

In Summary It Makes Sense: A Proposal to Substantially Expand the Role of Summary Judgment in Nonjury Cases

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I. INTRODUCTION

Traditionally, summary judgment has been used as a tool to resolve questions of law. Summary judgment was initially a disfavored judicial procedure. However, as docket caseloads have substantially increased in recent years, courts have frequently turned to summary judgment as an efficient and just adjudication mechanism. This article proposes to dramatically expand the role of summary judgment in bench trial cases where the record is sufficiently complete to allow judges to draw their own inferences and to resolve factual disputes.

Although summary judgment is a useful device, many judges have intentionally constrained its effectiveness in federal courts in an effort to preserve litigants' rights to a jury trial. However, not every dispute is destined for a jury trial. Many cases, either because of the nature of the claims involved or as a result of the choice of the litigants, are decided solely by a judge. For example, in the United States Court of Federal Claims there are no jury trials and the judge is always the ultimate fact finder.

Unfortunately, however, neither Rule 56 of the Federal Rules of Civil Procedure nor, generally, the caselaw that has addressed it, has distinguished between bench trial cases and jury trial cases. At the same time, a number of circuits have begun to expand the scope of summary judgment in cases where the judge serves as the ultimate fact finder. This Article discusses the influence that concern for ensuring a litigant's right to jury trial has had on the crafting and interpretation of the

summary judgment rule. It also suggests that the greater role afforded by a number of circuits to judges at summary judgment in bench trial cases should be adopted by all courts. Specifically, this Article argues that in bench trial cases, where the record is sufficiently developed, judges should have the ability to draw their own inferences in reaching both factual and legal determinations. Furthermore, this Article recommends that judges should be able to decide factual disputes at summary judgment in bench cases where the record is sufficiently complete.

Indeed, this Article proposes that most bench trial cases can be resolved at summary judgment except when factual disputes turn on credibility of testimony. Even when a party demonstrates that further material evidence is yet to be discovered, a summary judgment motion need not be dismissed; rather, it can be stayed pending further discovery. The Article reviews the decisions of a number of circuits affording judges broader use of summary judgment during bench trials as evidence that the law and federal rules can already accommodate this expanded use of summary judgment. As an alternative, the Article suggests that trial courts make more frequent use of Rule 52 “trials on the paper.”

II. OVERVIEW OF SUMMARY JUDGMENT

Summary judgment may be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”¹

1. Rule 56 of the Federal Rules of Civil Procedure reads in its entirety as follows:
Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party’s favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party’s favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

An important mission of the summary judgment procedure is “to assess the proof in order to see whether there is a genuine need for trial.”² In other words, trial is indicated only where the case turns on the resolution of disputed facts. The Supreme Court has made clear that only factual disputes relating to matters of consequence preclude summary judgment proceedings: “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”³ Similarly, the Tenth Circuit has said “only

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. 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 the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney’s fees, and any offending party or attorney may be adjudged guilty of contempt.

2. FED. R. CIV. P. 56(e) advisory committee’s note.

3. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

material factual disputes preclude summary judgment; factual disputes about immaterial items are irrelevant.”⁴ The Supreme Court has also stressed that summary adjudication rather than trial is often the best avenue even in complex cases: “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.’”⁵ The purpose of summary judgment is “‘to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for a trial.’”⁶

In determining whether summary judgment is appropriate, the court must first identify material factual disputes. Traditionally, in doing so, all reasonable inferences are drawn in favor of the party against whom summary judgment is sought.⁷ Historically, when there are material factual disputes, summary judgment is inappropriate. When there are no material factual disputes, the court proceeds to search the undisputed facts in an effort to determine whether the moving party has shown that there is an absence of evidence to support the nonmoving party’s case.⁸

In other words, when the moving party would bear the burden of persuasion at trial, it must first show that there is no genuine dispute as to the material facts, and then it must satisfy the burden it would have at trial. To do this, it must show that it would be entitled to a directed verdict at trial.⁹ As the Supreme Court instructed,

[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.¹⁰

Here again, the nonmoving party has traditionally enjoyed the benefit of all inferences.

4. Hall v. Bellmon, 935 F.2d 1106, 1111 (10th Cir. 1991).

5. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting FED. R. CIV. P. 1).

6. Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990) (quoting FED. R. CIV. P. 56 advisory committee’s note).

7. See Kennedy v. Josephthal & Co., 814 F.2d 798, 804 (1st Cir. 1987). *But see* Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990) (stating that a court need not credit “conclusory allegations, improbable inferences, and unsupported speculation”).

8. Celotex, 477 U.S. at 322-23.

9. *Id.*

10. *Id.* at 322; *see also* Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987).

When the moving party does not bear the burden of proof at trial, it must show “that there is an absence of evidence to support the nonmoving party’s case.”¹¹ In other words, when the moving party does not bear the burden of persuasion, it must establish that no reasonable judge or jury could find that the nonmovant had established the requisite elements of its claim. If the moving party has not met its respective summary judgment standard, the motion should be denied. However, where the moving party has met its initial burden of proof, the burden shifts to the nonmoving party to show that some triable issue, whether factual or legal, remains unresolved. Again, the nonmoving party has traditionally enjoyed the benefit of all inferences drawn in its favor. If it succeeds, the motion must be denied; if it does not, the motion will be granted.

But what happens in a nonjury case when the parties have presented all the relevant evidence prior to the summary judgment stage? If the facts are in dispute, can the judge at summary judgment weigh the evidence and make determinations? What if the parties have different, but legitimate, interpretations of what facts mean; can a judge draw his or her own inferences? In a nonjury trial, after all the evidence is in, it would seem expedient and just for judges to draw their own inferences and resolve the facts at summary judgment instead of requiring the parties to resubmit exactly the same evidence for the judges’ review at another proceeding labeled “trial.” While some courts have begun to recognize the wisdom of such adjudication, most are still influenced by a concern for a litigant’s right to jury trial, even though such concern is of course inapplicable in nonjury cases.

III. THE INFLUENCE OF JURY TRIALS ON SUMMARY JUDGMENT RULES

This Article’s proposals would not radically depart from the historical use of summary judgment, but rather represent the next evolutionary step. Initially, summary judgment was viewed negatively because of concern that it interfered with or deprived litigants of a jury trial. Although summary judgment began as a disfavored legal procedure, over the years it became not only an accepted practice, but a favored process for efficient, expedient, and just case resolution. The next steps for application of summary judgment, as proposed by this Article, should further maximize the rule’s use by acknowledging that certain historical limitations of the rule are not appropriate in bench trial cases.

11. *Celotex*, 477 U.S. at 325.

The federal rule governing summary judgment was crafted with great concern to avoid depriving parties of jury trials.¹² This resulted from apprehension that state courts were unconstitutionally depriving litigants of their right to a jury trial through their use of summary judgment.¹³ While summary judgment was not found unconstitutional, this question affected the creation of the federal summary judgment rule resulting in its drafting as a hesitant remedy to be used cautiously.¹⁴

Summary judgment mechanisms based on English law were enacted in several states in the 1800s.¹⁵ Courts approached these statutes with reluctance, viewing summary judgment as a drastic remedy to be used sparingly.¹⁶ This reluctance began to give way when, in 1929, Professor Clark, later a Second Circuit judge, along with Mr. Samenow, published a seminal article advocating the use of summary judgment to address the excessive delay and congestion then existing in the courts.¹⁷ Judge Clark was subsequently the primary author of the Federal Rules of Civil Procedure, which were adopted in 1938 and incorporated Rule 56, a more advanced version of summary judgment than previously in common use.¹⁸ Nonetheless, courts by-and-large remained hesitant to use summary judgment.¹⁹

This reluctance stems from concern over accidentally denying the nonmoving party a full trial where there is an issue of fact. The United States Court of Appeals for the Fifth Circuit articulated this sentiment as follows:

12. *Poller v. Colum. Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962); *Sartor v. Ark. Natural Gas Corp.*, 321 U.S. 620, 627 (1944); *Walsh v. Chi. Bridge & Iron Co.*, 90 F. Supp. 322, 328 (N.D. Ill. 1949).

13. *Fid. & Deposit Co. of Md. v. United States*, 187 U.S. 315, 320 (1902); *Gen. Inv. Co. v. Interborough Rapid Transit Co.*, 139 N.E. 216, 219-20 (N.Y. 1923).

14. William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 446 (1992); CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, 10A FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2714, at 247-50 (3d ed. 1998).

15. See generally Robert Wyness Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L.J. 193 (1929) (detailing the history and application of summary judgment in the American colonies).

16. Schwarzer et al., *supra* note 14, at 446.

17. Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929).

18. Schwarzer et al., *supra* note 14, at 447.

19. See, e.g., *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940) (cautioning against using summary judgment as a “catch penny contrivance to take unwary litigants into its toils and deprive them of a trial”).

[V]aluable as [summary judgment] is for striking through sham claims and defences which stand in the way of a direct approach to the truth of a case, [it] was not intended to, it cannot deprive a litigant of, or at all encroach upon, his right to a jury trial. Judges in giving its flexible provisions effect must do so with this essential limitation constantly in mind.²⁰

This sentiment was echoed by the United States Court of Appeals for the Ninth Circuit:

The trial court was vested with no discretion. The federal Constitution gives a right of jury trial in a contested issue in a law action. This right is positive and should not be whittled away by decision of contested issues by the judge at hearings in camera before trial.²¹

Concern for how a jury might perceive evidence was perhaps best articulated in a decision by a federal district court in New York: “Since we are dealing with a procedure that operates in the shadow of the Seventh Amendment’s guarantee of trial by jury, if there is any doubt as to the existence of a genuine issue of fact, summary judgment cannot be granted.”²²

The reluctance to use summary judgment lasted in large part for almost fifty years until in 1986 the Supreme Court decided a trio of cases advocating a broadened use of summary judgment: *Celotex Corp. v. Catrett*,²³ *Anderson v. Liberty Lobby, Inc.*,²⁴ and *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*²⁵

Despite the Supreme Court decisions, courts have adhered to ingrained resistance against the use of summary judgment. Indeed, the concern for preserving a litigant’s right to a jury trial has become so entrenched in the interpretation of the summary judgment rule that courts reflexively adhere to it as a boilerplate principle even in nonjury cases.²⁶

20. *Id.* at 306.

21. *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 669 (9th Cir. 1955) (internal citations omitted).

22. *Elliott v. Elliot*, 49 F.R.D. 283, 284 (S.D.N.Y. 1970).

23. 477 U.S. 317 (1986).

24. 477 U.S. 242 (1986).

25. 475 U.S. 574 (1986).

26. *Brown v. United States*, No. 99-5082, 1999 WL 1021054, at *2 (Fed. Cir. Nov. 5, 1999); *Am. Broad. Cos. v. United States*, 129 F.3d 1243, 1245 (Fed. Cir. 1997) (“On appeal [from the Court of Federal Claims], we review a grant of summary judgment . . . de novo, with justifiable inferences drawn in favor of the non-moving party.”); *Lane Bryant, Inc. v. United States*, 35 F.3d 1570, 1574 (Fed. Cir. 1994) (“Upon review of a grant of summary judgment [by the Court of Federal Claims], all evidence is to be viewed in a light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of the nonmoving party. Summary judgment is properly granted when no material facts are in dispute and the prevailing party is entitled to a judgment as a matter of law.”); *Chem. Separation Tech., Inc. v. United States*, 45 Fed. Cl. 513, 516 (1999) (“[A]ll facts must be construed in a light most favorable to the nonmoving party and all inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion.”); *Gutz v. United States*, 45 Fed. Cl. 291, 295-96 (1999),

Still, a number of circuits have begun to realize the inapplicability of this concern to bench trial cases and the inefficiency it has generated. However, more courts should be educated on this point, and the judge's role in summary judgment accordingly expanded.

IV. EXPANDING THE ROLE OF SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure contemplates a broad use of summary judgment. The use of Rule 56 should be expanded to allow for the efficient drawing of inferences and resolution of factual disputes in nonjury cases. This expansion should be done both to determine if a trial is necessary and to interpret the facts. Not every case needs the extensive consumption of the parties' time, money, and other resources to reach resolution.²⁷ Where the judge is the ultimate finder of fact, even cases that raise new arguments or contain onerous fact patterns can be addressed at the summary judgment stage.

Although concern for preserving a litigant's right to a jury trial has resulted in the current limited use and application of summary judgment, this is not what the drafters of the Federal Rules of Civil Procedure intended. Comments to the 1963 amendments to Rule 56 make this clear:

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. . . . It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.²⁸

Where the proceeding is otherwise destined for a bench trial and the record is thoroughly established, summary judgment should be viewed as a compelling and efficient means of decisionmaking. As the United States Court of Appeals for the Ninth Circuit has stated:

quoting Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986) (remarking that summary judgment "will not be granted if 'the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury [trier of fact] could return a verdict for the nonmoving party.' . . . The judge's function is not to weigh the evidence, but to determine whether there is a genuine issue for trial. . . . When the record could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial, and the motion must be granted. . . . Any doubt over factual issues must be resolved in favor of the party opposing summary judgment, to whom the benefit of all presumptions and inferences runs.").

27. See Schwarzer et al., *supra* note 14, at 474.

28. FED. R. CIV. P. 56, advisory committee's note to 1963 amendment.

Not every novel claim or complex case must be settled through trial, and we must not let the difficulty of such cases make us hostile to summary adjudication generally. “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.’” Moreover, where the ultimate fact in dispute is destined for decision by the court rather than by a jury, there is no reason why the court and the parties should go through the motions of a trial if the court will eventually end up deciding on the same record.²⁹

Indeed, the distinction between summary judgment in a case where the matter would otherwise go to the jury as opposed to a case where the matter would otherwise be decided by a judge has been recognized by the United States Supreme Court. In *Weinberger v. Hynson, Westcott & Dunning*, the Court stated that “[i]f this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment”³⁰

A. Drawing Inferences

Once the concern for not invading the province of the jury is removed, the question should change from *who* decides, to *when* does the *judge* decide? In other words, in a bench trial case, the question should be: Should the judge draw inferences from the facts at summary judgment or is a trial necessary first? Where all evidence is in, the judge should be able to draw proper inferences so long as testimony is not necessary. As the Eleventh Circuit stated: “To put it in another fashion, whether disputed issues are issues of ‘fact’ for purposes of Rule 56 depends not only on the state of the evidence and nature of the issue but hinges also on whether the litigants have a right to a jury determination.”³¹

1. Drawing Inferences to Determine if Trial is Necessary

In bench trial cases judges should draw their own inferences to determine at summary judgment whether a “genuine” issue exists requiring a trial. As the Fifth Circuit stated, “the choice between

29. *Transworld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 684 (9th Cir. 1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) and FED. R. CIV. P. 1). However, despite the above quoted language the Ninth Circuit found that “the evidence that was before the district court [in *Transworld*] completely failed to illuminate many areas of inquiry” and therefore “did not warrant entry of summary judgment.” *Id.* at 685.

30. *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 622 (1973).

31. *Coats & Clark, Inc. v. Gay*, 755 F.2d 1506, 1510 (11th Cir. 1985) (quoting with approval *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978)).

permissible inferences is for the trier of facts.”³² To require that the judge at summary judgment find a genuine issue for trial based on how a nonexistent jury might infer the facts is nonsensical, a waste of the parties’ time and money, a waste of judicial resources, and certainly not what was intended by Rule 56.

Indeed, the First Circuit has already found that when “the judge would have the task at trial of interpreting undisputed evidence . . . the calculus is less demanding . . . and a bench trial may be unnecessary where the judge has all the evidence before him on summary judgment.”³³ In *Posadas de P.R., Inc. v. Radin*³⁴ the court stated:

We discern no reason why the trial judges should have conducted evidentiary hearings before determining whether the appellant merited a reduction of his gambling debts under the good father statute. The appellant has pointed to no additional facts which he sought to present at a hearing which were not already in the record when the trial judges granted the motions for summary judgment. Nor does he demonstrate the existence of any factual dispute. . . . Because the appellant has demonstrated no issue of fact to be determined at an evidentiary hearing and has failed to clarify how a hearing would aid in the decision of the equitable reduction issue, we see no error in the courts’ failure to hold such hearings prior to granting the appellees’ motions for summary judgment.³⁵

It is only logical that a judge in a bench trial has discretion at the summary judgment stage to decide that the evidence presented, the same evidence that would be presented at trial, would not lead to a different inference if presented later rather than sooner.³⁶

2. *Drawing Inferences in Interpreting the Facts*

Once judges determine that there are no genuine issues necessitating trial, judges should then draw their own inferences. Again, this is only logical. When judges determine that the record is sufficiently complete, this means they have just as much evidence at summary judgment as they would have at trial. Furthermore, judges are the ultimate triers of fact in bench trial cases. They would draw their own inferences at trial based on the record already before them at summary judgment; therefore

32. *Nunez*, 572 F.2d at 1124 (quoting *Walker v. U.S. Gypsum Co.*, 270 F.2d 857, 862 (4th Cir. 1959), *cert. denied*, 363 U.S. 805 (1960)).

33. *Wadsworth, Inc. v. Schwarz-Nin*, 951 F. Supp. 314, 319 (D.P.R. 1996).

34. 856 F.2d 399, 400-01 (1st Cir. 1988).

35. *Id.*

36. *U.S. Fid. & Guar. Co. v. Planters Bank & Trust Co.*, 77 F.3d 863, 866 (5th Cir. 1996).

no reason to draw any other inferences at summary judgment exists. It is thus appropriate for judges to draw inferences even if those inferences are outcome determinative.³⁷ Just as at trial, the judge's inferences are determinative, not some mythical jury's. In addition, at summary judgment it is the judge's inferences that are determinative. The proviso to draw inferences in favor of the nonmoving party is only sensible and applicable where there is a jury, and such jury at trial might have drawn inferences for the nonmoving party.

In this regard, a number of federal circuit courts have begun to endorse judges' ability to draw their own inferences at summary judgment in bench trial cases at least where the parties do not dispute the facts, but only dispute what the facts mean. For example, in *Nunez* the Fifth Circuit pointed out:

Hearing and viewing the witnesses subject to cross-examination would not aid the determination if there are neither issues of credibility nor controversies with respect to the substance of the proposed testimony. The judge, as trier of fact, is in a position to and ought to draw his inferences without resort to the expense of trial.³⁸

Following the circuit's decision in *Posadas de P.R.*, the court in *Wadsworth, Inc. v. Schwarz-Nin* found that in the dispute regarding corporate fraud before it, the court could "turn the cross-motions for summary judgment into a 'paper trial' and simply determine which party has prevailed in persuading the court that it is entitled to judgment."³⁹ The *Wadsworth* court made this procedural determination after finding that (1) "[n]either party to this case has made a proper demand for a jury trial under Fed.R.Civ.P. 38(b), and the parties have waived any right to trial by jury" and (2) "[t]he issues would have been tried by the court if the case went to trial."⁴⁰ Likewise, in *Jane L. v. Bangerter*⁴¹ the court found the record was sufficiently complete for it to draw its own inferences from the facts. In addition, district courts have found appropriate for summary judgment questions of intent, motive,⁴² and reasonableness.⁴³

37. *CSX Transp., Inc. v. City of Pensacola*, 936 F. Supp. 880, 883 (N.D. Fla. 1995) (citing *Coats & Clark, Inc. v. Gay*, 755 F.2d 1506, 1510 (11th Cir. 1985) and *Nunez*, 572 F.2d at 1124).

38. *Nunez*, 572 F.2d at 1124.

39. *Wadsworth, Inc. v. Schwarz-Nin*, 951 F. Supp. 314, 319 (D.P.R. 1996).

40. *Id.* (citing FED. R. CIV. P. 38(b), (d)).

41. *Jane L. v. Bangerter*, 794 F. Supp. 1537 (D. Utah 1992).

42. *Phillips v. Amoco Oil Co.*, 614 F. Supp. 694 (N.D. Ala. 1985), *aff'd*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). It should be noted though, as pointed out in *Phillips*, that the district court does not enjoy a higher presumption of correctness, such as the clearly erroneous test, than the de novo standard generally applied to orders granting summary judgment. A higher standard of review was proposed, discussed, and rejected in *Phillips*, as well as in *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991), and *Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d 1508 (11th Cir. 1989).

The proposal to allow judges to draw their own inferences at summary judgment in bench trial cases is not radical. Indeed, when the facts are not disputed, but only a question of how to draw inferences from the facts remains, this proposal simply allows summary judgment to anticipate a “trial [on] stipulated facts.”⁴⁴ Of course, it goes beyond the mechanism of a trial on the stipulated facts by proposing that judges should also be able to draw their own inferences even when the facts are in dispute.

B. Making Findings of Fact

In bench trials, when the record is sufficiently complete, judges should be able to make factual determinations at summary judgment. Although, as discussed above, some courts have recognized that judicial efficiency is served and that justice is unaffected when judges exercise greater decisionmaking ability at summary judgment, they have limited such judicial ability to drawing inferences. There is no reason for such a limitation. The courts allowed judges to draw inferences at summary judgment because they would be the ones to draw inferences at a trial. Judges should likewise be able to resolve disputed facts as long as the record is sufficiently complete. Although this proposal for the use of summary judgment might seem like a unheralded use of the Federal

43. In *Coleman v. Manufacturers Hanover Corporation*, Civ. A. No. 89-1249, 1990 WL 27370, at *6 n.4 (E.D. Pa. Mar. 14, 1990) (citations omitted), the court stated:

While it is true that questions of reasonableness are rarely appropriate for summary judgment, this general proposition does not preclude my granting summary judgment in this ERISA discrimination case. It is unquestioned that plaintiff's ERISA claims are not triable to a jury. To the extent that the court must draw inferences from the undisputed evidentiary facts to determine whether there has been prohibited discrimination, the court in a nonjury case is entitled to draw such inferences and conclusions on motions for summary judgment if a bench trial would not enhance its ability to draw those inferences and conclusions. The parties have submitted numerous affidavits and other evidence in connection with this motion, and it does not appear that any further probative evidence on point would likely be presented at trial. Based on all the evidence, therefore, I find that plaintiff was not constructively discharged so as to bring his claim within section 510 of ERISA.

44. *United States v. Patrick*, 532 F.2d 142, 145 (9th Cir. 1976) (stating that a criminal “trial can be upon stipulated facts or upon documentary evidence; no witness need be sworn in order to have a trial”); *Mid-Continent Cas. Co. v. Everett*, 340 F.2d 65, 70 (10th Cir. 1965) (stating that in a case “submitted to the trial court upon stipulated facts and documentary evidence with no oral testimony being presented,” the trial judge’s role is to “evaluate evidence and draw conclusions therefrom,” and the trial court’s findings will be set aside only if they were clearly erroneous).

Rules of Civil Procedure, in fact, as will be discussed, it is essentially the same as a Rule 52 “trial on the papers.” Rule 52 allows a judge to try a case on the papers without a jury and make findings of fact and inferences even when there are factual disputes.⁴⁵ The only difference is that this proposal does not require the consent of the parties, as does Rule 52. However, it should be noted that the parties’ consent is mandated for a trial on the papers also out of concern that litigants not be deprived of their right to a jury trial.⁴⁶

The Federal Rules, and the courts’ and litigants’ interests are better served when a judge can weigh the evidence and make findings of fact at summary judgment in situations where all the relevant and material facts are before the judge, even when such facts are disputed.

1. Findings of Fact to Determine if Trial is Necessary

In bench trial cases, judges should determine at summary judgment whether a “genuine” factual issue exists requiring a trial. There is only a genuine need for trial where there is a dispute over fact *and* additional evidence as to those facts might exist that could affect a judge’s determination. A mere dispute over the facts is not a genuine issue necessitating trial. Where the record is complete, judges are in the same position to decide all factual issues as they would be at trial. Therefore, when all evidence is in, judges should be able to resolve disputed facts so long as testimony is not necessary.

It is only logical that a judge in a bench trial has discretion at the summary judgment stage to decide that the evidence presented is the same as would be presented at trial and would not lead to a different result if presented later rather than sooner.⁴⁷

2. Deciding the Facts

Once judges determine that in their view there are no genuine issues for trial, they should resolve factual disputes. Even when the parties do dispute the facts, in bench trial cases when the record is sufficiently complete it serves the interests of judicial efficiency to allow judges to weigh the evidence and make findings of fact at the summary judgment stage instead of waiting until trial. When there are no additional facts that will be added to the record, it would be a waste of the litigants’ and

45. See FED. R. CIV. P. 52 advisory committee’s note.

46. See Judge Morton Denlow, *Trial on the Papers: An Alternative to Cross-Motions for Summary Judgment*, 46 FED. LAW. 30, 31 (1999).

47. U.S. Fid. & Guar. Co. v. Planters Bank & Trust Co., 77 F.3d 863, 866 (5th Cir. 1996).

the courts' time and resources to postpone until tomorrow what could be done more immediately.

The Eleventh Circuit has used language that apparently endorses this view, indicating that it is appropriate for the judge to resolve factual disputes at summary judgment in a nonjury case even if the facts are clearly contested.⁴⁸ The court, in setting the stage for its own de novo review, reviewed a district court's determination of disputed facts at summary judgment. It left the district court's factual determination untouched, implicitly allowing and endorsing it:

The record in the present case discloses Judge Ryskamp's acknowledgment that contested issues of fact might yet remain, but also evidences an eagerness to dispense with the case at the summary judgment stage for the same reasons articulated in *Nunez*: "I think that every facet of this case has been fully explored and the court has been considerably enlightened as to the details of this entire transaction. . . . It is also apparent that this court would have to sit as the trier of fact to hear this case, and it is quite different when you hear a summary judgment knowing the case will go to a jury and when a case is going to be tried by the court." While the judge's willingness to draw inferences from the facts was consistent with *Nunez*, on appeal our review will be unaffected by any inferential conclusions reached below.⁴⁹

While the extent of the Eleventh Circuit's ruling is not fully clear, parties and courts would be best served if judges were able to weigh evidence and make findings of fact at summary judgment instead of having to waste the time and money of repeating the same evidence at trial. However, the linchpin of this early adjudication is the requirement that all the necessary facts are already in the record.

C. Rule 56 of the Federal Rules of Civil Procedure

Judicial ability to evaluate the sufficiency of the record and weigh the facts to determine if a trial is necessary is in keeping with the spirit of Rule 56 and does not violate the rule's ban on reaching a determination where there are genuine issues of material fact.⁵⁰ Rule 56(c) states in part:

48. However, the appellate court would still review such inferences de novo. *Useden v. Acker*, 947 F.2d 1563, 1573 (11th Cir. 1991).

49. *Id.* at 1573 n.14 (citing the transcript of decision).

50. William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 477 (1982) ("[W]here the dispute is solely over ultimate facts, a trial normally adds nothing in a case where the judge is the trier of fact."). It should be noted however that not all courts agree that the language of Rule 56 is flexible enough to allow judges to draw their own inferences at the summary

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.⁵¹

Likewise, Rule 56(e) states in part:

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 the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a *genuine* issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.⁵²

What is a *genuine* issue for trial under Rule 56? This question requires judges to use some form of judgment. When the ultimate trier of fact is a jury, it makes sense that judges find a genuine issue upon which a jury could potentially interpret the facts in different ways. When judges themselves are the ultimate triers of fact, it does not make sense for them to apply the potential judgment of anyone else. In a nonjury case the logical question is whether *in the assessment of the judge* there is a genuine issue for trial. There is only a genuine issue for trial when judges believe the record is not yet complete and additional facts might affect the outcome of the case. Otherwise, judges know what the facts are and can resolve factual disputes at summary judgment, determining what inferences to draw from those facts and what legal consequences follow just as well as they can at trial.

D. Sufficiency of Record Generally a Question of Timing

The extent of the record is the central question in determining whether a dispute is suitable for summary judgment in a case that would otherwise result in a bench trial. When the record is sufficiently complete so that no material facts would be added between summary judgment and trial, the court is in just as good a position to determine facts at summary judgment as it would be at trial.

A party might show that a dispute is not ripe for summary judgment by demonstrating that potential material evidence might still be discovered. This, however, is not grounds for denying the motion for

judgment level in nonjury trial cases. At least one court has implicitly acknowledged the logic behind so empowering judges in nonjury trial cases but nonetheless felt the text of Rule 56 did not so allow. *Farmland Indus. v. Grain Bd. of Iraq*, 904 F.2d 732, 738 (D.C. Cir. 1990) (“The district judge has examined virtually all the evidence it would have before it at a bench trial. . . . Nevertheless, we must decide this case just as if there were a jury available, for the law of summary judgment does not vary with this circumstance.”).

51. FED. R. CIV. P. 56(c) (emphasis added).

52. FED. R. CIV. P. 56(e) (emphasis added).

summary judgment. Rather, the court should stay the motion, allow further reasonable discovery, and then decide the motion. Otherwise, summary judgment is appropriate for every bench case except when the credibility of affidavits or testimony requires further evaluation.

For example, in *Kennedy v. Silas* the Supreme Court vacated a summary judgment ruling because of the complexity of the question at issue and its determination that the factual record was inadequate.⁵³ The Supreme Court stated:

We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.⁵⁴

The concern of the Supreme Court is one of timing, not an absolute ban on expanding the role of summary judgment. When there is a concern that the record is not complete, the remedy is to stay the summary judgment motion pending further discovery, not to dismiss it.

In fact, the concern that the record is not yet complete is addressed by Rule 56 itself. Rule 56(f) states that summary judgment is not appropriate when outstanding discovery seeks information within the moving party's possession or knowledge that is relevant to the issues to be resolved on the motion.⁵⁵

To demonstrate that the record is not yet ripe for summary judgment, parties must affirmatively show why they require further discovery. As the Eighth Circuit stated:

Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its protections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and . . . rebut the movant's showing of the absence of a genuine issue of fact.⁵⁶

53. *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 257 (1948).

54. *Id.*; see also *Anderson v. Hodel*, 899 F.2d 766, 770-71 (9th Cir. 1990); *Eby v. Reb Realty, Inc.*, 495 F.2d 646, 649 (9th Cir. 1974).

55. *Glen Eden Hosp., Inc. v. Blue Cross & Blue Shield of Mich., Inc.*, 740 F.2d 423, 427 (6th Cir. 1984).

56. *Willmar Poultry Co. v. Morton-Norwich Prods., Inc.*, 520 F.2d 289, 297 (8th Cir. 1975).

The extent of the record as the central question in determining whether a dispute is suitable for summary judgment in a case that would otherwise result in a bench trial was discussed in *Jane L. v. Bangerter*.⁵⁷ In *Jane L.*, the court addressed a challenge to the Utah Abortion Act on the ground that it violated the Constitutions of Utah and the United States. The court, relying on *Transworld Airlines* and *Nunez*, determined that there was no need for trial. The court found that the issues were properly suited for summary judgment based on the thorough record:

The posture of this case is that fully briefed and extensively argued motions to dismiss and for summary judgment were submitted for decision and taken under advisement. As a prelude to those motions, the parties engaged in extensive discovery. Various affidavits, deposition testimony and voluminous other materials were submitted in direct support of and in opposition to the pending motions, so that both motions in substance are presented as summary judgment motions. In addition, the parties have prepared and lodged with the court summaries of all depositions which have been taken, as well as the depositions themselves, verified summaries of the testimony of persons whose depositions were not taken, verified statements of direct testimony of the persons who were deposed and all exhibits which the parties rely upon. . . . The court has examined the depositions, written summaries, exhibits and other documents which have been submitted, and has determined that such can be and are of assistance in determining the legal issues presented. . . . The court determines that for the most part the materials presented do not relate to controversies of the sort to be decided at a trial. Rather, these are the type of materials from which inferences may be made by the court in arriving at legal conclusions on the issues presented. . . . [A] sufficient record exists by reason of the many materials which have been submitted by the parties for the court to determine the legal issues in this case. Accordingly, the court determines that a trial at this time is not necessary and that the issues presented can and should be determined by summary judgment.⁵⁸

Despite cases such as *Jane L.*, at least one commentator believes that further proceedings beyond summary judgment will almost always significantly “illuminate a legitimate factual dispute,” and therefore judges should not be able to draw their own inferences at the summary judgment stage.⁵⁹ This author considers Professor Stempel’s concern a serious one, but disagrees with the premise that material facts that might affect the inferences to be drawn will be placed in the record after the summary judgment stage in most cases.⁶⁰

In addition, when further material evidence may not yet have been presented, this possibility is likely to be known either to the nonmoving party or to the court. As discussed above, any concern that the record is

57. 794 F. Supp. 1537 (D. Utah 1992).

58. *Id.* at 1540-41.

59. Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 132 n.199 (1988).

60. Indeed, anecdotally, the opposite appears true for the majority of cases.

not complete will be addressed by providing further discovery prior to ruling on the summary judgment motion.

The judicial system entrusts significant responsibility to trial judges and ensures proper exercise of that responsibility through vigilant appellate review. The authority granted to a trial judge is not unduly expanded through a judge's determination that the record is sufficiently complete and that no additional evidence that would change the inferences to be drawn exists. As Judge William W. Schwarzer wrote:

[T]he purpose of the Federal Rules of Civil Procedure [is] to bring about early and full disclosure of trial evidence. The summary judgment procedure implements that purpose by requiring the opponent to come forward with specific facts demonstrating that a trial is necessary. See Advisory Committee Notes to Rule 56, 1963 Amendment. To foreclose summary judgment on the chance that later discovery may turn up additional evidence would defeat that purpose.⁶¹

E. Additional Cases That Might Still be Suitable for Trial

Other categories of cases exist that are suitable for trial by a judge despite the existence of a complete record or the possibility of completing the record. These are cases that would benefit from a trial, notwithstanding their ability to be resolved on summary judgment. Such cases might include disputes which have a great impact on the public. Those cases might be appropriate for trial because of the education the trial might provide to the populace. Another category is extremely complex cases. Regardless of how the facts may be inferred or inferences drawn, there are cases that can no doubt benefit from the parties' opportunity to fully educate the court as to how the law should be applied. For the same reason, it might be valuable to have a trial when there is a novel issue that will have significant precedential consequences. In all of these instances the judge might in his or her discretion choose to have a trial despite the ability to resolve the dispute at summary judgment.

61. William W. Schwarzer, *Summary Judgment: A Proposed Revision of Rule 56*, 110 F.R.D. 213, 222 (1986). Indeed, Judge Schwarzer is also of the opinion that in nonjury cases, "when all material facts are before the court on motion and the argument of the parties is not over what the evidence is but over its application to issues of ultimate fact, the judge may conclude that a trial is not necessary for a decision." *Id.* at 228.

As the Ninth Circuit stated:

[J]ust as the procedural shortcut must not be disfavored, courts must not rush to dispose summarily of cases—especially novel, complex, or otherwise difficult cases of public importance—unless it is clear that more complete factual development could not possibly alter the outcome and that the credibility of the witnesses’ statements or testimony is not at issue.⁶²

V. THE UNITED STATES COURT OF FEDERAL CLAIMS: A BENCH TRIAL COURT

The United States Court of Federal Claims is a perfect forum to institute an expanded judicial role at summary judgment. The Court of Federal Claims was created pursuant to Article I of the Constitution of the United States.⁶³ It consists of judges nominated by the President and confirmed by the Senate for a term of fifteen years.⁶⁴ The jurisdiction of the court is not geographically limited, and the judges may conduct a trial anywhere in the United States.⁶⁵ The principal statute governing the jurisdiction of the Court of Federal Claims is the Tucker Act.⁶⁶ Under the Tucker Act, the Court of Federal Claims has jurisdiction over monetary suits against the United States that do not sound in tort and that are founded upon either: (1) the Constitution; (2) an act of Congress; (3) an Executive order; (4) a regulation of an executive department; or (5) any express or implied-in-fact contract with the United States.⁶⁷ The greater part of litigation brought in the Court of Federal Claims involves government contracts, tax refunds, federal takings, federal employees’ pay, Native American claims, patents, and copyrights.⁶⁸

The United States Court of Federal Claims is an excellent arena in which to implement the expanded judicial role at summary judgment discussed above because it has no jury trials; the judge is the ultimate finder of fact in all of its cases.⁶⁹ Therefore, for the reasons discussed above, when the record is sufficiently complete, Court of Federal Claims judges should determine if a genuine issue necessitating trial is present,

62. *Transworld Airlines, Inc. v. Am. Coupon Exch., Inc.*, 913 F.2d 676, 684-85 (9th Cir. 1990).

63. 28 U.S.C. § 171 (2000).

64. 28 U.S.C. §§ 171(a), 172(a) (2000).

65. 28 U.S.C. § 2505 (2000).

66. 28 U.S.C. § 1491 (2000).

67. *THE UNITED STATES COURT OF FEDERAL CLAIMS, A DESKBOOK FOR PRACTITIONERS* 3-79 (4th ed. 1998).

68. *Id.*

69. *S. Cal. Edison Co. v. United States*, 38 Fed. Cl. 54, 61-62 (1997) (permitting government to invoke statute to compel adjudication of contingent claims did not deprive purchasers of Seventh Amendment right to jury trial); *see also United States v. Rush*, 804 F.2d 645, 647 (Fed. Cir. 1986).

and if not, make inferences as well as factual and legal determinations at summary judgment even when the facts are contested.

A. Drawing Inferences

Despite the wisdom of allowing Court of Federal Claims judges to draw inferences at summary judgment, the United States Court of Appeals for the Federal Circuit, which reviews decisions of the Court of Federal Claims, has generally followed the historical interpretation of Rule 56. Nonetheless, at least one decision of the Federal Circuit seems to grant greater authority to Court of Federal Claims judges at the summary judgment stage, and it is an en banc decision. In *Preseault v. United States*,⁷⁰ the Federal Circuit allowed a Court of Federal Claims judge to draw his own inferences on summary judgment when the record was complete, but only if there was no dispute as to the underlying facts.⁷¹

In *Preseault*, the Federal Circuit, en banc, ruled that the parties' dispute over whether an easement granted to a railroad had been abandoned did not preclude resolution of that issue on summary judgment even though under state law the question of abandonment was one of fact.⁷² The court found that the underlying facts regarding the question were undisputed and that the Court of Federal Claims could find abandonment based on inferences it drew from historical events:

The underlying facts regarding this question are undisputed. As noted, Vermont denominates the question of abandonment as one of fact. The parties are in dispute over whether an abandonment occurred. Does this preclude summary judgment? We think not. Abandonment, though a fact question under Vermont law, is a factual conclusion based on inferences to be drawn from the undisputed evidence regarding the historical events. Nothing would be gained by requiring a further proceeding at the trial level, since the parties had full opportunity to establish all relevant underlying facts. Trial would not enhance the court's ability to draw factual inferences and conclusions. Nor, since this is a nonjury matter, does permitting the trial judge to rule on summary judgment have the effect of denying a party the right to have the issue decided by jury. . . . Obviously, if there is a genuine dispute over a material evidentiary fact, summary judgment is precluded.⁷³

70. 100 F.3d 1525 (1996).

71. *Id.* at 1546.

72. *Id.*

73. *Id.*

Despite *Preseault*, the majority of Federal Circuit decisions require Court of Federal Claims judges to draw inferences against the moving party when interpreting facts.⁷⁴

B. Making Findings of Fact

The Federal Circuit's decision in *Jay v. Secretary of Department of Health and Human Services*, is also particularly noteworthy.⁷⁵ In *Jay*, the Federal Circuit reviewed the Court of Federal Claims' decision to sustain a dismissal of a Vaccine Act case by a special master made on summary judgment.⁷⁶ Under the national Vaccine Injury Compensation Program special masters conduct nonjury proceedings to determine entitlement to compensation.⁷⁷ A substantial amount of procedural authority is granted to the special master.⁷⁸ Despite this procedural authority and the fact that there are no jury cases before Vaccine Act special masters, the Federal Circuit reversed the Court of Federal Claims.⁷⁹ The Federal Circuit ruled that the Vaccine Act required the special master in *Jay* to make factual findings in order to make a determination.⁸⁰ According to the Federal Circuit, factual determinations could not be made by a special master at the summary judgment stage.⁸¹

The Federal Circuit stated that it is inappropriate for a special master to weigh evidence or draw inferences at the summary judgment stage. Its ruling also applies to the Court of Federal Claims. The Federal Circuit stated that Rule 56 of the Rules of the United States Claims

74. See, e.g., *Brown v. United States*, No. 99-5082, 1999 WL 1021054, *2 (Fed. Cir. Nov. 5, 1999) (remarking that on an appeal from the Court of Federal Claims, the Federal Circuit, "give[s] plenary review to the grant of summary judgment . . . resolving any disputed material fact and drawing factual inferences in favor of the non-movant.") (citation omitted); *Am. Broad. Co.s v. United States*, 129 F.3d 1243, 1245 (Fed. Cir. 1997) ("On appeal [from the Court of Federal Claims], we review a grant of summary judgment . . . *de novo*, with justifiable inferences drawn in favor of the non-moving party."); *Lane Bryant, Inc. v. United States*, 35 F.3d 1570, 1574 (Fed. Cir. 1994) ("Upon review of a grant of summary judgment [by the Court of Federal Claims], all evidence is to be viewed in a light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of the nonmoving party. Summary judgment is properly granted when no material facts are in dispute and the prevailing party is entitled to a judgment as a matter of law."). But, compare to *Dairyland Power Cooperative v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994), which only requires Court of Federal Claims judges to draw inferences that are "reasonable" in favor of the nonmoving party. This discretionary word "reasonable" invests the judge with at least some ability to weigh the possible inferences of facts.

75. 998 F.2d 979 (Fed. Cir. 1993).

76. *Id.* at 980.

77. 42 U.S.C. §§ 300aa-10–300aa-12.

78. CL. Ct. R. 8(a).

79. *Jay*, 998 F.2d at 980.

80. *Id.* at 982-83.

81. *Id.*

Court (an earlier name of the Court of Federal Claims) (RUSCC) does not explicitly prohibit factfinding. However, it is not clear whether the Federal Circuit meant this is an implicit or court-added prohibition; or whether it is not prohibited. It should also be noted that the Federal Circuit reached its conclusion despite the fact that the authority it specifically quoted declared it was protecting a litigant's right to trial:

When ruling on summary judgment, “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are . . . not those of a judge. . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” The summary judgment inquiry in essence is whether the evidence presents a sufficient disagreement of fact to require submission to the factfinder or whether it is “so one-sided that one party must prevail as a matter of law.” Because summary judgment raises only questions of law, our review of the grant and denial in this case of summary judgment is *de novo*. . . . The Claims Court’s authorization of factfinding on summary judgment however is imprudent and illogical: either a case is decided by summary judgment or it is not. If the statute precludes the special master from making a determination without making factual findings, then the statute precludes summary judgment. . . .

Contrary to the assertion of HHS, the Vaccine Rules do not authorize factfinding on summary judgment. Vaccine Rule 8(d) permits the special master to decide a case on summary judgment, “adopting procedures set forth in RUSCC 56 modified to the needs of the case.” HHS argues that the Vaccine Rules permit the special master to “modify” summary judgment to dispense with waiting until the end of the case to find the facts. This is incorrect. Vaccine Rule 8(d) allows the “procedures set forth” in RUSCC 56 to be modified. RUSCC 56 sets forth various procedures, but does not mention the prohibition on factfinding. Vaccine Rule 8(d) therefore cannot be read to authorize factfinding on summary judgment. To allow a special master to weigh and find facts prior to the end of the case (effectively at an arbitrary point in the litigation dictated by the summary judgment movant) would raise serious due process concerns.⁸²

C. Expanding the Role of Summary Judgment in the United States Court of Federal Claims

Jay, Lane Bryant, American Broadcasting, and *Brown* should not be the end of the debate, but only the beginning. The Federal Circuit has not been confronted with the logic discussed above and endorsed in *Transworld Airlines*, *Nunez*, *Coats & Clark*, and *Posadas*. A test case might persuade the Federal Circuit to allow Court of Federal Claims judges to determine if genuine issues exist that necessitate trial, and if

82. *Id.* at 982-83 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 55 (1986)) (emphasis added and other citations omitted).

not, weigh the evidence, draw inferences, and make factual determinations at summary judgment.

Over the past decade, a number of Court of Federal Claims decisions have cautiously entered the debate. In *Dzuris v. United States*, the court highlighted the lack of sense in requiring a judge to draw inferences in favor of the nonmoving party in a bench trial case.⁸³ The court first noted that the “summary judgment ‘standard mirrors the standard for a directed verdict’” in certain circumstances.⁸⁴ The court next noted that the judge is therefore to decide whether “the trier of fact” could reasonably find for the nonmoving party at trial, and explicitly cited jury trial language.⁸⁵ The wording and citation of *Dzuris* again spotlight the lack of efficiency in requiring judges to draw inferences for nonmoving parties simply to allow judges to draw their own conclusions at a subsequent trial on the same facts:

When resolving a motion for summary judgment, the court may neither make credibility determinations nor weigh the evidence and seek to determine the truth of the matter. Although entitled to “all applicable presumptions, inferences, and intendments,” the non-movant bears the burden of presenting sufficient evidence upon which the trier of fact reasonably could find in its favor. Should the non-movant fail to present such evidence, summary judgment may be granted in favor of the moving party. Moreover, the summary judgment “standard mirrors the standard for a directed verdict . . . , which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.”⁸⁶

Another Court of Federal Claims decision that marks a significant step in expanding summary judgment power is *Chevy Chase Land Co. of Montgomery County v. United States*.⁸⁷ The court in *Chevy Chase* granted the defendant’s motion for summary judgment in a Rails-to-Trails Act case.⁸⁸ Although the court did not speak to a judge’s ability to weigh evidence or draw inferences, the court did note that where further proceedings would not serve any purpose, summary judgment is appropriate.⁸⁹ The court went so far as to say additional proceedings would not be useful even when there might be additional facts not yet presented, as long as the additional evidence is not likely to affect the

83. 44 Fed. Cl. 452, 456 (1999), *aff’d*, 232 F.3d 911, No. 99-5162, 2000 WL 366293 (Fed. Cir. Apr. 7, 2000) (cited in table of decisions in 232 F.3d but not reported).

84. *Id.* (quoting *Liberty Lobby*, 477 U.S. at 255).

85. *Id.* at 456.

86. *Id.* (quoting *Liberty Lobby*, 477 U.S. at 251-52) (“In essence, . . . the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”).

87. 37 Fed. Cl. 545 (1997).

88. *Id.* at 599.

89. *Id.* at 562.

determination: “Moreover, summary judgment will be appropriate when the material facts are adequately developed in the motion papers, such that full trial will be useless because additional evidence could not reasonably be expected to change the outcome of a case.”⁹⁰

Chevy Chase stops well short of expanding Court of Federal Claims judges’ summary judgment power. Apparently, no Court of Federal Claims case has explicitly proposed the expanded judicial role advocated by this Article. Nor has a Court of Federal Claims case espoused the reasoning of *Transworld Airlines*, *Nunez*, *Coats & Clark*, and *Posadas* on this point.

The expanded role for trial judges at summary judgment advocated by this Article should be implemented in the United States Court of Federal Claims. Court of Federal Claims judges should be allowed to weigh evidence, draw inferences, and make factual determinations at summary judgment because they would be the ones to do so at trial. This reasoning applies whether the facts are uncontested or contested as long as the record is sufficiently complete. The litigants’ and the courts’ interests would be better served and an inefficiency obviated.

D. Rule 56 of the Rules of the United States Court of Federal Claims

The Rules of the Court of Federal Claims suggest that definitive, factual, and inferential determinations might be appropriate at the summary judgment stage. RUSCC Rule 56(c) mirrors Federal Rule of Civil Procedure 56(c) and RUSCC 56(e) mirrors Federal Rule of Civil Procedure 56(e).⁹¹ The logic discussed above is also mirrored. In general, the Rules of the Court of Federal Claims are patterned on the Federal Rules of Civil Procedure. Therefore, precedent under the Federal Rules of Civil Procedure is relevant to interpreting the Rules of the Court of Federal Claims, including RUSCC 56.⁹² Indeed, the argument that judicial discretion in inference drawing is allowed in

90. *Id.*

91. CL. CT. R. 1 states in part:

FEDERAL RULES OF CIVIL PROCEDURE. The Federal Rules applicable to civil actions tried by the court sitting without a jury and in effect December 1, 1991, have been incorporated in these rules to the extent that they appropriately can be applied to proceedings in this court.

92. *Jay v. Sec’y of DHHS*, 998 F.2d 979, 982 (Fed. Cir. 1993); *Imperial Van Lines Int’l, Inc. v. United States*, 821 F.2d 634, 637 (Fed. Cir. 1987); *Lichtefeld-Massaró, Inc. v. United States*, 17 Cl. Ct. 67, 70 (1989).

summary judgment is even greater under the RUSCC. The RUSCC adds the following language to Rule 56 not found in the Federal Rule of Civil Procedure:

In determining any motion for summary judgment the court will, absent persuasive reason to the contrary, deem the material facts claimed and adequately supported by the moving party to be established, except to the extent that such material facts are included in the Statement of Genuine Issues and are controverted by affidavit or other written or oral evidence.⁹³

The language “to the extent that such material facts are . . . controverted by . . . evidence” requires the judge to determine whether the evidence presented by the nonmoving party does actually controvert the material facts asserted by the moving party. In making this determination it would be inane for a judge to draw all inferences in favor of the nonmoving part as a jury might do because there are no jury trials in the Court of Federal Claims. Common sense requires judges to draw the inferences as they would otherwise draw them at trial because they are the ultimate factfinders.

VI. TRIAL ON THE PAPERS UNDER RULE 52 AS AN ALTERNATIVE

In the event a federal circuit does not adopt the position advocated by this Article and its understanding of Rule 56, greater use of Rule 52 of the Federal Rules of Civil Procedure, as mirrored by Rule 52 of the Rules of the Court of Federal Claims, might allow an equally efficient adjudication.

Rule 52, sometimes referred to as a “trial on the papers,” allows the court to draw inferences, apply the preponderance of the evidence standard, and decide the case.⁹⁴ A trial on the papers is conducted by the consent of the parties where the papers contain all the necessary materials for a decision on the merits.⁹⁵ If Rule 56 is not interpreted by a circuit as recommended above, a judge in a nonjury case should strongly encourage the parties to invoke a Rule 52 determination and file the necessary briefs and exhibits. When this is done, the court evaluates the papers, makes a determination, and enters findings and conclusions.⁹⁶

93. CL. CT. R. 56(d).

94. Denlow, *supra* note 46, at 31.

95. Acuff-Rose Music, Inc. v. Jostens, Inc., 155 F.3d 140, 142 (2d Cir. 1998); Nielsen v. W. Elec. Co., 603 F.2d 741, 743 (8th Cir. 1979); WRIGHT ET AL., *supra* note 14, § 2720.

96. Rule 52 of the Rules of the United States Court of Federal Claims is almost identical to Rule 52 of the Federal Rules of Civil Procedure, which reads:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in

The parties might be encouraged to pursue a Rule 52 resolution in an initial special procedures order sent to the parties in the beginning of the adjudication process. The judge may point out that a Rule 52 proceeding allows the court and the parties to focus their energies on a process that will judiciously and relatively quickly decide the case even when a question of fact is present. The court should note that a trial on the papers is less expensive because it does not require nor allow witnesses to be prepared and presented. The court can also inform the parties that a Rule 52 trial on the papers is less likely to be appealed because a deferential standard of review is applied. Trials on the papers enjoy a “clearly erroneous” standard of review on appeal.⁹⁷

VII. CONCLUSION

Summary judgment was created as a tool for expedient and just litigation resolution. Because of concern for a litigant’s right to a jury

granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) Amendment. On a party’s motion filed no later than 10 days after entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

(c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

97. *Acuff-Rose*, 155 F.3d at 144; *Nielsen*, 603 F.2d at 743.

trial, the effectiveness of summary judgment has not been fully realized. This is particularly true in nonjury trials. Specifically, trial judges at summary judgment have not been able to make determinations requiring findings of fact or to draw inferences against the nonmoving party. When judges are the ultimate finders of fact and the record is sufficiently complete, this barrier requires an unnecessary trial, and the delay and expenditures that go with it, so that judges can simply do what they otherwise might have done at summary judgment. The Federal Rules of Civil Procedure do not require this inefficiency and indeed implicitly advocate against it. Realizing the unnecessary inefficiency that otherwise results, a number of circuits have begun to expand the scope of summary judgment when the judge is the ultimate fact finder. These decisions, and their logic, are applicable to all nonjury cases and should be built and expanded upon.

In bench trial cases at summary judgment the judge should first determine if there is a genuine issue requiring trial. Because the judge is the ultimate finder of fact, there is only a genuine issue where the judge finds the record is not complete. Otherwise, the judge faces the same information at summary judgment as at trial and there is therefore no *genuine* need for a trial. After determining there is no genuine issue, the judge should weigh the evidence, draw inferences, make factual determinations, apply the law, and make a decision.

Where the judge is the ultimate trier of fact, it does not make sense to apply the possible judgment of anyone else. In a bench trial case where the record is sufficiently thorough, it is only sensible for the judge to draw inferences from the facts as the judge would otherwise draw them at trial.

Alternatively, trial courts should institute and encourage frequent use of Rule 52 “trials on the paper.” A trial on the papers is conducted by the consent of the parties where the papers contain all the necessary materials for a decision on the merits, and allows the court to draw inferences, apply the preponderance of the evidence standard, and decide the case.

The federal rules should be applied as efficiently and effectively as possible. When the record is sufficient in nonjury disputes, judges should be able to draw their own inferences, resolve factual disputes, and decide cases at the summary judgment stage. To do otherwise is nonsensical, a waste of the parties’ time and money, and a waste of judicial resources.