

SUMMARY JUDGMENT IN ALASKA

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ABSTRACT

In modern civil litigation, disputes rarely proceed to trial. Summary judgment has evolved in state and federal courts across the country as a common mechanism for dispute resolution without trial. Alaska courts have largely refused to follow this trend. Instead, obtaining summary judgment in Alaska represents a nearly impossible challenge. Alaska's heightened summary judgment standard reflects a past era—one in which advocacy occurred in a courtroom before a jury and not in chambers on paper. This Note analyzes the evolution of summary judgment in federal courts and in Alaska and discusses three procedural mechanisms affecting summary judgment in Alaska. After assessing arguments for and against modernizing Alaska's summary judgment standard, this Note concludes with a recommendation: Alaska should adopt the reasonable jury summary judgment standard.

INTRODUCTION

Despite their textual similarities, winning a motion for summary judgment in Alaska state court is considerably more difficult than in federal court. In 1986, the United States Supreme Court decided three cases that modernized the federal summary judgment standard by incorporating the parties' evidentiary burdens at trial to determine whether a genuine issue of material fact exists.¹ By doing so, the Supreme Court recast summary judgment analysis to include not only whether a genuine issue of material fact exists, but also whether only the trier of fact may resolve the issue.² The moving party would be entitled

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1. These cases have come to be known as the *Celotex* trilogy. They are *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

2. *Anderson*, 477 U.S. at 251-52.

to summary judgment as a matter of law only if the trier of fact could come to one conclusion in light of the contested factual issues.³

The text of the federal and Alaska summary judgment rules are nearly identical. Under Federal Rule of Civil Procedure 56, courts “shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”⁴ Similarly, Alaska’s summary judgment rule states that “[j]udgment shall be rendered forthwith” upon a showing “that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.”⁵ However, the Alaska supreme court has repeatedly declined to adopt the modern federal standard for determining genuine issues of material fact for summary judgment purposes.⁶ The Alaska summary judgment standard does not consider evidentiary burdens and does not ask how the trier of fact would determine any disputed issue.⁷ This interpretive distinction carries important implications for the Alaska court system, its litigants, and the efficient administration of justice.

Much like the pre-1986 federal summary judgment standard,⁸ Alaska courts tend to disfavor treating summary judgment motions as a procedural shortcut. This exceedingly low barrier to entry undermines the utility of summary judgment as an effective procedural tool for civil practitioners and a screening device for courts. As one Alaska trial judge jokingly explained: “Under our state’s summary judgment rule, if there is so much as a shadow of a whisper of a hint of a contested issue of fact, then we must deny summary judgment.”⁹

Parts I and II of this Note analyze the distinctions between the federal and Alaskan summary judgment standards, respectively. Part III discusses three procedural aspects of Alaska law that relate to the state summary judgment standard: notice pleading, directed verdict, and Alaska’s “English Rule” fee shifting. In Part IV, this Note weighs

3. *Id.* at 252.

4. FED. R. CIV. P. 56(a).

5. ALASKA R. CIV. P. 56(c).

6. *E.g.*, *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 519–20 (Alaska 2014); *DeNardo v. Bax*, 147 P.3d 672, 683–84 (Alaska 2006); *Moffatt v. Brown*, 751 P.2d 939, 942–44 (Alaska 1988).

7. *Christensen*, 335 P.3d at 519–20.

8. *See Celotex*, 477 U.S. at 327 (unfavorably commenting on prior federal decisions that cast summary judgment in a disfavored light and instead adopting the view that summary judgment is more properly viewed as “an integral part of the Federal Rules as a whole”).

9. An Alaska Superior Court judge made this statement in conversation with the author. The statement should not be interpreted as a correct statement of the law, nor was it intended as such.

arguments for and against changing the Alaska summary judgment standard and concludes with the recommendation that Alaska should adopt the federal reasonable jury standard for summary judgment.

I. THE FEDERAL SUMMARY JUDGMENT STANDARD

In a series of cases now known as the *Celotex* trilogy, the U.S. Supreme Court significantly changed what constitutes a genuine dispute of material fact for the purposes of summary judgment. This change modernized the summary judgment standard to mirror its procedural relative—directed verdict—by considering the evidentiary burdens that the movant and nonmovant will bear at trial.¹⁰

To understand the policies underlying the federal summary judgment doctrine, it is helpful to first review the historic development of summary judgment as a procedural tool. The origins of summary judgment can be traced back to the 1855 Summary Procedure on Bills of Exchange Act in England, which granted courts power to issue summary decisions in collections actions brought by plaintiffs on bills of exchange and promissory notes.¹¹ The bill's goal was "expedition and economy in obtaining a judgment where the circumstances of the case lent themselves to a shortened procedure."¹² In 1938, the Supreme Court adopted Rule 56, along with the rest of the Federal Rules of Civil Procedure, pursuant to the Rules Enabling Act of 1934.¹³ However, as summary judgment continued to emerge as a procedural tool, federal courts were generally reluctant to use summary judgment out of a concern that the nonmoving party would face judgment without an opportunity to present his case in court.¹⁴ This concern rings true in many states today, including Alaska.¹⁵

10. *Anderson*, 477 U.S. at 251–52.

11. Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L. J. 423, 424 (1929).

12. *Id.*

13. Rules Enabling Act of 1934, Pub. L. No. 415, 651 Stat. 1064 (1934). See also Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1901 (1989) (discussing the history of the Federal Rules of Civil Procedure).

14. Clark & Samenow, *supra* note 11, at 470.

15. In 1975, the Second Circuit characterized summary judgment as "a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury." *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975). While the *Celotex* trilogy of cases incorporated a new summary judgment standard in federal courts, at least eleven states, including Alaska, have remained reluctant to loosen summary judgment. Thomas Logue & Javier A. Soto, *Florida Should Adopt the Celotex Standard for Summary Judgment*, 76 FLA. B.J. 20, 20 (2002).

As a result, pre-1986 summary judgment rulings required that the movant present evidence negating the nonmovant's case in order to obtain summary judgment.¹⁶ In *Adickes v. S.H. Kress & Co.*,¹⁷ the U.S. Supreme Court overturned the lower court's grant of summary judgment to the defendant because the moving defendant had failed to "foreclose the possibility" that the jury could infer facts sufficient for the nonmovant to prove its case.¹⁸ Under *Adickes*, the movant's Rule 56 burden required disproving the nonmovant's case by producing affirmative evidence of the nonexistence of any material factual issue.¹⁹ In a case where the movant bears no burden of proof at trial, as in *Adickes*, the pre-1986 summary judgment standard imposed an artificially high barrier on the movant.²⁰

Sixteen years later in 1986, the Supreme Court recast the standard set forth in *Adickes*. In *Celotex Corp v. Catrett*,²¹ the Supreme Court addressed the standard for summary judgment in the context of an asbestos case.²² Plaintiff's claim, that the defendant's products contained asbestos and exposure to that asbestos caused the death of her husband, would have been virtually immune to defendant's summary judgment under *Adickes* analysis.²³ The defendant-movant would have been required to foreclose the possibility of a verdict for the plaintiff at trial—that is, the defendant would have needed to *prove* the decedent's nonexposure to defendant's asbestos-containing products at any point in the decedent's life.²⁴

Without expressly overruling *Adickes*, the Supreme Court held that Rule 56(c) requires the entry of summary judgment against a nonmovant "who fails to make a showing sufficient to establish the existence of any element essential to [the nonmovant's] case, and on which [the nonmovant] will bear the burden of proof at trial."²⁵ In this circumstance, a "complete failure of proof concerning an essential element" of the nonmovant's case necessarily means that no genuine

16. John E. Kennedy, *Federal Summary Judgment: Reconciling Celotex v. Catrett with Adickes v. Kress and the Evidentiary Problem under Rule 56*, 6 REV. LITIG. 227, 236 (1987).

17. 398 U.S. 144 (1970).

18. *Id.* at 157.

19. Kennedy, *supra* note 16, at 229.

20. Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1334 (2005).

21. 477 U.S. 317 (1986).

22. *Id.* at 319.

23. Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L. J. 73, 80 (1990).

24. *Id.*

25. *Celotex*, 477 U.S. at 322.

issue of material fact exists, rendering any other disputed facts immaterial.²⁶ Thus, the standard for granting summary judgment “mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a).”²⁷

The Court’s decision in *Celotex*, however, raised more questions about the federal summary judgment standard than it answered. For one, a five-vote majority issued the *Celotex* opinion, with then-Associate Justice Rehnquist writing for four Justices and Justice White concurring.²⁸ These opinions included three divergent views on the burden of production required of the nonmovant to sufficiently demonstrate the existence of disputed facts.²⁹ Justice Rehnquist characterized this burden as “informing” the court of the absence of disputed facts.³⁰ Justice White required more in his concurrence, reasoning that “a conclusory assertion that the [nonmovant] has no evidence to prove his case” is not enough to move for summary judgment.³¹ Justice Brennan concluded in dissent that the movant without the burden of proof at trial could satisfy his burden of production for summary judgment either by presenting evidence negating an essential element of the nonmovant’s claim, or by affirmatively showing that there is no evidence in the record to support a judgment for the nonmovant.³² By shifting the requirements of summary judgment to correspond with the party’s trial burdens and requiring nonmovants to produce evidence of the full range of disputed facts, the *Celotex* majority made summary judgment a defendant’s motion.

Celotex also did not answer the question of how judges determine sufficiency and admissibility of the evidence presented at summary judgment in light of the reordered burdens facing the movant and nonmovant at summary judgment.³³ Considered in light of *Celotex*, both

26. *Id.* at 323.

27. *Id.*

28. Justice Rehnquist’s lead opinion was written on behalf of himself and Justices Marshall, Powell, and O’Connor. 477 U.S. at 319. Justice White’s concurring opinion provided the fifth vote for the majority. *Id.* at 328. Justice Brennan dissented, joined by Chief Justice Burger and Justice Blackmun. *Id.* at 329. Justice Stevens dissented on other grounds. *Id.* at 337.

29. Issacharoff & Loewenstein, *supra* note 23, at 81.

30. *Celotex*, 477 U.S. at 323.

31. *Id.* at 328.

32. *Id.* at 331–32.

33. See Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 104–07 (2006) (discussing questions left unanswered by majority opinion in *Celotex* relating to the movant’s burden, the nonmovant’s burden, admissibility, and determining the sufficiency of the evidence presented by a nonmovant to

*Anderson v. Liberty Lobby, Inc.*³⁴ and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*³⁵ enlarged the trial judge's discretionary authority by allowing for evidentiary review at the summary judgment stage.

In *Anderson*, the Supreme Court considered the newly announced summary judgment standard from *Celotex* in a defamation claim. Liberty Lobby brought a libel action against journalist Jack Anderson and others for three articles published in *The Investigator* magazine, which portrayed Liberty Lobby as "neo-Nazi, anti-Semitic, racist, and Fascist."³⁶ Anderson moved for summary judgment arguing that Liberty Lobby failed to present sufficient evidence of Anderson's actual malice.³⁷ The Court had to determine whether a showing of actual malice by clear and convincing evidence, as the Court announced in the landmark decision *New York Times Co. v. Sullivan*,³⁸ applied at the summary judgment stage in Liberty Lobby's case.³⁹

The Court held that the "inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."⁴⁰ Applying the substantive evidentiary burdens at trial meant that the judge must decide "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented."⁴¹ The Court reasoned that it made "no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations."⁴² Those standards are provided by the substantive evidentiary burdens applicable to the claim and properly determined by the trial judge at summary judgment.⁴³ However, the Court insisted that determining credibility, weighing the evidence, and drawing legitimate inferences from the evidence are functions of the jury alone.⁴⁴ The judge must view the evidence in the

prevent summary judgment).

34. 477 U.S. 242 (1986).

35. 475 U.S. 574 (1986).

36. *Anderson*, 477 U.S. at 245.

37. *Id.*

38. 376 U.S. 254 (1964).

39. *Anderson*, 477 U.S. at 247-48.

40. *Id.* at 252.

41. *Id.*

42. *Id.* at 254-55.

43. *Id.* at 255.

44. *Id.* In dissent, Justice Brennan notes the inherent tension in this concession. The measurement of the "caliber and quantity" of the evidence can only be performed by weighing the evidence, which is solely the province of the jury. Justice Brennan laments that the *Anderson* majority may invite "trial courts to assess and weigh evidence much as a juror would." *Id.* at 266 (Brennan, J., dissenting).

light most favorable to the nonmovant.⁴⁵ Additionally, *Anderson* provides the escape hatch that trial judges may decide not to grant summary judgment when there is reason to believe that a better course of action would be to proceed to trial.⁴⁶

Anderson extends the Court's directive in *Celotex*, mandating courts to consider the sufficiency of the evidentiary record, to its logical consequence: the sufficiency of the evidentiary record is a function of the burdens of the parties at trial.⁴⁷ While the Court carefully instructs that trial courts must not weigh the evidence, trial courts must assess whether the nonmovant provided enough evidence to support its claim at trial.⁴⁸ Thus, *Anderson* confirms the similarity between directed verdict and modern summary judgment and recognizes that the "substantive law, presumptions, and burdens of production and persuasion" bear on both directed verdict and summary judgment motions.⁴⁹

The Court's holding in *Matsushita* reveals the extent of the deference afforded to trial courts at the summary judgment phase following *Celotex* and *Anderson*. In *Matsushita*, American television manufacturers, led by Zenith, brought an antitrust suit against Matsushita and other Japanese television manufacturers, alleging that the Japanese manufacturers had illegally conspired in a predatory pricing scheme to set artificially low prices in the United States to drive American manufacturers out of the market.⁵⁰ Matsushita moved for summary judgment arguing that Zenith had failed to produce admissible evidence the Japanese manufacturers entered into an illegal conspiracy.⁵¹ The Court held that if the facts render the nonmovant's claim implausible—"if the claim is one that simply makes no economic sense"—then the nonmovant must present more persuasive evidence in support of its claim.⁵²

In sum, the *Celotex* trilogy reformulated the federal summary judgment standard in two significant ways, both of which greatly increased the utility of summary judgment as procedural device. First, the trilogy shifted the summary judgment burden to parallel that of the party bearing the burden of proof at trial.⁵³ In other words, the movant

45. *Id.* at 255.

46. *Id.*

47. *Id.*

48. *Id.*

49. Kennedy, *supra* note 16, at 232.

50. 475 U.S. 574, 577–78 (1986).

51. *Id.* at 578.

52. *Id.* at 587.

53. William W. Schwarzer, et al., *The Analysis and Decision of Summary*

does not need to disprove the nonmovant's case to prevail at summary judgment.⁵⁴ In practice, this most often means that the nonmovant plaintiff, who bears the burden of proof at trial, must also fend off a defendant's summary judgment motion. Second, the Court reformulated summary judgment by granting federal trial judges considerable discretion to consider genuine issues and factual support in the record.⁵⁵ These two major changes to federal summary judgment strengthened the motion as a tool for movants and increased the efficiency of the motion as a screening device for courts.

II. ALASKA'S SUMMARY JUDGMENT STANDARD

The text of Alaska Rule of Civil Procedure 56⁵⁶ sets forth a summary judgment rule substantially similar to the text of Federal Rule of Civil Procedure 56.⁵⁷ However, an important textual difference in the Alaska rule is that a motion "may be supported by affidavits" stating the material facts based on personal knowledge.⁵⁸ Accordingly, an opposition to summary judgment may include opposing affidavits and "a concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated."⁵⁹ Aside from allowing parties to show facts by affidavit in Alaska,⁶⁰ the federal and state requirements for summary judgment are the same textually: "that there is no genuine issue as to any material fact" and the movant is "entitled to judgment as a matter of law."⁶¹

In 1962, *Gilbertson v. City of Fairbanks*⁶² provided the Alaska supreme court its first opportunity to decide a summary judgment motion under the state's recently enacted Rules of Civil Procedure.⁶³ By affirming the trial court's grant of summary judgment, the court in *Gilbertson* ushered in a long line of cases adhering to the pre-1986 federal

Judgment Motions, 139 F.R.D. 441, 451 (1992).

54. *Id.*

55. Issacharoff & Loewenstein, *supra* note 23, at 79.

56. "Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." ALASKA R. CIV. P. 56(c).

57. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

58. ALASKA R. CIV. P. 56(c).

59. *Id.*

60. *Id.*

61. FED. R. CIV. P. 56(a).

62. 368 P.2d 214 (Alaska 1962).

63. *Id.* at 214.

summary judgment standard.⁶⁴ *Gilbertson* involved a dispute over outstanding utility bills Gilbertson owed to the city-owned utility following a fire that destroyed Gilbertson's hotel.⁶⁵ The City moved for summary judgment based on affidavits and cancelled checks showing the unpaid balance for utility services provided to the hotel.⁶⁶ Opposing the City's motion, Gilbertson relied on his deposition testimony in which he stated: "I am sure my bills were paid as my cancelled checks show . . . so far as I know. I could have lost some checks in the fire."⁶⁷ Gilbertson argued that this testimony raised a genuine issue of material fact as to whether the bills were paid.⁶⁸

The court rejected Gilbertson's argument that the possibility he "could have lost some checks in the fire" standing alone was sufficient to raise a genuine issue of material fact.⁶⁹ In affirming the trial court's grant of the City's summary judgment motion, the supreme court reasoned that even if Gilbertson had made an *unequivocal* assertion that his account was paid in full, then summary judgment would have been improper.⁷⁰ However, Gilbertson failed to demonstrate a genuine issue of material fact because his only supporting evidence was an equivocal statement.⁷¹ This shows that the Alaska court employed the same pre-*Celotex* trilogy summary judgment standard. For example, if Gilbertson had testified in his deposition that his record of checks showed some payments had not been credited or if the record of checks itself had been lost in the fire, then such testimony would have created a genuine issue of fact for trial.⁷² Arguably, these hypothetical examples would not pass muster under the *Celotex* trilogy because even an unequivocal statement from Gilbertson, considered in contrast to the City's physical evidence of previously paid checks in the months leading up to the fire, would fail to persuade any reasonable jury about the merits of Gilbertson's defense.

64. *Id.* at 216–17. *See, e.g.,* *Palzer v. Serv-U-Meat Co.*, 419 P.2d 201, 205 (Alaska 1966) (following the pre-1986 federal approach to summary judgment); *Moffatt v. Brown*, 751 P.2d 939, 939–44 (Alaska 1988) (rejecting the modern federal summary judgment standard announced in the *Celotex* trilogy); *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 519–20 (Alaska 2014) (reaffirming Alaska's commitment to the pre-1986 federal summary judgment standard).

65. *Gilbertson*, 368 P.2d at 216–17.

66. *Id.*

67. *Id.* at 215.

68. *Id.*

69. *Id.*

70. *Id.* at 216.

71. *Id.*

72. *Id.*

In 1988, two years after the U.S. Supreme Court decided the *Celotex* trilogy, the Alaska supreme court considered whether to incorporate substantive evidentiary burdens into Alaska state summary judgment practice. *Moffatt v. Brown*⁷³ involved a defamation claim by a physician against a newsletter publisher for allegedly false statements the publisher circulated in a newsletter regarding the physician's abortion practice.⁷⁴ In *Moffatt*, the Alaska supreme court declined to adopt the U.S. Supreme Court's holding in *Anderson* and instead reaffirmed its prior line of cases interpreting Rule 56(c) to require only "a showing that a genuine issue of material fact exists to be litigated, and not a showing that a party will ultimately prevail at trial."⁷⁵ The *Moffatt* court reasoned that incorporating substantive evidentiary burdens at summary judgment impermissibly required weighing the evidence, encroaching upon the role of the jury.⁷⁶ As a consequence of this holding, the Alaska supreme court rendered summary judgment "somewhat harder for a libel defendant to win" in Alaska state courts as compared to federal court.⁷⁷

Most recently, the Alaska supreme court reaffirmed its commitment to the pre-1986 federal summary judgment standard in *Christensen v. Alaska Sales & Service, Inc.*⁷⁸ There, the plaintiffs brought a design-defect product liability suit against a car dealership alleging that the car's seat belt system failed to restrain the driver in a collision with two moose.⁷⁹ Following discovery, Alaska Sales & Service moved for summary judgment, arguing that plaintiffs failed to present sufficient evidence that the seat belt was defective and also that plaintiffs failed to set forth admissible evidence that the seat belt's failure caused plaintiff's injuries.⁸⁰ The trial court granted Alaska Sales & Service's summary judgment motion and denied plaintiff's motion for reconsideration, determining that "no reasonable jury could find that [plaintiffs] have proven that the seat belt . . . was defective."⁸¹

In reversing the trial court's grant of summary judgment, the Alaska supreme court first noted that the trial court's conclusion misstated Alaska's summary judgment standard in two ways.⁸² First, to

73. 751 P.2d 939 (Alaska 1988).

74. *Id.* at 940.

75. *Id.* at 943-44 (citing *Gablick v. Wolfe*, 469 P.2d 391, 395 (Alaska 1970)).

76. *Id.* at 944 (citing *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 516 A.2d 220, 236 (N.J. 1986)).

77. *Id.*

78. 335 P.3d 514, 521 (Alaska 2014).

79. *Id.* at 515.

80. *Id.* at 516.

81. *Id.* (emphasis added).

82. *Id.*

fend off summary judgment, the state summary judgment standard does not require that the non-movant *prove* anything.⁸³ Instead, it is enough for the non-movant to present some evidence “directly contradict[ing] the moving party’s evidence.”⁸⁴ Second, to the extent that the trial court’s use of the term “reasonable jury” indicated that Alaska courts consider the evidence in light of a potential jury outcome—i.e. incorporating the substantive evidentiary burden at trial, as a federal court—the lower court erred.⁸⁵ The supreme court explained the proper summary judgment analysis under the Alaska standard as follows:

Although we occasionally have described the reasonableness standard as whether ‘reasonable jurors could disagree on the resolution of a factual issue,’ our perhaps inartful use of the term ‘reasonable jurors’ was not meant to suggest use of the federal summary judgment standard. We require only that the evidence proposed for trial must not be based entirely on ‘unsupported assumptions and speculation’ and must not be ‘too incredible to be believed by reasonable minds.’ After the court makes reasonable inferences from the evidence in favor of the non-moving party, summary judgment is appropriate only when no reasonable person could discern a genuine factual dispute on a material issue.⁸⁶

Thus, the court framed the inquiry as “whether a reasonable person could believe the non-moving party’s assertions” and concluded that the non-movant’s assertions created a genuine issue of material fact.⁸⁷

The distinction between a reasonable jury and reasonable minds slices the bologna very thin, but this difference cuts to the middle of Alaska’s outdated method of summary judgment analysis. If the federal summary judgment standard is appropriately summarized as the “reasonable jury” standard, then the Alaska standard may be characterized as the “not too incredible to be believed” standard. Applying the Alaska summary judgment standard to the facts of *Christensen*, the court found genuine issues of material fact as to both defective design and causation.⁸⁸ In support of the defective design dispute, plaintiffs proffered evidence of an unbroken chain of custody and deposition testimony that the seat belt mechanism occasionally failed to lock upon sudden forward movement and that the plaintiff

83. *Id.*

84. *Id.*

85. *Id.* at 519–20.

86. *Id.* (internal citations omitted).

87. *Id.* at 520.

88. *Id.* at 515.

always wore a seat belt.⁸⁹ The movant-defendant argued that the lack of evidence regarding the actual seat belt, its performance in the crash, or any police report presented such a gap in the evidentiary record that no genuine issue existed.⁹⁰ To prevent summary judgment on causation, the nonmovant-plaintiffs presented evidence of a lack of memory following the accident, medical evidence of a “closed head injury,” and a mark on Christensen’s head after the accident.⁹¹ The supreme court concluded that plaintiff’s evidence was “not too incredible to be believed” and therefore supported the inference that the alleged seat belt defect caused plaintiff’s injuries, a genuine issue of material fact.⁹²

Assessing the facts of *Christensen*, the supreme court may have arrived at the right conclusion by allowing plaintiffs to proceed to trial, but it did so for the wrong reasons and under an imprecise method of analysis. Finding a genuine dispute as to defective design, the court relied heavily on plaintiff’s deposition testimony that the seat belt lock failed on occasion, both before and after the accident. Without this testimony, plaintiff’s remaining evidence—an unbroken chain of custody and habitual seat belt use—was silent as to any defectively designed seat belt lock, instead relying only on “unsupported assumptions and speculation.”⁹³ However, even under the “reasonable jury” standard employed in federal courts, plaintiff’s testimony that the seat belt lock occasionally failed may have been enough to survive summary judgment because credibility determinations are an issue left to the trier of fact.⁹⁴ In cases like *Christensen*, where summary judgment turns on the nonmovant’s testimony, the application of the federal and Alaskan summary judgment standards will likely lead to the same result.

Alaska’s “not too incredible to be believed”⁹⁵ summary judgment standard also leaves questions regarding weighing and sufficiency of

89. *Id.* at 521.

90. *Id.*

91. *Id.* at 522.

92. *Id.*

93. *See id.* at 520 (requiring the nonmovant to present *more* than “unsupported assumptions and speculation” to overcome the movant’s summary judgment motion).

94. *See* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (limiting the Supreme Court’s holding by noting that credibility determinations are left to the jury).

95. The Alaskan court first employed this language in *Wilson v. Pollet*: “If, at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant’s evidence is impeached on material matters, then an issue of credibility is raised, providing the contradictory or impeaching evidence is not too incredible to be believed by reasonable minds.” 416 P.2d 381, 384 (Alaska 1966).

the evidence unanswered. While the federal summary judgment standard may be open to objections of judges weighing the evidence,⁹⁶ the Alaska standard arguably does the same. The only way for an Alaska judge to determine whether the nonmovant's evidence is not too incredible to be believed is to weigh the nonmovant's evidence against the evidence proffered by the movant. Case law does not make clear precisely *how much* evidence is sufficient make the dispute genuine, but the nonmovant must at least present "more than a scintilla of contrary evidence."⁹⁷

Other cases expose the over-breadth of the Alaskan "not too incredible to be believed" summary judgment standard. For example, in 1999, the supreme court reversed a trial court's grant of summary judgment in an improbable—but somehow not incredible⁹⁸—set of facts. In *Meyer v. State, Department of Revenue, Child Support Enforcement Division ex rel. N.G.T.*,⁹⁹ the Child Support Enforcement Division (CSED) sought to establish Meyer's paternity of N.G.T., the child in question.¹⁰⁰ Following discovery, CSED moved for summary judgment against Meyer, relying on a genetic test that established "the probability of Meyer's parentage at 99.98%."¹⁰¹ Meyer's opposition to CSED's summary judgment motion relied on a sworn affidavit in which he admitted to sexual intercourse with the mother, but denied intercourse during the possible period of conception.¹⁰² However, Meyer admitted that his memory was hazy and could only offer his "belief" that sexual intercourse was prior to the probable dates of conception.¹⁰³

The supreme court held that Meyer's sworn denial of sexual

96. *Anderson*, 477 U.S at 266 (Brennan, J., dissenting); see generally Kennedy, *supra* note 16.

97. E.g., *Cikan v. ARCO Alaska, Inc.*, 125 P.3d 335, 339 (Alaska 2005) (quoting *Martech Const. Co. v. Ogden Envtl. Servs., Inc.*, 852 P.2d 1146, 1149 n.7 (Alaska 1993)).

98. *Meyer* was decided fifteen years before *Christensen* and does not employ the court's "not too incredible to be believed" language. However, *Christensen* reaffirms Alaska's summary judgment standard without modification. 335 P.3d at 516-17. Thus, *Meyer* is properly analyzed under the same "not too incredible to be believed" language.

99. 994 P.2d 365 (Alaska 1999).

100. *Id.* at 366.

101. *Id.* According to the genetic test, the odds favoring Meyer's paternity were 6,243 to 1. *Id.*

102. *Id.* "Meyer admitted having a sexual relationship with the mother and could not remember the precise details of this relationship." *Id.* at 371. The possible period of conception was between March 15, 1992 and April 15, 1992, but the court does not discuss the method by which the possible period of conception was determined. See *id.* at 366. The baby, N.G.T., was born on December 26, 1992. *Id.*

103. *Id.* at 369 (Fabe, J., dissenting).

intercourse during the possible period of conception sufficiently created a genuine issue of material fact and therefore precluded summary judgment.¹⁰⁴ While noting that Meyer must submit more than a scintilla of contrary evidence to demonstrate a genuine issue of fact, the court opaquely explained that Meyer's sworn denial was more than a scintilla of evidence.¹⁰⁵ At least implicitly, the supreme court recognized the improbable, even incredible, nature of its holding.¹⁰⁶ For instance, the court recognized the possibility that Meyer was not the father, but failed to consider or analyze the possibility that the thirty-day period of conception may have been too narrow.¹⁰⁷ Additionally, although the court professed not to "weigh the evidence... on summary judgment[.]"¹⁰⁸ it did weigh evidence in determining that Meyer's affidavit was not simply unsupported speculation or too incredible to be believed, and that it constituted more than a scintilla of evidence.

The court's conclusion in *Meyer* raises issues about what "reasonable minds"¹⁰⁹ actually means. The term "reasonable minds" is just as much a legal fiction as "reasonable jury." The reasonable minds classification accomplishes little in deciding summary judgment. Rather, it is a categorical box that judges use to conduct legal analysis based on facts, as they fairly understand them.¹¹⁰ Of course, "reasonable minds" is a much larger categorical box than "reasonable jury" because it does not include the applicable substantive legal standard. Alaska should adopt the smaller box in summary judgment analysis. *Meyer* raises questions about the meaning of "reasonable minds" under Alaska's "not too incredible to be believed" summary judgment standard¹¹¹ when conflicting evidence flies in the face of common sense.

The court's decision in *Kalenka v. Jadon, Inc.*¹¹² presents a different problem: whether summary judgment may be denied under the "not too incredible to be believed" standard when common sense supports denial of the motion, but the evidence does not. The facts of *Kalenka* are tragic. After spending several hours drinking at Chilkoot Charlie's, an Anchorage bar, Morrell left the bar and drove to a fast-food drive

104. *Id.* at 368.

105. *Id.*

106. *See id.* ("We remain cognizant of the significant statistical odds suggesting Meyer's paternity.").

107. *See id.* at 366.

108. *Id.* at 367.

109. *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 520 (Alaska 2014).

110. *See, e.g., Meyer*, 994 P.2d at 368 (stating that the court resolves factual disputes at summary judgment in favor of the nonmovant).

111. *Christensen*, 335 P.3d at 521.

112. 305 P.3d 346 (Alaska 2013).

through where Morrell bumped the rear of Kalenka's car.¹¹³ The two men got into an altercation and Morrell fatally stabbed Kalenka.¹¹⁴

In filing suit against Chilkoot Charlie to recover a civil judgment, the Kalenka Estate must present evidence that the bar served Morrell alcohol while he was visibly intoxicated.¹¹⁵ Alaska law immunizes dram shops from civil liability for damages caused by an intoxicated patron unless the dram shop provided alcohol to the patron when the individual was already a "drunken person."¹¹⁶ The statutory definition of drunken person has two elements: (1) substantial impairment of the person's physical or mental conduct resulting from the consumption of alcohol; and (2) that such impairment be plain and easily observed or discovered by outward manifestations.¹¹⁷

The Kalenka Estate presented no direct evidence of Morrell's appearance or conduct at the bar.¹¹⁸ The Kalenka Estate presented an expert report in opposition to Chilkoot Charlie's motion for summary judgment which concluded that employees at Chilkoot should have monitored Morrell's drunkenness, but did not state whether any employee *actually observed* Morrell exhibit manifestations of drunkenness, as required by the statute.¹¹⁹ The trial court granted the bar's summary judgment motion because the Kalenka Estate's evidence involved "'such a degree of speculation' that no jury could properly infer Morrell was observably drunk at the bar."¹²⁰ By a three to two margin, the supreme court reversed the trial court's grant of summary judgment after finding six pieces of evidence that the Kalenka Estate presented, coupled with all reasonable inferences drawn in favor of the nonmovant, which raised a genuine issue of material fact preventing summary judgment for the bar.¹²¹ These six facts were: (1) Morrell was at Chilkoot Charlie's for two to four hours; (2) he consumed no alcohol before arriving at the bar; (3) Morrell was served and consumed 18-19

113. *Id.* at 347.

114. *Id.*

115. *Id.* at 350.

116. *Id.* at 349.

117. ALASKA STAT. 04.21.080(b)(8); *Kalenka*, 305 P.3d at 349-50.

118. *Kalenka*, 305 P.3d at 349. Surprisingly, Morrell was available to testify and the trial court granted a continuance to give the Kalenka Estate an opportunity to depose Morrell, but the Kalenka Estate decided not to depose Morrell. *Id.* at 354 n.15 (Maassen, J., dissenting).

119. *Id.* at 348.

120. *Id.* at 349. Interestingly, the language describing what "no jury could properly infer" is that of the supreme court. Alaska's summary judgment standard does not ask what a jury could properly infer, but rather, what evidence is not "too incredible to be believed by reasonable minds." *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 520.

121. *Kalenka*, 305 P.3d at 351.

alcoholic drinks while at the bar; (4) he consumed no alcohol after leaving the bar; (5) approximately forty-five minutes after leaving the bar, Morrell displayed “visible and obvious signs of intoxication;” and (6) Morrell’s blood-alcohol level was estimated as high as 0.27.¹²²

However, as the *Kalenka* dissent points out, these six facts only support that Morrell was highly intoxicated at the bar and that he manifested his drunkenness forty-five minutes later during a fight.¹²³ Thus, the assertions that Morrell outwardly manifested his drunkenness at the bar and the bar’s employees failed to observe these manifestations were not inferences but merely speculation.¹²⁴ The dissent argued that the *Kalenka* Estate’s claim rested entirely upon “unsupported assumptions and speculation.”¹²⁵

In contrast to *Meyer*, *Kalenka* is a case in which common sense and experience support the sentiment that the *Kalenka* Estate should be allowed to proceed to trial, while the evidence presented does not. Arguably, anybody who has seen a highly intoxicated person at a bar has a vivid mental image of how Morrell appeared the night at Chilkoot Charlie’s as he ordered his tenth, fifteenth, and eighteenth drink.¹²⁶ However, there was no evidence presented to establish Morrell’s behavior inside the bar. As the dissent notes, the “threshold for defeating summary judgment is indeed low, . . . but it is still a threshold that can be crossed only with evidence.”¹²⁷

The majority’s decision to allow the *Kalenka* Estate to proceed to trial creates two possible outcomes. Either *Kalenka* Estate’s claim would lose at directed verdict or the case would proceed to trial, where a jury would almost inevitably find for defendant after being instructed on the statutorily defined requirements for establishing dram shop liability. The *Kalenka* majority set a low bar for surviving a motion for summary judgment, one that allows plaintiffs to proceed to trial, but does not encourage plaintiffs to gather the necessary evidence first. Here, perhaps a more demanding summary judgment standard would have encouraged the *Kalenka* Estate to depose Morrell and gather the evidence needed to win at trial.

122. *Id.*

123. *Id.* at 353 (Maassen, J., dissenting).

124. *Id.* This point is reinforced by the only eyewitness testimony of Morrell’s typical appearance at the bar; on previous occasions Morrell had been “polite, soft spoken and mellow.” *Id.* at 349.

125. *Id.* at 352 (Maassen, J., dissenting; see *Christensen*, 335 P.3d at 520 (requiring the nonmovant demonstrate more than “unsupported assumptions and speculation” to survive summary judgment).

126. *Kalenka*, 305 P.3d at 348.

127. *Id.* at 352 (Maassen, J., dissenting).

III. THREE PROCEDURAL MECHANISMS AFFECTING SUMMARY JUDGMENT IN ALASKA

In addition to the problems inherent in Alaska's "not too incredible to be believed" summary judgment standard, three unique aspects of civil procedure in Alaska further urge courts to adopt a more demanding standard. First, Alaska has not addressed the U.S. Supreme Court's heightened pleading standards set forth in *Twombly*¹²⁸ and *Iqbal*,¹²⁹ and remains a notice pleading state.¹³⁰ Second, Alaska's directed verdict standard is not entirely clear.¹³¹ The court's most recent statement of the directed verdict standard grants trial courts more discretion after trial than at the pre-trial summary judgment stage.¹³² Third, unlike federal courts, Alaska employs the "English Rule" for fee shifting following the entry of judgment.¹³³ Taken together, notice pleading, the vagueness Alaska's directed verdict, and Alaska's fee shifting rules would support changing the state's summary judgment bar to mirror the modern federal "reasonable jury standard."

A. Notice Pleading

Both Federal Rule of Civil Procedure 8 and Alaska Rule of Civil Procedure 8 require a "short and plain statement of the claim showing the pleader is entitled to relief."¹³⁴ Notice pleading, as the U.S. Supreme Court described it in *Conley v. Gibson*,¹³⁵ only requires plaintiff to give "fair notice" of the claim and the grounds upon which the claim rests to

128. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

129. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

130. ALASKA R. CIV. P. 8. *See also* Valdez Fisheries Dev. Ass'n v. Alyeska Pipeline Serv. Co., 45 P.3d 657, 674 (Alaska 2002) (Bryner, J., dissenting) (dissenting from the majority's grant of a motion to dismiss on grounds that Alaska's notice pleading standard requires the complaint only set forth some viable cause of action).

131. *See* Christensen v. Alaska Sales & Serv., Inc., 335 P.3d 514, 520 n.49 (Alaska 2014) (disavowing prior comparisons of directed verdict to summary judgment and stating that Alaska's "summary judgment standard is not the same as the standard for deciding post-trial motions for directed verdict"). *Compare* Cameron v. Chang-Craft, 251 P.3d 1008, 1017-18 (Alaska 2011) (using a summary judgment standard for a directed verdict) *with* Murray E. Gildersleeve Logging Co. v. N. Timber Corp., 670 P.2d 372, 377 (Alaska 1983) (using a different definition of the standard for a direct verdict).

132. *Christensen*, 335 P.3d 514, 520 n.49.

133. *State v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 398 (Alaska 2007).

134. FED. R. CIV. P. 8(a)(2); ALASKA R. CIV. P. 8(a).

135. 355 U.S. 41 (1957), *abrogated by* *Bell Atl. Co. v. Twombly*, 550 U.S. 554 (2007).

survive dismissal of the complaint.¹³⁶ However, the U.S. Supreme Court arguably raised its pleading standard interpretation in *Twombly*¹³⁷ and *Iqbal*¹³⁸ to require the showing of a plausible claim for relief. Alaska has neither addressed nor adopted this change.¹³⁹

The Alaska supreme court has not addressed whether the facial plausibility standard federal courts in *Twombly* and *Iqbal* adopted also applies in Alaska.¹⁴⁰ However, there is little reason to think that Alaska will adopt the facial plausibility standard for Rule 12(b)(6) analysis any time soon. Alaska courts disfavor motions to dismiss and grant dismissal only when it “appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief.”¹⁴¹ Even if the relief demanded in the complaint is unobtainable, Alaska courts refuse to dismiss the complaint “as long as some relief might be available on the basis of the alleged facts.”¹⁴² Thus, Alaska courts construe complaints liberally and grant the complaining party the benefit of the doubt.¹⁴³

By contrast, federal courts require facial plausibility of a complaint to survive a motion to dismiss analysis.¹⁴⁴ This plausibility standard requires that the plaintiff’s complaint show more than a possibility of

136. *Id.* at 47.

137. 550 U.S. 554. In the antitrust context, *Twombly* required that the plaintiff must allege facts in the complaint with sufficient specificity to allow a court to determine that the claim was plausible. *Id.* at 556.

138. 556 U.S. 662 (2009). This case applied *Twombly*’s heightened pleading standard to all federal civil litigation. *Id.* at 684. After *Iqbal*, a federal complaint must state a plausible claim for relief, assuming all well-plead factual allegations as true, to survive a motion to dismiss. *Id.* at 678–79.

139. *E.g.*, *L.D.G., Inc. v. Robinson*, 290 P.3d 215, 218 (Alaska 2012) (using the “no set of facts” language from *Conley*); Philip A. Tarpley, *The Doctrine In The Shadows: Reverse-Erie, Its Cases, Its Theories, And Its Future With Plausibility Pleading In Alaska*, 32 ALASKA L. REV. 213, 215 (2015) (“Though a replica state, the Alaska court system has yet to address *Twombly* and *Iqbal*.”).

140. *Twombly* has been cited by the United States District Court for the District of Alaska twenty-seven times, but it has never been cited by the Alaska supreme court. Similarly, *Iqbal* has been cited by the United States District Court for the District of Alaska twenty-six times, but it has never been cited by the Alaska supreme court.

141. *Adkins v. Stansel*, 204 P.3d 1031, 1033 (Alaska 2009). This echoes the pre-*Twombly-Iqbal* federal standard: “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim” *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), *abrogated by Twombly*, 550 U.S. 554.

142. *Adkins*, 204 P.3d at 1033.

143. *See Knight v. Am. Guard & Alert, Inc.*, 714 P.2d 788, 791 (Alaska 1986) (“The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.”) (internal citation omitted).

144. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

entitlement to relief, but less than a level of probability.¹⁴⁵ Complaints that fail to allege sufficient factual particularity to carry claims “across the line from conceivable to plausible” are dismissed under the facial plausibility standard.¹⁴⁶ Deciding a motion to dismiss under the standard of facial plausibility is a context-specific inquiry that requires federal courts to rely on judicial experience and common sense.¹⁴⁷ Thus, a complaint requires far more factual specificity to survive a motion to dismiss in federal court than in Alaska state court.

Considered together, motion to dismiss and motions for summary judgment in federal court shifts the gatekeeping function of the trial judge from the trial phase forward to both the pleading and discovery phases.¹⁴⁸ The modernization of the pleading standard and summary judgment standard in federal court affords trial judges significant pretrial discretion.¹⁴⁹ The experience and common sense of the federal judiciary justifies this discretion.¹⁵⁰ A heightened summary judgment standard differs from a heightened pleading standard in that the facts matter, and this Note advocates for a higher summary judgment standard but *not* a heightened pleading standard. At the summary judgment stage of a proceeding, the trial judge has the benefit of a full evidentiary record.¹⁵¹ While a heightened pleading standard dismisses a plaintiff before unlocking the door to discovery, a heightened summary judgment standard only dismisses a plaintiff when no stone has been left unturned.

B. Directed Verdict

Recently, the supreme court has stated that Alaska’s summary judgment standard does not mirror the state’s standard for deciding post-trial motions for directed verdict.¹⁵² In a footnote, the supreme court in *Christensen* favorably quoted a thirty-one year old recitation of

145. *Id.*

146. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

147. *Iqbal*, 556 U.S. at 679.

148. Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. 1, 50–51 (2010).

149. *Id.* at 51.

150. *See Iqbal*, 556 U.S. at 679 (noting that determining plausibility will “be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense”).

151. If sufficient evidence is not available to the nonmovant, “the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.” ALASKA R. CIV. P. 56(f).

152. ALASKA R. CIV. P. 50(a); *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 520 n.49 (Alaska 2014).

Alaska's directed verdict standard: "[A] directed verdict will be granted when reasonable jurors could not differ in their resolution of a disputed issue of fact."¹⁵³ Thus, unlike Alaska's summary judgment standard, directed verdict analysis incorporates the movant's evidentiary burden in determining whether a factual issue is genuinely disputed.¹⁵⁴

However, the supreme court has repeatedly muddled whether directed verdict motions are analyzed under the "reasonable jury" standard (incorporating the evidentiary burden)¹⁵⁵ or the "reasonable person" standard (*not* incorporating the evidentiary burden).¹⁵⁶ Confusingly, the supreme court has cited the *same case* at different times for these conflicting propositions.¹⁵⁷

By contrast, the federal standard for directed verdict under Federal Rule of Civil Procedure 50(a) is set forth in *Anderson v. Liberty Lobby, Inc.*¹⁵⁸ In federal court, the standard for directed verdict mirrors the standard for summary judgment.¹⁵⁹ A trial judge must direct a verdict "if, under the governing law, there can be but one reasonable conclusion as to the verdict."¹⁶⁰ At the federal level, the difference between summary judgment and directed verdict is procedural: summary judgment is decided on documentary evidence before trial while directed verdict is made at trial based on the admitted evidence, whether documentary, physical, or oral testimony.¹⁶¹

If we take the Alaska supreme court at its (most recent) word, Alaska's directed verdict standard is essentially the same as the federal

153. *Christensen*, 335 P.3d at 520, n.49 (quoting *Murray E. Gildersleeve Logging Co. v. N. Timber Corp.*, 670 P.2d 372, 377 (Alaska 1983)).

154. *Id.*

155. *E.g., id.*

156. *E.g., Great W. Sav. Bank v. George W. Easley Co., J.V.*, 778 P.2d 569, 578 (Alaska 1989) (stating that the court's role "is to determine whether the evidence, when viewed in the light most favorable to the nonmoving party, is such that reasonable persons could not differ in their judgment as to the facts"; *see also* *Cameron v. Chang-Craft*, 251 P.3d 1008, 1017-18 (Alaska 2011) (stating that for directed verdict purposes "the only evidence that should be considered is the evidence favorable to the non-moving party" and if there exists "any doubt, questions of fact should be submitted to the jury") (emphasis added)).

157. *Compare Gildersleeve*, 670 P.2d at 377 (citing *Mullen v. Christiansen*, 642 P.2d 1345, 1348 (Alaska 1982) for the proposition that directed verdict will be granted when "reasonable jurors could not differ in their resolution of a disputed issue of fact."), *with Great W. Sav. Bank*, 778 P.2d at 578 (citing *Mullen*, 642 P.2d 1345 (pin cite omitted in original) for the proposition that directed verdict will be granted when "reasonable persons could not differ in their judgment as to the facts" and further explaining that courts will not weigh evidence or determine credibility at directed verdict).

158. 477 U.S. 242 (1986).

159. *Id.* at 250.

160. *Id.*

161. *Id.* at 251.

standard. The court considers the evidence in light of the parties' evidentiary burdens and may enter a verdict for the movant if no genuine issue of fact exists to require jury submission.¹⁶² This makes perfectly good sense. A directed verdict motion follows the presentation of evidence at trial and cross-examination. The only cases affected by direct verdict are those that are not worthy of submission to the jury to begin with.¹⁶³ If Alaska trial judges have the discretion to determine directed verdict motions under a "reasonable jury" standard, they should be afforded the same discretion to apply the same standard at the pretrial stage by way of summary judgment. Further, a revised summary judgment standard would afford the Alaska supreme court another opportunity to clarify its unclear case law on the appropriate standard for directed verdict.

C. "English Rule" Fee Shifting

Alaska Rule of Civil Procedure 82 grants the prevailing party in a civil lawsuit partial compensation by allowing a percentage award of a recovered money judgment, or a percentage of attorney's fees in a non-monetary judgment, paid by the losing party.¹⁶⁴ Rule 82 sets out a schedule providing the recoverable percentage for attorney's fees based on the judgment amount and whether the case went to trial.¹⁶⁵ In the other forty-nine states, courts employ the "American Rule" in which the prevailing party is typically not entitled to attorney's fees from the losing party.¹⁶⁶ Alaska's "English Rule" aims to compensate a prevailing party for the expenses incurred asserting and enforcing its rights.¹⁶⁷ Proponents of Alaska's fee shifting rule argue that heightened stakes both restrain frivolous or weak claims and create higher incentives for meritorious parties to assert their rights by compensating the prevailing party.¹⁶⁸ Opponents of the "English Rule" argue that the rule creates unfair windfall, draconian penalties for losing litigants, and generally has a chilling effect on both meritorious and frivolous litigation.¹⁶⁹

Though Alaska's "English Rule" has been analyzed both

162. *Id.*; *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 520 n.49 (Alaska 2014).

163. FED. R. CIV. P. 50(a)(1).

164. ALASKA R. CIV. P. 82.

165. ALASKA R. CIV. P. 82(b)(1).

166. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975).

167. *State v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 398 (Alaska 2007).

168. *Susanne Di Pietro & Teresa W. Carns, Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 ALASKA L. REV. 33, 35 (1996).

169. *Id.*

theoretically and empirically, the tangible effects of the rule remain murky.¹⁷⁰ However, three points are important in the context of Alaska's summary judgment standard. First, Alaska's "English Rule" does not appear to affect the per capita rate of civil lawsuit filings.¹⁷¹ While there are countless jurisdictional, cultural, and economic factors that require approaching this conclusion with caution, if correct, this finding indicates that the "English Rule" has little effect on frivolous lawsuits.

Second, Rule 82 is predominantly a one-way street in practice.¹⁷² Victorious plaintiffs bringing suits against corporations and insurance companies generally have a much higher prospect at recovering Rule 82 fees than victorious defendant corporations.¹⁷³

Third, and perhaps most important for any summary judgment discussion, the effect of Rule 82 on settlement prospects is unclear.¹⁷⁴ Rule 82 has the potential to increase the total cost of litigation for the losing party, thereby increasing the stakes of proceeding to trial.

Rule 82 should, then, encourage settlements among risk-averse, rational parties. However, such assumptions may not bear out in personally and emotionally charged cases. The actual effect of Rule 82 may instead be heavily influenced by the nature of the claim and the relationship between the parties to the lawsuit. A higher standard for summary judgment would serve to further settlement incentives by establishing a clear and meaningful litmus test for the viability of claims in Alaska during the pre-trial phase of litigation.

IV. WEIGHING THE MERITS OF CHANGING ALASKA'S SUMMARY JUDGMENT STANDARD

Thus far, this Note has analyzed the distinctions between current federal and Alaska summary judgment standards and discussed three related procedural devices that may support a modernized Alaska

170. See Douglas C. Rennie, *Rule 82 & Tort Reform: An Empirical Study of the Impact of Alaska's English Rule on Federal Civil Case Filings*, 29 ALASKA L. REV. 1, 7 (2012) (reviewing theoretical arguments about the "English Rule," conducting a comparative empirical analysis of civil filings in Alaska and similar districts, and concluding that civil filings are not significantly deterred in Alaska by the Rule); Di Pietro & Carns, *supra* note 168, at 62 (discussing the study's empirical findings regarding the effects of Alaska's "English Rule"); Gordon Sommers, *The End of the Public Interest Exception: Preventing the Deterrence of Future Litigants with Rule 82(b)(3)(I)*, 31 ALASKA L. REV. 131, 134 (2014).

171. Di Pietro & Carns, *supra* note 168, at 62-63.

172. See *id.* at 60-61 (discussing the effects of Rule 82 in the context of personal injury and insurance defense litigation).

173. See *id.* (quoting an insurance personal injury defense attorney who said that "[w]hen we . . . try to collect our Rule 82 award, we're seen as ogres").

174. Rennie, *supra* note 170, at 16.

standard. This note analyzes three major arguments for the adoption of a new summary judgment standard: (1) the efficient administration of justice; (2) preventing confusion; and (3) promoting consistency. This Note then addresses three arguments against changing the summary judgment standard: (1) overstatement of the efficiency justification; (2) the Seventh Amendment right of trial by jury; and (3) *stare decisis*. This Note concludes with a recommendation: the Alaska supreme court should adopt the “reasonable jury” summary judgment standard in accordance with the federal *Celotex* trilogy doctrine because the arguments in favor of a modernized standard, coupled with Alaska’s distinctive procedural devices, strongly outweigh the arguments to the contrary.

A. Arguments for Adopting the Federal Standard in Alaska

1. *Improving Efficiency*

A modernized summary judgment standard would allow for a more efficient administration of justice in Alaska state courts. The standard this Note advocates is essentially the same as the “reasonable jury” standard currently employed by federal courts. The purpose of the Alaska Rules of Civil Procedure is to “secure the just, speedy and inexpensive determination of every action and proceeding.”¹⁷⁵ A modernized summary judgment rule—one that incorporates the evidentiary burdens of the parties at trial and affords trial judges sufficient discretion to determine motions based on the facts presented—would be more faithful to the purpose of the Alaska Rules of Civil Procedure.

The reasonable jury standard in Alaska has its strongest effect on parties with the least viable claims. Yet, even these parties may fare objectively better under the reasonable jury standard. For example, a plaintiff with an exceptionally weak claim under Alaska’s current “not too incredible to be believed” summary judgment standard will likely have the opportunity to go to trial if they refuse to settle.¹⁷⁶ Although this hypothetical plaintiff can show more than a scintilla of evidence, they will likely not be able to win at trial. After their day in court, plaintiff may end up paying a portion of defendant’s attorney’s fees.¹⁷⁷

175. ALASKA R. CIV. P. 1.

176. See *supra* Part III discussing Alaska’s notice pleading requirements.

177. ALASKA R. CIV. P. 82. In this hypothetical, it is not hard to imagine that a trial judge might be more likely to award defendant’s attorney’s fees after being forced to deny summary judgment and preside over a largely meritless trial.

The meritless plaintiff would have been in a better economic position losing at summary judgment.

For the same economic reasons, defendants and the court would prefer this outcome as well. Alaskan defendants stand to benefit significantly from a modern summary judgment standard. Summary judgment gives defendants at least one meaningful chance resolve weak claims favorably, limit litigation expenses, and prevent the danger of exposure to a runaway jury. Courts would benefit as well. The mere threat of a stronger summary judgment standard would force contested issues to the forefront of a dispute in the pre-trial phase and allow courts to clear the docket of meritless cases more effectively. Nuisance value lawsuits are an economic drag on defendants, plaintiffs, and the court system. The reasonable jury standard would help to eliminate some of this deadweight loss in Alaska courts.

The reasonable jury standard in Alaska would also promote the efficient administration of justice by encouraging settlement. Alaska's procedural system affords defendants minimal opportunities to dispose of claims before trial, especially when compared to the federal system. Mindful plaintiffs, even those with relatively weak claims, will recognize that defendants have no reasonable expectation of obtaining dismissal at the pre-trial stage. Accordingly, plaintiffs have little incentive to engage in settlement discussions before trial. Under the current system, plaintiffs and defendants occupy diametrically opposed positions with respect to settlement.

An effective summary judgment procedure forces parties to evaluate the strength of their claims and defenses.¹⁷⁸ In the case of a weak claim where the court is more likely to grant summary judgment, meaningful summary judgment would incentivize the nonmovant to settle before the close of discovery. In the case of a contested claim, the parties would have to make a more concerted effort at the summary judgment stage by putting forth all available evidence to support their claims. This would allow the court to filter out the non-contested issues and enable the parties to better understand the opponent's claims and evidence. Even when denied, a motion for summary judgment under the reasonable jury standard may have the effect of bringing the parties closer to settlement.¹⁷⁹ Forcing the parties to confront the realities of the

178. See Edward Brunet, *Six Summary Judgment Safeguards*, 43 AKRON L. REV. 1165, 1167 (2010) ("This summary judgment burden of production insures that only those cases with legitimate disputed issues of fact merit a trial and thereby conserves expensive and scarce trial and jury resources.").

179. See *id.* at 1167 (arguing that a denial of a summary judgment motion enhances the value of settlement for the nonmovant).

evidence and “balance the realistic probabilities of success against the costs associated with further litigation” is more likely when the threat of summary judgment is viewed by both parties as legitimate.¹⁸⁰

Finally, granting trial court judges more discretion at the summary judgment stage would allow for great efficiency in the administration of justice. Alaska Rule 56 already grants judges a number of discretionary powers. Judges may “refuse the application for judgment” or “order a continuance” for further discovery or may “make such other order as is just.”¹⁸¹ Under the current “not too incredible to be believed” standard, a trial judge may deny summary judgment in the rare case where the nonmovant presents no evidence at all, but would be unable to grant summary judgment in a case where it is evident that the nonmovant cannot meet its burden at trial. Increased flexibility in granting summary judgments would be consistent with the trial judge’s other discretionary powers.

2. Preventing Confusion

The reasonable jury standard would also prevent considerable confusion in Alaska courts. For one, legal practitioners must recognize the difference between the state and federal summary judgment standards as well as the difference between the state’s summary judgment standard and its directed verdict standard. Additionally, the Alaska supreme court has been less than clear in rejecting the federal summary judgment standard. The supreme court’s recent discussion in *Christensen* admits that the court has often conflated “reasonable person” with “reasonable juror” and “reasonable jury.”¹⁸² The supreme court has also cited to *Celotex*,¹⁸³ *Anderson*,¹⁸⁴ and *Matsushita*¹⁸⁵

180. Issacharoff & Lowenstein, *supra* note 23 at 75 n.11.

181. ALASKA R. CIV. P. 56(f).

182. *Supra*, Part II.

183. The Alaska supreme court has erroneously cited to *Celotex* twice. *Greywolf v. Carroll*, 151 P.3d 1234, 1241 (Alaska 2007); *Cooper v. State, Dep’t of Corr.*, No. S-14497, 2012 WL 4039813, at *2 (Alaska 2012) (quoting *Greywolf*, 151 P.3d at 1241).

184. The Alaska supreme court has erroneously cited to *Anderson* three times. *Cameron v. Chang-Craft*, 251 P.3d 1008, 1017 (Alaska 2011) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, (2000)); *Enders v. Parker*, 125 P.3d 1027, 1031–32 (Alaska 2005); *State v. Carpenter*, 171 P.3d 41, 71 (Alaska 2007) (Carpeneti, J., concurring).

185. The Alaska supreme court has cited *Matsushita* six times, though on each occasion the case was cited for propositions other than the summary judgment holding. *Alakayak v. British Columbia Packers, Ltd.*, 48 P.3d 432, 450 (Alaska 2002); *Meyer v. State, Dep’t of Revenue, Child Support Enforcement Div. ex rel. N.G.T.*, 994 P.2d 365, 369 (Alaska 1999) (Eastbaugh, J., concurring); *Alakayak v.*

repeatedly—further confusing the issue of whether the state *actually* rejects the federal reasonable jury standard. Lastly, the supreme court has erroneously conflated the state’s “not too incredible to be believed” summary judgment standard with its “reasonable jury” directed verdict standard.¹⁸⁶ So long as these two standards are in conflict, confusion will persist within the Alaska Bar.

3. *Promoting Consistency*

Applying the reasonable jury standard at the state level would also promote consistency and produce more equitable and just results. Though the Alaska Rules of Civil Procedure were originally based on the federal rules, the Supreme Court has adopted a modernized interpretation of the federal rules, which Alaska courts largely declined to follow. The federal modernization favors “increasingly early case disposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits.”¹⁸⁷ Any eligible defendant sued in Alaska state court would be wise to file a notice of removal to take the suit to federal court, where summary judgment is more attainable. Accordingly, shrewd plaintiffs may be more likely to attempt to prevent diversity of citizenship and thereby remain in state court. Either way, the difference between state and federal procedural rules will be outcome determinative for a significant number of parties, regardless of the merits of the cases.

The reasonable jury standard may also promote consistency in application across Alaska state courts as well. The current “not too incredible to be believed” standard operates inconsistently to the extent that trial courts and the Alaska supreme court disagree about the facts of a case.¹⁸⁸ Ultimately, the Alaska standard for summary judgment is

All Alaskan Seafoods, Inc., No. 3AN-95-04676CI, 1999 WL 1027062 at *3-4 (Alaska Super Ct. July 2, 1999), *rev'd sub nom.* Alakayak v. British Columbia Packers, Ltd., 48 P.3d 432 (Alaska 2002); Buster v. Gale, 866 P.2d 837, 841 (Alaska 1994); Colt Indus. Operating Corp., Quincy Compressor Div. v. Frank W. Murphy Mfr., Inc., 822 P.2d 925, 933 (Alaska 1991), *superseded by statute on other grounds*, Tort Reform Act of 1986, Ch. 139, § 1 SLA 1986, *as recognized by* Alaska Gen. Alarm, Inc. v. Grinnell, 1 P.3d 98, 105 (Alaska 2000); Norris v. Gatts, 738 P.2d 344, 349 (Alaska 1987).

186. *Supra*, Part III.

187. Miller, *supra* note 148, at 10.

188. *E.g.*, Meyer v. State, Dep’t of Revenue, Child Support Enforcement Div. *ex rel.* N.G.T., 994 P.2d 365 (Alaska 1999) (finding that Meyer had raised a material fact issue of paternity through his sworn denial of sexual intercourse during the relevant time period, while the superior court had granted summary judgment based on a paternity test that established that there was a 99.98% probability of Meyer’s paternity, thereby creating no issue of material fact).

whatever the supreme court says it is—even in the case of the lying affiant and a DNA test. The reasonable jury standard would promote greater consistency and ease of administration by rendering the interpretive distinctions between what reasonable minds would find incredible and “not too incredible” irrelevant. Instead, under the reasonable jury standard, the dispute must rise to the level of the nonmovant’s substantive evidentiary burden.

B. Arguments Against Adopting the Federal Standard in Alaska

Many scholars have discussed drawbacks and problems with the modern federal summary judgment standard.¹⁸⁹ None of these articles address the particularities of Alaska law. Instead, the scholarship has generally focused on the transformation of summary judgment within the broader federal movement favoring early disposal and dismissal of claims.¹⁹⁰ Because Alaska has largely resisted the federal shift towards early claims disposal, much of the summary judgment scholarship is of limited utility as applied to Alaska’s procedural framework. Nevertheless, there are at least three tenable arguments against changing the Alaska summary judgment standard: (1) the efficiency justification is overstated; (2) the Seventh Amendment right of trial by jury; and (3) stare decisis.

1. Efficiency

One argument against the modern reasonable jury standard is that proponents overstate its efficiency. Opponents argue that the reasonable jury standard incentivizes defendants to impose lengthy discovery periods and an expensive motion practice upon all parties.¹⁹¹ Defendants, encouraged by the perceived gains at the summary

189. E.g., Issacharoff & Loewenstein, *supra* note 23, at 74–75 (discussing the unintended consequences of a liberalized summary judgment standard); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 139 (2007) (asserting that summary judgment unconstitutionally conflicts with the jury’s role as the finder of fact); Patricia Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1898 (1998) (analyzing the transformation and increased use of summary judgment in the D.C. Circuit); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 982 (2003) (arguing for further guidance to prevent trial courts from encroaching on the fundamental rights of litigants); John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 522 (2007) (arguing that summary judgment costs the court system more than it saves).

190. E.g., Miller, *supra* note 148, at 10.

191. Bronsteen, *supra* note 189, at 551 (2007).

judgment stage, would rattle off shotgun-style, boilerplate summary judgment motions in every case.¹⁹² A logjam of summary judgment motions would cripple court dockets and outweigh any gains from the higher number of dismissals.¹⁹³ Worst of all, these marginal or negligible efficiencies come at the expense of an ever-eroding right to trial by jury.¹⁹⁴

There are two potential responses to the opponents' argument that the reasonable jury standard's efficiency is overstated. First, judges could summarily review a motion for summary judgment immediately upon filing. In so doing, the judge would quickly determine whether the motion was frivolous, whether an opposition was necessary, and whether continued discovery was needed.¹⁹⁵ This intermediate step would allow judges to sift out meritless, boilerplate motions, even before the nonmovant's filing of an opposition.

Second, Alaska is uniquely situated to address any abuses of a modernized summary judgment standard because of the state's "English Rule" for fee shifting.¹⁹⁶ To the extent that reasonable jury summary judgment would incentivize defendants to employ dilatory tactics, expansive discovery, or expensive motion practices in the hopes of escaping at summary judgment, such tactics would become a double-edged sword. On the one hand, the defendant may have a better chance at escaping a lawsuit using summary judgment. On the other hand, extensively litigated issues would carry higher attorney's fees under Rule 82 for those defendants who lose at trial.¹⁹⁷ Prior to implementation, the efficiencies and inefficiencies of the reasonable jury standard in Alaska are largely speculative. However, there is good reason to think that some inefficiencies of the federal reasonable jury standard may not translate in Alaska's fairly unique procedural landscape.

2. *Seventh Amendment Right of Trial by Jury*

Some commentators have argued that summary judgment is unconstitutional.¹⁹⁸ Generally, this argument holds that no procedural mechanism available in 1791 restricted a plaintiff's right to jury trial to

192. Schwarzer, *supra* note 53, at 478.

193. *Id.*

194. Miller, *supra* note 189, at 1134.

195. Schwarzer, *supra* note 53, at 479.

196. See ALASKA R. CIV. P. 82 (setting forth the schedule and procedure for attorney's fees awards in Alaska state courts).

197. See *id.*

198. Thomas, *supra* note 189, at 139-40; Bronsteen, *supra* note 189, at 547-50.

the same extent as modern summary judgment,¹⁹⁹ and that summary judgment gave judges this power.²⁰⁰ Thus, because current federal summary judgment practice affords judges a power that did not exist at common law in 1791, federal summary judgment violates the constitutional principle that “[i]n suits at common law, . . . the right of trial by jury shall be preserved.”²⁰¹

Substantial case law and commentary exists rejecting the view that summary judgment is unconstitutional.²⁰² While the Seventh Amendment preserves the right to trial by jury, it does not preserve the right to trial by jury for meritless or frivolous claims.²⁰³ More importantly for the purposes of Alaska’s summary judgment standard, under current U.S. Supreme Court doctrine, the Seventh Amendment is one of the few Bill of Rights protections not incorporated upon the states through the Fourteenth Amendment.²⁰⁴ Thus, there is a strong argument that the Seventh Amendment’s protection of a right to trial by jury applies to the federal government and does not apply to the states.²⁰⁵

Instead, the constitutional protection argument against summary judgment must rely on protection from the Alaska constitution. The Alaska constitution provides: “In civil cases . . . the right of trial by a jury of twelve is preserved to the same extent as it existed at common law.”²⁰⁶ The Alaska supreme court has repeatedly rejected claims that summary judgment violates Article I § 16 of the constitution.²⁰⁷ At common law in Alaska, courts had authority to remove factual issues from consideration by the jury when the court determined “there was insufficient evidence to raise a question of fact to be presented to the jury.”²⁰⁸ A grant of summary judgment only violates the Alaska constitution when improperly granted—that is, when granted if a genuine issue of material fact actually exists.²⁰⁹ Accordingly, if the

199. Bronsteen, *supra* note 189, at 550.

200. *Id.*

201. *Id.* (quoting U.S. CONST. amend. VII).

202. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 350–51 (1979); *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 320 (1902); Brunet, *supra* note 178, at 1186.

203. *Fidelity*, 187 U.S. at 320–21. “The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.” *Id.*

204. *McDonald v. Chicago*, 561 U.S. 742, 765 n.13 (2010).

205. *Id.*

206. ALASKA CONST., art. I, § 16.

207. *Capolicchio v. Levy*, 194 P.3d 373, 380–81 (Alaska 2008); *Falke v. Council of the City of Fairbanks*, 960 P.2d 589, 590 (Alaska 1998); *Christensen v. NCH Corp.*, 956 P.2d 468, 477 (Alaska 1998).

208. *Christensen*, 956 P.2d at 477 (internal quotations and brackets omitted).

209. *Id.*

Alaska supreme court were to adopt a new interpretation of “genuine issue” that incorporated the nonmovant’s substantive evidentiary burden, the same logic applies to the constitutionality of summary judgment. If no genuine issue of fact exists and the movant is entitled to judgment as a matter of law, then summary judgment is proper and does not violate Art. I § 16 of the Alaska constitution.

The Alaska supreme court’s most recent statement on summary judgment indicates the court may be unlikely to adopt a reformed summary judgment standard any time soon.²¹⁰ However, the supreme court’s reason for declining to adopt a new standard does not appear to be based on constitutional concerns.²¹¹ Instead, the court has maintained its “lenient standard for withstanding summary judgment” to preserve the right of litigants to have factual questions determined by the jury.²¹²

3. *Stare Decisis*

Finally, the doctrine of stare decisis stands in the way of a reformed summary judgment standard in Alaska. Stare decisis is the principle to let that which has been decided stand. The judiciary’s duty – to say what the law is – would be meaningless if the court stated the law differently at any given opportunity. While Alaska has adhered to the same method of summary judgment analysis since its earliest days,²¹³ the notion that the summary judgment is “well-settled” is a dubious proposition.²¹⁴

A party raising a claim controlled by existing precedent must show compelling reasons for reconsidering the prior ruling.²¹⁵ This burden includes two elements. First, the party must show that the prior decision was erroneous when decided or that intervening changes have rendered the decision currently unsound.²¹⁶ A party seeking to challenge the summary judgment standard in Alaska would likely have a difficult time arguing that intervening changes in Alaska have rendered

210. See *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514, 521 (Alaska 2014) (“We see no reason to deviate from our long-established summary judgment standard today.”).

211. *Id.*

212. *Id.* at 520–21.

213. See *Gilbertson v. Fairbanks*, 368 P.2d 214, 214–17 (Alaska 1962) (showing that shortly after gaining statehood, Alaska used the same summary judgment standard).

214. See *Christensen*, 335 P.3d at 520 (attempting to clarify that the court’s “inartful use of the term ‘reasonable jurors’ was not meant to suggest use of the federal summary judgment standard”).

215. *Thomas v. Anchorage Equal Rights Comm’n*, 102 P.3d 937, 943 (Alaska 2004).

216. *Id.* (quoting *State, Commercial Fisheries Entry Comm’n v. Carlson*, 65 P.3d 851, 859 (Alaska 2003)).

Christensen erroneous. Much has changed since the U.S. Supreme Court decided the *Celotex* trilogy in 1986, but little has changed since the Alaska supreme court decided *Christensen* in October 2014. Importantly, the parties in *Christensen* did not brief the issue of Alaska’s summary judgment standard.²¹⁷ The appellee, seeking to affirm the lower court’s grant of summary judgment, simply (and wrongly) asserted that Alaska employed the reasonable jury standard.²¹⁸ To satisfy the first element of the doctrine of stare decisis, the party challenging the current “not too incredible to be believed” standard would likely argue that the line of cases spanning from *Moffat* to *Christensen* have improperly evaluated the merits of the reasonable jury standard and arrived at an erroneous conclusion as a result.

To satisfy the second element of the doctrine of stare decisis, a party must show “that more good than harm would result from a departure from precedent.”²¹⁹ This analysis mirrors the costs and benefits discussed in this Note, and the court considered some of these arguments in *Christensen*.²²⁰ The harms of the reasonable jury summary judgment standard include: (1) restricting access to courts and trial; (2) uncertainty in applying a new standard in light of prior case law; and (3) risks of defendants imposing expensive discovery and motion practice on plaintiffs. However, these potential harms are outweighed by the benefits of the reasonable jury standard, including: (1) efficiency in the court system; (2) resolved confusion between the differing standards; (3) consistency in application; and (4) fairness to defendants. Ultimately, the reasonable jury summary judgment standard, applied in Alaska courts, is more faithful to the goal of the Alaska Rules of Civil Procedure: “to secure just, speedy and inexpensive determination of any action.”²²¹ A modern summary judgment standard in Alaska would more effectively realize this admirable purpose.

CONCLUSION

Alaska should adopt the federal reasonable jury summary judgment standard. The benefits of a modernized method of summary

217. Brief for Appellant at 24–25, *Christensen v. Alaska Sales & Serv., Inc.*, 335 P.3d 514 (Alaska 2014) (No. S-14963); Brief for Appellee at 11–12, *Christensen*, 335 P.3d 514 (Alaska 2014) (No. S-14963).

218. Brief for Appellee at 11–12, *Christensen*, 335 P.3d 514 (Alaska 2014) (No. S-14963).

219. *Thomas*, 102 P.3d at 943.

220. See *Christensen*, 335 P.3d at 520–21 (arguing that the more lenient standard preserves the jury’s role as the finder of fact).

221. ALASKA R. CIV. P. 1.

judgment analysis are vast: judicial economy, consistency, fairness to defendants, and greater incentives for settlement. While the role of the jury as the finder of fact, *stare decisis*, and a long line of case law may stand in the way of a new summary judgment standard, the potential benefits of the modern federal standard outweigh these barriers. Additionally, certain aspect of Alaska's procedural rules—specifically, notice pleading, the directed verdict standard, and "English Rule" fee shifting—would result in a more equitable application of the reasonable jury standard in Alaska as compared to the federal courts.

Alaska's current summary judgment practices fail to fulfill the purpose of the motion—"to secure the just, speedy and inexpensive determination of any action."²²² Summary judgment should not be denigrated as a trap for unsuspecting plaintiffs. "Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test out, in advance of trial by inquiring and determining whether such evidence exists."²²³ The procedure's goal mirrors that of the court system generally: to arrive at the truth. Alaska's "not too incredible to be believed" summary judgment standard is less than adequate in fulfilling that role. The Alaska supreme court should reconsider *Christensen* and adopt the reasonable jury summary judgment standard.

222. *Id.*

223. *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940).