Lect 35

Terminating Litigation before trial

- P sues D for negligence  
- P offers sufficient evidence concerning negligence, causation and damages such that a reasonable jury *would have* to find in his favor  
- D offers no evidence

Summary judgment for P

summary judgment for plaintiff concerning a cause of action: no reasonable jury could find for the defendant with respect to *each* element of the cause of action

- P sues D for negligence  
- P offers sufficient evidence concerning negligence, causation and damages such that a reasonable jury would have to find in his favor   
- D offers rebutting evidence concerning causation

- result: partial summary judgment on negligence and damages – but causation will be a jury issue

partial summary judgment  
  
R 56(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

materials that may be submitted in support or opposition to summary judgment

56(c) Procedures.  
(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:  
(A) ***citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials***; or  
(B) ***showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact***.  
(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.  
(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.  
(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, ***set out facts that would be admissible in evidence***, and show that the affiant or declarant is competent to testify on the matters stated.

Note that the depositions and affidavits are generally inadmissible at trial - hearsay

But they are allowed for summ j, because they are showing what would be presented at trial

BUT – content of them must be admissible

* must be on personal knowledge, and be in form that is admissible (no hearsay content)

reasonable jury standard for summary judgment/directed verdict

* P is suing D for age discrimination
* P alleges in his complaint that
* D promoted X rather than P
* D did so because X was younger than P, not because X had performed better on the job than P
* D makes a motion for summary judgment
* In opposition to motion, P introduces an affidavit by P stating that D said to P at a meeting that D “did not want to promote old people”
* D introduces 10 affidavits from the other 10 people at that meeting stating that D said no such thing
* If P’s affidavit is the only evidence that he has that D’s motive for not promoting P was age, should D win on his summary judgment motion?
* NO – cannot use summ j to resolve dueling affidavits

P sues Ds for violation of the federal antitrust law (Sherman Act)  
P offers as evidence of an agreement in restraint of trade the Ds’ parallel conduct   
 - for example, that they do not cut in on each other’s territory

This is an example where summary judgment would be appropriate – no reasonable jury could find an agreement just on the basis of parallel conduct - too many alternative explanations of the parallel conduct

Other examples where summ j would be appropriate?

- Iqbal – summ j for D on intent to discriminate when only evidence is disparate impact on Muslims  
- Sierocinki – summ j for D on negligence of manufacturing when only evidence is that it blew up in his face

- Two cars enter an intersection at right angles and strike one another killing both drivers and all passengers.   
- There are no eyewitnesses to the accident.   
- The only evidence available is that there was a working traffic light; thus one of the drivers, but only one, had to go through the red light.  
- The family of driver of one car sues the estate of the driver of the other for negligence  
- The estate moves from summary judgment

- should be granted – no reasonable jury could find by a preponderance of the evidence that any of the two drivers was negligent

- X must take a certain pill once a day to remain alive. The pill is highly toxic. To take two within 24 hours is fatal.   
- X is found dead in his bedroom and the evidence is clear that he took two pills that day.   
- The uncontradicted evidence shows that several hours before his death, X made out a new will, substantially different from the one previously in force. It also shows that at about the same time, X made plans to accompany several friends on a fishing trip on the following day.  
- X’s family sues Insurance Co. for insurance proceeds on the ground that X’s death was an accident  
- Insurance Co. moves for summary judgment

Should be denied?

here a reasonable jury could find one or the other piece of evidence more persuasive

The movant has the burden of showing that summary judgment is appropriate.  
  
Does that mean that a defendant being sued for negligence cannot successfully move for summary judgment unless she offers some evidence against the plaintiff’s allegations?

NO – need not offer evidence – can simply argue that P’s evidence is insufficient. BUT D must offer the argument. Otherwise D has not satisfied burden.

# Trial

pretrial disclosure of evidence (except for impeachment evid)

Right to jury (7th Amendment question)

- must have been considered an action at law at time of enactment of 7th A

Even if there is a right, you need to request a jury trial or you will have waived your right

- empanel jury

- voir dire

- peremptory challenges, for cause challenges

Ps lawyer’s opening statement

- presentation of evidence by P’s lawyer

- examination & cross exam

- Motion for a directed verdict by D at end of P’s evidence

If denied then

- D’s opening statement (sometimes this is right after P’s opening statement instead), presentation of D’s evidence

Then both will make motion for directed verdict

If denied

- instructions to the jury

- verdict

- special or general (general can be with interrogatories)

- after verdict the loser will likely move for a judgment notwithstanding the verdict

- a.k.a. motion for a judgment NOV

Why bother if judge already rejected the motion for a directed verdict?

Consider…

At the end of the evidence, D moves for a directed verdict.  
It is granted.  
What happens if the trial court’s decision is reversed on appeal?

Must have a new trial, because jury will probably not be able to be brought together again

At the end of the evidence, D moves for a directed verdict.  
It is denied.  
The jury finds for the plaintiff.  
D moves for a judgment n.o.v.  
It is granted.  
What happens if the trial court’s decision is reversed on appeal?  
- can give effect to the verdict for P

Also possible - motion for new trial due to

•Improper jury instructions

•Jury failed to follow instructions

•Newly discovered evidence

•Verdict “against the weight of the evidence”

–Especially excessive damages

The court then takes the verdict and turns it into a JUDGMENT

If judgment for P, there will be relief

* If an injunction, then the court will retain jurisdiction to sanction the D if he does not abide by the injunction
* If damages, then that creates a debt
* P must bring action to collect debt

suit on the judgment will be under state law

even if the debt was created by a judgment in federal court

the federal court can also retain the case to enforce the judgment if the D has assets in the state

supplementary proceedings under R 69

Rule 69. Execution   
  
(a) In General.  
(1) Money Judgment; Applicable Procedure.   
  
A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution — and in proceedings supplementary to and in aid of judgment or execution — must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

Also loser can request:

motion for relief from a judgment  
  
R. 60

and can, of course, appeal

NOW Erie

Really about problem of one sovereign’s law in another sovereign’s courts

a federal court entertains a state law action, or action under the law of a foreign nation  
  
a state court entertains a federal action, or sister state action, or action under the law of a foreign nation

we’re interested in especially in a fed ct taking state law action (diversity or supplemental jurisdiction)

Brings up a number of puzzles

First is – how does fed ct interpret state law?

Second – how much state procedure follows state law into federal court?

How to interpret state law

* One might think it is obvious that one must respect state SCt decisions concerning the common law in the state – but that was not always so

Swift v. Tyson (US 1842) (Story, J.)  
  
P sues D in federal court in New York concerning commercial paper issued in New York.  
The Supreme Court held that in interpreting the general common law prevailing in New York, a federal court need not follow opinions of New York state courts.

But there was a problem -

Rules of Decision Act  
28 U.S.C. § 1652  
The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Story, J. – “laws” in the RDA refers to state statutes and to common law rules that are local – not to the general common law

Why no deference to state court decisions?

* was it because the general common law was federal law?
  + - NO
    - if it were it would be binding in NY state court
    - But NY state courts were free to ignore what the USSCt said about the general common law in NY

WHY no deference then?

* The usual story is that *Swift* was committed to natural law
* - the common law is a “brooding omnipresence” that applies in New York whatever New York officials say
* that’s wrong – Swift was compatible with positivism

positivism – the existence and content of the law is solely a matter of social facts about people in a jurisdiction  
e.g. if tomorrow everyone started acting as if Michael Green’s word was law, my word would be law

natural law theory – the existence and content of the law is not (or not solely) a matter of social facts

* Swift was compatible with positivism: the common law applies in New York only because New York officials say so, *BUT* New York officials *want* federal (and sister state) courts to come to their own judgment about what the common law in New York is – the common law standard is thought of as a standard that transcends the decisions of NY state courts, but it applies in NY only because NY officials say so