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SUMMARY JUDGMENT

H. GAYLE WELLER*

I am very pleased to be invited to come up here. For one thing I see that I appear on a panel with a man of great eminence and distinction. This is very flattering to me. It is a special pleasure to me talk about the summary judgment rule, Rule 56, because I like that rule and I think you're going to like it when you get used to it.

Down in my own state of Colorado we adopted rules modelled on the Federal Rules while the Federal Rules themselves were still brand new and not very much was known about them. We had to learn by experience how to practice under the rules instead of our former code pleading. Our code had provided for the use of the demurrer and in practice in the office in which I was engaged, it was a very frequent and very useful tool. When the rules came in we shifted from using the demurrer to a motion to dismiss under Rule 12, which seemed the logical thing. It seemed to us that the motion to dismiss took the place of the old demurrer. It took us some time to discover that under these rules and the spirit behind them, the motion to dismiss is a far different tool and not so extensive as the demurrer used to be. I'll go into that a little later.

By a somewhat painful process we discovered Rule 56, the procedure for summary judgment, and found to our delight that it takes the place of the demurrer in all respects and far more. I think that you will find that it is a useful tool and one that can save time and money. Since your time is money, I think that this can be a bread and butter subject for you and I hope that I can suggest to you enough uses of the summary judgment procedure that it will be, in fact, a bread and butter topic.

The summary judgment rule, Rule 56, provides in substance that any party, claimant or defendant, may have a summary judgment upon motion if he is entitled to a judgment as a matter of law, there being no genuine issue as to any fact material to the controlling legal issues. Now, that is not the phraseology in the rule. I have taken the liberty of changing it around a bit for emphasis and as I develop some of the things that we have learned about it I trust that I will make clear why I think the emphasis should be upon the legal questions involved in the lawsuit rather than upon the factual issues. Summary judgment procedure is not a substitute for a trial on the facts, and it is certainly not a trial on affidavits.¹ It is rather a procedure for resolving the legal issues in the case and, in cases where legal issues are all that are in dispute, deciding the case upon them.

As I have indicated, I feel that it does fill up the gap that the motion

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1. Schreffler v. Bowles, 153 F.2d 1, 3 (10th Cir. 1946).

to dismiss leaves as a substitute for the demurrer. Now, the reason in our experience that there is that gap, is that you have, in the rules, a notice system of pleading. You no longer have the necessity for spelling out a cause of action in statements of ultimate fact. It was anyone's guess what ultimate fact was, but we used to have to plead a lot of things trying to reach it, so the demurrer could test the sufficiency of the complaint and dispose of those law suits that never should have been brought in the first place. Now you will find that a short and plain statement of the claim is all that is required. Motions to make more definite and certain are provided, but we have found that you can waste a great deal of time arguing those motions to very little effect. It is not the intention of the rules to require elaboration of the factual statements upon which the claim is based, and we find that our judges almost universally turn a deaf ear to the motion for a more definite statement. The intention of the rules is that factual information shall be obtained by the use of the various discovery provisions and not by the use of motions and pleading arguments.

The motion to dismiss very rarely lies to the kind of complaints that are filed. There just isn't enough in them upon which to base the legal argument for a motion to dismiss. The summary judgment procedure fills the gap because it is designed to be based upon use of the discovery provisions, so that you make the results of your discovery efforts and, with the record made up of the pleadings and those results, you may then make up a legal issue for disposition on motion for summary judgment.

That is the first thing that the summary judgment procedure seems to us to do but it does far more than that. In fact it is a new type of tool. The British started using it some years ago, and some of our states have had it to a limited extent, but it has been new in our experience in Colorado. It is a procedure well attuned to the spirit of these rules that you are adopting. It is a very useful tool going far beyond what was possible under the old demurrer practice. It is said in the cases that the function of the motion is to pierce the allegations of fact in the pleadings.² It does just that because the results of discovery can produce the true facts rather than what may have been alleged in the pleadings; so that it is a more far-reaching procedure than anything we have had before.

Summary judgment procedure has, I think, a direct relation to the pre-trial procedure, another important concept in the new practice under these rules. In the pre-trial procedure it is intended that factual issues shall be set forth and legal issues determined, that matters which are not going to be contested shall be stipulated, so that the time of the court, the litigants, and the jury will be saved at the trial itself by eliminating formal proof of matters which the adverse party doesn't really intend to controvert. The spirit of a pre-trial—and in the hands of a good judge,

2. *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469, 473 (2d Cir. 1943); *New York Life Ins. Co. v. Cooper*, 167 F.2d 651, 655 (10th Cir. 1948).

it can be a spirit that you must follow—has to be one of candor and frankness. You are not supposed to hold back evidence; you are supposed to disclose to the court and counsel what your evidence is going to be.

Well, in that same spirit, the motion for summary judgment can be made to save much of the time of the courts, attorneys and litigants involved, because it can show that there is not going to be a real controversy over the facts and the underlying legal question can then be determined. It's a procedure that takes from a few hours to a day. The longest summary judgment hearing that I have encountered was a day and a half, and that was in a lawsuit that later took over two weeks to try.

The motion for summary judgment should be granted on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.³ The underlying theory of the summary judgment is the same as that of the directed verdict—entirely a matter of law. It should be distinguished from the situation where a trial judge may properly set aside a verdict as being contrary to the weight of the evidence. There is no intention in the summary judgment procedure that the judge should be required to weigh evidence or to judge the credibility of witnesses, and if it is that type of a case it is not a proper one for summary judgment.⁴ It has been held that the summary judgment procedure does not infringe the right of trial by jury⁵—that right being one that does not protect the old or existing forms of practice and that does not prohibit the modification of practice by a new method of determining what legal issues are involved, which is essentially what the summary procedure does.

At the outset we were under certain misconceptions of the function of the summary judgment rule. We found judges and lawyers to have the same misconceptions concerning it, and it seems to me that perhaps the best way to give you the result of our experience would be to discuss those misconceptions. In the first place, take the requirement that there be no genuine issue of material fact. That is stated first in the rule under grounds for the motion, and it is frequently treated as though it were the principal ground for granting the motion as though the mere absence of factual issues entitles one to judgment. I think that misconception is heightened by the fact that the rule goes on to set forth several provisions specifically relating to the use of affidavits in the procedure as though this use of affidavits were perhaps the principal thing involved in a summary judgment motion. Now those various rules concerning the use of affidavits are of course important where affidavits are involved, but it is my opinion that the affidavit is by far the least useful tool that is men-

3. *Sartor v. Arkansas Natural Gas Co.*, 321 U.S. 620, 624, 64 S.Ct. 724, 88 L.Ed. 967 (1944); *Gifford v. Travelers Protective Assn.*, 153 F.2d 209, 211 (9th Cir. 1946).

4. *Fireman's Mutual Ins. Co. v. Aponaug Manufacturing Co.*, 149 F.2d 359 (5th Cir. 1945).

5. *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed. 194 (1902); *Port of Palm Beach District v. Goethals*, 104 F.2d 706 (5th Cir. 1939).

tioned in this rule, and that it is the exceptional case where you will prepare your summary judgment by use of affidavits. The principal function of an affidavit is to carry into the record some document—a contract, insurance policy, letter or something of that nature—which does not happen to have been in the record theretofore. The affidavit can serve the purpose of identifying the document that is involved. I cannot think in my experience of any summary judgment granted upon the basis of affidavits of witnesses going into detail about the evidence. If it is the type of situation, the affidavit immediately shows the likelihood that here is an issue of fact to be tried and the court is going to deny summary judgment.

Next there is the key statement that there must be no genuine issue of material fact. There is some tendency, when one starts to deal with the rule, to feel that means there must be no fact at all possible of dispute, such as names, numbers, dates—things that may be in fact immaterial. We have seen attempts to show that there isn't any issue at all about a lot of immaterial things and conversely that issues do exist as to immaterial facts. We have even seen affidavits by counsel stating conclusions of law, "In fact we do have a case here." Well that certainly is not any kind of evidence and is not the use of affidavits intended in this type of procedure.

The rule does mention other things in addition to affidavits and, as I have indicated, I think they are the more important. It says that whenever it is shown by the pleadings, by the depositions, by the admissions on file or by the affidavits, if any, that there is no genuine issue of material facts, then the moving party may have judgment if he is entitled to judgment as a matter of law. The enumeration of those does not exclude another discovery provision in the rules, written interrogatories under Rule 33, under which you may propound written interrogatories to the adverse party which must be answered within a certain period of time. Now the rule of summary judgments, Rule 56, does not happen to mention the answers to interrogatories, but Rule 33 on interrogatories says they may be used in any way in which depositions may be used under Rule 26(d), and 26(d) quite clearly includes use of depositions in hearings on motions. Therefore, I think it is quite certain that answers to interrogatories may be used in support of a summary judgment motion as well as the items enumerated in Rule 56.

Rule 56 also mentions admissions on file. Those may be admissions under the rules but they also may be any other type of admissions—judicial admissions, admissions of counsel, admissions in stipulations—anything that is in the record of that nature can be used. And then by means of the affidavits, almost any record may be introduced for such purpose as it may serve in establishing the facts. Of the enumerated bases for establishing the absence of factual issues, the final and best in our experience is always the deposition of adverse parties. If frank answers are made to requests for admissions or to interrogatories, then they will serve, but our experience is that often they are evasive and then you must proceed to go

ahead with depositions in order to finally get into the record the facts that should be admitted.

The time for making the motion for summary judgment is set forth in the rule. A defendant may make it at any time. A plaintiff may make it at any time after the adverse party has made and served a motion, otherwise at any time after 20 days following the commencement of the action.

The form of making the motion, I think, is pretty much wide open and I don't see why it should ever be very troublesome. The rules do require that motions should state their grounds. I have never found anything, however, that prevents using the grounds stated in the rule itself, that is, that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. We've tended ourselves to bounce back and forth. Sometimes we persuade ourselves that it will be helpful to set forth the legal proposition upon which we are hoping to prevail, especially when that is a defense of confession and avoidance or a plea in bar. This gives notice that we are not expecting to negative the grounds of the plaintiff's claim itself, but to come in and prove a bar to that claim, no matter how meritorious it may be. I think that it is perfectly proper. There is some confusion about it, and we had one experience that I want to mention a little later that illustrates that confusion, but certainly if it is a matter of plea in bar or confession and avoidance, the issue before the court is whether that plea in bar or that matter of confession and avoidance is established as a matter of fact and there is no use wasting time upon the original claim. For the purpose of the motion, and for that purpose only, the original claim would stand as admitted.

There are some other parts in your rule which I think are important. One is that the motion may be granted for or against all or any part of the claim. Also that it may be granted on liability alone, although the issue on damages remains. Now you may have gathered that I'm principally a defense lawyer, but there is a part of this rule that a plaintiff's lawyer should certainly not overlook. The trial of the issue of damages, alone, if liability is admitted, in my experience has resulted in a tendency of the jurors to award higher verdicts. I think that this part of the rule has not been given very much attention in Colorado or used nearly as much as it might be. In cases of *clear enough* liability that you may persuade a court to determine it on motion for summary judgment, you could have a trial on damages alone.

Another provision of your rules is that if the case is not fully adjudicated on motion for summary judgment, the court should determine from what is before him and by interrogating counsel just as he would do in a pre-trial conference, what matters are in fact controverted and what admitted, and shall make an order setting forth what facts are to stand admitted. In all further proceedings those matters will stand as admitted.

That again in my opinion is a part of the rule that has been somewhat neglected and it could be a very valuable procedure. In phraseology it is mandatory upon the court. It says the court shall do this, but it qualifies that by the statement "if practicable." In our part of the country I'm afraid that the courts have thus far tended to duck doing this, but it can save much time at the trial if, after a summary judgment motion has been argued and the court has been educated as to the law and facts involved, you can get the judge to pin them down by such an order. And I think pressing this use of the motion occasionally justifies trying a motion for summary judgment, even though one is not fully confident that the motion will be granted in whole. It will have contributed to speeding up the trial itself and to the education of the court and counsel. The education of counsel on motion for summary judgment has been in our experience a major factor in settlement of cases ahead of trial.

One other provision in your rule which I think perhaps is the most important of all, and this is an addition that is not in the Federal Rule from which it is taken, is the provision that a party may not rest on his pleading in the face of a motion for summary judgment but that he must come forward and specifically show that there are issues of fact. This was part of the 1955 recommendations of the Federal Advisory Committee on Rules and I think you were very wise to adopt it as I think you were wise to adopt a good many of those recommendations. They are improvements. The lack of that type of amendment has given a fair amount of difficulty in the federal cases—where a party simply rests upon the allegation in his complaint and at times courts have felt that that establishes an issue of fact, notwithstanding ample showing by discovery procedure that this is not true at all. I think the leading case here is *Engl v. Aetna Life*⁶ and it happens to be one of many cases by the eminent judges who talked to you earlier, Judge Clark, that are leading authorities in the field of summary judgment.

This one is an excellent decision to overcome that type of contention, that the party may rest upon his pleading, by showing how that reduces to a nullity the summary judgment's function of piercing the allegations. I would like to quote to you part of the opinion: "If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity to pierce the allegations of fact in the pleadings or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions."⁷

I thought it worthwhile to comment upon that even though you do

6. 139 F.2d 469 (2d Cir. 1943).

7. *Id.* at 473.

have the provision that I mentioned. Although your provision should be effective, a misunderstanding on this score can be fatal to the use of the summary judgment, and I thought it might be well that you know of the decision quoted.

Now those observations are the principal things that I have learned about the remedy of summary judgment. I thought another thing that might be of some value to you would be to discuss actual cases from my own office in which the summary judgment has been used. If you will read Moore's Treatise, on Rule 56, you will find an exhaustive treatment of all kinds of cases in which summary judgment has been used in federal practice. I think it would be helpful to you to do this and consider the great variety of cases in which these motions have been used. It has been surprising to me that they can be used to advantage in all the types of practice in which we have engaged, even in the tort field.

The first case I want to tell you about does happen to have gone to our Colorado Supreme Court. The others have not. Generally speaking, in our experience a summary judgment is not appealed. It is just as good, if not a better disposition of the case than that by trial, so far as the likelihood of appeal is concerned.

This case, *Field v. Sisters of Mercy*,⁸ is a case where some of the misconceptions that I have mentioned were in the picture in the court below and they were clarified in the Supreme Court on appeal. Mrs. Field received a telephone call from a friend, saying that she was in the hospital and asking Mrs. Field to come to visit her. Without having found out what hospital, Mrs. Field started out and went to a hospital close-by, not the right one, entered, and when she saw that the reception clerk was busy at the moment, tripped off down a dark hallway and promptly tripped over a suitcase that had been left there, and was injured. Mrs. Field's deposition plainly showed these facts and we moved for a summary judgment upon the basis of our Colorado decisions that a bare licensee has no higher status than a trespasser and that no duty of care is owed to the licensee other than to refrain from injuring him after his presence is known; and also, upon the ground that upon her statement the lady was guilty of contributory negligence. The judge of the trial court said to us, "now if you admit the allegations of the complaint, for this motion, you will have admitted them for the purpose of the trial itself." We weren't able to shake that opinion of the court's and of course we withdrew the motion for summary judgment.

At the time of the pre-trial conference, these issues were discussed again and at that time the trial judge said, "I would like to hear argument on it"; after argument he said, "I would like to have briefs submitted." Thereafter, the court, of his own motion, granted summary judgment to the defendant, on the ground of the status question, that the lady was not

8. 126 Colo. 1, 245 P.2d 1167 (1952).

owed a duty of care by the hospital and that her allegation of negligence by the hospital did not establish a cause of action.

On appeal from that rather unusual procedure, the Supreme Court discussed what had taken place at the time of our motion for summary judgment and made it clear that admissions for such a motion are not binding thereafter in the trial upon the party making them. The Supreme Court affirmed the summary judgment, and, somewhat to our surprise, added our second ground, contributory negligence. At first blush one wonders if contributory negligence is not too much a question of fact to permit disposition of a case upon that ground on summary judgment. However, we have obtained summary judgments upon that ground in other cases since, and I think the presentation of the plaintiff's own statement of his conduct, in summary judgment proceedings, tends to emphasize the issue of contributory negligence, and to result in a better decision on that issue than you get in a trial of all the issues.

We have used the motion in other negligence and tort cases. We have also used it in contract cases and we have used it in cases of bonds insuring performance of contracts or fidelity of officers or officials. It is very useful there if in fact the big question is whether or not the particular defalcations or particular actions constitute a claim within the coverage of the bond. These are just legal questions; there isn't any dispute about the facts, and they can be disposed of on summary judgment.

I do have a plaintiff's case here and just so that you won't accuse me of bias. We had a contract case for an oil driller who contended that he was entitled to certain payments for work done under a written contract. The defense pleaded was that the work was not satisfactory, but the deposition of the defendant showed that he was present during all of the work and did not object but rather, approved of the manner in which the work was done. Summary judgment was rendered for the plaintiff. It is interesting that in Britain the summary judgment procedure was first used in bills and notes cases. In that type of case based upon documents and in collection cases generally, there will be many where the facts can be established and summary judgment obtained without the long delay waiting for a trial date.

A case in the federal court in which our summary judgment motion was unsuccessful, illustrates the settlement value of such a motion. The case involved a warehouseman who was storing Commodity Credit grain, who had given Commodity Credit a bond in one company guaranteeing performance of his contract to keep the grain safely, and that bond was later superseded by a new and larger bond in a second company which we represented. Suit was by Commodity Credit against the warehouseman and both sureties alleging heavy damage by reason of deterioration in the stored grain. Depositions showed that prior to the period covered by the second bond, Commodity Credit's people had become aware of very serious

deterioration in the grain and that the conditions of storage were such as to cause continued damage. Counsel for the various parties had estimated that trial would run thirty days. We filed a motion for summary judgment upon the ground that one may not take a bond covering loss when he is aware that loss has already occurred. The judge who heard the motion indicated approval of that defense but deferred the ruling until trial because of some doubt on the facts. Trial was unnecessary because Commodity Credit proceeded to accept settlements offered by the other parties and to dismiss its case against our company. I think this illustrates how half a day spent in educating the other side as to the case that you have may save a long and expensive trial even though your motion is not granted.

There is another case in which I thought you might be interested. When John Gilbert Graham planted a bomb on a United Airline plane that blew it up in the air near Fort Collins, Colorado, with some 44 people aboard, his purpose was to collect trip insurance which he had taken out on his mother before he put her aboard. Shortly afterward we received a call from the company in which the insurance had been taken, saying that there were numerous policies, some defectively executed, and others, perhaps effective. The company did not know whom it should pay or how much. After Graham was convicted of murder, we felt that it had been determined which policies were valid and these were paid to an aunt and sister of Graham's and to his mother's estate from which he could not inherit on account of the conviction.

Thereafter a good many people started getting tort judgments against Graham for wrongful death and garnisheeing the insurance company upon the theory that it owed Graham some \$65,000 of insurance on his mother. We have, in Colorado, some authority that conviction of a crime is prima facie evidence in a civil case, but we have some contrary authority and it is a rather uncertain question with us. We also have a statute that says a murderer cannot inherit or take by will from the estate of the person he has killed. The common law rule is broader and says that the murderer may not gain from his crime in any way—through insurance or otherwise. The issue posed by these garnishments was whether our statute pre-empted the field leaving no room for the application of the broader, common law rule.

It had taken the district attorney some nine weeks of trial to prove his case and we didn't want a trial like that on each of these garnishments. or even in one of them, if we could help it, so we decided to try a summary judgment in one of them. We used an affidavit to bring the record of the criminal conviction into our case. Now here is where I believe the rule of the *Engl* case is important. Under it, our prima facie showing of the murder required the other side to come forward and show if it was going to contend there was no murder, and since it did not, we had simply the legal question for decision. On that, the court applied the

common law rule, the garnishment was dismissed and the others followed. Counsel involved decided that our Supreme Court would probably affirm and there was no appeal. That is the outstanding example in our experience of how the summary judgment procedure can make great savings in trial expense.

Now I hope you won't think I've blown my own horn about these cases. I have some very good partners and they think up these things. Again I am happy to be here and I thank you.