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Proper and Improper Summary Judgment Cases

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This provision avoids a Supreme Court decision[30] which held that in the absence of a motion made for judgment within 10 days after the reception of a verdict, an appellate court is prohibited from entering such a judgment. Thus, where the trial court has denied a motion for a new trial and entered judgment on the verdict, a party might appeal and be successful in obtaining judgment in the appellate court, even though a motion for the same was not made in the trial court. That the rule explicitly provides for such a procedure should be ample warning to prevent a claim of surprise by the appellee.

The new rule should effectively accomplish its purpose if used imaginatively. It must be remembered that a motion for a directed verdict at the close of all the evidence is a prerequisite to a motion for judgment after the reception of a verdict. If there are grounds for making a motion for a new trial, as well as grounds for the motion for judgment, the motion should be made or it will be deemed waived. A trial judge should be hesitant in granting a directed verdict at the close of all the evidence; by letting the case go to the jury, unnecessary retrials can be avoided. When both motions have been presented in the trial court, care should be taken by the trial judge to make a truly independent ruling on each one. Indiscriminate making of conditional orders granting a new trial on an alternative motion will result in unnecessary retrials. Where these few pitfalls are kept in mind, it seems evident that each party will be given an opportunity to be heard as to any substantial error with a minimum of time and expense.

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PROPER AND IMPROPER SUMMARY JUDGMENT CASES

The summary judgment procedure was originated in England in 1855 and was applicable only to actions upon bills of exchange and promissory notes. The procedure was later broadened by the Judicature Act of 1873. By 1925 New Jersey and New York had adopted the procedure as had the federal courts hearing cases in these states under the Conformity Act. The federal courts adopted the procedure in 1938 and Wyoming in 1957.

The summary judgment procedure grew out of a distaste for the practice of stalling judgments by false pleas having no basis in fact,[1] or by attempting legal blackmail in bringing unfounded suits in order to force settlements.[2] Wyoming Rule of Civil Procedure 56 (c) is identical with the Federal Rule and fixes the standard by which to determine whether

30. Johnson v. New York, N.H. & H. Ry., 344 U.S. 48, 73 S.Ct. 125, 97 L.Ed. 77 (1952)

1. Sexton v. The American News Co., 133 F.Supp. 591 (N.D.Fla. 1955); Prudential Insurance Co. v. Goldstein, 43 F.Supp. 767 (E.D.N.Y. 1942).
2. Miller v. Miller, 122 F.2d 209 (D.C. Cir. 1941); Rabe v. Metropolitan Life Insurance Co., 1 F.R.D. 391 (D.Mass. 1940).

summary judgment should be granted.[3] The cases interpret the rule to mean that if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law, then summary judgment must granted,[4] and that it must be denied if there is a genuine issue as to a material fact and if the moving party is not entitled to judgment as a matter of law.[5] Some courts state that the purpose of the procedure is to allow a party to pierce the allegations of fact in the pleadings and to obtain relief by showing that there are no issues of fact to be tried.[6]

As to the requirement that there be no genuine issue, the court may not try issues of fact on a motion for summary judgment, but can only determine whether there are issues to be tried.[7] The question to be decided is whether there is a genuine issue of fact and not how that issue should be determined.[8] The motion should be granted only when all the facts entitling the movant to judgment are admitted or clearly established.[9]

If a genuine issue of fact is found to be present, Rule 56 (c) requires that it be a material fact. It has been held that an issue is material if the facts alleged are of such a nature as to affect the result of the action,[10] or are such as to constitute a legal defense.[11] An immaterial question of fact does not preclude summary judgment.[12]

On the question of how much evidence is needed, it has been held that a mere scintilla of evidence is not sufficient to require submission of an issue to a jury.[13] On the other hand, the United States Supreme Court has held that summary judgment should be entered only upon such evidence as a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party.[14] Ordinarily, the judge should hear the evidence and direct a verdict rather than attempt to try the case in advance on a motion for summary judgment.[15]

3. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
4. California Apparel Creators v. Weider of California, 68 F.Supp. 499 (S.D.N.Y. 1946); Ratner v. Paramount Pictures, 6 F.R.D. 618 (S.D.N.Y. 1942).
5. Stevens v. Howard D. Johnson Co., 181 F.2d 390 (4th Cir. 1950); Parmelee v. Chicago Eye Shield Co., 157 F.2d 582 (8th Cir. 1946).
6. Madeirense De Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399 (2d Cir. 1945), cert. denied, 325 U.S. 1201; Reconstruction Finance Corp. v. First National Bank, 17 F.R.D. 397 (D.Wyo. 1955).
7. Aetna Insurance Co. v. Cooper Wells & Co., 234 F.2d 342 (6th Cir. 1956); Crosby v. Oliver Corp., 9 F.R.D. 110 (S.D.Ohio 1949).
8. Gifford v. Travelers Protective Assn., 153 F.2d 209 (9th Cir. 1949).
9. Fleming v. Phipps, 35 F.Supp. 627 (D.Md. 1940).
10. McComb v. Southern Weighing & Inspection Bureau, 170 F.2d 526 (4th Cir. 1948).
11. Keehn v. Brady Transfer & Storage Co., 159 F.2d 383 (7th Cir. 1947); Curtis Publishing Co. v. Union Leader Corp., 12 F.R.D. 341 (D.N.H. 1952).
12. Finlay v. Union Pac. R.R., 6 F.R.D. 284 (D.Kan. 1946).
13. McVay v. American Radiator & Standard Sanitary Corp., 1 F.R.D. 677 (W.D.Pa. 1941).
14. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944).
15. Pierce v. Ford Motor Co., 190 F.2d 910 (4th Cir. 1951), cert. denied, 342 U.S. 887.

Although the rule provides for the filing of affidavits, there should not be a trial by affidavits.[16] Affidavits in support of summary judgment cannot be used as a basis for deciding the fact issue.[17] The affidavits should be used only for the purpose of discovering whether there is an issue of fact.[18]

The party against whom summary judgment has been rendered may feel that he has been deprived of his right to a trial by jury. Prior to the federal rules, such a case arose in New York with a defendant claiming that he had lost his right to a trial by jury becaues the court granted the plaintiff's motion for summary judgment.[19] The court held that the Constitution preserved substance only and that the summary judgment rule merely regulated procedure. If the pleadings and affidavits of the moving party (plaintiff in the New York case) disclose that no defense exists and the defendant fails to controvert such evidence, the court may determine that no issue triable by a jury exists between the parties and grant judgment summarily. The first federal court to consider this problem approved of the holding in New York, adding that in cases in which a jury has been demanded, summary judgment ought to be given only when it is quite clear what the truth is.[20] The federal courts have uniformly held that if the only question involved in the case is one of law, or if there is no genuine issue as to any material fact, the party opposing the motion for summary judgment may not defend on the ground that the granting of the motion deprives him of a jury trial.[21] The granting of the motion is a determination that as a matter of law there is no issue of fact in the case to be tried.[22]

The summary judgment procedure is an excellent device in certain types of cases and should be used cautiously in others. Judge Learned Hand, in a dissenting opinion, gives this warning:

> In trials of this kind (unfair competition) the issues are . . . vagrant and vague. . . . Indeed, when I see . . . the increasing disposition to make use of that remedy (summary judgment), I cannot help wondering whether there is not danger that it may not rather impede, than advance, the administration of justice. It is an easy way for a court with crowded dockets to dispose of them,

16. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944), reversing a summary judgment granted on the basis of numerous affidavits tending to establish the market value of natural gas.
17. Frederick Hart & Co. v. Recordgraph Corp., 169 F.2d 580 (3d Cir. 1948); Campana Corp. v. Harrison, 135 F.2d 334 (7th Cir. 1943).
18. Farral v. District of Columbia Amateur Athletic Union, 153 F.2d 647 (D.C. Cir. 1946).
19. General Investment Co. v. Interborough Rapid Transit Co., 235 N.Y. 133, 139 N.E. 216 (1923).
20. Port of Palm Beach District v. Goethals, 104 F.2d 706 (5th Cir. 1939); this warning was also given in Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940).
21. Fresh Grown Preserve Corp. v. United States, 143 F.2d 191 (6th Cir. 1944); Chandler Laboratories v. Smith, 88 F.Supp. 583 (E.D.Pa. 1950); United States v. Broderick, 59 F.Supp. 189 (D.Kan. 1945); King v. Stuart Motor Co., 52 F.Supp. 727 (N.D.Ga. 1943).
22. Carantzas v. Iowa Mutual Insurance Co., 235 F.2d 193 (5th Cir. 1956); Lindsey v. Leavy, 149 F.2d 899 (9th Cir. 1945).

> and the habit of recourse to it readily become a denial of that thorough, though dilatory, examination of the facts, on which justice depends even more than upon a studious examination of the law; for a mistake of law can always be reviewed. Speed and hurry ought to be antipodes of judicial behavior.[23]

The cases best adapted to decision by the summary judgment procedure are those in which the moving party is entitled to judgment as a matter of law. The defendant is entitled to judgment in cases in which the plaintiff's claim is barred by the statute of limitations and the plaintiff fails to establish that the statute has been tolled.[24] The question of whether the plaintiff's claim is barred by laches cannot as readily be decided on a motion for summary judgment since the defense generally raises issues of fact.[25] However, if the only question presented is one of law, then the motion may be granted.[26] A motion for summary judgment may also be used to enable the defendant to assert the defense that the plaintiff's claim has been determined in another action and that the prior judgment is res judicata.[27] However, if a fact question exists, the motion should be denied.[28] The defendant may use a motion for summary judgment to establish his right to judgment as a matter of law by asserting other affirmative defenses. Thus, he may assert such defenses as a release made by the plaintiff,[29] or an accord and satisfaction.[30]

When the moving party is entitled to judgment as a matter of law, the type of case involved is of no importance. Some types of cases are better adapted to the summary judgment procedure because the issues are not, in the words of Judge Hand, "vagrant and vague." The procedure is particularily well adapted to actions on promissory notes in which the execution of the note has been admitted, no issue remains as to the amount due, and no affirmative defense has been pleaded.[31] The motion may be granted where the only issue involved is the due date of a promissory note and the date is set out in the note and cannot be altered by parol

23. California Apparel Creators v. Weider of California, 162 F.2d 893, 902 (2d Cir. 1947).
24. Rohner v. Union Pac. R.R., 225 F.2d 272 (10th Cir. 1955); Reynolds v. Needle, 132 F.2d 161 (D.C. Cir. 1942); Carroll v. Pittsburg Steel Co., 100 F.Supp. 749 (W.D.Pa. 1951).
25. Greenspon v. Parke, Davis & Co., 8 F.R.D. 485 (S.D.N.Y. 1948); Clair v. Sears, Roebuck & Co., 34 F.Supp. 559 (W.D.Mo. 1940).
26. Dixon v. American Tel. & Tel. Co., 159 F.2d 863 (2d Cir. 1947); Reconstruction Finance Corp. v. Goldberg, 143 F.2d 752 (7th Cir. 1944), cert. denied, 323 U.S. 770; Monroe v. Ordway, 103 F.2d 813 (8th Cir. 1939).
27. Fletcher v. Nostadt, 205 F.2d 896 (4th Cir. 1953), cert. denied, 346 U.S. 877; Sabin v. Home Owners' Loan Corp., 151 F.2d 541 (10th Cir. 1945), cert. denied, 328 U.S. 840.
28. Kimble v. Anderson-Tully Co., 16 F.R.D. 502 (E.D.Ark. 1955) denying a motion for summary judgment because of an issue of fact as to whether the state law rendered the prior judgment res judicata.
29. Schetter v. United States, 136 F.Supp. 931 (N.D.Pa. 1956); Miller v. Hoffman, 1 F.R.D. 290 (D.N.J. 1940).
30. Colonial Airlines v. Janas, 202 F.2d 914 (2d Cir. 1953).
31. Luria Steel & Trading Co. v. Ford Mfg. Co., 14 F.R.Serv. 56c. 41, Case 14 (D.Neb. 1950).

testimony.[32] Insurance cases are also appropriate for summary judgment where, for example, the policy has lapsed for nonpayment of premiums,[33] or group insurance has terminated as to the particular plaintiff,[34] or where liability depends upon the construction of a clause presenting only a question of law.[35] Where the lack of a genuine issue of material fact is clearly established, summary judgments have frequently been granted in declaratory judgment cases,[36] injunction actions,[37] real property actions,[38] and stockholder's derivative suits.[39] Summary judgments will even be granted in cases in which the issuse are complicated.[40]

Although the basic test is still whether there is a genuine issue of material fact, some cases are not readily decided on a motion for summary judgment because the issues are "vagrant and vague." With the exception of affirmative defenses mentioned previously, cases involving negligence are ordinarily not susceptible to summary adjudication.[41] However, summary judgment may be properly rendered when the defendant's affidavits clearly establish negligence (granted except as to the amount of damages),[42] when the plaintiff's affidavits clearly establish that the defendant is not liable for the act even if the act constituted negligence,[43] or when the plaintiff relies on the doctrine of res ipsa loquitur and the defendant does not have exclusive control of the instrumentality causing the injury.[44] In the typical negligence case the facts are disputed and they are such that reasonable men would differ in drawing inferences and conclusions from them.[45] Negligence cases usually involve factual issues such as whether the defendant was an independent contractor,[46] or whether the automobile driver had the defendant's permission to use the car.[47]

32. Ford v. Luria Steel & Trading Co., 192 F.2d 880 (8th Cir. 1951); Hull v. Brandywine Fibre Products Co., 121 F.Supp. 108 (D.Del. 1954).
33. Pearce v. Fidelity Mutual Insurance Co., 63 F.Supp. 265 (D.N.J. 1945); Rabe v. Metropolitan Life Insurance Co., 1 F.R.D. 391 (D.Mass. 1940).
34. Habel v. Travelers Insurance Co., 117 F.2d 337 (5th Cir. 1941).
35. Summary judgment was denied because of a fact question as to whether the insured's death came under the provisions of the "war clause" in Grimes v. New York Life Insurance Co., 84 F.Supp. 989 (E.D.Pa. 1949); Hooker v. New York Life Insurance Co., 66 F.Supp. 313 (N.D.Ill. 1946); Fink v. Northwestern Mutual Life Insurance Co., 117 F.2d 337 (5th Cir. 1941).
36. Stuart Investment Co. v. Westinghouse Electric Co., 11 F.R.D. 277 (D.Neb. 1951); Durfee & Canning v. Socony-Vacuum Oil Co., 91 F.Supp. 819 (D.Mass. 1950).
37. Standard Oil Co. v. Lopeno Gas Co., 240 F.2d 504 (5th Cir. 1957); Bagby v. United States, 199 F.2d 233 (8th Cir. 1952).
38. Board of National Missions v. Smith, 182 F.2d 362 (7th Cir. 1950); Wier v. Texas Oil Co., 180 F.2d 465 (5th Cir. 1950).
39. Wise v. Universal Corp., 93 F.Supp. 393 (D.Del. 1950); Dickheiser v. Pennsylvania Ry., 5 F.R.D. 5 (E.D.Pa. 1945).
40 Morr v. United States, 243 F.2d 913 (6th Cir. 1957); Palmer v. Chamberlin, 191 F.2d 532 (5th Cir. 1951).
41. Roucher v. Traders & General Insurance Co., 235 F.2d 423 (5th Cir. 1956); Aetna Insurance Co. v. Cooper Wells & Co., 234 F.2d 342 (6th Cir. 1956).
42. American Air Lines v. Ulen, 186 F.2d 529 (D.C. Cir. 1949).
43. Thomas v .Furness (Pacific) Limited, 171 F.2d 434 (9th Cir. 1948). The defendant did not own the vessel involved in the alleged negligence.
44. Sanders v. Nehi Bottling Co., 30 F.Supp. 332 (N.D.Tex. 1939).
45. Roucher v. Traders & General Insurance Co., 235 F.2d 423 (5th Cir. 1956).
46. Vale v. Bonnett, 191 F.2d 334 (D.C. Cir. 1951).
47. Whitaker v. Coleman, 115 F.2d 305 (5th Cir. 1940).

When a defendant pleads a matter of abatement, that is when the claim is not dead but merely suspended, a summary judgment is technically incorrect since the complaint should only be dismissed. However, at least one court has entered summary judgment on a plea of abatement (prematurity of suit) wording the judgment so as not to bar any future action.[48] Likewise, summary judgment is improper to test lack of jurisdiction or venue since the judgment goes to the merits and operates as a bar to the claim.[49] One case granted the defendant a summary judgment for lack of jurisdiction becaues a statute expressly precluded the court from assuming jurisdiction.[50] A summary judgment cannot be entered against a defendant who has not been served or entered an appearance.[51] The only federal court with jurisdiction over divorce cases has held that the granting of a summary judgment is improper because public policy demands that no divorce should be granted except on the basis of a hearing in open court at which evidence is adduced.[52] A summary judgment for specific performance may not be granted even if the moving party is entitled to judgment as a matter of law because relief is in the sound discretion of the court and this is true even if there is no genuine issue as to any material fact.[53]

A summary judgment should not be granted unless the truth is clear,[54] and the moving party is entitled to judgment beyond doubt.[55] If the court has a reasonable doubt, then summary judgment will be denied.[56] It will also be denied if the evidence indicates that conflicting inferences could be drawn,[57] or if reasonable men might draw different conclusions.[58] The motion is not proper for cases in which the facts are uncertain,[59] and since it provides a rather drastic remedy it should be used somewhat cautiously so as to not deprive a party of his right to a trial by jury.[60] The moving party has the burden of establishing that no genuine issue of material fact is present and every doubt should be resolved against that party.[61] As

48. Hull v. Brandywine Fibre Products Co., 121 F.Supp. 108 (D.Del. 1954).
49. Martucci v. Mayer, 210 F.2d 259 (3d Cir. 1954); Jones v. Brush, 143 F.2d 733 (9th Cir. 1944).
50. Western Mercantile Co. v. United States, 111 F.Supp. 799 (W.D.Mo. 1953). The Tort Claims Act precludes action on a claim based on the performance of discretionary functions by federal agencies or employees. The plaintiff's action was based on a claim for flood damage because of misinformation by a government weather bureau. The court held that the giving of this information was dicretionary and granted the government's motion for summary judgment because the court was without jurisdiction by reason of the express language of the statute.
51. Bralove v. Bralove, 57 F.Supp. 1016 (D.D.C. 1944).
52. Rea v. Rea, 124 F.Supp. 922 (D.D.C. 1954).
53. Seaboard Surety Co. v. Racine Screw Co., 203 F.2d 532 (7th Cir. 1953).
54. Forstmann Woolen Co. v. J. W. Mays, 71 F.Supp. 459 (E.D.N.Y. 1946); United States v. Newbury Mfg. Co., 1 F.R.D. 718 (D.Mass. 1941).
55. United States Fidelity & Guaranty Co. v. Grundeen, 138 F.Supp. 498 (D.N.D. 1956); Kam Koon Wan v. E. E. Black, Ltd., 75 F.Supp. 553 (D.Hawaii 1948).
56. Ferran v. United States, 17 F.R.D. 211 (D.P.R. 1955).
57. Paul E. Hawkinson Co. v. Dennis, 166 F.2d 61 (5th Cir. 1948).
58. Caylor v. Virden, 217 F.2d 739 (8th Cir. 1955).
59. Chemical Foundation v. Universal-Cyclops Steel Corp., 2 F.R.D. 283 (W.D.Pa. 1942).
60. Begnaud v. White, 170 F.2d 323 (6th Cir. 1948); Avrick v. Rockmont Envelope Co., 155 F.2d 568 (10th Cir. 1946).
61. Gonzales v. Tuttman, 59 F.Supp. 858 (S.D.N.Y. 1945).

noted previously, the type of case involved is important only because in some cases the issues are more "vagrant and vague" than in others. The true test to be applied in each case is whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law.

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FORM OF SUMMARY JUDGMENT AFFIDAVITS

Summary judgment is a final judgment which is entered by the court upon a showing that as between the parties to a civil action there is no genuine issue of material fact and therefore no need for a formal trial of the action. The required showing may be accomplished by affidavits of the moving party. For instance, in an action on a note, when the defendant answers with a general denial and the plaintiff then makes a motion for summary judgment, he may, by affidavit, show the execution of the note, the loan of the money and the failure to repay. Unless the defendant then brings in counter-affidavits which raise some material issue of fact, the plaintiff is entitled to the summary judgment. The court, in ruling on a motion for summary judgment, also considers the pleadings, depositions, and admissions on file, as well as the affidavits,[1] in an effort to determine whether there is a genuine issue of material fact. In this process the court does not decide issues but merely seeks to find whether or not such issues exist. If there are none found, then the court may render a summary judgment for the moving party.

The Wyoming rule, like Federal Rule 56, in general provides that a motion for summary judgment may be made by either party in any civil action. Under this rule a party to an action may pierce the allegations of fact in the pleadings and obtain relief where the facts set out in greater detail in the affidavits show that there is no factual issue to be tried.[2] The summary judgment procedure in the federal courts has been a successful remedy for the prompt disposition of actions where there is no genuine issue present. It will undoubtedly become an equally important part of Wyoming civil procedure under the new rules.

The object of a motion for summary judgment is to get behind the allegations in the pleadings and to show that no real claim or defense exists.[3] This can be done by means of affidavits which bring into the case evidence to support or refute the allegations in the pleadings. The proper use of affidavits is vitally important in the summary judgment proceedings, since in the absence of counter-affidavits, the facts in the

1. Wyo. Rules of Civil Procedure, Rule 56 (c).
2. 6 Moore's Federal Practice 2066 (2d ed. 1953).
3. Sabin v. Home Owners' Loan Corp., 151 F.2d 541 (10th Cir. 1945).