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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.

JOHN F. LYNCH

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).

movant's affidavits are accepted as true.[4] The standard to which these affidavits must conform is set out in the rule itself.[5]

The first requirement of an affidavit which is in support of or in opposition to a motion for summary judgment is that the affidavit be made on personal knowledge.[6] This requirement of personal knowledge precludes the use of hearsay statements in the affidavit.[7] Affidavits, or statements contained in them, made merely "on information and belief" are also disregarded by the court.[8] However, an affidavit stating that the facts "are true as therein stated to the best of his knowledge and belief" has been held a sufficient statement by an affiant to fulfill the personal knowledge qualification.[9] Rule 56(e) has been interpreted as being mandatory on this point and a statement as to what the affiant "verily believes" has been held insufficient.[10]

It has been held that affidavits sufficiently show that they were made on personal knowledge where they recite that the affiants are "familiar with the facts" or "fully cognizant of the facts . . . set out."[11] However, an affidavit by an attorney stating that it "is based upon an investigation of the relevant facts of this motion and after communications and conferences with employees . . ." is insufficient to fulfill this requirement.[12] Affidavits by attorneys are usually excluded on the ground that they are not based on personal knowledge.[13] Evidently, the attorney can make an affidavit on facts within his own knowledge,[14] but the desirability of appearing as a witness in his own case is questionable.

The second standard required by Rule 56(e) is that the affidavits must set forth facts which are admissible in evidence.[15] The affidavits offered must be evidentiary in nature.[16] The affidavit should substantially follow the same form as if the affiant were giving testimony in court.[17] This reference to form means that the content of the affidavit must be competent evidence and is not a requirement that the physical form of the affidavit be in a question and answer format. General

4. Seward v. Missen, 2 F.R.D. 545 (D.Del. 1942).
5. Wyo. Rules of Civil Procedure, 56(e).
6. Person v. United States, 112 F.2d 1 (8th Cir. 1940), cert. denied, 311 U.S. 672; Walling v. Fairmont Creamery Co., 139 F.2d 318 (8th Cir. 1943); United States v. Kehoe, 4 F.R.D. 306 (M.D.Pa. 1945).
7. Seward v. Nissen, 2 F.R.D. 769 (D.Del. 1942); Boerner v. United States, 26 F.Supp. 769 (E.D.N.Y. 1939), aff'd 117 F.2d 387 (2d Cir. 1941), cert. denied, 313 U.S. 587.
8. Washington v. Maricopa County, 143 F.2d 871 (9th Cir. 1944), cert. denied, 327 U.S. 799.
9. Mellen v. Hirsch, 8 F.R.D. 248 (D.Md. 1948), aff'd 171 F.2d 127 (4th Cir. 1948).
10. The wording of the affidavit should indicate that the matters stated are personally known to the affiant. Jameson v. Jameson, 176 F.2d 58 (D.C. Cir. 1949).
11. Lawson v. American Motorists Ins. Corp., 217 F.2d 724, 726 n. 1 (5th Cir. 1954).
12. Abel v. Morey Machinery Co., 10 F.R.D. 187 (S.D.N.Y. 1950).
13. Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312 (1950); Cornacchio v. Coniglio, 7 F.R.D. 749 (E.D.N.Y. 1947); Mercantile Nat. Bank v. Franklin Life Ins. Co., 248 F.2d (5th Cir. 1957).
14. Graham v. Pennsylvania R.R., 13 F.R.Serv. 56e.1, Case 1 (S.D.Ohio 1949).
15. Lewis v. Clarence Coal Mining Co., 130 F.Supp. 909 (M.D.Pa. 1955).
16. 6 Moore's Federal Practice 2343 (2d ed. 1953).
17. Seward v. Nissen, 2 F.R.D. 545 (D.Del. 1942).

statements in the affidavits which do not show the facts in detail and affidavits which are vague and general are insufficient.[18] Also insufficient are affidavits by an attorney, in opposition to a motion for summary judgment, stating what he proposes to prove at trial or stating that he will present contradictory evidence at the trial.[19] In considering a motion for summary judgment, the court will disregard any statements of legal conclusions or mere expressions of opinion contained in the affidavits.[20] Hearsay statements are not considered.[21] It is not enough merely to repeat the allegations of the pleadings.[22] An affidavit should consist of affirmative facts which are inconsistent with the opponent's allegations or affidavits; thus the affidavit must contain something more than mere denials.[23]

A third requirement for the affidavits used in a summary judgment proceeding is that there must be an affirmative showing that the affiant is competent to testify to the contents of the affidavit. The affidavit is to be a statement of facts of which the affiant has knowledge and about which he is a competent witness. This requirement of competency is satisfied even though the affiant could at the trial claim some privilege of immunity; further it is unnecessary for the affidavit to include the affiant's offer to testify or submit to cross-examination.[24] Presumably a simple statement in the affidavit that the affiant is competent to testify as to the matters contained therein will satisfy this requirement of the Wyoming Rule.[25] However certain statements in affidavits made by persons precluded from testifying by the competency statutes[26] should be disregarded by the court upon the proper objections.

Where an affidavit supporting or opposing a motion for summary judgment includes incompetent evidence, the court will disregard that evidence, but will give consideration to those portions of the affidavit which contain competent evidence.[27] However if the opposing party makes no objection to the inadmissible matter in such papers, the court may then consider it.[28] The objecting party must state specifically the parts of the affidavit to which he objects.[29]

18. Engl v. Aetna Life Ins. Co., 139 F.2d 469 (2d Cir. 1943); Martin v. Allied International, Inc., 16 F.R.D. 385 (S.D.N.Y. 1954).
19. Engl v. Aetna Life Ins. Co., 139 F.2d 469 (2d Cir. 1943); United States v. Newberry Mfg. Co., 1 F.R.D. 718 (D.Mass. 1941).
20. G. D. Searl & Co. v. Chas. Pfizer & Co., 231 F.2d 316 (7th Cir. 1956).
21. Seward v. Nissen, 2 F.R.D. 545 (D.Del. 1942).
22. Walling v. Fairmont Creamery Co., 139 F.2d 318 (8th Cir. 1943).
23. Chapman v. United States, 139 F.2d 327 (8th Cir. 1943); Piantodosi v. Loew's, Inc., 137 F.2d 534 (9th Cir. 1943).
24. Banco De Espana v. Federal Reserve Bank of New York, 114 F.2d 438 (2d Cir. 1940).
25. Wyo. Comp. Stat. § 3-2601 (1945): "All persons are competent witnesses, except those of unsound mind and children under ten (10) years of age . . ."; Burt v. Burt, 48 Wyo. 19, 41 P.2d 524 (1935), stated that a 10 year old child witness was prima facie competent under this statute.
26. Wyo. Comp. Stat. §§ 3-2602, 3-2603 and 3-2605 (1945).
27. Dickhelser v. Pennsylvania R.R., 5 F.R.D. 5 (E.D.Pa. 1945), aff'd 155 F.2d 266 (3d Cir. 1946), cert. denied, 329 U.S. 808
28. Jno. T. McCoy, Inc. v. Schuster, 44 F.Supp. 499 (S.D.N.Y. 1942).
29. Ernst Seidleman Corp. v. Mollison, 10 FR.D. 426 (S.D.Ohio 1950).

A further requirement is that if there is a reference in the affidavit to some paper or document, a sworn or certified copy of that paper must be attached to the affidavit. Any reference in these affidavits to papers, sworn or certified copies of which are not attached, is an ineffective part of the affidait and is disregarded.[30] The mere statement of the substance of documents referred to or the affiant's interpretation of them does not comprise a sufficient affidavit.[31] The use of letters to the affiant is an improper way to present facts set out in those letters. Such facts should be shown by the writer's affidavit.[32] The fifth circuit court seems to have slightly restricted the scope of this provision of the rule in stating that in the absence of an objection, only papers which are materially in issue need be sworn to or certified, rather than requiring that all documents referred to be sworn or certified.[33]

Court records which are certified by the clerk of court and verified by a notary public are admissible as affidavits.[34] However a court may take judicial notice of the records of previous cases decided by that court, in which instance an affidavit concerning the previous case and containing that record is not necessary.[35] The affidavit of an attorney if made on personal knowledge as to testimony in another trial is sufficient.[36]

In summary judgment proceedings the parties are not restricted to the affidavits only, but may also make use of the pleadings, depositions and admissions on file[37] to supplement or oppose any affidavits on file. A deposition when so used should comply with the requirements which Rule 56 (e) sets forth for affidavits.[38] Exclusive of cost considerations it would seem to be desirable that a party present a deposition in preference to an affidavit, if possible. The person giving the deposition is either cross-examined in the process or at least is open to cross-examination and so his deposition is presumably more reliable than an affidavit.[39]

Affidavits which contain mere denials, unaccompanied by any facts which would be admissible in evidence, are not sufficient to raise the genuine issue of fact necessary to defeat a motion for summary judgment.[40] If the moving party presents evidentiary matter which shows that the movant should prevail as a matter of law, then he is entitled to the summary judgment[41] unless the opposing party comes forward with some

30. Washington v. Maricopa County, 143 F.2d 871 (9th Cir. 1944), cert. denied, 327 U.S. 799.
31. Walling v. Fairmont Creamery Co., 139 F.2d 318 (8th Cir. 1943).
32. Edward B. Marks Music Corp. v. Stasny Music Corp., 1 F.R.D. 720 (S.D.N.Y. 1941).
33. Lawson v. American Motorists Ins. Corp., 217 F.2d 724, 726 n. 3 (5th Cir. 1954).
34. Farm Bureau Mut. Ins. Co. v. Hammer, 83 F.Supp. 383 (W.D.Va. 1949), rev'd on other grounds, 177 F.2d 739 (4th Cir. 1949), cert. denied, 339 U.S. 914.
35. Fletcher v. Evening Star Newspaper Co., 114 F.2d 582 (D.C. Cir. 1940), cert. denied, 312 U.S. 694.
36. Graham v. Pennsylvania R.R., 13 F.R.Serv. 56e.1, Case 1 (S.D.Ohio 1949).
37. This includes admissions under Rule 36, and any admissions in the pleadings.
38. Lawson v. American Motorists Ins. Corp., 217 F.2d 724, 726 n. 2 (5th Cir. 1954).
39. 6 Moore's Federal Practice 2332 (2d ed. 1953).
40. Piantodosi v. Loew's, Inc., 137 F.2d 534 (9th Cir. 1943).
41. Gifford v. Travelers Protective Assn., 153 F.2d 209 (9th Cir. 1946).

materials, by affidavit or by the pleadings, depositions and admissions on file,[42] which show that there is an issue of material fact to be tried.[43] When the movant sets forth sufficient facts to justify a judgment for him as a matter of law, the summary judgment should be entered if the other party presents nothing to contradict those facts.[44]

General allegations or denials set out in the pleadings are not, in themselves, sufficient to prevent a summary judgment.[45] The object of a summary judgment proceeding is to pierce the allegations of the pleadings in order to determine whether there is a genuine issue of fact present. Therefore the allegations are not determinative of the propriety of granting the motion when the movant has made the required evidentiary showing. If the opposing party merely rests on the allegations or denials in his pleadings, he has not made the required showing and the court will enter summary judgment against him.[46] With the exception of the third circuit, this rule has been accepted as the correct rule in the federal courts.[47] In that circuit the case holdings are to the effect that well-pleaded allegations cannot be pierced by affidavits and that in such cases the motion for summary judgment is to be denied;[48] that contrary allegations or mere denials in the pleadings alone, are sufficient to raise an issue of facts so as to preclude summary judgment.[49] These cases have been called "patently erroneous."[50]

The Federal Rules Advisory Committee proposed an amendment to Federal Rule 56 (e) in order to overcome the third circuit exception and to assure that the correct rule would prevail in all circuits.[51] This proposed amendment has not yet been incorporated into the Federal Rules. It has, however, become a part of Wyoming Rule 56 (e). When one party makes a properly supported motion for a summary judgment, the opposing party cannot rely merely upon pleading allegations or denials. He must respond by affidavits or other appropriate means which set forth facts showing that there is a genuine issue present. Otherwise summary judgment, if appropriate, may be entered against the oppos-

42. Wilkinson v. Powell, 149 F.2d 335 (5th Cir. 1945).
43. Or unless Rule 56 (f) is applicable: Rule 56 (f). When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, 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.
44. Gray v. Amerada Petroleum Corp., 145 F.2d 730 (5th Cir. 1944).
45. Williams v. Kolb, 145 F.2d 344 (D.C. Cir. 1944).
46. 51 Mich. L. Rev. 1143, 1172 (1953).
47. 69 Harv. L. Rev. 839, 943 n. 16 (1956).
48. 6 Moore's Federal Practice 2066 (2d ed. 1953); Leigh v. Barnhart, 10 F.R.D. 279 (D.N.J. 1950); United States v. Bernauer, 10 F.R.D. 400 (D.N.J. 1950). These cases are district court interpretations of Fredrick Hart & Co. v. Recordgraph Corp., 169 F.2d 580 (3d Cir. 1948) and Reynolds Metals Co. v. Metals Disentegrating Co., 176 F.2d 90 (3d Cir. 1949).
49. 51 Mich. L. Rev. 1143, 1164 (1953).
50. 99 U. of Pa. L. Rev. 212, 214 (1950).
51. Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, prepared by the Advisory Committee on Rules for Civil Procedure, 57 (1955).

ing party. The Wyoming rule does not require the granting of a summary judgment in every case in which the opposing party fails to respond with sufficient counter-affidavits. The movant still has the burden of presenting such evidentiary facts to the court as to indicate that there is no triable issue of material fact in the case.

The summary judgment procedure is an important device in the modern legal trend toward the attainment of justice with a minimum of time and expense. By this method those cases in which the outcome of a trial is a foregone conclusion can be quickly disposed of. It also provides plaintiffs with a speedy and comparatively inexpensive judgment where there is no valid defense. While pleadings, depositions and admissions are considered, the objectives of the rule are also attainable through the use of the mechanical device of the affidavit. Furthermore Wyoming Rule 56 (e) has been wisely drafted in that it requires a positive factual showing by the party opposing the motion for summary judgment and does not permit him to rest on mere denials. This should serve as a guide for the courts in making a determination in the summary judgment procedure and preclude any mistaken interpretation of the procedure in this state similar to the unfortunate restriction of Rule 56 which has developed in the third circuit.

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