

1992

# Wesley G. Harline v. Ronald C. Barker and Larry Whyte : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

Brief of Appellee, *Harline v. Barker*, No. 920113 (Utah Court of Appeals, 1992).  
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**BRIEF**

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DOCKET NO. 920113CA IN THE UTAH COURT OF APPEALS

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WESLEY G. HARLINE, :

Plaintiff/Appellant :

v. :

RONALD C. BARKER and LARRY  
WHYTE, :

Defendants/Appellees. :

Case No. 9201<sup>1</sup>33-CA

Priority No. 16

---

**BRIEF OF APPELLEES**

---

**APPEAL FROM A SUMMARY JUDGMENT  
OF THE THIRD JUDICIAL DISTRICT COURT  
FOR SALT LAKE COUNTY  
HONORABLE JAMES S. SAWAYA**

---

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Attorneys for Plaintiff/  
Appellant

 JUN 12 1992

IN THE UTAH COURT OF APPEALS

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WESLEY G. HARLINE,	:	
Plaintiff/Appellant	:	Case No. 920133-CA
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### **STATEMENT OF JURISDICTION**

This Court has jurisdiction over this matter pursuant to Section 78-2a-3(2)(j), UTAH CODE ANNOT. Plaintiff/Appellant (hereafter "Harline") originally filed this appeal with the Utah Supreme Court, but that court poured this matter over to this Court on February 20, 1992.

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Pursuant to Rule 24(b) of the Utah Rules of Appellate Procedure, Defendants/Appellees (hereafter collectively referred to as "Barker") herein set forth their Statement of Issues Presented for Review.

1. Did the trial court correctly rule that there were no material issues of fact when Harline failed to controvert Barker's Statement of Undisputed Facts and failed to produce record evidence in support of each of the elements of his claims against Barker?

2. Did the trial court abuse its discretion in ruling that Barker should not have been compelled to reveal attorney work product during the discovery period?

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

Rule 56 of the Utah Rules of Civil Procedure (Addendum A).

Rule 4-501(2)(b) of the Utah Code of Judicial Administration (Addendum B).

### STATEMENT OF THE CASE

Harline commenced this action by filing a complaint against Barker on November 8, 1990. (R. 2-8). The complaint contained essentially two claims of legal malpractice against Barker, arising out of Barker's representation of Harline during a bankruptcy proceeding initiated by Harline in February 1986. Harline complained that Barker had a duty to amend certain schedules that Harline had already filed in his bankruptcy proceeding before Barker began representing him. Harline claims this failure caused two harms. The first alleged harm was that Harline was denied a discharge of his debts in bankruptcy. (R. at 3-4). The second alleged harm was that Harline's interest in his profit sharing plan was denied an exemption from his bankruptcy estate, thus making those funds available to Harline's creditors. (R. at 3-4).

On October 29, 1986 the bankruptcy court ordered Harline to amend his bankruptcy schedules in conjunction with the conversion of his bankruptcy case from one in Chapter 11 to one in Chapter 7. The deadline for doing this was November 18, 1986. (R. at 5, 246). Harline claimed that if Barker had amended his bankruptcy schedules in the Fall of 1986, the bankruptcy court would not have denied his discharge, and would have determined that Harline's interest in his profit sharing plan was exempt from his bankruptcy estate property.

On January 28, 1992, Harline served document production requests and interrogatories on Barker seeking, among other things, the identity of Barker's trial witnesses and exhibits. (R. at 17-18, 216-18). Barker timely responded to Harline's discovery requests and answered all

but two of the interrogatories, in spite of the fact that he objected to many more than two. (R. at 216-226). Harline brought a motion to compel responses to all interrogatories to which Barker objected, even though Barker had responded to all but two of the interrogatories. (R. at 212-215). After opposing the motion and pointing out that the only information Barker withheld was attorney work product, the trial court denied Harline's motion to compel. (R. at 231-7, 349).

On March 8, 1991, and in response to Harline's claims in opposition to Barker's motion for summary judgment, the trial court ordered that all non-expert discovery would be completed by June 3, 1991. (R. at 190, 240). On June 24, 1991 Barker filed his Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment. (R. at 242-333). On July 5, 1991, Harline filed his Memorandum in Opposition to Defendants' Motion for Summary Judgment. (R. at 355-379). Harline failed to controvert Barker's Statement of Undisputed Facts as required by Rule 4-501(2)(b) of the Utah Code of Judicial Administration. (R. at 385-6, 355-65). Further, Harline's counsel filed no affidavit under Rule 56(f) U.R.C.P. On July 16, Barker filed his Supplemental Reply Memorandum in Support of Defendants' Motion for Summary Judgment. (R. at 382-404).

On July 29, 1991, the trial court heard argument on Barker's motion for summary judgment. On August 16, 1991, the trial court entered its order granting Barker's motion for summary judgment and entering judgment against Harline herein. (R. 430-431). On September 9, 1991, Harline filed his Notice of Appeal. (R. at 437-8).



### STATEMENT OF FACTS

On February 14, 1986, Harline filed a Chapter 11 bankruptcy petition with the U.S. Bankruptcy Court for the District of Utah. (R. at 245, 263-5). On the date of his filing, Harline owned an account at Merrill, Lynch, Pierce, Fenner & Smith. In the month following his bankruptcy petition filing, Harline received a total of \$38,634.27 from post-bankruptcy petition sales of stock from his Merrill, Lynch account. He used these monies to pay for his personal expenses without first obtaining bankruptcy court approval to do so. (R. at 248, 295). On March 21, 1986, after receiving and improperly using these monies, Harline signed and filed his bankruptcy schedules and statements. In filing his schedules and statements, he swore a false oath. (R. at 249, 296, 299-301). Harline intended to hinder, delay, and defraud his creditors at the time he swore to the truth of his bankruptcy schedules. Id. Because of "the significant number of wrongful acts and the reckless indifference to the truth showed by Wesley G. Harline" at the beginning of his bankruptcy case, the bankruptcy court later denied his discharge in bankruptcy on August 10, 1988. Id.

In the early Fall of 1986, Harline knew that his bankruptcy schedules were deficient. Harline never communicated that information to Barker. (R. at 246, 280-2, 284-6, 314-5). On October 29, 1986, the bankruptcy court ordered Harline to amend his schedules by November 18, 1986. (R. at 5, 246). On December 12, 1986, Bettie Marsh, who had been Harline's bankruptcy counsel since June 9, 1986, withdrew as Harline's counsel. (R. at 247, 274-5). On December 31, 1986, Barker was retained by Harline to represent him in his bankruptcy

proceedings. (R. at 247, 280-2, 284-6). On July 10, 1989, Paul Cotro-Manes entered his appearance as counsel to Harline in his bankruptcy. (R. at 249, 309, 326).

On April 26, 1990, Harline filed amended bankruptcy schedules and statements, identifying his interest in his profit sharing plan as property which he claimed should be exempt from his estate and thus unavailable to his creditors. (R. at 249, 329). The bankruptcy trustee objected to the amended schedules and to the claimed exempt status of Harline's interest in his profit sharing plan. (R. at 249, 329). On October 9, 1990, the bankruptcy court allowed Harline's schedules to be amended. (R. at 249, 331). On November 9, 1990, the bankruptcy court sustained the bankruptcy trustee's objections to the exempt status of Harline's interest in his profit sharing plan, thus making those monies available to Harline's creditors. (R. at 250, 332).

Harline appealed the bankruptcy court's determination that his interest in his profit sharing plan was not exempt, which appeal was ultimately successful when the U.S. Court of Appeals for the Tenth Circuit reversed and remanded the U.S. District Court's affirmance of the bankruptcy court's decision. In re Harline, 950 F.2d 669 (10th Cir. 1991). The exempt status of Harline's interest in his profit sharing plan will depend on whether it meets the legal and factual requirements of ERISA. Id.

### SUMMARY OF ARGUMENT

This Court should affirm the trial court's dismissal by recognizing that the problems Harline experienced in his bankruptcy proceedings were caused solely by his own fraudulent

conduct, and were a function of the nature of his interest in his profit sharing plan. This Court may ignore Harline's arguments that there were factual issues about the dates of Barker's representing him in bankruptcy court because those facts are not material. One of the elements of a legal malpractice claim is that the alleged negligence of the attorney proximately cause the harms complained of. Because the bankruptcy court's treatment of Harline was based on facts completely independent of Barker's conduct or representation of Harline, the causation element of Harline's claims was unsupported by any evidence presented by Harline to the trial court. Harline did not controvert or make known any evidence to support his claims that his ills in bankruptcy were caused by any negligence of Barker. To the contrary, the uncontroverted facts (deemed admitted by Harline) show that he was denied his discharge because he defrauded his creditors. Also, the uncontroverted facts show that his profit sharing plan's exempt status will depend entirely upon whether it meets ERISA.

Even if this Court were to assume that a 1986 amendment of Harline's schedules would have changed the treatment he received from the bankruptcy court, summary judgment was appropriate for two other independent reasons. First, bankruptcy case law holds that an attorney has no duty to amend bankruptcy schedules to which a client has already attested, particularly if the client has not communicated known problems to his attorneys. Second, Harline is equitably estopped from claiming that Barker should have been aware of and cured false statements when Harline was knowingly responsible for the falsity of those statements.

This Court should also affirm the trial court's ruling denying Harline's motion to compel. Because trial was made unnecessary by the absence of factual issues, compelling Barker to

disclose trial witnesses and exhibits makes no sense. Trial courts have wide latitude in discovery matters, and Harline showed no abuse of discretion. Finally, because the trial court correctly dismissed all of Harline's claims against Barker, this Court should affirm the judgment, with costs to Barker.

### ARGUMENT

A. SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE THERE WERE NO MATERIAL FACTUAL ISSUES.

Barker agrees with the law cited to this Court by Harline that the existence of material factual issues precludes summary judgment. But the only factual issue really identified by Harline in his brief is the issue of when Barker began his representation of Harline in Harline's bankruptcy proceedings. The bankruptcy court filings make clear that Barker was not Harline's attorney between the alleged critical dates of October 29, 1986 and November 18, 1986. This Court may even assume that Harline's claims that Barker represented him during that time raise a factual issue. But that begs the question of whether that factual issue is material. The timing of Barker's representation of Harline is not material.

There are essentially three independent grounds supporting the trial court's summary judgment, and those grounds apply even if this Court makes the necessary factual inferences in favor of Harline by finding that Barker began representing Harline sometime before November 18, 1986. First, the harms Harline complains of were not caused by Barker. Second, Barker had no cognizable duty to amend schedules to which Harline had attested and about which Barker knew of no deficiencies. Finally, Harline is equitably estopped from claiming Barker

should have cured Harline's own lies. For these reasons, the single issue raised by Harline does not preclude affirming the summary judgment.

**B. HARLINE FAILED TO PRESENT RECORD EVIDENCE SUPPORTING ALL OF THE ELEMENTS OF HIS CLAIMS.**

Discovery concluded on June 3, 1991, more than two weeks before Barker submitted his supplemental memorandum in support of his motion for summary judgment. Harline's opportunity to amass evidence supporting his claims had passed, and he was obligated to come forward with evidence supporting each of the elements his claims against Barker. Harline's failure to produce evidence in opposition to Barker's motion entitled Barker to the summary judgment.

In Celotex v. Catrett, 477 U.S. 317 (1986), the United States Supreme Court outlined the burden of a plaintiff in response to a defendant's motion for summary judgment.

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the non-moving party has failed to make a sufficient showing of her case with respect to which she has the burden of proof.

Id. at 322-23 (emphasis added). This Court recognized this principle in Robinson v. Intermountain Health, Inc., 740 P.2d 262 (Utah App. Ct. 1987). In other words, Harline must

establish the existence of all of the elements necessary to recover on his claim for legal malpractice against Barker in order to avoid summary judgment.

The elements of a claim for legal malpractice are:

1. An attorney-client relationship;
2. A duty of the attorney to the client;
3. A breach of that duty; and
4. Damages suffered by the client proximately caused by the attorney's breach of duty.

Williams v. Barber, 765 P.2d 887, 889 (Utah 1988). See also, Breuer-Harrison, Inc. v. Combe, 799 P.2d 716, 727 (Utah App. 1990). The fact of an attorney-client relationship does not fulfill Harline's evidentiary burden. In legal malpractice cases, proximate cause embraces an assessment of the underlying cause of action. Williams v. Barber, 799 P.2d at 889. "Generally speaking, incurring liability through a breach of duty does not necessarily result in damages." Id. In this case, there was a complete failure of proof on the issue of causation.

1. Harline's False Oath, Not Any Failure To Amend, Resulted In His Denial Of Discharge.

Judge Allen of the U.S. Bankruptcy Court for the District of Utah could not have been more clear in his August 10, 1988 ruling denying Harline his discharge in bankruptcy. At the very outset of his ruling, Judge Allen indicated that the operative date was February 14, 1986, nearly a year before Barker became involved in Harline's general bankruptcy affairs. (R. at 292). Judge Allen found that on March 21, 1986, again months before Harline alleges Barker became involved, Harline knowingly and fraudulently swore a false oath regarding his assets on

February 14, 1986. No amendment by Barker can or could have cured the fact that Harline lied under oath. In addition to the false information contained in Harline's schedules, Judge Allen was also critical of Harline's liquidating his stocks (which were property of the estate) and using the money without authorization. No amendment to Harline's statements and schedules by Barker could undo that improper conduct.

Harline presented no evidence that Judge Allen would have allowed Harline his discharge in bankruptcy if the schedules had been amended. Harline's subjective beliefs of fault do not constitute any evidence of proximate cause. Harline determined not to depose Judge Allen on the discharge causation issue, and Harline's attorney did not file an affidavit under U.R.C.P. 56(f) claiming he needed more time to do discovery on the issue. In fact, time for discovery had lapsed. Finally, Harline admitted Barker's Statement of Undisputed Facts by failing to controvert them as required by Rule 4-501(2)(b) U.C.J.A. Harline simply failed to produce any record evidence or hope of any evidence tending to show that Barker's failure to amend Harline's false statements and schedules proximately caused the denial of Harline's discharge in bankruptcy. Therefore, this Court should affirm summary judgment in favor of Barker.

2. Harline Cannot Prove That Amending The Schedules Would Have Resulted in Exempt Treatment For His Pension Plan.

Harline claims that Barker should have amended his schedules to include certain purportedly exempt properties, and that Barker's failure to amend the schedules resulted in Judge Allen's sustaining the bankruptcy trustee's objection to Harline's exempt property claims. This claim is ironic, in that Harline's present counsel, Mr. Cotto-Manes, amended Harline's

schedules to include the exempt property, to no avail. The bankruptcy court allowed Harline's desired amendment, but denied the exempt treatment Harline sought for reasons totally unrelated to Barker. Now, Harline apparently claims that if only the schedules had been amended by Barker earlier than they were amended by Cotro-Manes, the subsequent denial of exempt treatment would have been avoided. This argument is without merit, especially in light of the Tenth Circuit's determination that the profit sharing plan may very well be exempt from treatment. A factual determination must be made regarding the nature of the plan. 950 F.2d at 676. In any event, Harline came forward with no evidence that an earlier amendment of Harline's schedules would have made a difference. Harline came forward with no evidence to suggest that an amendment by Barker would have had any more positive effect than Mr. Cotro-Manes' efforts. Therefore, Harline cannot lay the blame for his ills at Barker's feet, and this Court should affirm the trial court's summary judgment.

**B. BECAUSE BARKER HAD NO DUTY TO AMEND HARLINE'S SCHEDULES AND STATEMENTS, HARLINE'S CLAIMS FAIL.**

In addition to Harline's failure to create a material issue of fact on causation, this Court should affirm the trial court's summary judgment because as a matter of law, Barker had no duty to amend Harline's false schedules. Without a duty, there can be no claim for negligence. "A finding of negligence requires the presence of certain elements, one of which is a duty running between the parties." Hughes v. Housely, 599 P.2d 1250, 1253 (Utah 1979) (citation omitted). There was no such duty here.



Harline's alleged grounds for avoiding summary judgment are unavailing for the simple reason that no bankruptcy attorney has the legal duty to cure his client's falsified schedules and statements particularly when he is unaware of their falsity. In a bankruptcy case nearly identical to Harline's bankruptcy, In the Matter of Dawson, 446 F.Supp. 196 (E.D. Mo. 1978), a bankruptcy judge had denied an application for attorneys' fees made by the attorney for a bankrupt. In Dawson, the attorney for the debtor had entered his appearance months after the bankruptcy had been commenced. The bankruptcy judge had, prior to the attorney's appearance, ordered the debtor to amend certain of his schedules. In explaining the necessity of the amendments, the bankruptcy judge stated:

Such amended schedules were ordered because the schedules originally filed were deficient, in failing to accurately disclose the kind and character of the bankrupt's assets at bankruptcy.

. . .

[I]t is the duty of the bankrupt, primarily, to file schedules which truthfully state his assets, and debts, at bankruptcy.

Id. at 197-198. The new attorney, after helping his client amend his schedules, filed a fee application, including an application for payment for time spent preparing amended schedules. The bankruptcy judge denied the application for those fees, finding that the services rendered by the attorney in amending the schedules were not "compensable services."

On appeal, the U.S. District Court for the Eastern District of Missouri affirmed the bankruptcy judge's denial of fees, ruling that because the bankruptcy attorney had no legal duty to amend the schedules, the estate had no obligation to compensate him for those services.

Compensation is limited to services involving the performance of "legal duties rather than . . . [the exercise of] legal privileges." [Citation omitted]

Id. at 199.

Applying the rationale of Dawson to the facts of this case, even if this Court ignores the certified bankruptcy documents and Barker's Affidavits establishing the non-existence of an attorney-client relationship between Harline and Barker during the Fall of 1986 (R. at 280-86), and even if this Court accepts as true the self serving verified complaint and irrelevant affidavit of Harline's counsel, Barker had no legal duty to amend Harline's bankruptcy schedules and statements. In the absence of a legal duty, there can be no claim for negligence. See, Hughes, supra. In light of this, there are no material facts precluding this Court from affirming the trial court's summary judgment.

C. HARLINE'S CLAIMS ARE BARRED BY THE DOCTRINE OF EQUITABLE ESTOPPEL.

This Court should affirm the trial court's summary judgment for the additional reason that Harline's claims against Barker are barred by the doctrine of equitable estoppel. Harline never informed Barker of the falsity of his statements and schedules. Under Utah law, a litigant is barred from complaining about someone's acts or omissions when those acts or omissions are in reliance upon that litigant. The elements of equitable estoppel are:

(i) [A] statement, admission, act, or failure to act by one party inconsistent with a claim later asserted; (ii) reasonable action or inaction by the other party taken or not taken on the basis of the first party's statement, admission, act, or failure to act; and (iii) injury to the second party that would result from allowing the first party to contradict or repudiate such statement, admission, act, or failure to act.

Ceco v. Concrete Specialists, Inc., 772 P.2d 967, 969-970 (Utah 1989) (emphasis added) (citations omitted).

Applying this test to the undisputed facts of this case, Harline was aware in September, 1986 that his bankruptcy statements and schedules were deficient. He never communicated that information to Barker. That failure constitutes a failure to act which resulted in Barker's reasonably relying upon the fact that Harline's statements and schedules were verified, on file, and that nothing need be done to them. Allowing Harline to now disavow both his oath upon signing those documents and his silence when he was aware of the deficiencies will injure Barker to the extent this lawsuit is permitted to continue. Therefore, Harline should be estopped from claiming that Barker should have amended Harline's schedules, and summary judgment should be affirmed.

D. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S RULING DENYING HARLINE'S MOTION TO COMPEL.

This Court may ignore Harline's appeal from the trial court's denial of his motion to compel Barker to identify his trial witnesses and exhibits. Harline's Motion to Compel appeared to address broader questions than it really did. In responding to Harline's 17 interrogatories, Barker gave complete answers to all but Interrogatories No. 2 and 5. (R. at 217). Those interrogatories sought only the identity of trial witnesses and exhibits. Although Barker objected to numerous other interrogatories, Barker provided information notwithstanding those objections and without waiving them. Barker never quite understood the basis for Harline's Motion to Compel, since Harline had all of the factual information he requested. The only information

Barker did not provide answers to Harline's questions about attorney work product. There was no pre-trial order requiring disclosure of trial witnesses and exhibits, and absent an order of the court, the selection of witnesses and exhibits is a function of his counsel's mental processes and is protected by the attorney work product privilege. As the U.S. District Court for the District of Utah pointed out in Uinta Oil Refining Co. v. Continental Oil Co., 226 F. Supp. 495 (D. Utah 1964), the names of witnesses and exhibits are part of the "trial" component, and need not be specifically set forth in response to interrogatories. Id. at 505.

Harline's reliance upon the case of State Road Commission v. Petty, 17 Utah 2d 381, 412 P.2d 914 (1966) is misplaced. A closer reading of that case reveals (1) that the trial court judge is afforded great latitude in resolving discovery disputes and (2) many factors must be taken into account before forcing a party to reveal its intended witnesses and exhibits. Finally, the Petty case dealt with expert witnesses, not lay witnesses as requested by Harline herein.

The question as to whether interrogatories are subject to objection . . . is primarily for the trial court to determine. Because of this fact and his advantaged position in proximity to all aspects of the lawsuit, it is practicable and desirable that he be allowed considerable latitude and discretion in his rulings. . . . [T]he State is suing a private individual and undoubtedly has caused an appraisal of the property to be made. It seems both practicable and just that the court should be somewhat more liberal in directing answers to interrogatories than may be warranted in some other cases. This is particularly true in this situation where they are supposed to be experts.

Id. at 918 (emphasis added). Therefore, the teaching of Petty is that this Court should recognize the trial court's closer proximity to the facts and circumstances of this case and affirm his judgment that at least in the discovery phase of this lawsuit, Barker was not obligated to identify

his intended trial witnesses and exhibits. Indeed, at that early stage of the proceedings, the likelihood of Barker's having actually selected witnesses and exhibits for trial was remote. In a summary judgment scenario, being deprived of the names of trial witnesses and exhibits can have caused no prejudice to Harline.

The absence of factual issues makes Harline's appeal of the trial court's refusal to compel the production of trial witnesses and exhibits confusing and moot. Therefore, this Court need not even address the denial of Harline's Motion to Compel if it affirms summary judgment by finding that there were no material factual issues. If this Court determines to review the trial court's denial of Harline's Motion to Compel, it should affirm the trial court's ruling by holding that absent a court order, a party's intended witnesses and exhibits for trial are attorney work product, and need not be provided in response to discovery requests.

#### CONCLUSION

For the reasons set forth above, Barker respectfully requests that this Court affirm the summary judgment of the Third District Court.

DATED this 10th day of June, 1992.

Respectfully submitted,



---

Thomas L. Kay  
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Ronald C. Barker and Larry L. Whyte

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of June, 1992, four copies of the foregoing BRIEF  
OF APPELLEES were mailed, postage prepaid, to the following:

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Thomas F. Kay

## APPENDIX A

## **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 20 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 his 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 his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. 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 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. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for 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.

**Compiler's Notes.** — This rule is similar to Rule 56, F.R.C.P.

**Cross-References.** — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

## APPENDIX B

**ARTICLE 5.**  
**CIVIL PRACTICE.**

**Rule 4-501. Motions.**

**Intent:**

To establish a uniform procedure for filing motions, supporting memoranda and documents with the court.

To establish a uniform procedure for requesting and scheduling hearings on dispositive motions.

To establish a procedure for expedited dispositions.

**Applicability:**

This rule shall apply to motion practice in all district and circuit courts except proceedings before the court commissioners and the small claims de-

partment of the circuit court. This rule does not apply to petitions for habeas corpus or other forms of extraordinary relief.

**Statement of the Rule:**

**(1) Filing and service of motions and memoranda.**

(a) **Motion and supporting memoranda.** All motions, except uncontested or ex-parte matters, shall be accompanied by a memorandum of points and authorities appropriate affidavits, and copies of or citations by page number to relevant portions of depositions, exhibits or other documents relied upon in support of the motion. Memoranda supporting or opposing a motion shall not exceed ten pages in length exclusive of the "statement of material facts" as provided in paragraph (2), except as waived by order of the court on ex-parte application. If an ex-parte application is made to file an over-length memorandum, the application shall state the length of the principal memorandum, and if the memorandum is in excess of ten pages, the application shall include a summary of the memorandum, not to exceed five pages.

(b) **Memorandum in opposition to motion.** The responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation. If the responding party fails to file a memorandum in opposition to the motion within ten days after service of the motion, the moving party may notify the clerk to submit the matter to the court for decision as provided in paragraph (1)(d) of this rule.

(c) **Reply memorandum.** The moving party may serve and file a reply memorandum within five days after service of the responding party's memorandum.

(d) **Notice to submit for decision.** Upon the expiration of the five-day period to file a reply memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a certificate of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

**(2) Motions for summary judgment.**

(a) **Memorandum in support of a motion.** The points and authorities in support of a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which movant contends no genuine issue exists. The facts shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the movant relies.

(b) **Memorandum in opposition to a motion.** The points and authorities in opposition to a motion for summary judgment shall begin with a section that contains a concise statement of material facts as to which the party contends a genuine issue exists. Each disputed fact shall be stated in separate numbered sentences and shall specifically refer to those portions of the record upon which the opposing party relies, and, if applicable, shall state the numbered sentence or sentences of the movant's facts that are disputed. All material facts set forth in the movant's statement and properly supported by an accurate reference to the record shall be

deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party's statement.

**(3) Hearings.**

(a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs (3)(b) or (4) below.

(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for a hearing.

(c) Such request shall be granted unless the court finds that (a) the motion or opposition to the motion is frivolous or (b) that the dispositive issue or set of issues governing the granting or denial of the motion has been authoritatively decided.

(d) When a request for hearing is denied, the court shall notify the requesting party. When a request for hearing is granted, the court shall set the matter for hearing or notify the requesting party that the matter shall be heard and the requesting party shall schedule the matter for hearing and notify all parties of the date and time.

(e) In those cases where a hearing is granted, a courtesy copy of the motion, memorandum of points and authorities and all documents supporting or opposing the motion shall be delivered to the judge hearing the matter at least two working days before the date set for hearing. Copies shall be clearly marked as courtesy copies and indicate the date and time of the hearing. Courtesy copies shall not be filed with the clerk of the court.

(f) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

(g) All dispositive motions shall be heard at least thirty (30) days before the scheduled trial date. No dispositive motions shall be heard after that date without leave of the Court.

**(4) Expedited dispositions.** Upon motion and notice and for good cause shown, the court may grant a request for an expedited disposition in any case where time is of the essence and compliance with the provisions of this rule would be impracticable or where the motion does not raise significant legal issues and could be resolved summarily.

**(5) Telephone conference.** The court on its own motion or at a party's request may direct arguments of any motion by telephone conference without court appearance. A verbatim record shall be made of all telephone arguments and the rulings thereon if requested by counsel.

(Amended effective January 15, 1990; April 15, 1991.)

**Amendment Notes.** — The 1990 amendment rewrote this rule to such an extent that a detailed description is impracticable.

The 1991 amendment deleted "and a copy of

the proposed order" following "supporting documentation" in Subdivision (1)(b) and made related stylistic changes and inserted "principal" in Subdivision (3)(b).