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June 23, 2014

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Dear Committee:

I have enclosed an article that concludes with a suggestion that the Rules Committee consider studying the summary judgment standard with help from the FJC. The article explores the propriety of the reasonable jury standard underlying summary judgment, argues the standard has become a proxy for a judge's own view of the evidence, and proposes renewed study of the standard.

I already sent copies of the article to the civil rules advisory committee members. Upon Judge Koeltl's suggestion, I am sending this letter to the Administrative Office as an official request for a suggested Civil Rules agenda item.

Thank you for considering this.

Sincerely,

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Professor

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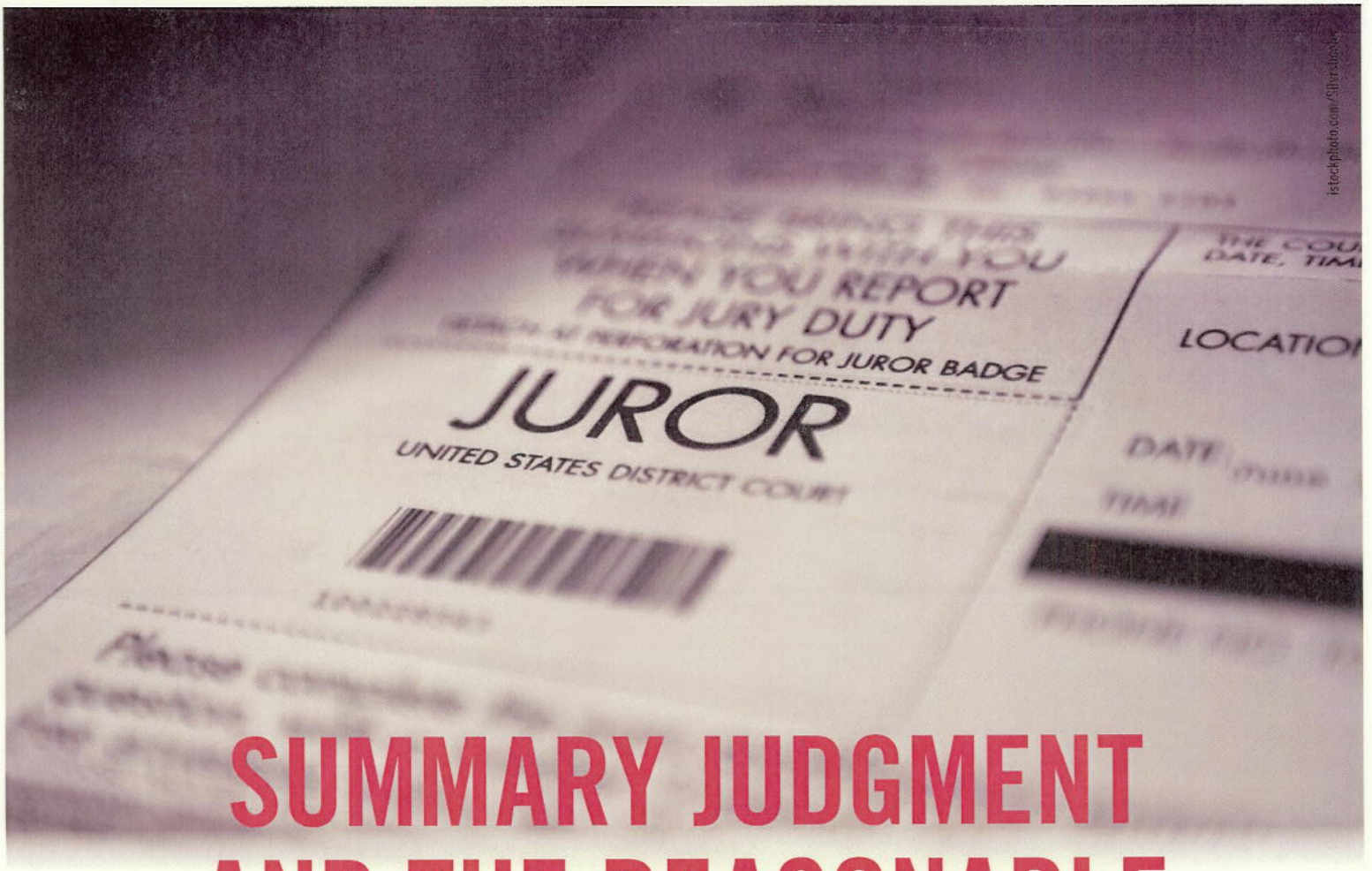

SUMMARY JUDGMENT AND THE REASONABLE JURY STANDARD

A Proxy for a Judge's Own View of the Sufficiency of the Evidence?

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Under motions for summary judgment, directed verdict, and judgment as a matter of law, judges employ the reasonable jury standard, deciding whether a reasonable jury could find for the nonmoving party. This article explores the propriety of the reasonable jury standard, argues the standard has become a proxy for a judge's own view of the evidence, and proposes renewed study of the standard.

by **SUJA A. THOMAS**

Judges use the reasonable jury standard to decide motions for summary judgment, the directed verdict, and judgment as a matter of law.[1] Under this standard, a judge dismisses a case if he decides that no reasonable jury could find for the nonmoving party. The reasonable jury standard is thus extremely important to civil litigation because litigants' cases rest on this standard. A prominent example of a case using this standard is the Supreme Court's decision in *Scott v. Harris*. There, using the reasonable jury standard, the Supreme Court dismissed a case in

Excerpted in large part from *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759 (2009)

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

which the plaintiff alleged the police had used excessive force during a car chase. Upon viewing a videotape of the car chase, the Court, eight to one, decided that no reasonable jury could find for the plaintiff. Previously, however, four lower court judges had propounded a different view of the evidence and decided that a reasonable jury could find for the plaintiff. The *Scott* case and the possibility that people can think differently about evidence have been the subject of important commentary. For example, Professor Dan Kahan and his co-authors surveyed approximately 1,350 people to study their views of the police's actions in *Scott*.[2] Based on their backgrounds, people differed on whether they thought the police acted properly. The conflicting views of judges on what a reasonable jury could find in *Scott*, as well as the different perspectives of survey participants, illustrate potential problems with the use of the reasonable jury standard to dismiss cases.

Here, I explore these problems and the propriety of the reasonable jury standard. I first describe the origins of the reasonable jury standard and then set forth the Supreme Court's interpretation of that standard. Next, I describe the different opinions of the judges in *Scott* and evaluate the use of the reasonable jury standard in that case. I go on to argue that the reasonable jury standard has become a proxy for a judge's own view of the evidence. Next, I describe Professor Kahan's proposal on how judges can account for differences in people's opinions of evidence. While the proposal is well crafted, I show that the reasonable jury standard is a questionable manner to decide summary judgments and other dispositive motions because of the impossibility of the standard. I also identify other difficulties with the reasonable jury standard. Finally, I propose that the standard for summary judgment and other dispositive motions be subject to renewed study.

Origins of the Reasonable Jury Standard

The Supreme Court set forth the reasonable jury standard in 1986, in *Anderson v. Liberty Lobby, Inc.*,[3] one of the famous trilogy of cases regarding summary judgment. The Court stated that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[4] The Court emphasized that the decision regarding summary judgment should not rest on the judge's own view of the evidence; "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial...[T]he judge must ask himself not whether he thinks the evidence unmistakedly [*sic*] favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented."[5] The Court pointed out that this reasonable jury standard for summary judgment is the same for judgment as a matter of law under Rule 50.[6] Citing *Jackson v. Virginia*, the Court also compared the reasonable jury standard to the similar standard for acquittal in criminal cases where the inquiry involves a court's determination of "whether a reasonable jury could find guilt beyond a reasonable doubt."[7] In dissent, Justice Brennan questioned the use of the reasonable jury standard. He emphasized that it was not apparent how a judge could determine "what a 'fair-minded' jury could 'reasonably' decide."[8] Similar to Justice Brennan in *Anderson*, the concurrence in *Jackson v. Virginia* also pointed out the difficulty of applying the reasonable jury standard.[9]

The Supreme Court's Interpretation of the Reasonable Jury Standard

The Supreme Court has made different, arguably inconsistent statements about the standard that underlies dispositive motions. On the one hand, the Court has stated that judges should decide whether a reasonable jury could find for the nonmoving party, and it has stated that what a reasonable jury could find is different than what a reasonable *juror* could find.[10] In deciding how an instruction regarding a death sentence was perceived by jurors, the Court stated that an "inquiry dependent on how a single hypothetical 'reasonable' juror could or might have interpreted the instruction" was not appropriate.[11] The Court explained that "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting."[12]

On the other hand, although the Court has recognized differences between a finding by a jury and individual jurors, it continues to interchange phrases that can have different meanings including reason-

2. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism, Video Evidence and Summary Judgment*, 122 HARV. L. REV. 837 (2009); *see also* Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012) (additional study of cognitive illiberalism). For a criticism of the Kahan videotape study, see Christopher Slobogin, *The Perils of the Fight Against Cognitive Illiberalism*, 122 HARV. L. REV. 1 (2009).

3. 477 U.S. at 248.

4. *Id.*

5. *Id.* at 249, 252.

6. *Anderson*, 477 U.S. at 250–251; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (stating that the summary judgment standard and the standard for judgment as a matter of law are the "same"). Other cases decided prior to this time also mentioned the term "reasonable jury." *See, e.g., Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 579 (1951) (Black, J., dissenting).

7. 477 U.S. at 252 (citing *Jackson v. Virginia*, 443 U.S. 307, 318–319 (1979)).

8. *Id.* at 265 (Brennan, J., dissenting).

9. *See* 443 U.S. at 331, 334 note 8, 336 (based partly on the fact that it was unclear how judges were to determine whether the factfinder or factfinders had been rational). In *Jackson*, Justice Stevens also stated that the new rule appeared to derive from a dissent to the denial of certiorari in *Freeman v. Zahradnick*. *Id.* at 334, note 8 (citing *Freeman v. Zahradnick*, 429 U.S. 1111, 1111–1116 (1977) (Stewart, J., dissenting)).

10. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

11. *Boyde v. California*, 494 U.S. 370, 380 (1990).

12. *See id.* at 380-381.

able jury, reasonable juror, reasonable mind, rational factfinder, and other terms.[13]

An Illustration of the Reasonable Jury Standard in *Scott v. Harris*

An examination of the recent prominent case of *Scott v. Harris*[14] where the Supreme Court uses the reasonable jury standard yields more information about the potential problems with the standard. There, the plaintiff driver, Victor Harris, alleged that the police used excessive force against him while pursuing him, which resulted in an unreasonable seizure under the Fourth Amendment. The defendant, deputy Timothy Scott, responded with a motion for summary judgment on the basis of qualified immunity. Based upon its viewing of a videotape of the police chase, the Supreme Court ultimately concluded that no reasonable jury could find for the plaintiff and uniquely invited readers to view the tape. (As a side note, the Supreme Court will soon decide *Plumhoff v. Rickard*, which concerned a summary judgment decision that involved some facts similar to those in *Scott*, including a fleeing motorist, a videotape, and a car chase by police officers.[15])

The facts of *Scott* included that the plaintiff was traveling at 73 miles per hour in a 55 miles per hour zone. When the police pursued the plaintiff, he did not stop his car, and the chase that followed involved numerous police officers, including the defendant. During the chase, the plaintiff left the road and entered a shopping center parking lot, where he continued to evade the police and hit the defendant's car. Thereafter, back on the road, in an attempt to stop the plaintiff, the defendant rammed the plaintiff's car from behind, and the plaintiff was rendered a quadriplegic after his car went down an embankment.

The U.S. District Court for the Northern District of Georgia denied the defendant's motion for summary judgment. Using the plaintiff's version of the facts, the United States Court of Appeals for the Eleventh Circuit affirmed the denial. It decided that the defendant's actions could constitute deadly force, that the use of such force would violate the plaintiff's Fourth Amendment right to be free from excessive force during a seizure, and as a result, a reasonable jury could find that the defendant violated the plaintiff's Fourth Amendment rights. Further, the Eleventh Circuit held that the defendant did not possess qualified immunity because he possessed sufficient notice that his actions could be unlawful.

Writing for the majority, Justice Scalia reversed the Eleventh Circuit's decision and ordered summary judgment. The Court decided that no reasonable jury could find for the plaintiff, and as a result there were no genuine issues of material fact for a jury to decide. Justice Scalia stated that while the plaintiff and the defendant had very different views of the facts, the plaintiff's version should be disregarded. Specifically, he stated that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[16] Justice Scalia described what he and his colleagues saw when they viewed the videotape and concluded that the police videotape demonstrated that no reasonable jury could believe the plaintiff's version of the facts.[17] Justice Scalia aimed to balance the Fourth Amendment interests of the plaintiff and the government's interest in protecting the public. While the defendant's actions posed a high likelihood of serious injury or death to the plaintiff, there was also significant likelihood of injury to the public or the police from the plaintiff's actions. In his decision, Justice Scalia took into account the culpability of those involved, namely the high culpability of the plaintiff for the situation that he created.[18] Justice Scalia also stated that other alternative police actions, including ceasing the pursuit, could have resulted in other undesirable outcomes, including injury to other drivers. Justice Scalia concluded that "[t]he car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise. Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment."[19] Justices Breyer and Ginsburg concurred that, in light of the videotape, no reasonable jury could find for the plaintiff.[20]

In his dissent, Justice Stevens argued that a reasonable jury *could* find for the plaintiff.[21] Justice Stevens discussed other facts in the record that showed this, including that the plaintiff had not run any red lights and that the roads had been cleared. He emphasized that the District Court and Court of Appeals judges who considered the case had decided that a reasonable jury could find for the plaintiff. He stated that "eight of the jurors on this Court reach a verdict that differs from the views of the judges on both the District Court and the Court of Appeals who are surely more familiar with the hazards of driving on Georgia roads than we are."[22]

13. *See, e.g., Cuellar v. United States*, 128 S. Ct. 1994, 2006 (2008) ("reasonable jury"); *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008) ("reasonable juror"); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("rational trier of fact"); *see Anderson*, 477 U.S. at 249-252.

14. 550 U.S. 372 (2007).

15. *Estate of Allen v. City of West Memphis*, 509 Fed. Appx. 388 (6th Cir. 2012), *cert. granted*, 134 S. Ct. 635 (Nov. 15, 2013) (No. 12-1117).

16. *See id.* at 380.

17. *See id.* at 381-386.

18. "It was respondent, after all, who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing respondent for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent." *Id.* at 384.

19. *See id.* at 386.

20. *Id.* at 386-387 (Ginsburg, J., concurring); *id.* at 387-389 (Bryan, J., concurring).

21. *See id.* at 389-397 (Stevens, J., dissenting).

22. *Id.* at 389.

Evaluating the Use of the Reasonable Jury Standard in *Scott v. Harris*

While the Supreme Court stated that no reasonable jury could find for the plaintiff in *Scott*, it is unclear how the Court came to this conclusion. Some of the language in the opinion suggests that the justices used their own opinions of the evidence to come to this decision. As an example, Justice Scalia repeatedly referred to what he and the other justices for whom he wrote saw in the videotape to reach the conclusion that no reasonable jury could find for the plaintiff. He stated, "for example we see respondent's vehicle racing down narrow, two-lane roads....We see it swerve around more than a dozen other cars....We see it run multiple red lights....Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood style car chase of the most frightening sort...."[23] Furthermore, Justice Scalia disagreed with what he described as Justice Stevens's "hypothesi[s]" regarding why the other motorists acted as they did in pulling to the side of the road.[24] Justice Scalia also disagreed with Justice Stevens on how an ambulance drives in response to an emergency, describing what he stated was his and the other justices' "experience" with what ambulances do.[25] He also analyzed the factual conclusions of the Eleventh Circuit.[26] As another example of the use of a justice's own opinion of the evidence, in the oral arguments for *Scott*, Justice Alito stated that after viewing the videotape "[i]t seemed to [him] that [Harris] created a tremendous risk to drivers on that road."[27] Nowhere in the opinion or otherwise does the Court refer to how a jury itself might analyze the evidence and deliberate about the matter. Instead, it happens that the only manner by which the justices determined whether a reasonable jury could find for the plaintiff was to decide what the justices themselves concluded regarding the sufficiency of the evidence. In his dissent, Justice Stevens emphasized that the justices decided whether a reasonable jury could find for the plaintiff based on their own views of the sufficiency of the evidence.[28]

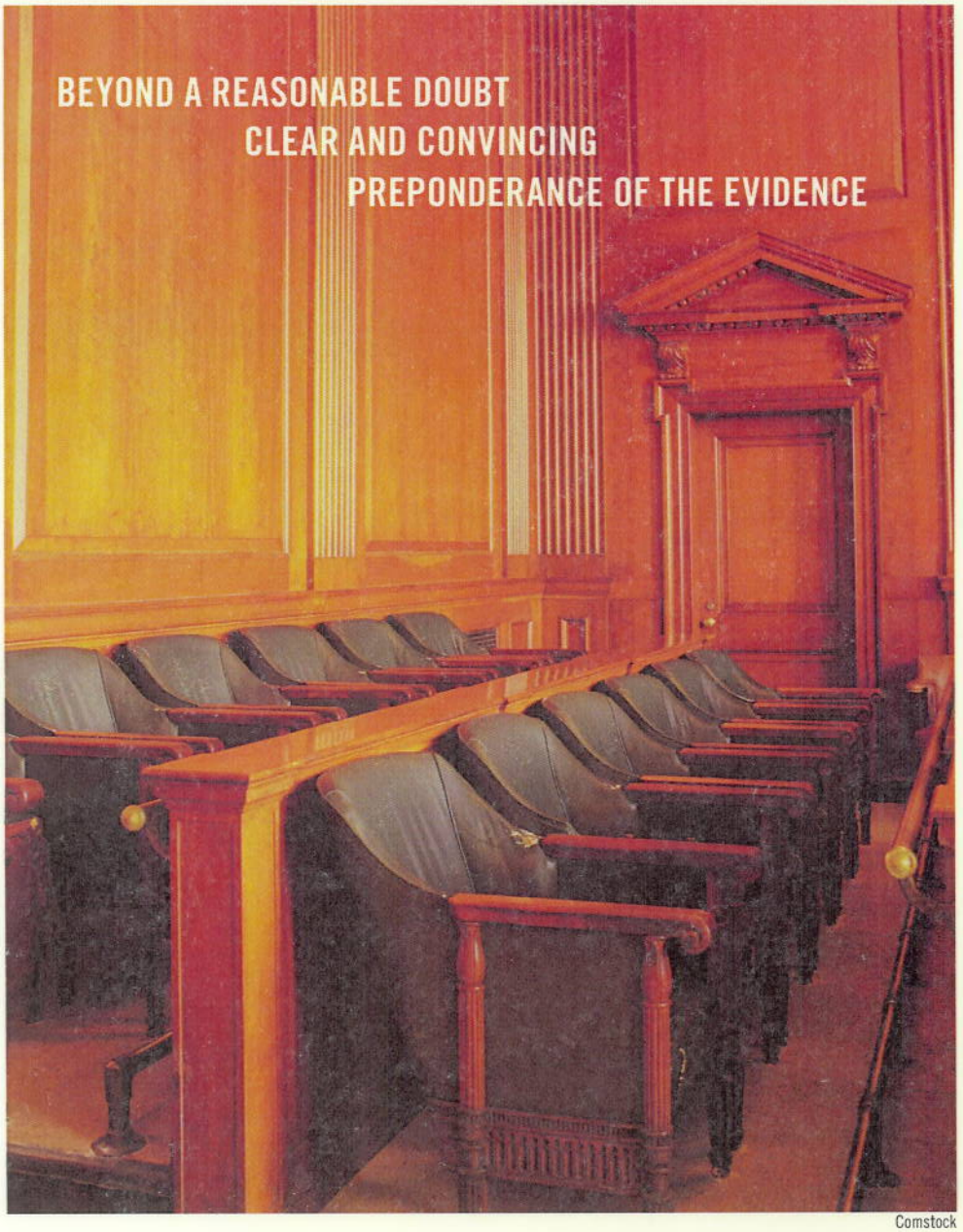
JUDGES MAY FALL PREY TO THEIR OWN OPINIONS OF EVIDENCE UPON MOTIONS FOR SUMMARY JUDGMENT.

The Reasonable Jury Standard: A Proxy for a Judge's Own View of the Evidence

There may be good reason why judges explain their decisions on motions for summary judgment and other dispositive motions based on their views of the facts and not otherwise on what a reasonable jury could find. As mentioned above, the standard for dispositive motions has been loosely defined with different words that can have different meaning; the Supreme Court has interchangeably used "reasonable juror," "reasonable mind," "rational juror," and "rational factfinder," along with "reasonable jury."[29] What a reasonable jury would find, for example, is not necessarily the same as what a reasonable juror would find because there is at least some possible difference between group decision making versus individual decision making.[30] The ease with which the Supreme Court interchangeably uses all of these terms suggests these labels have no specific meaning in the decisions and that they are all labels for the judges' own views of the sufficiency of the evidence in a case.

Other evidence that judges decide whether a reasonable jury could find for the nonmoving party based on their own views of the facts is actual disagreement among judges on whether a reasonable jury could find for the nonmoving party. For example, in *Matsushita Electronic Industrial Co. v. Zenith Radio Corp.*,[31] another one of the famous trilogy of summary judgment cases, five justices of the Supreme Court decided that, in the absence of other evidence, summary judgment should be entered against the plaintiff (American television manufacturers), which had alleged antitrust violations against Japanese television manufacturers. They concluded that no rational trier of fact could find for the plaintiffs. Four justices of the Supreme Court disagreed, stating summary judgment should not be entered because a rational trier of fact could find for the plaintiffs. As another example, in *Harbor Tug & Barge Co. v. Papai*[32] six justices concluded that no reasonable jury could find that the plaintiff was a seaman under the Jones Act, and three justices concluded the opposite. Interestingly, the Court of Appeals for the Ninth Circuit had also decided that a reasonable jury could find that the plaintiff was a seaman, while the district court had ordered summary judgment.[33] Finally, in *Scott*, four lower court judges and Justice Stevens found that a reasonable jury could find for the plaintiff, while eight justices found that no

23. *Id.* at 379-380 (majority).
24. *Id.* at 379, note 6.
25. *Id.*
26. *Id.* at 380, note 7.
27. Transcript of Oral Argument at 27, *Scott*, 550 U.S. 372 (No. 05-1631).
28. *See* 550 U.S. at 389-397 (Stevens, J., dissenting).
29. *See supra* text accompanying note 13.
30. *See supra* text accompanying notes 11-12.
31. 475 U.S. 574 (1986).
32. 520 U.S. 548 (1997).
33. *See Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 205-206 (9th Cir. 1995), *rev'd*, 520 U.S. 548 (1997).



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reasonable jury could find for the plaintiff.[34] Again, in all of these decisions judges do not explain how a reasonable jury could not find for the nonmoving party, except to analyze what the judges themselves think the evidence shows. That these judges disagree about whether a reasonable jury could find for the plaintiff is some indication that these judges have different views of the facts, views that form the basis of their different decisions.[35]

The Kahan Proposal

After the Supreme Court decided the *Scott v. Harris* case, in an important study published in the *Harvard Law Review*, Professor Dan Kahan and his co-authors studied how different people can respond to evidence. They sought to identify how different segments of the population would view the actions of the plaintiff and the police in the *Scott* videotape. The police had generated four videotapes.[36] Kahan showed a diverse group of over 1,000 people a videotape that was derived from two of the videotapes that he contended contained the most influential material.[37] Although a large majority of the subjects reacted to the video in a similar manner to the Court, with 75 percent agreeing that deadly force was warranted, certain subgroups had significantly different reactions to the video.[38] African American, Democratic, liberal, egalitarian, communitarian, lower income, more educated, single, and older subjects generally appeared more pro-plaintiff than their respective counter groups.[39] Kahan argued that these results conflicted with the Court's conclusion that reasonable people would find agreement regarding the risk involved in the chase or the role of the police in increasing or decreasing the risk.[40] Because the study showed that different segments of people could disagree, Kahan argued that the Court in effect referred to such people as unreasonable, and Kahan contended they were not.[41] The Court's view demonstrated a bias that Kahan referred to as "cognitive illiberalism."[42]

Kahan proposed an alternative method for judges to decide summary judgment motions.[43] Kahan stated that when a judge believes that no reasonable jury could find for the nonmovant, the judge should imagine what the particular jurors would look like who *would* find for the nonmovant. If the judge cannot identify the particular group to which these jurors belong, the judge should order summary judgment. In other words, if jurors who would perceive a particular situation differently "are mere outliers—if they don't share experiences and an identity that endow them with a distinctive view of reality, if the factual perceptions in question don't arise from their defining group commit-

34. *See Scott*, 550 U.S. at 374-386.

35. Recently, in *Ashcroft v. Iqbal*, the Court actually embraced a similar standard when it decided that a judge can use judicial experience and common sense when it decides whether a claim is plausible on a motion to dismiss. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

36. 550 U.S. at 395 note 7 (Stevens, J., dissenting).

37. Kahan et al., *Whose Eyes, supra* note 2, at 855–856.

38. Kahan et al., *Whose Eyes, supra* note 2, at 864–870.

39. Kahan et al., *Whose Eyes, supra* note 2, at 868–869.

40. Kahan et al., *Whose Eyes, supra* note 2, at 881–902.

41. Kahan et al., *Whose Eyes, supra* note 2, at 881.

42. Kahan et al., *Whose Eyes, supra* note 2, at 894-902.

43. Kahan et al., *Whose Eyes, supra* note 2, at 894-902.

ments—summary judgment will not convey the message of exclusion that delegitimizes the law in the eyes of the identifiable subcommunities."[44] On the other hand, if the judge can identify a particular subcommunity to which the jurors belong, the judge should "think hard" before deciding a case summarily.[45] If "privileging her own view of the facts risks conveying a denigrating and exclusionary message to members of such subcommunities," then the judge should not enter summary judgment on the basis that no reasonable jury could find this way.[46]

The Impossibility of the Reasonable Jury Standard

Kahan himself assumed that judges use their own opinion of the evidence when they decide summary judgment.[47] He also acknowledged that the results from his study did not include jurors' actual engagement in deliberations but rather only an individual's view of the videotape.[48] And the caselaw and commentary suggest that a court actually cannot determine what a reasonable jury could find. First, under the current standard, judges are not supposed to decide what they think about the sufficiency of the evidence. But, as illustrated by *Scott v. Harris*, that is the analysis that appears to occur. Second, under the current standard, judges must decide whether a reasonable jury could find for the nonmoving party, but judges do not actually engage in an analysis of what such a jury could find. Third, if courts attempted such an analysis, it would be speculative because courts are incapable of making such a determination. Although under the reasonable jury standard, courts could attempt to consider all viewpoints constituted in a hypothetical jury, this standard assumes that judges can perform this analysis. However, there is no evidence that judges can determine what other people, including those who do not have the same characteristics as they have, would decide. In *How Judges Think*, Judge Posner states that "[p]eople see (literally and figuratively) things differently, and the way in which they see things changes in response to the environment. That is true of judges. As Cardozo said, 'We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.'"[49] Thus, despite the hypothetical appeal of the reasonable jury standard, as currently used or as reformulated by Professor Kahan, the standard appears to be a legal fiction based on the false factual premise that a court can actually apply the standard.

The Practical Difficulties with the Reasonable Jury Standard

In addition to the false factual premise behind the reasonable jury standard, there are other potential problems or inconsistencies that underlie the standard. First, under the current standard, an appellate court can dismiss a case at summary judgment even if some judges (appellate or lower court) decide that a reasonable jury could find for the nonmoving party. As Justice Stevens emphasized in his dissent in *Scott*, such a disagreement indicates that a reasonable jury *could* find for the nonmoving party in such cases. He stated that "[i]f two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events."[50]

In cases where a jury has already found for the nonmoving party and a motion for judgment as a matter of law is brought, a problem with the reasonable jury standard is that it does not assess the jury selection process. If both parties participated in the selection of the jury and the parties do not allege misbehavior on the part of the jurors, the decision of the jury arguably should be considered presumptively reasonable. Both parties chose jurors attempting to maximize their chances of winning. Moreover, jurors were excluded if biased.

Finally, while jury instructions can be challenged otherwise, where a judge employs the reasonable jury standard upon a motion for judgment as a matter of law after a jury renders a verdict, the standard itself does not take into account that the jury followed the instructions. If there are no errors with the instructions after the jury has been properly selected, again arguably the jury should be considered presumptively reasonable.

A Suggestion for Renewed Study

As described here, judges may fall prey to their own opinions of evidence upon motions for summary judgment, directed verdict, and judgment as a matter of law. Moreover, judges may not be able to determine what a reasonable jury could find. As a result, the reasonable jury standard underlying these motions is in need of study. Given that the Supreme Court established this standard in conjunction with the Seventh Amendment right to a civil jury trial—in other words, not to dismiss a case that a reasonable jury could find in favor of—it appears that this important standard by which judges dismiss cases is ripe for reexamination. The rules committee, if so inclined, would be an appropriate body to engage in this study with assistance from the Federal Judicial Center, and such study would be welcome. ★

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44. Kahan et al., *Whose Eyes, supra* note 2, at 886.
45. Kahan et al., *Whose Eyes, supra* note 2, at 898.
46. Kahan et al., *Whose Eyes, supra* note 2, at 898-899.
47. Kahan et al., *Whose Eyes, supra* note 2, at 894-902.
48. Kahan et al., *Whose Eyes, supra* note 2, at 849.
49. RICHARD A. POSNER, HOW JUDGES THINK 68 (2008) (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921)).
50. *See Scott*, 550 U.S. at 397 (Stevens, J., dissenting). Previously, in his 2004 dissent in *Brosseau v. Haugen*, Justice Stevens similarly stated that "reasonable jurors" could disagree regarding qualified immunity, and he also stated similarly that his "conclusion [was] strongly reinforced by the differing opinions expressed by the Circuit Judges who ha[d] reviewed the record." 543 U.S. 194, 207 (2004) (Stevens, J., dissenting).