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MOTIONS FOR SUMMARY JUDGMENT: THEIR USE AND EFFECT IN WASHINGTON

Philip A. Trautman*

Modern summary judgment procedure originated in England in 1855, as a device to preclude frivolous and fictitious defenses to actions on commercial paper. Steady evolution of the procedure in England and the American states, characterized by expansion of its scope to include more parties in more types of actions, was culminated with the incorporation of motions for summary judgment into the Federal Rules of Civil Procedure in 1938. Rule 56 authorized use of summary judgment procedures by any party in any action, whether formerly denominated legal or equitable, as to both liquidated and unliquidated claims.¹

Adoption of summary judgment procedures in the states, however, was not so rapid. As late as 1950, established civil procedure in the State of Washington was justly criticized for its lack of such a device for quick and easy disposition of actions involving no genuine issue of material fact.² Several years later, Washington substantially adopted the federal summary judgment procedure, in what is now Civil Rule 56, effective November 1, 1955.³ By 1963, twenty states had rules resembling the federal procedure, twenty-one states had their own peculiar rules, and only nine states had no rule or statute authorizing summary judgments.⁴

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I. PURPOSES OF THE PROCEDURE

In general, summary judgment procedure may be used to deter-
mine what need exists for a trial, according to whether there is a
genuine issue as to any material fact, and whether one of the parties
is entitled to judgment as a matter of law. By enabling an early
conclusion to litigation, summary judgments minimize expenditures
of time and money by the parties, and serve the public interest by
decreasing court congestion. Availability of the procedure may elim-
inate the necessity of the extensive preparations otherwise required
for a trial. Even when judgment is not rendered on the whole case
or for all the relief sought, benefits may result in that the court may,
if practicable, make an order specifying those facts not in contro-
versy and those controverted in good faith, thereby limiting the scope,
duration, and expense of the subsequent trial.

II. MOVING PARTY'S BURDEN

A. Genuineness of the Factual Issues

Under Civil Rule 56, summary judgment can be rendered only
when it is shown that there exists no genuine issue as to any material
fact, and that a party is entitled to judgment as a matter of law. The
function of the court in ruling upon a motion for summary judgment
is not to resolve factual issues, but to determine whether such issues
exist. Thus, the first critical determination required of a court con-
fronted with the motion relates to the genuineness of the pleaded
factual issues.

The method used for determining genuineness of factual issues
in summary judgment proceedings is different from the one used in
resolving motions to dismiss for failure to state a claim. A complaint
should not be dismissed unless, weighing its language in favor of the
pleader, it appears beyond doubt that he can prove no possible set
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of facts which would entitle him to relief under his claim. A motion to dismiss for failure to state a claim might be denied, and yet a later motion for summary judgment may succeed, if it is shown that under no provable set of facts is the claim (or defense) good.9

That is, when ruling on a motion for summary judgment, the court may pierce the formal allegations of fact stated in the pleadings, in its search for genuine factual issues. Once such an issue is discovered, summary judgment is precluded. For example, *Fleming v. Smith*10 involved competing claims to life insurance by a decedent’s son and mother. The lower court granted the son’s motion for summary judgment. Though there was evidence to support such a conclusion, the Supreme Court also noted evidence in the record which might support the mother’s claim. It was held that the trial court could not weigh the evidence in ruling on a motion for summary judgment and the case was reversed and remanded for trial.

Generally, the Washington Supreme Court is disposed to affirm the denial of a motion for a summary judgment more often than the grant of the motion.11 An excellent example of the court’s tendency to find a claimed factual issue to be genuine is *Salvino v. Aetna Life Ins. Co.*12 Suit was instituted under a policy requiring that the insured’s disability have begun before a certain date. The defendant company served a request for an admission by plaintiff that he had once stated that his disability commenced after that date. When plaintiff failed to answer the request, it was deemed admitted under Civil Rule 36,13 and the company moved for summary judgment on

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10 64 Wn. 2d 181, 390 P.2d 990 (1964).

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the basis of that admission. In opposition, the plaintiff filed an affidavit from his doctor, stating that the disability had begun earlier. The Supreme Court reversed the grant of summary judgment on the ground that plaintiff had admitted only that he had made the statement, and not that the statement was true. Thus, there remained a genuine issue of material fact as to the date when plaintiff became disabled, and a trial was necessary. 14

A genuine issue as to the credibility of the movant's evidence similarly requires denial of a motion for summary judgment. Such an issue may be raised by contradictory evidence, or by impeachment of the movant's evidence. If the contradictory or impeaching evidence is reasonable, there is a genuine issue of credibility which must be resolved by trial. 15

Even when evidentiary facts are not disputed, a motion for summary judgment will be defeated if different inferences may be drawn from the evidence in the record as to ultimate facts (e.g. intent, knowledge, good faith, or negligence). 16 Similarly, a motion must be denied if reasonable minds might draw different conclusions from the undisputed evidentiary facts. 17

The test for genuineness of a material factual issue under a motion

the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. . . . Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing on the objections at the earliest practicable time . . . . 18

14 Another example of a similar interpretation of an admission is Phillips v. Richmond, 59 Wn. 2d 571, 369 P.2d 299 (1962).

15 Hudesman v. Foley, 73 Wn. 2d 880, 441 P.2d 532 (1968). In Balise v. Underwood, 62 Wn. 2d 195, 381 P.2d 966 (1963), the court concluded that there was a genuine issue as to a material fact where the plaintiff attacked the credibility of defendant-movant's witnesses. The court denied defendant's motion even though the plaintiff would have to "come forward with something more" than such an attack in order to prevail at the trial.


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for summary judgment is thus similar to the test applied to a motion for a directed verdict. In both cases, the court must consider the material evidence, and all reasonable inferences therefrom, most favorably to the non-moving party; and, after such consideration, if reasonable men might reach different conclusions, a genuine factual issue is presented, and the motion for summary judgment should be denied.

Assuming the test is properly applied, a grant of a summary judgment does not infringe either party's right to a jury trial. When there are no genuine issues of material fact to be decided, a jury would have no function, and neither the federal nor state constitutions require that the case be submitted to a jury. Because summary judgment may not be granted unless the court can state as a matter of law that one party must prevail, there is no discretionary power to grant the motion.

There is, however, apparently some discretionary authority in the court to deny a motion for summary judgment. For this reason, attorneys cannot completely forego preparations for trial, even when they are confident that they will be granted summary judgment. The court apparently may, in its discretion, deny the motion even when there appears to be no genuine issue, if it believes that justice will be better served by presenting the case to a jury.

Although Civil Rule 56 potentially applies to all civil actions, yet some types of actions are naturally more suited to summary determination. These include actions on commercial paper and writ-

18 See Trautman, Motions Testing the Sufficiency of Evidence, 42 WASH. L. REV. 787, 797-802 (1967), for a general discussion of the test to be applied.


21 See discussion and citations in 4 L. ORLAND, WASHINGTON PRACTICE 246 (2d ed. 1968). Civil Rule 56(f) suggests a discretionary power in the trial judge in providing, "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."

22 4 L. ORLAND, WASHINGTON PRACTICE 246-48 (2d ed. 1968).
ten contracts, and actions involving simple affirmative defenses (such as res judicata or the statute of limitations).\textsuperscript{23} Summary adjudication is less often appropriate in actions for negligence and divorce, and in cases which raise issues of constitutionality or broad public policy.\textsuperscript{24} However, even when the type of case seems inappropriate for summary determination, a motion for summary judgment may yet be expedient with regard to particular issues, and occasionally as to the entire case.\textsuperscript{25} Thus, litigants should never ignore the potential use of the motion.

B. Materiality of the Factual Issues

As noted earlier, Civil Rule 56 permits summary judgment only when there exists no genuine issue as to any material fact. A material fact is one upon which the outcome of the litigation depends. It is not enough that there be disagreement upon some issue; that issue must have some bearing upon the outcome of the case. Thus, a summary judgment has been held proper in an action on a promissory note, despite the alleged secret intent of one of the parties;\textsuperscript{26} summary judgment was appropriate in a personal injury suit by an invitee, where there was in fact no defect in the premises despite the alleged deceptive nature of the area;\textsuperscript{27} and summary judgment was the appropriate conclusion to an action brought to determine the validity of a testamentary residuary clause, where all of the alleged issues could not change the legal significance of the language used in the will.\textsuperscript{28}

These are representative of common situations in which summary judgment will be granted for lack of a material factual issue—where all of the factual issues presented, regardless of their outcome, cannot affect the resolution of the ultimate legal question presented.

\textsuperscript{24} See Washington State Bar Association Seminar, Motions for Summary Judgment 20 (1958); and Foster, Summary Judgment Procedure 2(a), 2(b) (1955).
\textsuperscript{25} See Lundgren v. Kieren, 64 Wn. 2d 672, at 677-78, 393 P.2d 625, at 628-29 (1964), in which the court stated: "Negligence claims normally involve factual disputes, but, if no genuine issue of material fact is presented when the motion for summary judgment is heard, the issue may be summarily resolved."
\textsuperscript{26} Zedrick v. Kosinski, 62 Wn. 2d 50, 380 P.2d 870 (1963).
Another excellent example is *Capitol Hill Methodist Church of Seattle v. Seattle.* In that case, property owners sued to enjoin the vacation of a nearby, but not adjacent, street, contending that they had purchased their properties in reliance on a recorded plat designating the street, that the street provided the principal and most convenient access to their properties, that closure would create a fire hazard, that their properties would be substantially and permanently damaged, and that closure of the public street was for a private purpose. In conjunction with defendant’s motion for summary judgment, plaintiffs and defendants filed conflicting affidavits concerning these complex issues. After examining each contention in detail, the Washington Supreme Court affirmed the lower court’s award of summary judgment on the ground that the issues presented either were not factual in nature, or were not material due to plaintiff’s lack of standing to challenge the vacation. Thus, even highly complex factual issues which appear in pleadings and/or affidavits may be considered immaterial in rendering summary judgment, especially when it is necessary to test only the relation of those factual issues to the ultimate legal question involved in the case, and it is relatively easy to determine whether or not the outcome of the case depends upon the asserted factual issues.

Immateriality is often less clear, and summary judgment more difficult to obtain, when the materiality of genuine factual disputes cannot be determined with reference to the ultimate legal issue alone. Consider, for example, *Jolly v. Fossum,* in which a city employee brought a libel and slander action against a mayor-elect and a newspaper, for their alleged defamatory statements that the plaintiff had used city-owned equipment without authorization. The trial court granted summary judgment to the defendants, on the ground that the city council’s alleged oral authorization to use the equipment was a nullity, and no written authorization was alleged. The trial court believed that whether or not the oral authorization was actually given was immaterial. The Supreme Court reversed, on this collateral legal question, holding that written authorization was not necessary, and that plaintiff’s deposition alleging oral authorization was sufficient to raise a genuine issue of material fact.

III. PUTTING THE PROCEDURE TO WORK

A. Affidavits and Related Materials

As previously stated, a primary purpose of the summary judgment procedure is to provide for an early determination of whether a genuine issue of material fact exists. Demurrers, motions to dismiss for failure to state a claim, and motions for judgment on the pleadings can raise only those defects which appear upon the face of the pleading. Summary judgment procedure authorizes a speaking motion, by which it is possible to proceed beyond and behind the pleadings in search of factual issues.

How is this accomplished? Civil Rules 56(a) and (b) provide that either party to an action may move for summary judgment “with or without supporting affidavits.” Clearly, the absence of affidavits does not preclude success of the motion, but affidavits are usually used, and are the primary vehicle by which genuine factual issues are brought to the court’s attention. Because extra-record information is ordinarily necessary to ascertain the existence of a genuine factual dispute, affidavits provide the most feasible, and most common method of informing the court.

Of course, an affidavit, not being subject to cross-examination, is a poor substitute for a live witness; and because summary judgment procedures are not intended to avoid trials of disputed factual issues, the Washington court has been inclined toward generally strict enforcement of the requirements as to affidavits. The best rule of thumb is that an affidavit should follow substantially the same form as testimony the affiant might offer in court.

Again, the filing of affidavits is not technically required for a successful motion for summary judgment. Civil Rule 56(c) provides

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33 The present rules relating to a motion to dismiss for failure to state a claim and a motion for judgment on the pleadings allow the court to treat speaking motions thereunder as motions for summary judgment. See Civil Rule 12(b) and (c). See also 6 J. MOORE, FEDERAL PRACTICE RULES PAMPHLET 427 and 841 (1966).
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that summary judgments may be rendered on the basis of "the pleadings, depositions, and admissions on file, together with the affidavits, if any," submitted by the parties.

When affidavits are not utilized, however, the motion may not achieve its full effectiveness. For example, in Maki v. Aluminum Building Products, defendant moved for summary judgment without filing either an answer or affidavits. The trial court granted summary judgment even though the only instrument before the court was plaintiff's complaint. On appeal, the Washington Supreme Court reversed, stating that, while it did not imply that Civil Rule 56 required an answer or affidavits, the posture of the case at the time the motion was brought required the court to treat it as a motion to dismiss for failure to state a claim. Such a claim was stated, and the motion for summary judgment without answer or affidavits failed.

Ordinarily, the party opposing the motion will also wish to support his position with affidavits. This will sometimes be difficult for the opponent if, for example, knowledge about the case is solely in the hands of the moving party and there has not been sufficient time to obtain discovery or to locate a witness. When it appears that the party opposing the motion cannot present by affidavits the facts essential to justify his position, the court may deny the motion for summary judgment, or may order a continuance to permit the taking of affidavits, or other discovery procedures, or "may make such other order as is just."

Attorneys are accustomed in many proceedings to making assertions on information and belief. In seeking a summary judgment, these are not sufficient. This is well-illustrated in Stringfellow v. Stringfellow. There, plaintiff moved for summary judgment with supporting affidavits. Defendant filed no controverting affidavits. Defendant filed no controverting affidavits, but contended that his cross-complaint served to raise genuine issues

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As to one of the plaintiffs, a copy of a contract and answers to written interrogatories were presented in addition to the complaint. The motion as to that plaintiff was treated as one for summary judgment but was denied upon the ground that factual issues existed.

Civil Rule 56(f).

of fact. The Washington Supreme Court held to the contrary; the answer and cross-complaint were verified by defendant's attorney on belief alone, which did not satisfy the requirement that affidavits be based on personal knowledge. Thus, plaintiff's affidavit was accepted as stating the facts, and the summary judgment was affirmed.\textsuperscript{40}

Only that matter in affidavits consisting of facts admissible in evidence will be considered on a motion for summary judgment. Hearsay statements and allegations in the nature of conclusions of law will be disregarded in the search for genuine factual issues. The affidavit must also show on its face that the affiant is competent to testify to the matters recited therein, although it is not necessary that it specifically allege such competency.\textsuperscript{41}

Furthermore, sworn or certified copies of all papers referred to in any affidavit must be attached thereto or served therewith.\textsuperscript{42} If this is not done, the opponent may move to strike the affidavit, although failure to so move constitutes a waiver.\textsuperscript{43} In any event, the court may permit affidavits to be supplemented or opposed by depositions or further affidavits.\textsuperscript{44}

Finally, if it appears that any affidavits have been presented in bad faith, or solely for the purpose of delay, the court will order the offending party to pay his opponent any reasonable expenses incurred in opposing the affidavits, and the wrongdoing party and his attorney may be adjudged guilty of contempt.\textsuperscript{45}

As pointed out earlier, Civil Rule 56 authorizes the court to consider "pleadings, depositions, and admissions on file," as well as affidavits, when ruling on a motion for summary judgment. This language should not, however, be read so restrictively as to exclude the use of materials obtained through other discovery procedures, such as answers to written interrogatories. Federal Rule of Civil Procedure 56(c) was amended in 1963 to permit such written answers among the materials considered when ascertaining the existence of a

\textsuperscript{40} The fact that an affidavit is submitted by an attorney on behalf of his client does not preclude its consideration if it otherwise meets the requirements of the rule. Meadows v. Grant's Auto Brokers, Inc., 71 Wn. 2d 874, 431 P.2d 216 (1967).
\textsuperscript{42} Civil Rule 56(e).
\textsuperscript{43} Meadows v. Grant's Auto Brokers, Inc., 71 Wn. 2d 874, 431 P.2d 216 (1967).
\textsuperscript{44} Civil Rule 56(e).
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genuine issue of material fact. But even before that, it was generally assumed that they could be so used under the federal rule, and the Washington rule should be read accordingly. Clearly, the most effective use of summary judgment procedures can be achieved when full use is made of the multiple discovery devices.

The phrase "admissions on file" of course includes admissions obtained under discovery rules. In addition, stipulations between the parties or counsel, admissions by counsel in court, and admissions in pre-trial orders should be included as permissible subjects for the court's consideration. There is also authority supporting the use of documentary evidence and oral testimony under the federal summary judgment rule. The Washington Supreme Court has further authorized consideration of matters which are the subject of judicial notice, and also the use of presumptions when ruling on motions for summary judgment. Finally, briefs are naturally very useful in demonstrating the existence or non-existence of a genuine issue of fact. In view of the broad interpretation the courts have given this area of the rule, counsel should employ ingenuity in collecting factual materials for a summary judgment proceeding, rather than feel literally restricted to the items named in the rule.

B. Parties and Time Limitations

Though defendants are more commonly successful in moving for summary judgments, the rule governing the procedure permits motions by either party. Whichever party makes the motion has the burden

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51 While not specifically provided for in Civil Rule 56, briefs are desirable and are commonly used. See Eschbach, Summary Judgment In Indiana: Some Observations Based Upon the Federal Experience, 2 Ind. Legal F. 67, 71 (1968).
52 If the motion is based upon depositions, answers to interrogatories, admissions, and the like, the critical language therein should be incorporated in a brief along with reference to page and line of the source. This, of course, is for the convenience of the judge and to encourage his consideration of the materials. In addition, care should be taken to get the brief to the judge personally a few days before the scheduled hearing.
53 Civil Rule 56(a) provides for the motion by "[a] party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment" while subsection (b) allows for the motion by the party against whom each of the above is asserted or sought.
of establishing the absence of any genuine issue of material fact,\(^5\) irrespective of who has the burden of proof on the issue at trial.\(^6\)

The practice is to carefully scrutinize the affidavits of the moving party and indulge some leniency with respect to the affidavits of the opposing party.\(^5\) The allegations of the opponent are ordinarily not required to be as well-supported as those of the movant.\(^5\) This is practically so, even though in theory summary judgment may be granted in favor of the non-movant, if during the hearing it appears that he is so entitled.\(^5\)

A plaintiff cannot move for summary judgment until after expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the defendant.\(^5\) This enables the defendant to obtain counsel before being confronted


\(^6\) See State ex rel. Bond v. State, 62 Wn. 2d 487, 490, 383 P.2d 288, 299 (1963), where it was stated: "Thus, even though in a trial on the merits the state would have the burden of proving its affirmative defense of laches, the reverse is true on relator's motion for summary judgment. Where the issue of laches has been properly raised, relator must establish that there are no facts or reasonable inference thereof to be drawn from the undisputed facts." See Peninsula Truck Lines, Inc. v. Tooker, 63 Wn. 2d 724, 388 P.2d 938 (1964); American Universal Ins. Co. v. Ranson, 59 Wn. 2d 811, 370 P.2d 867 (1962); Reynolds v. Kuhl, 58 Wn. 2d 313, 362 P.2d 589 (1961); Preston v. Duncan, 55 Wn. 2d 678, 349 P.2d 605 (1960).

\(^5\) Meadows v. Grant's Auto Brokers, Inc., 71 Wn. 2d 874, 431 P.2d 216 (1967). The court added some language which could create difficulty if taken out of context. "In this latter respect, it should be added, however, that the leniency spoken of does not permit of overtrading upon the indulgence of the court, for it is still necessary for the non-movant to satisfy the court that there exists a genuine issue of material fact to be tried, particularly in the face of a strong showing to the contrary." The court nevertheless clearly put the burden upon the movant to establish the absence of a genuine issue.

See also State ex rel. Bond v. State, 62 Wn. 2d 487, 491, 383 P.2d 288, 291 (1963) in which the court said, "Facts asserted by the nonmoving party and supported by affidavits or any other proper evidentiary material must be taken as true."


\(^5\) The limitation is stated in Leland v. Frogge, 71 Wn. 2d 197, 201, 427 P.2d 724, 727 (1967) that, "While there is authority for granting summary judgment for a nonmoving party (Rubenser v. Felice, 58 Wn. 2d 862, 365 P.2d 320 (1961); 4 Orland, Wash. Prac. 66 (1966)), it would be expected that such judgment would be either one of dismissal, or for relief sought by or uncontestedly due that second party."

\(^5\) Civil Rule 56(a). Fed. R. Civ. P. 56(a) provides, "at any time after the expiration of twenty days from the commencement of the action" rather than "at any time after the expiration of the period within which the defendant is required to appear."

Civil Rule 12(a), which allows a party ten additional days to answer after the court's disposition of certain motions, does not apply to a summary judgment proceeding. The validity of a motion for summary judgment is determined by the period in which the defendant must appear and not by the period in which he must answer. State ex rel. Carrol v. Simmons, 61 Wn. 2d 146, 377 P.2d 421 (1962).
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with the plaintiff's motion. A defendant, however, may move for summary judgment at any time.\textsuperscript{60}

Regardless of who brings the motion for summary judgment, it must be served at least ten days before the time fixed for the hearing,\textsuperscript{60} in order to enable the opponent to adequately prepare. Ordinarily, this rule would preclude any original motion for summary judgment at any time later than ten days before the trial date.\textsuperscript{61} But presumably a trial court might, in its discretion, grant a postponement of a trial in order to allow service and hearing of a motion for summary judgment.

C. The Opponent's Burden

When a party moves for summary judgment and supports his motion in the manner described above, a difficult question arises as to what the opponent must do to prevent the entry of summary judgment against him. May the opponent rely upon the general allegations in his pleading, or must he do more?

In the federal system, there was at one time a split of authority on this problem, mainly between the United States Court of Appeals for the Third Circuit, which held that the party could rely on his allegations in the complaint, and the other Circuits.\textsuperscript{62} To remedy this uncertainty, the following language was added to Federal Rule of Civil Procedure 56(e) in 1963:\textsuperscript{63}

\begin{quote}
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 his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.
\end{quote}

In \textit{W. G. Platts, Inc. v. Platts,}\textsuperscript{64} the problem was presented to the Washington Court. The plaintiff alleged a general and continuing

\textsuperscript{60}Civil Rule 56(b).
\textsuperscript{61}Civil Rule 56(c). \textit{See also} State ex rel. Zemple v. Twitchell, 59 Wn. 2d 419, 367 P.2d 985 (1962) and Mayflower Air-Conditions, Inc. v. West Coast Heating Supply, Inc. 54 Wn. 2d 211, 339 P.2d 89 (1959).
\textsuperscript{63}6 J. MOORE, \textit{FEDERAL PRACTICE RULES PAMPHLET} 941 (1966).
\textsuperscript{64}FED. R. CIV. P. 56(e).
\textsuperscript{64}73 Wn. 2d 434, 438 P.2d 867 (1968).
conspiracy by the defendants to damage his business. Defendants moved for summary judgment and filed an affidavit by an attorney who had overseen the controversy between the parties for ten years. He stated that, to his personal knowledge, every act complained of had occurred several years before. Plaintiff failed to come forth with any facts establishing a continuing conspiracy, and defendants were granted summary judgment. The Washington Supreme Court affirmed the result, although Washington’s summary judgment rule does not literally require an opponent to use affidavits or other materials to prove the existence of a factual dispute. Still, in order to defeat a properly supported motion for summary judgment, it is practically necessary to do more than merely rely on the allegations in a pleading.

The foundation for this result in Washington was laid in *Almy v. Kvamme*, where plaintiff, opposing defendant’s motion for summary judgment, contended that the facts alleged in his complaint established a conflict which could not be resolved at the summary judgment hearing, and that he was not obliged to disclose the nature of his evidence at that hearing. The Washington Supreme Court ruled to the contrary:

The office of a summary judgment proceeding is to avoid a useless trial. It is to test, in advance of trial, whether evidence to sustain the allegations in the complaint actually exists. Evidentiary pleadings alone, if properly challenged by controverting affidavits, depositions, and admissions presented by the moving party, will not carry the issue of fact to a trial. The object of a motion for summary judgment is to separate the wheat from the chaff in evidentiary pleadings, and to establish, at the hearing, the existence or nonexistence of a genuine, material issue. *Preston v. Duncan*, 55 Wn. 2d 678, 349 P.2d 605 (1960). Applying these rules to the record before us, we find no genuine issue of material fact which would prevent the trial court from granting respondent’s motion for summary judgment.

Thus, by decisional construction, Washington has reached a result conforming to the amended federal rule.

Particular note must be taken of *Preston v. Duncan*, which is cited in the *Almy* case. Plaintiff brought an action against a six-year old child for having jumped upon plaintiff "intentionally and with

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66 Id. at 329, 387 P.2d at 374.
full knowledge of the probable effects,” and against the parents of the child, who had “full knowledge” of such acts by the child but failed to warn plaintiff. The defendants moved for summary judgment, submitting plaintiff's deposition and written statement concerning her injury; plaintiff presented no affidavits, but simply relied upon the allegations in her complaint. The Washington Supreme Court reversed the trial court's entry of summary judgment, even though the plaintiff could not prevail upon the basis of the facts then before the court, because she might have additional evidence which could be presented at a trial. The court posed the question in this manner: “If such evidence exists, is the plaintiff required to produce it when the defendant’s showing on their motion for summary judgment does not negate the existence of such additional evidence?”

The response was in the negative. According to the court, while it would have been better for all concerned if plaintiff had set forth her evidence, yet because defendants had made no showing of a lack of evidence, plaintiff was entitled to rely upon the allegations in her complaint.

Although this decision may seem contrary to the decisions in Almy and Platts, Preston is still good authority. As has been previously discussed, the party moving for summary judgment has the burden of showing that there exists no genuine issue of material fact. If the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether or not the opponent has submitted affidavits or other responsive materials. That is the Preston case. If the moving party makes an adequate showing, the non-moving party must respond. That is the situation in Almy and Platts.

Just as the summary judgment procedure provides a means to pierce the pleadings, so likewise it may be used to pierce affidavits. In Reed v. Streib, plaintiff complained of a conspiracy, and filed an affidavit

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65 Wn. 2d at 681, 349 P.2d at 606.
66 See also a more recent case, Leland v. Frogge, 71 Wn. 2d 197, 427 P.2d 724 (1967), in which the court at 203 said, “We find ourselves in much the same position as in Preston v. Duncan, supra. We cannot with any certainty tell what are the issues of fact, but the material presented by appellant's motion was not sufficient to defeat the questions raised by respondent's pleadings and affidavit. Consequently, the order granting summary judgment was not properly made.”
67 Presumably the response of the nonmoving party might be in the form of the original pleading, if verified, and if it met the requirements of affidavits as set forth in Civil Rule 56(e). See 6 J. Moore, Federal Practice Rules Pamphlet 944-45 (1966); 4 L. Orland, Washington Practice 67-68 (Supp. 1965); and Reed v. Streib, 65 Wn. 2d 700, 399 P.2d 338 (1965). Ordinarily the pleading would not meet such requirements.
68 65 Wn. 2d 700, 399 P.2d 338 (1965).
containing evidentiary details linking all of the defendants except one, Reed, as to whom there was simply the allegation of conspiracy. Reed moved for summary judgment and filed an affidavit denying any conspiracy on his part. The court pierced the formal allegations in plaintiff's affidavit and pleadings, and entered summary judgment for Reed. Motions for summary judgment by the other defendants failed, however, because as to them plaintiff had raised genuine issues of fact.\textsuperscript{72}

IV. EFFECTS OF THE MOTION

When the defendant has moved for summary judgment, may the plaintiff thereafter obtain a voluntary nonsuit as a matter of right? In the federal courts, the answer is clearly "no"—an express rule limits the plaintiff's right of nonsuit to "any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs."

In Washington, the answer is not so clear. In \textit{Beritich v. Starlet Corp.},\textsuperscript{74} the plaintiff moved for a voluntary dismissal without prejudice after the defendant had moved for summary judgment, and after the trial court had orally announced its decision in favor of the defendant. Plaintiff's motion was nevertheless granted; on appeal, the Washington Supreme Court reversed the voluntary dismissal for three reasons. First, and most importantly, the summary judgment procedure would be useless to defendants if plaintiffs were permitted voluntary nonsuit after an adverse oral decision in a summary judgment hearing. Second, because the summary judgment rule is a more recent procedural innovation than the rule authorizing voluntary dismissals, a disposition under the more recent rule should control the scope of the older right of voluntary dismissal, insofar as there might be conflict.\textsuperscript{75}

\textsuperscript{72}A more recent application of the \textit{Reed} principle is Meissner v. Simpson Timber Co., 69 Wn. 2d 949, 421 P.2d 674 (1966).
\textsuperscript{73}FED. R. CRIM. P. 41(a)(1).
\textsuperscript{74}60 Wn. 2d 454, 418 P.2d 762 (1966).
\textsuperscript{75}Voluntary nonsuits were governed by Pleading, Practice & Procedure Rule 41.08W at the time of the case, Civil Rule 41(a), which now governs, is basically the same insofar as pertinent to the present consideration. The court placed some emphasis upon the term "affirmative relief", which was present in PPP 41.08W and is not in Civil Rule 41(a), but this term does not seem critical in view of the policy reasons stated for the \textit{Beritich} result. In short, though the voluntary dismissal rule in its present wording is now more recent than the summary judgment rule, it seems clear that \textit{Beritich} is still the law on its facts.
Third, the situation was said to be analogous to one formerly governed by a statute which allowed a voluntary nonsuit "at any time before the court has announced its decision"; that time had passed in this case.

Clearly, 

miss for want of prosecution by the plaintiff within one year from joinder of issue. The Washington court had previously held that normal pre-trial activities, such as the taking of depositions, serving of interrogatories, and making demands for admissions and applications to inspect adversely-held evidence, did not toll the period within which cases were to be noted for trial. The Storey court held, however, that the one-year period for noting was tolled by a good faith filing of a motion for summary judgment and disposition of that motion. Plaintiff's subsequent noting of the case for trial was therefore timely.

There was language in the Storey case which suggested that tolling of the prosecution period would not occur unless both the motion for summary judgment and the court's decision thereon were made within one year from joinder of issue, although the court did talk at length about the importance of good faith prosecution of the motion. But in a subsequent case, the court, relying on Storey, made it clear that the motion for summary judgment alone, if timely filed (and, presumably, if made in good faith), tolls the operation of the rule requiring noting within one year, until the issues raised by the motion are resolved by court order.

In the event a summary judgment is entered, findings of fact and conclusions of law are unnecessary. Consequently, if they are entered, they are deemed superfluous, and of no prejudice to the party against whom the judgment is entered. Furthermore, failure to assign error to them has no effect upon an appeal from the summary judgment.

79 This was based on Pleading, Practice & Procedure Rule 41.04W, since superseded by Civil Rule 41(b)(1).
81 Storey v. Shane, 62 Wn. 2d 640, 643, 384 P.2d 379, 381 (1963): "But it is not the mere filing of the motion that tolls the rule. It is the court's decision thereon, either in denial or granting in whole or in part, that sets the one year's time running again. One cannot simply file the motion, let it lie dormant, and then assume that the cause has been renewed for an additional year. It must be filed in good faith, supported with a record that indicates not only good faith but an intent to prevail, and brought before the court for hearing with reasonable dispatch under the rules prevailing in the forum where maintained. It is the court's ruling pursuant to such well-brought motion that tolls the rule."
V. APPEALS FROM A SUMMARY JUDGMENT HEARING

A common difficulty confronting counsel after entry of an order in a summary judgment proceeding lies in determining whether the particular order is appealable. With respect to judgments on the whole case, the problem is one of easy solution. If a summary judgment is granted, and it disposes of all the issues, then it is appealable just like any other final judgment on the merits.\textsuperscript{86} On the other hand, if the court's order denies the motion for summary judgment on all issues, the order is not appealable. Such an order is interlocutory in nature, and the case remains for trial.\textsuperscript{87}

The problem is more difficult when the court's ruling on the motion for summary judgment disposes of some of the issues before it, but not all of them. Certainly the court has the authority to make such an order. For example, Civil Rule 56(c) provides that "[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."\textsuperscript{88} Civil Rule 56(d) provides that the court may issue an order "specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just."\textsuperscript{89} When multiple claims are advanced, the court may dispose of one or more by summary order and leave the rest for trial.\textsuperscript{90} In each instance, counsel may desire an immediate appeal.

\textit{Maybury v. Seattle}\textsuperscript{91} is instructive as to when appeals may be taken. In that case, the court ruled that there was no genuine issue with respect to the city's liability, and that trial should be limited to the issue of damages. The Washington Supreme Court held this order not appealable, because to authorize such piecemeal review would interfere with the orderly administration of justice, unduly burden the supreme court, and create unnecessary delays for the parties. For the same reasons, the court refused to grant a writ of certiorari to review the interlocutory order.\textsuperscript{92}

\textsuperscript{86} Wash. R. O. A. 14(1) provides for an appeal from a final judgment.
\textsuperscript{87} Id.
\textsuperscript{88} Civil Rule 56(c).
\textsuperscript{89} Civil Rule 56(d).
\textsuperscript{90} Crosthwaite v. Crosthwaite, 56 Wn. 2d 838, 358 P.2d 978 (1960).
\textsuperscript{91} 53 Wn. 2d 716, 336 P.2d 878 (1959).
\textsuperscript{92} Apparently the court considered the order an interlocutory judgment within Civil
Dictum in *Maybury* indicated the same result with respect to orders entered under Civil Rule 56(d), limiting the issues to be tried. In a subsequent decision, the court held such partial orders to be merely interlocutory summary adjudications and not appealable.

With respect to multiple-claim actions, however, the same result is not necessary. In *Crosthwaite v. Crosthwaite*, the trial court, after a summary judgment hearing, entered an order which (1) awarded plaintiff a sum for alimony and support, (2) ordered reinstatement of a life insurance policy in plaintiff’s behalf, and (3) left for determination at trial the question whether the defendant should be required to make any future monthly payments. Upon appeal by defendant, the court stated the question to be, “Are the money judgment and the order for specific performance a ‘final judgment’ (and thus appealable) upon a part of plaintiff’s claim, pursuant to Rule 56(a), or are they simply an interlocutory summary adjudication of established facts (as distinguished from a judgment), pursuant to Rule 56(d) . . . ?” The court concluded that the order was an interlocutory summary adjudication of a portion of plaintiff’s claims, under Civil Rule 56(d), and that it was not appealable. However, the court went on to state that if Pleading, Practice and Procedure Rule 42(b) (now Civil Rule 54(b)) had been in effect at the time, the trial court could have directed a final appealable judgment upon one or more, but less than all, of the plaintiff’s claims. Thus, it is clear that a court ruling upon a multiple-
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claim action in a summary judgment proceeding may issue an appealable order, even though it does not dispose of all claims. But it should be noted that the trial court does not make an appealable order unless it expressly directs the entry of a final judgment.

The Crosthwaite decision does not reach the question of whether a trial court sitting in a summary judgment hearing on a single-claim action may enter an order which is appealable even though it does not dispose of all issues. Civil Rule 56(a) states that "[a] party seeking to recover upon a claim . . . may . . . move . . . for a summary judgment in his favor upon all or any part thereof." If he moves for summary judgment on a part, and the relief is granted, is there an appealable order?

In Crosthwaite, the court, by formulating the question in the manner quoted above, seems to suggest a distinction between sections of Civil Rule 56, to the effect that a partial order entered under Civil Rule 56(a) would be appealable, whereas an order issued under Civil Rule 56(d) is not appealable. Even so, the holding in Crosthwaite is not directly in point, and the question remains unresolved in Washington.

the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

8. An opinion was written in the case, reported in 355 P.2d 801, but not reported in the Washington Reports, which applied Civil Rule 54(b) (then Pleading, Practice & Procedure Rule 42 (b)), to the Crosthwaite facts. The opinion was withdrawn when it was discovered that PPP 42(b) was not in effect at the time of the action in the trial court and thus did not govern. The new opinion was then written as reported in 56 Wn. 2d 838, 358 P.2d 978 (1961).

The court apparently has had no difficulty in allowing for appeals from summary judgments as to less than all of the parties in multiple party actions. See Ferrin v. Donnellefeld, 74 Wn. 2d 286, 444 P.2d 701 (1968). Presumably, Civil Rule 54(b) must be complied with in such instances. See Eschbach, Summary Judgment in Indiana: Some Observations Based Upon the Federal Experience, 2 Ind. Legal F. 67, 77-80 (1968).

9. Civil Rule 54(b).

10. In the first, unofficial, opinion in Crosthwaite, reported in 355 P.2d 801 but not in the Washington Reports, the court said, at 805 "We reserve, for later decision, the question of whether Rule 56(d) necessarily precludes a summary judgment (as distinguished from a pretrial interlocutory summary adjudication) upon 'any part' of plaintiff's claim, as set forth in Rule 56(a) . . . for our principle concern is whether the order before us is appealable."

In the second, official, opinion in Crosthwaite, 56 Wn. 2d 838, 358 P.2d 978 (1961), while not expressly reserving the question, the court seemingly did not answer it.
When a non-appealable summary adjudication order is entered, it is, of course, later reviewable on appeal from the final judgment, assuming a proper foundation for such review has been laid below. But the Supreme Court will review only those matters presented for the superior court's consideration before entry of the interlocutory summary adjudication.

Likewise, supreme court review of a final summary judgment covers only matters of judicial notice and such other matters as were presented to the trial court for its consideration before entry of the summary judgment. The Supreme Court will not consider depositions taken after the entry of summary judgment, or other evidentiary materials which the trial court did not possess at the time it entered summary judgment. Nor will the Supreme Court consider any arguments not raised in the pleadings, depositions and affidavits submitted to the lower court with the motion for summary judgment. The record for review may be incorporated in a statement of facts certified by the trial court, or identified with particularity in the summary judgment and furnished to the Supreme Court by certified transcript.

A summary judgment is deemed to be a final decision on the merits of the case, and therefore has res judicata effects, including merger,
bar, and collateral estoppel. But a denial of a motion for summary judgment is not considered to reach the merits, although it may constitute a direct estoppel as to the point in issue, and may establish the law of the case upon that point.

VI. RELATION OF SUMMARY JUDGMENT TO OTHER PRELIMINARY MOTIONS

When matters outside the pleadings, such as affidavits, depositions and admissions, are presented to, and accepted by, a trial court in conjunction with a motion to dismiss for failure to state a claim or with a motion for judgment on the pleadings, the motion is treated as a request for summary judgment, governed by Civil Rule 56. The court may elect to consider only the pleadings, but ordinarily, a court will probably admit and consider such extra materials when they are offered. A refusal to do so, and a subsequent denial of one of the preliminary motions, may waste the court's time, because a second motion for summary judgment, with the accompanying materials, will very likely follow.

Such treatment of a preliminary motion and accompanying materials as a motion for summary judgment is well illustrated in Washington Optometric Ass'n Inc. v. County of Pierce. In that case, defendant moved to dismiss for failure to state a claim upon which relief could be granted, among other reasons. The trial court granted the motion to dismiss, because the complaint failed to state a cause of action, but on appeal, the Washington Supreme Court treated the dismissal as an order for summary judgment, because the trial judge had relied upon supporting affidavits in making his decision. Similarly, in another case where a party moved for judgment on the pleadings, and supported his motion with affidavits and exhibits, he was deemed to have moved for summary judgment, and on the record summary judgment was granted.

106 L. ORLAND, 2 WASHINGTON PRACTICE 411 (2d ed. 1965).
110 Civil Rule 12(b) and (c).
113 State ex rel. Town of Mercer Island v. City of Mercer Island, 58 Wn. 2d 141,
As noted above, Civil Rule 56(c) requires that a motion for summary judgment be served at least ten days before the time fixed for hearing. It is unclear whether this ten-day notice requirement applies with equal force when other preliminary motions are accompanied by extra-pleading materials, and are thus treated as motions for summary judgment under Civil Rules 12(b) and (c). Those sections provide that, when motions thereunder are treated as motions for summary judgment, “all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56” (emphasis added). Some early cases suggested that the ten-day requirement applied to such “transformed” motions, but a more recent decision seems to indicate that the “reasonable opportunity” requirement is to be construed independently of the ten-day requirement. Nevertheless, until this is made more clear by some more direct holding, only the ten-day notice can be safely relied upon by Washington practitioners.

Motions to dismiss for failure to state a claim, for judgment on the pleadings, and for summary judgment, all raise only a legal question. The great advantage of the motion for summary judgment is that it authorizes reliance on materials beyond the pleadings in order to resolve the legal question. In many cases, examination of the pleadings alone may give the misleading impression that the litigation cannot be resolved simply as a matter of law; yet the consideration of additional materials will often reveal the existence of only a legal issue, alleviating the need for a trial. To avoid the delay involved in bringing two motions, Civil Rules 12(b) and (c) should be liberally interpreted to encourage litigants to produce extra-pleading materials at the time preliminary motions are made, and to increase the use of this device for converting preliminary motions into proceedings for summary judgment.


144 Stevens v. Murphy, 69 Wn. 2d 939, 421 P.2d 668 (1966) (dictum).

145 This suggestion by Dean Orland in 3 L. Orland, Washington Practice 118 (Supp. 1966), still seems to be pertinent, despite Stevens v. Murphy, 69 Wn. 2d 939, 421 P.2d 668 (1966).

VII. RELATIONSHIP OF SUMMARY JUDGMENT TO PRE-TRIAL CONFERENCES

Civil Rule 56(d) provides that if a case cannot be completely determined on a motion for summary judgment, and a trial is necessary, the court shall nevertheless, if practicable, ascertain what material facts exist without substantial controversy, and what facts are actually controverted in good faith. The court is further directed to issue pre-trial orders specifying such facts as may appear beyond substantial controversy. At any subsequent trial of the case, these facts are deemed established. While the purpose of this provision is merely to salvage whatever partial benefit is possible from an unsuccessful summary judgment proceeding, it nonetheless establishes a practice which can be of peculiar practical utility to attorneys in the pre-trial stage of litigation.

An order rendered under such circumstances is comparable to one which may issue under Civil Rule 16 following a pre-trial conference. Of course, in some cases, a motion for summary judgment is inappropriate, and the pre-trial conference system should be used. Such conferences may serve roughly the same function as a summary judgment proceeding, in that they both may expedite trial by disposing of matters about which there is no genuine issue.

Civil Rule 16 authorizes courts, in their discretion, to call such conferences to consider simplification of issues, the necessity or desirability of amending the pleadings, the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, and limitation of the number of expert witnesses. The conference may also consider "such other matters as may aid in the disposition of the action." Counsel or court may broach practically any subject including jurisdiction, venue, separation of issues and separate trials, consolidation of trials, striking or adding of parties, stipulations, settlements, and rulings as to depositions, interrogatories, witnesses and evidence. The only apparent limit is the discretion of the court.


4 See In re Glant's Estate, 57 Wn. 2d 309, 356 P.2d 707 (1960), as to the purpose of such a conference and the effect of an order rendered therein.

5 Civil Rule 16(a)(5).

Despite their many advantages, formal pre-trial conferences are not a common practice,\textsuperscript{122} for several reasons. Much of the litigation in state courts is of too "small" a character, considering the size of the problems and amounts involved, to justify the time and expense of formal pre-trial conferences. In addition, the focusing of public attention in recent years on federal pre-trial practices has led many attorneys to informally pre-try their own cases to a greater degree as a matter of course, thus diminishing the utility of formal procedures. Furthermore, in the more populous counties, the use of master-calendar assignment systems has made pre-trial conferences less desirable, because the same judge will not necessarily preside at both the conference and the trial. Formal pre-trial procedures seem best suited to the smaller counties which have an individual assignment calendar; but in those counties, less formal procedures are favored. Finally, a substantial segment of the bar seems opposed to pre-trial conferences as a normal procedure, because they require preparation of each case twice, and participation in two formal proceedings. Without the full support of the bar, the objectives of such conferences are often impeded, and the result is often delay.

Because such formal conferences are uncommon, it becomes most important to encourage wider use of Civil Rule 56(d). Summary judgment proceedings are now relatively common, and through them at least some of the values of pre-trial conferences can be achieved. Moreover, summary judgment proceedings may be very useful even when a final judgment cannot appropriately be entered (due to the existence of material factual issues), as the court may dispose of those issues as to which there is no substantial controversy. The possibility of narrowing the issues for trial and thereby speeding the process of justice may thus justify the motion for summary judgment even though total success is doubtful.

\textsuperscript{122} This was the consensus of the superior court judges at the Washington Judicial Conference in September, 1963. See Trautman, Causes & Cures of Delay (Report to the Joint Committee for the Effective Administration of Justice of the American Bar Association, Sept. 1963).