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The Procedural Mirage: Post-Hall Summary Judgement Law in Florida

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NOTES

THE PROCEDURAL MIRAGE: POST-*HOLL* SUMMARY JUDGMENT LAW IN FLORIDA

The recent history of Florida's summary judgment rule[1] disclosed a judicial attitude diametrically opposed to the enthusiasm with which the procedure was originally received.[2] A study of 421 Florida appellate decisions rendered since 1967 reveals that 81.2 per cent of all appealed summary judgments have been reversed, at least in part,[3] thereby prolonging litigation and adding to litigants' expense and delay.

Florida Rule of Civil Procedure 1.510, derived from Federal Rule 56,[4] governs Florida summary judgments; its function is simply to provide for

1. FLA. R. CIV. P. 1.510. The operative section of the rule is §1.510(c), which is set forth in full in the text accompanying note 16 *infra*.

2. The summary judgment is a relatively recent addition to the attorney's procedural arsenal. It was first introduced in England in 1855 primarily to help plaintiffs overcome sham pleadings and delay by defendants. When the device was first introduced in New York in 1921 initial response was highly favorable; by 1940 a New York jurist proclaimed that "this summary remedy is working exceedingly well." D. SHIENTAG, SUMMARY JUDGEMENT 104 (1941). It was believed that parties would no longer attempt to advance feigned issues because the "repressive" character of the rule would render them futile. In this way the rule would discourage perjury and would facilitate early settlements. *Id.* at 3. In blunt contrast with this initial reaction to the device, Florida commentators in 1972 observed: "Summary judgments are generally not a favored device for terminating litigation in Florida." Massey & Klock, *Civil Procedure, Tenth Survey of Florida Law*, 26 U. MIAMI L. REV. 470, 547 (1972).

3. The full statistical results of the study are presented in tabular form in the Appendix. As indicated in the text, the compilation includes as "reversals" those cases where summary judgments were reversed in part; the result, of course, is to make the percentage reversal figures slightly higher. Because in these cases the partial reversals meant that final adjudication had not been accomplished through use of the summary judgment device, therefore prolonging the litigation in the same manner as in cases wherein reversal was "total," it is submitted that the figures as presented do not represent a statistical distortion.

Multiple and mixed holdings in these decisions also account for the fact that some of the numerical and percentage totals will not always balance. The use of this form in presentation of the results is to emphasize the obvious statistical lesson that emerges from this study: an overwhelming majority of summary judgments in Florida do not succeed and provide the movant with only temporary, hence illusory, relief.

The body of cases studied is so great as to render presentation of all the cases in tabular form in an appendix both unwieldy and unreadable. Citations in the footnotes are designed to provide a cross-section of all cases studied sufficient to reflect accurately the trends contained therein as indicated in summary form in the Appendix.

Undoubtedly the 421 cases do not comprise all the summary judgment decisions handed down since the appearance of volume 200 of the *Southern Reporter*, 2d series, which was selected as an arbitrary starting point for the study. Although a few cases undoubtedly escaped the sweep of the author's net, the cases compiled unquestionably represent the vast majority of decisions over the approximate seven-year period involved. The statistics are therefore submitted with a high degree of confidence in their accuracy.

4. FLORIDA CIVIL PRACTICE BEFORE TRIAL, *Summary Judgment* §19.5 (Fla. Bar Continuing Legal Educ. Practice Manual No. 11, 1969) [hereinafter cited as *Summary Judgment*].

early resolution of litigation where no questions of fact exist.[5] Theoretically, the device serves the purpose of expeditiously settling the interests of the parties and reducing the litigation load in the trial docket.[6] It is an open question, however, what purposes the summary judgment serves *in fact* if it so often results in reversal. Despite the overwhelming likelihood of reversal if appealed, counsel and trial courts continually resort to the summary judgment, sometimes with disastrous results. In the leading modern Florida case on the subject, *Holl v. Talcott*,[7] defendants in a medical malpractice action won summary judgment at the trial court and affirmance at the district court of appeal.[8] This victory was reversed by the supreme court, however, and after a subsequent trial, plaintiffs won a verdict and judgment for $1.5 million, a result affirmed by the same district court that had originally approved defendants' summary judgment.[9] Other less dramatic cases with the same basic outcome are abundant.[10] The statistics demonstrate that in more than four out of every five cases relief by summary judgment is short-lived. They indicate that the device has been misused and misunderstood by trial courts and counsel to the extent that it is becoming less useful to deserving parties. The inescapable conclusion is that rule 1.510, as applied by Florida courts in recent years, presents merely an attractive mirage to civil litigants.[11]

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5. *See* Massey & Klock, *supra* note 2, at 547, *citing* Page v. Staley, 226 So. 2d 129 (4th D.C.A. Fla. 1969), wherein the court enumerated three purposes of a summary judgment: (1) to determine whether evidence exists to justify trial on issues raised in the pleadings, (2) to expedite litigation, and (3) to reduce expense.

6. *Cf.* FLA. R. CIV. P. 1.010: "[T]o secure the just, speedy and inexpensive determination" of the action. *See* Stephens v. Dichtenmueller, 216 So. 2d 448, 451 (Fla. 1968) (Drew, J., concurring specially); Ham v. Heintzelman's Ford, Inc., 256 So. 2d 264, 267 (4th D.C.A. Fla. 1971).

7. 191 So. 2d 40 (Fla. 1966). Statistics were not kept on the number of times *Holl* was cited in the 421 cases examined in this study. It is estimated by the author, however, that it is cited twice as often as any other recent case on the subject in Florida. Of importance to the general subject of summary judgments is the fact that *Holl* emerged from the factual matrix of a medical malpractice action, a class that comprises a very small proportion of summary judgment decisions; significantly, it is often cited as authority in cases dealing with areas of law well removed from the milieu of malpractice. *E.g.*, Travel Internationale, Ltd. v. Batchelor, 234 So. 2d 648, 649 (Fla. 1970) (action for, *inter alia*, inducement to lease through misrepresentation and breach of contract); Stringfellow v. State Farm Fire & Cas. Co., 295 So. 2d 686 (2d D.C.A. Fla. 1974) (reversal of summary judgment for defendant-insurer on question of effectiveness of insurance coverage of defendant-insurer); Wagner v. Bonucelli, 239 So. 2d 619, 620 (4th D.C.A. Fla. 1970) (summary judgment for plaintiff-payee on demand note reversed).

8. Holl v. Talcott, 171 So. 2d 412 (3d D.C.A. Fla. 1965).

9. Talcott v. Holl, 224 So. 2d 420 (3d D.C.A. Fla. 1969).

10. *E.g.*, Mendez v. Blackburn, 226 So. 2d 340 (Fla. 1969); Butler v. Porter-Russell Corp., 217 So. 2d 298 (Fla. 1968); Stephens v. Dichtenmueller, 216 So. 2d 448 (Fla. 1968); MacArthur v. Gaines, 286 So. 2d 608 (3d D.C.A. Fla. 1973); Blank v. Yoo-Hoo of Florida Corp., 222 So. 2d 420 (Fla. 1969).

11. Further difficulty is posed by the wide disparity of treatment given summary judgments in various cases by the Florida appellate courts. Countless decisions merely recite the incantation that the movant for summary judgment has not demonstrated conclusively the absence of a genuine issue of material fact. *See, e.g.*, Hudson v. Fatolitis, 289 So. 2d 41 (2d D.C.A. Fla. 1974); Graham v. First Marion Bank, 237 So. 2d 793 (1st D.C.A. Fla. 1970); Tyler v. Gulf Coast Rd. & Equip. Co., 227 So. 2d 547 (3d D.C.A. Fla. 1969); McClendon v. Key, 209

Accordingly, this note examines in depth recent developments in Florida summary judgment law. Within a statistical framework,[12] an extensive examination of judicial interpretations and limitations of rule 1.510(c) is followed by discussion of the use of summary judgment in the major areas of negligence litigation and actions arising *ex contractu*. The functions and perspectives of counsel, trial courts, and appellate courts in summary adjudication are analyzed, concluding with suggestions for counsel to consider in deciding whether and when to move for summary judgment.[13]

THE FOCAL POINT: THE DUAL REQUIREMENT OF RULE 1.510(c)

The rules governing summary judgments are straightforward and simple.[14] Nevertheless, three basic problems recur in summary judgment law over the period studied. These are the definitions governing the basic requirements of the rule, the pervasive influence of two major decisions,[15] and confusion over the burdens placed on parties moving for and opposing summary judgment. Timing considerations compound the problem.

Threshold and Definitional Problems

A party moving for summary judgment must meet a twofold requirement:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admission on file together with the affidavits [in support or opposition, or both] if any, show [1]

So. 2d 273 (4th D.C.A. Fla. 1968), while others exhaustively sort and analyze the issues for trial, as in Mackey v. Arnold, 242 So. 2d. 754 (4th D.C.A. Fla. 1970). *Compare* Rosenberg v. Bank of Commerce, 256 So. 2d 17 (4th D.C.A. Fla. 1971), *with* Varnadoe v. Desoto Canning Co., 256 So. 2d 226 (2d D.C.A. Fla. 1972). See text accompanying notes 168-170 *infra*.

12. See Appendix. While the 421 cases studied for the purposes of this Note do not comprise an exhaustive collection of summary judgment decisions since 1967, they do constitute the substantial majority of summary judgment cases since that time, indicating that the statistical conclusions drawn therefrom are substantially accurate. The limited resources of the author also precluded collection of data on unappealed summary judgments (although it seems likely there are few of these), and on denials of motions for summary judgment at the trial court level. Given these limitations, however, the size of the statistical sample lends sufficient weight to the conclusions reached.

13. Conversely, suggestions for attacking summary judgment will be presented concurrently.

14. FLA. R. CIV. P. 1.510. The essential dual requirement, enumerated in §1.510(c), see text accompanying note 16 *infra*, is the focus of most of the appellate decisions. This will also be the primary focus in the discussion below. See text accompanying notes 16-107 *infra*. The apparent simplicity of the rule often leads courts merely to reiterate elementary matters on the subject without adding anything new. *See, e.g.*, Egan v. Washington Gen. Ins. Corp., 240 So. 2d 875, 878 (4th D.C.A. Fla. 1970); Knight v. American Heritage Life Ins. Co., 237 So. 2d 224, 225 (1st D.C.A. Fla. 1970); Fischer v. Bernard's Surf, 217 So. 2d 576 (4th D.C.A. Fla. 1969); Tyner v. Woodruff, 206 So. 2d 684 (4th D.C.A. Fla. 1968); Hellweg v. Holmquist, 203 So. 2d 209 (4th D.C.A. Fla. 1967).

15. Visingardi v. Tirone, 193 So. 2d 601 (Fla. 1966); Holl v. Talcott, 191 So. 2d 40 (Fla. 1966). The enormous influence of these cases is discussed in text accompanying notes 29-46 *infra*.

> that there is no genuine issue as to any material fact and [2] that the moving party is entitled to a judgment as a matter of law.[16]

The movant, who must satisfy *both* prerequisites to obtain summary judgment,[17] is confronted with definitional difficulties concerning each.

The "genuine issue" requirement has generated considerable comment at the appellate level; often the courts fail to define the term, as if it were quite clear to counsel and courts exactly what constitutes a "genuine issue as to a material fact," when the opposite is likely the case.[18] On occasion courts and counsel fail at the outset to distinguish between a determination of the *existence* of a genuine issue of material fact on the one hand and an *adjudication* of the facts on the other.[19] When a court engages in the latter, the "genuine issue" requirement is bypassed altogether, and a remand is the result.

When reviewing courts do address themselves to the definitional question, as in *Byrd v. Leach*,[20] the term "genuine issue" is defined descriptively as a "real, as opposed to a false or colorable issue."[21] Other courts have described the term as meaning a "justiciable"[22] or "triable"[23] issue. Perhaps more helpful is the functional description that if the "slightest doubt" exists as to presence of an issue of fact, then summary judgment cannot be granted.[24] Even where the trial court has before it all the evidence that will be adduced at trial or final hearing, the genuine issue requirement may still be met so long as there is a question for the trier of fact.[25] The complexity of the facts also generates judicial suspicion that genuine issues exist, therefore precluding summary judgment.[26] Aside from the "slightest doubt" and complexity tests, however, it is apparent that the courts have developed no comprehensive definition of the genuine issue requirement of section 1.510(c). This omission is surprising, for section (c) is the heart of the summary judgment rule.

The term "material fact" has also proved elusive of concrete definition. Presumably the standard evidentiary meaning is intended, but this assumption is confirmed nowhere in the recent body of Florida case law. One court attempted to define the entire genuine issue requirement as "disputed issue of

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16. FLA. R. CIV. P. 1.510(c); *see* Massey & Klock, *supra* note 2, at 547.

17. Nobles v. City of Jacksonville, 265 So. 2d 550 (1st D.C.A. 1972), *cert. denied*, 272 So. 2d 158 (Fla. 1973); Glens Falls Ins. Co. v. Board of Pub. Instruction, 213 So. 2d 741 (1st D.C.A. Fla. 1968).

18. *Cf.* Ham v. Heintzelman's Ford, Inc., 256 So. 2d 264, 267 (4th D.C.A. Fla. 1971).

19. *Id.* Sometimes the distinction is elusive and courts yield to the temptation to adjudicate. *Compare* Gentile v. Abadessa, 267 So. 2d 344 (4th D.C.A. Fla. 1972), *with* Lab v. Hall, 200 So. 2d 556, 559 (4th D.C.A. Fla. 1967) (Andrews, J., dissenting).

20. 226 So. 2d 866 (4th D.C.A. Fla. 1969). This opinion contains a lucid collection of the basic principles of summary judgment law.

21. *Id.* at 868.

22. Inland Rubber Corp. v. Helman, 237 So. 2d 291, 296 (1st D.C.A. Fla. 1970).

23. Mainor v. Hobbie, 238 So. 2d 499 (1st D.C.A. Fla. 1970).

24. Fletcher Co. v. Melroe Mfg. Co., 261 So. 2d 191, 193 (1st D.C.A. Fla. 1972); *cf.* Pacific Indem. Co. v. Pinellas County, 214 So. 2d 58, 60-61 (2d D.C.A. Fla. 1960).

25. Schollenberger v. Baskin, 227 So. 2d 79 (4th D.C.A. Fla. 1969).

26. 191 So. 2d at 46 (dictum).

critical fact,"[27] but this definition seems to collide with the slightest doubt standard. It may be that ultimate definition of the term is impossible; at this juncture in Florida summary law it is defined vaguely at best, and the definitional problem in all likelihood is a factor in the high reversal rate.

The Impact of Holl *and* Visingardi

Two medical malpractice actions decided in 1966 have exerted enormous influence on the development of Florida summary judgment law.[28] In both *Holl v. Talcott*[29] and *Visingardi v. Tirone*[30] the respective trial courts had stricken the plaintiffs' affidavits in opposition to defendants' motions for summary judgment, but the Florida supreme court reversed both decisions and remanded them for trial. The court in *Holl* held, *inter alia,* that the burden on parties moving for summary judgment is greater than that on plaintiff at trial, because the movant must prove a negative – the nonexistence of a genuine issue of material fact.[31] Moreover, the standard is that of conclusiveness;[32] the movant must remove all doubts as to the existence of any genuine issue of material fact,[33] although the text of the rule contains no such express requirement.[34] Until the movant conclusively demonstrates the absence of any genuine issue of material fact, it is not necessary for the court to reach the question of the legal sufficiency of any affidavits offered in opposition to the motion.[35]

In addition to imposing this high standard, the court in both cases appeared to lower the criterion to be met by affidavits submitted in opposition to a motion for summary judgment. The *Holl* court suggested in dictum that the opposing party need not, in his opposing affidavit, "cover all the details and formalities that would be required in offering the same experts' testimony at . . . trial"[36] lest the summary judgment process prematurely balloon into a full-blown trial, rather than remain a search for the issues.[37] The court added in *Visingardi* that the provisions of rule 1.510(e), which requires that affidavits submitted in opposition to the motion for summary judgment set forth such facts as would be admissible in evidence, do not require the opposing party

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27. Nichols v. Village Park Mobile Home Estates, Inc., 237 So. 2d 807 (2d D.C.A. Fla. 1970).

28. Croft v. York, 244 So. 2d 161, 164 (1st D.C.A. Fla. 1971); Grimes v. Holt, 225 So. 2d 566, 569 (3d D.C.A. Fla. 1969); Grove v. Sanford Mobile Park, Inc., 212 So. 2d 34, 37 (4th D.C.A. Fla. 1968).

29. 191 So. 2d 40 (Fla. 1966).

30. 193 So. 2d 601 (Fla. 1966).

31. 191 So. 2d at 43.

32. *Id.*

33. *Id.* at 48, *citing* Harvey Bldg., Inc. v. Haley, 175 So. 2d 780 (Fla. 1965).

34. See FLA. R. CIV. P. 1.510(c).

35. 191 So. 2d at 43, 45. It should be noted, however, that rule 1.510 by its terms does not *require* affidavits to be submitted in opposition to motions for summary judgment. FLA. R. CIV. P. 1.510(c).

36. 191 So. 2d at 45.

37. *Id.; see* 193 So. 2d at 605.

to "make out his whole case before his affidavit is admissible."[38] Although the court in *Visingardi* was concerned primarily with the issue of sufficiency of affidavits in opposition to motions for summary judgments, it complemented *Holl*'s imposition of a heavier burden on the movant by establishing a lesser burden on the opposing party. There may have been previous Florida cases on the general subject of the relation between the relative burdens of the parties,[39] but *Holl* and *Visingardi* were emphatic and exhaustive in their treatment and, coming so close together, were bound to exert substantial influence on summary judgment law.

In studying and, more importantly, in utilizing post-*Holl* summary judgment law, one must remember that both opinions emerged from medical malpractice causes. And, as the *Holl* court noted, summary judgment procedures are to be used with special care in negligence actions, particularly in malpractice cases.[40] Although the *Holl* court refrained from speculating on the potential impact of its opinion on the body of summary judgment law in general,[41] the impact clearly has been substantial.[42] It follows that a major reason why summary judgments have met with such little success in Florida in recent years is simply that these cases were decided in the context of an area of substantive law – malpractice – which is rarely amenable to summary adjudication.

The supreme court appeared to retreat from these exacting standards in *Travel Internationale, Ltd. v. Batchelor*.[43] The court affirmed summary judgment for a defendant who allegedly induced the plaintiff to enter an airplane lease contract through misrepresentation, and then allegedly breached the contract. Approving the course taken by the district court of appeal in testing the genuine issue requirement simply by inquiring whether there was "undisputed fact,"[44] the trial court's finding that the "undisputed facts" presented to it revealed no cause of action on behalf of the opposing party was considered by the supreme court tantamount to a finding that no genuine issues of material fact existed. The court was convinced that its decision was in harmony with *Holl*[45] and simply did not address itself to the issue of whether movant had met its burden under the earlier case. Focusing on the court's decision, rather than its language, suggests that the high standard of *Holl* was not applied. Nonetheless, *Travel Internationale* appears to be an aberration that

38. 193 So. 2d at 604.

39. Concerning the movant's burden to show conclusively the absence of a genuine issue of material fact, see Harvey Bldg., Inc. v. Haley, 175 So. 2d 780 (Fla. 1965); *cf.* Matarese v. Leesburg Elks Club, 171 So. 2d 606, 607 (2d D.C.A. Fla. 1965).

40. 191 So. 2d at 46.

41. *Id.*

42. See cases cited note 28 *supra*. The court in Kochan v. American Fire & Cas. Co., 200 So. 2d 213 (2d D.C.A.), *cert. denied*, 204 So. 2d 329 (Fla. 1967), warned that *Holl* arising as it did from a cause of action *ex delicto*, should have no bearing on cases arising *ex contractu*. *Id.* at 220. The court's admonition has been ignored substantially.

43. 234 So. 2d 648 (Fla. 1970).

44. *Id.* at 658.

45. *Id.*

has not been followed. *Holl* and *Visingardi* should therefore be considered intact in terms of their impact on Florida summary judgment law.

*The Post-*Holl *Approach*

The approach of post-*Holl* reviewing courts usually begins with an inquiry whether a movant has satisfactorily met the burden of conclusively showing the absence of any genuine issue of material fact.[46] If it finds the movant has not met this burden, reversal is automatic and it is not necessary for the court to move to the second aspect of the inquiry – the question whether movant is entitled to judgment as a matter of law. Although there is no language in any case making the point directly, the courts seem to view the dual requirement as a two-step progression: a party will not be entitled to judgment as a matter of law until he has proved the absence of a genuine issue of material fact. In at least one instance, however, the First District Court of Appeal made no mention of the inquiry into the existence of genuine issues of material fact and reversed from the opposite direction by finding movant was not entitled to summary judgment as a matter of law. In *Nobles v. City of Jacksonville*,[47] a personal injury action, the court, after reciting the dual requirements of rule 1.510(c), went straight to the question of whether a municipal ordinance placed a duty of care on various municipal officials responsible for maintenance of the bridge on which the plaintiff had been injured. Finding that it had created such a duty, the court reversed the summary judgment.[48] The court did not state whether the movant in this case had successfully met its burden of showing the absence of genuine issues of material fact. *Nobles* warns that even if the "threshold" burden is met the movant is not automatically assured of an affirmable summary judgment, emphasizing the additional requirement on the movant to show his entitlement to judgment as a matter of law.

A comparison between a motion for summary judgment and one for directed verdict is helpful in delineating the scope of the dual requirement of rule 1.510(c).[49] Although the former antedates trial while the latter occurs at trial and after presentation of the evidence, the two motions are analogous in that they will be granted only when no "questions of fact" remain and only "questions of law" are left for adjudication.[50] But in the vast body of summary

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46. *E.g.*, Moore v. School Bd., 292 So. 2d 244 (2d D.C.A. Fla. 1974); Moody v. Seaboard Coastline R.R., 287 So. 2d 707 (2d D.C.A. Fla. 1974); Krantz v. Donner, 285 So. 2d 699 (4th D.C.A. Fla. 1973); Goodman v. Anthony, 269 So. 2d 756 (3d D.C.A. Fla. 1972).

47. 265 So. 2d 550 (1st D.C.A. Fla. 1972).

48. *Id.* Even when the facts are stipulated and both parties are amenable to summary adjudication, judgment will not be available unless the dual requirement is met. See text accompanying notes 60-64 *infra.*

49. *Summary Judgment, supra* note 4, §19.3.

50. In one case it was held summary judgment would be granted if at trial a directed verdict would be awarded. Locke v. Stuart, 113 So. 2d 402 (1st D.C.A. Fla. 1959). But denial of the motion for summary judgment does not necessarily foreclose the direction of verdict at trial. *Summary Judgment, supra* note 4, §19.3. Perhaps the distinguishing feature of the motion is that it may be made at virtually any point along the procedural continuum short of trial. See text accompaning notes 108-117 *infra.*

judgment decisions handed down since *Holl,* no satisfactory explication of the sometimes narrow distinction between questions of "fact" and "law" has been formulated for the purpose of passing on the validity of summary judgments.[51] Thus, the matter is left for determination by trial courts on a case-by-case basis.

One test set forth in an older case[52] utilizes the distinction between "evidentiary" facts and "ultimate" facts; the latter are the operative facts relating to the cause of action or defense, as the case may be, and may be in dispute even when the basic or "evidentiary" facts ("what was done or said") are not.[53] The court did not equate "ultimate facts" with "material facts," but this meaning clearly emerges. Therefore, for the purpose of summary judgment the determination of the ultimate facts is for the trier of fact, so that even when only questions of ultimate fact remain, the cause is not amenable to summary adjudication.[54] This approach, however, has apparently been utilized very little in recent years.

A related and far more frequently utilized technique is that of examining the "inferences of fact reasonably deducible from [the] undisputed evidence."[55] Even when a material fact is not in dispute, summary judgment will be denied if conflicting inferences emerge therefrom.[56] In one personal injury case, for example, the evidence of a slippery floor caused by an oil slick was held by the court to *require* one of two inferences, the latter of which would have placed a duty of care on defendants.[57] Because a genuine issue of material fact

51. The question of fact-question of law distinction is similar to the problem discussed in the text accompanying notes 18-19 *supra,* concerning the difficulty experienced by some courts in discerning fact adjudication and determination of the existence of factual issues.

52. National Airlines, Inc. v. Florida Equip. Co., 71 So. 2d 741 (Fla. 1954).

53. *Id.* at 744. *National Airlines* was an action for breach of contract in which the "evidentiary facts" of defendants' removal of old engines from plaintiffs' boat were undisputed. Plaintiff contended that this evidentiary fact, coupled with the evidentiary fact of a signed order received by defendant, led to a finding of ultimate fact of defendants' acceptance of plaintiffs' offer. *Id.*

54. *Id.* The determination of the ultimate facts showing the formation of a contract was held by the *National Airlines* court to be a matter "peculiarly within the province of the jury." *Id. But see* Shafer & Miller v. Miami Heart Institute, 237 So. 2d 310 (3d D.C.A. Fla. 1970), wherein the court, in a personal injury action, affirmed summary judgment for cross-claimant owner against co-defendant contractor, stating in part: "The trial judge correctly held that there was no genuine issue of material fact as to ultimate fact that if liability existed for the injury that the liability existed because of an 'act or omission of the said contractor.' It follows from the clear wording of the contract that as a matter of law the appellee was entitled to the partial summary judgment upon liability." *Id.* at 311. The court's treatment of "ultimate fact" seems to conflict directly with the term as used by the supreme court in *National Airlines.* The confusion may have been compounded by the court in Duprey v. United Serv. Auto. Ass'n, 254 So. 2d 57 (1st D.C.A. Fla. 1971), when it cited *Shafer & Miller* as authority in affirming summary judgment for defendant-insurer. Still, *National Airlines* has not been overruled and sets forth the correct rule. If this approach is revived in summary judgment litigation, *National Airlines* should control and, in fact, could help to clear up some of the current confusion concerning rule 1.510(c).

55. Tatman v. American Heritage Life Ins. Co., 215 So. 2d 11 (1st D.C.A. Fla. 1968).

56. Ham v. Heintzelman's Ford, Inc., 256 So. 2d 264, 267 (4th D.C.A. Fla. 1971); Herold v. Computer Components Int'l, Inc., 252 So. 2d 576 (4th D.C.A. Fla. 1971); General Fire & Cas. Co. v. Bent, 204 So. 2d 38, 41 (1st D.C.A. Fla. 1967) (Wigginton, J., dissenting).

57. Bars v. Morrison-Knudsen Co., 222 So. 2d 445 (4th D.C.A. Fla. 1969).

thus emerged, in terms of a conflict of deducible inferences, summary judgment for defendants was reversed.[58]

Not infrequently both parties move for or indicate amenability to summary adjudication, presumably in most instances because they are convinced only "questions of law" remain to be decided. In such instances, as where counsel stipulate for the use of the summary judgment procedure,[59] the trial court is not bound if genuine issues of material fact exist.[60] One case where the reviewing court upheld summary judgment because "all parties were in agreement concerning the material issues of fact"[61] likely has little precedential value because the opposing party attempted to amend her fact averments on appeal in an effort to generate de novo a question of fact. Finally, if the subject matter of the case involves a new or uncharted area of law, agreement or stipulation of the parties to summary adjudication will not suffice to prevent reversal. In *Van Arsdale v. Dimil Land Co.*,[62] a dispute concerning certain rights to recently discovered mineral and petroleum deposits, the court, citing "critical unplumbed areas," remanded the case for trial on the merits. In spite of the stipulated agreement of counsel to summary adjudication, the court stated that there were disputed fact issues but stressed the need for a full trial of the novel issues involved:

> We feel that the conflicts in the testimony of the experts and the summary presentation does [*sic*] not afford an adequate basis for a definitive treatment and judgment.
>
> It is generally understood that in certain parts of Florida, at least, there have been significant oil and mineral discoveries. Thus a careful pronouncement in this case could do much to insure orderly development in future conveyancing.[63]

One may justifiably conclude that post-*Holl* reviewing courts are simply hostile to summary judgments, and use a variety of techniques to defeat them.

Burdens on Moving and Opposing Parties

The burden on the movant, substantial enough as set forth in the rule,[64] has been described by the *Holl* court as even greater than that on plaintiff at trial. While the plaintiff can win his case on the strength of the greater weight of the evidence, the movant for summary judgment must show *conclusively* that there are no genuine issues of material fact.[65] The question of what is conclusive for the purpose of meeting the burden has not been resolved clearly. It apparently does not require that a movant exhaust *all* possible claims or

58. *Id.*
59. Schollenberger v. Baskin, 227 So. 2d 79 (4th D.C.A. Fla. 1969).
60. Van Arsdale v. Dimil Land Co., 264 So. 2d 85 (4th D.C.A. Fla. 1972).
61. Keller v. Penovich, 262 So. 2d 243, 244 (4th D.C.A. Fla. 1972).
62. 264 So. 2d 85 (4th D.C.A. Fla. 1972).
63. *Id.* at 86.
64. FLA. R. CIV. P. 1.510(c).
65. Holl v. Talcott, 191 So. 2d 40 (Fla. 1966).

defenses, although in *Madison v. Haynes*[66] summary judgment for plaintiff apparently was reversed for that very reason: plaintiff failed to negate the unlikely but possible affirmative defense of valid title in defendant's predecessor in title.[67] The "conclusive" requirement *does* mandate that the reviewing court draw all possible inferences in favor of the opposing party[68] and means that if such inferences are sufficient in themselves to indicate the existence of genuine issues of material fact, the summary judgment will not be permitted to stand.[69] Although the movant is technically not placed under the burden of excluding *every* possible inference in favor of the opposing party,[70] the courts at times seem to suggest that a movant meet that burden.[71] The court in *Visingardi,* in fact, went so far as to spell out the inferable issues that the movant had failed to foreclose and that thus dictated the reversal of summary judgment.[72]

Even given the substantial burden placed on the moving party,[73] the opposing party is nevertheless in no position passively to assume denial or reversal.[74] Still, the "burden" does not "shift" to the opposing party until a movant has conclusively met his task of proving the dual requirements of rule 1.510(c).[75] In *Fletcher Co. v. Melroe Manufacturing Co.*[76] the trial court, which had ordered a new trial after finding that a jury verdict for plaintiff was not supported by the evidence, granted summary judgment for defendants. Nonetheless, the district court of appeal reversed because genuine issues of material fact remained unresolved, even though the plaintiff had been unable to meet its evidentiary burden at trial.[77]

When the burden does "shift"[78] to the opposing party, the courts are gen-

66. 220 So. 2d 44 (4th D.C.A. Fla. 1969).

67. *Id.* at 46.

68. Prestress Erectors, Inc. v. James Talcott, Inc., 213 So. 2d 296, 298 (3d D.C.A.), *cert. denied,* 219 So. 2d 702 (Fla. 1968).

69. *See* Greer v. Workman, 203 So. 2d 665 (4th D.C.A. Fla. 1967).

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

71. Tyner v. Woodruff, 206 So. 2d 684, 687 (4th D.C.A. Fla. 1968).

72. 193 So. 2d at 606.

73. 191 So. 2d at 40.

74. Matarese v. Leesburg Elks Club, 171 So. 2d 606, 607 (2d D.C.A. Fla. 1965).

75. Croft v. York, 244 So. 2d 161, 163-64 (1st D.C.A.), *cert. denied,* 246 So. 2d 787 (Fla. 1971).

76. 261 So. 2d 191 (1st D.C.A. Fla. 1972).

77. *Id.* at 193. The court also invoked the "slightest doubt" test in assessing whether movant had met the "conclusiveness" requirement.

78. There is some conflict whether the burden of "proof" "shifts," or whether the opposing party is under the somewhat less stringent duty to "come forward with the evidence" in opposition to the motion. See text accompanying notes 88-93 *infra.* Perhaps the courts would benefit by adopting the approach of one commentator who recognizes three distinct burdens relating to the establishment of legal claims. The first is the burden of *pleading* the facts required to establish a party's substantive claim or defense. The second is the initial burden of *producing evidence* of the existence or nonexistence of the fact. The third burden is that of *persuading* the factfinder of the existence or nonexistence of the fact. K. HUGHES, EVIDENCE §23 (Massachusetts Practice vol. 19, 1961). Substituting the words "genuine issues of material fact" for "fact" in the foregoing definition, it appears that a movant's burden, as defined by *Holl,* is that of *persuasion* — persuading the trial court of the nonexistence of the genuine issue of material fact. According to this view the burden of

erally amenable to denying (or reversing) summary judgment so long as the opposing party can demonstrate existence of the "slightest doubt" as to issues of material fact or inferences arising therefrom.[79] Here again an aberrant decision confuses and contradicts the principle. In *Lindsey v. Seaboard Coastline Railroad Co.*,[80] a wrongful death action, the reviewing court affirmed a summary judgment for the defendant railroad, holding that inasmuch as it was "extremely doubtful" that application of the train's emergency brakes would have prevented the collision, the opposing party failed to meet her burden of showing the existence of a genuine issue of material fact.[81]

Assuming a movant does meet his burden, and that the burden in fact "shifts," the "paper issue" principle may defeat opposing parties who rely, for example, merely on naked denial in the pleadings as the basis for claiming existence of genuine issues of material fact.[82] The cases make clear that the party moved against may not "sit back and do nothing."[83] Nevertheless, the courts generally adopt a minimal standard in testing the sufficiency of affidavits offered in opposition; ordinarily the opposing party need only establish the existence of evidence that meets the "slightest doubt" standard.[84] In *Ham v. Heintzelman's Ford, Inc.*,[85] for example, a certificate of title containing the legend "previously used in long-T lease" was held sufficient to generate a genuine fact issue as to the question of alleged misrepresentation by defendant over its claim that the document — which was plaintiff's sole evidence appended to his affidavit in opposition — violated the hearsay rule and "paper issue" principle.[86]

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persuasion does *not* shift. Thus, it would appear that the party opposing the motion is under the *second* burden — that of producing evidence of the existence of genuine issues of material fact. Although this view does not describe the quantum of evidence required to meet this second burden, it is clear that in the summary judgment context it would be considerably less than the burden of persuasion, as indicated in the text accompanying note 79 *infra*.

79. Fletcher v. Melroe Mfg. Co., 261 So. 2d 191, 193 (1st D.C.A. Fla. 1972); *cf.* Smith v. Baker, 206 So. 2d 409 (4th D.C.A. Fla. 1968).

80. 248 So. 2d 518 (1st D.C.A. Fla. 1971).

81. *Id.* at 521. This case is also unusual in its approach to determining the validity of the trial court's action in granting the summary judgment; the court seemed to accept without question the premise that movant-defendant had met its burden, and framed its inquiry solely in terms of whether the plaintiff had established existence of any genuine issues of material fact. In this regard it appears to be at variance with the requirement for review implicitly set forth in *Holl*.

82. Kochan v. American Fire & Cas. Co., 200 So. 2d 213, 216 (2d D.C.A. Fla. 1967); *see* General Fire & Cas. Co. v. Bent, 204 So. 2d 38, 39 (1st D.C.A. Fla. 1967). *But cf.* Rinzler v. Carson, 262 So. 2d 661, 665 (Fla. 1972) (plaintiff's sworn complaint raised justiciable issue as to physical possession of firearm in replevin action).

83. Matarese v. Leesburg Elks Club, 171 So. 2d 606, 607 (2d D.C.A. Fla. 1965).

84. Lampman v. City of North Miami, 209 So. 2d 273 (3d D.C.A. Fla. 1968).

85. 256 So. 2d 264 (4th D.C.A. Fla. 1971).

86. *Id.* at 268-69. The plaintiff relied on this certificate because a statute required that automobile dealers who sold automobiles that had been leased previously were required to so indicate on certificates of title by inserting the legend: "This motor vehicle has previously been used under long-term lease." *Id.*

The uncertainty that permeates this entire area of summary judgment law extends even to the description of the "burdens" on moving and opposing parties. Against *Holl*'s flat assertion that movant carries a burden of proof greater than that on plaintiff at trial but that the burden shifts to the opposing party once the movant has met it successfully,[87] the court in *Byrd v. Leach*[88] expressly stated that the burden does *not* shift to the opposing party but that the opposing party must go forward with "evidence sufficient to generate an issue on a material fact."[89] This variance in descriptions by the courts suggests a blurry delineation of the scope of the burden on the opposing party, a problem that unquestionably contributes to the high reversal rate.[90] Clearly, a plaintiff need not prove all the elements of his case in opposition to a motion for summary judgment as he would in opposition to a motion for directed verdict at trial.[91] On the other hand, it is insufficient for a defendant seeking to interpose an affirmative defense in opposition to a motion for summary judgment merely to assert the defense in the pleadings.[92] It is not at all clear, however, what is required of defendant beyond the level of pleadings.[93]

The evidentiary requirements on the parties at the motion hearing provide yet another area of uncertainty. By one view, when defendant moves for summary judgment the inquiry is whether, from the pleadings, depositions and affidavits it has been shown conclusively that plaintiff cannot possibly prove his case.[94] If there is a possibility, however remote, that plaintiff may be able to adduce sufficient evidence to establish a prima facie cause of action, the courts will disallow summary judgment.[95] "Critical" differences between the depositions of opposing parties, by virtue of their generating "massive conflict," have been held sufficient to lift the case from the level of summary adjudication.[96] There appears to be no set rule governing the extent to which reviewing courts are bound by the pleadings, depositions, and answers to interrogatories on which the order granting summary judgment is based. Accordingly, the courts appear at times to strain to find genuine issues in the record when it is

87. Holl v. Talcott, 191 So. 2d 40 (Fla. 1966).

88. 226 So. 2d 866 (4th D.C.A. Fla. 1969).

89. *Id.* at 868.

90. Unequivocal adoption of Professor Hughes' three-burden test would almost certainly alleviate this difficulty; see note 78 *supra*.

91. 193 So. 2d at 605.

92. Tippett v. Frank, 238 So. 2d 671, 673 (3d D.C.A. Fla. 1970).

93. *Compare* Tippett v. Frank, 238 So. 2d 671 (3d D.C.A. Fla. 1970), *with* Haren v. Sundie, 219 So. 2d 731 (3d D.C.A. Fla. 1969). It should be noted, however, that rule 1.510(c) does not require the submission of affidavits in support of or in opposition to the motion for summary judgment. Because rule 1.510(a) permits the motion within 20 days of the filing of the initial pleading by plaintiffs, and any time after commencement of the action in the case of defendants, it is conceivable that summary judgment could be granted before the pleading stage is complete, to say nothing of discovery. In theory, at least, summary judgment can be rendered on the pleadings alone.

94. Food Fair Stores of Florida, Inc. v. Patty, 109 So. 2d 5 (Fla. 1959); Williams v. Florida Realty & Management Co., 272 So. 2d 176 (3d D.C.A. Fla. 1973).

95. Charles Taylor Marine, Inc. v. State Farm Fire & Cas. Co., 234 So. 2d 400, 402 (3d D.C.A.), *cert. denied,* 238 So. 2d 109 (Fla. 1970).

96. Lescrynski v. Middlebrook. 260 So. 2d 215 (4th D.C.A. Fla. 1972).

questionable whether such issues in fact exist.[97] Ordinarily, credibility of witnesses and quality of the evidence presented in opposition to a motion for summary judgment are not considered by the trial court at the hearing.[98] But the supreme court noted in *Escobar v. Bill Currie Ford, Inc.*[99] that summary judgment could conceivably be granted where the evidence in opposition is "either too incredible to believe or is without probative value even if true."[100] Summary judgment will also withstand attack where the opposing party's evidence requires a pyramiding of inferences.[101]

Inherent in any appeal from summary judgment is the irreconcilable conflict between the presumption in favor of the correctness of the trial court's decision and the requirement that the reviewing court draw every possible inference in favor of the party against whom the motion is made.[102] The corollary to this rule is that the movant's papers be read strictly.[103] The statistics strongly suggest that movants should not rely on the presumption in favor of the trial court's decision. The impression that emerges from the data might be described as an *a posteriori* presumption *against* the correctness of the ruling of the lower court.[104] It appears, therefore, that when the appellate courts state that summary judgments are an extreme form of relief they mean to be taken literally. The extreme independence exhibited by courts reviewing summary judgments is illustrated in *Graff Enterprises v. Canal Insurance Co.*,[105] wherein the court found it could not concur with the reasoning on which the trial court relied in granting summary judgment, but nonetheless affirmed on separate grounds.[106] Notwithstanding the trepidation with which appellate courts view summary judgments, they will not indulge inferences in favor of the opposing party when he attempts to raise new issues in opposition for the first time on appeal.[107]

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97. *Cf.* Tucker v. American Employers Ins. Co., 218 So. 2d 221, 223 (4th D.C.A. Fla. 1969) (Walden, C.J., dissenting); Lab v. Hall, 200 So. 2d 556, 559 (4th D.C.A. Fla. 1967) (Andrews, J., dissenting).

98. Tucker v. American Employers Ins. Co., 218 So. 2d 221, 223 (4th D.C.A. Fla.), *appeal dismissed*, 227 So. 2d 482 (Fla. 1969).

99. 247 So. 2d 311 (Fla. 1971) (dictum).

100. *Id.* at 315, *citing* Johnson v. Studstill, 71 So. 2d 251 (Fla. 1954). It is not clear why the court inserted this dictum in its opinion; it is clearly contrary to the weight of authority. Industrial Sales & Serv. Corp. v. Duval Motors, Inc., 245 So. 2d 891 (3d D.C.A. Fla. 1971); *see* Massey & Klock, *supra* note 2, at 547; Massey & Bridges, *Civil Procedure, Eighth Survey of Florida Law*, 22 U. MIAMI L. REV. 495, 498 (1968).

101. Byrd v. Leach, 226 So. 2d 866, 868 (4th D.C.A. Fla. 1969).

102. First Realty Corp. v. Standard Steel Treating Co., 268 So. 2d 410, 413 (4th D.C.A. Fla. 1972) (Mager, J., dissenting).

103. 191 So. 2d at 46 (dictum).

104. See Appendix.

105. 213 So. 2d 738 (1st D.C.A. Fla. 1968).

106. *Id.* at 740. Ordinarily in review of summary judgment, the court will frame the question simply in terms of whether the trial court correctly found the nonexistence of genuine issues of material fact, and affirm or reverse accordingly.

107. Jones v. Life Ins. Co., 215 So. 2d 889 (3d D.C.A. 1968), *cert. denied*, 225 So. 2d 539 (Fla. 1969).

Timing Problems

Because the purposes of the summary judgment require flexibility, the motion can be made at virtually any pretrial stage of the action.[108] In this respect motions for summary judgment differ from the pleadings, responsive motions, motions for judgment on the pleadings, or motions for directed verdict, all of which are limited to fixed stages of the litigation. Summary judgment is therefore potentially available at any point before trial. As a result, courts are often faced with the question of whether summary judgment has been entered prematurely. Although the rule appears to contemplate a fairly complete record,[109] the elastic provisions of subsections (a) and (b) permit submission of the motion early in the pleading stages,[110] so that when the motion is utilized in accordance with these provisions it serves as little more than a motion to dismiss and has the same procedural effect.[111] In *Watier v. Rew Crane Service, Inc.*,[112] for example, the court held per curiam that although the summary judgment appealed from was properly entered, opportunity should have been afforded plaintiff to amend her complaint, and such authorization could have been included in the order granting summary judgment.[113] On the other hand, when utilized after the discovery stage at the other end of the procedural continuum, the motion when granted may be dispositive of at least some aspects of the case.[114] In such an instance, use of the summary judgment approximates the effect of a directed verdict. The general trend of decisions disfavors summary judgments rendered in the early stages of litigation,[115] and insists both on hearings on the motion[116] and on liberal treatment of motions for rehearing.[117] It appears that the very flexibility of the motion for summary judgment, in terms of timing, makes it a disruptive and delaying factor when entered pre-

108. FLA. R. CIV. P. 1.510(a)-(b).

109. FLA. R. CIV. P. 1.510(c) permits rendition of summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits if any" indicate movant has met this dual burden.

110. FLA. R. CIV. P. 1.510(a) provides in essence that a claimant may move for summary judgment "after the expiration of twenty days from the commencement of the action." FLA. R. CIV. P. 1.510(b) allows a party against whom a claim is asserted to move for summary judgment "at any time."

111. *Cf.* Sea Shore Motel Corp. v. Fireman's Fund Ins. Co., 233 So. 2d 651 (4th D.C.A. Fla. 1970) (where summary judgment is proper but it appears that opposing party may have a cause of action if properly pleaded, and the proper procedure is to grant summary judgment with leave to amend).

112. 240 So. 2d 177 (4th D.C.A. Fla. 1970).

113. *Id.* at 179. Judge Owens, concurring specially, thought the court did not need to go so far to reach the result it did, and could have rested on the theory that defendant-movants failed to demonstrate that they were entitled to judgment as a matter of law. *Id.*

114. FLA. R. CIV. P. 1.510(c).

115. Lovelace v. Sobrino, 280 So. 2d 514 (3d D.C.A. Fla. 1973); *see* Smith v. Continental Ins. Co., 281 So. 2d 393 (2d D.C.A. Fla. 1973). *See generally* Tyner v. Woodruff, 206 So. 2d 684 (4th D.C.A. Fla. 1968) (supporting proofs for plaintiff's motion for summary judgment held insufficient to overcome every theory on which defendant's position could be maintained).

116. Lovelace v. Sobrino, 280 So. 2d 514 (3d D.C.A. Fla. 1973).

117. *Cf.* Anderson v. Aamco Transmissions of Brevard, Inc., 265 So. 2d 5 (Fla. 1972).

maturely, in much the same manner as a motion to dismiss. This explains its attractiveness to some litigants, as well as the disfavor in which it is held by reviewing courts.

"Right to Trial"

In reversing summary judgments Florida appellate courts commonly express solicitude for litigants' rights to jury trial.[118] But right to trial is not legal justification for denying summary judgment, inasmuch as that right comes into being only when a genuine issue of material fact exists between the parties.[119] The courts in recent years have used a variety of means to circumvent this point in order to assist litigants in getting to trial. Examples are: (1) emphasizing the burden on movant;[120] (2) minimizing the burden on the opposing party;[121] (3) invoking the difference between the determination of the existence of factual issues and the adjudication of those issues;[122] and (4) expressing preference for directed verdicts at trial after plaintiff has had the opportunity to present factual issues fully to the trier of fact.[123] Only when opposing parties "sit idly by" and do nothing, or when absolutely no evidence exists to support the opposing party's cause of action or defense,[124] does the courts' solicitude for the right to trial appear to wane.

TRENDS IN CLASSES OF ACTIONS

As might be expected, the highest rates of reversal of summary judgments occur in negligence and medical malpractice actions.[125] "Success" (that is, affirmance) is somewhat, but not significantly, more likely in actions arising *ex contractu,* creditors' actions and non-negligence tort claims, and miscellaneous actions pertaining to the title, possession and use of real and personal property.[126] Given the caveat that summary judgments are to be entered with great caution in negligence cases,[127] however, it is surprising that the wide

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118. *E.g.,* Stephens v. Dichtenmueller, 216 So. 2d 448, 450 (Fla. 1968); Page v. Staley, 226 So. 2d 129, 132 (4th D.C.A. Fla. 1969); Stephens v. Moody, 225 So. 2d 586, 588 (1st D.C.A. Fla. 1969).

119. The Florida supreme court has held that summary judgment does not infringe on the constitutional right to jury trial. See Williams v. City of Lake City, 62 So. 2d 732 (Fla. 1953). *But see* Escobar v. Bill Currie Ford, Inc., 247 So. 2d 311, 315 (Fla. 1971), where the court observed in dictum that "[t]he summary judgment procedure is limited else the opposing party loses his constitutional right to trial."

120. Holl v. Talcott, 191 So. 2d 40 (Fla. 1966).

121. Byrd v. Leach, 226 So. 2d 866, 868 (4th D.C.A. Fla. 1968).

122. Ham v. Heintzelman's Ford, Inc., 256 So. 2d 264, 267 (4th D.C.A. Fla. 1971). See text accompanying notes 108-117 *supra.*

123. See text accompanying notes 73-93 *supra.*

124. 226 So. 2d at 868.

125. Negligence: 88.5%; malpractice: 87.5%. See Appendix.

126. The reversal rates in these classes of cases range from 76.0% to 83.3%. See Appendix.

127. Stephens v. Moody, 225 So. 2d 586 (1st D.C.A. Fla. 1969); Maury v. City Stores Co.,

disparity in reversal percentages (a difference of 12.5 per cent between negligence actions and "other" actions – primarily creditor actions and non-negligence tort claims)[128] is not greater. It is also notable that, although the summary judgment was originally conceived as a procedural aid for plaintiffs,[129] it is now used more than twice as often by defendants,[130] with only slightly less success.[131]

Summary judgments are attempted most often in the cases arising *ex contractu* and in negligence actions,[132] and some trends in summary judgment law unique to each of these broad classes of actions are therefore discernible.[133]

Negligence and Medical Malpractice

Despite the appellate courts' reiteration that ordinarily the jury should decide negligence questions,[134] counsel and trial courts stubbornly persist in attempting to utilize summary judgment.[135] The extraordinary burden placed on movant[136] – nearly always defendant in negligence actions[137] – renders the movant's task nearly impossible; the "possible" existence of inferences giving

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214 So. 2d 776 (3d D.C.A. Fla. 1968); Jones v. Crews, 204 So. 2d 24 (4th D.C.A. Fla. 1967); Dutton v. Ryder's Motel, Inc., 200 So. 2d 823 (2d D.C.A. Fla. 1967).

128. Percentage of negligence reversals (88.5%) minus "other" reversals (76.0%) equals 12.5%. See Appendix.

129. See note 2 *supra*.

130. In the 421 cases studied, defendants moved for summary judgment in 293 cases, plaintiffs in 128. See Appendix, table 2.

131. Defendants were reversed on appeal in 82.6% of the total cases while plaintiffs were reversed in 76.5% of the cases, a difference of 6.1%. See Appendix, table 2.

132. Of the 421 decisions studied by the author, nearly 75% of them (300) fell into one of these two broad categories. See Appendix, table 1.

133. The malpractice cases will be considered with the negligence cases. The other two classes of cases, miscellaneous cases pertaining to real and personal property, and miscellaneous creditor and intentional tort actions, were relatively small and so internally varied as to make identification of trends unique to those classes of cases unfeasible. The two major classes of cases, by comparison, were sufficiently large and homogeneous to facilitate analysis and conclusion about certain basic aspects of the state of summary judgment law in each class.

134. See cases cited note 127 *supra*.

135. See Appendix. The motivation for counsel in seeking summary judgment in these cases is clear enough; usually the movant is defendant who wants to avoid the jury. The reasons why trial courts persist in *granting* summary judgments in negligence actions is not clear, and certainly cannot be attributed to any single factor. Among the possible motivations are a desire to lessen the trial docket and perhaps a desire to force plaintiffs into accumulating more "hard" evidence to justify taking the case to trial. Of course, there doubtless are instances where the trial court is convinced defendant has met his twofold burden under FLA. R. CIV. P. 1.510(c).

136. In Byrd v. Leach, 226 So. 2d 866 (4th D.C.A. Fla. 1968), the court flatly stated summary judgment is appropriate when no evidence of negligence is present. It is inferable from the court's assertion that this is the only situation in which summary judgment is permissible in a negligence action.

137. Holl v. Talcott, 191 So. 2d 40 (Fla. 1966). Of the 123 negligence cases examined in this study, defendant was movant in 116. See Appendix.

rise to genuine issues of material fact presents an imposing barrier.[138] Moreover, in reviewing summary judgments in negligence actions, courts will often strain to find possible inferences in favor of opposing parties.[139]

In terms of the basic principles of negligence theory, reviewing courts look for an utter absence of linkage between defendant-movant and proximate cause and usually do not find it.[140] For the purposes of withstanding a motion for summary judgment, plaintiff need not establish defendant's duty in detail[141] because the courts in fact are willing to imply the obligation.[142] Thus, close scrutiny by the courts usually results in a finding that defendant has failed to foreclose the possibility of genuine issues of material fact.[143]

In *Glisson v. North Florida Telephone Co.*,[144] a slip-and-fall case, the trial court granted defendant's motion for a new trial on the ground that the verdict was contrary to the manifest weight of the evidence. Because "a new trial on the same evidence would be a useless gesture,"[145] the court granted defendant's motion for summary judgment. The district court of appeal, pointing out that trial courts have much broader discretion in granting a new trial than in granting summary judgment, reversed on the ground that the defendant had not met its *Holl* burden of demonstrating conclusively the nonexistence of genuine issues of material fact. The district court's previous affirmance of the new trial order "did not mean that there was *no* evidence introduced before the jury in support of plaintiffs' case."[146] In short, the fact that plaintiffs had not adduced sufficient evidence to prove their negligence claim was insufficient in itself to justify summary judgment for defendants.

Another case, *Lindsey v .Seaboard Coastline Railroad Co.*,[147] is an exception to appellate courts' adherence to this strict approach in negligence actions. Here, instead of framing the question in terms of whether the defendant had met its burden of proving the nonexistence of genuine issues of material fact on the question of negligence, the court stated the issue as whether *plaintiff* had met her "burden" of proving the *existence* of genuine issues.[148] Given this approach, it is hardly surprising that the court found that plaintiff failed to meet her burden and affirmed the summary judgment for the defendant.[149]

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138. Williams v. Florida Realty & Management Co., 272 So. 2d 176 (3d D.C.A. Fla. 1973); *see* Anderson v. Aamco Transmissions of Brevard, Inc., 265 So. 2d 5 (Fla. 1972).

139. *Cf.* Lab v. Hall, 200 So. 2d 556, 559 (4th D.C.A. Fla. 1967) (Andrews, J., dissenting).

140. Thomas v. Atlantic Associates, Inc., 226 So. 2d 100 (Fla. 1969); Byrd v. Leach, 226 So. 2d 866 (4th D.C.A. Fla. 1969); Grove v. Sanford Mobile Park, Inc., 212 So. 2d 37 (4th D.C.A. Fla. 1968).

141. Grove v. Sanford Mobile Park, Inc., 212 So. 2d 37 (4th D.C.A. Fla. 1968).

142. *Id.*

143. Butler v. Porter-Russell Corp., 217 So. 2d 298 (Fla. 1968).

144. 210 So. 2d 25 (1st D.C.A. Fla. 1968).

145. *Id.* at 26.

146. *Id.* at 27.

147. 248 So. 2d 518 (1st D.C.A. Fla. 1971).

148. *Id.*

149. An illustration of what happens when the court takes the approach opposite to that taken in *Lindsey* — focusing on whether the movant has met his burden will be found in the factually similar case of Mackey v. Arnold, 242 So. 2d 754 (4th D.C.A. Fla. 1971)

It is difficult to predict the impact of the adoption of the comparative negligence rule on the use of the motion for summary judgment in negligence actions, but it seems probable that it will have some deterrent effect.[150] It appears, however, that current law will remain valid vis-a-vis defendants who seek to avoid liability altogether.

In the specialized area of medical malpractice, *Holl* and *Visingardi* have virtually closed the door to defendants seeking summary judgment.[151] The percentage reversal rate (87.5 per cent) is probably misleading because summary judgment is rarely granted in these cases; the rate would likely be higher if more cases were appealed. While the *Holl* court set forth several thoretical circumstances in which a malpractice defendant might obtain affirmable summary judgment,[152] in practice the defense must be able to prove the absence of negligence by an evidentiary standard approaching the level of "clear and convincing." In *Rosen v. Parkway General Hospital, Inc.*[153] the only recent medical malpractice case found in which summary judgment for defendants was affirmed, defendants were able to prevail because they demonstrated that the patient who died in the wrongful death action had been injured so badly it was impossible to save her.[154] Even when given factual situations that appear eminently amenable to summary judgment, however, courts are loathe to approve it in this class of cases.[155]

Actions Arising Ex Contractu

Summary judgments have a better chance of ultimate success in the broad class of actions arising *ex contractu,* which includes actions involving insurance, actions on notes, and landlord-tenant cases.[156] But even in these cases, which so often revolve around written instruments and thus are more amenable to findings that only questions of law exist,[157] the courts reviewing sum-

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(summary judgment for defendant reversed). The preferable approach is set forth in K. HUGHES, *supra* note 78, §23.

150. Because the culpability for injuries and death caused by negligence can now be apportioned using comparative negligence theory, movants for summary judgments will face the almost insurmountable burden of proving no negligence whatever in order to prevail. With contributory negligence no longer an absolute bar to recovery, it seems logical to predict that courts will be much less amenable to granting summary judgment in this class of cases.

151. In the approximately seven years of summary judgment case law studied by the author, only eight malpractice decisions were found. See Appendix.

152. The *Holl* court pointed out that movant can succeed by (1) showing conclusively he is not guilty of the negligence charged against him, (2) showing conclusively that the alleged negligence was not related to plaintiff's injury, or (3) showing conclusively that plaintiff is completely unable to present proof of the alleged negligence. 191 So. 2d at 47-48.

153. 265 So. 2d 93 (3d D.C.A. Fla. 1972).

154. *Id.*

155. *Cf.* Lab v. Hall, 200 So. 2d 556 (4th D.C.A. Fla. 1967).

156. The reversal rate is 77.4% compared with 88.5% in negligence cases. See Appendix, table 1.

157. Westchester Fire Ins. Co. v. In-Sink-Erator, 252 So. 2d 856, 858 (4th D.C.A. Fla. 1971); Shafer & Miller v. Miami Heart Institute, 237 So. 2d 310 (3d D.C.A. Fla. 1970).

mary judgment have indicated a willingness to go beyond the four corners of the writing if there is any indication of a genuine issue of material fact surrounding execution. Summary judgments on matters such as modification of written contracts and disputes concerning interpretation or mistake[158] are carefully examined by reviewing courts to determine whether the trial court actually made findings of disputed fact in reaching its conclusion about the "questions of law."[159] The same close scrutiny pertains where, when performance is claimed by the movant, questions of agency[160] and delivery arise.[161] Reversal is likely when it appears the trial court based its decision (at least in part) on the admissibility or probative value of documents appended to affidavits in opposition to the motion.[162] The assertion of affirmative defenses in opposition to the motion renders affirmance unlikely if accompanied by affidavits that set forth the possibility of evidentiary support.[163]

The largest single subgroup in the broad category of control actions is the insurance case in which the insured attempts to recover from the insurer under any of a wide variety of policies. Generally, mere denial of coverage in the insurer-movant's supporting affidavit has been held insufficient to foreclose the existence of any genuine issues of material fact.[164] Reversal occurs, too, where the appellate court finds the trial court has made findings of fact with reference to the terms of the policy in question.[165] Because the issue of coverage involves a linkage of the facts with the policy provisions, the courts usually find a genuine issue of material fact, which they occasionally spell out on remand.[166]

FUNCTIONS OF COURTS AND COUNSEL

Appellate Courts

The function of the appellate courts in the summary judgment process is to frame, clarify, and explicate the provisions and limitations of rule 1.510(c) and, in the context of reviewing cases, to delineate the situational boundaries within which it will be permitted. Most importantly, the appellate courts'

158. Wagner v. Bonucelli, 239 So. 2d 619 (4th D.C.A. Fla. 1970); Charles Taylor Marine, Inc. v. State Farm Fire & Cas. Co., 234 So. 2d 400 (3d D.C.A. Fla. 1970).

159. Pacific Indem. Co. v. Pinellas County, 214 So. 2d 58 (2d D.C.A. Fla. 1968); Glens Falls Ins. Co. v. Board of Pub. Instruction, 213 So. 2d 741 (1st D.C.A. Fla. 1968).

160. Herold v. Computer Components Int'l, Inc., 252 So. 2d 576 (4th D.C.A. Fla. 1971).

161. Westchester Fire Ins. Co. v. In-Sink-Erator, 252 So. 2d 856 (4th D.C.A. Fla. 1971).

162. Ham v. Heintzelman's Ford, Inc., 256 So. 2d 264 (4th D.C.A. Fla. 1971).

163. Coquina Ridge Properties v. East West Co., 255 So. 2d 279 (4th D.C.A. Fla. 1971).

164. Stringfellow v. State Farm Fire & Cas. Co., 295 So. 2d 686 (2d D.C.A. Fla. 1974). Conversely, in Old Equity Life Ins. Co. v. Suggs, 263 So. 2d 280 (2d D.C.A. Fla. 1972), judgment for the insured was reversed where the insurer had responded to plaintiff's "Request for Admissions" with blanket denials, because the "Request" was for an admission as to a legal conclusion and not simply as to a fact.

165. Tatman v. American Heritage Life Ins. Co., 215 So. 2d 11 (1st D.C.A. Fla. 1968).

166. An excellent example of this will be found in Knight v. American Heritage Life Ins. Co., 237 So. 2d 224 (1st D.C.A. Fla. 1970), *quoted* in pertinent part in the text accompanying note 204 *infra*.

chief function in summary adjudication is to provide workable guidelines for trial courts and counsel.

The general disfavor in which appellate courts hold summary judgments is obvious from the statistics[167] as well as from the pronouncements of the courts themselves.[168] It often surfaces in close cases where the existence of a genuine issue of material fact is doubtful;[169] in such instances the courts draw the "issues" sufficiently broadly or vaguely to justify their finding that a genuine issue of material fact remains unresolved.[170] On occasion, possibly influenced by the equities of the case, the courts appear to reach to find a genuine issue in the face of a strong case in favor of summary judgment.[171] In other cases, however, the appellate courts will pinpoint for counsel and trial court the precise finding of fact on which reversal is predicated.[172]

The reviewing courts' treatment of the facts from which the genuine issues ostensibly emerge in any given case varies from detailed exposition[173] to no particulars of the case at all.[174] Likewise, in discussing concurrence or disagreement with the trial court's decision, the appellate courts in some cases set forth the unresolved issues in detail. In other cases they simply register agreement or disagreement with the trial court without setting forth their reasons. For example, in *Bell v. Gray*,[175] a case *affirming* summary judgment for defendant in a negligence action, the court declined the opportunity to give trial courts and counsel an idea of the standards to be met in seeking summary judgment in such actions and contented itself with agreement with the trial court's assessment of the evidence. Nevertheless, concise statements of the operative facts and unresolved justiciable issues of fact do not seem beyond reach,[176] and would provide helpful guidance to courts and counsel in avoiding frivolous use of the device. It seems clear that the present confusion and high reversal rate in summary judgment law is due in part to the widely varying and inconsistent treatment of such cases by Florida appellate courts.

The appellate courts periodically indicate a desire for trial courts to set forth the grounds on which summary judgments are based,[177] although this practice is not required by the rule.[178] If the trial court's findings require *any*

167. See Appendix.

168. *E.g.*, Stephens v. Dichtenmueller, 216 So. 2d 448 (Fla. 1968); Holl v. Talcott, 191 So. 2d 40 (Fla. 1966).

169. *See* Tucker v. American Employers Ins. Co., 218 So. 2d 221 (4th D.C.A. Fla. 1969); Lab v. Hall, 200 So. 2d 556 (4th D.C.A. Fla. 1967).

170. *See* Tucker v. American Employers Ins. Co., 218 So. 2d 221 (4th D.C.A. Fla. 1969); Lab v. Hall, 200 So. 2d 556 (4th D.C.A. Fla. 1967).

171. Wagner v. Bonucelli, 239 So. 2d 619 (4th D.C.A. Fla. 1970).

172. Gentile v. Abadessa, 267 So. 2d 344 (4th D.C.A. Fla. 1972).

173. Egan v. Washington Gen. Ins. Corp., 240 So. 2d 875 (4th D.C.A. Fla. 1970); Schollenberger v. Baskin, 227 So. 2d 79 (4th D.C.A. Fla. 1969).

174. *E.g.*, Claudio v. Miami Aerospace Academy, Inc., 291 So. 2d 72 (3d D.C.A. Fla. 1974); Dilallo v. Winn-Dixie Stores, Inc., 267 So. 2d 843 (4th D.C.A. Fla. 1972).

175. 220 So. 2d 446 (1st D.C.A. Fla. 1969).

176. *See, e.g.*, Gentile v. Abadessa, 267 So. 2d 344 (4th D.C.A. Fla. 1972).

177. *E.g.*, Tatman v. American Heritage Life Ins. Co., 215 So. 2d 11 (1st D.C.A. Fla. 1968); Tyner v. Woodruff, 206 So. 2d 684 (4th D.C.A. Fla. 1968).

178. FLA. R. CIV. P. 1.510(c) is explicit as to the record materials to be submitted to the

inferences in favor of movant, reversal is assured. In any event, it appears that appellate courts, perhaps subconsciously, are somewhat more receptive to summary judgments where the record on appeal is full and accompanied by the trial court's opinion.[179] Finally, reviewing courts exhibit sensitivity to instances where it is even possible that the trial court may have based its decision on the credibility of witnesses or the probative value of the evidence.[180] Such cases also result in reversal.

Trial Courts

One of the failings of trial courts is the frequent omission, in the judgment itself, of the grounds on which its decision to grant summary judgment is based.[181] When this occurs the appellate court is left to speculate on the basis for the action of the trial court, and the judgment is put in jeopardy.

In some instances rendition of summary judgment is proper because of defective pleadings; here the appellate courts indicate the proper action for trial courts is to include in the order granting summary judgment authorization for the opposing party to amend.[182] In one case, however, it was held that because plaintiff had not introduced evidence that he had misstated his position, it was proper for the trial court to grant defendant's motion for summary judgment without granting plaintiff leave to amend his complaint.[183]

Given the flexibility of the timing provisions of the rule,[184] the trial court could conceivably grant summary judgment before the pleading stage is complete. Success in this instance is unlikely, however, especially when no hearing on defensive motions has been held,[185] the answer has not been filed,[186] or where discovery is incomplete.[187]

Technical deficiencies in opposing affidavits, without more, are generally held by the appellate courts to be insufficient justification for the entry of summary judgment.[188] The preferred procedure is to allow the opposing party to cure the shortcomings by amendment if possible. Likewise, where a witness in an action makes a subsequent inconsistent statement in an opposing affidavit, it has been held that the proper procedure for the trial court is to re-

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trial court for its decision on the motion, and §1.510(d) requires the trial court to make an order specifying nondisputed facts in instances where summary judgment is dispositive as to some of the issues of the case. The rule is silent as to requirements for a record for appeal.

179. See text accompanying notes 109-118 *supra*.

180. Tucker v. American Employers Ins. Co., 218 So. 2d 221 (4th D.C.A. Fla. 1969).

181. Mowery v. First Nat'l Bank, 228 So. 2d 298 (4th D.C.A. Fla. 1969); Newman v. Shore, 206 So. 2d 279, 280 (3d D.C.A. Fla. 1968).

182. Watier v. Rew Crane Serv., Inc., 240 So. 2d 177, 179 (4th D.C.A. Fla. 1970).

183. Bernard Marko & Associates, Inc. v. Steele, 230 So. 2d 42, 44 (3d D.C.A. Fla. 1970).

184. FLA. R. CIV. P. 1.510(a)-(b); see text accompanying notes 108-117 *supra*.

185. Lovelace v. Sobrino, 280 So. 2d 514 (3d D.C.A. Fla. 1973).

186. Madison v. Haynes, 220 So. 2d 44 (4th D.C.A. Fla. 1969).

187. Lovelace v. Sobrino, 280 So. 2d 514 (3d D.C.A. Fla. 1973).

188. *See* Stephens v. Dichtenmueller, 216 So. 2d 448 (Fla. 1968); Holl v. Talcott, 191 So. 2d 40 (Fla. 1966). A succinct summary of the subject of sufficiency of affidavits will be found in Massey & Klock, *supra* note 2, at 549-51.

quire evidence through discovery and a further motion for summary judgment, rather than entering judgment outright.[189]

Both the statistics and a study of the cases themselves indicate that the attitude of trial courts toward summary judgments differs markedly from that of appellate courts. Certainly the existence of heavily-laden trial dockets would explain trial courts' willingness to settle cases through the expeditious mode of summary adjudication. The trial courts are understandably influenced as well by the amenability of both parties to the procedure.[190] Whatever the reasons for this disparate approach, the trial courts are unquestionably the key figures in the summary judgment process and thus are primarily responsible for the current problems in Florida summary judgment law.[191]

Counsel

In *J.M. Fields, Inc. v. Lenz,*[192] an indemnity dispute between defendants wherein summary judgment for one defendant was reversed, the court observed that an extended explanation of its decision was unnecessary because "it is apparent from the arguments and briefs that both parties are acquainted with summary judgment law."[193] The statistical evidence,[194] however, suggests that in most cases quite the reverse may be true. Indeed, the reviewing courts occasionally scold opposing counsel for failing to take proper measures when confronted by a motion for summary judgment.[195]

Among common failures of opposing counsel at the trial court level is the failure to submit affidavits or depositions in opposition to the motion for summary judgment.[196] Even in negligence actions, where the likelihood of denial or reversal is high, reliance on the "slightest doubt" rule alone may not be sufficient to defeat the motion.[197] Failure of opposing counsel simply to request more time to accumulate evidence in opposition[198] can result in entry of summary judgment.[199] The outcome is the same when counsel submits a

189. Andrews v. Midland Nat'l Ins. Co., 208 So. 2d 136, 137 (3d D.C.A. Fla. 1968).

190. See text accompanying notes 59-63 *supra.*

191. Certainly counsel and appellate courts have contributed to the current state of affairs, but it is apparent that trial courts are in the best position to *control* the use of the summary judgment. The undisciplined use of the device, evidenced by the numerous cases (and reversals) indicated in the Appendix, can be stemmed by rigorous scrutiny of summary judgment motions at the trial court level.

192. 257 So. 2d 305 (4th D.C.A. Fla. 1972).

193. *Id.* at 306.

194. See Appendix.

195. See Byrd v. Leach, 226 So. 2d 866, 868 (4th D.C.A. Fla. 1969).

196. *Id.*

197. *Id. See* Lindsey v. Seaboard Coastline R.R., 248 So. 2d 518 (1st D.C.A. Fla. 1971).

198. FLA. R. CIV. P. 1.510(f) is available for this purpose: "If it appears 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."

199. Byrd v. Leach, 226 So. 2d 866 (4th D.C.A. Fla. 1969); *cf.* Smith v. Continental Ins. Co., 281 So. 2d 393 (2d D.C.A. Fla. 1973).

deposition in opposition after judgment has been entered and after denial of a motion for rehearing.[200] The general rule prohibiting the raising of new defenses on appeal applies to appeals from summary judgments as well.[201] It is incumbent on opposing counsel to base his attack on the motion on *pleaded* defenses or causes of action; affirmance is the sanction.

In examining appellate opinions that delineate unresolved issues of fact, the reader is struck by the failure of opposing counsel either to recognize the issues or to convince the trial court of their validity.[202] A vivid illustration of the point is *Knight v. American Heritage Life Insurance Co.*,[203] a disability insurance policy dispute in which a final summary judgment was reversed and remanded with directions. After reciting the prerequisites for summary judgment the First District Court of Appeal catalogued the issues that apparently escaped the attention of opposing counsel:

> There existed genuine issues as to several material facts, including issues as to whether the plaintiff was totally and permanently disabled; whether the defendant was timely notified of the plaintiff's claim and, if not, whether the defendant, by its actions, waived formal notification and formal proofs; whether the facts shown create an estoppel or waiver on the defendant's part; whether the plaintiff used due diligence, or did the defendant have actual or constructive knowledge of the plaintiff's claim; whether the defendant is estopped from denying policy coverage if its claim agent had the confidence and trust of the illiterate insured, the plaintiff, and what damages, if any, the plaintiff is entitled to in the light of the evidence.[204]

The plethora of summary judgment cases in recent years suggests that the motion is employed by moving counsel almost reflexively, in a manner akin to moving for a directed verdict at trial. While counsel cannot be faulted for attempting the fastest possible adjudication of a client's interest, the question arises whether the "reflexive" motion for summary judgment ultimately gains the client anything. In 81.2 per cent of appealed summary judgments in the body of recent Florida case law the granting of the motion for summary judgment merely represented postponement of the cause to the trier of fact and added cost and delay to the client.

Suggestions for Counsel

The infinite variety of summary judgment cases, with their attendant inconsistencies and conflicts, precludes formulation of any ironclad rules for counsel to consider in determining whether and how to move for or oppose a motion for summary judgment. Some helpful suggestions do emerge, however, from the preceding analysis.

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200. Lane v. Haskoe, 200 So. 2d 268 (3d D.C.A. Fla. 1967).
201. Jones v. Life Ins. Co., 215 So. 2d 889 (3d D.C.A. Fla. 1968).
202. *See* Byrd v. Leach, 226 So. 2d 866 (4th D.C.A. Fla. 1969).
203. 237 So. 2d 224 (1st D.C.A. Fla. 1970).
204. *Id.* at 225.

In view of the statistics, moving counsel should realistically assess his chances for success on appeal. Even though the motion be made solely for the purpose of delay, the ultimate result in terms of the client's interest may be no different than if the cause proceeded directly to settlement or trial.[205] Obviously, consideration of the type of action involved is important; in negligence or malpractice actions, for example, the likelihood of a movant's success on appeal will be conditioned on conclusive demonstration of absence of duty and proximate cause.[206]

Moving counsel should remember, too, that his evidentiary burden will be greater than that on a plaintiff at trial. In many instances the moving party may have more proof available to it concerning the validity of its cause of action or defense than does the nonmoving party.[207] For this reason, reviewing courts will be inclined to reverse on the "slightest doubt" rationale or a finding of prematurity. An exhaustive search for all possible issues that could emerge from the facts will also provide an indicator of the likelihood of affirmance.[208] To put it another way, counsel should adopt the perspective of the reviewing court in scrutinizing the factual picture for genuine issues of material fact. At the same time, moving counsel should resist the temptation to take the evidentiary weaknesses of the opponent's case or the credibility of its witnesses into account. Finally, timing is an important consideration. The attractive flexibility of the timing provision notwithstanding, the chances for affirmance are reduced where summary judgment is rendered prior to conclusion of the pleading or discovery stages.

Opposing counsel's task is made easier by the disfavor in which appellate courts hold summary judgments, as well as by the considerable burden on moving counsel. This does not mean, however, that token or minimal opposition will insure denial at the trial court or reversal on appeal, especially as there are numerous weapons of attack in opposing counsel's arsenal. First, motions for rehearing should be pursued vigorously; ample case law, led by *Holl,* provides that such motions should be entertained liberally by trial courts.[209] Next, the apparently little-used section (f) of rule 1.510 provides that the court may refuse the application for judgment or order a continuance if opposing counsel shows present inability to "present by affidavit facts essential to justify his opposition."[210] More extensive use of this rule would in many instances reduce the likelihood of premature entry of summary judgment as

205. *See* Talcott v. Holl, 224 So. 2d 420 (3d D.C.A. Fla. 1969). While it may seem heretical to suggest that counsel entertain the possibility of *not* using a procedural device in a client's interest, it is apparent that in the special case of summary judgments, abstention would be less heretical than honest. If foregoing a motion for summary judgment — in the average case where ultimate failure is likely — reduces the cost and delay to the client, counsel can hardly be said to have not properly advanced his client's cause of action or defense. Even though many counsel employ the motion almost automatically, a motion for summary judgment is certainly not obligatory.

206. See text accompanying notes 64-107 *supra.*

207. *E.g.,* Smith v. Continental Ins. Co., 281 So. 2d 393 (2d D.C.A. Fla. 1973).

208. See text accompanying notes 202-204 *supra.*

209. 191 So. 2d at 46-47; *see Summary Judgment, supra* note 4, §19.20.

210. FLA. R. CIV. P. 1.510(f).

well as the cost and delay of appellate litigation. Similarly, at the hearing on the motion, arguments on the question of prematurity can be persuasive. If the opposing party has not had the opportunity to perfect his pleadings and complete discovery, he should be able to persuade the trial court that, given the opportunity, he will be able to meet the burden that has "shifted" to him.[211] In instances where it is apparent that the moving party has met the dual requirement of rule 1.510(c), opposing counsel generally risks entry of an order granting summary judgment by simply asserting naked denial or claim.[212] While reviewing courts do not insist that the opposing party prove its entire case at the hearing on the motion, opposing counsel should be prepared to show, through the introduction of affidavits, depositions, and other documents that he will be able to adduce, at trial, evidence that will at least raise the possibility of a genuine issue of material fact. The recent cases suggest that this threshold requirement is rather easily attainable if counsel will make bona fide efforts to oppose entry of summary judgment.

CONCLUSION

The statistics dramatically demonstrate that the use of the summary judgment device in Florida is producing the opposite of the intended effect. Instead of reducing delay and cost in an overwhelming majority of cases in which it is employed, it produces additional expense and prolongs unnecessarily the final disposition of the interests of litigants. It would be an exaggeration to conclude that counsel and trial courts are abusing the device, but it is clear that great care and caution are needed at the trial court level to restore the integrity of the procedure. Disciplined use and consideration of the motion for summary judgment by counsel and courts, respectively, would reduce the number of summary judgments reversed on appeal. Counsel and courts employing the device must always keep in mind that the leading cases in recent Florida summary judgment law arose in medical malpractice actions and thus impose more stringent restrictions on the use of the motion than might otherwise be the case.

It would also be helpful to incorporate into rule 1.510(c) the judicially-engrafted requirements that the movant *conclusively* "show that there is no genuine issue as to any material *ultimate* fact" *or to any infrences arising therefrom.* This change would not add to existing law, but it could serve to remind both trial courts and counsel that the summary judgment is an extreme form of relief ordinarily not available for the final disposition of a cause.

A reduction in the number of motions for summary judgment would probably have little effect in increasing the case load of trial courts because most summary judgments are reversed and proceed on to trial or settlement anyway. Such a reduction would, however, reduce the load of appellate litigation. Moreover, a decline in the number of appeals from summary judgments would in all likelihood reduce the "statistical presumption" of invalidity that now

211. *Cf.* Watier v. Rew Crane Serv., Inc., 240 So. 2d 177 (4th D.C.A. Fla. 1970); Sea Shore Motel Corp. v. Fireman's Fund Ins. Co., 233 So. 2d 651 (4th D.C.A. Fla. 1970).

212. See text accompanying notes 82-83 *supra.*

characterizes them. It is reasonable to expect that faced with fewer appeals from summary judgment, appellate courts would place more faith in trial court results than they do now. Perhaps most importantly, such a reduction would insure that parties with bona fide grounds for summary judgment will receive the expeditious adjudication they merit.

ROBERT T. HYDE, JR.

APPENDIX

(A tabular summary of the statistical results of a collection and study of 421 Florida summary judgment decisions rendered between 1967 and 1974, covering volumes 200 through 294, Southern Reporter, second series).

Table 1
PERCENTAGE REVERSALS BY MAJOR CLASSES OF CASES

Class of Cases	Total No. of Cases	No. Cases Summary Judgment Granted and Reversed[1]	No. Cases Summary Judgment Affirmed (outright)[2]	Percentage Reversal
Ex Contractu[3]	177	137	40	77.4
Negligence	123	109	14	88.5
Medical Malpractice[4]	8	7	1	87.5
Miscellaneous Property[5]	42	35	7	83.3
Other	71	54	9	76.0
Total	421	342	71	81.2

1. This figure also includes a small number of cases wherein summary judgment was denied, and upheld on appeal.

2. Multiple decisions — partial affirmances and reversals — account for the failure of the figures to balance. *See* note 9 *supra*.

3. This class includes ordinary contract actions, insurance cases and landlord-tenant actions.

4. The relatively very small size of this class, which easily could have been included in the negligence data, points rather dramatically to the statistically disproportionate influence of *Holl* in recent summary judgment law in Florida.

5. This class includes all actions concerning title, possession, and use of real and personal property, other than landlord-tenant cases.