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Civil Procedure -- Cutts v. Casey Extended to Summary Judgment

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unimpressive as a guidepost to statutory meaning. The crucial language cited by the court is capable of differing interpretations. A leading commentator, in rejecting the committee reports, explains that "as essays in statutory construction, they do not commend themselves."[102] In contrast to its indulgent attitude towards the ambiguities that abound in the committee report, the court exhibited an unnecessarily rigid approach to the statutory language itself. Maritime employment includes those tasks that take place over navigable waters. The coverage provisions can be fairly read to encompass all employment-related injuries that occur within the Act's territorial limits. At the very least, maritime employment must include all employees engaged in the overall process of loading and unloading vessels. An affirmation of the Benefits Review Board in these three cases would come closer to accomplishing the congressional intention of creating a modern, fair and workable longshoremen's compensation scheme.

BRIAN A. POWERS

Civil Procedure—Cutts v. Casey Extended to Summary Judgment

[PROLOGUE

As this Note went to press, the Supreme Court of North Carolina held in *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976), that summary judgment may be granted for the party with the trial burden of proof even when he carries that burden, at least in part, with his own affidavits. *Cutts v. Casey* was expressly rejected as not controlling since it involved a directed verdict motion upon conflicting evidence on a strenuously contested issue of fact.

In an excellent analysis that appears to adopt the federal construction, Chief Justice Sharp concluded that a movant with the trial burden of proof is entitled to summary judgment on the basis of his own affidavits when: (1) there are only latent doubts concerning the credibility of his affidavits; (2) the non-movant has failed to introduce any materials which support his opposition to the motion or which point to specific areas of contradiction or impeachment in the movant's materials and the non-movant has failed to utilize rule 56(f); and (3) summary judgment is otherwise appropriate—

102. GILMORE & BLACK, *supra* note 5, § 6-51, at 450.

that is, the movant must succeed on the basis of his own materials. The Chief Justice clearly articulated that to succeed on his own materials the movant must show: (1) that there are no genuine issues of material fact; (2) that there are no gaps in his proof; (3) that no inferences inconsistent with his recovery arise from his evidence; and (4) that there is no standard that must be applied to the facts by a jury. With equal clarity she noted that summary judgment must be denied if the movant's affiants are inherently incredible, if the circumstances are suspect, or if the need for cross-examination appears. Thus, she concluded that when a movant's *only* materials were his own affidavits, ordinarily he will not be able to meet the above standards. However, interest in the outcome of the case on the part of an affiant, by itself, was said to raise only latent doubts as to his credibility which do not preclude summary judgment.

Despite the *Kidd* opinion we feel that this Note warrants publication for several reasons. First, it provides a vehicle by which the *North Carolina Law Review* can timely disseminate information concerning the important *Kidd* decision. Second, this note presents arguments that the pronouncement in *Cutts* is obiter dictum. There is some language in the *Kidd* decision that supports these arguments. In light of the *Kidd* decision, these arguments may prove particularly useful. Additionally the court in *Kidd* expressly rejected the argument that the constitutional right to jury trial compelled the preclusion of summary judgment for the movant with the trial burden of proof. A similar argument was the basis of the *Cutts* rationale. Thus the court in *Kidd* rejected the argument it thought persuasive in *Cutts*. This express rejection certainly weakens *Cutts* even as it applies to directed verdict cases and supports the conclusion of this note that the *Cutts* rule may be only dictum. Third, the policy arguments for not applying the *Cutts* decision to summary judgment cases presented in this note are quite similar to those expressed by the court in *Kidd*. Finally, we think this Note, though somewhat pre-empted, will provide a useful research tool when read in conjunction with the *Kidd* decision.

THE BOARD OF EDITORS]

When the North Carolina Supreme Court decided *Cutts v. Casey*,[1] the decision was met with a less than favorable reaction.[2] *Cutts* denies the availability of a motion for directed verdict to the party with the burden of proof when his right to recover depends upon the credibility of his witnesses.[3] Some critics of this opinion, like Jeremiah predicting

1. 278 N.C. 390, 180 S.E.2d 297 (1971).

2. *See, e.g.*, Louis, *A Survey of Decisions Under the New North Carolina Rules of Civil Procedure*, 50 N.C.L. REV. 729, 746-54 (1972); Comment, *Directing the Verdict in Favor of the Party with the Burden of Proof*, 50 N.C.L. REV. 843, 847-52 (1972).

3. 278 N.C. at 417, 180 S.E.2d at 311. The rationale for this decision was that to direct a verdict based on testimonial evidence for the party with the burden of proof would violate the non-movant's constitutional right to jury trial. *Id.* at 417-18, 180

doom to the peoples of Judah, prophesied that the decision not only forced an unintended and restrictive interpretation on the use of the directed verdict, but also that its application to summary judgment motions would be compelled by force of logic.[4] It appears that such things have come to pass. In *Shearin v. National Indemnity Co.*[5] the North Carolina Court of Appeals reluctantly concluded that the Su-

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S.E.2d at 311. The constitutional provision relied upon provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. CONST. art. I, § 25. From this statement of constitutional policy, it was concluded by the *Cutts* majority that the presentation of testimonial evidence raises an issue of credibility that must be submitted to the jury. 278 N.C. at 417, 180 S.E.2d at 311. This conclusion is clearly at odds with federal and most state precedent. *See* cases cited by Huskins, J., concurring, *id.* at 427, 180 S.E.2d at 319. *See also* Comment, 50 N.C.L. REV., *supra* note 2, at 848 & n.29. Generally, the federal courts will allow a directed verdict based upon testimonial evidence for the party with the burden of proof if that evidence is uncontradicted, unimpeached, and if no conflicting inferences may be drawn therefrom. 5A J. MOORE, FEDERAL PRACTICE ¶ 50.02[1], at 2318-19 (2d ed. 1975) [hereinafter cited as MOORE]. Under this approach, when a judge directs a verdict based upon such evidence, he has not deprived the non-movant of his right to jury trial because the *preliminary* question—"Is there a genuine issue of fact for the jury?"—is a question of law for the judge that may be decided against the non-movant. *See* 2 A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1488.20 (Phillips Supp. 1970) [hereinafter cited as Phillips]. The majority in *Cutts* distinguished this precedent by relying upon N.C.R. CIV. P. 51(a), North Carolina's "no comment" statute, which forbids a judge from commenting on the sufficiency of the evidence during his charge to the jury. It has been pervasively argued that this reliance was neither appropriate nor compelled. *See* 278 N.C. at 427, 180 S.E.2d at 319 (Huskins, J., concurring); Phillips § 1488.20; authoritites cited note 2 *supra*.

This note proceeds upon the preliminary conclusion that the *Cutts* decision was unfortunate for two reasons. First, under *Cutts*, an entire class of potential movants (those with the burden of proof who must rely upon testimonial evidence) are denied access to the directed verdict procedure. Thus, even if the non-movant has presented no evidence and regardless of the strength of the movant's case, the issues created by denials in the pleadings must be submitted to a jury if the movant's right to recover depends upon the credibility of his witnesses. Second, to the extent that the *Cutts* holding is extended to summary judgment, the primary purpose of that procedure—to preview the evidence so that a trial may be avoided if there is no genuine issue of material fact —is frustrated. If the movant bears his burden of proof with testimonial evidence (affidavits), there is no compulsion on the non-movant to come forward with materials of his own since, under *Cutts*, summary judgment cannot be entered against him on the basis of the movant's testimonial evidence. If he does not come forward, it is impossible for a judge to predetermine if the non-movant can present triable issues of fact. This is clearly at odds with the language of rule 56(e). *See* note 38 *infra*.

During these days of crowded dockets it seems inappropriate to deny the availability of two procedures and to frustrate their clear purpose of promoting judicial economy for less than compelling reasons. Since the constitutional infirmity propounded in *Cutts* has been rejected by the vast majority of jurisdictions using virtually identical procedural rules, and since the factor used by the *Cutts* majority to distinguish this precedent is less than persuasive, until overruled, *Cutts* should be limited. This note proceeds upon that premise.

4. *E.g.*, Cutts v. Casey, 278 N.C. 390, 426-27, 180 S.E.2d 297, 321 (1971) (Huskins, J., concurring); Louis, *supra* note 2, at 749 & nn.132-33.

5. 27 N.C App. 88, 218 S.E.2d 207 (1975).

preme Court's reasoning in *Cutts* applied to summary judgment motions.[6]

In *Shearin* plaintiff-insured sought to recover from defendant-insurer for accidental damage to his airplane. The insurer denied liability on two grounds. First, it alleged that at the time of the accident the airplane was not being used for a "use" covered in the policy.[7] Second, it alleged that the aircraft was not being operated by a "qualified" pilot as that term was defined in the policy.[8] Plaintiff's answers to interrogatories issued by defendant tended to show that at the time the airplane was damaged, it was being used by a friend of plaintiff who was receiving flight instruction from a certified instructor.[9] On the basis of the pleadings and plaintiff's answers to the interrogatories, defendant moved for summary judgment.[10]

Plaintiff responded with an affidavit by his friend, an affidavit by the flight instructor and two affidavits of his own. These materials tended to show that plaintiff had made his airplane available at no charge so that his friend could get flight instruction; that the instructor was certified and was a "qualified" pilot under the policy definitions; and that although his friend was operating the plane from the pilot's chair, the instructor had "continuous ready access to a set of controls during the entire flight . . . ."[11] On the basis of these affidavits plaintiff made a cross-motion for summary judgment to which defendant did not respond.

The trial judge determined that there was no genuine issue of material fact and concluded as a matter of law that the "use" in question was covered by the policy and that the airplane was being operated by a

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6. *Id.* at 91-92, 218 S.E.2d at 210.

7. Insurer admitted in its answer that it had issued an accident policy to plaintiff and that the policy was in effect at the time of the mishap. Its defenses were definitional in nature. *Id.* at 88, 218 S.E.2d at 208.

8. *Id.* Item six of the Policy Declarations provided that the airplane would be used for "[p]leasure and [b]usiness." This was defined as "[p]ersonal and [p]leasure use and use in direct connection with the [i]nsured's business, excluding any operation for which a charge is made." "Qualified [p]ilot" as defined in the policy referred to Federal Aviation Administration certifications and ratings. *Id.* In addition, the policy provided that it did not apply to any loss occurring while the airplane was being operated by a student-pilot unless the student was under the direct supervision of a certified instructor. *Id.* at 89, 218 S.E.2d at 208.

9. *Id.* at 89, 218 S.E.2d at 208.

10. Summary judgment is authorized for either "claimant" or "defending party" under N.C.R. Civ. P. 56(a) & (b). All references in this Note to specific rules of civil procedure will be, unless otherwise indicated, to the North Carolina rules.

11. 27 N.C. App. at 90, 218 S.E.2d at 209.

"qualified" pilot.[12] Plaintiff's summary judgment motion was granted on the issue of liability and a trial on the issue of damages was ordered.[13] The defendant appealed.

The Court of Appeals clearly articulated the narrow issue: "[W]hether . . . a summary judgment may be granted in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses." The holding is equally clear: "On authority of *Cutts v. Casey*, we conclude that the answer is NO."[14] Judge Parker, writing for the majority,[15] was unable "to see why the principle announced in *Cutts v. Casey* [did] not apply with at least equal force when the question is presented by a motion for summary judgment under Rule 56."[16] Judge Vaughn, in dissent, acknowledged that *Cutts* was controlling precedent in directed verdict cases, but concluded that since a summary judgment motion comes at a different "stage" of a proceeding, different responsibilities could be placed on the parties.[17] Therefore, failure to meet the responsibilities imposed at one stage could result in a party losing "the shield that would otherwise be available for the next [stage]."[18]

Before considering the import of the *Shearin* decision, it is necessary to examine briefly the development and application of summary judgment, a procedure new to North Carolina.[19] Summary judgment represents the most drastic change in our procedural system wrought by the new rules.[20] The procedure outlined in rule 56 is clearly available to any party and is not limited in its application to any particular type of action.[21] Its purpose is to pierce the allegations of the pleadings and to

12. *Id.* at 91, 218 S.E.2d at 209. Although the court of appeals reversed the trial judge on the basis of *Cutts*, both the majority opinion and the dissent concluded that, but for *Cutts*, the trial judge's conclusions of law were correct. *Id.* at 91-93, 218 S.E.2d at 210-11.

13. Rule 56(c) specifically allows summary judgment on the issue of liability even though a genuine issue exists as to the amount of damages. *See* note 29 *infra*.

14. 27 N.C. App. at 91, 218 S.E.2d at 209, 210 (citation omitted).

15. Britt, J., concurred without opinion. Vaughn, J., dissented. *Id.* at 92, 218 S.E.2d at 210.

16. *Id.*

17. *Id.* at 93, 218 S.E.2d at 210-11.

18. *Id.*

19. W. SHUFORD, NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE § 56-2 (1975) [hereinafter cited as SHUFORD]. Prior procedure did allow certain issues of fact raised by the pleadings to be stricken if they were irrelevant or redundant, if a "sham" defense was raised, or if an answer, reply or demurrer was "frivolous." Where these procedures did not apply, any issue raised by the pleadings required a trial. *Id.*

20. SHUFORD, *supra* note 19, § 56-3, at 467.

21. *E.g.*, McNair v. Boyette, 282 N.C. 230, 234, 192 S.E.2d 457, 460 (1972); Kessing v. National Mortgage Corp., 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971); Pridgen v. Hughes, 9 N.C. App. 635, 638, 177 S.E.2d 425, 426 (1970).

determine if there are any issues of material fact for trial.[22] If no such issue exists, the court can dispose of a case on the merits by applying the appropriate law without incurring the cost or delay of further proceedings.

While North Carolina practitioners have utilized summary judgment extensively,[23] the state courts have considered it a drastic remedy that should be granted sparingly.[24] Great pains have been taken by the appellate courts to describe the situations in which summary judgment is *not* appropriate. It is absolutely clear that the trial judge hearing the motion is not to decide issues of fact.[25] It is equally clear that although a judge may have before him many materials,[26] and may even hear oral testimony,[27] he is not to let the hearing develop into a "trial."[28]

Rule 56 contains a statement of the standard that must be met before summary judgment can be granted. Only when the allowable materials "show that there is no genuine issue as to any material fact and

22. *E.g.*, Singleton v. Stewart, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972); *cf.* cases cited note 21 *supra.*

23. It has been suggested that more summary judgment motions have been the subject of appeal than any other procedure available under the new rule. SHUFORD, *supra* note 19, § 56-3, at 467.

24. *E.g.*, First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972); Koontz v. City of Winston-Salem, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

25. *E.g.*, Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974); Houck v. Overcash, 282 N.C. 623, 627, 193 S.E.2d 905, 908 (1973); Singleton v. Stewart, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). Some North Carolina judges persist in listing "findings of fact" in their summary judgment orders. Although this practice is not appropriate, it does not constitute reversible error if the judge did not decide issues of material fact and only listed stipulated or admitted facts and conclusions of law. *See* Wall v. Wall, 24 N.C. App. 725, 729, 212 S.E.2d 238, 241 (1975).

26. Rule 56(c) specifically names pleadings, depositions, answers to interrogatories, affidavits, and admissions on file as appropriate materials. *See* note 29 *infra.* However, the scope of available materials is broader. In addition to the materials listed in rule 56(c), the court can consider admissions in the pleadings and admissions on file, whether obtained under rule 36 or otherwise, and any other material which would be admissible in evidence or of which judicial notice may be taken. *E.g.*, Kessing v. National Mortgage Corp., 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). Oral testimony is also available. *See* note 27 *infra.* In addition, stipulations of fact are considered as admissions and any presumptions that would be available at trial can be considered. Page v. Sloan, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972) (stipulations of fact); Koontz v. City of Winston-Salem, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972) (presumptions).

27. Oral testimony, by virtue of rule 43(e), can be heard at a summary judgment hearing. However, such testimony should be used sparingly to prevent the hearing from developing into a "trial" to determine if a trial is necessary. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 461, 211 S.E.2d 484, 489 (1975); Walton v. Meir, 14 N.C. App. 183, 188-89, 188 S.E.2d 56, 60 (1972).

28. *See* note 27 *supra.*

that any party is entitled to a judgment as a matter of law . . ."[29] is summary judgment appropriate. Interpreting this statutory standard, North Carolina courts have stated that an issue is "material" if the facts alleged constitute a legal defense, or are of such a nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved cannot prevail.[30] Similarly, a "genuine issue" has been defined as one that can be supported by substantial evidence.[31] Thus neither a material issue that cannot be supported by substantial evidence nor an issue of immaterial fact will preclude summary judgment.[32] In applying these standards, directed verdict has developed into somewhat of a touchstone. It has been repeatedly stated that summary judgment is appropriate when only legal issues are involved and when a party would be entitled to a directed verdict at trial.[33]

These interpretations of rule 56 have not caused substantial controversy. The difficult task for any court is application of the evidentiary standards that each party must meet either to be entitled to or to defeat a motion for summary judgment. Consistent with the present interpretation of the equivalent federal rule,[34] the burden in North Carolina is on the movant to establish the lack of a triable issue of material fact, regardless of which party bears the burden of proof at trial.[35] General-

29. Rule 56(c) states in full:

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 genuine issue as to any material fact and that any 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 genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

30. *E.g.*, Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974); Koontz v. City of Winston-Salem, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

31. *E.g.*, cases cited note 30 *supra.*

32. *E.g.*, Kessing v. National Mortgage Corp., 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971).

33. Long v. Long, 15 N.C. App. 525, 526-27, 190 S.E.2d 415, 416-17 (1972); Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 698-99, 179 S.E.2d 865, 867 (1971).

34. There are four minor differences between the North Carolina rule and the federal rule. SHUFORD, *supra* note 19, § 56-1, at 466-67. For discussion of the present federal interpretation see Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 748 & n.13.

35. *E.g.*, First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972); Whitley v. Cubberly, 24 N.C. App. 204, 206, 210 S.E.2d 289, 291 (1974).

ly, this burden will be met by proving the non-existence of an essential element of the opposing party's claim or by showing through discovery that the opposing party cannot produce evidence to support one of the essential elements of his claim.[36] To determine whether this burden has been met, the court views the record in the light most favorable to the non-movant, accepts his evidence as true and regards his papers indulgently.[37] If the movant meets this initial burden, rule 56(e) specifically provides that unless the non-movant produces specific facts showing the existence of a triable issue, the movant is entitled to summary judgment.[38]

Applying these standards to the *Shearin* facts, both the trial court and the court of appeals believed that plaintiff had met his burden.[39] They were equally in agreement that defendant had failed to set forth specific facts showing the existence of a triable issue. The court of appeals concluded: *but for Cutts v. Casey*, summary judgment was appropriate for the plaintiff.[40] Given this conclusion, it is unfortunate that the court of appeals did not take the opportunity in *Shearin* to distinguish *Cutts*.

There were several options available to the court of appeals. The majority opinion indicates that the court felt compelled to apply the

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36. Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974).

37. *E.g.*, Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974); Hall v. Funderburk, 23 N.C. App. 214, 216, 208 S.E.2d 402, 403 (1974). In addition, it is often said that the movant's papers will be closely scrutinized. *Id.*

38. Rule 56(e) provides 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 his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

North Carolina courts have interpreted this provision to mean that if the movant's materials are not sufficient, summary judgment in his favor is not "appropriate" and must be denied even if the non-movant does not respond at all. Thus it has been held that the non-movant does not incur the burden of coming forward with evidence of a triable issue until the movant produces evidence of the necessary certitude which negates the non-movant's claim in its entirety. Whitley v. Cubberly, 24 N.C. App. 204, 206, 210 S.E.2d 289, 291 (1974); *see* Tolbert v. Great Atlantic & Pacific Tea Co., 22 N.C. App. 491, 494, 206 S.E.2d 816, 817 (1974).

39. 27 N.C. App. at 91-92, 218 S.E.2d at 210.

40. *Id.* The court's reliance on *Cutts* appears justified. There, as in *Shearin*, the movant with the burden of proof met that burden with testimonial evidence. Credibility conceivably could be questioned at trial. Thus the *Cutts* conclusion that credibility of witnesses is for the jury, combined with the substantial precedent equating the tests for the two motions, provides some justification for the extension of the *Cutts* reasoning to summary judgment proceedings.

Cutts reasoning to the *Shearin* facts even though it was unanimous in its opinion that summary judgment was proper.[41] If stare decisis was the force behind that compulsion, the court of appeals need not have yielded so readily. Though the doctrine of stare decisis is "fully established" in North Carolina,[42] it was not necessarily applicable in *Shearin* for two reasons. First, while the North Carolina Supreme Court has spoken to the credibility question in relation to directed verdict motions, there has been no decision in that court applying the *Cutts* rationale to summary judgment cases. By refusing to apply the *Cutts* doctrine to the *Shearin* facts, the court of appeals would not be committing the *verboten* act of overruling a supreme court decision since there is little factual similarity between the two cases.[43] In addition, it must be remembered that *Shearin* and *Cutts*, cases of statutory interpretation, deal with different statutes. Though the similarity of the motions authorized by the two statutes is undeniable,[44] there are technical differences upon which a court could reasonably rely in distinguishing them.[45] Second, at least theoretically, the pronouncement in *Cutts* that credibility is always for the jury can be considered obiter dicta.[46] Justice Sharp, in the *Cutts*

41. *Id.*

42. Williamson v. Rabon, 177 N.C. 302, 305, 98 S.E. 830, 831 (1919); *cf.* Bulova Watch Co. v. Brand Distributors, 285 N.C. 467, 472-73, 206 S.E.2d 141, 145 (1974).

43. Stare decisis is a doctrine based on similarity of fact patterns. *Cf.* Dennis v. City of Albemarle, 243 N.C. 221, 223, 90 S.E.2d 532, 533 (1955). *Cutts*, an action to try title to land, has little in common with *Shearin*, an action to recover under an insurance contract.

44. *See* text accompanying note 33 *supra*. The similarity is such that it has led one commentator to suggest that, analytically, the motions are identical. Louis, *supra* note 2, at 749 & nn.132-33.

45. Distinction at this level of analysis is not difficult since stare decisis is a doctrine based on recurring fact patterns. *See* note 43 *supra*. Several differences between the two motions are apparent. First, they appear at different stages of a proceeding. As a result, the materials a judge considers when ruling on a summary judgment motion are not "evidence" as they are in a directed verdict setting, but are "evidence of evidence." In addition, granting a summary judgment can avoid a needless trial while granting a directed verdict cannot. Second, there are differences in the language of the two rules upon which a distinction could be forced. Although rule 50 is less than ambiguous in its references to who may move for directed verdict, rule 56(a) specifically provides for a summary judgment for a "party seeking to recover upon a claim, counterclaim, or crossclaim . . . ." In the normal situation such a party will bear the burden of proof at trial. For a comparison of the language of the two rules see Cutts v. Casey, 278 N.C. 390, 425-26, 180 S.E.2d 287, 320-21 (1971) (Huskins, J., concurring). These "technical differences," while perhaps unacceptable as distinctions upon which to allow a summary judgment for the party hearing the burden of proof with testimonial evidence, certainly are substantial enough to reject *Cutts* as controlling in summary judgment cases. *See generally* Louis, *supra* note 2, at 749 & nn.132-33.

46. Statements in the text of a judicial opinion unnecessary to the determination of the case have to be regarded as obiter dicta. *Cf.* Washburn v. Washburn, 234 N.C. 370, 373, 67 S.E.2d 264, 266 (1951).

majority opinion, noted that granting summary judgment was doubly error since the movant's evidence was contradicted.[47] It can be argued that this factor was dispositive of the case.[48] If it was dispositive, then the statement in *Cutts* concerning the movant with the burden of proof and credibility must be dictum. The credence of this argument is enhanced by an important qualification in the *Cutts* opinion; despite the pronouncement that credibility is always for the jury, Chief Justice Sharp conceded that there may be a few situations in which credibility as a matter of law seems compelled.[49] In light of this equivocation, it would not be unreasonable to confine *Cutts* to its own facts for stare decisis purposes. Certainly it should not be extended to control a different statute. And certainly any decision to extend it at all should not be made by an intermediate court that finds the extension contrary to the clear language of the statute.[50]

If the court of appeals was not compelled to apply the *Cutts* rationale to summary judgment by the doctrine of stare decisis, what was the basis for its decision to do so? It is submitted that the court was

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47. 278 N.C. at 422, 180 S.E.2d at 314. Even under the more liberal federal interpretation of directed verdict for the party with the burden of proof, the motion must be denied if the movant's testimonial evidence is contradicted or impeached. 5A MOORE, *supra* note 3, ¶ 50.02[1], at 2318-19 (2d ed. 1975). North Carolina case law is consistent with this interpretation. *See* cases cited notes 55-56 *infra*.

48. *See* note 47 *supra*. An additional dispositive factor, not recognized by the court, was that the plaintiff in *Cutts* apparently did not move at the close of all the evidence for a directed verdict on his own claim. Such a motion is an absolute prerequisite to a motion for judgment notwithstanding the verdict under rule 50(b), the motion the trial court erroneously granted. *See* Louis, *supra* note 2, at 747 & nn.116 & 117.

49. 278 N.C. at 421, 180 S.E.2d at 314. The *Cutts* opinion did not elaborate upon the situations in which credibility as a matter of law would be compelled. The federal courts accept credibility as a matter of law when the movant's evidence is uncontradicted, unimpeached, and no conflicting inferences may be drawn therefrom. *See* note 3 *supra*. Dean Phillips, cited by Chief Justice Sharp in *Cutts*, suggests that credibility could be accepted where the movant's evidence is entirely documentary or where it is uncontradicted and the facts to contradict it, if they exist at all, are within the non-movant's peculiar knowledge. Phillips, *supra* note 3, § 1488.20, at 26. Other jurisdictions accept credibility when the non-movant "admits" facts that establish the movant's case, when the controlling evidence is documentary and its construction is a matter of law for the court, or when the movant's oral evidence is unimpeached and uncontradicted. *See* Comment, 50 N.C.L. REV., *supra* note 2, at 844-48. In addition most courts will deny directed verdict if the movant's evidence is inherently suspect by reason of interest, internal inconsistencies, equivocation, or scientific impossibility. *Id.* at 849. The negative implication from North Carolina case law is that the movant's evidence must be from a disinterested witness whose testimony is not contradicted or impeached. *See* text accompanying notes 51-54 *infra*.

50. The *Shearin* majority noted, "Therefore, were we at liberty to give full scope to Rule 56, we would agree with the trial court in the present case that, upon the basis of plaintiff's uncontradicted affidavits, there is here no genuine issue as to any material fact." 27 N.C. App. at 91, 218 S.E.2d at 210.

misled concerning the scope of *Cutts* and missed the opportunity to free summary judgment from its shadow.

One possible ground for distinction is suggested by Judge Vaughn in his dissent. In considering the fact that rule 56 clearly contemplates the availability of a summary judgment for any party,[51] regardless of burdens of proof, he seemed to be raising a question as to what policy is contravened when the movant has the burden of proof and carries that burden with testimonial evidence. The *Cutts* opinion suggests that the policy violated in directed verdict cases is the right to have a jury observe the demeanor of the movant's witnesses and pass upon their credibility. Even if this policy is effectuated in *Cutts*,[52] it is still possible to distinguish the two motions by considering the stages at which they are available. To preserve the right to have a jury pass upon the credibility of an adversary's witnesses, a party must file the necessary pleadings in accordance with the statutory requirements. The procedural system thus imposes a condition precedent to this "constitutional" right[53] at the pleading stage. If preservation of the right can be conditioned upon requiring a certain response at the pleading stage, it follows that preservation of that right can be similarly conditioned when an adversary moves for summary judgment.

Another possible ground for distinction lies in North Carolina case law concerning summary judgment. Some early decisions did deal directly with the credibility question when summary judgment was the procedural posture of the case. Before the *Cutts* decision came down, the North Carolina Court of Appeals purported to follow federal precedent in reversing the grant of summary judgment when the movant's affidavits were made by interested parties.[54] Similar North Carolina decisions have held that the motion is not available to a party who bears his burden of proof with testimonial evidence when that evidence is contradicted[55] or when the knowledge of the facts is largely within the

51. *See* note 45 *supra.*

52. It is submitted that this policy does not compel or justify the *Cutts* result. *See* note 3 *supra.*

53. This right is articulated in N.C. CONST. art. I, § 25. *See* note 3 *supra.*

54. Lee v. Shor, 10 N.C. App. 231, 235, 178 S.E.2d 101, 104 (1970). The court in *Shor* also suggested that a trial court should never resolve an issue of credibility. *Id. Cf.* Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 98-99, 209 S.E.2d 734, 739 (1974); Shook Builders Supply Co. v. Eastern Assoc., Inc., 24 N.C. App. 533, 537, 211 S.E.2d 472, 475 (1975).

55. *Cf.* Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 89, 98, 209 S.E.2d 734, 739 (1974); Reavis v. Campbell, 27 N.C. App. 231, 236, 218 S.E.2d 873, 876 (1975).

movant's control.[56] These holdings are consistent with federal precedent.[57] It is contended that in *Shearin*, the court of appeals bolted from this established line of cases which follows federal precedent when it applied the *Cutts* reasoning to a summary judgment case.[58]

The *Shearin* departure from North Carolina and federal summary judgment precedent even stands in marked contrast with other post-*Cutts* decisions by the court of appeals. In *Brooks v. Smith*[59] the defendant successfully supported his summary judgment motion with the affidavit of an eyewitness. The court found that the "deposition clearly establishe[d] contributory negligence on the part of the plaintiff which was the proximate cause of his injuries."[60] This unimpeached and uncontradicted affidavit of a disinterested witness carried the defendant's burden as movant upon an issue for which he would have the burden of proof at trial. Since the plaintiff did not respond to defendant's motion, the court of appeals held that summary judgment was proper.[61] Similarly, in *Bogle v. Duke Power Co.*[62] the same result was reached in a wrongful death action. In that case the defendant carried his burden as movant for summary judgment with the affidavit of a disinterested witness. The affidavit clearly showed that plaintiff's deceased was contributorily negligent.[63] Since plaintiff did not respond to these materials, the court of appeals held that summary judgment properly was granted against her.

From these two cases it can be concluded that the court of appeals does not feel compelled to apply the *Cutts* reasoning to all summary judgment cases in which the movant carries his trial burden with testimonial evidence. It is submitted that in *Shearin* the court was not

56. *Cf.* Norfolk & W. Ry. v. Werner Indus., Inc., 286 N.C. 88, 98-99, 209 S.E.2d 734, 739 (1974); Lee v. Shor, 10 N.C. App. 231, 235-36, 178 S.E.2d 101, 104 (1970).

57. *See* 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2726, at 521-24 (1913); notes 3 & 49 *supra*.

58. It is difficult to imagine why these limitations on the availability of summary judgment to the party who bears his burden of proof with testimonial evidence were ever articulated if *Cutts* were controlling.

59. 27 N.C. App. 223, 218 S.E.2d 489 (1975).

60. *Id.* at 226, 218 S.E.2d at 491.

61. *Id.* at 227, 218 S.E.2d at 491-92.

62. 27 N.C. App. 318, 219 S.E.2d 308 (1975).

63. *Id.* at 322, 219 S.E.2d at 311. It should be noted that in *Bogle*, an alternative ground for the grant of defendant's motion was "no negligence," an issue upon which defendant did not bear the trial burden of proof. *Id.* This was pointed out by Parker, J., who concurred in the result since defendant had shown that plaintiff could not prove negligence. However, he rejected contributory negligence as an alternative ground for granting defendant's summary judgment since "[t]he credibility of defendant's witness is involved." *Id.* at 323, 219 S.E.2d at 311.

compelled to do so by the doctrine of stare decisis. It also appears that the court missed the opportunity to limit the *Cutts* opinion to its own facts as obiter dictum. Also present and missed was the opportunity to narrow its scope by assigning credibility as a matter of law in *Shearin* or at least recognizing the availability of that action on other facts.[64] Finally, available to and never mentioned by the majority were several possible distinctions between the two motions.[65]

In light of *Brooks* and *Bogle*, it is difficult to evaluate the significance of the *Shearin* holding. The danger in the court's blind application of *Cutts* is that *Shearin* will become the same rigid touchstone in summary judgment cases that *Cutts* has become in directed verdict cases. Unfortunately, it appears that this process has already begun.[66]

CARL N. PATTERSON, JR.

Construction Lending—General Contractor v. Lender

Any number of complex legal relationships may be generated by a building construction project.[1] Even within the framework of an ordinary situation with standard contracts, small factual variations can produce very different legal consequences. The relationship between

64. Since *Shearin* was basically a case of contract interpretation, granting summary judgment for plaintiff seems appropriate. *See* note 49 *supra*. However, in *Shearin* the option was certainly available to deny plaintiff's summary judgment motion since two of his affiants (the plaintiff and his friend) were interested parties. *See* text accompanying note 11 *supra*.

65. *See* text accompanying notes 44-58 *supra*. One final distinction is particularly troublesome. The impact of the *Cutts* opinion is somewhat ameliorated by the availability of a peremptory instruction to the movant. In this procedure the jury is instructed to find for the movant if it believes the movant's evidence. No such procedure is available in summary judgment proceedings.

66. *Shearin* was decided on October 1, 1975. Twice before the end of that year it was referred to in conjunction with *Cutts* concerning the propriety of summary judgment for the party having the burden of proof when the credibility of his witnesses is at issue. *See* Equitable Leasing Corp. v. Kingsmen Prod., 27 N.C. App. 661, 663, 220 S.E.2d 95, 97 (1975); Alpine Village, Inc. v. Lomas & Nettleton Fin. Corp., 27 N.C. App. 403, 405, 219 S.E.2d 242, 243 (1975).

1. Unless otherwise indicated, the following situation is assumed: The owner of the property finances the project through a lender, for example, a savings and loan association. The owner contracts with a general contractor to build the building and agrees to pay him accordingly. The general contractor in turn employs various subcontractors and material suppliers. These subcontractors may similarly employ other subcontractors and material suppliers. The chain of subcontracts may become quite long on a major project.