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Summary Judgment in a Negligence Action -- The Burden of Proof

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CASES NOTED

SUMMARY JUDGMENT IN A NEGLIGENCE ACTION—THE BURDEN OF PROOF[1]

The plaintiff filed suit against the defendants alleging specific acts of malpractice. Each of the defendants, pursuant to the Florida Rules of Civil Procedure,[2] moved for summary judgment and in support of their motions filed affidavits with the court. The plaintiff filed an opposing affidavit which subsequently, on defendants' motion, was stricken from the record as legally insufficient. Summary final judgment was entered for the defendants. The Third District Court of Appeal affirmed.[3] The plaintiff sought review by the Supreme Court through certiorari proceedings. The Supreme Court, *held,* reversed and remanded: Before it becomes necessary to determine the legal sufficiency of documents offered in opposition to a motion for summary judgment, it must first be shown that the movant has conclusively established the non-existence of material issues of fact. *Holl v. Talcott,* 191 So.2d 40 (Fla. 1967).

The rulings of the trial court and the district court of appeal were based upon a finding that the affidavit offered in opposition to the motion was legally insufficient.[4] The district court of appeal concluded that summary judgment was properly entered for the defendant-movant because his opponent had failed to come forth with evidence sufficient to establish the existence of factual issues. As authority for its position the court relied on *Hardcastle v. Mobley.*[5] In *Hardcastle,* the plaintiff, attempting to enforce a contract to make a will, sought to introduce in opposition to a motion for summary judgment an affidavit swearing to the existence of witnesses to whom the deceased had admitted the oral contract. The court stated:

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1. The scope of this note is limited to a discussion of the evidentiary showing required on a motion for summary judgment and the effect of that burden on the negligence action. For a general analysis of the rule see Massey and Westen, *Seventh Survey of Florida Law; Civil Procedure,* 20 U. MIAMI L. REV. 668 (1966); Massey and Westen, *Sixth Survey of Florida Law; Civil Procedure,* 18 U. MIAMI L. REV. 754 (1964).

2. FLA. R. CIV. P. 1.510(c):

> The judgment sought shall be rendered forthwith 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 judgment as a matter of law.

3. Holl v. Talcott, 171 So.2d 412 (Fla. 3d Dist. 1965).

4. The affidavit offered in support of the motion alleged conformity to local medical standards. The opposing affidavit alleged that the act did not conform to the required standard. Though the decision went to the procedural error, the supreme court did express a feeling that the opposing affidavit *did* sufficiently establish the existence of factual issues and, therefore, the district court of appeal and the trial court had erred in their finding of legal insufficiency.

5. 143 So.2d 715 (Fla. 3d Dist. 1962).

> [T]he *party moved against* by summary judgment or summary decree must come forward with fact contradicting those submitted by the movant and demonstrating a real issue between the parties.[6]

Thus the failure of an opponent to a motion for summary judgment to either support the allegations in his complaint[7] or to counter those offered by the movant would prove fatal to his claim.[8] Under such circumstances the court would presume that the opponent had gone as far as he could and summary judgment would be entered for the movant.[9]

However, a different rule was established by the Second District Court of Appeal in *Martarese v. Leesburg Elks Club*.[10] In *Martarese*, the plaintiff sued for damages sustained when he slipped and fell on the defendant's dance floor. The defendant moved for summary judgment and in support of the motion offered the deposed plaintiff's admission that he could not of his own knowledge explain what caused him to fall. The motion was granted. The district court of appeal reversed because the defendant-movant had failed to show the non-existence of material issues of fact. The appellate court, relying on federal practice and procedure, cited *Moore*[11] in pointing out that:

> A party moving for summary judgment has the burden of establishing by a record that is adequate for the decision of the legal questions presented that there is no triable issue of material fact; and he has the burden even as to issues upon which the opposing party would have the trial burden. If the moving party fails to shoulder his burden the motion should be denied, even though the opposing party has presented no evidentiary materials....

The supreme court adopted the holding of the *Martarese* case, which is essentially the position adopted by a majority of other jurisdictions.[12]

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6. *Id.* at 717. (emphasis supplied).

7. *See* Herring v. Eiland, 81 So.2d 645 (Fla. 1955).

8. *See* Pritchard v. Peppercorn & Peppercorn, Inc., 96 So.2d 769 (Fla. 1957).

9. Hardcastle v. Mobley, 143 So.2d 715, 717 (Fla. 3d Dist. 1962).

10. 171 So.2d 606 (Fla. 2d Dist. 1965).

11. 6 J. MOORE, FEDERAL PRACTICE § 56.23 (2d ed. 1966). It is significant to note that the Florida position and the Federal position appear to be identical. The quote from Moore indicates that the opponent need not file opposing documents until it has been determined that the movant has satisfied his burden. However, it would appear that unless the opponent is prepared, and does in fact file opposing affidavits, he will find himself in a precarious position because of the provision in the rules requiring the fulfilling of documents one day prior to the consideration on the motion. It would appear that if the burden is shifted to the opponent and he has failed to support his position, he will thereafter be unable to file documents in support of his cause. *See* Hardcastle v. Mobley, 143 So.2d 717 (Fla. 3d Dist. 1965).

12. Stationers Corp. v. Dunn and Bradstreet Inc., 42 Cal. Rptr. 449, 398 P.2d 785 (Sup. Ct. 1965); Tidewater Oil So. v. Murphy Motors Inc., 4 Conn. Cir. 160, 227 A.2d 443 (1967); Phillips v. Delaware Power & Light, 216 A.2d 281 (Del. 1966); Christiansen v. Rumsey, 429 P.2d 416 (Idaho 1967); Dowdy v. Lincoln Nat. Life Ins. Co., 384 S.W.2d 282

However, there are cases which impose on the movant only a slight burden of proof.[13] Furthermore, as recently as 1967 it has been held that the burden rests initially on the opponent to the motion.[14]

In the instant case,[15] the view of the Third District Court of Appeal in *Hardcastle* was described as faulty and in direct conflict with the supreme court decision in *Harvey Building, Inc. v. Haley*.[16] In *Harvey* the action was based on injuries sustained when the plaintiff fell in the lobby of the defendant's building. The trial court entered summary final judgment for the defendant and the plaintiff appealed. The Second District Court of Appeal agreed with the plaintiff that a motion for summary judgment should not be granted where it could be inferred from the evidence that the plaintiff could sustain his trial burden of proof and reversed.[17] On certiorari to the Supreme Court of Florida the defendant relied on the "*Hardcastle* Rule." However, the court stated:

> A movant for summary judgment has the burden of demonstrating that there is no issue of any material fact. All doubts regarding the existence of an issue are to be resolved against the movant, and the evidence presented at the hearing plus favorable inferences reasonably justified thereby are liberally construed in favor of the opponent.[18]

A careful reading of the instant case indicates that the action of the district court of appeal, using *Hardcastle* as authority on a problem identical with *Harvey Building*, was prompted by a feeling that the "*Hardcastle* Rule" was the only way to preserve for the litigants in a negligence action the right to effectively utilize summary judgment procedure.

Florida courts have long recognized that the summary judgment procedure is in derogation of the right to trial by jury.[19] The case law

(Mo. Ct. App. 1964); Mecham v. Colby, 156 Neb. 386, 56 N.W.2d 299 (1960); Bd. of Educ. of Town of Morristown v. Palmer, 88 N.J. Super. 378, 212 A.2d 564 (1965); Oxford Paper Co. v. S.M. Liquidation Co., 45 Misc.2d 612, 257 N.Y.S.2d 395 (1965); Rukavina v. New York Cent. Ry., 1 Ohio App.2d 48, 203 NE.2d 495 (1964); Gulbenkian v. Penn, 252 S.W.2d 929 (Texas 1952); Reed v. Davis, 399 P.2d 338 (Wash. 1965).

13. *See* Dobson v. Grand Inter. Bhd. of Locomotive Eng'rs. 101 Ariz. 501, 421 P.2d 520 (1966) and Schoenfeld v. Modern Silver Linen Supply Co., 279 App. Div. 49, 107 N.Y.S.2d 861 (1951) wherein the courts stated that they do not require a *conclusive* showing of the non-existence of genuine issues of fact. The burden of proof is shifted to the opponent upon a prima facie showing of the absence of genuine material issues of fact.

14. *See, e.g.*, Geyser Co. v. Blue Rock Shopping Center, Inc., 299 A.2d 499 (Super. Ct. Del. 1967) wherein it is stated that on a motion for summary judgment it is incumbent on the party moved against to come forward with documents sufficient to establish the existence of genuine material issues of fact.

15. Holl v. Talcott, 191 So.2d 40, 43 (Fla. 3d Dist. 1965).

16. 175 So.2d 780 (Fla. 1965).

17. Harvey Bldg., Inc. v. Haley, 168 So.2d 330 (Fla. 2d Dist. 1964).

18. Harvey Bldg., Inc. v. Haley, 175 So.2d 780, 782 (Fla. 1965).

19. Drahota v. Taylor Constr. Inc., 89 So.2d 16, 18 (Fla. 1956) wherein the court stated:

> The constitutional right to a jury trial demands that particular care be accorded in this field, to the end that controverted issues of fact be resolved not upon pleadings and depositions but by a jury functioning under proper instructions.

interpretation of the rule reflects that principle and it has been held that summary judgment or decree is a drastic remedy which must be cautiously administered.[20] A party moving for summary judgment must show conclusively that no material issues of fact remain for trial.[21] The burden of a party moving for summary judgment is greater, not less, than that of plaintiff at trial.[22] The presumptions which favor the opponent to the motion continue throughout the entire consideration on the motion,[23] and the opposing party's papers are to be liberally read and construed, as opposed to a strict reading of the movant's papers.[24]

The burden imposed by the aforementioned rules weighs heavily on the movant in the negligence action. Given the nature of the evidentiary showing required by the principal case[25] and those presumptions favoring the opponent outlined above, it appears that our courts will have little trouble, if any, in finding issues of fact in a negligence action. Thus it is unlikely that the defendant in a malpractice action, when armed only with the pleadings, depositions, answers to interrogatories, affidavits, and the admissions on file will be able to conclusively prove: (1) that the act was not a negligent act; (2) that the harm was not proximately caused by the act; or (3) that the plaintiff cannot sustain his trial burden of proof.[26] The task is formidable enough on trial; as a pre-trial requirement it approaches impossibility.

In Florida the rule adopted in the instant case is not discriminatory. It does appear, however, that the interpretation and criteria of the rule have *limited*[27] its effective use to non-negligence actions despite a Florida Supreme Court statement to the contrary.[28]

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20. Seven-Up Bottling Co. of Miami v. George Constr. Corp., 166 So.2d 155, 158 (Fla. 3d Dist. 1964).

21. Leaks v. Adeimy 195 So.2d 47 (Fla. 4th Dist. 1967).

22. Visingardi v. Tirone, 193 So.2d 601 (Fla. 1966).

23. This view is expressed in the principal case, *Holl*, and appears to be consistent with the other principles expressed.

24. This statement is expressed in the principal case and has support from prior decisions. *See* Prescott v. Erwin, 133 So.2d 332 (Fla. 2d Dist. 1961); Remington v. L.P. Gunson & Co., 125 So.2d 885 (Fla. 2d Dist. 1961); Tarkoff v. Schmunk, 117 So.2d 442 (Fla. 2d Dist. 1960).

25. The evidentiary showing required by the principal case is a *conclusive showing* of the non-existence of genuine issues of fact.

26. In *Holl*, the petitioners on rehearing contended that the action of the court would preclude the use of summary judgment procedure in negligence actions. In response the court stated that they had not done so, that the petitioner had only to show: 1) that the act was not negligent 2) that the harm was not proximately caused by the act or 3) that the plaintiff could not sustain his trial burden of proof. It appears that the court was not responsive to the plea of the petitioner.

27. The author does not contend that the holding in the principal case *absolutely* precludes the use of summary judgment procedure in negligence actions. There will be negligence actions wherein the facts lend themselves to the procedure. However, the technical aspects of many negligence actions will necessarily place it well beyond the narrow scope of the rule.

28. Holl v. Talcott, 191 So.2d 40, 47 (Fla. 1967).