Motions for Summary Judgment in State Court Actions

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Until a few years ago, New Jersey's standard for summary judgment was governed by *Judson v. Peoples Bank & Trust Company of Westfield.*[1] In 1995, the standard was refined by the New Jersey Supreme Court's decision in *Brill v. Guardian Life Insurance Company of America.*[2] There, the Court essentially adopted the federal standard[3] set forth in the 1986 United States Supreme Court trilogy of *Anderson v. Liberty Lobby, Inc.*,[4] *Celotex Corp. v. Catrett*[5] and *Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio Corporation.*[6] The refined standard is identical to the standard applied to motions for involuntary dismissal or judgment as a matter of law.[7]

Lawyers who do not practice in federal court may not be familiar with the federal standard governing motions for summary judgment. Moreover, lawyers having limited trial experience may not be familiar with the standard governing motions for involuntary dismissal or judgment as a matter of law. As a result, it is critical for lawyers involved in litigated matters to carefully review and understand the new summary judgment standard enunciated in *Brill.*

This article will discuss the *Judson* and *Brill* decisions as well as the federal decisions of *Liberty Lobby, Celotex* and *Matsushita.* It will explain the burdens of both the moving party and non-moving party (also called the opposing or adverse party) as well as the court's function in considering such motions, including the "weighing" of the evidence. Finally, it will also explain such terms as genuine issue of material fact, legitimate or reasonable inferences, credibility of the evidence and the effect of the evidentiary standard to be used at trial.

All of the foregoing terms are factors considered in motions for summary judgment. It is difficult to discuss each factor separately since they are inextricably intertwined within the summary judgment standard. Nevertheless, an examination of each factor should lead to a better understanding of these often misunderstood concepts.

Purpose of the Summary Judgment Procedure

First, it should be noted that the summary judgment procedure "is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits ... clearly shows not to present any genuine issue of material fact requiring disposition at trial."[8]

The Supreme Court has noted the conflicting principles of affording a litigant with bona fide claims or defenses the opportunity to fully present his or her case at trial versus protecting a litigant against groundless claims and frivolous defenses. Nevertheless, the Court determined that "[w]here ... a *prima facie* right to summary judgment exists, neither principle is sacrificed" in requiring the non-moving party to demonstrate the existence of a genuine issue of material fact which requires resolution by a factfinder.[9]

In *Brill,* the Supreme Court clearly stated that "[t]he thrust of today's decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves."[10]

Moving Party's Burden

Rule 4:46-2(c) provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."[11]

In *Judson*, the Court stated that the moving party has "the burden of showing clearly the absence of a genuine issue of material fact."[12] This required the moving party to "exclude any reasonable doubt[13] as to the existence of any genuine issue of material fact ...."[14]

In *Brill*, the Court refined this standard by allowing the court to weigh the competent evidentiary materials, in light of the evidentiary standard of proof to be used at trial, to determine whether there is a genuine issue of material fact.[15] In essence, the moving party is required to show that there is no genuine issue of material fact to be resolved by a factfinder because the evidence is so one-sided that a rational factfinder could not decide the issue in favor of the opposing party.[16] A moving party does so by "informing the [trial] court of the basis for its motion, and identifying those portions of [the record] which [the moving party] believes

demonstrate the absence of a genuine issue of material fact."[17]

When is a Fact Material?

Only "genuine issues" about "material facts" are important when considering motions for summary judgment. Thus, it is critical to know which facts are material and how to identify whether there is a genuine issue, *i.e.*, dispute, about such facts.

The substantive law identifies the facts that are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."[18] In general, facts supporting or contradicting a cause of action or defense are considered material.[19]

Opposing Party's Burden

It is the non-moving party that has the burden of presenting evidence to demonstrate the existence of a genuine issue of *material* fact. "[A] non-moving party cannot defeat a motion for summary judgment merely by pointing to *any* fact in dispute."[20] In other words, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."[21]

The opposing party must do more than merely point to "facts which are immaterial or of an insubstantial nature, a mere scintilla [of evidence, or] 'fanciful, frivolous, gauzy or merely suspicious.'"[22] Further, the opposing party cannot merely "rais[e] a misguided subjective belief, without more, to create the existence of a genuine issue of material fact."[23]

Furthermore, the opposing party "may not rest upon the mere allegations or denials of the pleadings, but must respond by ... *setting forth specific facts* showing that there is a genuine issue for trial."[24] Likewise, he or she "must do more than simply show that there is some metaphysical doubt as to the material facts. ... [T]he nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*'"[25]

"If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."[26] Moreover, if the non-moving party fails to come forward with evidence creating a genuine issue of material fact, then the court "tak[es] as true the statement of uncontradicted facts in the papers relied upon by the moving party, [unless] such papers themselves ... show[] the existence of [a genuine] issue of material fact."[27]

When is There a Genuine Issue About a Material Fact?

The crux of a motion for summary judgment is whether an issue or dispute over a material fact is "genuine." The court rules provide that "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact."[28]

Brill explained that a genuine dispute exists when "'the evidence presents a sufficient disagreement to require submission to a jury [but that there is no genuine dispute when the evidence] is so one-sided that one party must prevail as a matter of law.'"[29] Thus, if "the competent evidential materials presented[30] ... are sufficient to permit a rational factfinder to resolve the alleged disputed issue [of material fact] in favor of the non-moving party," then summary judgment must be denied.[31] But "[i]f there exists a single, unavoidable resolution of the alleged disputed issue of [material] fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact...."[32]

"The import of [the *Brill*] holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment."[33]

The Court's Function

The court's function is to determine whether there is a genuine issue of material fact requiring a trial.[34] It does not, however, decide the genuine issue of material fact.[35] In other words, it does not "weigh the evidence and determine the truth of the matter."[36] Rather, the court must only "determin[e] whether there is the need for a trial —whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[37]

The United States Supreme Court has described the court's function as follows:

> [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side to the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the [opposing party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [opposing party].[38]

"[T]he standards are to be applied with discriminating care so as not to defeat a summary judgment if the movant is justly entitled to one."[39] As a result, "[t]he papers supporting the motion are closely scrutinized and the opposing papers indulgently treated."[40]

When a court grants summary judgment, it is saying that based on the evidence presented there is no genuine issue of material fact to be decided by a jury. "A jury resolves factual, not legal, disputes. If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party on the issue of liability or damages or both."[41]

Some 40 years ago, the Supreme Court explained the foregoing principle in an opinion involving an involuntary dismissal:

> [W]e require the determination by the jury only of the existence or nonexistence of those facts in issue as to which the minds of reasonable men might differ in the application of their mental processes to the evidence. Therefore, when the proof of a particular fact is so meager or so fraught with doubt that a reasonably intelligent mind could come to no conclusion but that the fact did not exist there is no question for the jury to decide. Likewise, when the proof on a question of fact is so strong as to admit of no reasonable doubt as to its existence, again, there is no question for the jury to decide.[42]

Therefore, it can be said that a genuine issue of material fact requiring resolution by a trier of fact exists only when "men of reason and fairness may entertain differing views as to the truth of [the evidence], whether it be uncontradicted, uncontroverted or even undisputed."[43] Otherwise, a question of law is presented for the court.[44]

"Weighing" of the Evidence

In *Brill,* it was held that when considering a motion for summary judgment, the court must engage in: a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials. This process, however, is not the same kind of weighing that a factfinder (judge or jury) engages in when assessing the preponderance or credibility of evidence. On a motion for summary judgment the court must grant all favorable inferences to the non-movant. But the ultimate factfinder may pick and choose inferences from the evidence to the extent that a "miscarriage of justice under the law" is not created.[45]

This is the same type of weighing "as required by Rule 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial."[46] The standard required under Rule 4:37-2(b) (involuntary dismissal), as well as under Rule 4:40-1 (judgment as a matter of law), was set forth by the Supreme Court in *Dolson v. Anastasia*[47] as follows:

> [W]hether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in ... favor" of the party opposing the motion, *i.e.*, if, accepting as true all the evidence which supports the position of the party defending against the motion and according him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied ... [48]

In a decision involving a motion for an involuntary dismissal, the Appellate Division, citing *Brill,* noted:

> In determining whether reasonable minds could differ, the judge weighs the evidence, but only in order to decide whether the evidence presents a "significant disagreement," in which case the issue must be submitted to the jury; absent such a disagreement, the judge may decide that the evidence "is so one-sided that one party must prevail as a matter of law.[49]

The foregoing principles concerning the court's function in "weighing" the evidence to determine whether there is a genuine issue of material fact may be illustrated by an example involving whether a stoplight was red or green when the defendant drove through the intersection.[50] The court, in deciding a motion for summary judgment, does not decide whether the light was red or green. Rather, it determines whether the competent evidential materials reveal a disputed factual issue material enough to require resolution by a finder of fact.

For example, if the defendant states in an affidavit that the light was green, but an eyewitness testifies at a deposition that the light was red, then there is enough evidence on both sides of the issue creating a genuine issue of material fact to be decided by a finder of fact. The court could not determine whether the light was red or green without either improperly weighing the evidence or deeming one witness more credible than the other.[51]

However, if accurate videotape evidence reveals and numerous disinterested eyewitnesses say that the defendant had the green light, then there is no genuine issue of material fact requiring resolution by a finder of fact. Rather, the evidence is so one-sided or overwhelming in support of one party that the issue does not have to be resolved by a finder of fact. The court may grant summary judgment in favor of the defendant. In such a case, the court neither improperly weighs the evidence nor assesses the credibility of the witnesses. Rather, it determines that there would be no significant disagreement about the material fact; that is, reasonable minds could not differ on how to resolve the issue of material fact.

Inferences

A finder of fact may or may not make inferences from the evidence. On a motion for summary judgment, however, "the court must grant all favorable inferences to the non-movant."[52] In other words, all inferences are "decided" in favor of the non-moving party.[53] Stated in the contrary, "[a]ll inferences of doubt are drawn against the movant in favor of the opponent of the motion."[54] Moreover, the court must consider the "evidence in the light most favorable to the parties opposing summary judgment."[55] The federal standard likewise requires that "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."[56]

"An inference is a deduction or logical conclusion which may or may not be made from certain proven facts."[57] An inference may be illustrated by the following example: If the evidence proves that there was no snow on the ground in the evening and that there was snow on the ground in the morning, then it can be inferred (deduced or concluded) from the evidence that it snowed during the night.[58]

Under the federal standard, the court may determine and limit the scope of permissible inferences made from the evidence in

determining the existence of a genuine issue of material fact.[59] In other words, there is no genuine issue of material fact when the non-moving party relies on an inference that the court determines to fall outside the scope of permissible inferences.[60]

For example, assume that the inference that it snowed during the night supports the plaintiff's claim. At trial, the factfinder may accept or reject this inference. On the defendant's motion for summary judgment, the court must accept this inference as true; that is, in favor of the plaintiff, the non-moving party. However, the court may well refuse to accept the inference in favor of plaintiff if it determines that the inference falls outside the scope of permissible inferences that may be drawn from the evidence.

Evidentiary Standard

In deciding a motion for summary judgment, the court must also consider the evidentiary standard of proof that would be used at trial. Rule 4:46-2(c) provides that the court must consider the "burden of persuasion at trial." The burden of persuasion is a party's obligation to prove facts in accordance with the applicable evidentiary standard of proof to prevail on a claim or defense.[61] It is the same as the burden of proof.[62]

In determining the existence of a genuine issue of material fact, the court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party ***in consideration of the applicable evidentiary standard***, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party."[63] The court is "to be guided by the same evidentiary standard of proof — by a preponderance of the evidence or clear and convincing evidence — that would apply at the trial of the merits ..."[64]

> The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict —' whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."[65]

The United States Supreme Court explained the principle as follows:

> [T]he judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and the quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant. It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.[66]

The court's consideration of the evidentiary standard is a part of the court's weighing process. The court may, for example, determine that based on the competent evidentiary materials presented, the opposing party could not prove its case at trial by the applicable burden of persuasion — by a preponderance of the evidence or clear and convincing evidence.[67]

Credibility

Finally, the court may not simply conclude that there is no genuine issue of material fact "solely because the evidence opposing the claimed [issue of material] fact strikes the judge as being incredible [or unbelievable]. Issues of credibility are *ordinarily* for the trier of fact, and the judge does not function as a trier of fact in determining a motion for summary judgment."[68]

"Credibility is a jury question when people 'of reason and fairness may entertain differing views as to the truth of [the evidence], whether it be uncontradicted, uncontroverted or even undisputed.' However, credibility is not a jury question when [the evidence] is reliable and uncontradicted."[69] That is, under the court's weighing process, credibility may well be a question for the court when there could be no significant disagreement about the material fact.

For example, assume that a witness testified at a deposition that it snowed in New Jersey in July. Assume further that this fact is disputed but that the testimony is not contradicted by other evidence. Although the court may not determine credibility, it may determine that there would be no significant disagreement, *i.e.*, reasonable minds would not differ) that it did not snow in New Jersey in July.

Conclusion

Brill (and the 1996 amendments to Rule 4:46-1, *et seq.*) refined the standard governing motions for summary judgment. The standard has somewhat shifted the focus from the moving party's burden to show the absence of a genuine issue of material fact to the opposing party's burden to show the existence of a genuine issue of material fact.[70] At a minimum, it clarified the parties' respective burdens on such motions.

The refined standard allows the court to engage in a weighing process, taking into account the evidentiary standard of proof to be used at trial, in determining whether there exists a genuine issue of material fact. Under the new standard, there is no genuine issue unless there would be a significant disagreement, *i.e.*, reasonable minds could differ, about the material fact, thus requiring resolution by a factfinder.

In conclusion, lawyers making or opposing a motion for summary judgment would be well-advised to review the *Brill* decision. An understanding of the new summary

judgment standard will undoubtedly lead to the preparation of better motion papers, which will in turn result in the courts granting a greater number of motions for summary judgment.

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Endnotes

1. 17 N.J. 67 (1954).
2. 142 N.J. 520 (1995). It has been noted that *Brill* did not disavow *Judson*. *See* Anthony J. Laura & Joseph A. Boyle, *Finally, A Summary Judgment Rule That Gets Judson Off Judges' Backs,* 142 N.J.L.J. 822 (December 4, 1995). Indeed, it has been suggested that the result in *Brill* would have been the same under *Judson* and that, therefore, the new standard enunciated in *Brill* may well be considered dictum. *See* Editorial, *Summary Judgment (1995),* 142 N.J.L.J. 762 (November 27, 1995). *See also* Sylvia B. Pressler, *New Jersey Court Rules* (Gann 1998), Comment to R. 4:46-2 at 1360 ("the underlying premise of the summary judgment practice may be regarded as not materially altered [by *Brill*]").
3. *See Brill,* 142 N.J. at 539-40 (stating that it is following the national trend in adopting the federal standard for summary judgment). *See also* Ralph N. Del Deo & John H. Kloch, *New Jersey Practice: Court Rules Annotated (4th ed.),* Comment to R. 4:46-2 at 142 (West Supp. 1997).
4. 106 S. Ct. 2505 (1986).
5. 106 S. Ct. 2548 (1986).
6. 106 S. Ct. 1348 (1986).
7. *See Brill,* 142 N.J. at 523, 535-36 & 539-40. Courts have even begun relying on *Brill* in deciding motions for involuntary dismissal and judgment as a matter of law. *See Caputo v. Nice-Pak Products, Inc.,* 300 N.J. Super. 498, 505 (App. Div. 1997); *Cameco, Inc. v. Gedicke,* 299 N.J. Super. 203. 212 (App. Div. 1997). Likewise, the United States Supreme Court has noted that the standard for summary judgment mirrors the standard for a directed verdict (*i.e.*, an involuntary dismissal or judgment as a matter of law). *See Liberty Lobby,* 106 S. Ct. at 2511.
8. *Judson,* 17 N.J. at 74 (citation omitted).
9. *Robbins v. Jersey City,* 23 N.J. 229, 240-41 (1957). *See also Judson,* 17 N.J. at 77 (citation omitted) (the court should not "shut a deserving litigant from his trial." Yet, it should not "allow harassment of an equally deserving suitor for immediate relief [from] a long and worthless trial."); *Brill,* 142 N.J. at 540-42 (*citing Robbins* and *Judson*).
10. *Brill,* 142 N.J. at 541. It has been suggested that *Brill* has done little to encourage the courts to grant motions for summary judgment. *See* Alan J. Baldwin, *Brill's Impact: The Shadow Of A Shadow,* 150 N.J.L.J. 631 (November 17, 1997). It has also been suggested that trial and appellate courts appear to be reluctant in applying the *Brill* standard with vigor, at least in the employment discrimination and sexual harassment context. *See* Editorial, *Immaterial Issues,* 148 N.J.L.J. 262 (April 21, 1997).
11. Even if the movant demonstrates the absence of any genuine issue of material fact, she must also demonstrate that she is entitled to the entry of summary judgment as a matter of law. *See* R. 4:46-2(c).
12. *Judson,* 17 N.J. at 74.
13. Two commentators have suggested that the "reasonable doubt" language in *Judson* may have caused courts to view the evidence against the "beyond a reasonable doubt" evidentiary standard used in criminal matters, noting that any issue of fact can create reasonable doubt. *See* Anthony J. Laura & Joseph A. Boyle, *Finally, A Summary Judgment Rule That Gets Judson Off Judges' Backs,* 142 N.J.L.J. 822 (December 4, 1995).
14. *Judson,* 17 N.J. at 74 (citation omitted). The Court also noted that the (then existing) court rule required the absence of a genuine issue of material fact to "appear palpably." *Id.* The word "palpably," meaning clearly or obviously, was eliminated in 1973 as being of little, if any, assistance. *See* Sylvia B. Pressler, *New Jersey Court Rules* (Gann 1998), Comment to R. 4:46-2 at 1359.
15. *Brill,* 142 N.J. at 523, 533-34, 535-36 & 539-40 (citations omitted).
16. *Id.* In what appears to be an aberration, the Appellate Division has stated that "[i]f there is the *slightest* doubt as to the existence of a material issue of fact, the motion should be denied." *See Hermann Forwarding v. Pappas Ins. Co.,* 273 N.J. Super. 54, 60 (App. Div. 1994); *Saldana v. DiMedio,* 275 N.J. Super. 488, 494 (App. Div. 1994) (emphasis added; citation omitted). It is clear that this is no longer the standard governing such motions, if it ever was. *See* Editorial, *Understanding Brill,* 145 N.J.L.J. 1054 (September 2, 1996).
17. *Celotex,* 106 S. Ct. at 2553. *See Id.* at 2554 (the moving party must show "that there is an absence of evidence to support the nonmoving party's case").
18. *Liberty Lobby,* 106 S. Ct. at 2510 (citation omitted). *See also Brill,* 142 N.J. at 529 (defining the word "substantial").
19. *See Celotex,* 106 S. Ct. at 2552 (summary judgment is appropriate when the opposing party has produced no evidence or insufficient evidence to support an element of the claim).
20. *Brill,* 142 N.J. at 529 (emphasis in original).
21. *Liberty Lobby,* 106 S. Ct. at 2510 (emphasis in original).
22. *Judson,* 17 N.J. at 75 (citations omitted); *Brill,* 142 N.J. at 529 (*citing Judson*).
23. *Swarts v. Sherwin-Williams Co.,* 244 N.J. Super. 170, 178 (App. Div. 1990).
24. R. 4:46-5(a) (emphasis added). *See also Liberty Lobby,* 106 S. Ct. at 2514 (the non-moving party "may not rest upon mere allegation[s] or denials of his pleading, but must set forth specific facts showing that there is a genuine issue of material fact").
25. *Matsushita,* 106 S. Ct. at 1356 (citations omitted; emphasis in original).
26. *Liberty Lobby,* 106 S. Ct. at 2511 (citations omitted).
27. *Judson,* 17 N.J. at 75 (citations omitted). *See also* R. 4:46-5(a).
28. R. 4:46-2(c). The 1996 amendment to the summary judgment rule incorporated this definition of a genuine issue of material fact into Rule 4:46-2(c). *See Brill,* 142 N.J. at 538 (*citing* Civil Practice Committee Report proposing amended rule). *See also* Sylvia B. Pressler, *New Jersey Court Rules* (Gann 1998), Comment to R. 4:46-2 at 1359-60. The rule would have been clearer if it explicitly included the term "material" within the definition.
29. *Brill,* 142 N.J. at 536 (*citing Liberty Lobby,* 106 S. Ct. at 2512).
30. "Competent evidential materials" include deposition testimony, answers to interrogatories, admissions and any affidavits. *See Celotex,* 106 S. Ct. at 2553. *See also* R. 4:46-2(c). Affidavits are not required. *See* R. 4:46-2(c) ("together with the affidavits, if any"); *Sellers v. Schonfeld,* 270 N.J. Super. 424, 427 (App. Div. 1993) ("the rule does not require submission of affidavits in support of a motion for summary judgment"). However, if submitted, they must be "made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify." R. 1:6-6. *See also* R. 4:46-5(a); *Sellers,* 270 N.J. Super. at 427.
31. *Brill,* 142 N.J. at 540 (*citing Liberty Lobby,* 106 S. Ct. at 2511).
32. *Id.* (*citing Liberty Lobby,* 106 S.Ct. at 2511-12). *See also* Sylvia B. Pressler, *New Jersey Court Rules* (Gann 1998), Comment to R. 4:46-2 at 1361 ("the standard is now expressed in terms of a prima facie case or defense and the movant is entitled to judgment if, on the full record, the adverse party has not demonstrated the existence of a dispute whose resolution in his favor will ultimately entitle him to judgment").
33. *Id.* (*citing Liberty Lobby,* 106 S. Ct. at 2512). Federal case law provides that a genuine issue of material fact requiring submission to the trier of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby,* 106 S. Ct. at 2511. By contrast, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita,* 106 S. Ct. at

1356 (citation omitted).
34. *Judson*, 17 N.J. at 73 (citation omitted).
35. *Id.*
36. *Brill*, 142 N.J. at 540 (*citing Liberty Lobby*, 106 S. Ct. at 2511).
37. *Liberty Lobby*, 106 S. Ct. at 2511. *See also Brill*, 142 N.J. at 533-34 (*citing Liberty Lobby*).
38. *Liberty Lobby*, 106 S. Ct. at 2512.
39. *Judson*, 17 N.J. at 74.
40. *Id.* at 75 (citation omitted). *See also Brill*, 142 N.J. at 541 (citations omitted) ("A summary judgment motion has in the past required and will in the future continue to require a searching review").
41. *Brill*, 142 N.J. at 537.
42. *Ferdinand v. Agricultural Ins. Co.*, 22 N.J. 482, 493 (1956) (citations omitted).
43. *Id.* at 494 (citations omitted).
44. Even on the denial of a motion for summary judgment, the court should, at a minimum, specify which facts are disputed and which are undisputed. *See* R. 4:46-3(a). *See also Judson*, 17 N.J. at 74 (citation omitted).
45. *Brill*, 142 N.J. at 536 (citation omitted).
46. *Id.* at 539-40.
47. 55 N.J. 2 (1969).
48. *Id.* at 5-6. *See also Lanzet v. Greenberg*, 126 N.J. 168, 174 (1991).
49. *Caputo*, 300 N.J. Super. at 505 (*quoting Brill*; other citations omitted).
50. The illustration is set forth in Jeffrey W. Stempel, *Moore's Federal Practice 3d*, §56.11[3] & §56.11[5][a] at 56-98 to 56-100 and 56-108 to 56-109, respectively (hereafter "*Moore's Federal Practice 3d*").
51. On these facts, the defendant would not prevail on a motion for summary judgment under *Judson*, which, arguably, set forth a more stringent standard than *Brill*.
52. *Brill*, 142 N.J. at 536.
53. *Id.*
54. *Judson*, 17 N.J. at 75. *See also Evers v. Dollinger*, 95 N.J. 399, 402 (1984) (nonmovant's evidence should be treated as uncontradicted).
55. *Brill*, 142 N.J. at 523 (*citing*, among others, *Judson*, 17 N.J. at 75).
56. *Liberty Lobby*, 106 S. Ct. at 2513 (citation omitted). *See also Matsushita*, 106 S. Ct. at 1356 (citations omitted) ("the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion").
57. *State v. Corby*, 28 N.J. 106, 114 (1958). *See also Ferdinand*, 22 N.J. at 488.
58. *See New Jersey Model Jury Charges—Civil* (ICLE 1997 Supp.) §1.12[9][a].
59. *See Brill*, 142 N.J. at 531 (*citing Matsushita*, 106 S. Ct. at 1361). *See also Moore's Federal Practice 3d*, §56.11[6][a].
60. It is not clear whether the Supreme Court adopted or approved this principle set forth in *Matsushita* because its opinion refers only to the *Liberty Lobby-Celotex* standard. *See Brill*, 142 N.J. at 538-39. Nevertheless, the principle may well be subsumed within the weighing process that *Brill* requires the court to perform in deciding a motion for summary judgment.
61. *See* N.J.R.E. 101(b)(1).
62. *See* Richard J. Biunno, *New Jersey Rules of Evidence* (Gann 1997-98), Comment to N.J.R.E. 101(b)(1) at 24 ("burden of persuasion" replaces the term "burden of proof" found in the former evidence rule, but the definitions of both terms are identical).
63. *Brill*, 142 N.J. at 523 (emphasis added). *See Id.* at 539-40.
64. *Id.* at 533 (*citing Liberty Lobby*, 106 S. Ct. at 2513).
65. *Liberty Lobby*, 106 S. Ct. at 2512 (citation omitted).
66. *Id.* at 2513 (emphasis in original).
67. When assessing or weighing the evidence under the preponderance of the evidence standard, the trier of fact must conclude or be convinced that the fact or allegation is probably true, that is, more likely true than not true. If the evidence is equally balanced, the fact, allegation or issue has not been proven by a preponderance of the evidence. *See New Jersey Model Jury Charges—Civil* (ICLE 1997 Supp.) § 1.12[8].
Clear and convincing evidence, on the other hand, is more than a mere balancing of doubts or probabilities. It is evidence that produces "a firm belief or conviction that the allegations sought to be proved by the evidence are true. It is evidence so clear, direct, weighty in terms of quality, and convincing" that results in a "clear conviction of the truth of the precise facts in issue." *Id.* §1.19 (ICLE 1996 Supp.).
68. *Judson*, 17 N.J. at 75 (emphasis added; citation omitted). *See also Brill*, 142 N.J. at 540 ("Credibility determinations will continue to be made by a jury and not the judge"); *Liberty Lobby*, 106 S. Ct. at 2513 (citation omitted) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ....").
69. *Johnson v. Salem Corp.*, 97 N.J. 78, 92-93 (1984) (citing *Ferdinand*, 22 N.J. at 494 & 498). *See also D'Amato by McPherson v. D'Amato*, 305 N.J. Super. 109, 115 & 116 n.1 (App. Div. 1997) (holding that a credibility issue may require resolution by the trier of fact, even though the evidence is uncontradicted, uncontroverted or even undisputed, when reasonable men could differ as to the truth of the evidence); *Caliguire v. Union City*, 104 N.J. Super. 210, 217-19 (App. Div. 1967), *aff'd sub. nom., Estate of Caliguire*, 53 N.J. 182 (1969). *But see Cameco*, 299 N.J. Super. at 213 (holding that trial court improperly determined credibility of testimony on a motion for involuntary dismissal).
70. *Compare Judson*, 17 N.J. at 74 (focus on movant's burden) *with Brill*, 142 N.J. at 529, R. 4:46-2(c) and R. 4:46-5(a) (focus on opposing party's burden).