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SUMMARY JUDGMENTS IN MISSOURI— SOME DISTURBING ABERRATIONS

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Summary judgments did not come to Missouri until 1960—long after their introduction in many other states. When the summary judgment procedure was proposed in 1943 it met with sufficient opposition to cause its rejection.[1] Much of the early opposition was due to a misunderstanding of the rule, and some of this misunderstanding lingers on.

The summary judgment motion is intended to fill an important need in modern procedure. Missouri lawyers are keenly aware that prior to 1960 a capricious claim or defense could be disposed of only after the delay and expense of a full scale trial. A demurrer or motion for judgment on the pleadings could be granted only when the stalling lawyer was so unimaginative as to omit an essential element from his claim or failed to plead a legal defense. The courts could not "go behind" those pleadings and avoid a trial, no matter how fanciful the pleaded allegations. Missouri courts, unlike the federal courts, impose no sanctions on lawyers who file purely capricious pleadings.[2] The lawyer who formerly filed the

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1. Mr. Charles Carr wrote that the summary judgment section was omitted from the new 1943 Missouri Civil Code "apparently on the ground, and based on federal precedents, that said sections did not contain adequate safeguards against rendering summary judgments on conflicting affidavits and against improper invasion of the jury province." See 1 CARR, MISSOURI CIVIL PROCEDURE 15 (1947). Professor Atkinson, Technical Advisor to the Missouri Supreme Court Committee on Civil Procedure during the formulation of the 1943 Code, wrote:

> The elimination of this [the summary judgment] procedure from the code may have been based upon distrust of trial courts. True, a judge might grant a summary judgment in an improper case, but he can also direct a verdict in an improper case. The remedy in both situations is the same—by appeal. Perhaps, after all, the objection to the procedure was really based upon the professional antipathy to anything which results in expedition. It may be remarked in this connection that most of the English reforms such as summary judgments originated through the efforts of laymen to inject a common sense attitude into court procedure. American lawyers also may well harken to criticisms of laymen as to the expense and delays caused by traditional legal procedure.

See Atkinson, *Missouri's New Civil Procedure: A Critique of the Process of Procedural Improvement*, 9 MO. L. REV. 47, 63 (1944).

2. FED. R. CIV. P. 11 provides in part: "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay."

"nuisance value" petition or the "stalling tactic" answer could plead what he knew was false, force his opponent to suffer the delay and expense of trial, and further clutter the congested dockets without penalty.

The summary judgment rule requires that issues be "genuine" and not merely pleaded. It is important to remember that summary judgment hearings do not resolve these "genuine" issues but merely determine whether such issues in fact exist. If they exist, the case is set for trial. If they do not exist, no one has need of a trial.[3]

The Missouri rule is almost a duplicate of the federal rule. The Missouri Supreme Court has said: "Civil Rule 74.04, V.A.M.R., relating to summary judgment procedures, is practically identical with Rule 56 of the Federal Rules of Civil Procedure. . . . The federal rule had been in existence for many years when the Missouri rule was adopted in 1960. Thus the federal decisions construing Rule 56 are particularly persuasive in applying the Missouri rule."[4] Two rather recent Missouri cases suggest an approach to summary judgments which, either intentionally or accidentally, varies radically from the federal cases and seriously threatens the usefulness of Missouri's summary judgment rule. In order for these Missouri cases to be examined closely, some review of the federal decisions on summary judgments is required.

I. The Directed Verdict Test

Missouri Rule 74.04(c) provides that summary judgment shall be rendered 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 any party is entitled to a judgment as a matter of law."

The same principle which permits a trial judge to grant a directed verdict authorizes him to grant a summary judgment, and the test applied by the judge is the same.[5] The United States Supreme Court has said that "a summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party."[6] Thus when five claimants attempted to recover on an oral contract to make a will the court said:

> It would seem, therefore, that considering the allegations of the complaint, and those of the answers to interrogatories in the light

3. See 6 Moore, Federal Practice ¶ 56.04[1] at 2060 (2d ed. 1965).
4. Cooper v. Finke, 376 S.W.2d 225, 228 (Mo. 1964).
5. See 6 Moore, Federal Practice ¶ 56.04[2] at 2066 (2d ed. 1965).
6. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 624 (1944).

most favorable to the claimants, there would be lacking at the trial that precise, convincing, and persuasive proof of the oral contract alleged that would require the court to submit the issue of its making to the jury and we perceive no difference of principle in respect to the quantum of evidence required which distinguishes the entry of summary judgment from the direction of a verdict in favor of the defendant.[7]

A. *Evidence Which Justifies Granting a Summary Judgment for the Defendant*

As explained above, a summary judgment is appropriate on the same evidence which would justify a directed verdict. The comparison requires a further explanation because a directed verdict motion comes after a portion of the trial has been completed, while the summary judgment motion comes before the trial starts. The kind of evidence before the judge is obviously different. In the former case the judge has "live" testimony, while in the latter he has only affidavits, admissions, depositions, and interrogatories. A summary judgment motion should be granted if the same admissions, affidavits, etc., accompanying the motion are such that if presented as "live" testimony at a trial, *and if this were all the testimony given,* a directed verdict would be granted.[8]

Thus when plaintiff made conclusive admissions which were not explained, the court granted a summary judgment to defendant saying:

> [T]he ruling is to be made on the record the parties *have actually presented, not on one potentially possible.* Hence the case here is as though defendant had offered plaintiff's admissions, and plaintiff had then rested, with no contradiction or rebuttal of any kind,

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7. Appolonio v. Baxter, 217 F.2d 267, 271 (6th Cir. 1954).

8. In Fishman v. Teter, 133 F.2d 222, 223 (7th Cir. 1943) the court said: "In other words, it was for the court to determine, if the evidence contained in the affidavits was orally submitted to the court, whether the evidence justified submitting the case to the jury."

In Braughton v. United Air Lines, Inc., 189 F. Supp. 137 (W.D. Mo. 1960) plaintiff sued TWA and United for the death of his wife and two children in the Grand Canyon disaster. Plaintiff's family was riding on a TWA pass which relieved TWA of liability except for gross and wanton negligence. The trial judge granted TWA's motion for summary judgment. Lengthy pre-trial conferences had been held and the trial judge said:

> Suffice to say, that from the evidence adduced and facts established of record in the aforementioned [pre-trial] transcripts as to which there can be no dispute between the parties . . . it is transparent that, assuming all facts to be true which plaintiff here states he will rely on at the trial of this case to establish gross and wanton negligence . . . this Court would be required to direct a verdict in favor of TWA . . . . *Id.* at 139.

and had made its own motion for a directed verdict or peremptory instruction.[9]

The courts are unwilling to deny a summary judgment simply because the opposing party claims a better case is "potentially possible" by the time the trial rolls around. A defendant who moves for summary judgment ought not be subjected to the expense and burden of a full scale trial if plaintiff is unwilling or unable to offer sworn testimony which would, if offered at trial, make a submissible case.[10] If plaintiff has no such case, he has no business forcing defendant to trial.

This principle is illustrated in *Orvis v. Brickman*.[11] Plaintiff suffered a self-inflicted cut on her wrist which was thought to be a suicide attempt by the police officer called to the scene. Plaintiff was taken to a hospital early in the morning, but the court order requiring her to be held did not reach the hospital until late the same afternoon. Plaintiff filed suit for false imprisonment naming, among others, two doctors in the hospital. Each of the doctors filed a motion for a summary judgment accompanied by an affidavit that he did not know of plaintiff's presence in the hospital until after the hospital had received the court order. The trial judge granted a summary judgment because "plaintiff failed to assert any fact contradictory to the affidavits of the doctors." The court said:

> Knowledge on the part of [defendants] . . . of plaintiff's presence at the hospital prior to receipt of the court order committing her, is an essential element of plaintiff's case against them. . . .
>
> All the plaintiff has in this case is the hope that on cross-examination . . . the defendants . . . will contradict their respec-

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9. Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co., 147 F.2d 399, 405 (2d Cir. 1945). (Emphasis added.)

10. See JAMES, CIVIL PROCEDURE § 6.18, at 236 (1965):
Where there is something which points to a specific likelihood that trial will elicit evidence not otherwise available, denial of a summary judgment might be warranted. But where trial is required, "only on the vague hope or suspicion that somehow some evidence may thereby be developed, the advantages of speed and early disclosure afforded by the summary judgment procedure are largely dissipated without a commensurate return of justice to the litigants."

11. 95 F. Supp. 605 (D.D.C. 1951). The case was affirmed on appeal in 196 F.2d 762 (D.C. Cir. 1952). The court on appeal held that the hospital was required to detain plaintiff until the police had time to get a court order requiring detention of plaintiff. Thus as a matter of law, defendants doctors were not liable. The court makes it clear that summary judgment was appropriate in any event as plaintiff failed to produce evidence at the summary judgment hearing that defendants doctors had notice. The uncontradicted affidavits of defendants showed there was no genuine issue.

tive affidavits. This is purely speculative, and to permit trial on such basis would nullify the purpose of Rule 56. . . .

On a record such as was before the court at the time of the hearing on defendant's motion for summary judgment—in fact as the record now stands—a motion for directed verdict would have to be granted.[12]

B. *Evidence Which Justifies Granting a Summary Judgment for the Plaintiff*

Plaintiffs receive fewer directed verdicts than defendants and, likewise, receive fewer summary judgments.[13] But there are occasions when the absence of genuine issues would make it unfair to force a plaintiff to suffer the expense of a full scale trial.

The obvious and immediate problem faced by the plaintiff who wants either a directed verdict or a summary judgment is the credibility question, more accurately called the risk of non-persuasion. Even if defendant offers no testimony at a trial, plaintiff may lose his case because of his inability to persuade the jury of the truth of his contentions.[14] In the same way,

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12. 95 F. Supp. 605, 606-07 (D.D.C. 1951).

13. Since 1960 two summary judgments have been granted to plaintiffs and affirmed on appeal.

In Brummett v. Livingston, 384 S.W.2d 101 (K.C. Mo. App. 1964) a real estate broker collected his commission when defendant's interrogatory answers admitted that plaintiff produced a purchaser. In Lynch v. Webb City School Dist. No. 92, 373 S.W.2d 193 (Spr. Mo. App. 1963) plaintiff, a schoolteacher, was fired while her contract was in force. The school board minutes showed on their face that plaintiff was fired without proper cause and she was ordered reinstated with back pay.

A third case which might be included in this category is State ex rel. Reardon v. Mueller, 388 S.W.2d 53 (St. L. Mo. App. 1965). The State brought an action challenging the right of Alderman Mueller to hold office because he was not a resident of the ward from which elected. Summary judgment was granted against Mueller based on the statements he made in his pleading and in his deposition.

14. In Holtzman v. Holtzman, 278 S.W.2d 1, 4-5 (St. L. Mo. App. 1955), the court said:

> The trial court had no power premptorily to direct a verdict in favor of the parties having the burden of proof, Staehlin v. Major, Mo. App., 199 S.W. 427, because defendant was entitled to have the jury pass upon the credibility of plaintiffs' witnesses. The jury had a right to reject and find against plaintiffs' testimony. Troll v. Protected Home Circle, 161 Mo. App. 719, 141 S.W. 916. When the trial court directed a verdict for plaintiffs it in effect told the jury that it must believe the witnesses for plaintiffs and disbelieve the defendant. This it had no right to do. Gannon v. Laclede Gaslight Co., 145 Mo. 502, 46 S.W. 968, 47 S.W. 907; Wolff v. Campbell, 110 Mo. 114, 19 S.W. 622; Cluck v. Abe, 328 Mo. 81, 40 S.W.2d 558. This constituted an invasion of the province of the jury and a denial to defendant of the right of trial by jury. Staehlin v. Major, *supra*. It would have been error for the court to direct a verdict for plaintiffs (the parties having the burden of proof) even though defendant had

failure of a defendant to offer counter-affidavits would not entitle plaintiff to a summary judgment if the credibility of plaintiff's witnesses remained an issue.

Directed verdicts and summary judgments for plaintiffs may be given only where such a credibility problem does not exist.[15] This most commonly occurs when defendant by his own testimony makes admissions which establish the necessary elements of plaintiff's case. *American Airlines, Inc. v. Ulen*[16] is a classic example. Plaintiff was injured when the plane in which she was riding struck a mountain. She charged negligence, which the airline denied, so there was a *pleaded* issue. Defendant by its interrogatory answers admitted that the plane was flying at an altitude below that permitted by Civil Air Regulations when the crash occurred. Plaintiff moved for a summary judgment and attached the interrogatory answers. The court held that the airline's admission that it struck the mountain while violating the minimum altitude regulation conclusively established negligence so that negligence was not a genuine issue. A summary judgment was

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introduced no evidence whatever. This is the rule in all cases except where the defendant has admitted the plaintiff's cause of action or by his evidence has established plaintiff's claim.

The rule is expressed in 6 MOORE, FEDERAL PRACTICE ¶ 56.02 [10] at 2044 (2d ed. 1965) as follows:

> Further, since credibility is normally a matter for the trier of the facts to pass on at a live trial, it is not the trial court's function to pass upon credibility in evaluating the evidentiary material in support of and in opposition to the motion for summary judgment, where the issue of credibility would properly be for the jury if the case were so tried.

15. The principle has recently been expressed as follows:

> *Was plaintiff entitled to a directed verdict on its petition*? The law governing the direction of a verdict for the party carrying the burden of proof is well-articulated in this oft-quoted statement from Coleman v. Jackson County, 349 Mo. 255, 261, 160 S.W.2d 691, 693(2): "It is a generally accepted rule in this state that a verdict may not be directed in favor of the proponent, that is the party upon whom the law casts the final burden of proof. (Citing cases) There is, however, a well-recognized exception to the rule. *If the opponent, that is the party not having the burden of proof, admits* either in his pleadings or by counsel in open court or *in his individual testimony on the trial the truth of the basic facts upon which the claim of the proponent rests, a verdict may be directed against him,* and if the proof is altogether of a documentary nature and the authenticity and correctness of the documents are unquestioned, and if such proof establishes beyond all doubt that truth of facts which as a matter of law entitled the proponent to the relief sought, and such proof is unimpeached and uncontradicted, the proponent will be entitled to a peremptory instruction. This is upon the theory that there is no question of fact left in the case and that upon the questions of law involved the jury has no right to pass. (Citing cases)" (All emphasis herein is ours.) M.F.A. Central Cooperative v. Harrill, 405 S.W.2d 525, 527 (Spr. Mo. App. 1966).

16. 186 F.2d 529 (D.C. Cir. 1949).

granted on the issue of liability, and the jury decided only the measure of damages.

II. Recent Missouri Aberrations

A. *Pleaded Issues*

Missouri Rule 74.04(c) provides that a summary judgment shall be granted when the moving party shows "there is no genuine issue as to any material fact." *Genuine* issues are to be sharply distinguished from *pleaded* issues. Subsection (e) of the same rule states:

> [W]hen 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.

The committee note following Rule 74.04 says:

> If pleading allegations are sufficient to raise a genuine issue as against uncontradicted evidentiary matter, this remedy then becomes substantially without utility. . . .
>
> [S]ubdivision (e) . . . makes it clear that pleading allegations cannot, in themselves, create a genuine issue of material fact when summary judgment is sought.

The words could hardly be clearer, but these words on occasion have been overlooked or misread.

A 1966 St. Louis Court of Appeals decision severely impairs the value of the summary judgment rule. In *Burns v. Weber*,[17] defendant was co-maker of a note. Payment was not made as required and plaintiff sued defendant for the balance due. Defendant first filed a general denial, but by failing to properly answer certain requests for admissions, defendant admitted that the note was genuine and that payment had not been made.

Plaintiff then moved for a summary judgment and attached an affidavit alleging that defendant executed and delivered a note to plaintiff and that, after certain payments of principal and interest were deducted, a balance of $3,200.00 was due and unpaid. Defendant by an amended answer admitted that she signed the note and admitted the prior payments, but asserted the affirmative defense of lack of consideration and the further "defense" that it was "agreed between the parties" that she would not be liable on the note.

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17. 399 S.W.2d 446 (St. L. Mo. App. 1966).

Defendant at no time filed any counter-affidavits, but relied exclusively on her *pleaded* affirmative defenses. On this record the trial judge granted summary judgment against defendant for $3,200.00 plus interest. Defendant appealed and the St. Louis Court of Appeals reversed. The court said:

> The vital issue presented by defendant's second assignment is whether, under the pleadings, the admissions, and the plaintiff's affidavit, there remain any genuine issue as to a material fact. If so, then it was error to render the judgment in favor of plaintiff . . . .[18]

The court summarized the record, saying:

> Essentially, therefore, the situation is one in which plaintiff merely declared on the note, negotiable in form, and attached it to his petition; and defendant, while admitting that she had executed the note, *affirmatively pleaded* the defense of want of consideration.[19]

The court then reached the peculiar conclusion that "defendant's *pleaded defense* of absence of consideration *raised a genuine issue* as to a material fact and that under the present state of the record, plaintiff was not entitled to a summary judgment."[20] (The additional defense of a parol agreement that plaintiff would not be liable on the note was held to be legally insufficient and, of itself, would not have precluded entry of a summary judgment.)

Unless overruled, this decision is apt to haunt Missouri lawyers for a long time. The Committee Note following Missouri Rule 74.04 says:

> If pleading allegations are sufficient to raise a genuine issue as against uncontradicted evidentiary matter, this [the summary judgment] remedy then becomes substantially without utility. . . .

Rule 74.04(e) states:

> 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* . . . . (Emphasis added.)

Defendant did not respond, but relied completely on a pleaded affirma-

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18. *Id.* at 448.
19. *Id.* at 449. (Emphasis added.)
20. *Ibid.* (Emphasis added.)

tive defense.[21] She admitted the note and the non-payment. She offered no "opposing affidavits . . . made on personal knowledge . . . [setting] forth such facts as would be admissible in evidence . . ." as required by 74.04(e). If the case had been tried with defendant admitting the note and the non-payment and offering no proof to support her affirmative defense, plaintiff would have received a directed verdict.[22] Defendant's admissions obviously removed the credibility problem. Summary judgment was properly granted and should have been affirmed on appeal.[23]

B. *Adequacy of Counter-Affidavits*

A second case which will likely impair the effectiveness of the summary judgment rule is *Cooper v. Finke*,[24] decided by the Missouri Supreme Court in 1964. Plantiff, a fourteen year old boy, was injured when a display tombstone fell on him as he was "rocking" it. The tombstone was located in an unfenced area adjacent to defendant's monument business. The plaintiff sued on an attractive nuisance theory and alleged that the stones were on temporary stands, were unsteady, and were "easily rocked"; that for several years prior to his injury children were attracted to the display yard and played on the stones by "rocking" them. Defendant's answer denied plaintiff's petition and alleged contributory negligence.

Plaintiff's deposition disclosed that plaintiff and his younger brother ate dinner at a restaurant across the street from defendant's monument business; that while they waited for other members of the family to finish eating, plaintiff and his brother went to defendant's display yard; that it was about 8:30 p.m., dark, and defendant's business was closed. Plaintiff and his brother began playing around the monuments; plaintiff rocked a

21. Compare Port of Palm Beach Dist. v. Goethals, 104 F.2d 706 (5th Cir. 1939). Here plaintiff sued on a certificate of indebtedness. Defendant admitted that the document was genuine, but pleaded, among other defenses, fraud and the statute of limitations. The court granted summary judgment to plaintiff because no affidavits were produced to sustain these defenses. Plaintiff's affidavits plus defendant's admissions made out a prima facie case, which if uncontradicted at trial would have required a directed verdict.

22. *Supra* note 15.

23. See JAMES, CIVIL PROCEDURE, § 6.18, at 230 (1965):

> A natural question is why anyone should want to plead groundlessly when he should know that he will not be able to make his pleading good when proof is called for. Unfortunately there are reasons. A defendant from whom payment is sought (e.g., for services rendered or goods sold and delivered) often wants delay. Indeed, that may well be the very reason why suit had to be brought. And defendant can have delay by the simple device of denying the debt, and perhaps gilding the lily by adding pleas of payment and breach of warranty—a trilogy know in the trade as the last refuge of the deadbeat.

24. 376 S.W.2d 225 (Mo. 1964).

monument back and forth until it fell on him. Defendant in his deposition testified that he had *never* seen children playing among the monuments and had *never* had any reports of children so playing. In substance he denied under oath the actual or constructive knowledge which plaintiff must prove to make a submissible case.[25]

Defendant moved for a summary judgment on the basis of all the depositions and two exhibits.[26] The depositions of plaintiff and the members of his family were not "on file" at the time of the motion, and the supreme court said they could not be considered. No such construction has ever been given the identical language in the federal rule,[27] but it

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25. The Missouri Supreme Court in Hull v. Gillioz, 344 Mo. 1227, 1234, 130 S.W.2d 623, 627 (1939) adopts the *Restatement* view that plaintiff must show that "the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass . . . ." Instruction Number 22.01 of the Missouri Approved Jury Instructions directs a verdict for plaintiff in an attractive nuisance case only if the jury believes that "defendant knew or should have known that [condition] was attractive to children and that children so attracted would be exposed to an unreasonable risk of serious harm from [the condition] . . . ."

26. The opinion mentions the exhibits but does not indicate what they showed.

27. Missouri Rule 74.04(c) provides that summary judgment "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 any party is entitled to a judgment as a matter of law." (Emphasis supplied.)

The supreme court held that the words "on file" apply not only to "admissions" but also to depositions, and that depositions not on file may not be considered. This construction has never been given to identical language in the federal rule. 6 MOORE, FEDERAL PRACTICE ¶ 56.11[1.-5] at 2146 (2d ed. 1965) says:

> Rule 56(c) includes "admissions on file" within its enumeration of materials that may be used in support of or in opposition to a motion for summary judgment. While Rule 36 [relating to requests for admissions] provides a very useful procedure to obtain admissions, Rule 56(c) does not limit the use of admissions to those so obtained; and hence any material that is on file that may properly be treated as an admission of a party may be considered on a motion for summary judgment.

In Jno. T. McCoy, Inc. v. Schuster, 44 F. Supp. 499 (S.D.N.Y. 1942) the judge ruled on a summary judgment motion and considered a deposition not properly certified as "no motion has been made to suppress the deposition."

The construction given the clause by the Missouri Supreme Court is also contrary to traditional grammatical meaning. The words "on file" are close or restrictive modifiers attached to the headword "admissions" and modify only that headword. See PERRIN, WRITER'S GUIDE AND INDEX TO ENGLISH (4th ed. 1960).

It is hard to imagine why an appellate court would ever ignore depositions to which no objection has been raised simply because of a failure to follow Missouri Rule 57.42. This rule requires only that depositions be "sealed up . . . [and] delivered . . . to the recorder of the county in which the suit is pending." Missouri Rule 57.48(d) specifically provides:

> Errors and irregularities in the manner in which . . . the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rule 57 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable

made little difference as plaintiff's petition showed he was a trespasser and was injured when he deliberately "rocked" a tombstone until it fell on him. Defendant argued that plaintiff was a trespasser and guilty of contributory negligence.

The trial judge granted defendant's motion for summary judgment, but the supreme court reversed holding that the record did not show that the plaintiff was guilty of contributory negligence as a matter of law. The issue of plaintiff's trespass was not mentioned in the decision.

Defendant based his motion on the admissions in the petition and the sworn testimony in both his own and plaintiff's depositions. The only document filed by plaintiff in opposition was an affidavit made by one of plaintiff's *attorneys*. The supreme court said that plaintiff's attorney "asserted facts substantially as alleged in plaintiff's petition." Indeed he did. The affidavit is not set out in the opinion, but the court file shows that it was nothing more than another petition prefaced with a claim of personal knowledge and followed by an acknowledgment. It even repeated the prayer for damages.[28]

Rule 74.04(e) specifically requires that "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* . . . ." (Emphasis added.) The attorney could not make an affidavit on what he learned from others for this would be hearsay. Hearsay testimony and opinion testimony that would not be admissible at trial may not properly be set forth in an affidavit.[29]

Anything is possible, so plaintiff's attorney may have witnessed the fall and had such personal knowledge of the facts that he could have

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promptness after such defect is, or with due diligence might have been, ascertained.

There is no suggestion that plaintiff protested the use of these depositions on the summary judgment motion. Had such an objection been raised, it could have been cured in about thirty seconds. Such a trifling and unprotested irregularity, if it was an irregularity, should not be allowed to affect the outcome of a case on appeal.

28. In addition to copying the petition and alleging personal knowledge of the facts, the affidavit recited a history of the pleadings and motions up to the time of the summary judgment motion and alleged that the affidavit showed genuine issues which prevented a summary judgment.

29. "Hearsay testimony and opinion testimony that would not be admissible if testified to at the trial may not properly be set forth in an affidavit." 6 MOORE, FEDERAL PRACTICE, ¶ 56.22[1] at 2806 (2d ed. 1965).

In Seward v. Nissen, 2 F.R.D. 545 (D. Del. 1942) the court said: "The affidavit of plaintiff's attorney is clearly hearsay. . . . In connection with motions for summary judgment under Rule 56, hearsay statements in affidavits must be disregarded."

climbed into the witness box and made out plaintiff's case all by himself. Plaintiff's attorney swore personal knowledge of the following:

1. "That the bottom surfaces of the tombstones, monuments and grave markers . . . were irregular and unsmooth . . . ."

(Busy lawyers can appreciate the work involved in checking the bottom of all those grave markers.)

2. "That for several years prior to [the date of the accident] the above described condition regarding the tombstones, monuments and grave markers continued to exist . . . ."

(The bottoms of the tombstones were not only checked after the accident, but they had been checked periodically prior thereto so that the attorney can now testify that the condition existed for "several years prior to the [accident].")

3. "That for several years prior to [the date of the accident] . . . children entered the yard displaying the aforesaid tombstones . . . and rocked, swayed and tilted the aforesaid tombstones."

(The attorney-affiant was perhaps a steady customer at defendant's monument works and noticed the children during his visits.)

4. "That on the 24th day of April, 1962, the plaintiff entered the above described display yard of the defendant and began to rock a tall, heavy monument back and forth and after the monument began to rock it fell over upon the plaintiff . . . ."

(One wonders if the attorney-affiant rushed to give first aid, for if he had *personal knowledge* of the accident, he was there.)

It would be unfair to say that the attorney did not have *personal knowledge* of all these facts, but if he did, it is the most remarkable set of coincidences since Adam, Eve, and the snake all showed up under the same apple tree. Indeed, one wonders if the attorney should be representing plaintiff when he is such a valuable witness, not only to the accident but also to the long standing nuisance maintained by defendant.

It is possible that the attorney-affiant did not understand what Rule 74.04(e) means by "personal knowledge." The supreme court not only missed a good opportunity to explain it, but also gave its tacit blessing to defendant's most bizarre interpretation of the term.

The supreme court ruled that defendant must face the expense of a full scale trial. Except for the attorney's affidavit—which should have been

ignored as patently without value[30]—no one came forward to state under oath those matters on which testimony would be required to make a submissible case. If no such person exists, defendant should not be burdened with the expense of trial. If such person is available, there is no excuse for plaintiff's failure to produce an appropriate affidavit at the summary judgment hearing.

The court refers to the *"pleaded"* charge that "children for several years prior to the happening were attracted to the monument display and rocked, swayed and tilted them—all with defendant's knowledge."[31] The court then said, "[W]hether this can be supported by substantial proof is another question."[32] This ought not be a question. Why should defendant be subjected to the expense of trial when it is not clear that plaintiff can do more than *plead* a good case? Defendant denied under oath that he had ever seen or even heard of children playing on his display lot. Plaintiff cannot make a submissible case unless he proves that defendant knew or should have known that the tombstones were attractive to children.[33] If there is to be a genuine issue on the question of actual or constructive knowledge, plaintiff must produce an affidavit by someone with personal knowledge who will swear to facts showing that defendant had actual or constructive knowledge that the tombstones attracted children.[34]

The rule is expressed by Moore as follows:

> But if the moving party by affidavit or otherwise presents materials which would require a directed verdict in his favor, if presented at trial, then he is entitled to summary judgment unless the opposing party either shows that affidavits are then un-

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30. In Mercantile Nat'l Bank v. Franklin Life Ins. Co., 248 F.2d 57, 59 (5th Cir. 1957) the court said:
> There were no affidavits on file, except that the attorneys for the rival claimants appended their own affidavits to some of the pleadings. In no instance did such affidavits show that the facts were based upon the affiants' knowledge; or that they otherwise complied with the requirements of Rule 56(e) F.R. Civ. P., 28 U.S.C.A. In fact, it is obvious that the attorneys did not have any personal knowledge of the facts and that they were not competent to testify to them. Such affidavits have no probative value on a motion for summary judgment.

31. Cooper v. Finke, *supra* note 24, at 230.
32. *Ibid.*
33. Hull v. Gillioz, *supra* note 25.
34. See Gifford v. Travelers Protective Ass'n, 153 F.2d 209, 211 (9th Cir. 1946):
> Where a defendant presents evidence on which it would be entitled to a directed verdict if believed and which the plaintiff does not discredit as dishonest, it rests on the plaintiff, in opposing defendant's motion for summary judgment, at least to specify some opposing evidence which it can adduce and which will change the result.

> available to him, or he comes forward with some materials, by affidavit or otherwise, that show there is a triable issue of material fact.[35]

If, at trial, the only evidence on defendant's actual or constructive knowledge were defendant's denial, defendant would receive a directed verdict. He should also have received a summary judgment where his affidavit was unchallenged by sworn testimony from anyone with personal knowledge.

Summary judgment motions will serve little purpose if they can be defeated each time plaintiff's lawyer files a warmed-over petition and calls it an affidavit based on personal knowledge.

C. *Confusing the Summary Judgment Motion with the Motion To Dismiss for Failure to State a Claim*

A third Missouri case casts a shadow of confusion by applying the summary judgment label to what should have been called a motion to dismiss for failure to state a claim. It is not a serious interference with the summary judgment procedure, but any confusion of remedies should be avoided.

In *Dowdy v. Lincoln Nat'l Life Ins. Co.*,[36] plaintiff was the wife and beneficiary of an insured who had a group life policy with Lincoln Life. Insured was a union member and the union administered the group policy through three trustees who apparently issued individual insurance certificates under the group policy. Insured died, payment on the policy was refused, and plaintiff sued both Lincoln Life and the trustees. The policy was made a part of the petition.

Insured had been laid off in July, 1962, and died the following September. The policy provided that insurance coverage was terminated if insured ceased to be a full time employee *unless* the trustees continued to pay the premiums. In such a case insured would be treated as an employee on temporary layoff and the policy would remain in force. The policy also gave insured a conversion privilege for thirty days after his employment was terminated so that the insurance could be continued—apparently on a regular life basis.

Plaintiff sued the trustees on two theories. First, she claimed they were liable as insurers, that all conditions of the policy had been met, and that no payment had been made. Second, plaintiff claimed the trustees failed

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35. 6 MOORE, FEDERAL PRACTICE ¶ 56.11[3] at 2171 (2d ed. 1965).
36. 384 S.W.2d 282 (St. L. Mo. App. 1964).

to inform insured of their decision not to continue premium payments during insured's layoff; that as a result insured did not convert his policy to regular life insurance; and that the trustees thereby breached their duty to insured and plaintiff.

The trial judge granted trustees' motion for a "summary judgment." The trustees filed *no* affidavits, depositions, or supporting papers with their motion, but they relied exclusively on plaintiff's petition and the attached policy. The appellate court affirmed the trial judge pointing out that the insurance policy imposed no duty on the trustees to continue the policy in force during layoffs or to inform insured of their decision. The trial and appellate courts both neglected to note the distinction between a motion of summary judgment and a motion to dismiss for failure to state a claim. The functions of the two rules are entirely different. Moore states:

> If the motion [for summary judgment] is made by the defendant solely on the basis of the complaint the motion is functionally equivalent to a motion to dismiss for failure to state a claim under Rule 12(b)(6); the complaint should be liberally construed in favor of the complainant; *the facts alleged in the complaint must be taken as true; and the motion for summary judgment must be denied if a claim has been pleaded.*[37]

The plaintiff pleaded both a duty by trustees to continue the insurance premiums during layoff or to advise the insured of the decision to do otherwise and a breach of this duty. There is no suggestion that plaintiff claimed the duty was spelled out in the policy. The trustees might have assumed this obligation by an agreement totally independent of the insurance policy and plaintiff's petition was broad enough to allow such proof.

Admittedly the same result might have been reached if defendant had filed a summary judgment motion with supporting affidavits, but failure to note the distinction between summary judgment motions and motions for failure to state a claim will cause some confusion. The difference is not an academic one. If plaintiff's petition is defective, leave to amend would normally be granted.[38] In contrast, a summary judgment is a disposition of the case on the merits.[39] The sufficiency of the petition does not determine whether summary judgment should be granted for "if this were

37. 6 MOORE, FEDERAL PRACTICE ¶ 56.11[2] at 2152 (2d ed. 1965). (Emphasis added.)

38. Missouri Rule 55.53 provides that a party may amend after a responsive pleading has been filed with leave of court, "and leave shall be freely given where justice so requires."

39. 6 MOORE, FEDERAL PRACTICE ¶ 56.03, at 2051 (2d ed. 1965).

not the case, [the rule relating to summary judgments] would be a nullity for it would merely duplicate the motion to dismiss."[40]

Missouri's summary judgment rule is less than six years old and some growing pains should be expected. But congested court dockets cry for relief, and summary judgments can help ease the congestion if permitted to function in Missouri as they have functioned in the federal courts.

40. Lindsey v. Leavy, 149 F.2d 899, 902 (9th Cir. 1945).