POINT I

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED, AS THERE ARE MATERIAL QUESTIONS OF FACT.

A summary judgment motion should be viewed as a valuable tool for this Court in administering justice. Summary judgment should not be denied if papers pertinent to the motion show palpably the absence of any issue of material fact, although allegations of pleadings, standing alone, may purport to raise such an issue. *U.S. Pipe & Foundry Co. v. American Arbitration Ass'n*, 67 N.J. Super. 384 (App. Div. 1961).

Summary judgment is a proper remedy where there is no genuine issue of material fact challenged and the moving party is entitled to judgment as a matter of law. This falls within the literal guidelines of *Rule* 4:46-2, which states that summary judgment must be granted:

> [I]f the pleadings, deposition, 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.

The rationale upon which this rule is premised was enunciated in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 N.J. 67, 73-74 (1954), wherein the Supreme Court declared:

> It is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly show not to present any genuine issue of material fact requiring disposition at trial. . . . In conjunction with the pre-trial discovery and pre-trial conference procedure, the summary judgment procedure aims at "the swift uncovering of the merits and either their effective disposition or their

advancement toward prompt resolution by trial."

See also N.J. Sports and Exposition Authority v. McCrane, 119 N.J. Super. 457, 470 (Law Div. 1971), *aff'd*, 61 N.J. 1 (1972).

In essence, these proceedings are designed to "pierce the allegations of the pleadings" and to demonstrate that the facts are contrary to what was alleged. *See Rankin v. Sowinski,* 119 N.J. Super. 393, 399-400 (App. Div. 1972); *Eisen v. Kostakos,* 116 N.J. Super. 358, 370-371 (App. Div. 1971); *Sokolay v. Edlin*, 65 N.J. Super. 112, 121 (App. Div. 1961). As appropriately enunciated in *Heljon Management Corp. v. DiLeo*, 55 N.J. Super. 306 (App. Div. 1959):

> [I]t is settled that where there is a *prima facie* right to summary judgment, the party opposing the motion is required to demonstrate by competent evidential material that a genuine issue of a material fact exists. This is to afford litigants protection against groundless claims and frivolous defenses. *Robbins v. Jersey City*, 23 N.J. 229, 240-241, 128 A.2d 673 (1957). It is not sufficient for the party opposing the motion merely to deny the fact in issue where means are at hand to make possible an affirmative demonstration as to the existence or non-existence of the fact.

Rule 4:46-2 and the further guidelines set forth in *Judson* are the basis upon which the motion is to be determined. *See Bilotti v. Accurate Forming Corporation*, 39 N.J. 184 (1963); *United Advertising Corp. v. Metuchen*, 35 N.J. 193 (1961); *Steward v. Magnolia*, 134 N.J. Super. 312 (App. Div. 1975); *Friedman v. Friendly Ice Cream Co*, 133 N.J. Super. 333 (App. Div. 1975).

The requirements, once the burden has shifted, are clearly set forth in *Rule* 4:46-5(a), which states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not

> rest upon the mere allegations or denials of the pleading, but must respond . . . setting forth specific facts showing that there is a genuine issue for trial.

The same philosophy runs through those reported opinions in which the question of summary judgment has arisen. Precedent dictates, "Bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." *U.S. Pipe & Foundry Co. v. American Arbitration Ass'n*, 67 N.J. Super. 384, 399-400 (App. Div. 1961).

In conjunction with this, the courts have gone on to say that sworn assertions of ultimate facts based on information and belief are not sufficient to satisfy the burden placed on the opposing party where neither the source of the information nor the material basis of the belief is specifically stated. *James Talcott v. Shulman*, 82 N.J. Super. 438, 443 (App. Div. 1964); *N.J. Mortgage & Investment Corp. v. Calvetti*, 68 N.J. Super. 18, 32 (App. Div. 1961).

As stated above, summary judgment is a procedure which should pierce the naked allegations of pleadings to require a real showing that the facts are otherwise than as alleged by the movant. *Rankin v. Sowinski,* 119 N.J. Super. 393 (App. Div. 1972); *Eisen v. Kostakos*, 116 N.J. Super. 358 (App. Div. 1971); *Sokolay v. Edlin*, 65 N.J. Super. 112 (App. Div. 1961). In *Rankin, supra*, at 399, Judge Collester clearly puts all of this in perspective, stating:

> Motions for summary judgment pursuant to *Rule* 4:46-2 do not admit all the well-pleaded facts in a complaint. Summary judgment is not to be denied if other papers pertinent to the motion show . . . the absence of any issue of material fact, although the allegations of the pleadings, standing alone, may raise such an issue.

The Supreme Court has gone so far as to hold that even the existence of an issue

of fact does not preclude summary judgment unless such fact adequately supports some claim of relief or is genuinely material. *Bilotti, supra.*

Summary judgment is a procedure which requires careful consideration and due deliberation and should be granted with caution. *Devlin v. Surgent*, 18 N.J. 148, 154 (1955); *Friedman*, 133 N.J. Super. at 337. In the case of *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995), it appears that the court has modified to some extent, while not overturning the matter, the enunciation of *Judson, supra*. The court set forth a standard, which has been utilized by the federal courts since 1986 pursuant to Fed. R. Civ. P. 56 and cases decided thereunder. *Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Brill, supra, appears to make clear that the non-movant must raise a factual issue substantial enough to lead a rational jury to decide in the non-movant's favor if a trial were held. The analysis required is similar to a motion for involuntary dismissal or directed verdict pursuant to *R.* 4:37-1 et seq. The facts offered by the non-movant, along with reasonable inference, must be able to sustain a judgment in its favor.

In the case presently pending before this Court, a review of the subsequent Points, as set forth herein, will indicate that sufficient factual and legal basis exist for the court to deny defendant's motion for summary judgment.

The court in *Brill, supra*, did not appear to disavow the rulings and precedents of *Judson, supra*. It does appear that the issue of "reasonable doubt" has been removed from the decision-making analysis to be made by the court, as was previously set forth in *Judson*, and the *Brill* court has made it clear that in analyzing whether the non-movant has presented evidence sufficient to permit a rational jury to decide in its favor, the court

must do so in the light of the evidentiary burden that must be met at trial. While placing a greater burden upon the court in evaluating the evidence and the factual basis set forth by the non-movant, the non-movant must present to the court its evidentiary claims, as the standard is no longer that of "reasonable doubt."

Plaintiff has accomplished this with the material that it has submitted to the court in opposition to defendant's motion for summary judgment and pursuant to the Points which follow in this memorandum.

In *Saldana v. DiMedio*, 275 N.J. Super. 488 (App. Div. 1994), the court held that the moving party's burden on a summary judgment application is to exclude all reasonable doubt as to the existence of any genuine issue of material fact. Any inferences of doubt are to be considered against the moving party and in favor of the party opposing the motion. If there is the slightest doubt as to the existence of a material issue of fact, the motion should be denied.

In addition, the court should not pass on the veracity of the matters contained in the various certifications but must only determine on such a motion whether a question of fact has been raised. *First Fidelity Bank v. Southeastern Ins. Group*, 253 N.J. Super. 439 (Law Div. 1991).

The court does not weigh the evidence on a motion for summary judgment but merely seeks to ascertain whether sufficient evidence has been produced on the elements of the plaintiff's cause of action and on which it has the burden of proof. If the plaintiff has done so, then the motion for summary judgment must be denied.

A. ISSUES OF CREDIBILITY AND THE FACTS AS WELL AS ADDITIONAL DISCOVERY REQUIRE THE DENIAL OF SUMMARY JUDGMENT

In *D'Amato by McPherson v. D'Amato*, 305 N.J. Super. 109 (App. Div. 1997), the court stated:

> A case may present credibility issues requiring resolution by a trier of fact even though a party's allegations are uncontradicted. As Chief Justice Vanderbilt observed in *Ferdinand v. Agricultural Ins. Co. of Watertown, N.Y.*, 22 N.J. 482, 494, 126 A.2d 323 (1956), "[w]here men of reason and fairness may entertain differing views as to the truth of testimony, whether it be uncontradicted, uncontroverted or even undisputed, evidence of such a character is for the jury." *Accord Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 415, 690 A.2d 575 (1997). Thus, a trier of fact "is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it ... contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." *In re Perrone's Estate*, 5 N.J. 514, 521-22, 76 A.2d 518 (1950). . . .

Here there are disputed material questions of fact as to the happening and cause of the accident that the province of the jury and not for summary judgment.

It is axiomatic that "ordinarily summary judgment dismissing the complaint should not be granted until the plaintiff has had a reasonable opportunity for discovery." *Auster v. Kinoian*, 153 N.J. Super. 52, 56 (App. Div. 1977). Likewise, in the instance case, summary judgment should not be granted until defendant has had a reasonable opportunity for discovery. The co-defendant has submitted a certification of an alleged witness which is new and requires that the plaintiff have an opportunity to depose this

witness.

The submitted certification clearly reflects that there is a well-documented disputed material fact in this case, that being, the manner and cause of the accident. The defendants raise the issue with respect the cause.. How much more of a disputed question of material fact can there be.

The facts are all questions to be resolved by a fact-finder at the hearing testimony from the plaintiff and the defendant and not for a court to make such a determination.

The cases are replete with incidences as to where the court, in a summary judgment motion, must first determine whether there was a genuine issue of material fact. A review of the Certifications filed by the plaintiff and the defendant clearly establishes that a genuine issue of material fact exists and that the court should not decide the motion for summary judgment, but rather permit the matter to move forward for trial. *Downs v. Prudential Insurance Co. of America*, 130 N.J. Super. 558 (Law Div. 1974), *Brenner v. Jackson Township*, 94 N.J. Super. 445 (App. Div. 1967).

A review of the pleadings filed in this case and the documentation on the motion for summary judgment more than satisfy the requirement of a disputed question of fact, and the court must consider and act favorably on all of the contentions made by the non-moving party in determining a motion for summary judgment.