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# Civil Procedure -- Kidd v. Early: Summary Judgment on Testimonial Evidence in North Carolina

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glaring defect in the court's analysis is that it treats the state finding as one of a singular factual issue, rather than as an issue of fact so entangled with an overlay of legal issues that it is impossible to extract with confidence the one factual finding relevant to the second suit. The state court issue was decided as one of mixed fact and law; the federal court issue was one of fact alone. Therefore the issues were not the same in both suits. The issues being different, no estoppel should have attached.[71]

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## Civil Procedure—Kidd v. Early: Summary Judgment on Testimonial Evidence in North Carolina

In *Cutts v. Casey*[1] the North Carolina Supreme Court held that any testimonial evidence submitted in support of a motion for a directed verdict created an issue of credibility to be presented to the jury. This holding gave rise to dire predictions[2] that the North Carolina summary judgment procedure would be crippled. The North Carolina Supreme Court, however, has narrowed the scope of *Cutts* by setting guidelines for determining when an issue of credibility actually arises.

In *Kidd v. Early*[3] the court granted summary judgment[4] for the

evidence to show what was decided in the first suit. The holding in the instant case thus could possibly have been redeemed if the court had examined the trial record and, say, found the level of evidence against a threat having been made so overwhelming as to support a partial directed verdict in an antitrust trial. With such a demonstration, the ambiguity of the judge's findings could justifiably have been disregarded.

71. The instant case should at least remind us that the "lesson" preached by Professor Vestal has not been thoroughly learned: "One of the lessons which must be learned is that great exactness must be used in determining the issues decided in Suit I and to be decided in Suit II. . . . In the years ahead, it will be necessary to use more finesse in the area." Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 WASH. U.L.Q. 158, 192 (1965). The basic value of *Azalea* is to point out that refinement of collateral estoppel technique is needed to insure that the "fit" between issues is a close one.

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

2. Louis, *A Survey of Decisions Under the New North Carolina Rules of Civil Procedure*, 50 N.C.L. REV. 729 (1972); Note, *Civil Procedure—Cutts v. Casey Extended to Summary Judgment*, 54 N.C.L. REV. 940 (1976).

3. 289 N.C. 343, 222 S.E.2d 392 (1976).

4. Pursuant to N.C.R. CIV. P. 56. The North Carolina Rules of Civil Procedure were enacted in 1970. Rule 56 enables a court to grant final judgment for a

party bearing the burden of proof at trial who supported his motion with depositions and affidavits, while the non-moving party failed to produce any evidence to support his opposition to the motion. For the first time in North Carolina, the court held that testimonial evidence does not automatically trigger an issue of credibility which must go to the jury, but may be afforded credibility as a matter of law if it is disinterested, unimpeached and uncontradicted.

The parties stipulated that on August 4, 1972, plaintiffs, Dr. Claude Kidd, Thomas H. Collins and David P. Dillard,[5] purchased a thirty-day renewable option to purchase farm land in Guilford County, North Carolina from defendant, C.F. Early. The option agreement failed to specify any time or method of payment.

On September 28, 1972, plaintiffs executed a written offer to purchase and delivered it to defendant, who refused to accept their terms for payment.[6] The next day plantiffs mailed a letter to defendant exercising the option,[7] and delivered a check for $119,000 to their attorney to hold until the deed was delivered.[8] Defendant found these terms unacceptable and refused to convey the property.

After further negotiations, the parties continued to disagree on the method of payment and the purchasers filed suit seeking specific performance of the option contract. After the pleadings were filed, both parties moved for summary judgment under rule 56. The trial court granted summary judgment for the vendor, and the purchasers ap-

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party before trial when there remains no genuine issue of material fact. The court applies the law to the undisputed facts and grants summary judgment for the party entitled to it as a matter of law.

5. Plaintiff Kidd originally purchased the option with Howard M. Coble, who later sold his interest to Kidd. Later, Kidd assigned one-third of his interest to Collins and one-third of his interest to Dillard. 289 N.C. at 347, 222 S.E.2d at 396.

6. Defendant Early learned from talking with his CPA that he would gain a substantial tax advantage if he were paid in installments rather than in cash on delivery of the deed. *Id.* at 348-49, 222 S.E.2d at 397.

7. The letter read in part:

> The option granted by you on September 1, 1972, for the purchase of 200 acres more or less of the C. F. Early farm . . . is hereby exercised by delivery of a check to your joint order in the sum of $119,000 to my attorneys . . . to be held in trust for you and given over to you upon the occurrence of the following conditions:
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> (1) The furnishing of a new survey by you of the land being sold as provided in the option agreement;
>
> (2) Delivery by you of a good and marketable warranty deed in fee simple absolute, free of all encumbrances, to the property covered by the option agreement.

*Id.* at 349-50, 222 S.E.2d at 397-98.

8. At the time the check was delivered, the balance in the account from which the check was drawn was only $17,173. *Id.* at 350, 222 S.E.2d at 398.

pealed. The North Carolina Court of Appeals reversed by finding that there was a genuine issue of material fact that required a jury trial. The court affirmed the denial of summary judgment for the purchasers and remanded the case for jury trial.[9]

On appeal the North Carolina Supreme Court determined that the undisputed facts established every essential element except the purchasers' willingness and ability to perform the contract at the time they exercised the option.[10] To meet their burden of proof on this remaining issue, the purchasers submitted their own affidavits, loan applications and financial statements[11] showing that their net worth was between $261,000 and $364,494 at the time the option was exercised. They also submitted the affidavit of the president of the Federal Land Bank Association of Winston-Salem that stated that he was prepared to issue a firm commitment loan of $100,000 to the purchasers using the farmland as security. The vendor made no response to these materials.

Since the vendor failed to present any evidence in opposition to the purchaser's evidence in support of the motion, the court determined that rule 56(e) would allow summary judgment if the purchasers met their burden of production and succeeded on their own evidence.[12] The court held that any credibility problems were minimal and that only latent doubts existed about the accuracy of the pur-

9. Kidd v. Early, 23 N.C. App. 129, 135, 208 S.E.2d 511, 516 (1974).

10. Defendant asserted three defenses to the motion for summary judgment, based upon the uncontested facts of the case: (1) the description of the property was insufficient to meet the Statute of Frauds; (2) the option was void because the parties had failed to agree upon an essential term—the method of payment; and (3) plaintiffs failed to tender payment within the option period. The North Carolina Supreme Court rejected all three affirmative defenses and denied defendant's motion for summary judgment since he was not entitled to judgment as a matter of law under N.C.R. Civ. P. 56(c). 289 N.C. at 364-65, 222 S.E.2d at 407.

11. N.C.R. Civ. P. 56(e) states that:

> 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, the opposing 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.

The court may also consider oral testimony at a summary judgment proceeding under N.C.R. Civ. P. 43(e).

12. 289 N.C. at 365-66, 222 S.E.2d at 407.

chasers' proof. As a result, the purchasers were held to have met their burden of production on the remaining factual issue and were granted summary judgment.[13]

Summary judgment[14] is a means of looking beyond the pleadings to determine whether a genuine issue of material fact exists.[15] Both parties may move for summary judgment[16] regardless of which party carries the burden of proof at trial,[17] but the burden is upon the moving party to establish the lack of any triable issue of fact.[18] The evidence presented to meet this burden may not be sufficient even if the opposing party fails to present any materials in opposition to the motion;[19] any doubt about the existence of a material issue of fact is resolved against the moving party.[20] Once the moving party meets the initial

13. *Id.* at 372, 222 S.E.2d at 411. Quoting from Professor Louis' article, the court stated that the standard for determining the sufficiency of the moving party's evidence is as follows:

> (1) [T]he [movant's] supporting evidence is self-contradictory or circumstantially suspicious or the credibility of a witness is inherently suspect either because he is interested in the outcome of the case and the facts are peculiarly within his own knowledge or because he has testified as to matters of opinion involving a substantial margin for honest error, (2) there are significant gaps in the movant's evidence or it is circumstantial and reasonably allows inferences inconsistent with the existence of an essential element, or (3) although all the evidentiary or historical facts are established, reasonable minds may still differ over their application to some principle such as the prudent man standard for negligence cases.

289 N.C. at 366-67, 222 S.E.2d at 408 (quoting Louis, *supra* note 2, at 738-39). Only one standard was not met: the affidavits were presented by interested parties and the facts were peculiarly within their own knowledge.

14. *See* note 4 *supra*.

15. *See, e.g.*, First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972).

16. *See, e.g.*, McNair v. Boyette, 282 N.C. 230, 192 S.E.2d 457 (1972). N.C.R. Civ. P. 56(a) & (b) state that either the "claimant" or the "defending party" may move for summary judgment.

17. *See, e.g.*, First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 191 S.E.2d 683 (1972). There is a greater reluctance, however, to grant summary judgment for the party bearing the burden of proof at trial. *See* Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745, 748, 755 n.42 (1974).

18. *See, e.g.*, Whitley v. Cubberly, 24 N.C. App. 204, 210 S.E.2d 289 (1974); Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

19. *See, e.g.*, Lineberger v. Colonial Life & Accid. Ins. Co., 12 N.C. App. 135, 182 S.E.2d 643 (1971); Robinson v. McMahon, 11 N.C. App. 275, 181 S.E.2d 147 (1971). *See also* N.C.R. Civ. P. 56(e), set forth in note 11 *supra*. The North Carolina courts have interpreted the meaning of the rule to be that even if the non-moving party fails to present any evidence, the moving party's materials may not be enough to entitle the moving party to summary judgment.

20. Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 29, 209 S.E.2d 795, 798 (1974); *see* Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663 (1972). "[T]he Court in considering the motion carefully scrutinizes the papers of the moving party and, on the whole, regards those of the opposing party with indulgence." 289 N.C. at 29, 209 S.E.2d at 798.

burden by showing a lack of any triable issue of fact,[21] the opposing party must come forward with some evidence tending to show a triable issue of fact or explain his failure to do so under rule 56(f).[22]

The North Carolina courts view the summary judgment procedure as a drastic remedy to be granted with caution.[23] The procedure does not entitle the court to decide an issue of fact, but merely to determine whether an issue of fact exists.[24] The procedure is not designed to constitute a trial by affidavits in which the court weighs the sufficiency of evidence or weighs the credibility of testimony,[25] since these are traditionally the province of the jury.

Although the North Carolina courts agree that all issues of credibility must be presented to the jury, the courts have not applied a uniform evidentiary standard for determining when an issue of credibility arises. In *Cutts*[26] the North Carolina Supreme Court indicated that all

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21. *See* N.C.R. Civ. P. 56(e), set forth in note 11 *supra*.

22. N.C.R. Civ. P. 56(f) states in full:

> *When Affidavits are Unavailable.*—Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his 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.

The courts have excused the failure to present materials when the evidence was within the moving party's own knowledge and not available to the non-moving party. Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

23. First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co., 282 N.C. 44, 52, 191 S.E.2d 683, 688 (1972); W. Shuford, North Carolina Practice and Procedure § 56-3, at 467-68 (1975). Shuford also suggests that numerous North Carolina practitioners are taking advantage of the new rule, and that more summary judgment motions have been appealed than any other procedure made available by the new North Carolina Rules of Civil Procedure. *Id.*

24. Caldwell v. Deese, 288 N.C. 375, 218 S.E.2d 379 (1975); Zimmerman v. Hogg & Allen, P.A., 286 N.C. 24, 209 S.E.2d 795 (1974); Houck v. Overcash, 282 N.C. 623, 193 S.E.2d 905 (1973). The courts should not decide which affidavits are true when there is a conflict in the evidence presented.

25. Lee v. Shor, 10 N.C. App. 231, 235, 178 S.E.2d 101, 104 (1970); *see* Mitchell v. Mitchell, 12 N.C. App. 54, 182 S.E.2d 627 (1971).

26. 278 N.C. 390, 180 S.E.2d 297 (1971). Although *Cutts v. Casey* is a directed verdict case, the standards for directing a verdict and granting summary judgment are essentially the same. *See* Millsaps v. Wilkes Contracting Co., 14 N.C. App. 321, 188 S.E.2d 663, *cert. denied*, 281 N.C. 623, 190 S.E.2d 466 (1972); Coakley v. Ford Motor Co., 11 N.C. App. 636, 182 S.E.2d 260, *cert. denied*, 279 N.C. 393, 183 S.E.2d 244 (1971). In *Cutts v. Casey* both parties claimed title to the same piece of property. Each party presented a survey showing that he owned the land in question, relying partly upon testimonial evidence to establish his claim. The North Carolina Supreme Court stated: "The established policy of this State—declared in both the constitution and the statutes—is that the credibility of testimony is for the jury, not the court, and that a genuine issue of fact must be tried by the jury unless this right is waived." 278 N.C. at 421, 180 S.E.2d at 314.

testimonial evidence creates a credibility issue that must be resolved by a jury. In reinstating a jury verdict after the trial judge granted a judgment n.o.v., the court stated that testimonial evidence could never support a directed verdict:[27] to do so would violate the opposing party's right to jury trial, which is guaranteed by the North Carolina Constitution.[28] The *Cutts* rationale is based on the premise that "the right to determine the credibility of witnesses lies at the core of the jury's factfinding function."[29] Since affidavits are not subject to cross-examination, and since no one can observe the behavior of the affiant making his statement, affidavits are generally considered to be "the least satisfactory form of evidentiary materials."[30] Depositions are also regarded with skepticism, even though the witness was cross-examined, since the court is unable to observe the demeanor of the witness.[31] The observation of the demeanor of a witness is necessary, because the witness can be either lying intentionally or mistaken about the facts.[32]

The *Cutts* rationale was applied to a motion for summary judgment in *Shearin v. National Indemnity Co.*[33] The North Carolina Court of Appeals held that an uncontradicted eyewitness' statement raised an issue of credibility, which the jury must resolve. The court, however,

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27. 278 N.C. at 421, 180 S.E.2d at 314.

28. N.C. CONST. art. I, § 25 was relied upon by the court in its opinion. It reads: "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."

29. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 928 (1971).

30. 6 (pt. 2) MOORE'S FEDERAL PRACTICE ¶ 56.15[4], at 514 (2d ed. 1975).

31. *See* Cooper, *supra* note 29, at 929-40.

32. *Id.* The validity of these checks on credibility does not go unquestioned. To reach conclusions solely on the basis of demeanor is a very weak foundation for a judgment, especially since it may be that juries form less accurate decisions when they base them on the observation of witnesses. The demeanor of a witness can be misleading because many factors combine to make the witness behave the way he does on a witness stand. For example, the witness may appear nervous either because he is lying or because he feels uncomfortable speaking in front of a large group of people; or his nervousness may be merely a mannerism. The jury is just as likely to distort the truth since they too are witnesses. Since the jury must rely upon demeanor evidence alone if the testimony goes uncontradicted and unimpeached by the non-moving party, the accuracy of the appraisal is highly suspect. And if the non-moving party fails to present opposing evidence at the summary judgment level, it is unlikely that he will obtain the necessary evidence by the time the trial begins. Therefore if the court determines that the evidence is so strong that the jury cannot disbelieve the testimony merely on the basis of demeanor, then the court should be able to assign credibility as a matter of law and avoid a long unnecessary trial.

33. 27 N.C. App. 88, 218 S.E.2d 207 (1975); *accord*, Lowe's of Greensboro, Inc. v. Curry, 29 N.C. App. 229, 223 S.E.2d 909 (1976); Van Poole v. Messer, 19 N.C. App. 70, 198 S.E.2d 106 (1973); Wyche v. Alexander, 15 N.C. App. 130, 189 S.E.2d 608, *cert. denied*, 281 N.C. 764, 191 S.E.2d 361 (1972).

stated that but for the *Cutts* opinion, summary judgment would have been appropriate.[34]

Other cases deny summary judgment for the moving party when the testimonial evidence is presented by an interested party and the facts were within his own knowledge. In three cases, the witness was held to be interested because of an economic relationship with the moving party. In *Lee v. Shor*[35] and *Shook Builders Supply Co. v. Eastern Associates, Inc.*[36] the affiants were either the directors or the president of the company that was moving for summary judgment. As a result of this relationship, the parties were interested, and "[The affiant's] credibility itself may be such an issue of fact as will take the case to trial."[37] In *Norfolk & Western Railway v. Werner Industries Inc.*[38] the sole eyewitness to the accident over which the dispute arose was an employee of the moving party. The court denied summary judgment on this basis, and on the basis that conflicting inferences arose from the evidence presented.

Other cases, however, have completely ignored the *Cutts* requirement that all testimonial evidence be presented to the jury. In *Brooks v. Smith*[39] and *Bogle v. Duke Power Co.*[40] defendants used testimonial evidence to meet the burden of production to establish their affirmative defenses of contributory negligence on motions for summary judgment. In both cases the evidence was deemed sufficient since the affiants were disinterested and plaintiff failed to contradict or impeach the testimony.

The court in *Kidd* rejected the *Cutts* rule that all testimonial evidence must be presented to the jury even though it may be extremely credible. In explaining the different results reached under *Kidd* and *Cutts* the court stressed the factual differences between the two cases, rather than basing the distinction upon the differences between a directed verdict and a motion for summary judgment.[41] In *Cutts* the

34. 27 N.C. App. at 91-92, 218 S.E.2d at 210. The court, in deciding whether summary judgment would be appropriate for the party bearing the burden of proof at trial who used testimonial evidence to meet his burden of production, stated that "on authority of *Cutts v. Casey*, . . . we conclude the answer is No." 27 N.C. App. at 91, 218 S.E.2d at 210.

35. 10 N.C. App. 231, 178 S.E.2d 101 (1970).

36. 24 N.C. App. 533, 211 S.E.2d 472 (1975).

37. *Id.* at 537, 211 S.E.2d at 475.

38. 286 N.C. 89, 209 S.E.2d 734 (1974).

39. 27 N.C. App. 223, 218 S.E.2d 489 (1975).

40. 27 N.C. App. 318, 219 S.E.2d 308, *cert. denied*, 289 N.C. 296, 222 S.E.2d 695 (1976).

41. 289 N.C. at 370, 222 S.E.2d at 410. For a discussion of the differences

court noted that the facts presented by testimonial evidence were vigorously attacked by the opposing party. The credibility issue arose *not* because the evidence was testimonial, but because the testimonial evidence was challenged. In making the distinction, the court indicated that *Cutts* was never meant to stand for the proposition that all testimonial evidence must go to the jury. Instead, *Cutts* is to be read as saying that if testimonial evidence is contradicted, then a credibility issue arises for the jury to consider.[42]

Therefore, *Kidd* and *Cutts* fall squarely within the federal interpretation of rule 56 of the Federal Rules of Civil Procedure.[43] The federal courts may assign credibility as a matter of law when the evidence is not contradicted or impeached.[44] Even if the witness is interested in the outcome of the case, if the facts necessary to oppose the

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between directed verdict and summary judgment, see Note, *Civil Procedure—Cutts v. Casey Extended to Summary Judgment*, 54 N.C.L. REV. 940, 948 n.45 (1976).

42. Cutts v. Casey, 278 N.C. at 423, 180 S.E.2d at 319 (Huskins, J., concurring in result); *see* Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320 (1902); 2 A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1488.20 (Phillips Supp. 1970); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2714 (1973); Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 690-91 (1918).

It is clear that the summary judgment procedure itself does not deprive a party of his constitutional right to jury trial, but it is arguable that testimonial evidence does always create an issue of fact for the jury since it is always possible for the witness to lie. Some federal courts applied this evidentiary standard. *See* Colby v. Klune, 178 F.2d 872 (2d Cir. 1949); Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946). However, this test has not been followed even within the Second Circuit. *See* Dyer v. MacDougall, 201 F.2d 265 (2d Cir. 1952); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2726, at 523 (1973). Prior to *Kidd*, the North Carolina Court of Appeals considered itself to be bound to that standard as a result of *Cutts*. *See* Note, *Civil Procedure—Cutts v. Casey Extended to Summary Judgment*, 54 N.C.L. REV. 940, 942 (1976). *But see* cases cited notes 39 & 40 and accompanying text *supra*. According to Robert Doge, one of the original members of the Advisory Committee on the Federal Rules of Civil Procedure:

> In reality, the rule does not interfere in the slightest degree with the right to trial by jury, because the court can not, of course, enter a summary judgment if there is any issue of fact to be tried, and if the court erroneously orders a summary judgment, the right of appeal will protect the party.
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> The judge is not to weigh affidavits, is not to determine which affidavit is right and which is wrong. He is simply to see whether upon the affidavits there is a real issue of facts between the parties.

ABA PROCEEDINGS OF THE INSTITUTE (ON THE FEDERAL RULES OF CIVIL PROCEDURE) AT WASHINGTON, D.C., October 6-8, at 176 (1938).

43. For an analysis of the federal rule see Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1971).

44. The fact that a witness is interested in the outcome of the case is sufficient to create a credibility problem for the jury to resolve. Sonnentheil v. Christian Moerlein Brewing, Inc., 172 U.S. 401 (1899). Some federal courts, however, limit this rule to cases in which the facts are peculiarly within the moving party's own knowledge, *see* Poller v. CBS, 368 U.S. 464 (1962), or when conflicting inferences arise from the evidence presented, United States v. Perry, 431 F.2d 1020 (9th Cir. 1970).

motion are readily available to the non-moving party through discovery, then credibility should be assigned as a matter of law if the non-moving party presents no opposing evidence. It is assumed that the opponent obtained, or could have obtained, the information necessary to contradict the witness. If he failed to utilize discovery, then he loses because he was too lazy to establish his case; if he utilizes the discovery procedure and finds nothing to support his opposition to the claim, then there is no reason to question the veracity of the moving party's witness. It would be a waste of time to require a full jury trial when the opposing party cannot, or will not, present any evidence to raise doubts about the credibility of the witness in the mere hope[45] that something will turn up at trial.

The North Carolina Supreme Court in *Kidd*, however, went beyond the federal standard by determining whether a credibility issue actually arose from the facts presented. The court held that the testimonial evidence was presented by an interested party; the court found some of the facts peculiarly within the knowledge of that party and thus not discoverable by the vendor. Under a strict construction of the "interested party" rule this evidence would have been enough to create a credibility problem that would have required a determination by the jury. The court rejected strict application of the rule, stating that "it is quite clear that it would be futile to attempt to state a general rule which would determine whether a 'genuine issue of fact' exists in a particular case"[46] and granted summary judgment for plaintiff because only latent doubts about the credibility of his evidence existed.

The result reached by the court on the facts of *Kidd* is both practically and logically correct. The bank president's affidavit did not create a credibility problem because the bank president had no reason to lie about his willingness to grant a loan. The circumstances were not suspicious since the bank was using the land as security and would only grant the loan if the title were good. Even if it could be argued

45. Rifiieri v. Scanlon, 254 F. Supp. 469 (S.D.N.Y. 1966). The federal courts clearly reject the idea that the non-moving party can go to trial on the mere hope that some evidence will turn up, or the jury will disbelieve the testimony presented. *Compare* Poller v. CBS, 368 U.S. 464 (1962) (holding that since motive was a crucial issue, there was more than a mere hope that additional evidence would result from a full jury trial) *with* Lundeen v. Cordner, 354 F.2d 401 (8th Cir. 1966) (holding that a non-moving party cannot force a trial on the vague supposition that by cross-examining a disinterested party he might be able to produce additional evidence).

46. 289 N.C. at 368, 222 S.E.2d at 409; *see* 6 (pt. 1) MOORE'S FEDERAL PRACTICE ¶ 56.15[1.-0], at 401 (2d ed. 1975).

that there was an economic relationship between the parties, it would have been too attenuated to cast doubts upon the witness' veracity without some specific facts to show a closer relationship.

Plaintiff's affidavits, however, were presented by an interested party and so should be viewed with more skepticism. In this case, however, it would have been a simple matter for defendant to use the discovery procedure to get a look at the bank books, check the credit rating of plaintiffs and appraise the value of plantiffs' personal property. The court is willing, under these circumstances, to shift the burden of producing evidence to the non-moving party in the interests of judicial expediency. By enabling the moving party to meet his initial burden of proof with testimonial evidence when the opposing party has access to the evidence, the court can make certain that the opposing party has some specific evidence to get to the jury. If he fails to provide these facts, then summary judgment should be granted for the moving party.

Some of the testimony presented by the moving parties was used to establish a subjective fact—their willingness to pay the purchase price. Since it is impossible to discover the innermost thoughts and feelings of an opposing party, the only way to attack his statement of events is to impeach his credibility. Such a situation of impossibility provides sufficient excuse under rule 56(f) for failing to present opposing materials. As a result, a jury question is normally created and summary judgment becomes inappropriate.

Nevertheless, the court in *Kidd* was willing to grant summary judgment for the purchasers, probably because in the entire four years of the dispute, the purchasers never gave any indication that they did not want to perform the contract. Indeed, it is undisputed that the purchasers suggested several methods of payment in order to find some terms that the vendor would accept, and on several occasions voiced their desire to purchase the land. The purchasers also exercised the option, which bound them to the contract if defendant sought to enforce it. On the basis of these manifestations, the purchasers' testimony achieved credibility in the absence of a showing by defendants of some specific facts demonstrating the purchasers' intent to renege on the agreement.

As a result of the *Kidd* opinion, North Carolina attorneys who are faced with a motion for summary judgment by the party who bears the burden of proof at trial must make some effort to gather specific facts to contradict or impeach the witness before the hearing on the motion.

If the attorney cannot get the necessary information because of witness hostility or because the moving party has sole control over the information, then he must move for a protective order under rule 56(f). Otherwise, he runs the risk that the testimonial evidence will be afforded credibility as a matter of law and that summary judgment will be granted for the moving party.

In *Kidd v. Early* the North Carolina Supreme Court set out a flexible standard for determining the sufficiency of testimonial evidence on a motion for summary judgment. With the help of this standard, the courts can now determine with greater accuracy whether testimonial evidence has created an issue of fact that must be presented to the jury. This promotes judicial expediency by weeding out cases that contain no factual disputes at the summary judgment level, without jeopardizing the parties' right to a jury trial.

REBECCA WEIANT

## Consitutional Law—Property and Liberty Interests in Public Employment

The proposition that a government cannot unreasonably restrict the exercise of constitutional rights by its employees has become a basic tenet of constitutional law.[1] However, in the absence of a specific statute or regulation to the contrary, a government's authority to dismiss its employees for purely arbitrary reasons, or for no reason at all, has remained essentially unchallenged.[2] Except for situations in which the government appears motivated by a desire to stifle constitutional privileges, the maximum protection afforded a public employee against discharge has been some form of hearing at which he can appeal the decision. Moreover, the United States Supreme Court, in the companion

1. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961).

2. The United States Supreme Court noted in Cafeteria Workers v. McElroy, 367 U.S. 886 (1961) that "[t]he Court has consistently recognized that . . . the interest of a government employee in retaining his job can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." *Id.* at 896.