "traditional summary judgment standards."[277] However, in applying this purported "traditional stringent standard," the court used a "fair-minded factfinder" test that did not differ substantially from New Mexico's directed verdict standard and federal summary judgment standards.[278] The court's primary divergence from federal law was its more intangible assessment that "the ethos of New Mexico courts is less favorable to disposing of cases through summary judgment than that of federal courts in the period following *Matsushita*, *Anderson* and *Celotex*."[279] Motivated by this ethos, the court of

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274. *See supra* text accompanying notes 188–191 (summarizing *Matsushita*).

275. *See* Romero v. Philip Morris, 2009-NMCA-022, ¶ 1, 203 P.3d 873, *rev'd* 2010-NMSC-035, 242 P.3d 280.

276. *See id.* ¶ 13, 203 P.3d at 878.

277. *Id.* ¶ 15, 203 P.3d at 879. ("Although New Mexico courts have continued to assume a general correspondence (except for the specific exception recognized in *Bartlett*) between federal and New Mexico summary judgment standards subsequent to *Matsushita*, *Anderson*, and *Celotex*, New Mexico appellate decisions have not relaxed the traditional stringent standard that a movant must meet in order to satisfy a New Mexico court that a dispute as to a material fact is not genuine, and unlike their federal counterparts, New Mexico courts continue to view summary judgment with disfavor.") (internal citations omitted).

278. *See id.* ¶¶ 12, 15 (citing Goradia v. Hahn Co., 111 N.M. 779, 810 P.2d 798 (1991) for "fairminded factfinder" standard). *See also supra* text accompanying notes 124, 166, 239.

279. *Romero*, 2009-NMCA-022, ¶ 15. 203 P.3d at 879. Whether federal courts have an altered ethos towards summary judgment after the *Celotex* trilogy is a topic beyond the scope of this article. For discussion of this question, see Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 862 (2007) (questioning whether *Celotex* led to the expansion of summary judgment); Adam Steinman, *The Irrepressible Myth of* Celo-

appeals reversed summary judgment in part, determining that for those manufacturers against whom the plaintiffs presented expert testimony, there was a question of fact as to whether the manufacturers' price changes could be explained as independent actions.[280]

The New Mexico Supreme Court granted certiorari, tackling at the outset whether New Mexico's summary judgment standards differed from those in federal courts. The supreme court reasoned that the court of appeals had been correct to apply New Mexico's "traditional" summary judgment standard.[281] However, the court's description of the substance of this traditional standard consisted of the same, routine inquiries that had long been law in New Mexico and that do not differ from federal standards, such as that reasonable, rather than slight, questions of material fact are needed to defeat summary judgment.[282] As with the court of appeals, the supreme court's disagreement with federal law was rhetorical, not substantive. The Court stated that it "refus[ed] to align our state's approach with that of the federal courts,"[283] but described this refusal as not adopting *Celotex*'s rhetorical support for summary judgment, instead "view[ing] summary judgment with disfavor" and "refus[ing] to loosen the reins of summary judgment."[284] The court was afraid that a more lenient attitude towards summary judgment would risk turning summary judgment into a "full-blown paper trial on the merits."[285]

The court's rhetorical distancing of New Mexico's summary judgment law from federal law was premised on the notion that summary judgment has always been difficult to obtain in New Mexico. The court proclaimed that it was "*continu[ing]* to refuse to loosen the reins of summary judgment," such that New Mexico's current summary judgment standards would be those that have "been traditionally available in New Mexico."[286] However, as discussed in Parts III and IV of this article, New Mexico courts have not historically been very conservative in granting summary judgment. Therefore, the "traditional" summary judgment law that the supreme court has held constitutes New Mexico's current summary judgment standards, should not be thought of as particularly unfa-

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tex: *Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81 (2006) (studying the impact that the *Celotex* cases have had on federal courts).

280. Romero, 2009-NMCA-022, ¶ 1, 203 P.3d at 875.

281. *Id.* ¶ 7, 242 P.3d at 287.

282. *Id.*

283. *Id.* ¶ 9, 242 P.3d at 288.

284. *Id.* ¶¶ 8–9.

285. *Id.* ¶ 9 (quoting Bartlett v. Mirabal, 2000-NMCA-036, ¶ 32, 999 P.2d 1062).

286. *Id.* (emphasis added).

vorable towards summary judgment. The summary judgment standards that remain law in New Mexico and that are expressed in *Romero*—(1) that a burden-shifting procedure be used to evaluate summary judgment motions; (2) that issues of material fact must be reasonable and inferences from undisputed facts reasonable to defeat summary judgment; and (3) that a court determines which facts are material by looking to the underlying substantive law—are shared with federal law and allow summary judgment motions to be granted with regularity.[287] In fact, despite its disavowal of federal summary judgment law and the *Celotex* trilogy, *Romero* ultimately is a case decided on the *Celotex* principle that a party may move for summary judgment on the basis that the nonmovant lacks evidence of a essential element of its case.[288]

The great irony of *Romero* is that after the supreme court waxed at length regarding the perils of summary judgment, it reversed the court of appeals and affirmed the district court's grant of summary judgment for all defendants, finding that plaintiffs had failed to present evidence excluding the possibility that defendants' parallel increases of cigarette prices were decided upon independently.[289] The court arrived at this judgment after reviewing the defendants' summary judgment motion in a fashion that made it easier to grant summary judgment. It used the underlying antitrust law as a filter to determine whether genuine issues of material fact existed and, in so doing, was able to weigh the plaintiffs and defendants' evidence because antitrust law required a comparison of the parties' evidence to determine whether the plaintiff could make a prima facie claim.[290] As well, the court seemed to evaluate the credibility of the plaintiffs' expert witness, concluding that ambiguities drawn out in the expert's deposition undermined his testimony such that the testimony could not create a dispute of material fact.[291] It also examined and rejected each of plaintiffs' nine alleged "plus factors" that were evidence of

287. *See id.* ¶¶ 10–11; *see also supra* text accompanying notes 112–114, 143–146, 158–165, 168–170, 244 (discussing the effect of these standards).

288. *See Romero*, 2010-NMSC-035, ¶ 16, 242 P.3d at 291 (citing Blauwkamp v. Univ. of N.M. Hosp., 114 N.M. 228, 232, 836 P.2d 1249, 1253 (Ct. App. 1992) for the proposition that failing to establish an essential element of one's case is grounds for summary judgment and holding that plaintiffs failed to establish evidence excluding the possibility that the defendant manufacturers acted independently in changing cigarette prices).

289. *See id.* ¶ 2.

290. *See id.* ¶¶ 17, 22. In cases like Romero where the underlying, substantive law creates heightened burdens for plaintiffs and permits courts to undertake more active inquiries on summary judgment, New Mexico courts have been more willing to grant summary judgment. *See supra* text accompanying notes 130–137, 266–269.

291. *See Romero*, 2010-NMSC-035, ¶¶ 23–25.

defendants' parallel price changes being made collaboratively, concluding that the plus factors could not preclude summary judgment.[292]

Yet, *Romero* is less surprising than typical. Although New Mexico courts have for more than half a century used strong language cautioning the use of summary judgment, they continue to grant summary judgment, using standards that facilitate motions for summary judgment, especially in certain types of cases. *Romero*'s directive that summary judgment be limited to the extent summary judgment has traditionally been available in New Mexico does not compel that summary judgment be extremely difficult to obtain, just as it did not preclude the court from affirming summary judgment in *Romero* itself.

B. New Mexico Summary Judgment Cases Following Romero

After *Romero*, New Mexico courts have continued to grant summary judgment in cases where summary judgment has traditionally been available. For example, in *Summers v. Ardent Health Services*, the New Mexico Supreme Court reversed the trial court's denial of summary judgment, holding that the defendant hospital corporation was immune, under the Healthcare Quality Improvement Act (HCQIA), from claims related to the suspension of plaintiff's medical privileges.[293] Like other cases involving immunities,[294] the court in *Summers* seemed particularly willing to grant summary judgment.[295] It also used the underlying substantive law, as did the Court in *Romero*, to conclude that the parties' factual disputes did not rise to a genuine issue of material fact. In *Summers*, the court reasoned that to refute the defendant's immunity under the HCQIA, the plaintiff needed to show that the peer review was not rea-

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292. *See id.* ¶¶ 33–34. "Plus factors" are "economic actions and outcomes, above and beyond parallel conduct by oligopolistic firms, that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action." William E. Kovacic, et al., *Plus Factors & Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 393 (2011).

293. Summers v. Ardent Health Services, 2011-NMSC-017, 257 P.3d 943.

294. *See supra* note 136.

295. *See Summers*, 2011-NMSC-017, ¶ 11, 257 P.3d at 948. The court stated that the immunity issue created a "twist" on the general summary judgment standard because there existed a rebuttable presumption in favor of immunity and the plaintiff is required to prove by a preponderance of the evidence that the defendant's peer review was not reasonable. This seems questionable. First, the court seems to be considering the underlying evidentiary burden of proof, in keeping with *Anderson*, and in tension with the New Mexico Court of Appeals' decision in *Bartlett v. Mirabal*. Second, I am not clear as to how the plaintiff's burden to establish that the immunity does not apply by a preponderance of the evidence differs from any other summary judgment motion brought by a defendant on a plaintiff's claim, where the plaintiff has a burden to establish her claim by a preponderance of the evidence.

sonable considering the totality of the evidence, and the plaintiff presenting a single piece of evidence could not rise to this threshold.[296] Similarly, in *City of Rio Rancho v. Amrep Southwest*, the supreme court affirmed summary judgment on the type of claim that New Mexico courts have been willing to decide on summary judgment: one involving the interpretation of written legal documents.[297] In *Amrep Southwest*, this document was a plat;[298] often in such cases, the court is interpreting a written contract.[299] However, the court in *Amrep Southwest* reversed summary judgment on another claim not typically subject to summary judgment—an unjust enrichment claim where the parties submitted conflicting deposition and affidavit testimony.[300]

Other recent cases show a general willingness to grant summary judgment, even where some disputed facts remain. In *Martinez v. St. Vincent Hospital*, the court of appeals affirmed partial summary judgment for the *plaintiffs* (the party with the burden of proof) on their apparent authority theory.[301] It found that independent contractor doctors of the defendant hospital were the apparent agents of the hospital, and that a form signed by one of the plaintiffs disclaiming this fact was "immaterial" and could not create a genuine issue of material fact, because the disclaimer dated from seven months before the incident in question.[302] In *Lucero v. Lucero*, the court of appeals affirmed summary judgment despite the nonmovant's submission of affidavits rebutting the movant's claim that a legal delivery of a will took place.[303] The court reasoned that the affidavits "tracked the form, but failed to produce substance" and "[h]ence, they do not rise to the level of suggesting that a fact finder might return a verdict favorable to Plaintiffs."[304] These cases demonstrate that despite the supreme court's rhetoric in *Romero* warning courts against granting sum-

296. *See id.* ¶¶ 16–19, 21–22, 257 P.3d at 950–52.

297. City of Rio Rancho v. Amrep Southwest, 2011-NMSC-037, 260 P.3d 414. Interestingly, in both *Summers* and *Amrep Southwest*, the supreme court cited to its earlier opinion in *Romero* for the general summary judgment standard, but omitted any reference to *Romero*'s language describing summary judgment as a disfavored remedy. *See Summers*, 2011-NMSC-017, ¶ 10, 257 P.3d at 948; *Amrep Southwest*, 2011-NMSC-037, ¶ 14, 260 P.3d at 420.

298. *See id.*, ¶¶ 20, 23, 260 P.3d at 421–22.

299. *See supra* text accompanying notes 130, 269.

300. *Amrep Southwest*, 2011-NMSC-037, ¶ 54, 260 P.3d at 428–29.

301. Martinez v. St. Vincent Hosp., No. 30,455, 2011 WL 2041841 (N.M. Ct. App. Apr. 27, 2011).

302. *Id.*, at *4. The court did hold that a question of fact existed as to whether the independent contractors were the defendant's *actual* agents. *Id.*, at *2.

303. Lucero v. Lucero, No. 30, 181, 2011 WL 6016981 (N.M. Ct. App. Nov. 1, 2011).

304. *Id.* at *4.

mary judgment, New Mexico's appellate courts continue to affirm summary judgments—and even reverse denials of summary judgment.

C. Recent Amendments to Federal Rule of Civil Procedure 56

New Mexico has not amended its summary judgment rule since 1989.[305] Federal Rule of Civil Procedure 56, on the other hand, has been amended three times lately: in 2007, 2009, and 2010.[306] As a result, although the federal and state rules have historically been very similar, today there are substantial differences between the two rules. The current version of Federal Rule 56 explicitly provides for a motion following *Celotex* that is based on pointing out the absence of evidence to support the nonmovant's claim or defense.[307] The 2010 amendments to the Federal Rule also clarify that evidence used to support or oppose summary judgment must be admissible at trial.[308] As well, provisions were added to the Federal Rule to accommodate different local rules that require parties to specifically support and dispute material facts and deem undisputed facts to be admitted;[309] these provisions contrast with New Mexico's rule which already contains a specific procedure requiring parties to list and refute undisputed material facts.[310] Finally, Federal Rule 56 was amended to include various provisions clarifying that judges had discretion in handling

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305. *See supra* text accompanying note 258 (discussing 1989 amendments to Rule 1-056).

306. *See* FED. R. CIV. P. 56, Committee Notes on Rules—2007, 2009, and 2010 Amendments.

307. FED. R. CIV. P. 56(c)(1)(B), and Committee Notes on Rules—2010 Amendments. The rules' timing provisions also differ. In federal court, a motion for summary judgment may be filed any time up to 30 days after the close of discovery, while in New Mexico state court, a motion for summary judgment must be filed "within a reasonable time" prior to the date of trial to enable the opposing party to file a response and the court to decide the motion. *Compare* FED. R. CIV. P. 56(b) *with* Rule 1-056(D)(1) NMRA. Also, Federal Rule 56 helpfully clarifies the procedure by which a nonmovant may request further discovery before the motion for summary judgment is decided; additional time may be granted not only where the present *affidavits* are insufficient (a remnant of the original summary judgment rule, which focused on affidavits), as the New Mexico rule states, but also where additional time is needed for other reasons. *Compare* FED. R. CIV. P. 56(d) *with* Rule 1-056(F) NMRA.

308. Fed. R. Civ. P. 56(c)(2). *Cf. supra* note 204 (discussing ambiguous statement in *Celotex* regarding the admissibility of evidence on summary judgment).

309. FED. R. CIV. P. 56(c)(1), (e), and Committee Notes on Rules—2010 Amendments.

310. Rule 1-056(D) NMRA. *See also supra* note 258 (discussing the New Mexico rule).

motions for summary judgment and could consider evidence or arguments or grant summary judgment *sua sponte*.[311]

These recent amendments to Federal Rule of Civil Procedure 56 are not intended to change the substantive standard for summary judgment.[312] However, they are useful, clarifying amendments on issues where New Mexico and federal summary judgment law do not diverge. The New Mexico Supreme Court should review its summary judgment rule and consider incorporating the recent changes to Federal Rule 56.

D. The Role of Legal History in New Mexico's Summary Judgment Law

Understanding the history of summary judgment in New Mexico is not merely a matter of satisfying our antiquarian curiosities. New Mexico's current standards for summary judgment are defined by reference to the summary judgment law that has historically existed in New Mexico.[313] In *Romero*, the supreme court held that it does "not wish to grant trial courts greater authority to grant summary judgment than has been traditionally available in New Mexico."[314] The court's implication was that "traditional" summary judgment law viewed summary judgment with disfavor and was more restrictive than federal law.[315] However, as this article illustrates, summary judgment law in New Mexico has not been as monolithic or opposed to summary judgment as *Romero* presumes. Summary judgment law has been mixed and vacillating, often hewing closely to fed-

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311. *See* FED. R. CIV. P. 56(c)(3), (e), (f), and Committee Notes on Rules—2010 Amendments. The changes to Federal Rule 56(e) remove the language relied upon in *Matsushita* in describing the burden-shifting procedure used in assessing a motion for summary judgment. *See supra* note 193. However, I do not believe—and the committee notes do not indicate—that the 2010 amendment to Rule 56(e) was intended to alter the burden-shifting procedure. Rather, the amendment clarifies that courts have the discretion to give parties a second chance to provide evidence to refute unaddressed facts, to consider *sua sponte* record materials that were not cited by the parties, and to make their own assessments of whether the undisputed material facts support summary judgment, rather than granting a "default" judgment against a party that fails to refute material facts. *See* FED. R. CIV. P. 56(e) and Committee Notes on Rules—2010 Amendments. None of these changes precludes the burden-shifting procedure described in *Matsushita*.

312. *See* FED. R. CIV. P. 56, Committee Notes on Rules—2010 Amendments; 10A WRIGHT, *supra* note 44, § 2711, at n.28.

313. This is more than the routine reference to precedent in defining current law. Rather, New Mexico courts have suggested that they wish to preserve the state of summary judgment law as it existed in New Mexico before *Celotex*. *See supra* text accompanying notes 283–286.

314. Romero v. Philip Morris, 2010-NMSC-035, ¶ 9, 242 P.3d 280, 288.

315. *See id.* ¶¶ 8–9, 242 P.3d at 287–88.

eral law. The biggest difference between state and federal summary judgment law has been a matter of rhetoric—since *Celotex*, New Mexico courts have been more willing than federal courts to use cautionary language about summary judgment.[316] Hopefully, this article clarifies what the New Mexico Supreme Court held when it decreed that lower courts should not exceed the "traditional" bounds of summary judgment in the state. As the article demonstrates, traditional summary judgment law does not require that summary judgment be unavailable if any factual dispute exists, or that a party moving for summary judgment face a tremendous burden, especially in types of cases where summary judgment has historically been available.[317]

Along with providing a detailed history of summary judgment in New Mexico, this article seeks to warn against the use of overly simplistic descriptions of legal history in judicial opinions. *Bartlett v. Mirabal* and *Romero v. Philip Morris* demonstrate the danger of relying upon summary accounts of history to support a court's holding. In both cases, the court asserted that New Mexico had historically employed traditional standards for summary judgment that disfavored summary judgment.[318] The courts did not substantiate these assertions with an objective assessment of how summary judgment had historically been handled in New Mexico.[319] Rather, the courts' appeal to historical authority seems to have been an attempt to bolster their already-arrived-at conclusion that summary judgment should be difficult to obtain.

Using history as a means to an end, rather than conducting history for its own sake—*l'histoire pour l'histoire*,[320] is particularly perilous in

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316. *See supra* text accompanying notes 253–256, 271–272. *Cf.* Mollica, *supra* note 178, at 162 (describing the *Celotex* trilogy as constituting "facially modest extensions of summary judgment orthodoxy" but containing pro-summary judgment language that "infused rapidly into all subsequent Rule 56 decisions").

317. *See supra* text accompanying notes 130–137, 266–269 (discussing summary judgments granted despite disputed facts and types of cases where summary judgment is more readily available).

318. *See supra* text accompanying notes 226–230, 281–288.

319. *See supra* text accompanying notes 226–229, 237–239, 282, 286–288. Of course, a purely objective assessment of history is impossible, but one may still strive for a history that acknowledges events and evidence both supporting and opposing the current law that one is advocating.

320. *L'art pour l'art*—art for art's sake—was a phrase popularized among members of the 19th century Aesthetic Movement, who advocated that art not be viewed for its functional value and be unrestrained from moral constraints. *See* COLLEEN DENNEY, AT THE TEMPLE OF ART: THE GROSVENOR GALLERY, 1877–1890, at 38–39 (2000). German church historian Karl Heussi would later use the phrase *"l'histoire pour l'histoire"* to describe a school of history. KARL HEUSSI, DIE KRISIS DES HISTORISMUS 6 (1932). For a contrary view, see FRIEDRICH NIETZSCHE, ON THE USE AND ABUSE

law.[321] In writing a judicial opinion, a court is necessarily referencing authority—including historical facts—that supports its holding. There is an inherent bias in this process to skew and oversimplify history such that it provides a basis for the court's judgment. Even if the court acknowledges the ambiguities and complexities of the history involved, because the court must ultimately rule in favor of one party or another given the adversarial system, it will inevitably shade its description of history to support its conclusion. This structural incentive to slant history carries a heightened risk given the importance of precedent and value placed on stability in law. Accounts of history are not merely meant to inform, but undergird the structure of our common law system.

That it is difficult to write accurate histories in judicial opinions does not mean that we should not attempt to do so, or even that historical events should not be summarized and oversimplified. Where it is necessary to invoke history in law, one must often distill the history to a summary that can provide a touchstone to be applied to a legal rule or serve as a precedent in future cases. Yet, when a court examines and writes history, it is important to keep in mind the natural tendency to simplify complex events and emphasize the evidence that supports the court's holding. I am confident this very article suffers from similar biases. But although legal history may be fraught with difficulty and error, it remains a necessary endeavor.

Romero v. Philip Morris was the New Mexico Supreme Court's clearest statement to date that New Mexico does not follow federal law regarding summary judgment. The court instead invoked a notion of "traditional" New Mexico law that disfavored summary judgment as a procedure. However, a careful examination of summary judgment's history in New Mexico reveals that summary judgment has been regularly available in a manner not much different from summary judgment in federal court. *Romero*'s caution against using summary judgment is largely rhetorical and does not alter New Mexico's legal standards that permit summary judgment in many cases.

OF HISTORY (1873). I do not use the phrase "*l'histoire pour l'histoire*" to reference Huessi's idea specifically, but to suggest the general principle that one attempt to engage with history for non-ideological ends.

321. I do not contend that any history is free from its own biases and ideological ends. Still, one can distinguish, in broad strokes, between histories undertaken and written without an ultimate thesis to prove and hand-picking historical evidence to support a predetermined conclusion.

VI. CONCLUSION

I began the research for this article in expectation of uncovering the origins of a tradition in New Mexico disfavoring summary judgment, as described in *Romero v. Philip Morris*. However, in examining the history of summary judgment in New Mexico, I found a conflicted and nuanced treatment of the procedure that is not as uniformly opposed to summary judgment as *Romero* suggests. The summary adjudication of civil lawsuits without trial dates to territorial days. Following the adoption of transsubstantive summary judgment in Rule of Civil Procedure 56, New Mexico generally followed federal summary judgment law, only departing from federal standards in a few, limited areas after the *Celotex* trilogy. Today, New Mexico summary judgment law remains conflicted—the procedure is rhetorically disfavored, but applied with standards that make it regularly available in practice.

These conflicting elements, and the inconsistent and sometimes confused handling of summary judgment throughout history, reflect the tension between the two primary interests at stake in summary judgment. Summary judgment attempts to balance the goals of ensuring that civil litigants are afforded the right to a jury trial with protecting parties from, and disposing quickly of, meritless claims and defenses. This article sets out to untangle some of this complexity, clarifying what summary judgment law has been in New Mexico, and as a result, what it is today. At the same time, I hope to challenge descriptions of the procedure that fail to acknowledge its nuanced application by courts over time.

Summary judgment will never be a clear-cut procedure that can be applied uniformly to all cases. Factual differences among cases and the tension between the right to a jury trial and the interest in resolving disputes efficiently will inevitably result in summary judgment using standards with amorphous criteria such as "reasonable doubt" and "genuine issues." These ambiguities cannot be resolved by resorting to "traditional" summary judgment law. Historically, summary judgment law has been just as hazy and conflicted as summary judgment today. Instead, the New Mexico Supreme Court should set forth, as best possible, clear standards for summary judgment, preferably by amending Rule 1-056 and beginning by considering adopting the recent amendments to Federal Rule of Civil Procedure 56. Although history teaches us that summary judgment opinions will always vary based on the facts of each individual case, we can impart some clarity and uniformity by agreeing upon the basic procedures and standards for handling a motion for summary judgment.