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Practice and Procedure

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the public employment setting of the *Yantsin* case. It might have been said that the purpose and policy behind the establishment of municipal civil service systems is to insure, in the public interest, the employment of faithful, competent officers regardless of their political affiliation, and to protect the officers against summary removal from office.[19] It would follow that use of a suspension power to vitiate this purpose[20] and to introduce political favoritism into police department administration would be contrary to public policy as actually embodied in Washington's statute.[21]

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PRACTICE AND PROCEDURE

Summary Judgment.[1] In several 1959 decisions, the Washington Supreme Court has considered the application of Rule 56 of the Washington Rules of Pleading, Practice and Procedure.[2] Two of these decisions illustrate facets of summary judgment procedure which the court has explored.

In *Stringfellow v. Stringfellow*,[3] the plaintiff sought to gain possession of United States savings bonds issued in his name and held by his father (defendant), who had purchased them. The plaintiff, with supporting affidavits, moved for a summary judgment. No controverting affidavits were filed by the defendant. The trial court granted the plaintiff's motion.

On appeal, defendant contended that his answer and cross-complaint raised issues of material facts as effectively as would counter-affidavits. In affirming the trial court, the supreme court rejected this contention, reasoning that since Rule 56(e) requires that supporting and opposing

[19] 2 DILLON, MUNICIPAL CORPORATIONS 479, quoted approvingly in State *ex rel.* Voris v. Seattle, 74 Wash. 199, 133 Pac. 11 (1913).

[20] It is interesting to note that when charges were later preferred against police captain Yantsin in proceedings for his dismissal, the charges were dropped, after four days of hearings, before he had the opportunity to present a defense. He was restored to his position. His suspension would seem to have served no useful purpose with regard to the administration of the police department.

[21] RCW 41.12.090, Civil Service for City Police.

[1] This Note supplements a Note on summary judgment which appeared at 34 WASH. L. REV. 204 (1959).

[2] 154 Wash. Dec. 60 (1959). In addition to the decisions discussed and cited herein, two other cases presented phases of the summary judgment procedure. In Mayflower Air-Conditioners, Inc. v. West Coast Heating Serv., Inc., 154 Wash. Dec. 203, 339 P.2d 89 (1959), the court held that a motion for judgment on the pleadings will not be treated as a motion for summary judgment under the circumstances described in Rules of Pleading, Practice and Procedure 12(c) unless there is compliance with the notice requirements of Rule 56. Maybury v. City of Seattle, 53 Wn.2d 716, 336 P.2d 878 (1959), held that a "summary judgment, interlocutory in character . . . rendered on the issue of liability alone" under Rule 56(c) is, in effect, a pre-trial order, which will not be reviewed by certiorari in advance of trial of the damaging issue.

affidavits be made on personal knowledge,[4] pleadings cannot furnish factual material unless they, too, are on personal knowledge. The court stated that verification on belief does not raise an issue as contemplated by the rule. Therefore, plaintiff's affidavits were accepted as stating the established facts of the case.

Some confusion may be generated by the court's holding that the answer and cross-complaint verified on belief only failed to raise an issue as contemplated by the rule.[5] Pleadings verified on belief only can raise factual issues, but an affidavit on personal knowledge can show that these are not genuine issues of material fact. Contrary to this decision, there are cases which hold that if the moving party's pleadings or affidavits fail to meet the issues raised in pleadings verified on belief only, then those issues must be considered by the court for the purposes of the motion.[6] Personal knowledge is an express requirement *only* of affidavits under Rule 56(e). The court has attempted to extend this requirement to pleadings and other supporting documents without critically analyzing the applicability of such a requirement. For example, under Rule 36, if an admission is requested in writing by either party and the other party fails to answer in compliance with the rule,[7] then the matters of which the admission is requested shall be deemed admitted. The admission is in no way dependent upon the personal knowledge of either party, and yet, that admission can be used to support a summary judgment.[8]

It should be kept in mind that the summary judgment procedure is not a trial by affidavits. The primary purpose of the affidavits is to pierce, or to supplement, the allegations of fact in the pleadings. A

[3] 53 Wn.2d 639, 335 P.2d 825 (1959).

[4] Rule 56(e) reads in part: "Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on 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. . . ."

[5] The court cited Shotwell v. United States, 163 F. Supp. 907 (D.C. Wash. 1958), in support of this proposition. However, the Shotwell case does not say that such pleadings failed to raise an issue, but merely that general allegations or denials in opposition to a motion for summary judgment are not sufficient to prevent the granting of a motion for summary judgment.

[6] *E.g.*, Griffith v. William Penn Broadcasting Co., 4 F.R.D. 475 (D.C. Pa. 1945).

[7] 154 Wash. Dec. 45 (1959). The party must submit: ". . . (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 the objections at the earliest practicable time."

[8] Rule 56(c) states in part that 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 . . ."

judicious use of the affidavits serves as an effective tool in eliminating certain issues or claims which are not substantially in dispute.

The *Stringfellow* case clearly demonstrates the hazards of failing to file affidavits in opposing a motion for summary judgment. Affidavits need not be filed,[9] but if the moving party's affidavit is not controverted by an opposing affidavit, or by properly verified pleadings, depositions, or admissions on file,[10] then the facts stated in that affidavit must be taken as true.[11]

The merit in supporting or opposing affidavits is that they bring before the court sworn evidentiary materials. The fact that such evidence lacks some of the protective features incorporated into an actual trial of an issue is immaterial. The court is interested only in determining whether a genuine issue of material fact exists and not in weighing or evaluating the evidentiary material presented.

A rule of thumb to follow in submitting supporting or opposing affidavits is to present the evidence as though the affiant were relating oral testimony. If an affidavit includes inadmissible matter, the court should disregard that portion and consider only that which is admissible.[12] The court should not, however, strike out the entire affidavit,[13] and it is not bound to disregard the inadmissible matter if opposing counsel does not specifically object.[14] The trial judge also has a great deal of discretion in determining whether a motion to strike is timely. Therefore, one should act promptly and state specifically the portions of the affidavit to which he objects, and the grounds therefor.[15] Any sworn or certified copies of papers referred to in the affidavit should be attached.[16]

In *Thoma v. C. J. Montag & Sons*,[17] the supreme court affirmed the decision of a lower court denying defendants' motion for summary judgment. Plaintiff's husband was accidentally killed during lunch

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[9] Fletcher v. Evening Star Newspaper Co., 133 F.2d 395 (D.C. Cir. 1942).

[10] Rule 56 specifically includes the itemized materials, but this listing probably would not preclude the court from giving equal consideration to answer to interrogatories, oral testimony, facts before the court by judicial notice, or other extraneous materials admissible in evidence.

[11] Allen v. Radio Corp. of America, 47 F. Supp. 244 (D.C. Del. 1942).

[12] New York Life Ins. Co. v. Wilkinson Veneer Co., 86 F. Supp. 863 (D.C. La. 1949). In Henry v. St. Regis Paper Co., 155 Wash. Dec. 147, 150, 346 P.2d 692, 694 (1959), the supreme court said: "[A]ny additional allegations in the affidavit which may have consisted of conclusions or inadmissible evidence must be treated as mere surplusage."

[13] New York Life Ins. Co. v. Wilkinson Veneer Co., *supra* note 12.

[14] Monks v. Hurley, 45 F. Supp. 724 (Mass. 1942).

[15] Ernst Seidelman Corp. v. Mollison, 10 F.R.D. 426 (S.D. Ohio 1950).

[16] Rule 56(e).

[17] 154 Wash. Dec. 5, 337 P.2d 1052 (1959).

hour while employed by defendants. Plaintiff filed a claim for pension with the Department of Labor and Industries. The claim was speedily processed and allowed. Shortly thereafter, plaintiff consulted with an attorney as to her rights, withdrew her claim, and brought the present action for wrongful death. Defendants jointly moved for summary judgment and, in the alternative, for abatement. The action was abated October 17, 1957. On that same day, defendants filed an answer containing an affirmative defense setting out the filing and allowance of the industrial insurance claim. Plaintiff had no opportunity to reply before the action was abated. The supreme court reversed the trial court's order abating the action[18] and stated that if plaintiff were allowed to file a reply in which she pleaded the very facts appearing from the showing on defendant's motion for summary judgment, an issue of constructive fraud would be raised. Therefore, the court concluded, defendants' motion for summary judgment had been properly denied.

In the *Stringfellow* case, the plaintiff submitted affidavits in support of his motion for summary judgment which, under the court's reasoning, stated "the established facts of the case." In the *Thoma* case, the defendant submitted affidavits which had an adverse effect. Instead of eliminating issues of material fact, the affidavits presented certain facts from which the court could raise an issue of constructive fraud. The *Thoma* case should serve as a reminder that the utility of submitting affidavits can be impaired unless one drafts his affidavits to meet precisely and definitively the issues raised by the other party.

It should be kept in mind that summary judgment is still considered a rather extreme remedy, and the opinion in the *Thoma* case reflects a prevailing attitude of caution.[19] All doubts are to be resolved against the moving party,[20] and the moving party should show the right "to a judgment with such clarity as to leave no room for controversy. . . ."[21]

Summary judgment procedure in the state of Washington is still in a formative stage. It is difficult at this juncture to predict accurately what course the court will follow in resolving certain problems which arise in its use. It is to be hoped that the Washington court will continue to follow the general pattern established in the federal courts.

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[18] The court stated that the separate plea in abatement does not exist in Washington.
[19] As the dissenting opinion points out, the majority bends over backwards to raise the issue of constructive fraud.
[20] Walling v. Fairmont Creamery Co., 139 F.2d 318 (8th Cir. 1943).
[21] Traylor v. Black, Sivalls & Bryson, Inc., 189 F.2d 213, 216 (8th Cir. 1951).