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Summary Judgment in Rhode Island: Is It Time to Wrap the Mantra in Celotex?

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Articles

Summary Judgment in Rhode Island: Is It Time to Wrap the Mantra in *Celotex*?

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It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.

Oliver Wendell Holmes[1]

I. Introduction

Like an old religion whose contemporary adherents chafe under the regime of an ancient liturgy and insist upon modern metaphors for their worship, the law has its own litany of maxims and mantras that no longer inform or enlighten in a way they may have done when first utilized. Nowhere is this more evident than in the area of summary judgment under Rule 56 of the Rhode Island Rules of Civil Procedure,[2] where the controlling mantra of the

* Associate Justice, Rhode Island Superior Court. I thank Judge Francis Darigan, Christopher Rawson, Caitlin Riley, Judge Judith Savage, and Linda Rekes Sloan for their helpful comments on earlier drafts of this Article. I also benefited from the able and thorough research assistance of Kimberly Norato, Roger Williams University School of Law, Class of 1998, and Eva Badway. Naturally, any errors are mine.

1. Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting).

2. Rule 56 provides:

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

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

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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

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

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

(g) *Affidavits Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affida-

Rhode Island Supreme Court for the past quarter of a century has been that "summary judgment is a drastic remedy and should be cautiously applied."[3] This language is recited regardless of

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vits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

R.I. Super. Ct. R. Civ. P. 56.

Although the purpose of this article is not to provide a historical analysis of the development of summary judgment in the state of Rhode Island, one should note that as early as 1929, statutes provided for summary judgment in a contract action where the plaintiff sought to recover a debt or liquidated demand in money payable by the defendant. *See* R.I. Gen. Laws ch. 333, § 29 (1929); *see also* Sutter v. Harrington, 154 A. 756 (R.I. 1930); Rosenthal v. Halsband, 152 A. 320 (R.I. 1930); Morris Plan Co. v. Whitman, 150 A. 121 (R.I. 1930) (illustrating the Rhode Island Supreme Court's application of that statute).

Moreover, Rhode Island General Laws section 9-7-1 provided for a motion for judgment on the pleadings; however, it also applied only to contract actions. R.I. Gen. Laws § 9-7-1 (repealed 1965). On January 10, 1966, Rhode Island adopted Civil Procedure Rule 56, which was identical to Federal Rule 56 of Civil Procedure. R.I. Super. R. Civ. P. 56 reporter's notes.

See Robert Millar, *Three American Ventures in Summary Civil Procedure*, 38 Yale L.J. 193 (1928) (providing a more detailed history of summary judgment comparing the English rules with early-American versions of summary judgment); *see also* John A. Bauman, *The Evolution of the Summary Judgment Procedure*, 31 Ind. L.J. 329 (1956); Charles Clark & Charles Samenow, *The Summary Judgment*, 38 Yale L.J. 423 (1928); William David Carlist et al., Summary Adjudication: Dispositive Motions and Summary Trials (1990); Warren Freedman, Summary Judgment and Other Preclusive Devices (1989) (providing an in-depth analysis of summary judgment procedure).

3. Ladouceur v. Prudential Ins. Co. of America, 302 A.2d 801, 803 (R.I. 1973); *see also* Elgabri v. Lekas, 681 A.2d 271, 275 (R.I. 1996); Boland v. Tiverton, 670 A.2d 1245, 1248 (R.I. 1996); Pound Hill Corp. v. Perl, 668 A.2d 1260, 1263 (R.I. 1996); Smith v. Tully, 665 A.2d 1333, 1335 (R.I. 1995); St. Paul Fire & Marine Ins. Co. v. Russo Bros., Inc., 641 A.2d 1297, 1301 (R.I. 1994) (Murray, J., dissenting); Regnier v. Cahil, 618 A.2d 1266, 1276 (R.I. 1993); Russian v. Life-Cap Tire Serv., Inc., 608 A.2d 1145, 1146 (R.I. 1992); Ferro v. Volkswagen of America, Inc., 588 A.2d 1047, 1049 (R.I. 1991); McPhillips v. Zayre Corp., 582 A.2d 747, 748 (R.I. 1990); Trend Precious Metals Co. v. Sammartino, Inc., 577 A.2d 986, 989 (R.I. 1990); Mullins v. Federal Dairy Co., 568 A.2d 759, 761 (R.I. 1990); Mignone v. Fieldcrest Mills, 556 A.2d 35, 37 (R.I. 1989); Ouimette v. Moran, 541 A.2d 855, 856 (R.I. 1988); O'Coin v. Woonsocket Inst'l Trust Co., 535 A.2d 1263, 1263 (R.I. 1988); Cardi Corp. v. Rhode Island, 524 A.2d 1092, 1096 (R.I. 1987); Violet v. Travelers Express Co., 502 A.2d 347, 348 (R.I. 1985); Norberg v. Feist, 495 A.2d 687, 689 (R.I. 1985); Commercial Union Co. v. Graham, 495 A.2d 243, 245 (R.I. 1985); Brill v. Citizens Trust Co., 492 A.2d 1215, 1217 (R.I. 1985); People's Trust Co. v. Searles, 486 A.2d 619, 620 (R.I. 1985); Reed v. Notorantonio, 477 A.2d 954, 955 (R.I. 1984); Rustigian v. Celone, 478 A.2d 187, 189 (R.I. 1984); Berube v. Matoian, 463 A.2d 183, 184 (R.I. 1983); Berarducci v. Rhode Island Hospital, 459 A.2d 963, 964 (R.I. 1983); Saltzman v. Atlantic Realty Co., Inc., 434 A.2d 1343, 1344 (R.I. 1981); Steinberg v. State, 427 A.2d 338, 339-40 (R.I. 1981); Ardente v. Horan, 366 A.2d 162, 164 (R.I. 1976).

whether the supreme court is affirming or reversing the grant of summary judgment in the court below. *Ladouceur v. Prudential Insurance Co. of America*,[4] decided in 1973, appears to be the first case in which the court employed that phrase. Prior to *Ladouceur*, the words "drastic remedy" standing alone served as the approved appellation for summary judgment.[5]

The imprecation that "summary judgment is a drastic remedy and should be cautiously applied" is embedded in the Rhode Island Supreme Court's modern jurisprudence and is regularly invoked by trial judges entertaining motions and cross-motions for summary relief. Anecdotally, I can report that during my period of service on the Providence County Motion Calendar in 1995 and 1996, the members of the bar constituted a willing choir, apparently feeling constrained to recite the mantra regardless of whether they were pressing for or opposing a Rule 56 motion.

However "drastic" the remedy and however "cautious" the trial court should be in applying it, the supreme court has always held that "when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law, summary judgment properly issues."[6] This unremarkable declaration mirrors the language of Rule 56(c). Another frequently used comment in this area which is not found in the Rule itself is the venerable language that the trial judge is to "consider the affidavits and pleadings in the light most favorable to the [non-moving party]."[7]

My contention in this Article is that the ritual incantation of these phrases and related ones by the Supreme Court of Rhode Island, without explication or analysis, relegates summary judgment to a disfavored position that is unwarranted and unjustified. Trial judges laboring under the shadow of the canon of "drastic" and "cautious" may often be inclined to reject a meritorious motion for

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4. 302 A.2d 801, 803 (R.I. 1973).

5. Hodge v. Osteopathic General Hospital, 265 A.2d 733, 737 (R.I. 1970); Slefkin v. Tarkomian, 238 A.2d 742, 743 (R.I. 1968). When in *Slefkin* the supreme court first characterized summary judgment as a "drastic remedy" it did so without citation to any legal authority. *Slefkin*, 238 A.2d at 743. Likewise, five years later in *Ladouceur*, when the supreme court first added its warning that this "drastic remedy" should be "cautiously applied," it did not cite any legal authority for its characterization. *Ladouceur*, 302 A.2d at 803. In both cases, the court reversed grants of summary judgment by the trial judge.

6. Saltzman v. Atlantic Realty Co., 434 A.2d 1343, 1344 (R.I. 1981) (citing Ardente v. Horan, 366 A.2d 162 (R.I. 1976); *Ladouceur*, 302 A.2d at 803).

7. Kirby, Inc. v. Weiler, 276 A.2d 285, 287 (R.I. 1971).

summary judgment. As little, if any, opportunity exists for the unsuccessful movant to remedy the denial in the supreme court, the result is further delay and expense with the attendant possibility of a settlement prior to trial in excess of that which should fairly be associated with an unfounded claim or defense. As one respected commentator describing the problem in the federal courts from his vantage point in 1974 put it:

> Most [summary judgment decisions] simply draw from the available clichés, which are selected in classic cut-and-paste style to support whatever result the court feels is proper. In reality most judges are simply muddling through and denying the motion whenever they are in doubt. This timorous approach obviously reduces the danger of unjust dismissals, but it does so at the cost of permitting at least some useless trials to be conducted.[8]

I will argue in these pages that there is nothing drastic about entering a summary judgment against a party whose claim or defense is without merit. Trials are ordained for one purpose and that is to resolve factual disputes, or more particularly, to determine whether the facts support the contentions of the party to whom the law has assigned the burden of proof. If a party with the burden cannot produce evidence regarding material facts—or facts of consequence[9]—that would allow a reasonable jury to find in his or her favor, then summary judgment is in order because a trial would be a pointless and wasteful undertaking. Granting summary judgment in appropriate circumstances is no more drastic than applying any other rule of procedure or evidence where required.

In a similar fashion, to single out summary judgment from among the other pre-trial procedures authorized by the Rules as one that should only be "cautiously applied" is to unnecessarily tie a millstone on its utility. It is a truism that judges should be cautious in ruling on any matter of significance, and they should never

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8. Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745, 746 (1974).

9. Rule 56(c) and (d) refer to "any material fact" and "material facts" respectively. R.I. Super. Ct. R. Civ. P. 56(c)-(d). *But see* R.I. R. Evid. 401 (abandoning this terminology in favor of the phrase "facts of consequence"). Rule 401 provides that "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

be reckless regardless of what the impact of their ruling may be. Motions to suppress in criminal trials, admissibility decisions, motions to sever, motions to vacate, motions involving discovery access to materials that are arguably privileged or constitute the work product of an attorney and countless other rulings all call upon a judge to approach the issues cautiously and carefully. While there may be isolated appellate decisions in all these areas counseling care and prudence on the part of trial judges, I am not aware of any other aspect of trial or pre-trial procedure about which the Rhode Island Supreme Court has so frequently waved the flag of caution.

Whatever effect clichés, maxims and mantras have had in defining the parameters of judicial decision-making in the area of summary judgment, they have failed to create an analytical framework to serve as a coherent guide for litigators and trial judges seeking to reach outcomes that are principled, if not always predictable. With the objective of providing clear guidance to the federal trial bench and bar, the United States Supreme Court in 1986 handed down three decisions explaining the purpose and application of Rule 56 of the Federal Rules of Civil Procedure:[10] *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[11] *Anderson v. Liberty Lobby, Inc.*,[12] and *Celotex Corp. v. Catrett*,[13] (the *Celotex* trilogy). I will argue below that these three cases read together move beyond the cliché to a formulation of principles of analysis that carefully define the role of the trial judge examining a motion brought pursuant to Rule 56. These principles, if incorporated into Rhode Island practice, would serve both the bench and bar, not to mention litigants, by removing from the trial track those cases that should not be there.

Additionally, I will argue that despite its own protestations to the contrary, the United States Supreme Court has invited trial judges on Rule 56 motions to weigh the evidence, at least to the extent of making a determination as to whether the evidence supports inferences that a reasonable jury could rely upon to conclude

10. Federal Rule of Civil Procedure 56 is identical to Rhode Island's Rule 56. *See* R.I. R. Civ. P. 56 reporter's notes; *see supra* note 2 (setting out Rule 56 in its entirety).

11. 475 U.S. 574 (1986).

12. 477 U.S. 242 (1986).

13. 477 U.S. 317 (1986).

that the proponent of the evidence can sustain the burden the substantive law has imposed on him or her (or it).[14] If this and the other analytical guidelines of the trilogy were applied in Rhode Island, our summary judgment jurisprudence would be advanced far beyond incantations that it is a "drastic remedy that should be cautiously applied" and "an examination of the pleadings, affidavits, admissions, answers to interrogatories, and other similar matters [must be] reviewed in the light most favorable to the party opposing the motion."[15]

Of special significance for Rhode Island procedure—where, I submit, "drastic" has come to be viewed as synonymous with "disfavored"—is the United States Supreme Court's ringing endorsement of the salutary purpose of Rule 56. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action' . . . ."[16]

The *Celotex* trilogy has been the subject of a considerable amount of scholarly commentary[17] and is, not surprisingly, regu-

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14. In *Liberty Lobby*, for example, after the obligatory declaration that a trial judge entertaining a Rule 56 motion is not to weigh the evidence, 477 U.S. at 249, the Court stated that the "trial judge must bear in mind the actual quantum and quality of proof necessary to support liability," *id.* at 254, and that "the determination of whether a given factual dispute requires submission to a jury must be guided by the *substantive evidentiary standards* that applied to the case," *id.* at 255 (emphasis added). The injunction that trial judges not weigh the evidence did not mollify Justice Brennan, who wrote in dissent that "the Court's opinion is . . . full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would." *Id.* at 266 (Brennan, J., dissenting); *see infra* notes 115-17 and accompanying text.

15. Saltzman v. Atlantic Realty Co., Inc., 434 A.2d 1343, 1345 (R.I. 1981).

16. *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

17. *See, e.g.*, Rodney L. Bean & Sean P. McGinley, *West Virginia's Very Own* Celotex *Trilogy, A Series of Recent Opinions by the Supreme Court of Appeals of West Virginia Reveals that the Rumors of Rule 56's Death Were Greatly Exaggerated*, 98 W. Va. L. Rev. 571 (1996); Robert M. Braton, *Summary Judgment Practice in the 1990's: A New Day Has Begun—Hopefully*, 14 Am. J. Trial Advoc. 441 (1991); Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2067 (1989); William L. Kandel, *Rule 56 After* Celotex *and* Liberty Lobby: *The Increased Availability of Summary Judgment*, 12 Employer Rel. L.J. 491 (1986); Amy D. Ronner, *Destructive Rules of Certainty and Efficiency: A Study in the Context of Summary Judgement Procedure and Uniformed Customs and Practices For Documentary Credits*, 28 Loy. L.A. L. Rev. 619 (1995); Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in*

larly referenced in lower federal court decisions.[18] It has also been

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the Core Motion Context, 36 Wm. & Mary L. Rev. 1633 (1995); Eric K. Yamomoto et al., *Summary Judgment at the Crossroads; The Impact of the* Celotex *Trilogy*, 12 U. Haw. L. Rev. 1 (1990); Gregory A. Gardillo, Comment, *Summary Judgment and Problems in Applying the* Celotex *Trilogy Standard*, 42 Clev. St. L. Rev. 263 (1994); Kyle M. Robertson, Comment, *No More Litigation Gambles: Toward a New Summary Judgment*, 28 B.C. L. Rev. 747 (1987); Mark C. Wilson, Comment, *Civil Procedure: Massachusetts Adopts the Federal Summary Judgment Standard*, Kourvacalis v. General Motors Corp., 26 Suffolk U. L. Rev. 191 (1992).

18. *Celotex, Liberty Lobby* and *Matsushita* have impacted the federal courts' use of summary judgment. *See, e.g.*, Lipsett v. University of P.R., 864 F.2d 881, 894-95 (1st Cir. 1988) (quoting *Celotex*, 477 U.S. at 324) ("The court must insist that the party opposing the motion not rest upon 'mere allegations,'" but go beyond the pleadings and by his or her "own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"); Knight v. United States Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986) (quoting Fed. R. Civ. P. 1) (holding that "'summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"); Williams v. West Chester, 891 F.2d 458, 459-61 (3d Cir. 1989) (citing *Liberty Lobby*, 477 U.S. 242) (expounding on the fact that the summary judgment standard mirrors the directed verdict standard and stating that, if reasonable minds could differ as to the import of the evidence, then a verdict should not be directed); Ballinger v. North Carolina Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir. 1987) (citing *Liberty Lobby*, 477 U.S. at 247-48) ("[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."). *But see Ballinger*, 815 F.2d at 1004 (referring to summary judgment as a "drastic remedy"); Washington v. Armstrong World Industries, Inc., 839 F.2d 1121, 1122 (5th Cir. 1988) (citing *Celotex*, 477 U.S. at 322) ("The Court has stated that Fed. R. Civ. P. 56(c) mandates summary judgment in any case where a party fails to establish the existence of an element essential to his case and on which he bears the burden of proof."); Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989) ("Scholars and courts are in agreement that a 'new era' in summary judgment dawned by virtue of the Court's opinions in these cases."); Beard v. Whitley County REMC, 840 F.2d 405, 410 (7th Cir. 1988) (citing *Celotex*, 477 U.S. at 323) ("However, when confronted with a motion for summary judgment, a party who bears the burden of proof on a particular issue may not rest on its pleading, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact which requires trial."); City of Mt. Pleasant v. Associated Elec. Coop., 838 F.2d 268, 273 (8th Cir. 1988) ("In *Celotex*, the Supreme Court held that the burden on the party moving for summary judgment is only to demonstrate, *i.e.*, '[to] point[ ] out to the District Court,' that the record does not disclose a genuine dispute on a material fact.") (alterations in original) (citations omitted); California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1486 (9th Cir. 1987) ("In three recent cases, the Supreme Court, by clarifying what the non-moving party must do to withstand a motion for summary judgment, has increased the utility of summary judgment."); Reazin v. Blue Cross & Blue Shield, 899 F.2d 951, 979 (10th Cir. 1990) (quoting *Celotex*, 477 U.S. at 322) (Under the Supreme Court's recent guidelines, summary judgment must be

discussed and followed to varying degrees by some state high courts.[19] This is not the case in Rhode Island. Since the trilogy

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granted against a party "'who fails to . . . establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'"); Bald Mountain Park, Ltd. v. Oliver, 863 F.2d 1560, 1563 (11th Cir. 1989) (quoting *Celotex*, 477 U.S. at 325) ("Recently, in *Celotex*, the Supreme Court held that the requirement that the moving party show initially the absence of a genuine issue concerning any material fact should be understood as requiring the moving party to discharge his burden ''by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the non-moving party's case.'") (citation omitted).

For a practical recent illustration of the First Circuit's use of summary judgment after the *Celotex*, *Liberty Lobby* and *Matsushita* cases, see R.W. Int'l Corp. v. Welch Foods, Inc., 88 F.3d 49, 53 (1st Cir. 1996) (holding that the non-moving party proffered no competent evidence to rebut the historical facts relied on by Welch Foods to justify unilateral termination of a contract).

19. *See, e.g.*, Brill v. Guardian Life Ins. Co. of America, 666 A.2d 146, 151-53 (N.J. 1995) (After an extended discussion of all three trilogy decisions, the Supreme Court of New Jersey concluded that when considering a motion for summary judgement, "the motion judge was to engage in an analytical process essentially the same as that necessary to rule on a motion for directed verdict" and that the judge was to undertake a "weighing process" that would be governed "by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits."); Kourouvacilis v. General Motors Corp., 575 N.E.2d 734, 738 (Mass. 1991) (asserting that it was not bound to apply the summary judgment standard articulated by the Supreme Court in *Celotex*, but declaring that "it makes eminent good sense to do so"); Poplaski v. Lamphere, 565 A.2d 1326, 1329 (Vt. 1989) (quoting *Celotex*, 477 U.S. at 322) (drawing from *Celotex* the principle that summary judgement is "mandated" against a party who fails to produce sufficient evidence "essential to his case and on which he has the burden of proof at trial"); Transportation Ins. Co. v. Huntzinger Const. Co., 507 N.W.2d 136, 140 (Wis. Ct. App. 1993) (following *Celotex* for the proposition that a party moving for summary judgement is not necessarily obliged to negate the opponent's position with affidavits but "need only explain the basis for its motion" if such explanation will demonstrate the inability of the opposing party to produce sufficient evidence supporting its claim or defense); Hodgkinson v. Dunlop Tire & Rubber Corp., 526 N.E.2d 89, 90 (Ohio Ct. App. 1987) (adopting the *Celotex* holding that the moving party does not always have to negate the opponent's claim). *But see* G & M Farms v. Funk Irrigation Co., 808 P.2d 851, 853-55 (Idaho 1991) (adopting, without any cogent rationale, the principle of *Liberty Lobby* that the trial judge considering a motion for summary judgment must do so in the light of the burden of proof imposed at trial in libel suits only, but that the *Liberty Lobby* principle would not be used in a misrepresentation claim even though the standard to be followed at trial was clear and convincing proof); Carlton v. Alabama Dairy Queen, Inc., 529 So. 2d 921, 923 (Ala. 1988) (Despite its admitted awareness of *Celotex*, the court candidly adhered to the scintilla rule, holding, in effect, that if a plaintiff opposing a motion for summary judgement could produce "a mere gleam, a glimmer, a spark, the least bit, or the smallest trace of evidence" the complaint could stand.).

was handed down in 1986,[20] the Rhode Island Supreme Court inexplicably—and incredibly—has cited only one of the three cases and then only on one occasion.[21] I say "incredibly" because the Rhode Island Supreme Court, as a matter of declared principle, regularly turns to federal case law when reviewing questions surrounding a Rhode Island rule that is a verbatim replication of the federal rule addressing the same topic. This is done when Rhode Island case law in the area is "undeveloped"[22] or "sparse."[23] "We have repeatedly held that in situations where our procedural rule is identical to the federal counterpart and our case law is sparse in that area, we will look for guidance in the precedent of the federal courts."[24]

Indeed, in a 1972 decision regarding summary judgment, the court declared: "Super. R. Civ. P. 56 is patterned on Fed. R. Civ. P. 56. Consequently, decisions of the federal courts, interpreting a federal rule which is identical to our own, can and heretofore have served as a guide to this court's interpretation of a comparable rule."[25] On an even grander scale, the Rhode Island Supreme Court has looked to the United States Supreme Court in such areas as search and seizure[26] and equal protection, this latter excur-

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20. *Matsushita* was decided on March 26, 1986. Matsushita Elec. Indus. Co. v. Zenith Radio Corp. 475 U.S. 574, 574 (1986). *Liberty Lobby*, 477 U.S. 242, and *Celotex*, 477 U.S. 317, followed on June 25, 1986.

21. In a case arising under the Rhode Island Antitrust Act, R.I. Gen. Laws § 6-36-1, the Rhode Island Supreme Court referenced *Matsushita* for the proposition that "in antitrust cases summary judgment is appropriate when a plaintiff fails to present evidence to support a conclusion that the alleged anti-competitive conduct is more probable than not." UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp., 599 A.2d 1033, 1037 (R.I. 1991) (citing *Matsushita*, 475 U.S. at 587).

22. Testa v. Providence, 572 A.2d 1336, 1338 (R.I. 1990).

23. Kirios v. Arsenault, 632 A.2d 15, 16 (R.I. 1993).

24. *Id.* at 16-17 (citing Kelvey v. Coughlin, 625 A.2d 775, 776 (R.I. 1993) (citing Cabral v. Arruda, 556 A.2d 47, 49 (R.I. 1989)); Smith v. Johns-Manville Corp., 489 A.2d 336, 339 (R.I. 1985); Nocera v. Limbo, 298 A.2d 800, 803 (R.I. 1973)). This principle applies to the Rhode Island Rules of Evidence as well. *See* State v. Haslam, 663 A.2d 902, 908 (R.I. 1995) (following *Tome v. United States*, 513 U.S. 150 (1995), for guidance in interpreting Rule 801(d)(1)(b) regarding prior consistent statements); State v. Trafficante, 636 A.2d 692, 694-96 (R.I. 1994) (turning to federal case law in a case of first impression involving Rule 410 of the Rules of Evidence).

25. Egan's Laundry & Cleaners, Inc. v. Community Hotel Corp., 297 A.2d 348, 350 (R.I. 1972).

26. The Supreme Court of Rhode Island occasionally has declared that article I, section 6 of the Rhode Island Constitution erects a higher barrier than the Fourth Amendment regarding searches and seizures. *See, e.g.*, Pimental v. Depart-

sion revealing an unhappy mimicry in the face of an express declaration by the authors of our modern constitution that the Rhode Island standard should be higher than the federal one.[27]

While an ample number of reported decisions permeate the area of summary judgment and Rule 56, these cases are rife with maxims but thin on the type of thoughtful guidance found in the *Celotex* trilogy. Nowhere in Rhode Island's summary judgment jurisprudence do we find any doctrinal or historical explanation as to why Rule 56 has been selected from among all the other rules for a cautious and restricted application. Clearly, the text of the rule does not indicate that special treatment is warranted. In contradistinction to this approach, the United States Supreme Court, after asserting that the procedure defined in Rule 56 was to be considered "as an integral part of the Federal Rules as a whole," saw fit to explain its proposition with a reference to the evolution of pre-trial procedure.[28]

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ment of Transp., 561 A.2d 1348, 1351 (R.I. 1989) (Article I, section 6 of the Rhode Island Constitution prohibited the use of police roadblocks to examine all drivers to determine if any of them were intoxicated, even though the Fourth Amendment might permit such activity. "[A] principled rationale exists to depart from the minimum standards of protection provided under the Fourth Amendment."); State v. Maloof, 333 A.2d 676, 681 (R.I. 1975) ("In the interest of giving the full measure of protection to an individual's privacy, particularly as it relates to electronic eavesdropping, we shall insist upon a closer adherence to the Rhode Island statute than may be expected by those who interpret the federal legislation. In so doing, we give added meaning to the state's constitutional guarantee of privacy . . . ."). More recently, the court abandoned some of its earlier holdings and expressly adopted the views of the United States Supreme Court that the government need not show any exigency in order to justify a warrantless automobile search. State v. Werner, 615 A.2d 1010, 1014 (R.I. 1992).

27. *Compare* Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 738 (R.I. 1992) (stating that it would look to United States Supreme Court precedent regarding the interpretation and application of the 1987 due process and equal protection amendment to the Rhode Island Constitution, R.I. Const. art. I, § 2), *with* Jones v. State, 724 F. Supp. 25 (D.R.I. 1989) (Then-Judge Lagueux observed that, although the language of article I, section 2 and the Fourteenth Amendment are similar, the intent of the 1987 drafters, as revealed in the constitutional convention committee report was to "protect the citizens of the state if the federal judiciary were to adopt a narrow interpretation of the Fourteenth Amendment in the future.").

28. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

> Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice plead-

Similarly, discussions in Rhode Island case law are "sparse," if not nonexistent, regarding the showing to be made by the moving party who wishes to call to the attention of the trial court the fact that the opponent's claim or defense has an insufficient evidentiary basis; the burdens of proof and persuasion imposed by the substantive law at trial and their relationship to summary judgment considerations; problems engendered by an ambiguous affidavit or self-contradictory positions on a specific point asserted by a party opposing a motion for summary judgment; what a trial judge does when evaluating the persuasiveness of inferences in determining whether summary judgment should be granted; and so on. On the other hand, the *Celotex* trilogy elaborates on these and other aspects of the summary judgment procedure with the result being the creation of a framework of principles to guide the bench, bar and litigants.[29]

By way of a cautionary note, I contend that the United States Supreme Court was less than candid in its discussion of the evaluative function discharged by the trial judge considering a Rule 56 motion, as the Court respected its own mantra that judges are not to engage in any weighing of the evidence. This disingenuousness provoked harsh criticism from Justices White and Brennan.[30]

But whatever its shortcomings, the trilogy articulates clear and practical guidelines. Accordingly, it would be of great assistance to the trial bench and bar for the Rhode Island Supreme

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> ing," the motion to dismiss seldom fulfills this function anymore, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id.

29. The principles to be gleaned from the *Celotex* trilogy are discussed *infra* Part II.

30. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 600 (1986) (White, J., dissenting) (stating that the majority's "language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff"); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 266 (1986) (Brennan, J., dissenting) (stating bluntly that "the Court's opinion is . . . full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would"). For a discussion of this intra-Court squabble, see *infra* Part III.

Court to examine *Matsushita, Liberty Lobby* and *Celotex* and draw from these opinions practical criteria for the evaluation of Rule 56 motions in this jurisdiction. While it is true that the United States Supreme Court has no general supervisory jurisdiction over state court procedures,[31] reasoned pronouncements of the nation's highest court should not be ignored or rejected without some logical and principled justification for doing so.

Although the Rhode Island Supreme Court has not yet drawn upon the *Celotex* trilogy to formulate a coherent framework for assessing summary judgment motions, none of the maxims it has employed to define its interpretive approach—other than the "drastic-cautious" mantra—contradicts the criteria enunciated in the trilogy. This is not to say, however, that the declarations of the Rhode Island Supreme Court, standing alone, logically and irresistibly lead to the *Celotex* trilogy principles. As a start, the Rhode Island Supreme Court should articulate specifically whether Rule 56 is an integral[32] part of the Rhode Island Rules of Procedure or whether we are to continue to view the procedure it describes as "drastic" or "extreme," to use the word Justice Lederberg selected in a decision she wrote for a unanimous court shortly after her appointment to that bench.[33] It is my suggestion that in undertaking such a review,[34] the supreme court should also tell the trial bench and bar whether, in effect, it has been employing the "scintilla rule" in determining whether the non-moving party has shown enough to cause a rejection of the moving party's claim for relief under Rule 56. I say this because the United States Supreme Court declared that the standard to be employed in evaluating a motion for sum-

31. *See, e.g.*, Victor v. Nebraska, 114 S. Ct. 1239, 1248 (1994) ("[W]e have no supervisory powers over the state courts . . . .").

32. *Celotex*, 477 U.S. at 327; *see also supra* text accompanying note 16.

33. Hydro-Manufacturing v. Kayser-Roth Corp., 640 A.2d 950, 954 (R.I. 1994) ("As a remedy, summary judgment is extreme and must be applied cautiously."). More recently, Justice Lederberg wrote similarly, with only insignificant changes in phrasing, that "summary judgment is an extreme remedy and should be applied cautiously." Rotelli v. Catenzaro, 686 A.2d 91, 93 (R.I. 1996).

34. I am well aware that all this Article or any law review article may do is make suggestions and hope that the supreme court, the trial bench and the trial bar will make use of them as the common law of summary judgment evolves. Moreover, I realize that, just like its counterpart in the federal system, our high court declarations regarding local procedure are final. As Justice Jackson correctly wrote about the status of decisions rendered by a court of last resort, "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

mary judgment is the same as the one to be used when considering a motion for a judgment as a matter of law at the close of the plaintiff's case, a position held by the Rhode Island Supreme Court.[35] The United States Supreme Court went on to remind federal judges that the long disfavored "scintilla rule" was not to be used to defeat the moving party on either motion.[36] This is especially important for Rhode Island because many years ago, the Rhode Island Supreme Court joined its federal colleagues in rejecting the scintilla rule, at least so far as judgments as a matter of law—then termed directed verdicts—were concerned.[37]

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35. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 ("[T]his standard [of Rule 56(c)] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ."). The Rhode Island Supreme Court made a similar observation in Palmisciano v. Burriville Racing Ass'n, 603 A.2d 317, 320 (R.I. 1992). *See infra* note 114 and accompanying text.

36. After noting that trial judges were to use the same standard when considering summary judgment motions and motions for judgments as a matter of law, *Liberty Lobby* proceeded to remind federal judges that, since at least 1872, the scintilla rule had been rejected. *Liberty Lobby*, 477 U.S. at 250-51. Thus, the party opposing the motion could not escape either a summary judgment or a directed verdict simply by producing a scintilla of evidence in support of its cause. The Court continued that:

> "[f]ormerly, it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

Id. at 251 (quoting Improvement Co. v. Munson, 82 U.S. (14 Wall.) 442, 448 (1872)) (citing Pleasants v. Fant, 89 U.S. (22 Wall.) 116, 120-21 (1875); Coughran v. Bigelow, 164 U.S. 301, 307 (1896); Pennsylvania R.R. v. Chamberlain, 288 U.S. 333, 343 (1933)).

37. By 1904 at the latest, Rhode Island had abandoned the scintilla rule. Hehir v. Rhode Island Co., 58 A. 246, 248 (1904) ("A mere *scintilla* of evidence is never sufficient to sustain a verdict, or, according to the modern rule, even to warrant the trial court in submitting the case to the jury."). In support of its assertion about the existence of a "modern rule," our supreme court cited *Commissioners v. Clark*, 94 U.S. 278, 284 (1876). *Hehir*, 58 A. at 248. Fifty years later, the Rhode Island Supreme Court similarly addressed the situation when it considered the standard to be applied by the trial judge confronted with a motion for a directed verdict made at the close of the defendant's case. Simeone v. Prato, 111 A.2d 708, 712 (1955) ("After defendants had rested it became the duty of the trial judge not merely to determine whether plaintiffs' evidence made out a prima facie case for the jury, but whether such evidence was sufficient in law to support a verdict in plaintiffs' favor and if not to direct a verdict against them.").

Lastly, my recommendation for the adoption in this state of the *Celotex* principles is not motivated by any concern for crowded dockets, real or imaginary, as that problem is in the lap of the presiding justice of the superior court and court administrators. Rather, my objective is to save litigants, lawyers and the court from wasting time and resources trying unfounded claims and defenses. Moreover, in so doing, the jury will be confined to its historic role of resolving genuine disputes about material facts and concomitantly precluded from rendering verdicts supported only by sympathy, bias or illogical and unlawful inferential leaps.

II. A LOOK AT THE *CELOTEX* TRILOGY

The principles for analyzing Rule 56 motions set out in *Matsushita*, *Liberty Lobby* and *Celotex* revitalized, if not resuscitated, summary judgment procedure in the federal courts, and there can be little doubt that if the Rhode Island Supreme Court applied these principles the same effect would be achieved. Each opinion contributed separate principles, and a reading of the cases reveals that the United States Supreme Court was interested not only in resolving the controversies before it, but in providing federal trial judges with workable criteria for use in future cases.

A. Matsushita Electrical Industrial Co. v. Zenith Radio Corp.

When *Matsushita* was argued in November of 1985, Zenith and the National Union Electric Corporation had been battling in the lower courts for eleven years against Matsushita and twenty other corporations that manufacture and sell television sets in the United States. Zenith and National (the respondents in the United States Supreme Court) contended that they were the victims of a price cutting conspiracy on the part of Matsushita and the twenty other corporations (the petitioners). The respondents argued, among other things, that the alleged conspirators were selling televisions at artificially high prices in Japan at the same time they were selling them at losses in the United States.[38] As a matter of substantive law, the Supreme Court declared that there could be no recovery under United States Antitrust Laws based "solely on

38. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 577-78 (1986).

an alleged cartelization of the Japanese market."[39] In sum, Zenith's theory was that Matsushita and its fellow petitioners were cutting prices as part of a scheme to hurt Zenith and that, conversely, the price-cutting was not simply a legitimate business decision undertaken to gain a competitive place in the market.[40]

In the course of reviewing the matter, the Supreme Court read a voluminous record that was replete with expert economic treatises and depositions, not to mention numerous and lengthy lower court opinions, all directed toward answering the question of whether a predatory pricing conspiracy had occurred.[41] For our purposes, it is not important how the Supreme Court interpreted the contending economic data and theories; instead, what is significant is the methodology the Court handed to trial judges to resolve such a complex factual dispute.

The Supreme Court focused on the requirement of Rule 56(c) and (e) that a "genuine issue" grounded in "specific facts" must be presented by the non-moving party to defeat a motion for summary judgment.[42] In the dispute between Zenith and Matsushita, the Court observed that the substantive law required that Zenith, in order to defeat a motion for summary judgment, must show a plausible motive on the part of Matsushita to engage in price-cutting. In addition, such a state of mind could be inferred only if all inferences pointed to a "rational economic motive to conspire." The Court wrote, "[i]f petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy."[43] Thus, we see the United States Supreme

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39. *Id.* at 582.

40. *Id.* at 581-84.

41. In the first several paragraphs of the opinion, the Supreme Court described its challenge:

> Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs 69 pages; the primary opinion of the District Court is more than three times as long. Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a 40-volume appendix in this Court that is said to contain the essence of the evidence in which the District Court and the Court of Appeals based their respective decisions.

Id. at 576. Elsewhere, the Court extrapolated from the records containing economic analyses and theories. *Id.* at 588-95.

42. *Id.* at 586-87.

43. *Id.* at 596-97.

Court culling through reams of contradictory economic materials to determine whether twenty corporations agreed to lower prices to damage Zenith and National Union.

The Supreme Court first made it clear that the issue must be framed in terms of what conclusions the record could support if placed in front of "a rational trier of fact."[44] Matsushita and its corporate colleagues had argued "that, in light of the absence of any apparent motive and the ambiguous nature of the evidence of conspiracy, no trier of fact reasonably could find that the conspiracy with which petitioners are charged actually existed."[45] The Supreme Court agreed with Matsushita and in doing so gave to federal trial judges the standard of "plausibility," a standard to be measured against the prediction of what a rational jury would do. Plausibility is indeed the refrain throughout *Matsushita:*

> It follows from these settled principles that if the factual context renders respondents' claim *implausible*—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.[46]

It is also worthy of note that the Supreme Court observed that the district court judge had reviewed a study of one of Zenith's experts in considerable detail, but had rejected the expert's assumptions, concluding that they were "both implausible and inconsistent with record evidence."[47] The Supreme Court said the trial judge's analysis was "persuasive" and went on to say that "in our view the expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational."[48]

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44. *Id.* at 587.

45. *Id.* at 588.

46. *Id.* at 587 (emphasis added). "The Court of Appeals did not take account of the absence of a *plausible* motive to enter into the alleged predatory pricing conspiracy." *Id.* at 595 (emphasis added). "[T]he court failed to consider the absence of a *plausible* motive to engage in predatory pricing." *Id.* (emphasis added). "That being the case, the absence of any *plausible* motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists within the meaning of Rule 56(e)." *Id.* at 596 (emphasis added). "In *Monsanto* [*v. Spray-Rite Service Corp.*] we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are *implausible*, because the effect of such practices is often to deter procompetitive conduct." *Id.* at 593 (emphasis added).

47. *Id.* at 594 n.19 (citing Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1313, 1356-63 (E.D. Pa. 1981)).

48. *Id.*

What, then, did the Supreme Court do regarding Rule 56 in *Matsushita*? In my opinion, it gave to federal trial judges the authority, if not the mandate, to review even the most complex evidence and then make a determination as to whether the evidence could support reasonable inferences by a fact finder regarding the material prongs of the burden imposed by the substantive law on the party seeking to have the favorable inferences drawn. While antitrust litigation is not commonplace in the trial courts of Rhode Island, when read together with *Liberty Lobby* and *Celotex*, *Matsushita* clearly requires the trial judge to thoroughly assess the facts—dare I say *weigh*?—in order to determine if a jury could reach one or more conclusions supported by the evidence.

B. Anderson v. Liberty Lobby

In *Liberty Lobby*, syndicated columnist Jack Anderson had written that a non-profit group of political activists known as the Liberty Lobby, Inc., were "neo-Nazi, anti-Semitic, racist, and Fascist."[49] Liberty Lobby, Inc., brought suit against Anderson in the United States District Court for the District of Columbia, and Anderson sought summary judgment on each of thirty allegations of defamation. The trial judge determined that the case must be evaluated against the holding of *New York Times Co. v. Sullivan*,[50] and granted Anderson's motion, having concluded that Anderson's research assistant had acted in a thorough and responsible fashion, checking numerous sources, all of which "precluded a finding of actual malice."[51] In *New York Times*, the United States Supreme Court held that a public official bringing a libel action against a media defendant must prove that the defendant "acted with actual malice—'with knowledge that it was false or with reckless disregard of whether it was false or not;'"[52] and the court held further that the actual malice "must be shown with 'convincing clarity.'"[53]

In *Liberty Lobby*, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision and Anderson sought relief from the Supreme Court, which stated

49. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 245 (1986).
50. 376 U.S. 254 (1964).
51. *Liberty Lobby*, 477 U.S. at 246.
52. *Id.* at 244 (quoting *New York Times*, 376 U.S. at 280).
53. *Id.* (quoting *New York Times*, 376 U.S. at 285-86).

the issue on the first page of its opinion: "this case presents the question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies."[54] Eleven pages later the Supreme Court answered in the affirmative, and more specifically, it held that the trial judge's task is to determine: "Whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity."[55]

In the intervening pages, the Supreme Court repaired to a 1944 decision where it said "that summary judgment should be granted where the evidence is such that it 'would require a directed verdict for the moving party.'"[56] The Court elaborated that it had observed on earlier occasions that the "genuine issue" standard of summary judgment is "very close" to the "reasonable jury" directed verdict standard, and for this proposition, it referred to a more recent case. "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted."[57] The Court found persuasive the requirement of the criminal law that a judge entertaining a motion for acquittal must determine whether the evidence could support a reasonable jury's finding of guilt beyond a reasonable doubt.[58]

After marshaling these analogues, the Supreme Court gave its directive to trial judges relative to what they must do in considering the burden assigned by the substantive law when scrutinizing Rule 56 motions:

> [W]e are convinced that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of

54. *Id.*

55. *Id.* at 257.

56. *Id.* at 251 (quoting Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 624 (1944)).

57. *Id.* (quoting Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745 n.11 (1983)).

58. *Id.* at 252 (citing Jackson v. Virginia, 443 U.S. 307, 318-19 (1979)).

> a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.[59]

From these few sentences, we can glean several principles, none of which has been addressed with any thoroughness in Rhode Island's modern jurisprudence:[60] (1) summary judgment and directed verdict (or judgment as a matter of law) assessments are substantively the same; (2) the scintilla standard is emphatically rejected (again!);[61] (3) the judge is reminded that he or she neither operates in a vacuum nor functions as a one-person jury; rather, the judge must ask whether a "reasonable jury" could find for the plaintiff in light of the burden imposed by the substantive law; (4) trial judges may not stop their inquiry by simply evaluating whether the party opposing a motion for summary judgment has come forward with evidence on material points—"facts of consequence"—that rebuts the moving party's contentions; rather, trial judges must ascertain whether the moving party and the opposing party can fairly discharge the substantive burdens imposed by law; and (5) the Court was not writing merely to resolve the dispute between Anderson and the Liberty Lobby, nor simply to further develop the law of libel; rather, it was stating principles applicable in "run-of-the-mill civil cases."

Having demystified the question of substantive burdens of proof and persuasion, the Court journeyed into the controversial area of assessing and weighing evidence, just as it had done three months earlier in *Matsushita*, though interestingly, the *Liberty Lobby* majority did not refer to that case. Despite its obligatory recitation that "[c]redibility determinations, the weighing of the

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59. *Id.*

60. *See supra* notes 20-25 and accompanying text.

61. *See, e.g.*, Commissioners of Marion County v. Clark, 94 U.S. 278, 284 (1876).

> [B]efore the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

Id.

evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge,"[62] the majority opinion declared that "a trial judge must bear in mind the actual *quantum and quality* of proof necessary to support liability under *New York Times*."[63] The Court concluded that "there is no genuine issue if the evidence presented in the opposing affidavits is of *insufficient caliber or quantity* to allow a rational finder of fact to find actual malice by clear and convincing evidence."[64]

If a trial judge's scrutiny of the "quantum and quality" of the evidence offered by the non-moving, or opposing party, and the judge's consideration of the caliber and quantity of the evidence against the legal standard the reasonable jury must apply in order to find for the non-moving party, is not weighing, then it is hard to imagine what does constitute weighing. Indeed, Justice Brennan, writing in dissent, characterized the quantum and insufficiency language as "an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would."[65]

C. Celotex Corporation v. Catrett

Ironically, the case that gives its name to the trilogy involves the simplest fact pattern and the least controversial offering of interpretive criteria. In 1980, Myrtle Catrett brought a wrongful death action as administratrix for the estate of her late husband, Louis, contending that he died as a result of repeated exposure to "products containing asbestos manufactured or distributed" by Celotex and 14 other corporations.[66] Celotex moved for summary judgment, pointing out that in her answers to interrogatories Mrs. Catrett failed to supply the names of any witnesses who could testify about Louis's exposure to any asbestos products which it manufactured or distributed.[67] By the time the Rule 56 motion came before the United States District Court for argument, Catrett had submitted a transcript of a deposition of the decedent, a letter from a former employer of the decedent, and a letter from an insurance

62. *Liberty Lobby*, 477 U.S. at 255.
63. *Id.* at 254 (emphasis added).
64. *Id.* (emphasis added).
65. *Id.* at 266 (Brennan, J., dissenting); *see also infra* notes 115-17 and accompanying text (elaborating further on the question of weighing and Justice Brennan's charge that the *Liberty Lobby* majority allows it).
66. Celotex Corp. v. Catrett, 477 U.S. 317, 319 (1986).
67. *Id.* at 320.

company to her attorney, "all tending to establish that the decedent had been exposed to [Celotex's] asbestos products."[68] Nevertheless, Celotex prevailed on its motion for summary judgment by arguing successfully that the "three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion."[69]

The court of appeals reversed, holding, in effect, that the asbestos manufacturer had failed to produce any evidence by affidavit or otherwise to support its motion, but rather had simply relied on the apparent defects in the case which Catrett sought to bring forward.[70] The court of appeals claimed that *Adickes v. S. H. Kress & Co.*[71] mandated this outcome,[72] but the Supreme Court wasted

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68. *Id.*

69. *Id.*

70. *Id.* at 321-22.

71. 398 U.S. 144, 159 (1970).

72. *Celotex*, 477 U.S. at 321-22. The Supreme Court referenced the court of appeals's reliance on *Adickes* for the proposition that "'the party opposing the motion for summary judgment bears the burden of responding *only after* the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact.'" *Id.* at 322 (quoting Celotex Corp. v. Catrett, 756 F.2d 181, 184 (D.C. Cir. 1986)). The Supreme Court stated that this was not a proper interpretation of *Adickes*. *Id.* In *Adickes*, a white school teacher, while in the company of several African-Americans, attempted to gain service at a racially segregated lunch counter operated by S.H. Kress & Co. Service was refused, and after the teacher left the restaurant, the Hattiesburg, Mississippi police arrested her and charged her with vagrancy. She sought relief pursuant to 42 U.S.C. § 1983 in the United States District Court, alleging, inter alia, that S.H. Kress & Co. unlawfully conspired with the Hattiesburg police to deprive her of her civil rights. The district court granted S.H. Kress & Co.'s motion for summary judgment. *Adickes*, 398 U.S. at 146-48. In reviewing the matter, the Supreme Court held that the district court improperly granted summary judgment in favor of the restaurant. Its rationale was that, despite the restaurant manager's declarations that he neither entered into any agreement with the police to arrest the teacher nor observed any police officer in the store when she sought to be served in the company of black people, the fact that the teacher, at her deposition, as well as a Kress employee in an unsworn statement, indicated that a police officer was in the store at the time of the incident gave rise to the possible existence of a conspiracy. *Id.* at 156-57. Kress, reasoned the Supreme Court, failed "to foreclose the possibility that there was a policeman in the Kress store while petitioner was awaiting service," *id.* at 157; and it was for the jury to determine from all the circumstances whether there had been a meeting of the minds between the police officers and Kress, *id.* at 158. Petitioner Adickes pointed to her complaint, her comment in her deposition and the unsworn statement of the Kress employee about the presence of a police officer, but she did not submit an affidavit to this effect. *Id.* at 156-57. The Supreme Court held that this was not legally significant; "[b]ecause respondent did not meet its initial burden of establishing the absence of a policeman in the store,

little time in declaring that to the extent such a reading of *Adickes* was possible, it was incorrect and contrary to the express meaning of Rule 56.[73]

After observing that Rule 56(c) references "affidavits, *if any*"[74] and that Rules 56(a) and (b) "provide that claimants and defendants, respectively, may move for summary judgment '*with or without supporting affidavits*,'"[75] the Court declared that the party moving for summary judgment is not obligated "to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof."[76] The Court held that the moving party's first obligation was simply to make a "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case."[77]

Thus, *Celotex* clearly allows the party moving for summary judgment on the weakness of her opponent's claim or defense, rather than the strength of her own case, to "point" by way of argument—and without affidavits—to the absence of evidence supporting the non-moving party's theory of liability or defense. This appears to be an eminently sensible approach, for, if the discovery completed at the time the motion is brought reveals that the nonmoving party has insufficient evidence to support his claim or defense, then the moving party cannot do anything other than to point this out to the trial judge.

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petitioner here was not required to come forward with suitable opposing affidavits." *Id.* at 160.

73. *Celotex* discussed Rule 56(c) in refining the *Adickes* holding. *Celotex*, 477 U.S. at 322. The Court held that the production of evidence for the purposes of a Rule 56 hearing depended on first resolving the issue of which party had the burden of proof at the trial. This being so, *Adickes* could not be relied upon to impose upon a party moving for summary judgment the obligation to produce evidence showing the non-existence of a material fact if that party did not have the burden of proof: "but we do not think [that *Adickes*] . . . should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof." *Id.* at 325.

74. *Id.* at 323.

75. *Id.* (quoting Fed. R. Civ. P. 56(a)-(b)).

76. *Id.* at 325.

77. *Id.*

D. *Elaborating on the* Celotex *Trilogy*

Several post-*Celotex* decisions of the Supreme Court have refined its 1986 holdings. The most important of these is *Lujan v. National Wildlife Federation*[78] because it expanded upon the meaning of the Rule 56(e) requirement that the opposing party must submit in its "affidavits or . . . otherwise . . . specific facts showing that there is a genuine issue for trial."[79] In *National Wildlife*, the Court reiterated that *Liberty Lobby* clearly stated that Rule 56(e) was not written "to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."[80] A brief revisit to *Liberty Lobby* shows the Court pointing to earlier decisions describing the type of information that will not satisfy the requirement of Rule 56(e). For example, *Liberty Lobby* held that if the opposing party's "evidence is merely colorable"[81] or "is not significantly probative,"[82] then the court may grant summary judgment.

In *National Wildlife*, the Court examined a controversy that pitted environmental activists against the United States Department of the Interior and its Bureau of Land Management.[83] The National Wildlife Federation and some of its members brought an action against various United States governmental agencies and officials, contending that lands previously ceded for public use pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), and the National Environmental Policy Act of 1969 (NEPA), had been withdrawn unlawfully from the protection mandated by that legislation and improperly made available for mining.[84] The Court acknowledged that management of public lands under the federal legislative regime had become "chaotic,"[85] but for our purposes, it confined itself to determining whether the Na-

78. 497 U.S. 871 (1990).

79. *See id.* at 884-85 (construing Fed. R. Civ. P. 56(e)).

80. *Id.* at 888 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)).

81. *Liberty Lobby*, 477 U.S. at 249 (citing Dombrowski v. Eastland, 387 U.S. 82 (1967)).

82. *Id.* (citing First Nat'l Bank v. Cities Service Co., 391 U.S. 253 (1968)).

83. *National Wildlife*, 497 U.S. at 875.

84. *Id.*

85. *Id.* at 876.

tional Wildlife Federation and the other plaintiffs below had standing to pursue their claims.[86]

In *National Wildlife*, the district court had entered summary judgment in favor of the government on the standing issue because affidavits submitted by individual environmentalists claimed that they used some of the public land in question for recreational and aesthetic enjoyment without specifying whether that land was the specific acreage being withdrawn by the government for mining use.[87]

> There is no showing that Peterson's recreational use and enjoyment extends to the particular 4,500 acres covered by the decision to terminate classification to the remainder of the two million acres affected by the termination. All she claims is that she uses lands "in the vicinity." The affidavit on its face contains only a bare allegation of injury, and fails to show specific facts supporting the affiant's allegation.[88]

The court of appeals reversed the district court, reasoning that, at worst, the environmentalists' affidavits were ambiguous and the

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86. *Id.* at 882. The environmentalists sought judicial review pursuant to section 10(a) of the Federal Administrative Procedure Act, 5 U.S.C. § 702, [hereinafter APA]. They proceeded properly to the United States District Court after exhausting their administrative remedies. *Id.* at 881-82. While the Supreme Court scrutinized the propriety of the district court's entry of summary judgment in favor of the government and the court of appeals's reversal of that decision, at no time did the Court suggest that appeals brought into the federal courts pursuant to the APA were not susceptible to disposition pursuant to Rule 56. To further buttress my contention that the Rhode Island Supreme Court's interpretation of Rule 56 is unnecessarily restrictive, see *Notre Dame Cemetery v. Rhode Island State Labor Relations Board*, 373 A.2d 1194, 1196 (R.I. 1977). *Notre Dame* expressly declared that Rule 56 could not be used by a trial judge considering an agency appeal brought under the Rhode Island Administrative Procedure Act, R.I. Gen. Laws §§ 42-35-1 to -18. *Notre Dame*, 373 A.2d at 1196 ("[T]he motion for summary judgment, appropriate when there is no genuine issue of material fact in a civil action, can play no part in the appellate proceedings involved in judicial review of contested administrative actions."). *But cf.* Rhode Island Bd. of Governors for Higher Educ. v. Newman (No. 94-737) (Feb. 17, 1997). Without referencing *Notre Dame*, the court considered a superior court grant of summary judgment in a matter brought pursuant to the A.P.A. *Id.* Did the court overrule *Notre Dame sub silentio*?

87. *National Wildlife*, 497 U.S. at 887 (quoting National Wildlife Fed'n v. Burford, 699 F. Supp. 327, 331 (D.D.C. 1988), *rev'd sub nom.* Lujan v. National Wildlife Federation, 497 U.S. 871 (1990)).

88. *Id.*

district court improperly failed to resolve the ambiguity in favor of their opposition to the government's motion.[89]

To the court of appeals's generous, if not forgiving, approach to the ambiguities in the non-moving parties' affidavits, the reply of the Supreme Court was abrupt and clear: "That is not the law."[90] The Supreme Court emphasized that "the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a *specific fact* essential to the other side's case to *demand* at least one sworn averment of that fact before the lengthy process of litigation continues."[91] Moreover, a trial judge cannot "'presume' the missing facts,"[92] in this instance, the actual use by the affiants of the specific acreage in question. The Court emphatically refused to permit turning the strictures of Rule 56 into "a circular promenade."[93]

Most important, *National Wildlife* held that "'a District Court must resolve any factual issues of controversy in favor of the non-moving party' only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied."[94] Therefore, a trial judge may not fill in the blanks for the opposing party; nor may a judge, when confronted by a submission from the opposing party of two alternative factual possibilities, one of which can lawfully support

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89. *Id.* at 887-88 (citing National Wildlife Fed'n v. Burford, 878 F.2d 422, 431 (D.C. Cir. 1989)).

90. *Id.* at 888.

91. *Id.* at 888-89 (emphasis added).

92. *Id.* at 889.

93. *Id.*

> [Presuming missing facts] converts the operation of Rule 56 to a circular promenade: plaintiff's complaint makes general allegation of injury; defendant contests through Rule 56 existence of specific facts to support injury; plaintiff responds with affidavit containing general allegation of injury, which must be deemed to constitute averment of requisite specific facts since otherwise allegation of injury would be unsupported (which is precisely what defendant claims it is).

Id. Our Superior Court Rules allow complaints to state causes of action and claims for relief in the alternative, *see* R.I. Super. Ct. R. 8(a), and to submit alternative defenses as well, *see* R.I. Super. Ct. R. 8(a)(2), but this should not lead to the conclusion that separate pieces of evidence leading to contradictory conclusions and inferences may validly support the opposing of a summary judgment motion. When this is permitted, Rule 56 proceedings indeed become a "circular promenade."

94. *National Wildlife*, 497 U.S. at 888 (quoting *National Wildlife*, 878 F.2d at 431).

that party's claim or defense and one of which cannot, resolve the ambiguity by selecting the former. Put another way, while the rules may permit a complaint to state alternative theories of recovery or an answer to present various, and possibly inconsistent, defenses,[95] once the moving party places the issues before a judge pursuant to Rule 56, the opposing party's obligations are both more onerous and stringent and each defense or each claim asserted by the non-moving party must be supported by specific and non-ambiguous evidence.

The Supreme Court has used other post-*Celotex* decisions to underscore its earlier declarations. In *Eastman Kodak v. Image Technical Services, Inc.*,[96] the Court reprised its reasoning in *Matsushita* by declaring, "if the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted."[97] *Kodak* also demonstrated that the Court did not believe that its approach was favoring plaintiffs over defendants: "*Matsushita* does not create any presumption in favor of summary judgment for the defendant."[98]

In *Nebraska v. Wyoming*,[99] the Court reiterated that courts must consider summary judgment with express reference to the burdens assigned by the substantive law to the respective parties at trial.[100] The Court further reiterated that "[i]n determining whether a material factual dispute exists, the Court views the evidence through the prism of the controlling legal standard."[101]

I am not aware of any post-*Celotex* decision of the United States Supreme Court signaling any retreat from the principles enunciated in the trilogy. I turn now to an examination of the

95. R.I. Super. Ct. R. 8; *see supra* note 93.

96. 504 U.S. 451 (1992).

97. *Id.* at 468-69.

98. *Id.* at 478. Indeed, the trilogy does not create any presumptions in favor of either plaintiffs or defendants as a class. The reason is that, post-*Celotex*, the trial judge must consider the allocation of the burden or burdens of proof by the substantive law, whereas in the pre-*Celotex* scheme, the non-moving party (usually plaintiffs) may have enjoyed a preferred position as all their factual assertions in opposition to a Rule 56 motion were taken as true. While the non-moving party's evidence must still be accepted as true by the trial court, the further inquiry, whether the non-moving party has produced evidence that could satisfy a reasonable fact finder as it applies the burden assigned by the substantive law, levels the playing field.

99. 507 U.S. 584 (1993).

100. *Id.* at 590 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

101. *Id.* (citing Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986)).

principles of the *Celotex* trilogy, especially in terms of what they could mean—and, in my view, what they should portend—for Rhode Island jurisprudence in the area of summary judgment. My objective here is not to argue that decisions of the Rhode Island Supreme Court made without reference to the *Celotex* trilogy have been wrongly decided, though it is likely that in some instances an application of these principles would have changed the outcome. Rather, my concern is that the Supreme Court of Rhode Island draw upon the trilogy's declarations and insinuate them into Rhode Island case law so that the trial bench and bar will have principled guideposts to refer to when a party makes a Rule 56 motion.

III. Is Rhode Island Weighing Yet?

If any practical and principled development of Rhode Island's summary judgment practice will occur in the shadow of the *Celotex* trilogy, it is necessary, first, to determine what these three leading cases decided relative to the judge's role in weighing evidence, disclaimers of the Court that the trial judge is not to engage in such activity notwithstanding. Next, we must assess what trial judges do in daily practice when confronted with a Rule 56 motion.

The resolution of the weighing issue is central to the implementation of the *Celotex* principles in Rhode Island. To date, the Rhode Island Supreme Court, just like the United States Supreme Court, has stated that trial judges may not weigh the evidence when considering motions for summary judgment. As with some of their other pronouncements in this area, the Rhode Island Supreme Court has not defined what constitutes weighing. The fact that a problem exists regarding both the definition and explanation of this process should be evident from the dispute that exists within the United States Supreme Court on this point. A number of judges and commentators believe that weighing does and should occur when a judge considers a motion for summary judgment, and I share this view. Until the appellate courts forthrightly recognize that some weighing is taking place and that this is proper and fitting, the rubric of "no weighing allowed" will continue to provide the reviewing court with a mechanism to overturn any grant of summary judgment it wishes, simply by declaring that the reasoning processes of the trial judge constitute weighing.

This occurred in the Rhode Island Supreme Court's decision of *McPhillips v. Zayre Corp.*[102]

My view is that the trilogy permits weighing regardless of declarations to the contrary and that trial judges regularly weigh the evidence to one degree or another in considering motions for summary judgment. In using the term "weighing," I mean the judge's scrutiny of the evidence and the reasonable inferences that can be drawn from it, measured against a principled prediction of what a reasonable jury would do in light of the substantive law regarding both materiality and the allocation of evidentiary burdens. Moreover, I am assuming that the judge considers, as he or she must, that all affidavits, admissions and other assertions of fact submitted by the opposing party which could find their way into a form that would be admissible at trial are accepted as true, and that the judge steers clear of evaluating the credibility of any affiant or other person who may be called as a witness.

The opinions of Justices White and Brennan in *Matsushita* and *Liberty Lobby* reveal the internal split among the members of the Court as to whether the issue of weighing on summary judgment motions finally has been resolved, or even coherently addressed. Indeed, Justice White's majority opinion in *Liberty Lobby*, when placed alongside his dissent in *Matsushita*, reveals an inconsistent approach at best. To reiterate, *Matsushita* was the first of the trilogy decisions, and the majority opinion repeatedly emphasized that the trial judge, in considering whether a "genuine issue of material fact" exists, must consider the "plausibility" of the evidence offered by the party opposing the Rule 56 motion.[103] Obviously, a trier of fact could not find for the non-moving party at a trial if that party's evidence is implausible or leads to inferences that are implausible. Moreover, only "evidence that is sufficiently unambiguous" may allow a trier of fact to find for the non-moving party.[104] If the best the non-moving party shows is that one permissible inference bolsters its claim or defense while the other does not, then the party has failed to raise a genuine issue if it has the burden of persuasion on that point.

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102. 582 A.2d 747 (R.I. 1990); *see infra* text accompanying notes 134-50.

103. *See supra* text accompanying notes 45-51.

104. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 (1986).

> We do not imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co. v. Spray-Rite Cook Service Corp.*, establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.[105]

These declarations prompted a cutting dissent from Justice White who wrote that the Court's opinion "muddies the waters" by making "confusing and inconsistent statements about the appropriate standard for granting summary judgment."[106] Justice White asserted that the Court had defied established precedent by permitting the trial judge on a Rule 56 motion to "decide for himself whether the weight of the evidence favors the plaintiff,"[107] and investing the judge with "the job of determining if the evidence makes the inference of conspiracy more probable than not."[108]

It was a different Justice White, however, who authored the majority opinion in *Liberty Lobby* three months later. After cogently explaining the two separate analyses the trial court must undertake to identify which facts are "material"[109] and which evidentiary standard, or burden of proof, is to be applied,[110] Justice White emphasized the Court's continuing rejection of the scintilla rule. He cited an 1872 case which explained that a judge, in determining whether a jury should receive the case, must determine "not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."[111]

Writing for the majority, Justice White made several attempts at defining what the trial judge must do when considering a motion for summary judgment. In doing so, he observed that the summary judgment and directed verdict standards are virtually identical: "In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require

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105. *Id.* at 597 n.21 (citation omitted).
106. *Id.* at 599 (White, J., dissenting).
107. *Id.* at 600.
108. *Id.* at 601.
109. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).
110. *Id.*
111. *Id.* at 251 (quoting Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1872)) (emphasis omitted).

submission to a jury or whether it is so one sided that one party must prevail as a matter of law."[112] Justice White went on to write, inter alia, that "there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity."[113] It is worth noting at this juncture that the Rhode Island Supreme Court in 1992, speaking through then-Justice Weisberger, noted that there was "little difference" between the standards applied to a motion for summary judgment and a motion for a directed verdict.[114]

It does not seem unfair to ask what a trial judge is doing when he or she examines the evidence of the non-moving party to determine if it is of insufficient (or sufficient) caliber or quantity. The simple answer appears to be that the judge is weighing the evidence, a process separate and apart from evaluating credibility.

Justice Brennan, who was the only member of the Court to dissent in all three decisions of the *Celotex* trilogy, was as critical of the *Liberty Lobby* majority as Justice White had been to the *Matsushita* majority. Justice Brennan sardonically observed that the "Court's opinion is replete with boilerplate language," and that the Court "purport[ed] to restate the summary judgment test, but with each repetition, the original understanding is increasingly distorted."[115]

Justice Brennan, who had joined with Justice White as well as Justices Blackmun and Stevens in the *Matsushita* dissent, could not enlist any of his colleagues to join his dissenting opinion in *Liberty Lobby*, but his criticism is trenchant:

> I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the

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112. *Id.* at 251-52.

113. *Id.* at 254.

114. Palmisciano v. Burriville Racing Ass'n, 603 A.2d 317, 320 (R.I. 1992).

> If this [summary judgment] standard is compared with that for the consideration of a directed verdict, little difference will be found save the point in the proceeding wherein such motions will be considered. A motion for summary judgment will normally be offered prior to the commencement of trial, and the motion for directed verdict will be offered at the close of the evidence. Each, however, must establish that the proponent of the motion is entitled to judgment as a matter of law and that there are no issues of fact for a jury or other trier of fact to determine or resolve.

Id.

115. *Liberty Lobby*, 477 U.S. at 265 (Brennan, J., dissenting).

> judge also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," *i.e.*, the importance and value, of the evidence in light of the "quantum," *i.e.*, amount "required," could *only* be performed by weighing the evidence.[116]

Thus, the anomalous situation of Justice White chastising the *Matsushita* majority for allowing the weighing of evidence on summary judgment motions and then himself receiving a scolding from Justice Brennan for the same transgression in *Liberty Lobby* reveals that the best efforts of the majority opinions in the *Celotex* trilogy have not definitively resolved this issue. Of course, this is in no small part engendered by the unfortunate, continued obeisance of the Court to clichés about not weighing the evidence[117] in the face of express language that legitimately provoked the dissenting accusations of Justices Brennan and White.

Is there a way out of this tangle? Surely, in Rhode Island, where the United States Supreme Court has no general supervisory power[118] and where questions in superior court civil matters regarding burdens of proof and the weight of the evidence are "normally not . . . of federal constitutional moment,"[119] the Rhode Island Supreme Court could declare that weighing is occurring when trial judges consider whether the affidavits and other evidence submitted by a party in a Rule 56 situation are "plausible," "sufficient," of a particular "caliber or quantity," etc. This hardly would be an unprincipled flight of fancy in view of the *Celotex* trilogy as well as cogent analyses from some earlier sources.

Witness the refreshing candor and practical wisdom of Judge Rutledge's discussion of a judge's role in deciding whether a plaintiff's case "was strong enough for us to allow the jury to consider it:"[120]

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116. *Id.* at 266.

117. *See, e.g., id.* at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . .").

118. *See supra* note 31.

119. Lavine v. Milne, 424 U.S. 577, 585 (1976).

120. Christie v. Callahan, 124 F.2d 825, 826 n.1 (D.C. Cir. 1941) (considering the sufficiency of the evidence in the context of the defendants' motions for directed verdict made at the end of plaintiff's case, a similar motion made at the close of all

> [T]he jury is not absolute in the realm of fact. Like judges, jurors have weaknesses of emotion and judgment. Unlike judges, they seldom have a background of decision experience against which to check them. Our tradition supplies this through judicial controls. Exclusion of evidence is one. When one side's case is thin, determining its "legal sufficiency" is another. *This really means weighing it factually, not for conviction, but for doubt as to the outcome.*[121]

This last declaration should be read in tandem with Judge Rutledge's statement that "evidence should not be so thin that it would be dangerous for the jury to consider it."[122]

It would seem, then, that Judge Rutledge, whose analysis was termed "brilliant" by no less a student of the trial process than Dean Wigmore,[123] is saying that the judge considering the "sufficiency of the evidence" on a motion for a directed verdict—which we know is examined with the same standard that applies in summary judgment matters—may not consider the credibility of the witnesses; rather, he or she must evaluate the inferences that reasonably flow from evidence that is required to be taken as truthful.

Two years later, as a member of the United States Supreme Court, Justice Rutledge wrote in a similar vein that the Seventh Amendment guarantee of a right to a jury trial in civil cases "requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them," but that "it does not require that experts or the jury be permitted to make inferences from the withholding of crucial facts, favorable in their effects to the party who has the evidence of them in his peculiar knowledge and possession, but elects to keep it so."[124]

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the evidence and motions to set aside the verdict and judgment, all of which were denied).

121. *Id.* at 827 (emphasis added). Many years earlier, a common law scholar made the same point with greater precision. "The judge weighs the proof for one purpose, and the jury for another. The judge weighs it to see that there might be a verdict either way; the jury weigh [sic] it to see which way it ought to be." Austin Abbott, *Two Burdens of Proof*, 6 Harv. L. Rev. 125, 126 (1893).

122. *Christie*, 124 F.2d at 827.

123. 9 John Henry Wigmore, Evidence in Trials at Common Law § 2494, at 383 n.13 (Chadbourn rev. 1981) ("This truth is emphasized by Rutledge, J., in his brilliant opinion in *Christie v. Callahan*.") (citation omitted).

124. Galloway v. United States, 319 U.S. 372, 396 (1943). As if to prevent posterity from dropping the dreaded mantel of consistency on his shoulders, Justice

In *Brady v. Southern Ry. Co.*,[125] the Supreme Court declared that the trial court must conduct the analysis of the sufficiency of the evidence on a motion for a directed verdict *"without weighing the credibility of the witnesses."*[126] However, the Court did not preclude weighing in the sense of a reasoned consideration of the inferences to be drawn from evidence after considerations of credibility have been placed aside. In short, the trial court was allowed, indeed directed, to keep thinly supported claims and defenses from the jury in order to prevent it from engaging in the unauthorized activities of speculation and sympathy.

It is of course one thing to recognize the long-standing proscription, not to mention the practical impossibility, of considering the credibility of witnesses on a motion for summary judgment. It is quite another thing to argue that on a Rule 56 motion, after the evidence of the non-moving party is taken as true, the court subsequently must evaluate the evidence in light of the reasonable inferences that a jury could draw, keeping in mind at all times the controlling substantive burden of persuasion in the particular case.

When the trial judge examines affidavits and discovery materials to determine whether a reasonable fact finder could reach a verdict in favor of the party opposing summary judgment, he or she necessarily must consider (read *weigh*) the intensity of the belief on the part of the rational fact finder that the evidence will support, bearing in mind at all times that, under the *Celotex* trilogy, the burden in each case resides in the substantive controlling law. Just as with the situation confronting a trial judge on a motion for a new trial, the permissible question is not how the judge would

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Rutledge joined the dissent in *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943), which gave us the *Brady* rule:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

Id. at 479-80. "Since that time, although they have used many different formulations, the federal courts have been reasonably consistent in the application of the *Brady* rule . . . ." 5A James Wm. Moore et al., Moore's Federal Practice ¶ 50.02[1], at 50-25 (2d ed. 1996).

125. 320 U.S. 476 (1943).

126. *Id.* at 479 (emphasis added).

have ruled, but whether the evidence could support a favorable jury verdict. In order to answer this question in the context of Rule 56, a forecast of the intensity of belief the evidence will engender in a rational fact finder is unavoidable.

The controversy that formerly existed as to whether the standard of proof by a fair preponderance of the evidence applicable in most civil trials referenced a subjective state of mind or an objective standard[127] has been resolved, at least in the jurisprudence of the United States Supreme Court, in favor of the subjective state of mind viewpoint. In the recent case of *Director, Office of Workers Compensation Programs v. Greenwich Collieries,*[128] the Supreme Court reviewed the evolution in meaning of the term "burden of proof" and concluded that "'the modern authorities are substantially agreed that, in its strict primary sense, 'burden of proof' signifies the duty or obligation of establishing, *in the mind of the trier of facts,* conviction on the ultimate issue.'"[129] Naturally, from case to case, the degree of conviction, or intensity of belief, that the law requires differs depending on which burden of proof governs.

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127. *See, e.g.*, J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 Cal. L. Rev. 242, 247 (1944) ("[The civil instruction] does not, as it should do, direct the attention of the jury to the degree of belief which the proponent of the proposition must produce in their minds before he is entitled to a finding favorable to him . . . .").

128. 512 U.S. 267 (1994).

129. *Id.* (quoting Burr W. Jones, The Law of Evidence in Civil Cases 310 (4th ed. 1938)) (emphasis added); *see also* Concrete Pipe & Products v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 622 (1993). The Court again emphasized the state of mind of the fact finder. "The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, 'simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" *Id.* (quoting *In re* Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring)) (citation omitted). *Concrete Pipe* went on to state that "'[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing [body] on the entire evidence is left with definite and firm conviction that a mistake has been committed.'" *Id.* (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). "A showing of 'unreasonableness' would require even greater certainty of error on the part of the reviewing body." *Id.* (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). In addition, one evidence scholar noted that "in the ordinary usage of words there may be properly said to be degrees of conviction or persuasion." Edmund M. Morgan, *Instructing the Jury upon Presumptions and Burdens of Proof*, 47 Harv. L. Rev. 59, 66 (1933); *see also* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1311 (1977) ("There is some evidence, then, that factfinders can distinguish among degrees of belief, and that rules about the burden of persuasion affect the outcome of cases.").

The Rhode Island Supreme Court presaged the observations of the United States Supreme Court regarding subjectivity in *Greenwich Collieries* by nearly three decades:

> To verbalize the distinction between the differing degrees more precisely, proof by a "preponderance of the evidence" means that a jury must believe that the facts asserted by the proponent are more probably true than false; proof "beyond a reasonable doubt" means that facts asserted by the prosecution are almost certainly true; and proof by "clear and convincing evidence" means that the jury must believe that the truth of the facts asserted by the proponent is highly probable.[130]

In my view, even if all that is considered is the United States Supreme Court's continual and forceful rejection of the scintilla rule, the 1986 mandate of *Liberty Lobby* that the trial burden be factored into Rule 56 considerations, and the more recent pronouncements in *Concrete Pipe & Products v. Construction Laborers Pension Trust for Southern California*[131] and *Greenwich Collieries* that references to burdens of proof are ipso facto references to a subjective intensity of belief, then the only conclusion is that weighing of the facts and the reasonable inferences they generate is taking place, albeit without assessments of credibility. Moreover, the authority granted by the trilogy to trial judges to consider the "caliber" and the "quantum and quality" of the evidence is, as Justice Brennan wrote, "an invitation—if not an instruction—" to trial judges to weigh the evidence.

IV. Is Rhode Island Following the Scintilla Rule? . . . And Why?

Once again, I am not inquiring as to whether the Rhode Island Supreme Court has decided some summary judgment cases incorrectly since 1986 because it did not follow the *Celotex* trilogy criteria, though reference to the United States Supreme Court's principles regarding Rule 56 would undoubtedly have resulted in some different outcomes. In any event, a response to such a question would be pointless because, as Justice Jackson pointed out

130. Parker v. Parker, 238 A.2d 57, 61 (R.I. 1968).
131. 508 U.S. 602 (1993).

some time ago, courts of last resort are not final because they are infallible, but rather they are infallible because they are final.[132]

There are, however, more important questions, the answers to which may provide some assistance in extracting Rhode Island's Rule 56 case law from the stifling pall of the "drastic-cautious" mantra and accompanying clichés. As two early and influential students of summary judgment proceedings observed, "generalizations are of comparatively little assistance to the trial judge in disposing of the individual case."[133] To the question of whether the current Rule 56 jurisprudence in Rhode Island is providing workable and useful guidelines to the trial bench and bar, my answer is in the negative. The reason is that the clichés and maxims employed thus far by the Rhode Island Supreme Court do not thoroughly and cogently describe what the trial judge is doing, or should be doing, when considering a motion brought pursuant to Rule 56. To those who would ask what should supplant the present state of affairs, I say that the "drastic-cautious" mantra should be jettisoned, weighing on the part of the trial justice should be candidly acknowledged and the *Celotex* trilogy criteria should be adopted. This would take no more effort or intellectual fortitude than the Rhode Island Supreme Court displayed when it modified its position regarding the use of inferences.[134]

If the Rhode Island Supreme Court is to reach the position advocated in this article, first, it must ask itself whether its modern decisions in the area of summary judgment coalesce in such a way as to lead to a reasonable conclusion that the scintilla rule is alive and well in this area of Rhode Island procedure.[135] In my view,

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132. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring); *see supra* note 34 for the precise quote.

133. Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 Yale L.J. 423, 450 (1928).

134. Waldman v. Shipyard Marina, Inc., 230 A.2d 841 (R.I. 1967). In *Waldman*, the Rhode Island Supreme Court candidly abandoned its prior reliance on the judge-made rule against "the pyramiding of inferences, so called," *id.* at 844, in favor of the approach taken in Arizona and Florida. That approach dictates that "the integrity of the fact-finding process is protected, it being clear that when an inference is such as to exclude any other reasonable inference being drawn from the basic fact, such an inference partakes of the nature of a fact to which probative force must be attributed." *Id.* at 845.

135. The continuing vitality of the scintilla rule, albeit sub rosa, is seen in the recent memorandum decision of *Goodkin v. DeMaio*, 664 A.2d 1119 (R.I. 1995). In that matter, the trial judge granted summary judgment in favor of a landlord against a tenant who had brought suit claiming that a latent defect in a window

this is the source of the "drastic-cautious" approach: an uncritical solicitousness for the claim of a jury trial coupled with an unwarranted deference to the jury's prerogatives has led the court to articulate rules, such as they are, that allow cases to get to trial on slight evidence. While the Rhode Island Supreme Court has never held that the scintilla rule may be permissibly employed regarding summary judgment or directed verdict considerations, its "drastic-cautious" maxim and related pronouncements create a framework that allows this rule to be applied in practice, even while it is not expressly acknowledged. Several cases illustrate this point.

In 1990, the Rhode Island Supreme Court reviewed the tragic case of *McPhillips v. Zayre Corp.*[136] in which a young boy, Sean McPhillips, became a quadriplegic after a failed attempt to ride his bicycle off a retaining wall some two or three feet high.[137] Sean and his father sued the bicycle manufacturer, complaining that the brakes were defective and did not respond as they should have when Sean abandoned his original intent to ride his bicycle off the wall "[w]hen he was approximately one and one-half to two feet away from the edge of the wall."[138]

The defendant bicycle manufacturer was successful in pursuing a Rule 56 motion for summary judgment in the superior court. The principal materials the trial judge reviewed in considering the motion were the depositions of Sean and his riding companion, Stephen, who already had successfully made the jump and watched

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had caused the window to slam shut on his hand causing injury. In opposition to the defendant's motion, the plaintiff tenant's counsel argued that the landlord was aware of the latent defect, but the trial judge found that there was no evidence to support this claim and concluded: "'[t]here is nothing in the factual situation that I've observed to explain why the window fell.'" *Id.* at 1120. In reversing the grant of summary judgment, the supreme court said that "[t]his finding [by the trial judge] constitutes a factual determination," and then observed that "we find that a question of material fact exists regarding the existence of the alleged latent defect and that defendant was not entitled to judgment as a matter of law." *Id.* Contrary to the conclusion of the supreme court, I submit that the trial judge was not improperly resolving issues but simply declaring that the plaintiff had failed to produce any evidence—let alone sufficient evidence—in support of its claim that the landlord knew of a latent defect. In sum, the tenant prevailed with less than a scintilla of evidence to support his claim, and the supreme court muddied the waters further by substituting the existence of "a question of material fact" for the focus required by Rule 56(c) as to whether there is a legitimate and "genuine issue as to any material fact." *See* Fed. R. Civ. P. 56(c).

136. 582 A.2d 747 (R.I. 1990).

137. *Id.* at 748.

138. *Id.*

Sean's attempt from twenty-five feet away, and the affidavit of plaintiff's expert who had concluded, in the words of the supreme court, "the brake would not have engaged correctly when Sean applied it in the ordinary manner two feet before the wall."[139]

Stephen's deposition indicated that "he saw the rear wheel of the bicycle stop immediately after Sean had leaned on the [pedal] brakes and the bicycle continue over the wall simply because of the speed Sean had attained."[140] For his part, Sean testified at his deposition that the brakes had "jammed" and "locked" when he applied them,[141] but he also responded in the negative "when asked if he felt the rear wheel lock after the brakes were applied."[142] The manufacturer argued that "rear coaster brakes are supposed to 'lock' when functioning properly."[143]

In making his ruling, the trial judge observed that the affidavit of the plaintiff's expert was conclusory, a point with which the Rhode Island Supreme Court did not disagree.[144] The judge further stated: "'The bike didn't stop, and I doubt twenty-four inches from the edge of the wall that any braking mechanism would have stopped the bike before it went over the wall.'"[145]

In reversing, the supreme court concluded that the trial judge had improperly passed on credibility, particularly in light of his observation that no braking mechanism would have stopped the bike,[146] and that the superior court judge "dismisse[d] any possibility of a brake defect."[147] Additionally, the supreme court stated that, because Stephen witnessed the accident from twenty-five feet away, "the issues of witness credibility and reliability become crucial yet remain beyond the scope of what the trial justice may properly consider when deciding a motion for summary judgment."[148]

Thus, the overweening deference to trial by jury and the concomitant truncating of the trial judge's reasoning powers—pre-

139. *Id.* at 749.
140. *Id.*
141. *Id.* at 748.
142. *Id.*
143. *Id.* at 749.
144. *Id.* at 750.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*

sumably developed through legal training and life experience[149]—leads to a scenario that defies the laws of biology and physics. In *McPhillips*, the court opined that "[h]ad the judge been functioning as a trier of fact, in all likelihood his determination that defendant's theory of the cause of the accident was more probable than that of plaintiffs' undoubtedly would have been correct,"[150] but the trial judge's principal error in the view of the supreme court was that "[h]e assessed the credibility of the witnesses and the persuasiveness of the evidence, a function denied him on such a motion."[151] As to credibility assessment being off-limits to trial judges deciding Rule 56 motions, the supreme court is correct in principle, even after the *Celotex* trilogy, but the same cannot be said for its statement about persuasiveness. How else is a trial judge to determine whether a party has presented evidence sufficient to satisfy its burden in front of a jury if it does not consider persuasiveness?[152]

In my opinion, the supreme court, in *McPhillips*, improperly skewed the credibility admonition. Remember, the trial judge had accepted Stephen's declaration concerning the bicycle accident on its face, but the supreme court determined that, because the boy's observation was made at a distance of twenty-five feet, it was presumptively incredible, or at least should go to the jury. This flies in the face of not only the prohibition against credibility determinations being made on Rule 56 motions, but the equally well-established principle that a trial judge may reject testimony because it is inherently improbable and contrary to the laws of nature.[153]

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149. The mists of time regrettably conceal this important point made more than four decades ago by the Rhode Island Supreme Court: "The rule contemplates that on . . . a motion [for a judgment as a matter of law] the trial justice will himself consider the evidence *in the light of his superior knowledge and experience* to determine whether [the evidence] is susceptible of an inference that is reasonable and favorable to the plaintiff." Cote v. Arrighi, 162 A.2d 797, 799 (R.I. 1960) (emphasis added); *see also supra* note 121 and accompanying text.

150. *McPhillips*, 582 A.2d at 750.

151. *Id.*

152. *See supra* pp. 195-99.

153. "[I]t is well settled that no weight is to be given to testimony that is opposed to the laws of nature or undisputed physical facts." Charles Allan Wright & Arthur R. Miller, Federal Practice and Procedure § 2527, at 285 (2d ed. 1994); *see also* Zollman v. Symington Wayne Corp., 438 F.2d 28, 31-32 (7th Cir. 1971) (describing this "physical facts" rule: "'[I]t is well settled in this jurisdiction and elsewhere that the testimony of a witness which is opposed to the laws of nature,

Here we have a perfect example of the Rhode Island Supreme Court applying the long-derided "scintilla rule," though the court of course does not acknowledge this. The only evidence of any kind indicating that the brakes may have been defective was the declaration of young Sean McPhillips that he did not feel the rear wheel lock after he applied the brakes.[154] Remember, however, that Sean also had testified at another point in his deposition that the brakes had "locked" when he applied them.[155] If the plaintiff's self-contradictory declarations on a material point can overcome the testimony of an eyewitness, the failure to present any evidence on proximate cause in light of the conditions of the lawn, the common sense observations of the trial judge regarding the stopping distance involved and the absence of probative and relevant expert testimony, then the supreme court clearly was operating in the domain of the scintilla rule.

In another case, decided nearly a decade before *McPhillips*, the supreme court went to a similar extreme in reversing a grant of summary judgment in order to let the jury consider an issue. In *Steinberg v. State*,[156] plaintiffs complained that the defendant law enforcement officials had violated their civil rights because of an inordinately long detention between the time of the plaintiffs' arrest and their arraignment. In a motion for summary judgment, the defendants submitted an affidavit stating that the reason for a delay of some thirty-eight hours was that the plaintiffs furnished them with false names and their fingerprints had to be sent to the Federal Bureau of Investigation in Washington, D.C., for identification.[157] The arrested individuals did not file any affidavit in opposition.[158] Even so, the supreme court held, in effect, that the affidavit filed by the defendant police officers did not show the absence of a genuine issue and that the trial judge improperly concluded that there had been no unnecessary delay in presenting the plaintiffs for arraignment.[159]

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or which is clearly in conflict with principles established by the laws of science, is of no probative value and a jury is not permitted to rest its verdict thereon . . . .'").

154. *See supra* text accompanying note 140.

155. *See supra* text accompanying note 139.

156. 427 A.2d 338 (R.I. 1981).

157. *Id.* at 339.

158. *Id.*

159. *Id.* at 340.

These two cases illustrate how the Rhode Island Supreme Court has allowed the jury to venture into the realm of speculation and conjecture. In *McPhillips*, a young boy rode his bicycle across a snow-covered lawn bent on using it in a manner for which it was not designed, only to decide "one and one-half to two feet" before the retaining wall that he did not wish to make this dangerous leap. His friend was clear in stating that the brake caused the rear wheel to stop, as it was designed to do, and the unfortunate rider himself was ambiguous as to the response of the brake to the pressure he applied on the pedals. This was coupled with the conclusory affidavit of the plaintiff's expert, not to mention that, as the trial judge implied, there was a total lack of any evidence connecting the defective brake—if there indeed was one—to the injuries. It seems, then, that the trial judge correctly opined that no one could have used and gained the benefit of brakes upon a decision made two feet from the edge of the wall over which one was about to ride.

Likewise, in *Steinberg*, the jury—under the supreme court's approach—was permitted to speculate as to how long a time was reasonable for law enforcement officials, confronted with individuals who refuse to give their proper names, to ascertain identities through fingerprints sent to Washington, D.C. It seems that here the supreme court confused the burden of persuasion with the burden of producing evidence. Once the defendants presented evidence showing that the plaintiffs withheld their correct names and that this had occasioned the "goose chase" to learn their identity, the burden of producing evidence then should have shifted back to the plaintiffs to demonstrate that the arresting officials or their colleagues at the F.B.I. had been improperly dilatory in straightening out the mess.[160]

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160. The distinction between the burden of proof (or persuasion) and the burden of producing evidence is often not appreciated, though our supreme court explained the distinction precisely more than seventy years ago when it adopted the language of an early commentary on the Rules of Evidence.

> The term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a *prima facie* case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish

The jury, of course, is an integral part of our constitutional democracy, and in my view, functions quite well. This is not to say, however, that the court should give the civil jury tasks beyond the one for which it was ordained, namely the resolution of disputes over material facts—facts of consequence—in order to render an ultimate determination on whether the party assigned the burdens of proof and persuasion by the law has met this burden. In this regard it is important to remember that the function of the civil jury is circumscribed considerably when measured against that of the criminal jury. Because in criminal cases society has imposed almost the entire risk of non-persuasion on itself,[161] the court may not grant summary judgment or a judgment as a matter of law, or any variants of these procedures, in favor of the state, nor may the trial judge entertain a motion for a new trial brought by the state after a not guilty verdict has been returned. This is all in contradistinction to the numerous opportunities the civil law allows for the intervention of the judge to either terminate proceedings prior to trial or interrupt the trial in a final fashion by way of a judgment as a matter of law prior to the jury receiving the case.[162]

In discharging their important, but narrow function, jurors may not speculate, make illogical inferential leaps or determine an outcome because of sympathy for a party any more than they may send messages to an audience beyond the courtroom, nullify statutes or articulate social policy. While nullification, message-sending and the like are undoubtedly rare, they can be addressed on a

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> the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end.

Giblin v. Dudley Hardware Co., 117 A. 418, 419 (R.I. 1922) (quoting 10 R.C.L. Evidence § 45 (current version at R.I. R. Evid. 302)).

In *Steinberg*, the plaintiffs could have invoked Rule 56(f) to give them an ample opportunity through discovery to determine if the defendants in fact needed the 38 hours to get results to their identity inquiry.

161. *See* Addington v. Texas, 441 U.S. 418, 423-24 (1979).

> In a criminal case, on the other hand, the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. In the administration of criminal justice, our society imposes almost the entire risk of error upon itself.

Id.

162. R.I. Super. Ct. R. Civ. P. 50.

motion for a new trial when they arise in the context of a civil case. The problem of speculation, however, is often present, and can be excised from the trial process as early as the Rule 56 motion. In my view, the judge engages in a weighing methodology to do this.

I submit the judge undertakes weighing because she or he must consider the nature of the evidence and the persuasiveness of the inference that a party claims the evidence supports. This is illustrated in *Banks v. Bowen's Landing Corp.*[163] Thomas Banks, while under the lawful age for drinking, was served alcoholic beverages at a bar operated by the defendants. While intoxicated, he dove off the end of a pier that formed part of defendant's outdoor bar and broke his neck.[164] At the close of the presentation of plaintiff's case, the defendant corporation and one Kilroy, its sole stockholder and principal officer, moved for a directed verdict. Kilroy prevailed, but Bowen's Landing Corp. did not, and ultimately a verdict was rendered against it. On appeal, the supreme court rebuffed Bowen's contention that a directed verdict should have been entered in its favor as well as the plaintiff's argument that its case against Kilroy had been improperly terminated.

It is what the supreme court said about Kilroy's responsibility[165] that is of concern here. The plaintiff argued that Kilroy should be held responsible in his individual capacity as shareholder and manager because he approved a decision to hire an eighteen year old entertainer and this, said plaintiff Banks, "constituted evidence that [Kilroy] desired to attract underage patrons who would then be served alcohol."[166] The supreme court rejected this argument: "Such an inference is not based upon any appropriate primary inference but would require a speculative leap that a jury would not be permitted to make."[167]

Remaining mindful that the standard governing a directed verdict is the same that applies to summary judgment motions, we may fairly ask what is the trial judge—or the supreme court—considering in reaching such a result? While the conclusion of the supreme court about the validity of the inference is hardly irrational, it is just as possible to reach a contrary conclusion. It is not

163. 652 A.2d 461 (R.I. 1995).
164. *Id.* at 462.
165. *See id.* at 464-65.
166. *Id.* at 464.
167. *Id.*

implausible that a young entertainer hired to perform in a bar is supposed to attract a large crowd of young people who will then spend money on what the bar offers for sale, namely alcoholic drinks, soft drinks and food. This conclusion would not be possible if the eighteen year old entertainer were a violin virtuoso on tour with the Boston Symphony Orchestra and if the bar was an eleemosynary institution, but that of course was not the case in *Banks*. Again, my concern is not whether the *Banks* court was correct, but whether the mental process engaged in by judges to select one inference over the other is a specie of weighing.

The Rhode Island Supreme Court's inordinate deference to the jury in civil cases is not supported by its earlier jurisprudence.[168] The early court did not mince words in rejecting the notion that a scintilla of evidence could sustain a verdict: "a mere *scintilla* of evidence is never sufficient to sustain a verdict, or, according to the modern rule, even to warrant a trial court in submitting the case to the jury."[169] This pronouncement evolved over the course of the next fifty years to a declaration by the supreme court that on a motion for a directed verdict made at the close of the presentation

168. This history of the civil jury trial in Rhode Island is a lengthy topic beyond the scope of this article, but the reader is directed to one of the most thoughtful and scholarly opinions in the annals of Rhode Island law, *Gunn v. Union R.R.*, 62 A. 118 (R.I. 1905), a *tour de force* survey of early state and federal practice regarding the judge's role in evaluating the legal and factual sufficiency of evidence to determine if the case should be submitted to the jury. Contrary to the exaggerated deference to the jury's role that infuses the legal ethos in this jurisdiction, an argument can be made that the early Rhode Island practice of allowing for two and sometimes three jury trials on the same case, *id.* at 123-25, evinces skepticism about, rather than a reverence for, jury verdicts. Saying that our forebears had an unalloyed faith in juries because they allowed the same case to be retried as a matter of course is like saying the Italians revere government because they have had nearly fifty of them since World War II.

169. Hehir v. Rhode Island Co., 58 A. 246 (R.I. 1904). Neither *Hehir* nor any other Rhode Island Supreme Court decision has specifically defined "scintilla," though it has been indirectly defined by way of reference to other standards. *E.g.*, Caswell Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981) ("[S]ubstantial evidence as used in [zoning law] means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means in amount more than a *scintilla* but less than a preponderance."). Contextually, it appears that the Rhode Island Supreme Court always has used this term in accordance with the definitions in Black's Law Dictionary, 1345 (6th ed. 1991), under the entries for "Scintilla," ("A spark; a remaining participle; a trifle; the least participle."), *id.*, and "Scintilla of Evidence Rule," ("A spark of evidence. A metaphorical expression to describe a very insignificant or trifling item or particle of evidence.") *Id.*

of all the evidence, "it became the duty of the trial justice not merely to determine whether a plaintiff's evidence made out a prima facie case for the jury but whether such evidence was *sufficient* in law to support a verdict in plaintiff's favor and if not to direct a verdict against them."[170] What are we to make of these declarations, particularly in light of the even more recent pronouncement that "[p]rima facie evidence is that amount of evidence that, if unrebutted, is *sufficient* to satisfy the burden of proof in a particular issue?"[171] In my view, the satisfaction of the burden of proof cannot be viewed in a vacuum, but must be related specifically by the trial judge to the available facts. Thus, the question is not whether on a Rule 56 motion the party to whom the law has assigned the burden of proof has presented some evidence on each fact of consequence, that is, on each constituent element of the cause of action (or affirmative defense), but whether the evidence is sufficient in "amount" and quality so that it could persuade a fact finder that the party with the burden has met it. This is the weighing the *Celotex* trilogy permits, its disclaimers notwithstanding, and happily—for my thesis, at least—there are declarations in Rhode Island case law that can be used as building blocks to this conclusion.

When I say that the Rhode Island Supreme Court should frankly acknowledge that some weighing is occurring when the trial judge considers a Rule 56 motion—especially if this is done with the criteria of the *Celotex* trilogy—it may appear to some that I am engaging in heresy. I do not think that is the case and, at the very worst, it is a pseudo-heresy. A true heresy in the common law would be a departure by a lower court judge from the clear precedent or express mandates of the court of last resort in his or her jurisdiction, even though the heretical pronouncement be grounded in common sense and experience. For example, Chief Judge Jon Newman of the United States Court of Appeals for the Second Circuit labeled as heresy his recommendation that, on motion for judgments of acquittal in some criminal cases, trial judges should consider the credibility of the state's witness when the trustworthiness of the only witness to the crime has been signifi-

170. Simeone v. Prato, 111 A.2d 708 (R.I. 1955) (emphasis added).

171. Paramount Office Supply Co. v. MacIsaac, Inc., 525 A.2d 1099, 1101 (R.I. 1987) (emphasis added).

cantly undermined.[172] On the other hand, in the *Celotex* trilogy, the language of the majority opinions is replete with language suggesting that a weighing process is occurring, and the reader can make her or his own judgment as to whether I—and Justices White and Brennan in their *Matsushita* and *Liberty Lobby* dissents—are correct in arguing that the Court is permitting this practice.

What is so drastic about weighing in the *Celotex* mode? One distinguished scholar has suggested that the "drastic-cautious," pre-*Celotex* standard "would not permit a jury to find a traffic light green if forty bishops testified it was not, or a debt unpaid in the face of a signed receipt without evidence of fraud or the like."[173]

What I am advocating will appear as less than even pseudo-heretical, if not positively mainstream, when we observe the number of instances created by the Rhode Island Supreme Court, both through rule and judicial fiat, allowing a trial judge to intervene in a definitive manner before a case is submitted to the jury. Two of the most significant situations involve the pre-trial evaluation of the merits of a punitive damages claim and the trial judge's determination of the existence of a duty in negligence cases.

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172. Jon O. Newman, *Beyond "Reasonable Doubt,"* 68 N.Y.U. L. Rev. 979 (1993). Judge Newman acknowledged that he was "moving past the provocative to the heretical," *id.* at 997, by suggesting that in some cases appellate courts should abandon the prohibition against assessing the credibility of witnesses on motions for judgments of acquittal, especially where the witness has been "seriously impeached" or where "a witness is indisputably shown to have lied on prior occasions, perhaps under oath, and is currently in a position to save himself years of jail time by accusing the defendant." *Id.* at 997-98.

173. David P. Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. Chi. L. Rev. 72, 72-73 (1977). Professor Currie's article was one of three important discussions that the Supreme Court relied upon in *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 n.5 (1986). The other two are Martin B. Louis, *supra* note 8, *see Celotex*, 477 U.S. at 324 n.5, and William Schwarzer, *Summary Judgment Under the Federal Rules: Defining General Issues of Material Fact*, 99 F.R.D. 465 (1984), *see Celotex*, 477 U.S. at 327. Professor Currie's principal contribution is found in the concluding sentences of his seven page article:

> The purpose of rule 56 requires that summary judgment be granted if and only if the evidence before the court would justify a directed verdict if presented at trial. Consequently, the rule should be amended to make clear that a motion for summary judgment, without more, puts an opposing party with the burden of proof to the task of producing evidence sufficient to sustain a favorable verdict.

Currie, *supra*, at 79 (footnote omitted).

V. A HOPEFUL DEVIATION

Three years ago, in *Palmisano v. Toth*,[174] without either precedent or any expression in the rules to guide it, but mindful of "[its] plenary revisory powers,"[175] the Rhode Island Supreme Court ordained that an evidentiary hearing must be conducted by a judge designated by the presiding judge of the superior court when a defendant moves to strike a punitive judgment count on the grounds that the evidence available to the plaintiff cannot sustain it.[176] After conducting a hearing that would allow for the cross-examination of witnesses, the presentation of contradictory witnesses and apparently the weighing of evidence and the assessment of witness credibility, the trial judge must make a determination "whether the evidence presented *as a matter of law and fact* warrants submission to a trier of fact (either judge or jury) of the punitive-damage issue."[177] Whether one agrees with the supreme court's policy determination that a defendant facing a count for punitive damages is "to be protected from undue harassment, embarrassment, and oppression,"[178] or the means it adopted to shield the defendant, there can be no doubt that the supreme court intruded into an area previously occupied by the jury. After all, prior to *Palmisano*,

174. 624 A.2d 314 (R.I. 1993).

175. *Id.* at 320.

176. The supreme court was creative and acknowledged its departure from the rules, if not from precedent:

> If a defendant believes that a punitive-damage claim cannot be supported factually and legally, the defendant may move to strike the claim for punitive damages. This motion will not be in strict accord with Rule 12(f) of the Superior Court Rules of Civil Procedure, but instead it will have the appropriate expanded function to test by an evidentiary hearing the propriety of a claim for punitive damages . . . . The motion may be referred to a justice of the Superior Court on whatever calendar the presiding justice of that court determines appropriate. The plaintiff may present evidence in opposition to the motion sufficient to constitute a prima facie showing of his or her eligibility for punitive damages, which would be determined in accordance with our standards that the defendant acted so willfully, maliciously, or recklessly as to amount to conduct bordering on criminality.

Id. Prior to this decision, such an attack on a punitive damages claim would have been proper under Rule 56, but no evidentiary hearing with the attendant assessing of credibility would have been permitted. We can conclude then, that when it sees fit, our supreme court is prepared to relax—if not abandon—its prohibitions regarding weighing the evidence, and even assessing credibility prior to a case going to the jury.

177. *Id.* at 320-21 (emphasis added).

178. *Id.* at 320.

had not the only consideration for the trial justice been whether there was any evidence on the record that could allow a reasonable inference of recklessness or willfulness "as amounted to criminality?"[179]

Similarly, a trial judge is necessarily involved in the "heretical" weighing of evidence and credibility determinations when considering the competency of a witness to testify,[180] the helpfulness of expert testimony to the jury[181] and its reliability and soundness as well,[182] and a host of issues subsumed under the rubric of "preliminary questions."[183] With respect to the judge's role in examining evidence to determine if a lawful duty exists, the Rhode Island Supreme Court has explicitly distinguished the standard to be employed from the one used when a motion for directed verdict is under consideration: "We wish to note that it is often necessary for the trial justice to find preliminary facts in deciding questions of law. When finding such preliminary facts, the trial justice exer-

179. Sherman v. McDermott, 329 A.2d 195, 196 (R.I. 1974).

180. R.I. R. Evid. 601; *see also* R.I. R. Evid. 601 advisory committee's note, at 1104 (providing, inter alia, "the competency of infants and mentally handicapped persons are matters to be determined by the trial justice").

181. R.I. R. Evid. 701.

182. In the oft cited and much discussed case of *Daubert v. Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the United States Supreme Court elaborated upon the "gatekeeping role" for the trial judge regarding expert testimony. *Id.* at 597. While acknowledging that it "[did] not presume to set out a definitive checklist or test," *id.* at 593, the Supreme Court did delineate some criteria to be followed by federal trial judges in order for them to ensure that "scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. In *State v. Morel*, 676 A.2d 1347, 1355 n.2 (R.I. 1996), our supreme court said that it found "the reasoning and guidelines [of *Daubert* to be] helpful and illuminating." *Id.* In *State v. Quattrocchi*, 682 A.2d 879 (R.I. 1996), our supreme court found *Daubert* to be generally persuasive, but said that it would "leave to a later day the emphasis to be placed on general acceptance," which is one of the criteria that *Daubert* declares should be considered by a judge considering the admissibility of scientific testimony based on a new or novel theory. *Id.* at 884 n.2. For our purposes, the Rhode Island Supreme Court said that in both criminal and civil cases, a trial judge "must exercise this gatekeeping function and . . . conduct a preliminary examination prior to allowing scientific evidence," *id.* at 884, and that this evidentiary hearing should be conducted before the judge allows the evidence to be placed before the jury. "In a civil case, the challenge to expert testimony or scientific evidence should be made sufficiently in advance in order to alert the trial justice to the need for holding a preliminary evidentiary hearing either prior to empaneling a jury or outside the presence of the jury." *Id.* at 884 n.3.

183. R.I. R. Evid. 104. On the matter of preliminary questions, see R.I. R. Evid. 104 advisory committee's note, at 1052 ("[T]o the extent that these inquiries are factual, the judge acts as trier of fact.").

cises his or her independent judgment and does not apply the directed-verdict standard."[184]

With the exception of the role assigned to the trial judge by the supreme court regarding a punitive damages hearing, these examples may not be perfect analogues to the judge's function on a Rule 56 motion, but they do demonstrate that the weighing of evidence and assessment of credibility are not exclusively the province of the jury. In fact, the trial judge regularly engages in this activity prior to submitting the case to the jury, and often with the consequence that she or he decides that the case—or a portion of it—is not in a posture to go to the jury.

Perhaps a more important—and certainly a more direct—signal of the supreme court's willingness to assign a more active role to the trial judge on a Rule 56 motion is an opinion offered by Justice Murray, without dissent, in the same year she wrote *Palmisano*. In *Regnier v. Cahill*,[185] after the ritual incantation that "[t]he trial justice must bear in mind that a summary-judgment [sic] motion is a drastic and dispositive remedy and, therefore, should be granted with caution," Justice Murray used words that, at the very least, suggest that a trial judge reviewing a motion for summary judgment may permissibly conduct an evidentiary hearing not unlike that permitted by *Palmisano*.[186] "An evidentiary hearing on the merits of the defendant's counterclaims and defenses may or may not reveal the existence of genuine issues of material fact, particularly whether there is a surplus or a deficiency of monies owed to the plaintiff."[187] To any suggestion that Justice Murray's reference to "an evidentiary hearing" meant a trial, I would reply that Rule 56 contemplates the determination of the "existence of genuine issues of material fact" well in advance of the trial and that, in any event, this eminent and precise jurist would have used the word "trial" if she meant trial. Moreover, Justice Murray was describing a hearing that has as its objective identifying the genuine issues, not resolving them.

More troublesome than any quibble with Justice Murray's choice of words is the declaration by the supreme court three years later that a trial judge considering a Rule 56 motion may speculate

184. Rodriques v. Miriam Hospital, 623 A.2d 456, 461 (R.I. 1993).
185. 618 A.2d 1266 (R.I. 1993).
186. *Id.* at 1267.
187. *Id.*

as to what the non-moving party may be able to show at trial. In *Boland v. Town of Tiverton*,[188] the supreme court, not surprisingly, began its discussion of summary judgment with the "drastic-cautious" mantra before it observed that "[t]his court notes that the record before us contains sufficient facts that, *if more fully developed at trial*, . . . could probably support a finding [in favor of the non-moving party]."[189] Where, it may be fairly asked, does Rule 56 permit the trial judge to speculate as to what may be "more fully developed at trial?"[190] Rule 56, after all, is a pre-trial procedure designed to determine if a party has presented sufficient evidence for the claim or defense to go to trial and be placed before a jury. While the trial judge must look toward the trial conceptually in order to make a determination as to where the burdens of persuasion are assigned by the substantive law, the judge should not confuse this role with making a determination as to what a reasonable jury *might* do *if* certain facts were to be developed later at trial. Moreover, it should not be overlooked that Rule 56(e) affords the party opposing the motion an ample opportunity to gather and submit to the court evidence in support of its contention if it is unavailable when the motion is first brought. The dichotomous views of *Regnier v. Cahill* and *Boland v. Town of Tiverton* should be harmonized during any undertaking by the supreme court to refine and clarify summary judgment practice.

CONCLUSION

In 1986, the United States Supreme Court handed down the *Celotex* trilogy, which provided federal trial judges with specific and workable principles for the consideration of Rule 56 motions. While these decisions have no binding effect on the states, a number of courts and scholarly commentators have noted the helpful and salutary effect of the principles set forth in the trilogy. Apart from one passing reference to *Matsushita*, the Rhode Island

188. 670 A.2d 1245 (R.I. 1996).

189. *Id.* at 1248-49 (emphasis added).

190. The *Celotex* construct clearly does not permit deference to potential developments at trial. "[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with *all of her evidence*." Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986) (second emphasis added).

Supreme Court, without stating any reasons for doing so, has ignored these decisions.

As to why Rhode Island follows this course, we can only surmise. Clearly, to this point in time, the Rhode Island Supreme Court is comfortable with its principal teaching that summary judgment is a drastic remedy to be applied only with great caution. Additionally, the supreme court has in my view an unduly solicitous and historically unjustifiable deference to the role of the jury in civil cases.

The *Celotex* trilogy moved federal summary judgment considerations beyond the realm of the cliché into that of a principled and workable analytical framework that affords guidance to the trial bench and bar. The central principles to be gleaned from the trilogy are: (1) Rule 56 is an integral part of the pretrial regime of procedure and should be used wherever required; (2) the moving party need only point to deficiencies in the non-moving party's case, whereupon the non-moving party must produce a sufficient amount of evidence to forestall the granting of a motion; (3) it is crucial that the trial judge look at the burdens of the contending parties, not only in terms of who is pressing the motion or cross-motion for summary judgment, but to determine who has the burden of proof at trial as mandated by the controlling substantive law; (4) the standard to be employed in considering motions for summary judgment is virtually identical to that used in determining which party should prevail on a motion for a judgment as a matter of law; (5) the scintilla rule has no place in summary judgment considerations; and (6) the central question to be resolved by the trial judge considering a motion for summary judgment is whether the quantum and quality of the evidence is sufficient to permit a rational trier of fact to return a verdict in favor of the party to whom the substantive law has assigned the burden of proof.

In my view, these principles mean that, among other things, the trial judge becomes involved in weighing the evidence (as distinguished from assessing the credibility of witnesses, which in any event, would be an impossibility), just as Justices Brennan and White suggested in their *Liberty Lobby* and *Matsushita* dissents.

All is not bleak in Rhode Island for one to advocate, as I do, the wholesale adoption of the principles of the *Celotex* trilogy. Rhode

Island's legal history is replete with examples showing the supreme court's rejection of the scintilla standard. In addition, many court-fashioned procedures give trial judges considerable leeway in the area of weighing evidence—and sometimes assessing credibility of witnesses—at points prior to submission of the case to the jury. Within the last several years the supreme court has created, through the use of its plenary powers, a pre-trial evidentiary hearing to be employed when a defendant contends that there is no basis to support a cause of action for punitive damages; and the court has adverted to the possibility of an evidentiary hearing being conducted in conjunction with the pressing of a motion for summary judgment.

Whatever the historical developments in Rhode Island have been relative to summary judgment and the role of the civil jury, the trial bench and bar are in need of workable and principled criteria for the evaluation of Rule 56 motions. The Rhode Island Supreme Court is in a position to meet this need by adopting the criteria of the *Celotex* trilogy, which should be read in conjunction with the United States Supreme Court's pronouncements in *Greenwich Collieries* regarding burdens and the fact finder's intensity of belief, and the Rhode Island Supreme Court's similar declarations in *Parker v. Parker*.[191] Clearly, the Rhode Island Supreme Court may do this in the exercise of its plenary power.

The Rhode Island Supreme Court, like any common law court of last resort, is no stranger to reversing or modifying its course. Whether the court will follow the path of *Celotex* principles remains to be seen; but whatever it ultimately does, we know that it will be final and infallible.[192]

191. 238 A.2d 57, 60-61 (R.I. 1968).
192. *See supra* note 34.