Washington Law Review

Volume 34
Number 2 *Washington Case Law—1958*

7-1-1959

Practice and Procedure

Marjorie D. Rombauer

that neither partner was entitled to judgment against the other, since the amount due each could not be determined.

The supreme court reversed, holding that in the absence of agreement the rights and duties of the partners in relation to the partnership are governed by the provisions of the Uniform Partnership Act, RCW 25.04.180, which provides (1) that each partner must contribute toward the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits and (2) that no partner is entitled to remuneration for acting in the partnership business. Applying this to the instant case, the managing partner was required to recompense his co-partner for one half the losses sustained on his capital contribution.

The Uniform Partnership Act thus operates to require a partner who contributes only services, in the absence of agreement, to risk not only receiving nothing for his services but also being required to indemnify his partner against capital losses. See CRANE, PARTNERSHIP § 65, p. 345 (2d ed. 1952); Note, 24 COLUM. L. REV. 508 (1924). A party should guard against the result in the *Richert* case by taking care to fix his respective liability in advance by express agreement.

PRACTICE AND PROCEDURE

Summary Judgment. In *Capital Hill Methodist Church v. Seattle*,[1] the Washington court reviewed for the first time a case involving an application of Rule 19(1) of the Washington Rules of Pleading, Practice and Procedure,[2] dealing with motions for summary judgments.[3]

The case involved a petition by non-abutting property owners seeking to enjoin enforcement of a Seattle city ordinance providing for the vacation of a public street in response to a petition by the defendant Group Health Cooperative. The plaintiffs' complaint alleged

[1] 152 Wash. Dec. 305, 324 P.2d 1113 (1958). For a discussion of the substantive points involved in the case, see casenote, page 212, this issue.

[2] 34A Wn.2d, Cumulative Supplement July 1957, page 29, which reads, in part:

> 1. Summary Judgment: (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of the period within which the defendant is required to appear, or after a service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. (b) For Defendant Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. (c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party, prior to the day of 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.
>
> Omitted are sections (d) Case Not Fully Adjudicated on Motion; (e) Form of Affidavits' Further Testimony; (f) When Affidavits are Unavailable and (g) Affidavits Made in Bad Faith.

[3] As adopted by Washington originally in 1951, Rule 19(1) was a limited version of its present text, including only the present sections (a) and (b), leaving open for

several types of special damages resulting from the vacation, all of which were denied by the defendants. The defendants moved for summary judgment, which was granted by the trial court and affirmed by the supreme court, upon a determination that there existed no genuine issue of material fact requiring a trial on the merits.

A motion for summary judgment has a broader range of use than either a demurrer or a motion for judgment on the pleadings as a tool for obtaining early disposition of litigation, since it does not require that facts well pleaded be admitted, but permits a view behind the scenes to discover whether the facts can be substantiated.

The object of the procedure is to separate formal and sham issues from the genuine issues raised by the pleadings. To attain this object the court must examine the evidence, not to decide any issue of facts, but to discover if any real issue exists.[4] Only if it is perfectly clear that there are no genuine issues of material fact should a summary judgment be granted.[5]

An appreciation of the advantages and pitfalls which may be encountered in its application may be gained by an analysis of the procedure utilized by the defendants in the instant case, resulting in a judgment of dismissal within less than two months of the service of the complaint.

A defendant can move for summary judgment "at any time."[6] In this case the defendant city's motion was made seventeen days after service of the complaint.

The motion may be supported by affidavits.[7] The moving party has the burden of demonstrating the *absence* of genuine issues of material fact, and any doubts should be resolved against the moving party.[8] Hence, whether and to what extent affidavits should be used will depend upon the extent to which facts relied upon (to establish

question all details of procedure. In consequence it was of little practical value. Effective November 1, 1955, it was amended to include the remaining sections and in its present text substantially duplicates Federal Practice and Procedure Rule 56.

[4] Walling v. Fairmount Creamery Co., 139 F.2d 318, 322 (8th Cir. 1943).

[5] Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944) (cited by the court). See also Cox v. English-American Underwriters, 245 F.2d 330 (9th Cir. 1957) (cited by the court), and Kirkpatrick v. Consolidated Underwriters, 227 F.2d 228 (4th Cir. 1955), and the decisions cited therein suggesting cautious application.

[6] Rule 19(1)(b). A plaintiff, however, must allow the time permitted for answer to expire before moving for summary judgment. Rule 19(1)(a). The only other time limitation is that the motion be served at least ten days before date fixed for hearing. Rule 19(1)(c). This precludes an original motion for summary jdugment at any time after ten days before the trial date.

[7] Rule 19(1)(a) and (b). The court's consideration, however, is not limited to the pleadings and affidavits, since Rule 19(1)(c) states that the "pleadings, depositions, and admissions on file, together with the affidavits, if any" may be considered.

[8] Walling v. Fairmount Creamery Co., 139 F.2d 318 (8th Cir. 1943).

absence of genuine issues of material fact) are already before the court through pleadings and discovery proceedings.

In the present case, as appears from the court's decision, with the exception of two of plaintiffs' allegations, factual disputes raised by the pleadings could have been resolved in favor of the plaintiffs, and the defendants would still have been entitled to judgment as a matter of law; issues of fact existed, but they were not material to the outcome of the litigation.[9] The plaintiffs' complaint, however, alleged two types of special damages resulting from the vacation which, if proved, *might* have entitled them to the injunction they sought: that the street vacation interfered with the most direct and convenient access to their properties, and that it created a fire hazard.

Since these factual allegations, denied by the defendants, were material, the burden was on defendants to establish they were not genuine. To meet this burden, defendants presented three affidavits. Two were directed toward establishing that all proceedings in connection with the vacation ordinance had been in accord with regular practice. The third was an affidavit of a city engineer, accompanied by a map which clearly showed the location of the plaintiffs' property in relation to the vacated street, that the vacated street was a minor access street only, that two avenues of approach to plaintiffs' properties from the same direction remained, and that one of the streets so available was a primary arterial. The total effect was to dispel any claim that plaintiffs' access had been "substantially" or "unreasonably" obstructed, and to place the issue within the language of a previous case[10] as undeserving of recognition.

As a broad generalization, it may be said that the motion for summary judgment admits all *specific* facts well pleaded and that contradictory affidavits cannot be used to eliminate such facts from issue. But where a *general* statement in a pleading is shown by specific facts stated in affidavits to be untrue, the foundation is laid for elimination of that fact from issue.[11] Thus, it will be seen that, in accepting the defendant's specific facts as against the plaintiffs' general allegations of interference with access, the court would not be determining a factual issue but would be determining that the issue was not genuine.

[9] This preliminary examination of factual issues will determine whether, as a matter of strategy, resort should be had to Rules of Pleading, Practice and Procedure 26-32 (depositions); 33 (interrogatories); 34 (discovery and production of documents, etc.), or 36 (admissions), or whether affidavits will be sufficient to establish lack of substance in the opposing parties' allegations.

[10] Mottman v. Olympia, 45 Wash. 361, 88 Pac. 579 (1907).

[11] Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196 (9th Cir. 1950).

When the moving party presents evidence which, if believed, would entitle him to judgment, the opposing party must either discredit that evidence or show that he has evidence of a substantial character on at least one issue which, if believed, would entitle him to judgment.[12] Thus, a determination of whether and to what extent to use counter-affidavits will depend upon the circumstances of each case. They are not required, but it would seem that in most cases they will be not only advisable but essential.[13]

In opposing the motion in this case, the plaintiffs presented only one affidavit—by the plaintiff who had signed the complaint, alleging personal knowledge of the facts stated in that complaint, that they were true and correct, and repeating allegations as to creation of a fire hazard. These allegations were based on a letter written by the chief of the Seattle fire department, a copy of which was attached to the plaintiff's affidavit.

At the hearing on the motion,[14] objections were raised to the form of the affidavits submitted as not being in compliance wtih Rule 19 (1) (e), and a continuance was granted to permit compliance.

Rule 19 (1) (e) requires that affidavits "be of personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Thus, statements as to opinion, belief, or conclusions of law,[15] or statements inadmissible as hearsay,[16] may be disregarded.

The plaintiff's affidavit wholly failed to comply with these requirements. It is not sufficient to assert that the affiant has personal knowledge, but it must be affirmatively shown that he possesses the knowledge asserted.[17] The affidavit showed lack of knowledge as to factors creating the alleged fire hazard, since the affiant relied on a letter to sustain the allegations in this regard, and the letter attached was itself hearsay.

---

[12] Gifford v. Travellers Protective Ass'n, 153 F.2d 209 (9th Cir. 1946).

[13] Albert Dickinson Co. v. Mellos Peanut Co., 179 F.2d 265 (7th Cir. 1950).

[14] The Superior Court for King County adopted, as of November 1, 1958, an experimental policy in connection with motions for summary judgment. It requires that the moving party submit a statement of fact upon which reliance is had, with appropriate citations from the record, and a brief on the law supporting his motion, to be served on opposing counsel at least five days before noting the motion for hearing; that the opposing counsel serve and file his brief at least one day prior to the hearing; and that copies of the brief be furnished to the judge hearing the motion at the earliest opportunity to permit the court to familiarize itself with the issues prior to argument.

[15] Dewey v. Clark, 180 F.2d 766, 770 (D.C. Cir. 1950).

[16] Jameson v. Jameson, 176 F.2d 58 (D.C. Cir. 1949).

[17] Walling v. Fairmount Creamery Co., 139 F.2d 318 (8th Cir. 1943).

The trial court ultimately granted the defendant's motion, and the supreme court affirmed this action. In reaching this determination, the supreme court, in terms of the basic test set forth in the rule itself, inquired merely as to whether the case presented a genuine issue of material fact requiring a trial on the merits and found the record did not present such an issue.

No general formula can be used in determining whether, in a specific case, there exists an issue requiring a trial. Each case must be decided on its own record. However, in this regard the Washington attorney can feel on somewhat familiar ground. As pointed out in the *Gifford* case,[18] summary judgment is justified under the same circumstances justifying a directed verdict. Hence, the opposing party is entitled to the same favorable inferences from unchallenged allegations in pleadings, affidavits, and other facts before the court as could be drawn from evidence actually presented in a trial if he were opposing a motion for directed verdict.[19]

In the present case, one of the theories upon which plaintiffs proceeded in seeking an injunction against enforcement of the street vacation ordinance was that they possessed a vested right in the street, in the form of an easement resulting from estoppel, which would be affected by the vacation. One of the factors to be affirmatively proven by the plaintiffs in establishing such easement was deraignment of title by plaintiffs and defendants from a common grantor. Their complaint, however, failed to allege title through a common grantor. When this deficiency was brought to the attention of the court in the summary judgment proceedings, the plaintiffs made no move to amend their complaint, nor did they present any evidence indicating that they could establish this fact on trial.[20] Instead, they relied on an inference of deraignment of title from facts pleaded in their complaint. Whether such an inference was justified was not determined by the supreme court.

Though summary judgment is still a new procedure in the State of Washington, it stands as an effective tool for attorneys anxious to avoid the crowded trial calendars and the expense of trial in those situations where, at best, the opponent has only a slim bid for relief, and, at worst, he makes formal allegations designed only to delay

[18] Gifford v. Travellers Protective Ass'n, 153 F.2d 209 (9th Cir. 1946).
[19] Dulansky v. Iowa-Illinois Gas & Elec. Co., 191 F.2d 881 (8th Cir. 1951).
[20] If facts presented by affidavit or otherwise upon hearing motion for summary judgment justify an amendment, amendment should be permitted. Hartman v. Times, Inc., 64 F.Supp. 671, 680 (E.D. Pa. 1946).

entry of judgment in a case where the relief sought is certain to be granted. A careful reading of the text of the rule will, for most purposes, serve to educate the attorney who has not used it before. For more detailed points there is a wealth of federal case law, developed in twenty years' experience with substantially the same rule.

MARJORIE D. ROMBAUER

Misconduct of a Party—Shadowing Jurors. In *Coats v. Lee & Eastes*[1] the Washington court ruled it was not an abuse of discretion to deny a motion for a new trial sought on the basis of alleged misconduct of the defendants in having a juror "shadowed" during the trial of a personal injury action.

The juror's affidavit, which was submitted in support of the motion, stated he had been advised he was being followed by a detective employed by defendants, that he believed he was being followed, and that the resultant annoyance and disturbance had made him apprehensive and "might possibly have prevented his free exercise of judgment." Other affidavits presented by plaintiffs tended to establish the investigator had stated to third persons that he was following the juror.

Defendants denied any intentional surveillance of the juror. Their affidavits stated that after they had exhausted their challenges a juror had admitted on examination that he knew one of the plaintiffs fairly well and had seen him around his place of employment. Investigation later revealed that they were actually employed by the same establishment, and a private investigator had been employed to follow the plaintiff in order to ascertain whether he attempted to contact the juror. Other affidavits tended to establish that such surveillance of the juror as occurred was incidental to observation of the plaintiff. The trial court, in denying a new trial, accepted the defendants' version of what had occurred.

The supreme court pointed out that it would be the duty of a trial court to order a new trial if anything was brought to his attention which might tend to "interfere with the calm and fair judgment of any particular juror," but concluded that because the trial judge had been able to observe the affiants, including the juror, throughout the trial, he was much better qualified to give proper weight to each affidavit. Recognizing the wide discretion in a trial court in passing

[1] 51 Wn.2d 542, 320 P.2d 292 (1958).

upon a motion for a new trial, the court found no abuse of that discretion.

In *Commonwealth v. Corcoran*,[2] upon which defendants relied but which was not cited by the court, a Massachusetts court reached the same conclusion in a case where the commonwealth had admittedly had two jurors followed during the course of a criminal trial. After conviction the defendants moved for a new trial on the ground the surveillance had intimidated the jurors, and, as in the instant case, the motion was heard on conflicting affidavits. The trial court found the detectives had been hired to shadow the jurors for the purpose of protection and denied the motion. On appeal the court ruled that the trial judge had a right to discredit the affidavits presented by the defendants and found no abuse of discretion, without discussion as to the propriety of the shadowing activities.

In the instant case the trial court found there had been no intentional surveillance of the juror. Despite this finding, a dissent urged reversal in order to place the "stamp of severe judicial disapproval" upon what had happened in this case. In effect, this was done by dictum by the majority in pointing out that "tampering with the jury would not be tolerated," and by observing that in *Sinclair v. United States*[3] the "employment of detectives by defendants in a criminal case to shadow the jurors amounted to a contempt of court, even though none of the persons engaged in such shadowing approached or communicated with a juror or attempted to do so."[4]

It should be noted that the defendants in the *Sinclair* case were charged with contempt of court in having procured the surveillance and investigation of all the jurors for the purpose of obtaining information for false charges, intimidation and influence—a charge far more extensive and serious than the prejudice alleged by plaintiffs in seeking a new trial. The strong language quoted by the Washington court from the *Sinclair* case was actually an attack upon the defendants' defense that they could not be guilty of contempt because they had not actually contacted any juror.

Use of the extensive quotations from the *Sinclair* case in the instant case seems to infer that, had the private investigator been employed to follow the *juror*, the Washington court would have directed a new trial, on the ground that the possibility of deliberate surveillance

[2] 252 Mass. 465, 148 N.E. 123 (1952).
[3] 279 U.S. 749 (1929).
[4] 51 Wn.2d 542, 551, 320 P.2d 292, 298.

would be sufficient to disturb the ability of a juror to exercise a calm judgment.

Use of the *Sinclair* case in this decision also confuses the two ways in which a charge of juror shadowing may arise: As the ground for a contempt charge (as in *Sinclair*) and as the ground for a new trial (as in the *Coats* case). In the latter situation, it would seem the inquiry should be directed solely to whether the conduct had in any manner interfered with the deliberations of the jury so as to prejudice the party seeking the new trial. When a charge of contempt is based on shadowing jurors, however, the inquiry is directed toward whether there has been an *attempt to influence* jurors as a component part of the court.[5]

Few cases were found in which the charge of juror following has been considered by higher courts, and the many unanswered questions remaining in the two situations in which it may be raised would seem to make it unwise to procure such surveillance for any reason.

MARJORIE D. ROMBAUER

Appeal—Time for Notice of Appeal Cannot be Enlarged. In *Cohen v. Stingl*, 51 Wn.2d 866, 322 P.2d 873 (1958), both parties submitted proposed findings, conclusions, and judgment. It was stipulated that the judge, who was from another county, would take them to his home and determine which he would sign. Eight days later he signed those proposed by the plaintiff and returned them to the clerk, a copy of the letter of transmittal going to both parties. Seven months later counsel for defendants expressed surprise that the judgment had been entered and, claiming lack of notice as to entry, moved for a new trial. The court then entered an "Order Vacating Date of Entry of Judgment and Denying Motion for New Trial." This order purported to change only the date of entry of the original judgment to the then current date. If effective, this change of date would have made the motion for new trial timely—*i.e.*, within the two days permitted for such motion under RCW 4.76.060—and an appeal from its denial could have been properly taken.

The defendants did appeal from the denial of motion for a new trial, and the plaintiffs, ignoring the purported vacation order, moved for a dismissal of the appeal, challenging the jurisdiction of the court to hear an appeal from the *original* judgment because of failure to comply with the provisions of Rules on Appeal 33 (1) (a), which makes notice of appeal within 30 days of entry of judgment an express jurisdictional requirement.

The ground relied upon by the trial court for the purported vacation was that the "failure of the defendants to move against the judgment *or appeal* therefrom was due to an excusable neglect," (emphasis by the court) the court apparently relying on RCW 4.32.240, which permits a party to be relieved of a judgment taken against him through, *inter alia*, excusable neglect.

The supreme court, however, looked beyond this recital and concluded that it was not a vacation within the meaning of the statute because not made for the purpose of

[5] 63 A.L.R. 1270 (1929).

changing any of the *terms* of the judgment. It ruled the new judgment was void as an obvious attempt to "revive the time for taking an appeal" and dismissed the appeal. RCW 4.32.050 expressly provides: "[T]ime for bringing . . . appeal shall in no case be enlarged, or a party permitted to bring such . . . appeal after the time therefor has expired."

This is in accord with the view taken by courts which have considered similar "vacations." Cases are collected in 89 A.L.R. 941 (1933) and 149 A.L.R. 741 (1944).

Service of Process—Leaving Papers in Unattended Office. In *Rohr v. Baker,* 52 Wn.2d 903, 329 P.2d 848 (1958), service of a motion for default was effected by the process server's pushing the documents through the mail slot of the locked office door of defendant's counsel.

The Washington court reversed dismissal of a petition to vacate the default based on the form of service, stating that "this was no service at all," under RCW 4.28.240. This statute permits papers to be served upon an attorney (in those situations in which such service is allowed) by leaving them in a conspicuous place in his office if there is no person in the office, but requires that they be left at the attorney's residence if the office "is not open to admit of such service."

By this decision the court apparently reversed *Spencer v. Arlington,* 54 Wash. 259, 103 Pac. 30 (1909), which was not cited in the brief of either party or discussed by the court.

In the *Spencer* case the court held that service made by dropping the papers through an open transom above the locked door of appellant's counsel's office was a valid service within the requirements of the same statute. There an additional factor was shown: respondent's counsel had seen the papers on a desk in the office of appellant's counsel the day following the service. But the court's language broadly approved such a service, even in the absence of that factor. The court rejected the contention that because the door was locked the office was not "open to admit of such service" (by placing in a conspicuous place within the office), saying: "[I]t seems to us that the office was sufficiently open to admit of service by leaving the notice in a conspicuous place therein if that could be easily accomplished by the use of any opening into the office." The court further stated in the *Spencer* case: "It seems to us that on the floor, and immediately in front of the door on the inside, is a very conspicuous place. Indeed it is not easy to conceive of a place in the ordinary law office more conspicuous."

Because the *Rohr* case reached a result contrary to the *Spencer* case on facts substantially similar, it seems to represent a shift in the interpretation of RCW 4.28.240. However, it must be noted that the court appears not to have considered the *Spencer* case.

REAL PROPERTY

Easements—Rights of Nonabutting Property Owners. In *Capitol Hill Methodist Church v. City of Seattle,*[1] nonabutting property owners sought to enjoin (1) the vacation of East John Street between Fifteenth and Sixteenth Avenues north in Seattle, and (2) the obstruction of that street by the co-defendant, Group Health, Inc. The plaintiffs and the defendants allegedly purchased from a common grantor in reliance on a plat delineating East John Street as dedicated to

[1] 52 Wn.2d 359, 324 P.2d 1113 (1958).