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Recent Developments in the Law of Summary Judgment in Florida

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COMMENT

RECENT DEVELOPMENTS IN THE LAW OF SUMMARY JUDGMENT IN FLORIDA

INTRODUCTION

This comment is limited to an analysis of summary judgment procedure under Rule 1:36, Florida Rules of Civil Procedure, 1954.[1] The purpose of the rule is to bring a speedy, just, and inexpensive termination to actions in which no genuine issue as to any material fact exists.[2] As the court stated in *General Truck Sales, Inc. v. American Fire and Cas. Co.*,[3] "The fundamental purpose for the summary judgment procedure is to relieve the litigant and the court from the trial of unnecessary lawsuits. . . ." The function of the court in ruling on a motion for summary judgment is: (1) to determine if there are any *genuine, material* issues of fact; and (2) to determine if the moving party is entitled to judgment as a matter of law.[4] It is *not* the function of the court to decide any issue of fact.[5] Incorrect use of this procedure defeats its very purpose, and has resulted in a surprising number of summary judgment reversals by the courts of this state.[6]

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1. The rule states in paragraph (c): "The judgment or decree 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 or decree as a matter of law. . . ."

2. Jones v. Stoutenburgh, 91 So.2d 299, 302 (Fla. 1956) "While summary judgment procedure is to be commended as a procedural facility for bringing an early termination to cases that lack genuine and material factual issues, nevertheless, the power to enter summary judgment should be exercised with a degree of circumspection in view of its potentialities for encroaching upon our traditional processes for determining the rights of parties to a cause. . . ."; Connolly v. Sebeco, Inc., 89 So.2d 482 (Fla. 1956); Cook v. Navy Point, Inc., 88 So.2d 532 (Fla. 1956); Patty v. Food Fair Stores of Fla., Inc., 101 So.2d 881 (Fla. App. 1958); General Truck Sales, Inc. v. American Fire & Cas. Co., 100 So.2d 202 (Fla.App. 1958).

3. 100 So.2d. 202, 203 (Fla.App. 1958).

4. Connolly v. Sebeco, Inc., 89 So.2d 482 (Fla. 1956); Shulman v. Miller, 107 So.2d 274 (Fla.App. 1958); Buck v. Hardy, 106 So.2d 428 (Fla.App. 1958); Warring v. Winn-Dixie Sores, 105 So.2d 915 (Fla.App. 1958); Patty v. Food Fair Stores of Fla. Inc., 101 So.2d 881 (Fla.App. 1958).

5. Buck v. Hardy, 106 So.2d 428, 429 (Fla.App. 1958): "The function of the court in passing on a motion for summary judgment is to determine whether there is a genuine issue of any material fact and not to determine any issue of fact."

6. Williams v. Levine, 103 So.2d 191 (Fla. 1958); West Shore Restaurant Corp. v. Turk, 101 So.2d 123 (Fla. 1958); Macina v. Magurno, 100 So.2d 369 (Fla. 1958); Weber v. Porco, 100 So.2d 146 (Fla. 1958); Dieas v. Associates Loan Co., 99 So.2d 279 (Fla. 1957); Manning v. Mentone Corp., 99 So.2d 223 (Fla. 1957); Bess v. 17545 Collins Ave., Inc., 98 So.2d 490 (Fla. 1957); Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957); Florida Nat'l Bank at St. Petersburg v. Geer, 96 So.2d 409 (Fla. 1957); Parker v. Bryce, 96 So.2d 154 (Fla. 1957); Robinson v. Great So. Trucking Co., 95

CONTRACTS

In actions on written instruments the facts are usually not in dispute; therefore, the problems presented on motions for summary judgment are not as difficult as in other cases.[7] In *Seaview Awning Shutters v. E. M. Eisfield, Inc.*,[8] an action for breach of a written contract, summary judgment for the plaintiff was affirmed. The answer of the defendant admitted the contract, but interposed the affirmative defense of accord and satisfaction through the creation of a new written contract. On plaintiff's motion for summary judgment, the defendant's affidavits alleged misrepresentation and an oral contract, neither of which were issues raised by the pleadings. The plaintiff's affidavits conclusively showed the non-existence of a new written contract. Since the defendant failed to sustain his defense of accord and satisfaction, or rebut the plaintiff's affidavits, there was no *factual dispute* as to the existence of the contract sued upon.

In an action to recover attorney's fees,[9] under a written contract, the plaintiff filed a request for admissions under Rule 1.30 of the Florida Rules of Civil Procedure. The defendant's sworn answer admitted all the

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So.2d 418 (Fla. 1957); Estes v. Moylan, 94 So.2d 362 (Fla. 1957); Delany v. Breeding's Homestead Drug Co., 93 So.2d 116 (Fla. 1957); Shaffran v. Holness, 93 So.2d 94 (Fla. 1957); Navison v. Winn & Lovett Tampa, Inc., 92 So.2d 531 (Fla. 1957); Dezell v. King, 91 So.2d 624 (Fla. 1956); Jones v. Stoutenburgh, 91 So.2d 299 (Fla. 1956); Drahota v. Taylor Constr. Co., 89 So.2d 16 (Fla. 1956); Cook v. Navy Point, Inc., 88 So.2d 532 (Fla. 1956); Volusia Discount Co. v. Alexander K-F Motors, 88 So.2d 302 (Fla. 1956); Magee v. City of Jacksonville, 87 So.2d 589 (Fla. 1956); Chereton v. Armstrong Rubber Co., 87 So.2d 579 (Fla. 1956); Parker v. Bryce, 84 So.2d 323 (Fla. 1955); Cockerham v. R. E. Vaughn, Inc., 82 So.2d 890 (Fla. 1955); Whitehall Realty Corp. v. Manufacturers Trust Co., 81 So.2d 475 (Fla. 1955); Bassato v. Denicola, 80 So.2d 353 (Fla. 1955); Hicks v. Kemp, 79 So.2d 696 (Fla. 1955); National Airlines v. Florida Equip. Co. of Miami, 71 So.2d 741 (Fla. 1954); Pavlov v. Florida Power & Light Co., 107 So.2d 780 (Fla.App. 1959); Martin v. Arrow Cabs, 107 So.2d 394 (Fla. App. 1958); Shulman v. Miller, 107 So.2d 274 (Fla. App. 1958); Ormsby v. Ginolfi, 107 So.2d 272 (Fla.App. 1958); Mason v. Reick, 107 So.2d 38 (Fla.App. 1958); Allen Kroklin, Inc. v. Roberts, 106 So.2d 580 (Fla.App. 1958); Warring v. Winn-Dixie Stores, 105 So.2d 915 (Fla. App. 1958); Pividal v. City of Miami, 105 So.2d 811 (Fla.App. 1958); Sarasota Tile & Terrazzo Corp. v. De Soto Terrazzo Corp., 105 So.2d 502 (Fla. App. 1958); Olins v. Avis Rental Car Sys. of Fla., 105 So.2d 497 (Fla.App. 1958); Gordon v. Hotel Seville, 105 So.2d 175 (Fla.App. 1958), *cert. denied*, 109 So.2d 767 (Fla. 1959); Van Engers v. Hickory House, 104 So.2d 843 (Fla.App. 1958); Humphrys v. Jarrell, 104 So.2d 404 (Fla.App. 1958); Rogers v. Johnson, 104 So.2d 75 (Fla.App. 1958); Owens v. MacKenzie, 103 So.2d 677 (Fla.App. 1958); Klein v. G.F.C. Corp., 103 So.2d 120 (Fla.App. 1958); Kelly v. Kaufman, 101 So.2d 909 (Fla.App. 1958); Patty v. Food Fair Stores of Fla. Inc., 101 So.2d 881 (Fla. App. 1958), *reversed*, 109 So.2d 5 (Fla. 1959); Saunders v. Kaplan, 101 So.2d 181 (Fla.App. 1958); Anderson v. Carter, 100 So.2d 831 (Fla. App. 958); Hawkins v. Townsend, 100 So.2d 89 (Fla.App. 1958); Presley v. Thomas, 99 So.2d 875 (Fla.App. 1958); Zaretsky v. Jacobson, 99 So.2d 730 (Fla.App. 1958); Wallace v. Boca Raton Properties, 99 So.2d 637 (Fla.App. 1958); Pancoast v. Pancoast, 97 So.2d 875 (Fla.App. 1957); Cameron v. Mittuch, 96 So.2d 826 (Fla.App. 1957).

7. Patrick Fruit Corp. v. Fosgate Citrus Concentrate Co-op., 85 So.2d 828 (Fla. 1956); Fink v. Powsner, 108 So.2d 324 (Fla.App. 1958); Seaview Awning Shutters v. E. M. Eisfield, Inc., 106 So.2d 597 (Fla.App. 1958); Williams v. Noel, 105 So.2d 901 (Fla.App. 1958); Bauman, *A Rationale of Summary Judgment*, 33 IND.L.J. 467, 475-476 (1958).

8. 106 So.2d 597 (Fla.App. 1958).

9. Fink v. Posner, 108 So.2d 324 (Fla.App. 1958).

material allegations of the complaint. The plaintiff then moved for summary judgment based on these admissions of the defendant. The defendant, in opposing the motion, presented affidavits admitting the contract, but alleging a new agreement on different terms. Since the only factual dispute involved an issue which was not within the pleadings, and the allegations of the plaintiff were established without denial, summary judgment for the plaintiff was properly granted.

On the other hand, the defense interposed by the defendant will often raise factual issues, such as disputes as to whether a breach has occurred, or other circumstances in which entry of a summary judgment or decree is improper.[10] For example, in *Olins v. Avis Rental Car System of Fla.*,[11] an action for declaratory relief, it was held that there were genuine and material issues of fact as to whether or not a breach of contract had occurred, and summary decree for the plaintiff was reversed. In *Whitehall Realty Corp. v. Manufacturers Trust Co.*,[12] an action on two promissory notes, the defendant pleaded no consideration, payment, and want of corporate authority on the part of the corporate officer who executed the notes. The trial court entered a summary judgment in favor of the plaintiff-indorsee. In reversing this judgment the supreme court stated:

> It may be, as contended here by plaintiff, that the affidavits, depositions and exhibits showed there were no genuine isuues of fact as to defenses (2) and (3) supra; but it is otherwise as to the defense of "no consideration." As to this issue, there remained undisposed of the question of whether a consideration had been paid and as to whether, at the time the plaintiff discounted the notes . . . it was on notice that no consideration had as yet passed. . . .[13]

Tort Cases

In tort cases the problems confronting the courts in ruling on motions for summary judgment appear to be more difficult than in other areas of the law, since the factual situations are usually so varied.

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10. (1) Disputes as to breach of contract: West Shore Restaurant Corp. v. Turk, 101 So.2d 123 (Fla. 1958); National Airlines v. Florida Equip. Co. of Miami, 71 So.2d 741 (Fla. 1954); Olins v. Avis Rental Car Sys. of Fla., 105 So.2d 497 (Fla.App. 1958). (2) Disputes as to whether a principal-agent relationship existed: Manning v. Mentone Corp., 99 So.2d 223 (Fla. 1957); Owens v. MacKenzie, 103 So.2d 677 (Fla.App. 1958); Hawkins v. Townsend, 100 So.2d 89 (Fla.App. 1958). (3) Dispute as to want of consideration: Whitehall Realty Corp. v. Manufacturers Trust Co., 81 So.2d 475 (Fla. 1955). (4) Dispute concerning conditional delivery of negotiable instrument: Bassato v. Denicola, 80 So.2d 353 (Fla. 1955). (5) Disputes concerning usurious interest: Dezell v. King, 91 So.2d 624 (Fla. 1956); Parker v. Bryce, 84 So.2d 323 (Fla. 1955). (6) Dispute as to whether a negotiable instrument is a bearer instrument: Florida Nat'l Bank at St. Petersburg v. Geer, 96 So.2d 409 (Fla. 1957). (7) Dispute converning equitable defenses of estoppel, laches and waiver: Macina v. Magurno, 100 So.2d 369 (Fla. 1958).

11. 105 So.2d 497 (Fla.App. 1958).

12. 81 So.2d 475 (Fla. 1955).

13. *Ibid.*

In *Drahota v. Taylor Constr. Co.*,[14] an intersection collision case, the court, in reversing a summary judgment for the defendant, held that there were factual issues present as to the plaintiff's alleged contributory negligence and as to the negligence of the defendant. It was indicated that "the constitutional right to 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." (Emphasis added.) In another intersection case,[15] the trial court granted plaintiff's motion for summary judgment on defendant's counterclaim. Depositions of the parties showed conflicts as to respective speeds at which the automobiles involved were traveling, as to distances away from the intersection, etc. The supreme court, in reversing the decision of the lower court, stated:

> While summary judgment proceedings have done much when properly employed to expedite the disposition of litigated causes, we have consistently adhered to the proposition that when the depositions or affidavits submitted in support of a motion for summary judgment suggest a factual conflict or present a situation on which a jury might properly draw varied conclusions from the record presented, then it is not proper to grant a summary judgment. The record here tenders an almost typical intersection collision with varied stories as to speed, caution and ultimate responsibility for the near tragedy. . . .[16]

This case was followed in *Mason v. Remick*,[17] which held that although the evidence was not disputed, if "conflicting *reasonable inferences*" could be drawn from the admitted facts, negligence and causation would be jury questions.[18] (Emphasis added.)

In cases involving hotels, grocery stores, restaurants, etc., similar reasoning has been used by the courts with respect to *inferences which might reasonably be drawn* by a jury. A guest, while swimming in a hotel pool, was injured as a result of "horseplay" on the part of other patrons. The circuit court granted the hotel's motion for summary judgment on the ground that there was no casual connection between the "horseplay" and the injury. The evidence indicated that the accident resulted from the "horseplay," that this had been going on for several days, and that the defendant-hotel had allowed it to continue unrestrained. In reversing the lower court, the district court decided that there was a material issue of fact, precluding summary judgment.[19] In cases involving similar factual

14. 89 So.2d 16, 18 (Fla. 1956).
15. Weber v. Porco, 100 So.2d 146 (Fla. 1958).
16. *Id.* at 148.
17. 107 So.2d 38 (Fla.App. 1958) (The plaintiff was on a through street and the defendant had a "Yield Right-of Way" sign; the plaintiff's own deposition stated that he had failed to look in the direction from which the defendant appeared).
18. See also Farrey v. Bettendorf, 96 So.2d 889,892 (Fla. 1957).
19. Gordon v. Hotel Seville, 105 So.2d 677 (Fla.App. 1958), *cert. denied*, 109 So2d 767 (Fla. 1959).

situations where there is *any question* of negligence or contributory negligence it is the duty of the court to submit such questions to the jury.[20] Even in cases which are extremely close on the question of negligence and contributory negligence, "doubt . . . should *always* be resolved in favor of a jury trial."[21] (Emphasis added.)

The Patty Case

Although questions of negligence are generally questions for the jury, where there is a clear showing from the pleadings, affidavits, admissions on file, or depositions that the plaintiff was either contributorily negligent, or that the defendant was not negligent, a summary judgment in favor of the defendant is proper.[22] It is also proper to enter a summary judgment in favor of the defendant where the plaintiff is without proof to establish facts necessary to constitute a cause of action or to rebut facts established by the defendant, which if true would preclude any recovery on the part of the plaintiff.[23] This proposition is clearly illustrated in the case of *Food Fair Stores of Fla., Inc. v. Patty*.[24] The plaintiff allegedly slipped on a green bean while buying groceries in defendant's food store. The plaintiff's own depositions stated that there were no witnesses to her injury, and that she could offer no evidence as to whether defendant or some other agency was responsible for the green bean being on the floor, or the length of time it had been there. The circuit court granted defendant's motion for summary judgment, which was subsequently reversed by the district court on the ground that there were material issues of fact as to the negli-

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20. Delany v. Breeding's Homestead Drug Co., 93 So.2d 116 (Fla. 1957) (plaintiff tripped over bumper logs bordering defendant's parking lot after dark); Navison v. Winn & Lovett Tampa, Inc., 92 So.2d 531 (Fla. 1957) (factual issue as to whether, when attempting to reach ice-cream in defendant's freezer, the plaintiff hit his own head on a shelf above the freezer, or whether the plaintiff's injury was a result of the negligence of the defendant in placing the jars on top of the shelf); Van Engers v. Hickory House, 104 So.2d 843 (Fla.App. 1958) (defendant's employer parked the plaintiff's car in such a manner that a hole was concealed, and the employee failed to warn the plaintiff); Saunders v. Kaplan, 101 So.2d 181 (Fla.App. 1958) (plaintiff slipped on defendant's outdoor dance floor after a rain and after observing defendant's employees mopping the floor); Wallace v. Boca Raton Properties, 99 So.2d 637 (Fla.App. 1958) (a golf tournament scoreboard blew down during a high wind, injuring the plaintiff who was sitting beneath it).

21. Bess v. 17545 CollinsAve., Inc., 98 So.2d 490 (Fla. 1957).

22. Connolly v. Sebeco Inc., 89 So.2d 482 (Fla. 1956); Herring v. Eiland, 81 So.2d 645 (Fla. 1955); Finklestein v. Brooks Paving Co., Inc., 107 So.2d 205 (Fla.App. 1958); Stone v. Hotel Seville, 104 So.2d 847, 848 (Fla.App. 1958) (dissenting opinion that there were disputed issues as to contributory negligence); Andrews v. Goetz, 104 So.2d 653, 658 (Fla.App. 1958) (dissenting opinion that there was lack of evidence as to contributory negligence and judgment should be reversed); Raphael v. Koretzky, 102 So.2d 746 (Fla.App. 1958); Pritchard v. Peppercorn & Peppercorn, Inc., 96 So.2d 769 (Fla.App. 1957).

23. Food Fair Stores of Fla., Inc., v. Patty, 109 So.2d 5 (Fla. 1959); Connolly v. Sebeco Inc., 89 So.2d 482 (Fla. 1956); Atkins v. Humes, 107 So.2d 253 (Fla. App. 1958).

24. 109 So.2d 5 (Fla. 1959), *reversing*, Patty v. Food Fair Stores of Fla., Inc., 101 So.2d 881 (Fla.App. 1958).

gence of the defendant and contributory negligence of the plaintiff. The court stated:[25]

> [W]e hasten to point out that this court does not intend to indicate by statements in this opinion a desire on our part to discourage or encourage the granting or denying of summary judgments or decrees. Like any other rule, it can be misused and abused, but on the other hand, *its use should not be discouraged to the point of extinction.* This we believe has been the view generally expressed by our court of last resort long before the creation of this court and as we are duty bound to do, we follow and reiterate this view. . . . (Emphasis added.)

In reversing this decision of the district court, the supreme court stated:[26]

> Upon an application for summary judgment in an action for negligence when it is properly shown that the plaintiff is *completely without proofs to sustain her complaint* the defendant has no obligation to offer evidence to excuse itself. This is so because in the first instance the complaining party has failed to carry her initial burden. . . . (Emphasis added.)

A comparison of the two reported opinions indicates that the district court, although recognizing the purpose of summary procedure, and admitting that it does not wish to discourage its use in appropriate cases, may have been overly cautious in the application of its own principles.

BURDEN OF THE MOVING PARTY

On a motion for summary judgment the burden is on the moving party to clearly establish that there is no genuine, material issue of fact.[27] In *Warring v. Winn-Dixie Stores*[28] it was determined:

> When the facts established on defendant's motion for summary judgment *clearly show* there is no genuine issue of any material fact, then, the court may pierce the "paper-issues" made by the pleadings and render judgment on the merits for the defendant, because of the want of any genuine issue as to any material fact; *but upon failure to show the absence of any genuine issue as to all material facts, the defendant has not sustained the burden* and the defendant's motion should be denied. A clear showing by the movant for a summary judgment in the *absence* of such issues is essential and the absence of genuine issues is not made evident by the absence of an affirmative showing, except as to presumptions and matters of which the court may take judicial notice. . . . (Emphasis added.)

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25. Patty v. Food Fair Stores of Fla., Inc., 101 So.2d 881, 884 (Fla.App. 1958).
26. Food Fair Stores of Fla., Inc., v. Patty, 109 So.2d 5, 7 (Fla. 1959).
27. Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957); Shulman v. Miller, 107 So.2d 274 (Fla.App. 1958); Warring v. Winn-Dixie Stores, 105 So.2d 915 (Fla.App. 1958).
28. 105 So.2d 915, 918 (Fla.App. 1958).

Not only must the movant show that there is no genuine issue as to any material fact, but he must also show that he is entitled to judgment as a matter of law.[29] In determining whether the movant has sustained this burden, *all reasonable inferences from the evidence are resolved in favor of the non-moving party*.[30] As was stated in *Owens v. MacKenzie*:[31]

> The *critical question* is whether there exists a genuine issue as to any material fact, thus requiring the case to be submitted to a jury. In considering this, the evidence as well as all *reasonable inferences* that may be drawn therefrom must be considered in a light most favorable to the party moved against. . . . (Emphasis added.)

This proposition is based upon recognition of the fact that the constitutional right to trial by jury is sacred and must not be infringed upon.

It is interesting to note that although Rule 1.36 does not expressly authorize the entry of a summary judgment at a pre-trial conference, or on the court's own motion, such action has been upheld.[32] It has, however, been recognized that this procedure should be employed with a great deal of caution so as not to prejudice the rights of the litigants.[32a] The rule requires that ten days notice of a motion for summary judgment must be given.[33] When counsel receives less than ten days notice of a pre-trial conference, even though all issues of material fact are eliminated, the court should not enter a summary judgment without giving counsel a "reasonable opportunity to make a showing that a genuine issue of material fact" exists.[34]

Conclusion

While there is no doubt that summary procedure is a necessary tool in ridding the dockets of unwarranted litigation, an analysis of these cases reveals that at times the courts have extended the application of the rule to its outer limits. Even though the trial dockets in the circuit courts are quite extensive, the constitutional right to trial by jury is sacred, and should no be infringed upon by the summary judgment procedure which is merely a convenience available to the parties.[35] It should be employed by the courts *only* where there *remains no genuine issue of any material*

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29. Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957).
30. Ormsby v. Ginolfi, 107 So.2d 272 (Fla.App. 1958); Gordon v. Hotel Seville, 105 So.2d 175 (Fla.App. 1958), *cert. denied*, 109 So.2d 767 (Fla. 1959); Owens v. MacKenzie, 103 So.2d 677 (Fla.App. 1958).
31. 103 So.2d 677,679 (Fla.App. 1958).
32. Bess v. 17545 Collins Ave., Inc., 98 So.2d 490,492 (Fla. 1957) (reversed on on other grounds); Roberts v. Braynon, 90 So.2d 623 (Fla. 1956); Raphael v. Koretzky, 102 So.2d 746 (Fla.App. 1958).
32a. *Ibid.*
33. Fla. R. Civ. P. 1.36(c).
34. Roberts v. Braynon, 90 So.2d 623 (Fla. 1956).
35. Gordon v. Hotel Seville, 105 So.2d 175 (Fla.App. 1958), *cert. denied*, 109 So.2d 767 (Fla. 1959).

fact and the moving party is entitled to judgment as a matter of law. It was further indicated that when there is the "slightest doubt" regarding issues of fact, summary judgment *must not* be granted. It was stated in *Humphrys v. Jarrell:*[36]

> Caution and discernment should go hand in hand where the power to enter summary judgment or decree is exercised, for such a power wields a dangerous potential which could have the effect of trespass against fundamental and traditional processes for determining the rights of litigants. . . .

A misuse and abuse of summary procedure, rather than expediting litigation, leads to inconvenience, delay and unnecessary expense to the courts as well as to the parties involved. This may readily be seen by the number of cases in which summary judgment was improperly granted, resulting in appeals, reversals and further proceedings. A clear example of such inconvenience, delay and expense is *Parker v. Bryce.*[37] The trial court granted a summary judgment for the defendant which was reversed by the supreme court.[38] On remand the trial court *again* granted a summary judgment for the defendant on the complaint, from which the plaintiff appealed. While the second appeal was pending, the trial court entered a summary judgment in favor of the defendant on the counterclaim, from which it was necessary to prosecute a separate appeal. Fortunately, the court was able to consolidate the last two appeals, and *again* reversed the trial court and remanded the case for further proceedings. It is thus apparent that a procedure intended to be a convenience to the courts and the parties, when improperly used, becomes a nightmare of confusion, inconvenience and delay.

On the basis of public policy, and in view of the ever increasing expense of litigation and crowded conditions of our courts, it would be of definite service to the judiciary of this state if counsel would refrain from making this motion except in cases where it is *unequivocally clear* that there are no genuine, material issues of fact.

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36. 104 So.2d 404,408 (Fla.App. 1958).
37. Parker v. Bryce, 96 So.2d 154 (Fla. 1957).
38. Parker v. Bryce, 84 So.2d 323 (Fla. 1955).