Summary Judgment at the Crossroads: The Impact of the *Celotex* Trilogy

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I. INTRODUCTION

Summary judgment law in Hawaii courts is approaching a crossroads. The path it takes will be influenced by the courts' view of recent changes in the federal summary judgment landscape. A trilogy of 1986 United States Supreme Court cases[1] has sent a message, loud and clear to trial judges: "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 . . . ."[2] This message has not gone unheeded; federal and state courts alike are looking to the opinions in these three cases to unlock the wonders of summary adjudication.[3]

Our inquiry is divided into four parts. The first is an overview of Hawaii's traditional and somewhat murky approach to summary judgment law. The second part is an in-depth critique of the 1986 Supreme Court trilogy regarding the evolution of — some say revolution in — federal summary judgment law. The third is a description of the Hawaii appellate courts' apparent drift toward federal standards without express adoption or discussion of underlying value tensions. The final part describes three alternate paths to Hawaii's summary judgment future and analyzes each path doctrinally and in light of competing values of efficiency and access. Our premise is that this value tension provides context for meaningful evaluation of summary judgment law. As Justice Rehnquist observed in *Celotex Corp. v. Catrett*,[4] summary judgment exists not in a vacuum, but within a system of procedural rules and standards.

What is the context of summary judgment reform? A perceived "litigation explosion" in federal and state courts has generated cries for litigation reform. Accounts of delay and excessive cost have fueled a strong movement toward efficiency improvements, nationally and in Hawaii. Reform has occurred at two levels: administrative reforms, such as computerized case files and more efficient calendaring systems; and procedural reforms for admitting and handling cases. In the federal courts, the procedural reforms include "new" Rules 11,[5] 16,[6] and 26,[7] often referred to as managerial rules.[8] Hawaii courts have adopted

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[1] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[2] Celotex Corp. v. Catrett, 477 U.S. at 327.

[3] A LEXIS search has revealed over 3,000 citations to *Celotex* in published state and federal court opinions as of March 1990.

[4] 477 U.S. 317, 327 (1986).

[5] Fed. R. Civ. P. 11 (deterring unreasonable filings).

[6] Fed. R. Civ. P. 16 (pretrial conferences).

[7] Fed. R. Civ. P. 26 (limiting discovery).

[8] *See* Yamamoto, *Case Management and the Hawaii Courts: The Evolving Role of the Managerial Judge in Civil Litigation*, 9 U. HAW. L. REV. 395 (1987). Modified versions of these rules are pending before the Hawaii Supreme Court. The rules are recommended by the Judiciary's rules committee chaired by Judge Philip T. Chun. Professor Yamamoto served as counsel for the

mandatory arbitration and greatly revised circuit court rules and are currently considering modified versions of the recently amended Federal Rules of Civil Procedure (FRCP).[9]

One price of enthusiastic efficiency reform is diminished court access. Are the reforms worth the price? Does everyone benefit equally from the reduction of cost and delay? Does reform undermine values of the litigation processes — values such as personal dignity, individual participation in governmental process, public education and institutional accountability?[10] Summary judgment reform is appropriately analyzed in the context of these questions.

For the sake of discussion, we have identified two conceptually distinct, although practically related, dimensions of summary judgment law. The first dimension is the "mechanics" of summary judgment; the second is the "substantive standard" for summary judgment. Summary judgment "mechanics" has two facets: technical requirements such as filing deadlines, use of affidavits, and interrogatories;[11] and the burdens of producing evidence by the movant[12] and respondent. This article focuses on the latter facet of summary judgment mechanics because it is conceptually complex and practically important and because shifting burdens of production enable courts to regulate the balance of power between plaintiffs and defendants.

The "substantive" summary judgment standard refers to the standard that a court applies to decide whether, after both sides have carried their burdens of production, the movant has satisfied its ultimate burden of persuasion on the motion (no genuine issue of material fact and entitled to judgment as a matter of law). This article focuses on the substantive standard because it too affects the balance of power between plaintiffs and defendants and implicates competing concerns about cost reduction and open court access. For example, if the substantive summary judgment standard is "the slightest doubt," a plaintiff that demonstrates possibly conflicting inferences arising out of scant evidence will defeat a defendant's motion. The case then settles or proceeds to public trial. In contrast, if the standard incorporates the "preponderance of the evi-

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[9] Yamamoto, *Pending Procedural Reform In Hawaii's Courts—New Civil Rules 11, 16 and 26: Benefits and Problems of Active Case Management*, 22 HAWAII B.J. 1 (1989).

[10] Yamamoto, *supra* note 8, at 406-07; Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights - Part I*, 1973 DUKE L.J. 1153, 1172 (1987).

[11] *E.g.*, Wilder v. Tanouye, 7 Haw. App. ____, 753 P.2d 816 (1988), clarifies the operation of 56(f) concerning continuances to allow for discovery. Messier v. Association of Apt. Owners of Mt. Terrace, 6 Haw. App. 525, 531, 735 P.2d 939, 945-46 (1987), allows filing of summary judgment motions after the deadline for substantive motions set by Circuit Court Rule 12.

[12] Courts and commentators use "movant" and "moving party" interchangeably to refer to the proponent of the motion for summary judgment. Nonmovant, nonmoving party, respondent, and responding party all refer to the party opposing the motion for summary judgment. We use movant and respondent.

dence" level of proof and requires the judge to assess the quality of the evidence, the result is different. Defendant prevails; further cost and a public trial are avoided.

Commentators suggest that the balance of power in federal courts has shifted markedly toward defendant-movants, in principal part because of the United States Supreme Court's recent analysis of both summary judgment mechanics and the substantive standard.[13] Whether that shift is salutary (restoring the balance between plaintiffs and defendants), disastrous (equipping defendants with a tool of harassment), or something in between is the subject of continuing debate. We begin by summarizing and conceptualizing summary judgment law in Hawaii.

II. SUMMARY JUDGMENT IN HAWAII STATE COURTS

Hawaii summary judgment law may be characterized in three ways. First, it may be characterized by a lack of a precise mechanical framework. With few exceptions, reported cases do not analyze summary judgment mechanics and merely cite provisions of Hawaii Rule of Civil Procedure (HRCP) 56.[14] Second, Hawaii law on substantive summary judgment standards may be characterized by a clearly articulated appreciation for the values of jury access and full public trials. Reported cases caution against limiting access to trials except in clear-cut situations. Finally, Hawaii summary judgment law may be characterized by a relative silence about efficiency concerns. These aspects of Hawaii courts' interpretation and application of Rule 56 are discussed in the following sections.

A. Mechanics[15] of Rule 56: Burdens of Producing Evidence

On a summary judgment motion each party bears a burden of producing evidence. Conceptually, the movant must first support its motion by demonstrating to the court that the evidence in the discovery record, supplemented by affidavits, considered alone, warrants judgment for the movant. The respondent must then respond by producing conflicting evidence or evidence that raises

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[13] *See, e.g.*, Lankford, *New Life for Defensive Summary Judgment Motions*, FOR THE DEFENSE 2 (April 1987) ("The United States Supreme Court has made it much easier for defendants to obtain summary judgment under Rule 56 of the Federal Rules of Civil Procedure. . . . [T]he defendant's obligation is merely to analyze plaintiff's evidence, not to disprove plaintiff's case."); *accord* Stemple, *A Distorted Mirror, The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988).

[14] *See, e.g.*, Abraham v. Onorato Garages, 50 Haw. 628, 446 P.2d 821 (1968); Cane City Builders, Inc. v. City Bank of Honolulu, 50 Haw. 472, 443 P.2d 145 (1968).

[15] Under the heading of "Mechanics" we focus on burdens of production. Technical requirements, which are also part of mechanics, are discussed generally throughout the article.

conflicting inferences. Few Hawaii cases have addressed the parties' burdens of production.

Mossman v. Hawaiian Trust Co.[16] provided the Hawaii Supreme Court's first instruction on the movant's burden. There, the court placed the burden on the movant regardless of whether it had the burden of persuasion at trial.[17] The imposition of the initial burden of production on the movant, whether plaintiff or defendant, is consistent with the supreme court's view that "caution on the part of a trial court in the use of summary judgment procedure is commendable."[18] In *Mossman* and for several years following, the court did not, however, discuss the quantum of evidence needed to carry the movant's initial burden.

The Intermediate Court of Appeals (ICA) added to the discussion of the movant's initial burden of production and illustrated the operation of the respondent's corresponding burden twenty-three years later in *Arimizu v. Financial Security Insurance Co.*[19] Arimizu filed a complaint against his employer, seeking a statutory penalty for failure to pay back wages. To support his summary judgment motion, Arimizu referred to deposition testimony showing that his employer owed him wages and vacation benefits but refused to pay.[20] Arimizu thus satisfied his initial burden of production on the motion under Rule 56(c) through the use of specific evidence in the discovery record. The burden then shifted under Rule 56(e) to his employer to respond with "specific facts."

> Under Rule 56(c), HRCP, once the movant satisfies the initial burden of showing the absence of a genuine issue of material fact, "then the burden shifts to the opponent to come forward with specific facts showing that there remains a genuine issue for trial."[21]

The employer "failed to factually raise his defense in resisting Arimizu's motion for summary judgment," thereby failing to discharge its burden of production. The motion was granted in Arimizu's favor.[22]

Arimizu is the clearest articulation of burdens of production to date, at least where a plaintiff is the movant. But, its precedential value was thrown into

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[16] 45 Haw. 1, 361 P.2d 374 (1961).

[17] *Id.* at 9, 361 P.2d at 379. "The rule is that the defendant, as the party making the motion for summary judgment, has the burden of establishing the absence of a 'genuine issue as to any material fact' even though, upon trial, the burden . . . would rest on plaintiffs." *Id.*

[18] *Id.* at 12, 361 P.2d at 381 (citing 6 MOORE, FEDERAL PRACTICE § 56.15(1) (2nd ed. 1976)).

[19] 5 Haw. App. 106, 679 P.2d 627 (1984).

[20] *Id.* at 110-11, 679 P.2d at 632.

[21] *Id.* at 110, 679 P.2d at 632 (quoting Securities & Exchange Commission v. Murphy, 626 F.2d 633, 640 (9th Cir. 1980)).

[22] *Id.* at 111, 679 P.2d at 632.

question only two months later when the ICA seemed to ignore the *Arimizu* standard in deciding *Carrington v. Sears, Roebuck & Co.*[23] In *Carrington*, the court made no mention of the *Arimizu* burdens and stated only that "[w]here there are no genuine issues of fact, a defendant . . . is entitled to judgment as a matter of law if it is clear that there is no discernible theory under which plaintiff could recover."[24] As authority for this language, the court cited *Abraham v. Onorato Garages*,[25] a case decided sixteen years before *Arimizu*, ignoring *Arimizu*'s elucidation of mechanics.

The critical issue unaddressed by *Arimizu* (which involved a plaintiff's motion) was the extent of the initial burden of production of a defendant-movant. Must the moving defendant produce "specific facts," as a moving plaintiff must, or can the defendant discharge its burden by simply asserting that the discovery record lacks evidence supporting plaintiff's claims? The year after *Carrington*, the ICA seemed to address this question in *Waimea Falls Park, Inc. v. Brown*.[26] The court again did not acknowledge the language in *Arimizu*. Instead, the court relied on a treatise on federal civil procedure and stated somewhat ambiguously that the summary judgment movant may discharge its burden by showing that if the case went to trial there would be "no competent evidence" to support a judgment for his opponent.[27]

The guidance value of this statement for defendant-movants is questionable because the movant in *Waimea Falls* was the plaintiff. The court did not acknowledge the potential application to a defendant-movant attempting to satisfy its initial burden of production by simply pointing to a bare record. The opinion also failed to explain the meaning of "no competent evidence," the manner in which a defendant-movant might demonstrate a plaintiff's lack of evidence, or the manner in which the plaintiff-respondent might respond to such a motion.

Waimea Falls again left the Hawaii courts without an encompassing, coherently explained framework of the mechanics under Rule 56 concerning the burdens of production, especially for defendant-movants. That apparent confusion mirrored the ambiguous state of federal summary judgment law. A comment descriptive of federal court rulings also generally describes Hawaii's past summary judgment decisions on mechanics: "The actual decisional process appears to rely primarily on the facts of each case and a general, unarticulated sense of

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[23] 5 Haw. App. 194, 683 P.2d 1220 (1984).

[24] *Id.* at 197, 683 P.2d at 1224.

[25] 50 Haw. 628, 446 P.2d 821 (1968).

[26] 6 Haw. App. 83, 712 P.2d 1136 (1985).

[27] "If no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless and the movant is therefore entitled to a judgment as a matter of law." *Id.* at 92, 712 P.2d at 1142 quoting 10A WRIGHT, MILLER AND KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (1983). The court also used the phrase "no competent evidence."

when summary judgment is appropriate."[28]

The failure of the courts, both state and federal, to clearly articulate and follow mechanical standards defining the relative burdens of the parties appears to have resulted in uncertainty among practitioners.[29] In addition, the absence of a consistently applied framework may have contributed to decisions that seem to have no sound procedural basis. *Uffman v. Housing Finance and Development Corp.*[30] is an example. In this fee conversion case, defendant moved for summary judgment asserting that plaintiff's land failed to meet the requisite five acre minimum. Defendant's evidence indicated that plaintiff's land was 4.713 acres, based on descriptions in recorded documents.[31] Plaintiff responded by citing evidence indicating that the size of the area in question was 5.0002 acres, based on a recent survey of the beachfront land.[32] Despite this conflicting evidence, the trial court granted the motion. The Hawaii Supreme Court accepted the trial court's determination without explanation even though the trial court had summarily decided a disputed issue of material fact.

The lack of precise standards for summary judgment motions arguably contributed to the puzzling nature of this decision. Did the court decide that plaintiff failed to carry its responding burden of production because its survey evidence was inadmissible or otherwise unacceptable? Or did the court decide that the substantive summary judgment standard was satisfied even though conflicting evidence existed? Or did the court decide on some other basis? Neither Rule 56 standards nor the court's rationale are adequately explained.

The lack of clarity and uniformity in Hawaii summary judgment law is particularly troublesome in light of *Munoz v. Yuen*.[33] There the Hawaii Supreme Court stated that appellate courts "will not examine evidentiary documents . . . not specifically called to the attention of the trial court, even though they may be on file in the case."[34] The court's intention was to avoid forcing appellate courts to "wade through all of a voluminous record" searching for relevant documents, and thereby foster efficiency at the appellate level.[35] One result of this decision, however, is that a party responding to a summary judgment motion must bear the cost and bother of presenting its entire evidentiary case

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[28] Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C.L. REV. 1023, 1042 (1989).

[29] *Id.*

[30] 70 Haw. 64, 760 P.2d 1115 (1988). In this case, the plaintiffs sought a fee conversion from defendants pursuant to Hawaii Revised Statutes Chapter 516. The statute stipulated that such a fee conversion could not be obtained for a lot less than five acres in size.

[31] *Id.*

[32] *Id.* at 66, 760 P.2d at 1116.

[33] 66 Haw. 603, 670 P.2d 825 (1983).

[34] *Id.* at 606, 670 P.2d at 827.

[35] *Id.* at 605, 670 P.2d at 826.

couched in its various legal theories. The respondent at this pretrial stage will always reveal its entire case for two reasons: (1) it does not know precisely what is required to defeat the motion, and (2) it does know that if the motion is granted, the appellate court will only consider evidence specifically called to the attention of the trial court. Overkill by respondents seems inevitable.

In sum, Hawaii cases contain only scattered and inconsistent discussion of the mechanical steps to a summary judgment motion. Attempts to articulate the relative burdens of movant and respondent have not produced a definitive standard. The language in *Arimizu*[36] is perhaps the most detailed analysis by a Hawaii court to date, but it is far from an encompassing framework. It leaves unaddressed the burden of production of the defendant-movant, is rarely repeated in reported cases, and is not consistently followed. The lack of a uniform standard can lead to wasted time for motions judges and litigants and unpredictable results, perhaps frustrating the substantive principle declared by Hawaii courts, discussed below, that summary judgment should be granted sparingly.

B. Substantive Standard Under Rule 56

1. The basic standard

When both parties produce some evidence in support of their respective positions on the motion, arguably satisfying their respective burdens of production, the motions judge must then examine the evidence in light of a substantive standard to determine whether a *genuine* issue of *material* fact exists. A standard that makes it difficult for defendants to prevail on summary judgment may reflect the court's preference for public trials and jury access, but it may also promote inefficiency and unfair settlements. On the other hand, a standard that encourages defendants to file summary judgment motions without solid grounds may transform summary judgment into a tool of discovery or even harassment. And, this standard may disserve values associated with compromise resolutions and public trials.

Hawaii courts historically have employed a substantive standard known as "scintilla of evidence" or "slightest doubt," indicating a preference for settlements or public trials and jury decisions rather than truncated case terminations. In *Abraham v. Onorato Garages*,[37] the Hawaii Supreme Court announced that a defendant's summary judgment motion should be granted only if "it is clear that the plaintiff would not be entitled to recover under any discernible theory" and that "[t]he inferences drawn from the underlying facts . . . must be

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[36] *See supra* text accompanying notes 19-22.

[37] 50 Haw. 628, 446 P.2d 821 (1968).

viewed in the light most favorable to the party opposing the motion."[38] Consistent with the scintilla of evidence standard, the court did not incorporate the level of proof at trial (preponderance of the evidence, for example) into the summary judgment calculus. This combined posture has discouraged summary judgments.

Ten years later, in *Packaging Products Co. v. Teruya Bros. Ltd.*,[39] the Hawaii Supreme Court again indicated that the substantive standard is weighted heavily in favor of the respondent. If the court can find even arguably conflicting inferences, it is not to grant summary judgment. "Where . . . the evidence is fairly susceptible to conflicting interpretations, even though the operative facts themselves are not in dispute, there is a genuine issue of a material fact and the motion for summary judgment will be denied.[40] The *Teruya* court also stated that it is "incumbent upon the trial court to view the evidence in the light most favorable to the party opposing the motion . . . and to resolve all material ambiguities and disagreements against the movant."[41] Again, the court's statements evinced a strong preference for case resolutions via trials, in practical effect discouraging defendant summary judgment motions.

The preference for jury access is expressed strikingly in *McKeague v. Talbert*.[42] The ICA noted that the impact of summary judgment is "rather drastic" and therefore "must be used with due regard for its purposes and should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues."[43]

> Even in cases where the judge is of the opinion that he will have to direct a verdict . . . he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge

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[38] *Id.* at 632, 446 P.2d at 825; *See also* Del Rosario v. Kohanuinui, 52 Haw. 583, 586, 483 P.2d 181, 183 (1971); McKeague v. Talbert 3 Haw. App. 646, 650, 658 P.2d 898, 903 (1983); Kang v. Charles Pankow Assocs., 5 Haw. App. 1, 5, 675 P.2d 803, 806 (1984); Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982); Bidar v. Amfac, Inc., 66 Haw. 547, 553, 669 P.2d 154, 159 (1983); Aku v. Lewis, 52 Haw. 366, 371, 477 P.2d 162, 165 (1970); Rodriguez v. Nishiki, 65 Haw. 430, 438, 653 P.2d 1145, 1150 (1982); Fasi v. Burns, 56 Haw. 615, 616, 546 P.2d 1122, 1123 (1976).

[39] 58 Haw. 580, 574 P.2d 524 (1978). This case was a contract dispute in which neither side disputed the existence of or language in a bill of sale. The court found that the language was subject to conflicting inferences about the intent of the parties and thus created a genuine issue of material fact for trial. *Id.* at 584-85, 574 P.2d at 527-28.

[40] *Id.* at 583, 574 P.2d at 527. ("Not only must there be no dispute as to the basic facts but there must also be no reasonable controversy as to the inferences which may properly be drawn from them.").

[41] *Id.* at 584, 574 P.2d at 528.

[42] 3 Haw. App. 646, 658 P.2d 898 (1983) (vacated summary judgment for plaintiff).

[43] *Id.* at 650, 658 P.2d at 903.

weigh evidence in advance of its being presented.[44]

This language exemplifies the conflict between Hawaii's historical treatment of summary judgment and the new federal standard, discussed *infra*, which tends to equate summary judgments with directed verdicts.[45] To the extent *McKeague* is representative, Hawaii courts have recognized important differences between summary judgments and directed verdicts.[46] They have recognized that the trial process serves values of personal dignity, individual participation, public education and institutional accountability that are undercut by pretrial summary disposition of cases. When summary judgment is granted, the decision is based on a paper record without a public trial. When a directed verdict is granted, the decision is based on evidence scrutinized at a public trial — after a party has had its day in court. This view also implies a preference for compro-

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[44] *Id.* at 651, 658 P.2d at 903 (citing Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir.), *cert. denied*, 342 U.S. 887 (1951)). In Anderson v. Liberty Lobby, Inc., the United States Supreme Court states the federal view: "[t]he primary difference between the two motions is procedural; summary judgments 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." 477 U.S. 242, 251 (1986) (quoting Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745 n.11 (1983)).

[45] Anderson v. Liberty Lobby Inc., one of the cases in the federal trilogy which forms the basis for the current federal standard, contains language antithetical to *McKeague*. 477 U.S. 242 (1986); *see infra* notes 105-122 and accompanying text. In *Anderson*, the court stated that "the judge must view the evidence presented through the prism of the substantive evidentiary burden" to be used at trial. 477 U.S. at 254. Thus, under *Anderson*, summary judgment is a directed verdict before the trial, with the judge evaluating the "quantum and quality of proof necessary to support liability" under the standard of proof that would be used at trial, to determine whether a question of material fact exists. *Id.*

[46] What the Hawaii courts view the differences to be is not entirely clear. In contrast with *McKeague*, in at least three cases, the Hawaii Supreme Court has noted the similarity between summary judgment and directed verdict without noting the difference that at directed verdict neither party is deprived of the trial experience. *See* Fry v. Bennett, 59 Haw. 279, 280-81, 580 P.2d 844, 846 (1978):

> A summary judgment is analogous to a directed verdict. State v. Midkiff, 49 Haw. 456, 421 P.2d 550 (1966). The theory underlying a motion for summary judgment is substantially the same as that underlying a motion for a directed verdict. In both instances the movant is asserting that there is no genuine issue of material fact to be resolved by the factfinder and that he is entitled to judgment on the merits as a matter of law. 6 MOORE, FEDERAL PRACTICE, § 56.04(2) (2d ed. 1976). Where, therefore, the proffered facts on a motion for summary judgment or the evidence at trial on a motion for directed verdict, and the inferences which may fairly be drawn from them, are reasonably susceptible to conflicting interpretations, neither the motion for summary judgment, Packaging Products Co., Ltd. v. Teruya Bros. Ltd., 5[8] Haw. [580], 574 P.2d 524 (1978), nor the motion for directed verdict, Young v. Price, 47 Haw. 309, 388 P.2d 203 (1963), will be granted.

See also, Waimea Falls Park, Inc. v. Brown, 6 Haw. App. 83, 92, 712 P.2d 1136, 1143 (1985)(also citing State v. Midkiff).

mise resolutions over summary judgment. If the case is settled rather than adjudicated on summary judgment, the plaintiff recovers something rather than nothing (if it is a defendant's motion) or the defendant contributes something rather than everything (if it is plaintiff's motion).

Consistent with this larger view of the role of summary judgment in dispute resolution, the Hawaii courts predominantly have limited grants of summary judgment to clear-cut cases, *e.g.*, where the respondent fails to proffer opposing evidence.[47] This comports with the Hawaii appellate judges' extreme distaste for improvidently granted motions.[48] Significantly, this larger view does not explicitly acknowledge or attempt to accommodate efficiency concerns. Hawaii courts have not addressed the costs and burdens on courts and movants resulting from denials of summary judgment motions — the expense and time of further discovery, motions and trial; the settlement of cases involving claims or defenses clearly lacking in merit; or the problem of busy court calendars.

2. *Departure from the basic standard*

In addition to their general disfavor for summary judgment, Hawaii courts have displayed an extraordinary reluctance to grant summary judgment in three classes of cases. First, the courts seem particularly disinclined to grant summary judgments that foreclose the state or public interest in matters deemed to be of "vast public importance." Second, the courts seem especially hesitant to grant summary judgment in favor of defendants in ordinary negligence cases, particularly where an injured individual is suing a corporation or someone indemnified by insurance. Third, courts disfavor summary judgments where "state of mind" or credibility is at issue. These cases demonstrate an even stronger judicial allegiance to access values than the basic standard. In contrast, in a fourth category of cases, the courts have granted summary judgment for the defendant, even though a jury might reasonably decide for either party. This category of cases seems to reveal a desire to keep certain decisions away from juries, possibly to prevent the expansion of tort law liability.

a. Issues of public importance

A heightened summary judgment standard appears in cases involving controversial public issues where summary judgment will foreclose the public's interest. This elevated standard was first articulated in *State v. Zimring*.[49] The Ha-

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[47] Arimizu v. Financial Sec. Ins. Co., 5 Haw. App. 106, 679 P.2d 627 (1984).

[48] *See infra* the second paragraph of note 165 which discusses remarks made by Justice Padgett and Judge Burns at a HICLE meeting.

[49] 52 Haw. 472, 479 P.2d 202 (1970). *Zimring* involved a dispute between the State of

waii Supreme Court noted that the issue before it was "of vast public importance"[50] and employed the standard of *Phoenix Savings and Loan, Inc. v. Aetna Casualty and Surety Co.*:[51] "[S]ummary judgment should not be granted unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances."[52] The requirement that the record reflect no circumstances under which the respondent can prevail is arguably a mere rephrasing of the standard espoused in *Abraham v. Onorato Garages* that the record demonstrate the respondent would not be entitled to recover under any discernible theory.[53] However, the court in *Zimring* added:

> Judgment on issues of public moment based on . . . [conflicting affidavits], not subject to probing by judge and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of declaratory summary judgment.[54]

The court recognized that the value of the trial process, beyond dispute resolution, is especially great when the outcome is of wide-spread particular interest or will have a pronounced impact on the general public. The credibility and integrity of the court system may be called into question if the court is perceived, however erroneously, as giving only cursory treatment to an issue of vast public importance.

The court reaffirmed its reluctance to grant summary judgment in cases of public importance in *Leong v. Takasaki*[55] and *Keller v. Thompson*.[56] In *Keller*, the court quoted *Phoenix Savings and Loan* and the "vast public importance"

Hawaii and private land owners over title to new land created by a volcanic eruption which extended the seashore boundary.

[50] *Id.* at 476, 479 P.2d at 204.

[51] 381 F.2d 245 (4th Cir. 1967).

[52] *Zimring*, 52 Haw. at 475, 479 P.2d at 204.

[53] Abraham v. Onorato Garages, 50 Haw. 628, 632, 446 P.2d 821, 825 (1968).

[54] *Zimring*, 52 Haw. at 476, 479 P.2d at 205 (quoting Eccles v. Peoples Bank, 333 U.S. 426 (1948)).

[55] 55 Haw. 398, 520 P.2d 758 (1974). The plaintiff in *Leong* brought the action to recover damages for nervous shock and psychic injuries suffered without accompanying physical impact or resulting physical consequences. The court declined to grant defendant's summary judgment motion on plaintiff's attempt to create new law concerning the infliction of emotional distress, holding summary judgment inappropriate as long as there is "any doubt" about a defense victory.

[56] 56 Haw. 183, 532 P.2d 664 (1975). The court reversed a grant of summary judgment for general assistance recipients that declared a flat grant plan sought to be implemented by the Department of Social Services null and void as without statutory authority. Ordinarily, the existence of statutory authority for administrative regulations is deemed a question of law that is readily susceptible to summary judgment.

language from *Zimring* and added that "this is precisely the type of case where good judicial administration requires that the determination of the validity of the regulations be withheld until all testimony is adduced after a full trial."[57] This language arguably goes beyond the *Zimring* standard and makes summary judgment in a case of vast public importance an impossibility. The court's apparent unwillingness to foreclose the public's interest summarily suggests recognition of the value of public education engendered by a public trial and the value of enhanced system legitimacy derived from jury rather than judge decisions on controversial matters.

Six years later, the Hawaii Supreme Court retreated somewhat from its extreme position in *Keller*. In *Molokai Homesteaders Cooperative Association v. Cobb*,[58] the court upheld a grant of summary judgment, citing *Zimring* and stating that "in cases of public importance summary judgments should be granted *sparingly*, and never on limited and indefinite factual foundations."[59] Therefore, while maintaining that public importance cases should be treated as a special category, the Hawaii Supreme Court has not foreclosed the grant of summary judgment in such cases.

b. Issues of negligence

The Hawaii Supreme Court's stance with respect to summary judgment on issues of negligence is frequently expressed through a quote from *Pickering v. State*:[60] "[i]ssues of negligence are ordinarily not susceptible of summary adjudication."[61] *Bidar v. Amfac, Inc.*[62] illustrates the extreme application of this language. The plaintiff, a 220 pound person, was injured when a towel bar she used to lift herself gave way. Plaintiff asserted defendant's placement of the towel bar near the toilet was negligent. The trial court granted summary judgment for the defendant hotel, in effect finding no dispute about the appearance and intended function of the towel bar. The Hawaii Supreme Court reversed, stating that both breach of duty and causation, even in this case, are issues not susceptible to summary judgment:

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[57] *Id.* at 193-94, 532 P.2d at 672.

[58] 63 Haw. 453, 629 P.2d 1134 (1981).

[59] *Id.* at 458, 629 P.2d at 1139 (emphasis added). *See also* Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61 n.3, 647 P.2d 713, 716 n.3 (1982).

[60] 57 Haw. 405, 407, 557 P.2d 125, 127 (1976).

[61] *See also* McKeague v. Talbert, 3 Haw. App. 646, 650, 658 P.2d 898, 903 (1983); Messier v. Association of Apt. Owners of Mt. Terrace, 6 Haw. App. 525, 536 735 P.2d 939, 947 (1987).

[62] 66 Haw. 547, 669 P.2d 154 (1983) (notably involving a private individual plaintiff and corporate defendant).

> Whether the obligation to exercise reasonable care was breached is ordinarily a question for the trier of fact to determine . . . . "[r]easonable foreseeability of harm is the very prototype of the question a jury must pass upon in particularizing the standard of conduct in the case before it." Whether the breach of duty was more likely than not a substantial factor in causing the harm complained of is normally a question for the trier of fact also.[63]

The mere existence of possibly conflicting inferences arising out of undisputed facts precludes summary judgment in negligence cases. Since almost all negligence cases involve some possibly conflicting inferences as to liability, the court seems to have erected a nearly insurmountable barrier to summary judgment in negligence cases.[64] Why has the court done this? One explanation is that "reasonableness" inquiries are fraught with ambiguities that are best resolved according to community standards as determined by juries. Another explanation is that the court prefers to rectify, at least partially, the imbalance of power between injured individuals and defendant companies (or individuals indemnified by insurance) by giving negligence case plaintiffs every opportunity to try their cases before a jury or achieve some type of settlement.

c. Issues of credibility and state of mind

The Hawaii courts have indicated that issues of credibility and state of mind, like negligence issues, present questions ordinarily left to the trier of fact. In *Jacoby v. Kaiser Foundation Hospital*,[65] a medical malpractice case, the ICA employed the strict *Zimring* standard used in cases of public importance. The court further stated that "the issue . . . of credibility . . . is for the trier of fact . . . 'unless it also appears that the party opposing the motion cannot prevail in any event and that the issue of credibility therefore is immaterial.' "[66]

Also within the category of credibility are a trio of complex defamation cases. Each case involved materials which allegedly contained slanderous and defamatory statements suggesting that the plaintiffs, all public figures, had connections

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[63] *Id.* at 552-53, 669 P.2d at 159 (quoting 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.8, at 1059 (1956)). The court reversed the grant of summary judgment because "reasonable minds could draw different inferences from the facts and arrive at conflicting conclusions on relevant factual issues." *Id.* at 554, 669 P.2d at 160.

[64] *See also* Johnson v. Robert's Hawaii Tour, Inc., 4 Haw. App. 175, 183, 664 P.2d 261, 268 (1983); De Los Santos v. State, 65 Haw. 608, 610-11, 655 P.2d 869 (1982); Leary v. Poole, 5 Haw. App. 596, 599, 705 P.2d 62, 65 (1983); Lagua v. State, 65 Haw. 211, 215, 649 P.2d 1135, 1137-38 (1982).

[65] 1 Haw. App. 519, 622 P.2d 613 (1981).

[66] *Id.* at 527, 622 P.2d at 618 (quoting 10A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 at 526-31 (1983)); *see also* Aku v. Lewis, 52 Haw. 366, 378 477 P.2d 162, 169 (1970).

with organized crime. The first of the trio is *Rodriguez v. Nishiki*,[67] in which the Hawaii Supreme Court stated that issues of state of mind are not suitable for summary judgment:

> If there is a factual dispute about defendant's state of mind with regard to actual malice, summary judgment should not be granted . . . . "The proof of 'actual malice' calls a defendant's state of mind into question, and does not readily lend itself to summary disposition."[68]

The court added that "if a statement can be interpreted as having both an innocent and a defamatory meaning, it is within the province of the jury, rather than the trial court in summary judgment, to determine the sense in which it was understood."[69]

In the second case, *Mehau v. Gannett Pacific Corp.*,[70] the court merely quoted the language of *Rodriguez*. In the third case, *Beamer v. Nishiki*,[71] the court expressed a preference for jury access and quoted *Zimring*, a public importance case, as the standard.[72] In a footnote, the court commented that it "searched in vain for a single case upholding summary judgment for a public figure defamation plaintiff.[73]

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[67] 65 Haw. 430, 653 P.2d 1145 (1982). *See generally*, Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 527, 543 P.2d 1356, 1361 (1975); Tagawa v. Maui Publishing Co. (TAGAWA I), 49 Haw. 675, 679, 427 P.2d 79, 82 (1967), *appeal after remand*, 50 Haw. 648, 448 P.2d 337 (1968).

[68] *Rodriguez*, 65 Haw. at 439, 653 P.2d at 1151 (quoting Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979)).

[69] *Id.* at 439, 653 P.2d at 1151. The *Rodriguez* court also stated that in actions involving the alleged defamation of public figures, when "determining whether the moving party is entitled to judgment as a matter of law," the proper burden of proof is "clear and convincing." *Id.* at 439, 653 P.2d at 1150. The court's dedication to sparing use of summary judgments when the issue is defamation and its incorporation of a high burden of proof in the summary judgment calculus make sense only when the movant has the burden of proof at trial. When the moving party is the defendant, requiring the plaintiff to fend off the motion under a burden of "clear and convincing" proof would facilitate rather than discourage summary judgment and the court's position would be a paradox. *Cf.* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

[70] 66 Haw. 133, 145, 658 P.2d 312, 321 (1983).

[71] 66 Haw. 572, 670 P.2d 1264 (1983).

[72] *Id.* at 578, 670 P.2d at 1270-71. The court stated that "the question of the defendant's state of mind is generally a question for the trier of fact." *Id.* at 584, 670 P.2d at 1274. The court also repeated the "clear and convincing proof" language of *Rodriguez*. *Id.* at 582, 670 P.2d at 1272-73. Like *Rodriguez*, this case only makes sense if it is viewed as applicable only to instances in which the movant is asking for summary judgment of an issue he would have the burden of proving clearly and convincingly at trial.

[73] *Id.* at 584 n.9, 670 P.2d at 1274 n.9.

d. Issues of compelling substantive policy

In recent years, the Hawaii courts have occasionally granted summary judgments under less than clear-cut circumstances in a narrow category of cases. In these cases, the courts apparently perceive a need for judges rather than juries to control the expansion of tort law. These cases represent a departure from the basic standard and favor summary judgments. They are connected by a core of common attributes:

1. The plaintiffs rely on the language of existing principles, but seek to have that language apply to a new category of fact situations;
2. The application of existing principles to this new category would significantly expand the scope of current tort law, encouraging a host of previously excluded filings; and
3. The facts in these cases are particularly compelling and a sympathetic jury might stretch existing legal principles to conform to its view of the facts.

One example is *Wolsk v. State*,[74] where the Hawaii Supreme Court affirmed summary judgment in favor of defendant, the State of Hawaii. Plaintiffs asserted that the State breached a duty to provide reasonable security against criminal attacks against tent campers at a State camping park. The State provided facilities, invited campers, and created a park ranger force but failed to undertake any security measures at the particular park despite a significant history of crimes against visitors there and at other nearby parks. Despite apparently conflicting evidence about whether the State had a "special relationship" with the tent campers, the court did not address the issue and affirmed summary judgment on the ground of an absence of duty. One explanation of the court's decision is that a jury award for plaintiffs, a deceased doctor and his seriously injured (hemiplegic) fiancee, would likely have opened the doors to a multitude of claims against the State arising out of crimes at State parks.[75]

Another case in this category is *Feliciano v. Waikiki Deep Water, Inc.*[76] Plaintiff Feliciano filed a dram shop action against a hostess bar, claiming that the bar served him liquor after he was intoxicated. After leaving the bar, Feliciano drove his car and caused an accident rendering himself a quadriplegic. A prior Hawaii case barred such a claim unless Feliciano could show that the bar

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[74] 68 Haw. 299, 711 P.2d 1300 (1986).

[75] *See also*, Moody v. Cawdrey & Assoc., Inc., 68 Haw. 527, 721 P.2d 707 (1986) (The Hawaii Supreme Court reversed the Intermediate Court of Appeals and reinstated defendant condominium's summary judgment regarding criminal assault on condominium owner's guest in the owner's unit); Note, *Wolsk v. State: A Limitation of Governmental Premises Liability*, 9 U. HAW. L. REV. 301 (1987).

[76] 69 Haw. 605, 752 P.2d 1076 (1988).

took "affirmative acts that increase[d] the peril to an intoxicated customer."[77] Feliciano's opposition to the hostess bar's motion for summary judgment established that he was an unsophisticated 19 year old from Waianae who had never been to Waikiki. He did not recall asking for a drink but three hostesses brought him four drinks over a two and a half hour period at a cost of $175.00. He stated that he was intimidated by their aggressiveness and consumed drinks he had not ordered. The Supreme Court affirmed the lower court's summary judgment. It decided that "without more, aggressive sales of drinks at a bar do not constitute affirmative acts that would create liability to the consumer on the part of the bar or tavern."[78] It is not clear that a reasonable jury would have reached the same conclusion. The court, however, declined to allow a jury to expand substantive tort law, declaring as a matter of law that the facts did not satisfy the rather ambiguous legal standard of "affirmative acts."[79]

Cases such as *Wolsk* and *Feliciano*, in which jury access may lead to a marked expansion of tort liability and litigation volume, provide the only detectable exception to Hawaii courts' reluctance to grant summary judgment as reflected in the basic standard. The use of summary judgment in this manner to effectuate substantive policy is appropriate if a court clearly acknowledges its use of the procedural vehicle for that purpose. The court seemed to do this in *Feliciano* but not in *Wolsk*. Somewhat ironically, these cases in which summary judgment disposition is favored tend also to be cases of "public importance," in which summary judgment is to be "sparingly granted."

III. The Federal Summary Judgment Standard

In 1986, the United States Supreme Court significantly changed[80] federal summary judgment doctrine and practice through its decisions in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[81] *Anderson v. Liberty Lobby, Inc.*,[82] and *Celotex Corp. v. Catrett*.[83] These three decisions established a mechanical and substantive framework that encourages litigants and federal judges to use

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[77] *Id.* at 606, 752 P.2d at 1077 (referring to Bertelmann v. Taas Assocs., 69 Haw. 95, 735 P.2d 930 (1987)).

[78] *Id.* at 608, 752 P.2d at 1079.

[79] Our analysis of the court's use of procedure to implement substantive policies is not meant as a critique of the soundness of the policies.

[80] *See* Stemple, *supra* note 13 at 99; Note, *No More Litigation Gambles: Toward a New Summary Judgment*, 28 B.C.L. Rev. 747 (1987).

[81] 475 U.S. 574 (1986).

[82] 477 U.S. 242 (1986).

[83] 477 U.S. 317 (1986).

summary judgment more freely.[84] It is a framework that differs markedly from central aspects of Hawaii's summary judgment approach. Mechanically, this trilogy clarifies the burdens of production of the movant and the respondent. Substantively, these decisions incorporate the standard of proof at trial into the calculus for determining the existence of a genuine issue of material fact at summary judgment and redefine the capacity of motion judges to weigh conflicting evidence and assess the credibility of witnesses. These opinions also enable a judge to grant summary judgment because he or she finds the plaintiff's theory of the case to be implausible.

A. Matsushita v. Zenith

Matsushita was a complex antitrust case brought by American electronics manufacturers against Japanese manufacturers of consumer electronics products (CEPs).[85] Plaintiffs contended that the Japanese manufacturers conspired to drive the American firms from the American CEP market by, in part, maintaining artificially high CEP prices in Japan and artificially low CEP prices in the United States.[86] According to plaintiffs, defendants were able to carry out this price-cutting scheme in the U.S. market over a twenty-year period because of the considerable profits obtained in Japan through their concerted action and the support of the Japanese government.[87]

After years of detailed discovery, the United States District Court for the Eastern District of Pennsylvania granted defendants' motion for summary judgment.[88] First, the district court ruled that the bulk of plaintiffs' evidence was inadmissible.[89] Then, the court found that plaintiffs' claims depended on infer-

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[84] Commentators had been proposing clarification and reform of summary judgment law for years before these decisions were handed down. *See, e.g.*, Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984); Currie, *Thoughts on Directed Verdicts and Summary Judgments*, 45 U. CHI. L. REV. 72 (1977); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974) (Justice Rehnquist cites the Louis and the Currie articles in *Celotex*, 477 U.S. at 324 n.5). Since 1986, many writers have discussed the merits and possible ramifications of this trilogy of cases. *See, e.g.*, Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOKLYN L. REV. 35 (1988); Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change In Standards?*, 63 NOTRE DAME L. REV. 770 (1988); Pierce, *Summary Judgment: A Favored Means of Summarily Resolving Disputes*, 53 BROOKLYN L. REV. 279 (1987).

[85] 475 U.S. 574, 577 (1986).

[86] *Id.* at 577-78.

[87] *Id.* at 580-82.

[88] *Id.* at 578-79. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100 (E.D. Pa. 1981).

[89] 475 U.S. at 578. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp.

ences drawn from defendants' parallel conduct in the Japanese and American markets and the effects of that conduct on the American companies.[90] The district court held that "any inference of conspiracy was unreasonable" because (1) some of the evidence suggested that defendants' conspiracy did not injure plaintiffs, and (2) the evidence of the alleged conspiracy failed to rebut the more plausible inference that defendants were trying to compete in the American market and not attempting to monopolize it.[91]

The Court of Appeals for the Third Circuit reversed,[92] finding that the lower court had erroneously excluded admissible evidence and that "a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors, which conspiracy was funded by excess profits obtained in the Japanese market."[93]

In a five-four decision, the Supreme Court reversed the court of appeals' decision.[94] The Court found that, despite conflicting evidence on material issues, the court of appeals "failed to consider the *absence of a plausible motive* to engage in predatory pricing."[95] In the majority's view, the alleged predatory pricing scheme made "no practical sense."[96] And, when a claim is one that makes no economic sense, plaintiffs must present more persuasive evidence supporting their claim to escape summary judgment.[97] Although the Court remanded for consideration of any other evidence "sufficiently unambiguous" to overcome the Court's conclusion that plaintiff's theory was implausible,[98] the majority's economic analysis signaled the end of this litigation.[99]

Some commentators view *Matsushita*'s impact as limited to antitrust conspiracy cases.[100] The *Matsushita* opinion's broad statements, however, present

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1190 (E.D. Pa. 1980).

[90] 475 U.S. at 579.

[91] *Id.*

[92] In re Japanese Elec. Prods., 723 F.2d 238, 251 (3d Cir. 1983), *rev'd sub nom.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 577 (1986).

[93] 475 U.S. at 581 (discussing the court of appeals decision).

[94] *Id.* at 597-98.

[95] *Id.* at 595 (emphasis added).

[96] *Id.* at 597.

[97] *Id.* at 587.

[98] *Id.* at 597.

[99] *See* In re Japanese Elec. Prods. Antitrust Litig., 807 F.2d 44 (3d Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987) (On remand, the Third Circuit affirmed the trial court's judgment as to all defendants).

[100] *See* Risinger, *supra* note 84, at 36. ("*Matsushita* seemed to be too tied up with narrow constructions of both the substantive law and the standards of proof in the antitrust area to be of general impact."); Stemple, *supra* note 13, at 111 ("Summary judgment was merely the vehicle by which the Court rid the judicial system of an antitrust claim disfavored by five of the Court's members. As to summary judgment doctrine itself, the Court did not make vast doctrinal pronouncements.").

troubling implications for summary judgment doctrine in other types of cases. *Matsushita*'s "implausibility" test has been applied in gender discrimination cases, enabling judges to dismiss a plaintiff's claim as implausible despite reasonable inferences jurors might draw from direct evidence that support the plaintiff's theory.[101]

In addition, as noted by the dissenters,[102] the Court in *Matsushita* simply ignored plaintiffs' expert testimony that contradicted the majority's economic analysis of the case.[103] Instead of allowing a factfinder to determine which economic theory was more plausible, the Court chose to evaluate and discount one side's evidence and then weigh all evidence together as a prelude to finding inadequate support for plaintiffs' theory. Justice White, writing for the dissent, suggested that the majority overturned settled law by allowing a judge who was hearing a defendant's motion for summary judgment to evaluate the evidence and decide whether the weight of the evidence favors the plaintiff.[104]

B. Anderson v. Liberty Lobby

Three months after the *Matsushita* decision, in *Anderson v. Liberty Lobby, Inc.*,[105] the Supreme Court confirmed that it was encouraging broader use of summary judgment to dispose of cases in the federal courts.

The plaintiffs[106] in *Anderson* brought a libel suit against columnist Jack Anderson and The Investigator magazine[107] after the defendants published three articles portraying the plaintiffs as "neo-Nazi, anti-Semitic, racist, and Fascist."[108] The United States District Court for the District of Columbia granted defendants' motion for summary judgment, ruling that plaintiffs were limited-

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[101] *E.g., Beard v. Whitely County REMC*, 840 F.2d 405 (7th Cir. 1988).

[102] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 577, 601-03 (1986)(White, J. dissenting).

[103] Plaintiffs' experts, including Dr. Horace J. DePodwin, Dean of the Graduate School of Business Administration at Rutgers University, Kozo Yamamura, Professor of Economics and Asian Studies at the University of Washington, Gary R. Saxonhouse, Professor of Economics at the University of Michigan, and John O. Haley, Associate Professor of Law at the University of Washington, all agreed that plaintiffs' economic theory of the case was plausible in light of Japanese business and export marketing practices. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp 1100, 1137 (E.D. Pa. 1981).

[104] 475 U.S. at 600-01 (White, J., dissenting).

[105] 477 U.S. 242 (1986).

[106] The plaintiffs in this case are Liberty Lobby, Inc., a not-for-profit corporation and self-described "citizens' lobby" and Willis Carto, its founder and treasurer. *Id.* at 244.

[107] Named defendants were Jack Anderson, publisher of The Investigator, Bill Adkins, president and chief executive officer of Investigator Publishing Co., and Investigator Publishing Co. itself. *Id.* at 245.

[108] *Id.*

purpose public figures and therefore were required to prove their case under the *New York Times Co. v. Sullivan* standards[109] and finding that actual malice was precluded by evidence[110] presented by defendants.[111]

On appeal, the Court of Appeals for the District of Columbia reversed in part,[112] holding that: (1) the evidentiary threshold at trial was irrelevant for summary judgment purposes; (2) summary judgment should be denied whenever " 'a minimum of facts supporting the plaintiff's case' " can be established;[113] and (3) a genuine dispute existed about whether publication was made with reckless disregard of the truth.[114] The Supreme Court vacated the court of appeals' decision, reinstating defendants' summary judgment.[115]

The Court's holding established two significant changes in summary judgment jurisprudence. First, the Court determined that the evidentiary standard of proof at trial[116] (*e.g.*, clear and convincing proof) must be considered in ruling on a motion for summary judgment.[117] "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."[118]

Second, in contrast with the approach of Hawaii courts, the Court stated that a trial judge must "bear in mind the actual quantum and quality of proof necessary to support liability" when inquiring as to the existence of a genuine issue of material fact.[119] And if, for example, "the evidence presented in the opposing affidavits is of insufficient *caliber* or quantity," then no genuine issue of material fact is raised.[120] The majority thus held that the "quantum and quality" of a respondent's evidence must be sufficient to defeat a motion for

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[109] New York Times Co. v. Sullivan, 376 U.S. 254 (1964). This case held that, under the first amendment, a libel plaintiff who is a public official must show, with clear and convincing evidence, that defendant acted with actual malice. *Id.* at 279-80, 285-86.

[110] The district court relied on the affidavit of Charles Bermant, an employee of defendants and the author of two of the three articles. Bermant stated that he obtained information about the plaintiffs from numerous sources and that he believed that the articles were factually accurate. *Anderson*, 477 U.S. at 245.

[111] *Id.* at 246. *See* Liberty Lobby, Inc. v. Anderson, 562 F. Supp. 201 (D.D.C. 1983).

[112] The Court of Appeals for the District of Columbia reversed as to 9 of the 30 allegedly defamatory statements. *Id. See* Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984).

[113] 477 U.S. at 247 (quoting the court of appeals, 746 F.2d at 1570). This "minimum of facts" standard closely resembles the "scintilla of evidence standard" apparently applied by Hawaii courts. *See supra* notes 37-48 and accompanying text.

[114] 477 U.S. at 247.

[115] *Id.* at 257.

[116] In this case, the applicable standard of proof was "clear and convincing" evidence.

[117] *Id.* at 252.

[118] *Id.*

[119] *Id.* at 254.

[120] *Id.* (emphasis added).

directed verdict.[121] In a striking departure from traditional practices, the Court seemed to invite judges to evaluate the credibility of witnesses and the reliability of evidentiary materials. *Anderson* not only puts an increased burden on the respondent to establish that a material factual dispute exists, it also takes great strides toward usurping the jury's role in interpreting conduct and making other fact interpretations.[122]

C. Celotex Corp. v. Catrett

On the same day as the *Anderson* decision, the Supreme Court addressed the procedural mechanics of summary adjudication in *Celotex Corp. v. Catrett*.[123] The plaintiff in *Celotex* alleged that her husband's death resulted from exposure to defendant's asbestos products.[124] In response, plaintiff produced three documents which tended to show that the decedent was exposed to defendant's products.[125] Nevertheless, the district court granted the motion for summary judgment after defendant argued that the documents were inadmissible hearsay and "thus could not be considered in opposition to the summary judgment motion."[126]

The Court of Appeals for the District of Columbia reversed, holding that defendant's motion for summary judgment was "fatally defective" because defendant "made no effort to adduce *any* evidence . . . to support its motion."[127] The court of appeals, relying on *Adickes v. S.H. Kress & Co.*,[128] found

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[121] *Id.* The Court stated:

> [T]his standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.

Id. at 250.

[122] *See* Stemple, *supra* note 13, at 115:

> [T]he Court removed from the jury one of its traditional roles in litigation - to interpret conduct and decide whether it was "reasonable," "negligent," "reckless," "intentional," "indifferent," "fraudulent," "knowingly false," and the myriad of other fact interpretations that have been reserved to the jury, pursuant to the seventh amendment and the traditional federal court practice.

The majority in *Anderson* denied that this was the result: "our holding . . . does not denigrate the role of the jury." *Id.* at 477 U.S. at 255.

[123] 477 U.S. 317 (1986).

[124] *Id.* at 319.

[125] *Id.* at 320. The documents included: (1) a transcript of the decedent's deposition from a workman's compensation hearing; (2) a letter from decedent's former supervisor whom plaintiff intended to call as a witness at trial; and (3) a letter from an insurance company describing asbestos products to which the decedent had been exposed. *Id.* at 335-36 (Brennan, J., dissenting).

[126] *Id.* at 320.

[127] *Id.* at 321 (quoting Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 184 (D.C. Cir.

that summary judgment was inappropriate because defendant had not submitted affirmative evidence in support of its motion.[129]

The Supreme Court unanimously rejected the court of appeals' reading of *Adickes*.[130] The Court found that Rule 56 did not require a defendant-movant to support its motion with specific affirmative evidence negating an element of plaintiff's claim.

Justice Rehnquist's plurality opinion stated that a moving defendant can meet its initial burden of production by merely "pointing to the record" to show that there is an absence of evidence to support the plaintiff's claim.[131] The burden then shifts to the respondent plaintiff who must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admission on file, 'designate 'specific facts showing that there is a genuine issue for trial.' "[132] Because the lower court had inappropriately relied on *Adickes* in construing the defendant-movant's burden of production, and because the defendant had satisfied its burden by simply pointing to a bare record, the Court remanded the case to the court of appeals to address the adequacy of plaintiff's response to defendant's motion.[133]

Justice White concurred with the result but added the cautionary statement that "[i]t is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case."[134]

Justice Brennan's dissent, which purported to agree with the majority's legal framework while disagreeing with its application, drew upon Justice White's reservation with the plurality opinion and artfully restated Justice Rehnquist's procedural analysis in a way that softened its impact on plaintiffs opposing summary judgment.[135] First, Justice Brennan made clear that "[t]he burden of establishing the nonexistence of a 'genuine issue' is on the party moving for summary judgment."[136] This burden has two parts: (1) an initial burden of

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1985) (emphasis in original)).

[128] 398 U.S. 144 (1970).

[129] Catrett v. Johns-Mansville Sales Corp., 756 F.2d at 184.

[130] Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); *id.* at 328 (White, J. concurring); *id.* at 334 (Brennan, J. dissenting).

[131] *Id.* at 325.

[132] 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)).

[133] *Id.* at 327-28. The majority stated, somewhat confusingly, that evidence need not be submitted in admissible form. Under Rule 56(e), a respondent may use the evidentiary materials listed in Rule 56(c) (except the pleadings), including: depositions, answers to interrogatories, admissions on file, and affidavits. Clearly, not all of these materials are in a "form" that would be admissible at trial, but they may be used to support or defeat a motion for summary judgment.

[134] *Id.* at 328.

[135] *Id.* at 329-37.

[136] *Id.* at 330.

production (which we have defined as part of summary judgment mechanics); and (2) an ultimate burden of persuasion (which we have defined as part of the substantive standard).[137] The movant must satisfy its initial burden of producing evidence *before* the burden of production shifts to the respondent and certainly *before* the court needs to decide whether the movant has satisfied its ultimate burden of persuasion.[138]

Next, Brennan described the movant's burden of production as a requirement that the movant "make a *prima facie* showing that it is entitled to summary judgment."[139] If the movant will bear the burden of persuasion at trial, it must demonstrate that it would be entitled to a directed verdict at trial if its evidence were uncontroverted.[140] If the movant will not bear the burden of persuasion at trial, it may satisfy its burden of production in either of two significantly different ways: (1) by submitting "affirmative evidence that negates an essential element of the nonmoving party's claim;" or (2) by demonstrating that the nonmoving party's evidence is "insufficient to establish an essential element" of its claim.[141]

The second option is a departure from prior law, expanding defendants' summary judgment opportunities. It builds on the broad statement in Rehnquist's opinion about simply "pointing to the record," but recasts that statement in a tighter conceptual framework. That option, as recast, enables a defendant-movant to carry its initial burden of production without offering "specific facts" in support of the motion. The defendant, however, must "affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party."[142] This affirmative demonstration may "require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence."[143] A conclusory assertion that there is no evidence will not suffice.[144] Such a " 'burden' of production is no burden at all and would simply permit summary judgment procedure to be

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[137] *Id.*

[138] *Id.* at 330-31.

[139] *Id.* at 331 (quoting 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (1983)).

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* at 332.

[144] *Id.* If there is no evidence at all in the record, and there is no information in the record reasonably likely to lead to admissible evidence, then the movant can affirmatively show the absence of evidence by reviewing the admissions, interrogatories, and other parts of the record for the court. *Id.* The defendant-movant cannot simply file a two page memorandum in support of its motion asserting generally that the discovery record is bereft of admissible evidence in support of plaintiff's claim.

converted into a *tool for harassment.*"[145]

Summary judgment will be denied if the defendant-movant fails this initial burden of production.[146] If the movant's initial burden has been met, then under Rule 56(e) the burden of production shifts to the respondent, who must: (1) locate relevant evidence in the discovery record that has been overlooked;[147] (2) rehabilitate the evidence attacked by the movant;[148] (3) produce specific evidence, not yet in the discovery record, contradicting movant's assertions; or (4) request further discovery as provided in Rule 56(f).[149] Under Rule 56(e), summary judgment will be granted if the respondent fails to respond or if, after the response, the court finds that the movant has met its ultimate burden of persuasion by showing the absence of any genuine issue of material fact for trial.[150]

Celotex, *Anderson*, and *Matsushita* have focused attention onto summary judgment doctrine in the federal courts. The full impact of these decisions may not be apparent for several years. What is apparent is that the revitalization of the summary judgment mechanism is one aspect of systemic efficiency reforms implemented to cope with the perceived increase in, and difficulty of, federal cases and that the revitalization marks a shift in litigation power towards defendants.

IV. Is Hawaii Drifting Toward The Federal Standard?

Several recent Hawaii cases use language indicating allegiance to some aspects of the reformulated federal summary judgment standards without discussion of the competing values of court access and efficiency or other ramifications of the federal trilogy. Without such discussion, we find it difficult to conclude that Hawaii courts have adopted the federal standards. References to *Celotex* and *Anderson*, however, point to the need for full discussion of the issue, lest Hawaii courts adopt federal standards by assimilation or default without consideration of their effects.[151]

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[145] *Id.* (emphasis added).

[146] *Id.*

[147] *Id.*

[148] The nonmoving party must rehabilitate the evidence in the record attacked by the moving party's papers. Presumably, the nonmoving party does this by presenting its own analysis of the evidence contained in the affidavits, depositions, and answers to interrogatories disparaged by the moving party.

[149] 477 U.S. at 332 n. 3. *See also* 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2727, at 138-43 (1983).

[150] *Id.* Justice Brennan's analysis is recast in a detailed framework in Section V, C, *infra*.

[151] Although decided before *Celotex*, the trio of defamation cases surrounding the campaign of Wayne Nishiki seems to lay the foundation for adoption of the federal standard because it ac-

The ICA opinion in *Hall v. State*[152] quoted from *Celotex* and *Anderson* but did not expressly adopt the federal standards.[153] The decision did not acknowledge the dissonance between Hawaii law and the federal trilogy. Indeed, the weight of *Hall*'s reference to *Celotex* and *Anderson* was thrown into question by *Wong v. Panis*,[154] decided by the same court one year later. In *Wong* the court reviewed a grant of a defendant's summary judgment but made no mention of *Hall*, *Celotex* or *Anderson*. It instead relied on *Carrington v. Sears, Roebuck & Co.*[155] which in turn cited *Abraham v. Onorato Garages*,[156] and *McKeague v. Talbert*.[157] *McKeague*, as noted above, conflicts with the federal trilogy and is the leading case for the proposition that Hawaii courts prefer to deny summary judgment motions and to dispose of "undisputed fact" cases via directed verdict after the presentation of evidence at trial.[158]

The Hawaii Supreme Court recently entered the fray with its decision in *First Hawaiian Bank v. Weeks*.[159] The court started its discussion of the movant's substantive burden by citing section 2727 of a treatise by Wright, Miller & Kane[160] for the proposition that the movant "has the burden of demonstrating that there is no genuine issue as to any material fact relative to the claim or defense." The court further stated that the movant "may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent."[161] The court concluded by

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cepts a directed verdict standard at the summary judgment phase. All three decisions contain language to the effect that when the standard used at trial is one of "clear and convincing proof," in order to succeed at summary judgment the plaintiff must have sufficient proof such that a reasonable jury could find the existence of the elements of plaintiff's case with convincing clarity. Rodriguez v. Nishiki, 65 Haw. 430, 439, 653 P.2d 1145, 1151 (1982); Mehau v. Gannett Pac. Corp. 66 Haw. 133, 145, 658 P.2d 312, 314 (1983); Beamer v. Nishiki, 66 Haw. 572, 578, 670 P.2d 1264, 1270 (1983). As discussed above, these cases also state that summary judgment should be granted sparingly and therefore only make sense if the "clear and convincing" burden is imposed solely on a movant who will have that burden at trial. Furthermore, these cases constitute a departure from the basic standard followed by Hawaii courts and arguably apply only to cases in which credibility or state of mind is at issue.

[152] 7 Haw. App. ____, 756 P.2d 1048 (1988).

[153] *Id.* at ____, 756 P.2d at 1055.

[154] 7 Haw. App. ____, 772 P.2d 695 (1989).

[155] 5 Haw. App. 194, 197, 683 P.2d 1220, 1224 (1984).

[156] 50 Haw. 628, 446 P.2d 821 (1968); *see also supra* notes 37-38 and accompanying text.

[157] 3 Haw. App. 646, 658 P.2d 898 (1983); *see also supra* notes 42-46 and accompanying text.

[158] *See supra* notes 42-46 and accompanying text.

[159] 70 Haw. 392, 772 P.2d 1187 (1989).

[160] 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 at 121, 130 (1983).

[161] 70 Haw. at 396, 772 P.2d at 1190 (quoting 10A WRIGHT MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 at 130 (1983)).

citing *Celotex* with a "*cf.*" signal and reciting the *Celotex* proposition that the movant can satisfy its initial burden by merely pointing to the record as devoid of evidence in support of its opponent's claims.[162]

What did the court mean by this reference to the treatise and to *Celotex*? The ICA had cited section 2727 of the Wright, Miller & Kane treatise in past cases that retained the traditional Hawaii law perspective on the substantive standard for summary judgment.[163] The court thus may have intended this quotation to demonstrate its continued allegiance to the idea that summary judgment should be granted sparingly. In *Waimea Falls Park, Inc. v. Brown*, the ICA cited the same section 2727 for the proposition that "if the movant, by uncontroverted affidavits or by using any of the other materials specified in the rule, completely explores and establishes the facts, he may be able to demonstrate the absence of any genuine issue of fact."[164] This language requires more of the movant than merely pointing to the record and asserting an absence of evidence, which seems to be permitted by the Rehnquist approach in *Celotex*. Thus, the court's "*cf.*" reference to *Celotex* in *First Hawaiian Bank* is arguably a statement by the court that it recognizes the existence of *Celotex* but has not adopted it — an invitation to its readers to compare the Hawaii standard and the *Celotex* standard.[165]

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[162] The actual language of the court is as follows:

> *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986) (One moving for summary judgment under Fed. R. Civ. P. 56 need not support his motion with affidavits or similar materials that negate his opponent's claims, but need only point out to the district court that there is an absence of evidence to support the opponent's claims). For "[i]f no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless . . . ." 10A WRIGHT, MILLER & KANE, *supra*, at 130.

First Hawaiian Bank v. Weeks, 70 Haw. at 397, 772 P.2d at 1190.

[163] Arimizu v. Financial Sec. Ins. Co., 5 Haw. App. 106, 679 P.2d 627 (1984); Jacoby v. Kaiser Found. Hosp., 1 Haw. App. 519, 622 P.2d 613 (1981).

[164] 6 Haw. App. 83, 92, 712 P.2d 1136, 1142-43 (1985).

[165] However, this view is arguably not in strict accord with the bluebook treatment of the "*cf.*" signal. The bluebook discussion of the "*cf.*" signal appears under the heading "[s]ignals that indicate support" and is described as meaning that the "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support." *A Uniform System of Citation*, Rule 2.2(a) (14th ed. 1986) (The definition goes on to state that "[l]iterally, '*cf.*' means 'compare.' " *Id.* This provides further support for the argument that the court was inviting a comparison and calling attention to the differences between Hawaii and federal court practices.) Thus, the court's statement arguably means that the federal practice of allowing the movant to meet its initial burden by merely pointing to the record is different from the Hawaii practice but is sufficiently analogous to lend support. What does this say about the Hawaii practice? The bluebook definition of the "*cf.*" signal is reconcilable with the argument of the preceding paragraph if the similarity between the Hawaii and federal practices is that movant has the initial burden of demonstrating to the court the absence of any genuine issue of material fact, and the difference between them is the degree of affirmative action required of the movant to meet this burden.

V. AT THE CROSSROADS

The Hawaii courts can move in one of three directions: (1) they can continue Hawaii's traditional and somewhat murky approach to summary judgment; (2) they can adopt the federal trilogy, significantly reformulating summary judgment mechanics and the summary judgment standard; or (3) they can attempt to navigate a middle course, perhaps by incorporating Hawaii's substantive values into an improved mechanical framework. Each of these options has merit, each has drawbacks. A productive analysis must consider both mechanical and substantive aspects of these choices in light of the underlying values affected by the various applications of summary judgment doctrine.

A. Maintaining the Status Quo

The first option is to maintain the status quo. Hawaii's current summary judgment law, however, provides little practical guidance beyond the language of Rule 56 itself. Mechanical aspects of the rule have been occasionally elucidated, only to be ignored in subsequent cases.[166] No clear statement has been offered on the defendant-movant's options in discharging its initial burden of producing evidence. Without clearer guideposts, summary judgment mechanics will continue to be characterized by unpredictability.

Hawaii's substantive summary judgment standard is even hazier.[167] Some cases appear to adopt a "scintilla of the evidence" standard, which suggests focus on a search of respondent's evidence for something to raise the "slightest doubt" in the mind of the judge about whether movant should prevail. Other cases speak of a directed verdict standard, which suggests consideration of evidence of both movant and respondent and a prediction of how reasonable jurors would rule. In addition, special classes of cases exist in which summary judgment is to be even more reluctantly granted on the one hand, or more readily granted on the other. The precedential value of any case is unpredictable because the decisions have not been consistently followed.

In spite of the ambiguities in *Weeks*, at a recent Hawaii Institute for Continuing Legal Education (HICLE) meeting, Justice Padgett of the Hawaii Supreme Court and Judge Burns of the ICA both stated, without hesitation, that the federal standard has not been adopted in Hawaii. Justice Padgett also said that if there is the "slightest doubt" as to the existence of a genuine issue of material fact, then summary judgment should not be granted. He stressed that summary judgment should not be used as a method of calendar control and that, in his opinion, too many summary judgments were being granted. Frank D. Padgett and James S. Burns, Remarks at HICLE meeting, Motions and Appeals: The Art of Oral and Written Advocacy (February 3, 1990).

[166] *See supra* text accompanying notes 16-36.

[167] *See supra* notes 37-79.

There is, however, a salutary aspect to Hawaii summary judgment history. The most consistent themes in Hawaii summary judgment cases are jury access and public trials. This has led to a general reluctance to grant summary judgment and has created a process of litigation fully accessible to all with at least colorable positions. There is, in turn, a troublesome aspect to this ease of access. Hawaii courts, in their opinions, have not addressed the concerns reflected in the federal trilogy. These concerns are the added administrative burdens on courts, the unnecessary costs to litigants and the distortion of settlement leverage created by the failure of Rule 56 to terminate cases without material facts in controversy.

B. Embracing the Federal Standard

The second option is to embrace federal standards. To review this option we have placed federal standards into two categories: first, the *Celotex* trilogy (divided into "burdens of production" and the "substantive standard"); and second, the proposed amendments to the text of Federal Rule 56.

1. The Celotex *trilogy*

a. Burdens of producing evidence on the motion

Recent references to *Celotex* and *Anderson*[168] in Hawaii appellate court opinions have fueled speculation that Hawaii may adopt the reformed federal summary judgment standards enunciated in the *Celotex* trilogy.[169] One laudable feature of federal summary judgment reform is its introduction of a mechanical framework to guide judges and litigants through the procedural maze of Rule 56. A similar framework of burdens of producing evidence, adopted by Hawaii courts, might assist motion judges and attorneys in the orderly presentation and assessment of summary judgment motions. It might deter the filing of some motions. It would probably allow judges to grant a somewhat higher percentage of defendant summary judgments. It might also enable litigants to consider summary judgment dispositions as part of their overall litigation strategy. Of course these projected "effects" might be perceived as benefits by some and detriments by others. They are also speculative. Part of the difficulty of prediction, and part of the difficulty of deciding whether to adopt *Celotex*, results from the divergent views expressed within *Celotex* itself.

Where the movant bears the burden of persuasion at trial (usually a plain-

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[168] *See supra* text accompanying notes 152-164.

[169] FRCP Rule 56 decisions by federal courts, of course, do not control the interpretation of HRCP 56 unless Hawaii courts adopt the approach of the federal courts.

tiff's motion), the application of the *Celotex* framework is well understood and the justices are in agreement. For example, if a plaintiff asserting a negligence claim moves for summary judgment, it must produce specific evidence establishing duty, breach, proximate cause and damages. If plaintiff does this, the defendant must respond by discrediting plaintiff's evidence, rehabilitating any evidence in the discovery record that plaintiff has disparaged, or producing new specific evidence contradicting plaintiff's evidence.

However, where the movant will not bear the burden of persuasion at trial (usually a defendant's motion), the justices appear to disagree on significant aspects of the framework. The question raised by their disagreement is whether the defendant-movant really bears any burden at all. Justice Rehnquist's plurality opinion suggests that the answer is no.[170] The movant needs only to point to the discovery record and declare it bereft of evidence. In contrast, Justice White's concurrence and Justice Brennan's dissent indicate that an equal number of justices believe that a moving defendant must bear a meaningful burden of production before the responding plaintiff is compelled to fully assemble and present its case.[171]

The uncertainty generated by these conflicting approaches presents a daunting problem for plaintiffs. *Celotex* does not provide a plaintiff with a mechanism for challenging a defendant-movant's failure to meet its initial burden, short of the plaintiffs presenting its entire case. Even if a plaintiff believes that a defendant's motion simply "pointing to the record" is ill-conceived under the Brennan formulation, it knows the motion may be adequate under the Rehnquist formulation. The plaintiff must present its affirmative evidence in response. The risk is too high to do otherwise. If the plaintiff chooses not to present its affirmative case, and is wrong about defendant's satisfaction of its minimal burden, plaintiff will lose the summary judgment motion. Thus, as long as the Rehnquist approach in *Celotex* survives, a defendant can compel a plaintiff to disclose its entire affirmative case simply by filing a bare summary judgment motion. This creates the specter of summary judgment "harassment" identified by Brennan.[172]

This potential unfairness to plaintiffs would be exacerbated in Hawaii. In *Munoz v. Yuen*,[173] the Hawaii Supreme Court held that appellate courts are to consider only the evidence presented to the lower court at the time the summary judgment motion was supported or opposed. Therefore, a plaintiff who does not fully present its case in response to a defendant's summary judgment

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[170] *See supra* text accompanying notes 131-133.

[171] Justice Stevens dissented on other grounds, never reaching the question of what is the moving party's initial burden of production. Celotex Corp. v. Catrett, 477 U.S. 317, 337-39 (1986) (Stevens, J. dissenting).

[172] *Id.* at 332. *See supra* note 143 and accompanying text.

[173] 66 Haw. 603, 670 P.2d 825 (1983). *See supra* text accompanying note 33.

motion (which under *Celotex* need not be supported by any evidence) not only risks losing the motion, it also risks losing the opportunity for meaningful review of all of its evidence.

Accepting the Rehnquist approach in Hawaii would probably create insurmountable problems of unfairness. Defendant summary judgment motions would likely be transformed into a strategic discovery tool unavailable to plaintiffs.

Justice Brennan's approach, however, has considerably more potential. If thoughtfully executed, this procedural framework[174] could further the quest "to secure the just, speedy and inexpensive determination" of civil litigation.[175] First, instead of allowing the defendant simply to "point to the record," the movant-defendant is required affirmatively to show that an essential element of plaintiff's case is unsupported by discovered evidence. The movant must identify the unsupported element and explain how the record fails to demonstrate even *prima facie* support of that element. If, as in *Celotex*,[176] the record contains inadmissible evidence that might lead to admissible evidence on point, the defendant must reasonably pursue that lead. If the plaintiff believes the motion is premature, the court is encouraged to carefully and seriously consider allowing additional time for discovery under Rule 56(f). Through this mechanism, a court could prevent a defendant from forcing a plaintiff to prematurely bear the cost and bother of assembling the entire case. The liberal use of Rule 56(f) as an integral part of the summary judgment process could prevent misuse of the relatively inexpensive and easy motion for summary judgment by defendants.

Additionally, where the plaintiff has had ample and unobstructed opportunity to build its case, the framework reasonably expects plaintiff to be able to make at least a *prima facie* showing of each element of its claim. The defendant and court should be able to avoid a costly trial if the plaintiff cannot muster minimally reasonable support shortly before trial. The plaintiff may in fact benefit from the process of compilation and self-examination at this point. Settlement possibilities may be enhanced. Properly executed, this framework provides a measure of predictability, safeguards against the imbalanced distribution of litigation power, and promotes efficiency for litigants and the court system.[177]

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[174] *See infra* note 195 and accompanying text.

[175] Fed. R. Civ. P. 1. Rule 1 indicates that the federal rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Streamlining the summary judgment process undoubtedly furthers the goals of speedy and inexpensive determination, but justice must remain the first consideration.

[176] *See supra* note 125 and accompanying text.

[177] *Cf.* Schwarzer, *supra* note 84. While arguing for greater use of summary judgment to further efficiency and economy in the federal courts, Judge Schwarzer recognized that the reservations about summary judgment were not without foundation and that "supposed shortcuts [may] be costly and time-consuming when not well managed." 99 F.R.D. at 467.

b. Burden of persuasion on the motion: the substantive standard

Within the mechanical framework, a judge must also apply the substantive summary judgment standard. *Anderson*[178] and *Matsushita*[179] indicate that the applicable federal standard mirrors the directed verdict standard and incorporates the evidentiary standard of proof at trial — either "a preponderance of the evidence" or "clear and convincing evidence."

The use of this aspect of the directed verdict standard at summary judgment is appealing for two reasons. First, both judges and litigants are familiar with these standards. Second, these standards would allow efficient disposition of claims that would not get to the jury at trial. More summary judgment motions are likely to be granted under this standard because responding plaintiffs would have to show more than a scintilla of evidence to fend off summary judgment. A responding plaintiff would need to present enough of its case to convince the court that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[180]

The problem with the 1986 federal trilogy is that it goes beyond merely incorporating the quantitative level of proof at trial into the substantive summary judgment standard. *Anderson* directs the lower courts to evaluate the "caliber and quality" of evidence as well as the "quantum"[181] of proof. This is a major drawback to the substantive standard proffered by these cases. The motions judge is invited to evaluate the quality of the paper evidence without allowing the parties to develop fully the evidence and the credibility of witnesses through the trial process. This may transform a summary judgment motion into a "full blown paper trial on the merits."[182]

This troubling invasion of the jury's province is also seen in *Matsushita* where the Supreme Court appears to "undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment."[183] Judicial weighing of evidence facilitates speedier, cheaper resolution of claims, but at a price. Plaintiffs with novel economic or legal theories may never get a public airing. Litigants may not be able to fully develop the

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[178] *See supra* text accompanying notes 105-122.

[179] *See supra* text accompanying notes 85-104.

[180] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

[181] *Id.* at 254; *see also* 477 U.S. at 266 (Brennan, J., dissenting).

[182] *Id.*

[183] 475 U.S. 574, 600-01 (White, J. dissenting). The *Matsushita* majority stated that if "the respondents' claim [is] 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." *Id.* at 587. The Court invited judges to evaluate the plaintiffs' theory of recovery to determine the adequacy of the underlying facts to defeat summary judgment, rather than view the facts in the most favorable light to the party opposing the summary judgment.

testimony of hostile or uncooperative witnesses. And, the impartiality of the judge may be called into question. The price exacted by the judicial weighing of evidence on the summary judgment motion is a price Hawaii courts historically have been unwilling to pay.[184]

The *Celotex* trilogy thus offers some summary judgment changes that are advantageous and others that are problematic. In a later section, discussing the "Middle Ground" option, we have extracted the beneficial changes and incorporated them into a recommended framework.

2. *Proposed Amendments to FRCP 56*

The Advisory Committee to the Civil Rules has proposed a major restructuring of Rule 56.[185] The proposed changes reflect the efficiency values expressed in the 1986 trilogy. However, as currently drafted, the text and commentary appear to go even farther, shifting the balance of power significantly toward defendant-movants. Martin Louis, who has argued since 1974 that the defendant-movant's burden should be lightened, calls the proposed modifications "unabashedly pro-defendant."[186] At a recent meeting, Professor Louis stated, "At a time when in my opinion it is time to apply the brakes and steer for the middle of the highway, [the advisory] committee still has its pedal to the metal and very strongly."[187]

A detailed discussion of the proposed changes to Rule 56 is beyond the scope of this article. In brief, the rule is substantially rewritten. One important change provides for the summary establishment of fact or law, either on motion or at a pretrial conference.[188] Also, summary judgment may be entered upon motion or, significantly, at pretrial conference on the basis of "facts stipulated or summarily established or establishable as a matter of law."[189] Another change, important to this discussion, is the elimination of Rule 56(f) and the replacement with the "new" Rule 56(d) which states that "summary judgment shall [not]

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[184] *See supra* text accompanying notes 41-47.

[185] Advisory Committee on Civil Rules, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure*, 105-20 (September 1989).

[186] M. Louis, Remarks at the 1990 Annual Conference of the Association of American Law Schools at San Francisco, California: Civil Procedure Section Program (January 4-7, 1990) (Tape 71 produced by Recorded Resources Corp., 1468 Crofton Parkway, Crofton, MD 21114). Louis's seminal article, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974), is often credited with starting the movement toward federal summary judgment law reform.

[187] M. Louis, Remarks *supra* note 186.

[188] Proposed Rule 56(a)(1), Advisory Committee on Civil Rules, *supra* note 185, at 105-06.

[189] Proposed Rule 56(b)(1), Advisory Committee on Civil Rules, *supra* note 185, at 107-08.

be rendered . . . nor shall any fact be summarily established, until any opposing parties have had a reasonable time to discover evidence bearing on any fact sought to be established."[190] The advisory committee notes state that the new rule limits the discretion of the district court to withhold the opportunity for discovery.[191] Despite these assurances, there is no specified time period in the new Rule 56(d) in which a party can exercise its "reasonable opportunity" to use discovery.[192]

The overhaul of Rule 56 inevitably would create a new era of uncertainty for summary judgment law in the federal courts. It is unclear what impact the amended rule would have on existing federal case law and what response the new rule would elicit from federal judges. In light of the ever-changing face of federal summary judgment doctrine, Hawaii courts should move with extreme caution, if at all, toward the wholesale adoption of the current, or future, federal summary judgment standards.

C. *Towards a Middle Ground: Procedural Clarity and Substantive Integrity*

The summary judgment mechanics of the *Celotex* trilogy articulated in Justice Brennan's opinion in *Celotex* would provide Hawaii with clear guidelines for the marshalling of evidence and a well-balanced scheme that protects the interests of both plaintiffs and defendants.[193] The Hawaii Supreme Court began the process in *Mossman* nearly 30 years ago and the ICA contributed significantly in *Arimizu* in 1984;[194] now, the Hawaii courts should seize the opportunity to finish building a mechanical framework for Hawaii summary judgment law. The framework we suggest, drawn primarily from Justice Brennan's "clarification" of the plurality's general statements in *Celotex*,[195] is summarized below:

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[190] Proposed Rule 56(d), Advisory Committee on Civil Rules, *supra* note 185, at 112.

[191] Advisory Committee Notes, Advisory Committee on Civil Rules, *supra* note 185, at 119-20.

[192] Although the proposed Rule 56(d) does not include any specific time frame, the advisory committee notes indicate that a party would have a right to at least 30 days to oppose a proposed determination. This is the time allotted under the proposed Rule 56(b)(2)(B). However, it is interesting to note that a court may, for good cause, shorten or extend the 30 days under the proposed Rule 56(b)(2)(B). Advisory Committee on Civil Rules, *supra* note 185 at 108, 120.

[193] *See supra* text accompanying notes 169-177.

[194] *See supra* text accompanying notes 16-36.

[195] Celotex Corp. v. Catrett, 477 U.S. 317, 329-32 (1986); *see supra* text accompanying notes 135-145. We offer this summary based on Justice Brennan's framework for two reasons. First, it is based on a far more sophisticated analysis of summary judgment mechanics than the general statements of the plurality opinion. Second, it seems to balance better the interests of plaintiffs and defendants than does the plurality opinion. This is discussed *supra* notes 169-177 and accompanying text.

1. When the burden of persuasion at trial rests with the movant (generally, a plaintiff's motion for summary judgment):
   a. Movant has the initial burden of producing enough specific evidence to make a *prima facie* showing on each element of its claim;
   b. If, and only if, the movant's initial burden is met, the respondent must (1) attack and discredit the evidence proffered by the movant, (2) rehabilitate the evidence in the discovery record attacked by the movant, or (3) produce specific evidence not yet in the discovery record that contradicts movant's evidence; or the respondent may request a continuance on the motion under Rule 56(f) to conduct further discovery;
   c. If both parties meet their burdens of production, then movant has the ultimate burden of persuading the court that there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law.

2. When the burden of persuasion at trial rests with the respondent (generally, a defendant's motion for summary judgment):
   a. Movant has the initial burden of either (1) producing specific evidence that negates an essential element of the respondent's claim, or (2) affirmatively demonstrating the absence of evidence in the record supporting an essential element of the respondent's claim;
   b. (1) If the movant's initial burden is met by producing specific evidence negating an essential element of the respondent's claim, the respondent can then satisfy its burden of production in the manner set forth in 1(b) above;

      (2) BUT if the movant's initial burden is met by affirmatively demonstrating the *absence* of acceptable record evidence supporting an essential element of the respondent's claim, the respondent may (a) rehabilitate record evidence attacked by the movant, (b) produce specific evidence not yet in the discovery record supporting respondent's claim, or (c) refer to evidence already in the record or suggested by the record that has been overlooked by the movant; or the respondent may request continuance on the motion under Rule 56(f) to conduct further discovery;
   c. If both parties meet their burdens of production, then movant has the ultimate burden of persuading the court that there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law.

The strong middle ground embodied in this framework has a number of attributes. First, it spells out the moving party's (especially the defendant-movant's) initial burden of production options under HRCP 56(e). The defendant can support its motion with specific evidence or it can show that the record is bereft of evidence supporting plaintiff's claim. As to the second option, Justice Rehnquist's vague direction allowing defendant simply to "point to the rec-

ord"[196] is avoided. Instead, the defendant-movant is instructed to "affirmatively demonstrate" the absence of support for plaintiff's claim by summarizing and analyzing the evidence (that may bear on the challenged elements of the claim) contained in the discovery record.[197] This may require the movant to pursue reasonable leads to evidence that appear in the record.

Second, the framework recognizes the utility of Rule 56(f) continuances to allow for further discovery if a defendant prematurely files a motion relying upon the second option. It also recognizes Rule 56(f) as a possible mechanism for challenging defendant's failure to carry its initial burden when it points conclusorily to the record and asserts plaintiff's lack of evidence.[198] By making a Rule 56(f) request, the plaintiff is asking the court to halt the summary judgment process because it is premature to require plaintiff to respond. Although the provision is usually applied when plaintiff has had inadequate time for discovery, it could be applied more expansively to enable the plaintiff to assert the prematurity of his response in light of defendant's failure to discharge its burden of production by inadequately "pointing" to the discovery record. These aspects of the suggested framework ease the defendant's initial burden of producing evidence, but also prevent the defendant from using the motion for summary judgment as a tool for harassment or easy discovery.[199]

Third, the framework explains the point at which the burden of production shifts from movant to the respondent. It also sets forth in detail the varying ways in which the respondent can satisfy its burden of production. These are three significant attributes of a mechanical framework that endeavors to balance the interests of plaintiffs and defendants and accommodate underlying value tensions between efficiency and access.

Even if the suggested mechanical framework is embraced, however, we believe that Hawaii courts should part ways with the *Celotex* trilogy on the substantive standard for summary judgment. The substantive standard espoused by the Supreme Court in *Anderson* and *Matsushita* encourages the motions judge to evaluate the quality of evidence presented and weigh conflicting evidence as a fact-finder without the benefit of trial.[200] This is repugnant to the values Ha-

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[196] *See supra* text accompanying note 41.

[197] *See supra* text accompanying notes 135-145 (Justice Brennan's explanation of the moving party's initial burden of production).

[198] *See supra* note 173 and accompanying text.

[199] In part because Hawaii has yet to adopt a penalty comparable to FRCP 11, there is little incentive to avoid use of summary judgment as inexpensive and efficient discovery. The adoption of a Rule 11 identical to FRCP 11 is now being considered by the Hawaii Supreme Court. A significant penalty for the frivolous filing of a motion for summary judgment would deter the use of this motion as a harassment tool. Therefore, Hawaii courts could ease the defendant's initial burden of production, making summary judgment more readily available in appropriate cases, and avoid potential abuses.

[200] *See supra* notes 85-122 and 178-184 and accompanying text.

waii courts have consistently placed on access to the trial process.

We suggest, however, that Hawaii courts could incorporate the "level of proof at trial" (*e.g.*, preponderance of the evidence) into the summary judgment consideration without offending Hawaii's high regard for fairness (through jury access), provided that courts do so with appropriate safeguards. In many cases, a plaintiff can at least raise the "slightest doubt" that defendant is entitled to prevail. The current Hawaii summary judgment standard allows a plaintiff to proceed to trial even without evidence remotely resembling a *prima facie* case. Once a plaintiff has had an opportunity to make full discovery, defendants and the court ought to be saved the expense and burden of a full trial if the plaintiff still cannot muster a credible case. Incorporating the level of proof at trial into the summary judgment standard would accomplish this. After adequate time for full discovery, without evaluating the quality of the evidence, and viewing the evidence in a light most favorable to the respondent, the court would ask: can a reasonable jury find for the respondent by a preponderance of the evidence? If the answer is no, the court would grant the motion. Nevertheless, safeguards are necessary. In circumstances involving hostile witnesses who are uncooperative or defendants who are obstructionist throughout discovery, the motions judge would need to consider plaintiff's difficulties in obtaining evidence in determining whether plaintiff has presented a *prima facie* case.

Finally, as a matter of explicit policy, and in recognition of the added value of public trials and jury access in certain circumstances, the Hawaii courts could maintain the "slightest doubt" standard in cases involving issues of public importance,[201] issues of negligence,[202] and issues of credibility or state of mind.[203]

These flexible standards would allow wider use of summary judgment to be used more widely without compromising the underlying values that have concerned Hawaii courts in the past. They would provide enhanced clarity and predictability for litigants and motions judges. And, they would allow each procedural step of the summary judgment process to be evaluated in light of a substantive standard that takes appropriate notice of the competing goals of our adjudicatory system.

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[201] *See supra* text accompanying notes 49-59.

[202] *See supra* text accompanying notes 60-64.

[203] *See supra* text accompanying notes 65-73.