Alabama Rules of Civil Procedure

VII. JUDGMENT

Rule 56.

Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) *For defending party*. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) *Motion and proceedings thereon.*

(1) FORM OF MOTION AND STATEMENT IN OPPOSITION THERETO. The motion shall be supported by a narrative summary of what the movant contends to be the undisputed material facts; that narrative summary may be set forth in the motion or may be attached as an exhibit. The narrative summary shall be supported by specific references to pleadings, portions of discovery materials, or affidavits and may include citations to legal authority. Any supporting documents that are not on file shall be attached as exhibits. If the opposing party contends that material facts are in dispute, that party shall file and serve a statement in opposition supported in the same manner as is provided herein for a summary of undisputed material facts.

(2) TIME. The motion for summary judgment, with all supporting materials, including any briefs, shall be served at least ten (10) days before the time fixed for the hearing, except that a court may conduct a hearing on less than ten (10) days' notice with the consent of the parties concerned. Subject to subparagraph (f) of this rule, any statement or affidavit in opposition shall be served at least two (2) days prior to the hearing.

(3) JUDGMENT. 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 a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) *Case not fully adjudicated on motion*. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* 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. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. 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 the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When evidentiary matter is unavailable.* Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may deny the motion for summary judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are

presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(dc) *District court rule.* Rule 56 applies in the district courts except that the references to thirty (30) days and ten (10) days are reduced to fourteen (14) days and seven (7) days, respectively.

[Amended eff. 8-1-92; Amended eff. 10-1-95.]

Committee Comments on 1973 Adoption

> "The summary judgment procedure is a method for promptly disposing of actions in which there is not genuine issue as to any material fact. It has been used in England for more than 50 years and has been adopted in a number of states. It is intended to prevent vexation and delay, improve the machinery of justice, promote the expeditious disposition of cases, and avoid unnecessary trials where no genuine issues of fact are raised…. The summary judgment procedure is not a substitute for the trial of disputed issues of fact. On a motion for summary judgment, the court cannot try issues of fact. It can only determine whether there are issues to be tried. The procedure is well adapted to expose sham claims and defenses but cannot be used to deprive a litigant of a proper trial of genuine issues of fact."

3 Barron & Holtzoff, *Federal Practice and Procedure*, § 1231 (1958).

Summary judgment procedure must be regarded as an innovation in Alabama. The statutory authorization for summary proceedings, § 6-6-660 et seq., Code of Ala. is so limited as to bear little similarity to the procedure here provided. This rule is virtually identical with Federal Rule 56 and the similar rules adopted in many states. It differs from the federal rule in requiring the claimant to wait 30 days before moving for summary judgment rather than 20 days as in the federal rule.

This rule is closely connected with Rule 12(b)(6), providing for a motion to dismiss for failure to state a claim on which relief can be granted, and Rule 12(c), providing for a motion for judgment on the pleadings. If, on those Rule 12 motions, matters outside the pleadings are presented to and not excluded by the court, the motion is to be considered as for summary judgment, and the test of

this rule is applicable. See Clark, *The Summary Judgment*, 36 Minn.L.Rev. 567, 573-576 (1952).

Unlike some earlier summary judgment procedures, this rule may be used in any kind of case by either party. 3 Barron & Holtzoff, *Federal Practice and Procedure*, § 1232 (1958); Ritter & Magnuson, *The Motion for Summary Judgment and its Extension to All Classes of Actions,* 21 Marq.L.Rev. 33 (1936). The availability of the procedure in any action is not inconsistent with the obvious truth that there are some kinds of actions which almost inevitably present genuine issues of material fact, and in which summary judgment will rarely be proper. Negligence actions fall within this class. See *Vosbeck v. Lerdall*, 72 N.W.2d 371, 373-374 (Minn.1955); *Davidson v. Kalmbacher*, 74 A.2d 821 (Del.1950).

> "Summary judgment procedure is not a catch-penny contrivance to take unwary litigants into its toils and deprive them of trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."

Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir.1940), per Hutcheson, C.J.

The standard set out in subdivision (c) is that summary judgment may be granted only when the materials on file 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". As to when this test is met, see, e.g., *Chappell v. Goltsman*, 186 F.2d 215 (5th Cir.1950); *Lawson v. American Motorists Ins. Corp*., 217 F.2d 724 (5th Cir.1954); Asbill & Snell, *Summary Judgment under the Federal Rules--When an Issue of Fact is Presented*, 51 Mich.L.Rev. 1143 (1952); Clark, *The Summary Judgment*, 36 Minn.L.Rev. 567, 576-579 (1952); Comm., *"Genuineness" of Issues on Summary Judgment*, 4 Fed.Rules Serv. 940 (1941); 3 Barron & Holtzoff, *Federal Practice and Procedure*, § 1234 (1958); 6 Moore's *Federal Practice*, ¶ 56.15 (2d ed. 1971). This test must be read in context with the Alabama "scintilla evidence" rule, which these rules do not disturb. See Rule 50. Thus, if there is a scintilla of evidence supporting the position of the party against whom the motion is made, so that at a trial he would be entitled to go to the jury, summary judgment cannot be granted.

Affidavits to be considered on a motion for summary judgment must be made on personal knowledge and show affirmatively that the affiant is competent to testify as to the matters stated, and they may only set forth such facts as

would be admissible in evidence. Rule 56(e). Thus the court is not to consider statements in affidavits based on hearsay, or otherwise, inadmissible. E.g., *Dyer v. MacDougall*, 201 F.2d 265 (2d Cir.1952); *Jameson v. Jameson*, 176 F.2d 58 (D.C.Cir.1949); *United States v. Britten*, 161 F.2d 921 (3rd Cir.1947); 6 Moore's *Federal Practice*, ¶ 56.22 (2d ed. 1953). Where a party cannot present facts sufficient to defeat a motion for summary judgment, but there is a good reason to believe he may have such evidence by the trial, the court has ample discretion either to deny the motion or to order a continuance. Rule 56(f); *Mason v. New York Cent. R.R.*, 8 F.R.D. 637 (W.D.N.Y.1949); *United States v. Newbury Mfg. Co.*, 1 F.R.D. 718 (D.Mass.1941).

Mere allegations in a pleading are not enough to create a genuine issue of material fact as against a showing of evidence contrary to the allegations. See Rule 56(e).

Committee Comments to August 1, 1992,
Amendment to Rule 56(c) and Rule 56(f)

The August 1, 1992, amendments to Rule 56(c) and (f) are intended to provide a statewide procedure for submitting summary judgment motions and materials in support thereof and materials in opposition thereto. Many local rules throughout the state provided a variety of procedures for submitting and disposing of summary judgment motions. The committee felt that a uniform procedure should be incorporated in the rule so as to simplify practice in this area. It should be remembered that a trial judge, pursuant to Rule 6(b) ("Time"; "Enlargement"), may enlarge the periods set out in Rule 56(c)(2).

F.R.Civ.P. 56(f) and former A.R.Civ.P. 56(f) contain the words "by affidavit" in the context of evidentiary matter needed to justify opposition to a summary judgment. This revision changes the title of this subparagraph to read "When Evidentiary Matter Is Unavailable" and deletes the phrase "by affidavit" from the text so as to eliminate an unnecessary restriction on the form of evidentiary matter adequate to justify opposition. For example, a deposition could just as easily support a statement in opposition to the motion. See 10A C. Wright & A. Miller, *Federal Practice and Procedure*, § 2740, pp. 529-30 (1983), for a suggestion that F.R.Civ.P. 56(f) should be so interpreted, notwithstanding its use of the restrictive words "by affidavit." Note that this change does not alter the Rule 56(f) requirement of affidavits in support of a contention that a party is presently unable to present facts in opposition to the motion and that a continuance is therefore necessary. Such an affidavit should state with specificity why the opposing evidence is not presently available and should state, as specifically as possible, what future actions are contemplated to discover and present the opposing evidence.

Committee Comments to October 1, 1995,
Amendment to Rule 56

The amendment is technical. No substantive change is intended.