"NO SPITTIN,' NO CUSSIN' AND NO SUMMARY JUDGMENT:"

RETHINKING MOTION PRACTICE

By Susan Taylor Wall

A sign prominently displayed in in a rural Alabama courthouse reads "No Spittin,' No Cussin' and No Summary Judgment." The admonition might equally apply to trial courts in South Carolina. Although most lawyers will refrain from spitting and cussing without the need of a written injunction, many trial judges are reluctant to seriously entertain motions for summary judgment.

More than 10 years ago, the U.S. Supreme Court discussed at length the importance of summary judgment motions in securing the "just, speedy and inexpensive determination of every action." In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Court reminded the bench that Rule 56 *mandates* the entry of summary judgment in certain circumstances. Where a party fails to prove an essential element of its claim, there can be no genuine issue as to any material fact and the court *must* grant summary judgment.

"Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex* at 322.

The South Carolina Rules of Civil Procedure, Rule 56(c), in pertinent part include identical language to that of the Federal Rule. The Rule clearly sets forth the mandatory dispositive nature of an appropriate summary judgment motion. The Rule provides that summary judgment "shall be rendered forthwith" where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

The South Carolina Supreme Court has reminded the bench on numerous occasions that summary judgment is not only appropriate but also mandatory under certain circumstances. *Trico Surveying, Inc. D. Godley Auction Co.*, 314 *S.C.* 542,431 S.E.2d 565 (1993). A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories 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." *Standard Five Ins. Co. v. Marine Contracting and Towing Co.*, 301 S.C. 418,392 S.E.2d 460,462 (1990).

In response to a summary judgment motion, the non-moving party cannot produce "a mere scintilla" of evidence to overcome the motion. See *Thomas V. Waters*, 315 S.C. 524,445 S.E.2d 659 (Ct. App. 1994) and discussion in dissenting opinion in *Strouther V. Lexington Co. Rec. Comm.*, Op. No. 2586 (Nov. 1996).

"When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence, the plaintiff cannot defeat the motion by relying upon the mere allegations of his Complaint, but must disclose the facts he intends to rely on by affidavit or proof." *Shupe v. Settle*, 315 *S.C.* 510,445 S.E.2d 651, 655 (Ct. App. 1994).

More than 10 years ago, the U.S. Supreme Court discussed at length the importance of summary judgment motions in securing the "just, speedy and inexpensive determination of every action."

Summary judgment is an integral part of the rules of procedure, intended to expedite the disposition of cases not requiring the services of a fact finder. Bankers Trust of *S.C.* v. Benson, *267 S.C. 752,226 S.E.2d 703 (2976).*

Furthermore, the evidence presented in opposition to a summary judgment motion must be competent and admissible as if at trial. *See Baughman V. American Tel. & Tel. Co.,* 306 S.C. 101,410S.E.2d 537 (1991). Rule 56(e) requires that affidavits supporting or opposing summary judgment shall be made on personal knowledge and shall set forth facts admissible in evidence.

As the U.S. Supreme Court stated in *Anderson V. Liberty Lobby, Inc.,* 477 U.S. 242,247 (1986), "by its very terms, the standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."

Despite the clear language of Rule 56(c) and pronouncements of the United States and South Carolina Supreme Courts, on occasion South Carolina courts have characterized summary judgment as a "drastic" remedy and an "extreme" remedy. **As** discussed in the *Celotex* case, however, summary judgment is not to be viewed as a disfavored procedural shortcut. Summary judgment is an integral part of the rules of procedure, intended to expedite the disposition of cases not requiring the services of a fact finder. *Bankers Trust of S.C. V. Benson,* 267 S.C. 152,226 S.E.2d 703 (1976).

The benefits of motion practice to bring cases to conclusion before the time and expense of trials are obvious. Nevertheless, many trial judges are reluctant to grant summary judgment motions as mandated by Rule 56(c), often because of a concern that on appeal the decision will be overturned. The facts, however, indicate to the contrary. On appeal, South Carolina trial judges granting summary judgment motions are more often upheld than reversed. This conclusion is based on a statistical analysis of published appellate decisions reviewing civil cases over the last two years. The state Supreme Court and Court of Appeals affirmed approximately two-thirds of summary judgments in 1996 and over half in 1995.

The rules of civil procedure should be applied by judges to ensure that parties who cannot sustain their burden of proof as a matter of law be precluded from using the legal system through the trial stage. Certain cases should be ended as a matter of law before reaching trial; the public is not served where the bench is reluctant to conclude cases at an early stage.

Litigants and citizens called to serve on juries deserve the screening that motion practice provides. Consequently, trial judges should be congratulated for applying Rule 56(c) and making summary judgment decisions, regardless of the ultimate outcome on appeal.

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