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## Summary Judgment in Indiana

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## SUMMARY JUDGMENT IN INDIANA—DEFENSE REQUIRED

In *Kapusta v. DePuy*<sup>1</sup> the Supreme Court of Indiana registered its disapproval of the Appellate Court's comments on the conclusiveness of failure to respond to an adversary's properly substantiated motion for summary judgment filed in accordance with the state's summary judgment statute.<sup>2</sup> Possibly the Supreme Court's strictures marked a mere attempt to avoid an extreme position suggested in the lower court, but the upshot may well be a reversion to the now discredited rule that well-pleaded facts can stand in the face of contradictory affidavits, depositions, or other evidentiary matter which support a motion for summary judgment. The need for eradication of the confusion<sup>3</sup> engendered by *Kapusta v. DePuy* and for preclusion of a possible emasculation of the Indiana statute furnishes the impetus for the following comments.

Affirming summary judgment in *Kapusta v. DePuy*,<sup>4</sup> the Appellate Court noted that the state's rule was adopted verbatim from Federal Rule 56, as amended in 1963, and that its purpose was to establish the existence or non-existence of any fact issues for trial without protracted litigation.<sup>5</sup> Taking cognizance of the filing of a release by the defendant, and the plaintiff's failure to respond, the court noted: "The statute clearly provides that one relying solely upon his pleadings shall have summary judgment entered against him."<sup>6</sup> The appellee prevailed since he had raised a valid defense, and ". . . appellant's failure to file counter-affidavits gave force to a prima facie showing that appellee . . . was entitled to summary judgment as a matter of law."<sup>7</sup>

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1. *Kapusta v. DePuy*, —Ind.—, 234 N.E.2d 487 (1968).

2. IND. ANN. STAT. § 2-2524 (Burns Supp. 1968) (Indiana summary judgment statute).

3. There are unsubstantiated reports of confusion in the circuit and superior courts of Indiana. Some evidence of disagreement as to the implementation of the statute appeared in *Argus v. Matuska*, —Ind. App.—, 235 N.E.2d 205 (1968) (Faulconer, J., dissenting). In *Papp v. City of Hammond*, —Ind.—, 230 N.E.2d 326 (1967) (*semble*) there is *dictum* suggesting that ". . . without negation by the plaintiff in sworn answers to interrogatories and admission of facts, the facts alleged in the complaint must be taken as true," 230 N.E.2d at 329, where defendant was the moving party for summary judgment.

4. *Kapusta v. DePuy*, —Ind. App.—, 229 N.E.2d 828 (1967) (containing the alleged tort facts and trial court disposition). In 1959 plaintiff *Kapusta* was injured in an automobile accident. Subsequent surgery disclosed aggravation by a defective medical device, manufactured by *DePuy*. *Kapusta* later executed a general release which was successfully asserted in a motion for summary judgment.

5. *Id.* at 832. The court had first disposed of a contention by *DePuy* that the ninety day time limit for taking appeal had been violated and an argument by *Kapusta* that the release did not cover the defendant.

6. *Id.*

7. *Id.*

The Supreme Court affirmed in a unanimous opinion, but disapproved the language quoted above. The court set out the last two sentences of the Indiana summary judgment statute, section (e) :

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. (court's emphasis).<sup>8</sup>

According to the Supreme Court, "[t]he language of the [Appellate Court] opinion seems to indicate that the trial court need not decide if there is a material issue of fact."<sup>9</sup> Quoting the general standards for summary judgment<sup>10</sup> embodied in section (c) of the statute, the Supreme Court construed the words "if appropriate" to require, in light of that section, a finding of an issue of fact ". . . whether or not counter-affidavits are filed."<sup>11</sup> Observing the origin of the statute in Federal Rule 56, Judge Hunter quoted from the federal Advisory Committee's notes on the 1963 amendment:<sup>12</sup> "[T]he amendment [is not] designed to affect the ordinary standards applicable to the summary judgment motion."<sup>13</sup>

In 1948 in the Third Circuit Court of Appeals opinion in *Frederick Hart & Co. v. Recordograph Corp.*<sup>14</sup> it was suggested as dictum that an affidavit ". . . cannot be treated as proof contradictory to well-pleaded facts in the complaint."<sup>15</sup> Soon after in *Reynolds Metals Co. v. Metals Disintegrating Co.*<sup>16</sup> a district court confronted by a summary judgment motion with unsupported pleadings denied the motion but in doing so argued against the *Hart* case, considering it to strip judges of the power

8. *Kapusta v. DePuy*, —Ind.—, 234 N.E.2d 487 (1968), citing IND. ANN. STAT. § 2-2524(e) (Burns Supp. 1968).

9. *Id.* at 488.

10. IND. ANN. STAT. § 2-2524(c) (Burns Supp. 1968) : "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."

11. *Kapusta v. DePuy*, —Ind.—, 234 N.E.2d 487, 488 (1968).

12. *Id.* The complete text of these notes may be found at FED. R. CIV. P. 56, 28 U.S.C.A. 122 (Supp. 1967).

13. *Id.*

14. *Frederick Hart & Co. v. Recordograph Corp.*, 169 F.2d 580 (3d Cir. 1948), *rev'g*, 73 F. Supp. 146 (D. Del. 1947).

15. *Id.* at 581.

16. *Reynolds Metals Co. v. Metals Disintegrating Co.*, 8 F.R.D. 349 (D.N.J. 1948).

to strike sham pleadings.<sup>17</sup> The Third Circuit Court reversed but with a defense of the *Hart* opinion as interpreted by the district court.<sup>18</sup> This procedural gloss of the Third Circuit stood until the 1963 amendment.<sup>19</sup> As described by the Advisory Committee Report of 1955 “. . . mere allegation in the pleading [was] sufficient to create a genuine issue as to a material fact.”<sup>20</sup> In the words of Professor Wright “. . . summary judgment in the Third Circuit [was] dead as a dodo.”<sup>21</sup>

The Advisory Committee in 1955 proposed an amendment to Federal Rule 56 which would have conformed the Third Circuit to the other circuits.<sup>22</sup> With respect to the question of pleadings and response to affidavits the title was amended in section (e) to read “FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED” (Committee’s emphasis).<sup>23</sup> Further, the two sentences quoted by the Indiana Supreme Court from section (e) of the Indiana statute were to be added; the opposing party faced with affidavits could “. . . not rest upon the mere allegations or denials of his pleading . . .”<sup>24</sup> but would have to respond. In its note to the amendment the Committee observed that the provision would bring the rule within a result urged in commentary<sup>25</sup> and already reached by most federal courts. It was also noted, with apparent approval, that the line of cases from the Third Circuit had been alluded to as “patently erroneous.”<sup>26</sup> The amendment was to “. . . stimulate more frequent and effective use of this device, as urged by the Judicial Conference. . . .”<sup>27</sup>

The amendment was not promulgated until 1963. In the Seventh

17. *Id.* at 352. This opinion was criticized as out of date in an Editorial Note, 11 FED. RULES SERV. 154 (1948).

18. *Reynolds Metals Co. v. Disintegrating Metals Co.*, 176 F.2d 90 (3d Cir. 1949).

19. The Advisory Committee Notes to FED. R. CIV. P. 56(e), 28 U.S.C.A. 122 (Supp. 1967), mention the line of cases beginning with *Hart* and *Reynolds* as a continuing problem. See *Robin Constr. Co. v. United States*, 345 F.2d 610 (3d Cir. 1965).

20. REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 57 (1955), hereinafter cited as 1955 REPORT.

21. Wright, *Amending the Federal Rules*, 69 HARV. L. REV. 839, 849 (1956). This article contains an extensive history of the problems surrounding the *Hart* and *Reynolds* cases and, in general, the problem of attempting to let the federal courts work out their own procedural problems. See also 6 J. MOORE, FEDERAL PRACTICE ¶ 5615 (2d ed. 1966); 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1235.1 (C. Wright ed. 1958).

22. 1955 REPORT.

23. *Id.* at 56.

24. *Id.* at 56-57. The text is identical with the present Federal Rule 56(e) as amended in 1963 and IND. ANN. STAT. § 2-2524 (Burns Supp. 1968).

25. *Id.* at 57.

26. *Id.*, citing Comment, *Summary Judgment in the Federal Courts*, 99 U. PA. L. REV. 212, 214-15 (1950).

27. *Id.* It is noteworthy that in his dissent to the 1955 REPORT Professor Moore did not mention this amendment to Federal Rule 56 as he specifically did in the cases of rules 4, 8, 50, 60. (1955 REPORT at 6-8).

Circuit, in *Dismore v. Aetna Casualty & Surety Co.*,<sup>28</sup> a negligence case in which the plaintiff's answers to interrogatories controverted the complaint's allegations, the court held that ". . . the allegations of the complaint are not controlling where controverted by depositions, affidavits or answers to interrogatories."<sup>29</sup> A Southern District of New York court has commented that the 1963 amendment ". . . was designed to prevent the use of conclusionary and unsupported pleading allegations" to obstruct the speedy determination of a case which has no merit.<sup>30</sup> Even stronger language may be found in the Ninth Circuit: "Patently this amendment placed an absolute duty on the adverse party to set forth specific facts showing that there is a general issue of fact for trial."<sup>31</sup>

With some possible exceptions<sup>32</sup> that minority of states which had adopted Federal Rule 56 generally amended their procedure to conform to the Federal Rules.<sup>33</sup> Wyoming followed the same course and its supreme court considered the amendment's purpose too self evident to need clarification.<sup>34</sup>

In this form summary judgment was introduced in Indiana. During the 1965 legislative session a bill identical to Federal Rule 56 before the 1963 amendment was presented to the House. In the Senate this error was righted, even to the point of adding the title "Defense Required."<sup>35</sup>

In *Kapusta v. DePuy* the Supreme Court itself made interpretative use of federal material.<sup>36</sup> Such a reference, coupled with the fact that the Indiana rule was adopted verbatim from the Federal Rules, would seem to indicate that the statute as adopted and interpreted is to have the same effect as its federal progenitor. If pleadings are to be given equal weight with affidavits then Indiana will clearly be reverting to the error of the Third Circuit as corrected by the Federal Rules in 1963.

It is probable that in *Kapusta* the Supreme Court was striving to balance the various factors inherent in the implementation of the statute

28. *Dismore v. Aetna Cas. & Surety Co.*, 338 F.2d 568 (7th Cir. 1964). See also 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1235.1, n.22.24 (C. Wright ed. Supp. 1967).

29. 338 F.2d at 571.

30. *Hoffman v. Herdman's Ltd.*, 41 F.R.D. 275, 278 (S.D.N.Y. 1966). Cf. *Clayton v. James B. Clow & Sons*, 154 F. Supp. 108 (N.D. Ill. 1957); *United States v. Hurwitz*, 174 F. Supp. 925 (S.D.N.Y. 1959); *Crest Auto Supplies v. Ero Mfg. Co.*, 246 F. Supp. 224 (N.D. Ill. 1965).

31. *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 25 (D. Ore. 1966).

32. *Ramson v. Haner*, 362 P.2d 282 (Alaska, 1961) (*semble*); but cf. *Isler v. Jesen*, 382 P.2d 901 (Alaska, 1962).

33. *E.g.*, MINN. R. CIV. P. 56.05; ME. R. CIV. P. 56(e).

34. *Vipont Mining Co. v. Uranium Research & Dev. Co.*, 376 P.2d 868 (Wyo. 1961).

35. IND. S. JOUR., 1965 Sess., at 424. IND. H.R. 1271.

36. *Kapusta v. DePuy*, —Ind.—, 234 N.E.2d 487, 488 (1968) (FED. R. CIV. P. 56(e)); Advisory Committee Notes to FED. R. CIV. P. 56(e), 28 U.S.C.A. 122 (Supp. 1967)).

and to retreat from a possibly extreme position assumed by the Appellate Court and was not seeking to embrace the Third Circuit's now discarded notions. The Appellate Court opinion does contain some ill-chosen language. The use of the term "prima facie"<sup>37</sup> evokes considerable connotation of proof, while there is no question of making a factual choice under the statute. The courts are to decide only whether there is a choice to be made.<sup>38</sup> Concern over lack of adherence to this tenet was voiced by a dissenting Appellate Court judge in *Argus v. Matuska*<sup>39</sup> who objected to the apparent placing of a ". . . burden of proof upon the opponent to a motion for summary judgment. . . ."<sup>40</sup> The tension produced by missteps in this direction was early decried by Judge Frank in *Colby v. Klune*,<sup>41</sup> which he deemed ". . . one more regrettable instance of an effort to save time by an improper reversion to 'trial by affidavit'. . . ."<sup>42</sup> Clearly the courts must not allow the rule to become a ". . . handy instrument to let judges rather than juries try lawsuits. . . ."<sup>43</sup>

Nonetheless one legitimate object of the statute is conservation of the time and resources of litigants and of the courts.<sup>44</sup> It is with a view to this consideration that apparently unsupported pleadings are not permitted to stand in the face of affidavits or other proper evidentiary matter. The opposing party ". . . may not rest on mere allegations or denials . . .,"<sup>45</sup> but must ". . . show his hand and present facts which would justify a trial on [the] issue."<sup>46</sup> Section (e) implements this policy in providing for the "penalty" of entry of judgment against one who does not properly respond.

In both *Kapusta v. DePuy*<sup>47</sup> and *Argus v. Matuska*<sup>48</sup> it was noted that summary judgment is to be given only "if appropriate." This language of key import should be seen as an assertion that the policies

37. *Kapusta v. DePuy*, —Ind. App.—, 229 N.E.2d 828, 832 (1967).

38. *Hazeltine Research v. General Elec. Co.*, 183 F.2d 3 (7th Cir. 1950).

39. *Argus v. Matuska*, —Ind. App.—, 235 N.E.2d 205 (1968).

40. *Id.* at 207 (Faulconer, J., dissenting).

41. *Colby v. Klune*, 178 F.2d 872 (2d Cir. 1949). For a comment that the 1963 Federal Rules amendment tacitly criticizes this case, see *Dressler v. MV Sandpiper*, 331 F.2d 130 (2d Cir. 1964) (admiralty rules).

42. *Id.* at 872. *Cf.* *Duane v. Altenburg*, 297 F.2d 515 (7th Cir. 1962); *Clayton v. James B. Clow & Sons*, 154 F. Supp. 108 (N.D. Ill. 1957).

43. *Statement of Black and Douglas, JJ.*, 374 U.S. 865, 867 (1963) (dissenting to the promulgation of the 1963 amendments to the Fed. R. Civ. P.).

44. *Leake v. H.C. Jones*, 18 F.R.D. 80, 88 (W.D. Okla. 1955); *Prudential Ins. Co. of America v. Goldstein*, 43 F. Supp. 767, 768 (E.D.N.Y. 1942); *Sartor v. Arkansas Natural Gas Corp.*, 134 F.2d 433, 436 (5th Cir. 1943), *rev'd on other grounds* 321 U.S. 620 (1944); *Wright, supra* note 21, at 842.

45. IND. ANN. STAT. § 2-2524(e) (Burns Supp. 1968); FED. R. CIV. P. 56(e).

46. *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 25 (D. Ore. 1966).

47. *Kapusta v. DePuy*, —Ind.—, 234 N.E.2d 487 (1968).

48. *Argus v. Matuska*, —Ind. App.—, 235 N.E.2d 205 (1967).

which mark judicial efficiency as a desideratum must be weighed against the need to shield litigants from the inequities inherent in "trial by affidavit." It is the juncture at which more effective use shades into over-use which must be accurately perceived in fashioning the "appropriate" standard for summary judgment in Indiana.<sup>49</sup>

The "appropriate" relationship between affidavits and pleadings is not one of equal evidentiary weight but rather of mutual pertinence. Establishment of the criterion of appropriateness should be viewed as a pronouncement that a court must determine whether the affidavits are germane, *i.e.*, responsive to the pleadings. Obviously corollary is the observation that the non-moving litigant need only respond to the extent that a central issue in the action is challenged. In a contract action affidavits attacking offer and acceptance would not dictate response on the question of consideration.

In addition, the allocation of burdens of bringing forth evidence may determine the propriety of summary judgment.<sup>50</sup> Emphatically, to so state is not to suggest that one of the parties must "persuade" the court on a weighing of the evidence. Rather, allocation of burden may determine upon which party the penalty for failure to support adequately a particular issue is thrown. In a contract action, for example, summary judgment would be unlikely if the defendant asserted that a burden of bringing forth evidence on the question of legality was not borne by the plaintiff. Appropriateness would probably be lacking since, at least in the first instance, it is the defendant's duty to support the issue.

Also relevant to the issue of "appropriateness" of summary judgment is the nature of the affidavit or deposition offered to support the motion. The federal and Indiana provisions both require that "[s]upporting and opposing affidavits shall be made on personal knowledge, [and] shall set forth such facts as would be admissible in evidence. . . ."<sup>51</sup> The entire issue of *Frederick Hart & Co. v. Recordograph Corp.*<sup>52</sup> might have been avoided had it been noted that the district court had had ample

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49. See generally 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1234 (C. Wright ed. 1958).

50. See 6 J. MOORE, FEDERAL PRACTICE ¶ 56.15 (2d ed. 1966) (Summary judgment in particular types of actions). A survey of various types of cases illustrates the problem alluded to. Such a comparison will also show problems stemming from a type of action which dictates preclusion of summary judgment, *e.g.*, *Pacific Amer. Fisheries v. Mullaney*, 191 F.2d 137 (9th Cir. 1951) (constitutional issue, need for complete record); *Sarnoff v. Cioglia*, 165 F.2d 167 (3d Cir. 1947) (fraud, credibility issue).

51. IND. ANN. STAT. § 2-2524(f) (Burns Supp. 1968); *Chan Wing Cheung v. Hamilton*, 298 F.2d 459, 460 (1st Cir. 1962) (personal knowledge); *Cimijotti v. Paulsen*, 340 F.2d 613 (8th Cir. 1965), *aff'g* 230 F. Supp. 39 (N.D. Iowa 1964) (privileged information).

52. *Frederick Hart & Co. v. Recordograph Corp.*, 73 F. Supp. 146 (D. Del. 1947), *rev'd*, 169 F.2d 580 (3d Cir. 1948).

reason to disregard the opposing party's affidavits in support of the pleadings—they represented only hearsay.<sup>53</sup>

The requisite of "appropriateness" may also be viewed in light of the fact that in keeping with the notion of eschewing "trial by affidavit" judges often allude to a requirement that the least doubt on a central issue of fact precludes summary judgment.<sup>54</sup> This requirement was espoused in the dissent in *Argus v. Matuska*.<sup>55</sup> However, doubts should be required to be raised on response to affidavits and not by conclusionary pleadings.<sup>56</sup> In response one can raise an issue of credibility of the movant's affidavits ". . . but in doing so specific facts must be properly produced."<sup>57</sup> In this context it must be recalled that the summary judgment is a substantial determination of the case;<sup>58</sup> hence caution must be used to insure that the rights of the litigant are not jeopardized.<sup>59</sup>

#### CONCLUSION

The use of the term "prima facie" by the Appellate Court and the various considerations inherent in the standard of appropriateness, the foregoing discussion of which is not intended to be exhaustive, afford a suitable explanation for the Supreme Court's opinion in *Kapusta v. DePuy*. The lower court had concluded that a ". . . failure to file counter-affidavits . . . [entitles the movant] to summary judgment as a matter of law."<sup>60</sup> Such a statement might give the impression that affidavits of any sort alone, without response, give a right to summary judgment. However, such a conclusion is warranted only if the papers filed are in all other ways appropriate.

The worth of the summary judgment procedure is evident. Without such a device *Kapusta v. DePuy*<sup>61</sup> could have continued with much greater expense to both the litigants and an already burdened court. Yet, to guarantee the purpose of the statute and the rights of the adversaries, definite restrictions are imposed on the device's application. Pleadings

53. See Wright, *supra* note 21, at 844.

54. *Greenebaum Mortgage Co. v. Town & Garden Ass'n*, 385 F.2d 347 (7th Cir. 1967); *American Cas. Co. v. Reidy*, 386 F.2d 795, 798 (7th Cir. 1967).

55. *Argus v. Matuska*, —Ind. App.—, 235 N.E.2d 205 (1968) (Faulconer, J., dissenting).

56. *Hoffman v. Herdman's Ltd.*, 41 F.R.D. 275, 278 (S.D.N.Y. 1966).

57. *Lundeen v. Cordner*, 354 F.2d 401, 409 (8th Cir. 1966); *cf.* *Clayton v. James B. Clow & Sons*, 154 F. Supp. 108 (N.D. Ill. 1957).

58. *Hoffman v. Babbit Bros. Trading Co.*, 203 F.2d 636 (9th Cir. 1953); *Jose v. Indiana Nat'l Bank of Indianapolis*, —Ind. App.—, 218 N.E.2d 165, 167 (1966) (dictum).

59. *Hoffman v. Herdman's Ltd.*, 41 F.R.D. 275, 278 (S.D.N.Y. 1966); *accord* *Consolidated Elec. Co. v. United States*, 355 F.2d 437 (9th Cir. 1966).

60. *Kapusta v. DePuy*, —Ind.—, 234 N.E.2d 487 (1968).

61. *Kapusta v. DePuy*, —Ind. App.—, 229 N.E.2d 828, 832 (1967).



are not to be given conclusive weight lest the procedure become useless. But efficiency must always be balanced with fairness. Variation from this balance will either elide the effectiveness of the statute or critically impinge upon the substantial rights of litigants.

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62. *Kapusta v. DePuy*, —Ind. App.—, 229 N.E.2d 828 (1967), *aff'd on other grounds*, —Ind.—, 234 N.E.2d 487 (1968).