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# Summary Judgment in Maryland

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# SUMMARY JUDGMENT IN MARYLAND*

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## INTRODUCTION

As court congestion and judicial backlogs demand greater attention from the bench and bar, summary procedures have become increasingly popular for the speedy resolution of disputes. In the last thirty years or so, one such procedure, the motion for summary judgment, has emerged as one of the foremost means of streamlining the civil adjudicatory process. The standard formulation of the summary judgment procedure is simple. In Maryland under rule 610, for example, any party to an action "may at any time make a motion for summary judgment in his favor . . . on the ground that there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law."[1] As straightforward as this test may seem on the surface, it has been the source of great confusion to members of both bench and bar. Professor Moore, for example, has taken one and a half sizeable volumes to explain its workings in the federal system,[2] while Professors Wright and Miller have spent nearly four hundred pages discussing this topic.[3]

Summary judgment has also made a significant impact on Maryland courts. In the last ten years, the Maryland Court of Appeals and Court of Special Appeals have dealt with rule 610 issues in no less than ninety reported opinions. These statistics suggest the growing complexity and popularity of this summary procedure in the civil justice system. Unfortunately, however, what began as a simple and understandable procedural reform has evolved in many situations into a trap for the unwary litigator. The Maryland Court of Appeals' case law is replete with examples of the filing of defective summary judgment motions,[4] inadequate or ineffective supporting affidavits,[5] and unresponsive countering affidavits.[6]

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1. MD. R.P. 610(a)(1).

2. *See* 6 & 6 pt. 2 MOORE'S FEDERAL PRACTICE ¶¶ 56.01 to .27 (2d ed. 1976).

3. 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 2711-2742 (1973).

4. *E.g.*, Fletcher v. Flournoy, 198 Md. 53, 56-60, 81 A.2d 232, 233-35 (1951).

5. *E.g.*, Ehrlich v. Board of Educ., 257 Md. 542, 546, 263 A.2d 853, 855-56 (1970); White v. Friel, 210 Md. 274, 279-80, 123 A.2d 303, 305 (1956).

6. *E.g.*, Foley v. County Comm'rs, 247 Md. 162, 175, 230 A.2d 298, 305 (1967); Frush v. Brooks, 204 Md. 315, 321-22, 104 A.2d 624, 626 (1954).

These and other transgressions by counsel have been caused, in part, by the subtle complexities of a rule which at first blush seems simplistic. Other pitfalls have been created by variations between what the rule requires on its face and what the Court of Appeals has mandated in practice.[7] Whatever the causes, the entire benefit that should be derived from a smoothly functioning summary judgment procedure has yet to be realized fully in Maryland.

The objective of this Article is twofold. First, it is intended to explore thoroughly the workings of Maryland's summary judgment procedure and to report on the present status of the law. This analysis should be helpful to the practitioner in resolving everyday problems of litigation. Second, detailed reflection upon this first inquiry leads the inquirer to pinpoint many of the flaws in our present system and to suggest proposals for their reform. A number of ambiguities and inconsistencies exist in the cases interpreting rule 610. The implementation of modernizing amendments to the rule and stricter adherence to the lines of cases that are in accord with the fundamental purposes of summary judgment can help restore order to the procedure and eliminate its present pitfalls.

## HISTORICAL BACKGROUND

Summary judgment came into being to satisfy the increasingly recognized judicial need to provide a more expeditious and inexpensive way to resolve disputes raising little factual controversy. This procedure initially satisfied what was viewed as a plaintiff creditor's need for prompt judicial relief for relatively clear-cut cases of indebtedness. Although summary judgment procedures existed in this country as early as 1769,[8] they proved to be false starts and gradually dropped from sight.[9] Summary judgment procedures nevertheless managed to gain a more permanent foothold with the passage in England of The Summary Procedure on Bills of Exchange Act[10] in 1855. This provision was limited to a plaintiff's

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7. *See* pp. 202-10 *infra*.

8. *See* Millar, *Three American Ventures in Summary Civil Procedure*, 38 YALE L. J. 193, 195-204 (1928).

9. South Carolina, for example, employed a summary process from 1769 until 1870. *Id.* Kentucky's proceeding by petition and summons was in force from 1805 until 1851. *Id.* at 204-08. Several other states adopted summary forms similar to Kentucky's summary procedure, but they were also short-lived solutions. Summary forms existed in Alabama from 1820 to 1852, in Missouri from 1825 to 1849, in Illinois from 1833 to 1874, in Arkansas from 1837 to 1868, in Iowa from 1839 to 1851, and in Kansas from 1855 to 1859. *Id.* at 208-12. Virginia was the only state to retain the summary motion which it had adopted in the mid-nineteenth century. *Id.* at 213-24.

10. 1855, 18 & 19 Vict., c. 67.

liquidated claims on bills of exchange and promissory notes. Parliament declared that the bona fide holders of these documents "are often unjustly delayed and put to unnecessary Expense . . . by reason of frivolous or fictitious Defenses to Actions thereon."[11] It therefore enacted a more expedient remedy by which these relatively uncomplicated claims, which readily lent themselves to simplified procedures, could be adjudicated. Creditors could invoke the summary procedure by specially endorsing their claims upon a writ of summons.[12] After the defendant entered an appearance before the court in response to the specially endorsed writ, the plaintiff could apply to the judge to enter a final judgment based on an affidavit "'made by himself, or by any person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any), and stating that in his belief there is no defense to the action.'"[13] This application shifted the burden to the defendant to prove by affidavit or personal testimony that he either had a good defense to the charge or that such facts existed that would entitle him to defend.[14] Defendants filing such a personal affidavit could be ordered by the judge to attend and to be examined on oath or to produce any documents.[15] Once affidavits and any testimony had been received, the court determined whether an actual defense to the action had been made. If an adequate defense was not offered, the defendant would be considered to have defaulted, and summary judgment for the plaintiff could be granted.[16]

The historical predecessor to summary judgment in Maryland was a procedure in equity known as a hearing on bill and answer.[17] As Poe's treatise describes it:

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11. *Id.* (preamble).

12. *See* Clark & Samenow, *The Summary Judgment,* 38 YALE L.J. 423, 424-28 (1929). The indorsement filed by the complainant or plaintiff had to be a signed document that clearly established the connection between the defendant and the plaintiff's claim. The indorsement also served to apprise the defendant of the plaintiff's claim. *Id.* at 428.

13. *Id.* at 430 (quoting Order XIV, Rule 1(a), ANNUAL PRACTICE (1928)). While the English rules at that time seemed to require that an affidavit at least accompany the motion, the case law indicated that it could be filed after the summons had been issued. Clark & Samenow, *supra* note 12, at 430.

14. Clark & Samenow, *supra* note 12, at 430.

15. *Id.* at 431.

16. *Id.* at 430.

17. *See* E. MILLER, EQUITY PROCEDURE §§ 255-257 (1897). For a discussion of this equitable procedure and its application, see Warren v. Twilley, 10 Md. 39 (1856); McKim v. Odom 3 Bl. 407 (Md. Ch. 1828); Contee v. Dawson, 2 Bl. 264 (Md. Ch. 1826).

> Demurrers were not permitted to answers, and should the plaintiff feel that the answer of the defendant was legally insufficient he simply admitted [its] allegations . . . and upon proof of the facts alleged in his bill of complaint submitted the cause to the court on the legal issues or questions thus raised.[18]

This procedure was greatly limited in scope. The hearing on bill and answer rule was applicable only in cases heard in equity; it could be invoked only by plaintiffs;[19] and there were many risks for the unwary.[20]

It was not until 1858 that any summary proceeding in law was introduced into Maryland procedure. Maryland's first procedure for effecting "speedy judgments" was enacted by the legislature in 1858 and was applicable only to Baltimore City.[21] Similar to the English statute, this 1858 procedure applied only to actions for liquidated amounts "for recovery of money due on any contract endorsed by writing under the hand of the defendant."[22] In 1886 the legislature repealed and reenacted the 1858 act, and it became known as the Speedy Judgment Act of the Practice Act.[23] Most Maryland counties adopted identical or similar acts to provide a quick means of bringing to judgment valid uncontested claims in which the amount in controversy was certain and liquidated.[24] These "speedy judgment" acts not only offered "a short and expeditious method of recovery" in situations in which they were invoked, but also "by requiring disclosure under oath, as to the real amount or matter in dispute or actual contest between the parties, [avoided] unnecessary trouble and expense in the trial."[25]

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18. 4 POE'S PLEADING and PRACTICE 1 (6th ed. H. Sachs 1975) [hereinafter cited as POE'S PLEADING].

19. Somerville v. Marbury, 7 G. & J. 275, 280 (Md. 1835). *See* Aetna Indem. Co. v. Baltimore, S. P. & C. Ry., 112 Md. 389, 394-95, 76 A. 251, 253 (1910); Contee v. Dawson, 2 Bl. 264, 267 (Md. Ch. 1826); E. MILLER, *supra* note 17, § 255. *But see* Hollander v. Central Metal & Supply Co., 109 Md. 131, 150, 71 A. 442, 444 (1908).

20. *See* Nardo v. Favazza, 206 Md. 122, 126, 110 A.2d 676, 678 (1955); text accompanying note 26 *infra*.

21. Ch. 323, 1858 Md. Laws 488. *See* Nardo v. Favazza, 206 Md. 122, 125, 110 A.2d 676, 678 (1955); *Explanatory Notes of the Reporter on Rules of Procedure Recommended in the Second Report*, MD. ANN. CODE at 2107 (Cum. Supp. 1947) [hereinafter cited as *Explanatory Notes*].

22. Ch. 323, § 7, 1858 Md. Laws 489.

23. Ch. 184, § 1, 1886 Md. Laws 307-09. The 1886 act still only applied to Baltimore City. *See generally* Pittman, *The Maryland Speedy Judgment Acts*, 2 MD. L. REV. 305 (1938); *Explanatory Notes*, *supra* note 21, at 2107-08.

24. *See* Pittman, *supra* note 23, at 305; *Explanatory Notes*, *supra* note 21, at 2108.

25. Gemmel v. Davis, 71 Md. 458, 464, 18 A. 955, 956 (1889) (commenting on Baltimore City's Practice Act of 1886).

The Maryland Court of Appeals later criticized the successors of these acts, despite their broadened scope, stating that they

> had a number of shortcomings including lack of uniformity in the details of pleading and practice; technicalities that could be interposed to defeat the right to summary relief; requirements of unnecessary strictness for the form of affidavits; and the possibility that a defendant could postpone judgment by filing a demurrer or demand for particulars. It was also found that the proceedings, because of their formal and technical character, seldom achieved one of the important objectives of this procedure, the narrowing of issues to those genuinely in dispute to avoid unnecessary trouble and expense in the trial.[26]

In 1947 the Court of Appeals adopted what has become the present summary judgment procedure in Maryland.[27] It was modeled primarily after Federal Rule of Civil Procedure 56, which had been enacted in 1938.[28] The new Maryland rule, however, contained "certain changes to adapt it to the existing Maryland procedural system."[29] Unlike its predecessors, it was made applicable to both law and equity and could be invoked at any stage of the proceedings in all types of actions and by any party to the action.[30] To ferret out

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26. Nardo v. Favazza, 206 Md. 122, 126, 110 A.2d 676, 678 (1955). *See Explanatory Notes, supra* note 21, at 2107-09, *reprinted in* 4 POE'S PLEADING, *supra* note 18, at 2-4.

27. MD. GEN. R. PRAC. & P., IV. Summary Judgment, rules 1-4, MD. ANN. CODE at 2044-45 (Cum. Supp. 1947). *See* Brown v. Suburban Cadillac, Inc., 260 Md. 251, 255 n.1, 272 A.2d 42, 44 n.1 (1971) (noted that 1947 rules of procedure do not differ in any material respect from present Maryland summary judgment rule 610). To effect the transition from the earlier summary judgment procedures, rule 610(a)(4) specifically provides: "Cases formerly heard on bill and answer may be heard under this Rule."

28. *See Explanatory Notes, supra* note 21, at 2113, *reprinted in* 4 POE'S PLEADING, *supra* note 18, at 8.

29. *Id.*

30. *See Explanatory Notes, supra* note 21, at 2113-14, *reprinted in* 4 POE'S PLEADING, *supra* note 18, at 8. Maryland did have a special form of summary remedy which was set out in MD. ANN. CODE art. 26, § 24 (1939) and provided:

> Any party to an action or suit at law, or in equity, may, at any stage thereof, apply to the court for such order or judgment as he may, upon any admission of fact in the pleadings or other written admissions in the case, be entitled to without waiting for the determination of any other question between the parties. Such application may be made by motion or petition so soon as the right of the party applying to the relief claimed has appeared from the pleadings or other written admissions in such action or suit, and the court may, upon such application, give such relief, subject to such terms, if any, as such court may think fit, and such order or judgment shall, with the

any factual dispute, it relies primarily upon the filing of affidavits, depositions, or other documentary evidence.[31]

In some respects the Maryland rule updated its federal counterpart. Federal rule 56, for example, had been interpreted "not to allow partial summary judgments except where the only disputed issue is the amount of damages."[32] The new Maryland rule, however, specifically permitted such a partial adjudication,[33] an improvement that has also been incorporated into the federal rule.[34] The current rule governing summary judgment in Maryland trial courts is rule 610 which has been amended several times since its introduction in 1947. Although the adoption of this rule streamlined Maryland's summary procedures, further modifications are necessary to enhance its efficacy.

## GENERAL PRINCIPLES

A trial before a finder of fact is obviously unnecessary if no genuine dispute as to any material fact exists between the parties. A case in this posture, which would turn solely on an issue of law, may be resolved by a motion for summary judgment under rule 610. This device advances the speedy and efficient administration of justice by eliminating a costly, time-consuming, and unnecessary trial and permitting prompt resolution of the legal issues in the case.[35] The

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proceedings relating thereto, form part of the record and be reviewable on appeal from the final judgment or decree in such action or suit.

The statute was enacted in 1888, ch. 442, 1888 Md. Laws 720, but appears to have been used sparingly, if at all; it has not been cited in any reported case. Because it requires written admissions as the basis for judgment and Maryland had no adequate means for obtaining such admissions until the adoption of the discovery rules in 1941, there were probably few occasions for its use. Nevertheless, the statute is of great interest. It represents an early recognition of the desirability of summary disposition of cases, whether at law or in equity, when there is no genuine controversy as to the material facts. In making admissions the only basis for summary relief, however, the statute was too restrictive. The same procedure should be extended to any case in which it can be shown that the material facts are not genuinely controverted in good faith. *Explanatory Notes, supra* note 21, at 2110, *reprinted in* 4 POE'S PLEADING, *supra* note 18, at 4-5.

31. *See Explanatory Notes, supra* note 21, at 2114, *reprinted in* 4 POE'S PLEADING, *supra* note 18, at 8

32. *Id.* at 2115, *reprinted in* 4 POE'S PLEADING, *supra* note 18, at 10.

33. MD. GEN. R. PRAC. & P., IV. Summary Judgment, rule 4(c), MD. ANN. CODE at 2045 (Cum. Supp. 1947).

34. FED. R. CIV. P. 56(a)-(b).

35. *E.g.*, Whitcomb v. Horman, 244 Md. 431, 443, 224 A.2d 120, 126 (1966); Tri-State Properties, Inc. v. Middleman, 238 Md. 41, 47, 207 A.2d 499, 502 (1965); Gemmell v. Davis, 71 Md. 458, 464, 18 A. 955, 956 (1889).

summary judgment procedure provides a mechanism by which it can be ascertained if a factual dispute exists which will necessitate a trial. The procedure, however, is not intended as a substitute for a trial or as a fact-finding device.[36] If no genuine issue as to any material fact exists, the court may then resolve the case upon the issues of law. Thus, if "reasonable minds could reach but one conclusion from the uncontroverted facts, those questions of fact are for the Court to decide as a matter of law."[37] If a material factual dispute is found to exist, however, the motion must be denied and a trial will be necessary. It is not the presence of any factual dispute that negates the summary judgment procedure. Rather, the dispute must relate to a material fact, one whose resolution "will somehow affect the outcome of the case."[38] As the Court of Appeals has expressed it, "a dispute as to facts relating to grounds upon which the decision is not rested is not a dispute with respect to a *material* fact and such dispute does not prevent the entry of summary judgment."[39]

The Court of Appeals has not announced very definite standards to guide a trial judge in determining whether a factual dispute exists. The late Judge Charles Clark of the United States Court of Appeals for the Second Circuit, an eminent scholar of summary judgment practice, found a loose approach to be the most desirable:

> There is no desire to minimize the problem before the courts . . . . What is needed is the application of common sense, good judgment, and decisive action, on the one hand, not to shut a deserving litigant from his trial and, on the other, not to allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial. Formulas and cliches will not help, and the announcement of rolling precedents will only embarrass in the future.[40]

What Judge Clark suggested appears to be what the Court of Appeals has in fact adopted.

Because of its limited role, the summary judgment procedure has uniformly been held not to infringe upon a party's right to a jury

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36. *E.g.*, Lipscomb v. Hess, 255 Md. 109, 118, 257 A.2d 178, 182-83 (1969).

37. Brady v. State Farm Mut. Auto Ins. Co., 254 Md. 598, 604, 255 A.2d 427, 430 (1969). *Accord,* Owens v. Simon, 245 Md. 404, 409, 226 A.2d 548, 551 (1967).

38. Parklawn v. Nee, 243 Md. 249, 254, 220 A.2d 563, 566 (1966).

39. Salisbury Beauty Schools v. State Bd. of Cosmetologists, 268 Md. 32, 40, 300 A.2d 367, 374 (1973) (emphasis in original). *Accord,* Lynx, Inc. v. Ordinance Prods., Inc., 273 Md. 1, 8, 327 A.2d 502, 509 (1974).

40. Clark, *Summary Judgment,* 36 MINN. L. REV. 567, 578-79 (1952).

trial;[41] however, the Court of Appeals has never fully explicated this position. Like its cousin, the directed verdict,[42] it "merely permit[s] a justifiable determination that there is nothing for a jury to consider."[43]

## INTERPRETING RULE 610

A comparison of rule 610, as promulgated in 1947, with the 1947 version of Federal Rule of Civil Procedure 56, which had been in effect and unamended for eight years, reveals significant similarities. Obviously, the Maryland draftsmen followed the lead of rule 56, and consequently, decisions interpreting the federal rule should be given great weight in construing and applying rule 610.

Although the differences between the two rules in 1947 were relatively minor, the Maryland rule did tend to promote more liberal use of summary judgment. For example, under the federal rule a plaintiff must generally wait twenty days after filing his complaint before he can serve the defendant with a summary judgment motion.[44] In Maryland, however, a plaintiff may file such a motion and his initial pleading concurrently.[45] Unlike the federal rule, the Maryland rule expressly permits the court "[w]here appropriate . . . [to] render judgment for [an] opposing party even though he has not filed a cross-motion for summary judgment."[46] Although federal case law permits this result,[47] federal rule 56 does not explicitly sanction it.

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41. Because the summary judgment rules "merely operate to determine what, if any, issues are to be tried by jury," they "do not impair the right of trial by jury." Fletcher v. Flournoy, 198 Md. 53, 61, 81 A.2d 232, 235 (1951). *See generally* 10 C. WRIGHT & A. MILLER, *supra* note 3, § 2714.

42. *See* Lynx, Inc. v. Ordnance Prods., Inc., 273 Md. 1, 8, 327 A.2d 502, 509 (1974). For a comparison of the two procedural devices, see Knisley v. Keller, 11 Md. App. 269, 273 A.2d 624 (1971).

43. Frush v. Brooks, 204 Md. 315, 324, 104 A.2d 624, 628 (1954).

44. FED. R. CIV. P. 56(a).

45. *See* MD. GEN. R. PRAC. & P., IV. Summary Judgment, rule 1(a), MD. ANN. CODE at 2044 (Cum. Supp. 1947) (currently MD. R.P. 610(a)(1)). The federal rule was intended to safeguard defendants and to give them time to "secure counsel and determine a course of action." FED. R. CIV. P. 56(a) (Notes of Advisory Committee on 1946 Amendment). Defendants in Maryland are protected in this situation by rule 610(c)(1)'s requirement that a hearing on the motion not take place until 15 days after the return day.

46. MD. R.P. 610(d)(1).

47. *See* 1955 Report of the Advisory Committee, Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, Rule 56(c), *reprinted in* 12 C. WRIGHT & A. MILLER, *supra* note 3, at 612-13 (Appendix F). The 1955 amendments were not adopted.

Another minor difference existing in 1947, which has only recently proven significant, was that under the federal rule a party moving for summary judgment could, and today still can, move "with or without supporting affidavits."[48] In Maryland where a plaintiff can simultaneously file the initial pleading and motion for summary judgment, such a motion had to be accompanied by a supporting affidavit.[49] Originally, neither rule required the party opposing the motion to file a countering affidavit. In 1961 the Maryland rule was amended to require a countering affidavit or other document by the adverse party, but only in the limited situations in which the moving party was required to file a supporting affidavit.[50] In 1963 the federal rule was also amended, but it went a step further, requiring an opposing affidavit or other document *whenever* the moving party supported the motion with an affidavit or other documentary evidence.[51] As discussed below,[52] Maryland's failure to keep in step with this federal change has led to much confusion.

Other minor differences aside,[53] the two rules are quite similar. As the Court of Appeals has noted, rule 610 "was [intended] not to restrict or narrow, but to broaden, the federal rule."[54] When ambiguities arise in construing rule 610, the court has declared that interpretations of rule 56 are "especially persuasive" in ascertaining the meaning of rule 610.[55]

### TIMING OF THE MOTION, NOTICE, AND HEARING

A motion for summary judgment may be filed at any time after the action has been commenced.[56] Absent a court order to the

48. FED. R. CIV. P. 56(a)-(b).

49. MD. R.P. 610(a)(3).

50. MD. R.P. 610(a)(3) (amended Sept. 15, 1961).

51. *See* FED. R. CIV. P. 56(e) (Notes of Advisory Committee on 1963 Amendment).

52. *See* pp. 207-10 *infra*.

53. The Maryland rule has unique timing requirements for hearing motions not present in the federal rule. *See* MD. R.P. 610(c). This is due primarily to Maryland's practice of permitting plaintiffs to file summary judgment motions with their initial pleadings. *See* MD. R.P. 610(a)(1).

The federal rule originally omitted answers to interrogatories among the materials that may be considered on summary judgment. *See* FED. R. CIV. P. 56(c) (Notes of Advisory Committee on 1963 Amendment). Although the federal rule has been amended to permit the review of such materials, Maryland has not followed suit. It appears, however, that the Court of Appeals and Court of Special Appeals have approved the use of interrogatory answers for this purpose. *See* text accompanying note 144 *infra*.

54. Fletcher v. Flournoy, 198 Md. 53, 57, 81 A.2d 232, 233 (1951).

55. Frush v. Brooks, 204 Md. 315, 321, 104 A.2d 624, 626 (1954) (citing U.O. Colson Co. v. Goff, 204 Md. 160, 102 A.2d 548 (1954)).

56. MD. R.P. 610(a)(1).

contrary, the filing of this motion does not affect the filing date for a party's other pleadings.[57] The proper timing of the court's hearing on the motion depends on when it was filed. A party whose motion for summary judgment has been filed before an opponent has filed his initial pleading cannot obtain a hearing on the motion until fifteen days after the return day and upon not less than fifteen days notice to the opposing party.[58] This timing sequence also applies when a plaintiff has filed his motion with his complaint. If, however, the party moves for summary judgment after his opponent has filed an initial pleading, the motion can be heard at any time after not less than ten days notice.[59] A summary judgment motion that is heard and granted before the expiration of this time period can be reversed on appeal.[60] Whenever the motion is filed, it must advise the opponent of "the time at or after which the motion may be heard,"[61] and, in the case of a motion filed before the opponent's initial pleading, notice must also be given to the opponent that his failure to plead timely could result in judgment being entered against him.[62] As the timing of the motion suggests, the summary judgment procedure can provide plaintiffs with an extremely prompt method for resolving their claims. If the rule is applicable, the delays inherent in a trial can be avoided, and a judgment obtained within a couple of months.

Rule 610 sets no limit on how late a summary judgment motion can be filed, and it appears that a party could file such a motion in the midst of trial.[63] The only logical impediment to the resolution of such a motion would arise when it would unduly surprise the opposing party, denying him sufficient time in which to obtain countering affidavits, or perhaps to proffer opposing evidence with live witnesses.[64] If it becomes clear at trial that no material issue of

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57. MD. R.P. 610(a)(2). This rule could be awkward for a defendant who has moved for summary judgment before answering a plaintiff's complaint. His answer would be due before the motion was ruled upon. In this situation he obviously should seek an extension of time within which to answer under Maryland rule 309.

58. MD. R.P. 610(c)(1).

59. MD. R.P. 610(c)(2). *See* Concord Co. v. Matherly, 216 Md. 453, 459, 140 A.2d 900, 903 (1958). The party opposing summary judgment can, of course, waive this time limit.

60. Concord Co. v. Matherly, 216 Md. 453, 460, 140 A.2d 900, 904 (1958).

61. MD. R.P. 610(c)(1)-(2).

62. MD. R.P. 610(c)(1).

63. This was permitted in Placido v. Citizens Bank & Trust Co., 38 Md. App. 33, 41, 379 A.2d 773, 778 (1977). No other reported Maryland case or other authority appears to have considered this issue.

64. *Id.* at 42, 379 A.2d at 778.

fact exists between the parties, time and energy could surely be saved by invoking the summary judgment device. Nevertheless, if the interests of the opposing party could not be safeguarded or if no appreciable time savings were evident, the trial judge should surely have the discretion to refuse to resolve an inexcusably tardy and disruptive summary judgment motion.

### REQUIREMENT THAT A MOTION BE FILED

The Maryland case law is equivocal as to whether trial judges can invoke the summary judgment procedures on their own, without waiting for a motion to be filed by one of the parties. In several instances, the Court of Appeals has assumed that this practice is permissible, but on each occasion no supporting rationale or substantiated precedent for such a rule was offered.[65] It would appear that Maryland trial courts possess this power, but that its exercise should be tightly circumscribed.

Rule 610 does not provide a satisfactory answer to this question. Rule 610(a)(1) states that a party "may at any time make a motion for a summary judgment in his favor." Although it might be implied, the rule does not specifically say that a party "must" file a motion in order to reap its benefits, nor does it discuss whether the court could raise the motion sua sponte.[66] Thus, the text of rule 610(a)(1) adds little to the resolution of this issue.

When one party moves for summary judgment, and the court realizes that no factual dispute exists and that the law favors the opposing party, rule 610(d)(1) gives the court discretion to enter a "judgment for the opposing party even though he has not filed a cross-motion for summary judgment." Thus, the rule specifically waives the need for a summary judgment motion from the benefiting party in this situation, and this exemption could support the argument that if the rule makers had intended to waive the motion requirement entirely, they knew how to do so and would have done so explicitly. Rule 610(d)(1) might also be interpreted as giving rise to a negative inference that the filing of a motion is required of a party who is not in this special situation. Otherwise, there would be no need for rule 610(d)(1). Rule 610's failure to confront this problem directly, however, does not compel a single resolution of this issue.

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65. *See* text accompanying notes 67 to 84 *infra*.

66. *But cf.* Dudley v. Montgomery Ward & Co., 255 Md. 247, 254, 257 A.2d 437, 442 (1969) ("Entry of summary judgment has been approved by this Court under the last sentence of Rule 610 d 1 and the inherent power of the court, although the summary judgment rules had not been fully complied with.").

The existing case law is more explicit. In *Preissman v. Harmatz*,[67] the most recent Maryland Court of Appeals case to deal with this question, a party claimed that because his opponents' summary judgment motion and supporting affidavit were defective in form, the motion should not have been granted. Without engaging in an analysis of the particular defects in question, the court stated in dictum that "[t]he short answer to this contention is that even if [the motion and affidavit] were [defective in form], a court may enter summary judgment of its own motion where there is no genuine dispute as to a material fact . . . ."[68] *Preissman* made no attempt to explain the "longer answer" to the question;[69] instead, it merely cited *Hunt v. Montgomery County*[70] and *Fletcher v. Flournoy*[71] as supporting authority.[72]

*Hunt* was similarly devoid of reasoning. It simply declared that "[e]ven though no formal motion for summary judgment under the rules was made, there was before the court enough to justify its action in granting a summary declaratory judgment,"[73] and cited *Fletcher* and *Frush v. Brooks*[74] for support. In *Fletcher* the defendant filed a summary judgment motion that was deficient in numerous respects[75] but was nevertheless granted by the trial court. On review the Court of Appeals indicated that these technical deficiencies would have been sufficient grounds for the trial court to have denied the motion.[76] Because the record showed that there was

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67. 264 Md. 715, 288 A.2d 180 (1972).

68. *Id.* at 721, 288 A.2d at 184 (dictum).

69. The *Preissman* court's brief remarks also failed to distinguish between situations in which no motion is filed at all and those in which a defective one is filed. Because the party in *Preissman* did trigger the summary judgment process with a motion, albeit defective, it presented a much easier case in which to waive the motion requirement. Although its language implies a broader ruling, *Preissman's* dictum must be limited to the proposition that summary judgment can be entertained when raised by a defective motion.

70. 248 Md. 403, 237 A.2d 35 (1968).

71. 198 Md. 53, 81 A.2d 232 (1951).

72. The *Preissman* court also cited Myers v. Montgomery Ward & Co., 253 Md. 282, 252 A.2d 855 (1969), as support. Stating that a "court may enter summary judgment of its own motion," the *Myers* court relied totally on *Hunt* and *Fletcher*. *Id.* at 290, 252 A.2d at 860.

73. 248 Md. at 411, 237 A.2d at 39.

74. 204 Md. 315, 104 A.2d 624 (1954).

75. The defendant's motion departed from the language authorized by the summary judgment rule, and the issue was whether the trial court, in granting such a motion, had committed a reversible error even if it appeared that in fact there were adequate grounds for granting summary judgment. Also, contrary to the summary judgment rule, the defendant's supporting affidavit was not made on personal knowledge. 198 Md. at 56-60, 81 A.2d at 233-34.

76. *Id.* at 56, 81 A.2d at 233.

no genuine dispute as to any material fact, the court upheld the trial court's grant of summary judgment. Reasoning that "a motion is not always an indispensable prerequisite to obtaining a summary judgment,"[77] the Court of Appeals concluded that defendant's right to summary judgment was not "defeated by [his] disregard of provisions of the Summary Judgment rules."[78]

Although these statements have led later Court of Appeals panels to state that a motion is not a general prerequisite to the granting of summary judgment, *Fletcher* clearly does not stand for this proposition. First, because a motion had indeed been filed in *Fletcher,* its conclusion that a motion is "not always an indispensable prerequisite to obtaining summary judgment" is purely dictum. Second, its sole supporting authority was the predecessor to the current rule 610(d)(1), which, as noted above,[79] explicitly waives the motion requirement only where summary judgment is to be awarded to a party who has not filed a cross-motion. Thus, *Fletcher* should not have been cited by *Preissman* and *Hunt* in support of the proposition that no motion need be filed in other circumstances.

This leaves *Frush* as the next precedential authority that ostensibly permits a trial court to invoke summary judgment procedures sua sponte, but it too has its flaws. Again in pure dictum, the Court of Appeals implied that a court could grant summary judgment on its own motion[80] without elaboration. Instead of explaining why and under what circumstances a court might grant summary judgment sua sponte, the *Frush* court relied upon *Hamburger v. Standard Lime & Stone Co.*,[81] a case which lies at the root of this long line of dicta, but has nothing to do with the stated proposition. In that case motions for summary judgments had been filed, and the court said nothing about the legal result had they not been. The case allegedly involved a defective affidavit, but the central issue was whether the trial court had jurisdiction to grant the motions and enter the judgments.[82] Thus, *Hamburger* offers no

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77. *Id.* at 57, 81 A.2d at 233 (dictum).

78. *Id.* at 63, 81 A.2d at 236-37.

79. *See* p. 79 *supra.*

80. The *Frush* court stated that "[t]he court had jurisdiction of the parties and the subject matter and if it had granted a summary judgment of its own motion, this alone would not affect an otherwise valid judgment." 204 Md. at 322, 104 A.2d at 627 (dictum).

81. 198 Md. 336, 84 A.2d 74 (1951). In Ehrlich v. Board of Educ., 257 Md. 542, 546, 263 A.2d 853, 856 (1970), the Court of Appeals, again in dictum, cited *Frush* and implied that the filing of a motion was not a prerequisite to the granting of summary judgment.

82. 198 Md. at 339, 84 A.2d at 75-76.

support for the proposition that summary judgment may be invoked by the court sua sponte.

The Maryland Court of Special Appeals has not accepted the *Hamburger* to *Preissman* line of cases. Without citing that line of cases, the court in *Harris v. Stenfanowicz Corp.*[83] recently indicated that the summary judgment procedure must be initiated by motion of a party and not "by a court's peremptory action initiated sua sponte."[84] The court's primary authority for this statement was apparently rule 610(a)(1) which states, "a party . . . may at any time make a motion for summary judgment."

Faced with the equivocal wording of rule 610 and inadequate and confused legal precedents, the Court of Appeals should be free to fashion its own rule in this regard. If a case clearly contains no factual dispute, but neither party is apparently aware of the proper procedural device in such circumstances, the trial court's control of its docket would be jeopardized if such a case could not be expeditiously resolved by summary judgment. There is no justification for tying a trial judge's hands and forcing him to conduct an unnecessary trial. If summary procedures are clearly warranted, the court could, at the very least, suggest to both parties that they should file summary judgment motions to resolve their case. This approach would prompt most attorneys to file the necessary motions and thereby avoid the need to determine whether trial judges could grant summary judgment sua sponte.

Two conditions should be met before judicial intervention into a party's conduct of his own strategy should be permitted. First, any sua sponte or court-prompted summary judgment motion must give the opposing party ample notice and an opportunity to oppose it.[85] Although this may, at times, delay the resolution of a case, the need for notice should pose no great judicial obstacle. Second, because our adversary system is based on the model of a passive judge, the parties should be required to develop their own case. Too much judicial interference might undermine a party's right to develop his own strategy independently, and it could place the court in the awkward position of becoming an adversary who must decide when it will "file" a summary judgment motion for an erring attorney. The discretion associated with such strategic choices has traditionally

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83. 26 Md. App. 213, 337 A.2d 455 (1975).

84. *Id.* at 218, 337 A.2d at 458.

85. *Cf.* Harris v. Stefanowicz Corp., 26 Md. App. 213, 220, 337 A.2d 455, 459 (1975) (under MD. R.P. 502, courts, on their own motion, may consider issues of law at any time, but generally parties are given some warning and opportunity to prepare their responses).

been left to the litigants in our adversary process.[86] To permit the courts to encroach upon this polarized system would significantly weaken that process. Aggressive judicial intervention might also have the undesired side effect of encouraging lawyers to remain ignorant of the rules of procedure and to allow the court to conduct their litigation. If no motion or adequate affidavit need be filed by a party and a helpful trial judge can be expected to plead a party's case, what motivation is there for the attorney to learn and comply with the rules?[87] On balance these considerations counsel that the trial court's power to invoke summary judgment sua sponte should exist but be employed sparingly. It should be reserved for cases in which the resolution of a dispute will be readily enhanced by judicial intervention, while not undermining the tradition of adversarial independence that is the hallmark of our judicial system.

### THE REQUIREMENT THAT AFFIDAVITS BE FILED

The most troublesome aspect of summary judgment practice in Maryland is rule 610's requirement that the motion or its opposition be supported under certain circumstances by affidavits or other evidentiary documents. Even though the rule is equivocal as to exactly what is required of the parties, there is a confusing divergence between what it clearly does require and what the courts are, in fact, demanding. Generally, a party moving for summary judgment will file along with his motion one or more supporting affidavits which establish the relevant facts and demonstrate the lack of any genuine dispute as to their existence. The rules, however, do not require that affidavits accompany all motions for summary judgment. Rule 610(a)(3) specifically states: "The motion must be supported by affidavit when filed with the pleading asserting the claim or before the adverse party has filed his initial pleading to it; otherwise the motion may be made with or without supporting affidavits."[88] Thus, a plaintiff must file a supporting affidavit with any motion filed at the time he files his complaint or until the defendant has answered.[89] But if the motion is filed at a later time, it may be filed "with or without supporting affidavits."[90] If the

86. For a discussion of several of these strategies, see pp. 221-24 *infra*.

87. In Fletcher v. Flournoy, 198 Md. 53, 81 A.2d 232 (1951), for example, the Court of Appeals lamented that in practice there existed "a very great neglect of all regularity in the form of [summary judgment] affidavits." *Id.* at 58, 81 A.2d at 234.

88. Md. R.P. 610(a)(3).

89. *Id. See* White v. Friel, 210 Md. 274, 280, 123 A.2d 303, 305 (1956); Frush v. Brooks, 204 Md. 315, 319, 104 A.2d 624, 625 (1954).

90. MD. R.P. 610(a)(3). *Accord,* Fletcher v. Flournoy, 198 Md. 53, 58, 81 A.2d 232, 233-34 (1951).

defendant should counterclaim and seek summary judgment on the counterclaim, he must file an affidavit with his motion if it is filed at the time of his counterclaim or before the plaintiff answers the counterclaim. The same sequence would apply to cross-claims and third party claims. Under the wording of the rule, however, if the defendant files for summary judgment on an affirmative defense set forth in his answer or plea to the plaintiff's claim, rule 610 apparently excuses him from filing a supporting affidavit[91] because the filing of a responsive pleading by the plaintiff, such as a reply or replication, is not required.[92]

One justification for this distinction is that the record typically will be sparse before a party's initial responsive pleading is filed; consequently, an affidavit should accompany a summary judgment motion filed during that period in order to provide the court with a basis for an informed decision. Because the record will usually be more fully developed later in the litigation, the need for a supporting affidavit would then no longer exist. If this is the basis for rule 610's distinction, it is a tenuous rationale at best. There is no assurance that the record will be adequately supplemented. However weak this rationale might be, it is nevertheless difficult to imagine a better justification. As demonstrated below,[93] the best rule is one that requires an affidavit or other supporting document in nearly all instances.

When an affidavit is mandatory, rule 610 requires an opposing party who desires to controvert any statements of fact in the movant's affidavit to respond with a countering affidavit or deposition.[94] These documents must be filed prior to, or along with, the filing by the opposing party of his initial responsive pleading, unless time is extended.[95] "The failure to file such opposing affidavit

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91. *But see* Alamo Trailer Sales, Inc. v. Howard County Metro. Comm'n, 243 Md. 666, 668, 222 A.2d 181, 182 (1966); text accompanying notes 110 to 112 *infra*.

92. MD. R.P. 312(a) eliminates, for example, the need for a plaintiff to file a replication countering the affirmative defenses in a defendant's answer or plea. Under the rule, the plaintiff is automatically deemed to have denied all allegations regarding any defenses. MD. R.P. 312(b). Rule 312 nevertheless permits a plaintiff in this situation to file a reply if he so chooses. It might be argued that the filing of an optional reply would bring the defendant within the terms of rule 610(a)(3)'s affidavit requirement and, therefore, render a summary judgment motion deficient if not accompanied by an affidavit.

93. *See* pp. 204-10 *infra*.

94. MD. R.P. 610(a)(3). *See* Frush v. Brooks, 204 Md. 318, 320-21, 104 A.2d 624, 626 (1954).

95. MD. R.P. 610(a)(3). Although the rule is silent on this point, it also seems proper for the opposing party to counter with answers to interrogatories, admissions

or deposition shall constitute an admission for purposes of the motion of all statements of fact in the affidavit of the moving party, but shall not constitute an admission that such motion or affidavit is legally sufficient."[96] In those situations in which the opposing party is not required to file a countering affidavit, but nevertheless chooses to do so, the affidavit must be filed at or before the hearing on the motion.[97] Under rule 610, summary judgment motions filed after the opposing party's initial responsive pleading, which need not be supported by an affidavit, do not need to be responded to with an affidavit from the opposing party. Even when the moving party has filed supporting affidavits in this situation, rule 610(a)(3) still does not require the opposing party to file a countering affidavit or deposition.[98]

If rule 610 is taken at face value, an opposing party in cases in which no affidavit is required could merely rest on the more general denials of his pleadings, using them to show that a factual dispute persists between the parties. In numerous reported cases, Maryland attorneys appear to have followed just such a procedure but have paid dearly for it, losing their cases. In part, the reason for this surprising result is that the Court of Appeals has apparently imposed additional demands upon the parties to a summary judgment proceeding beyond those literally required by rule 610. In *Foley v. County Commissioners,*[99] for example, the plaintiffs challenged the legality of the Carroll County Commissioners' approval of a particular sanitary district. The commissioners responded with a motion for summary judgment that was supported — although rule 610 does not require it — with affidavits and

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under Maryland rule 421, or stipulations by the parties. These documents would also demonstrate the existence of a genuine dispute as to a material fact, which would make a grant of summary judgment improper.

96. MD. R.P. 610(a)(3).

97. *Id.* The tardiness and delay sanctioned by this rule are unfortunate. By permitting opposing parties to wait to file opposing affidavits until the day of the hearing on the motion, rule 610(a)(3) creates unnecessary hearings and delays of hearings. A moving party might withdraw his motion if his opponent's affidavit confirms the existence of a disputed fact, but under rule 610(a)(3)'s procedure, he might not be able to discover the existence of a dispute until he arrives for the hearing. Similarly, the moving party might need time to respond to an affidavit not filed until the day of the hearing. He may, for example, want to file a supplemental affidavit to clarify a point, as permitted by rule 610(b). This could easily lead to a continuance, thus wasting precious court and attorney time and client money. The federal rules have minimized this difficulty by requiring the opposing party to file countering affidavits "prior to the day of hearing." FED. R. CIV. P. 56(c).

98. *See* Hill v. Lewis, 21 Md. App. 121, 134 n.9, 318 A.2d 850, 858 n.9 (1974).

99. 247 Md. 162, 230 A.2d 298 (1967).

exhibits to demonstrate that the district was properly created.[100] Although the plaintiffs had filed an affidavit supporting their opposition to the summary judgment motion, they claimed that because the defendant's motion and supporting documents had not refuted two facts set forth in their declaration, as opposed to their affidavit, a dispute of fact existed, thereby precluding summary judgment.[101] The Court of Appeals rejected this argument, holding that "the supporting and opposing affidavits must submit evidentiary facts to the court."[102] Because the "facts" relied upon were not submitted in the plaintiffs' affidavit, they were held insufficient to raise an issue of fact and, therefore, to defeat the summary judgment motion.[103] Similarly, in *Dietz v. Moore*,[104] which involved challenges to a will alleging lack of execution and undue influence, the caveatees, following discovery, filed a motion for summary judgment supported by answers to interrogatories.[105] In reply the caveators presented no affidavits or any other admissible evidence regarding the question of execution to contradict the caveatees' presentation of facts.[106] Although rule 610 does not appear to require such an affidavit, the Court of Appeals held that because the caveators had "utterly failed to establish that there was a 'genuine dispute as to a material fact,'" summary judgment was properly granted.[107] *Tri-State Properties, Inc. v. Middleman*[108] and *Brown v. Suburban Cadillac, Inc.*[109] followed the same pattern. The defendant in each case filed for summary judgment and chose to support the motion with affidavits. The plaintiffs then responded by filing opposing affidavits, although they are apparently not required by rule 610. In both cases, the Court of Appeals held that the countering affidavits were too general and failed to show with sufficient specificity that a factual dispute actually existed. Thus, the inadequacy of the opposing parties' voluntarily filed affidavits resulted in the grant of

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100. *Id.* at 165, 230 A.2d at 299.
101. *Id.* at 175, 230 A.2d at 305.
102. *Id.*
103. *Id.*
104. 277 Md. 1, 351 A.2d 428 (1976).
105. *See* Joint Record Extract at E.51-E.55.
106. 277 Md. at 5, 351 A.2d at 432. With respect to the allegation of undue influence, the caveators did offer affidavits, but the Court of Appeals noted that they dealt only with the issue of competency which had been submitted to the jury.
107. *Id.* at 5, 351 A.2d at 431. Summary judgment has been granted in cases in similar procedural postures. Carter v. Baltimore Gas & Elec. Co., 25 Md. App. 717, 336 A.2d 790 (1975); Hill v. Lewis, 21 Md. App. 121, 318 A.2d 850 (1974).
108. 238 Md. 41, 207 A.2d 499 (1965).
109. 260 Md. 251, 272 A.2d 42 (1971).

adverse summary judgments. Similarly, in *Alamo Trailer Sales, Inc. v. Howard County Metropolitan Commission,*[110] the defendant moved for summary judgment on the claims of a portion of the plaintiff's amended complaint and attached a proper affidavit and exhibits. No opposing affidavit was filed by the plaintiff,[111] as apparently permitted by rule 610(a)(3). The Court of Appeals, however, stated: "Since no opposing affidavit was filed, we must conclude that Alamo has admitted, for purposes of the motion, all statements of fact in the Commission's affidavit. Maryland Rule 610a3."[112] Although all of these cases failed to address the contrary implication of rule 610 regarding the mandatory filing of countering affidavits, they do stand for the proposition that parties who fail to file such an affidavit — one that meets the various requirements demanded of a proper summary judgment affidavit — will not be able to rest on their pleadings to show the existence of a genuine factual dispute.

The court has generally followed this pattern of requiring proper affidavits even when rule 610 does not, but its decisions have certainly conveyed mixed messages to the bar. In *Khoyan v. Turner*[113] the plaintiff brought a negligence action alleging that the defendant left his keys in the ignition of his parked car, thereby allowing the car to be stolen and to collide later with plaintiff's parked car. The defendant responded by filing a motion for summary judgment unaccompanied by an affidavit. The plaintiff opposed the motion and, without a supporting affidavit, countered with one of his own.[114] Later, in answer to an interrogatory

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110. 243 Md. 666, 222 A.2d 181 (1966).

111. *Id.* at 668, 222 A.2d at 182.

112. *Id.* Poe's treatise cites *Alamo* as support for the proposition that when a defendant files for summary judgment prior to filing his first pleading, rule 610(a)(3)'s wording requires that both he and the plaintiff file affidavits; if the plaintiff files no countering affidavit, the facts in the defendant's affidavit will be held to have been conceded. *See* 4 POE'S PLEADING, *supra* note 18, § 409, at 21.

Rule 610(a)(3) requires an affidavit when the motion is filed with "the pleading asserting the claim" or "before the adverse party has filed his initial pleading to it." In *Alamo,* the plaintiff had already filed its bill for declaratory relief and the opposing party, moving for summary judgment, did not file a concurrent claim with its motion which would have been a cross-claim or counterclaim. Instead, it sought summary judgment with respect to a defense to the plaintiff's claim. Thus, the rule clearly required no countering affidavit. Consequently, the failure to file such an affidavit should not, under rule 610(a)(3), constitute an admission of the opposing party's factual claims, and *Alamo* should not have been based upon such a reading of rule 610(a)(3). The decision does not reveal its underlying rationale.

113. 255 Md. 144, 257 A.2d 219 (1969).

114. Although neither party offered supporting affidavits in conjunction with his summary judgment motion, the defendant filed a "memorandum of points and

propounded by the plaintiff, the defendant stated that he had not left his keys in the ignition of his car. The plaintiff's only rebuttal to this claim was his contrary allegation in the complaint. The Court of Appeals, however, held that the pleading allegation was sufficient to pose a genuine dispute over a material fact, and accordingly reversed the trial judge's summary judgment ruling for the defendant. Thus, an apparently unverified complaint was deemed sufficient to rebut the statement of fact in support of the defendant's motion. It is obviously difficult to reconcile this result with the aforementioned cases.[115]

In *Trustees of Bradfording Church of the Brethren v. Western Maryland Railway*[116] the court was faced with a plaintiff's motion for summary judgment and supporting documents (which were filed nearly a decade after the parties' initial pleadings), and the defendants' unverified answer to the motion, which simply alleged that there was a genuine dispute as to material facts and denied that the plaintiff was entitled to judgment as a matter of law.[117] Apparently, no affidavits or other documents were filed by the defendants. The Court of Appeals held that the unverified answer to the motion was sufficient to raise a triable issue of fact with respect to at least one of the defendants and that summary judgment should therefore have been denied.[118] This decision is also squarely at odds with *Foley, Dietz, Tri-State, Brown,* and *Alamo.*[119]

Decisions can also be found lying between these two extremes. *Fletcher v. Flournoy,*[120] a leading summary judgment case, declared that an affidavit is not required to support a summary judgment motion filed after the opposing party has filed a pleading "if not required by the nature of the case."[121] Another case noted that it merely would be the "better practice" to file such supporting documentation, although the rules may not require it.[122]

A requirement that a party opposing summary judgment always respond to the moving party's affidavit with a countering affidavit or other document, as mandated by the Federal Rules of Civil

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authorities" with his motion as did the plaintiff with his opposition to the motion. *Id.* at 146, 257 A.2d at 220.

115. *See* text accompanying notes 99 to 112 *supra.*

116. 262 Md. 84, 277 A.2d 276 (1971).

117. *Id.* at 87, 277 A.2d at 278.

118. *Id.* at 89, 277 A.2d at 279. *See also* Burrell v. Frisby, 212 Md. 181, 129 A.2d 75 (1957).

119. *See* text accompanying notes 99 to 112 *supra.*

120. 198 Md. 53, 81 A.2d 232 (1951). *See* text accompanying notes 75 to 79 *supra.*

121. 198 Md. at 58, 81 A.2d at 234.

122. Williams v. Knapp, 248 Md. 506, 512, 237 A.2d 450, 454 (1968).

Procedure,[123] would surely be a desirable change in Maryland's summary judgment procedure. Because summary judgment is intended to pierce the pleadings and to require a higher degree of proof to demonstrate that a factual dispute exists, necessitating a trial for its resolution, the value of this procedural device is undermined if parties are merely permitted to rest on the unverified allegations of their pleadings. If an unverified pleading is permitted to defeat a motion for summary judgment, the savings in time and needless trials, which the procedure seeks to foster, is lost. In such a situation there is no middle route — short of trial, but beyond the pleadings — by which cases actually posing no factual disagreements can be spotted and peremptorily resolved. The Court of Appeals has recognized the dilemma posed by the ambiguity of rule 610, and noted that if vague and general allegations in an opposing affidavit were sufficient to defeat a motion for summary judgment, "the real and crucial purposes of summary judgment procedure — to avoid delays and unnecessary costs — would be subverted and thwarted . . . [and] there would be few, if any, summary judgments granted."[124] If no affidavit is required to be filed, this problem is greatly compounded.

The ambiguity inherent in Maryland's rule 610 also existed in the federal rule prior to 1963. Decisions of the Third Circuit[125] interpreted federal rule 56 to permit an unverified pleading to rebut claims of no factual dispute in a motion for summary judgment and its supporting affidavit.[126] Recognizing that this application of the

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123. The federal rules permit a party to move with or without supporting affidavits. FED. R. CIV. P. 56(a)-(b). If the motion is made with a supporting affidavit, however, the adverse party must respond with a countering affidavit or other evidence, FED. R. CIV. P. 56(e), or he will be deemed to have conceded the moving party's factual assertions. *See id.*

124. Tri-State Prop., Inc. v. Middleman, 238 Md. 41, 47, 207 A.2d 499, 502 (1965). *See, e.g.*, Wyand v. Patterson Agency, Inc., 266 Md. 456, 460, 295 A.2d 773, 775 (1972).

125. *E.g.*, Frederick Hart & Co. v. Recordgraph Corp., 169 F.2d 580, 581 & n.1 (3d Cir. 1948) (dictum).

126. As the Federal Rules Advisory Committee explained:

> The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not supposititous, conclusory, or ultimate.

FED. R. CIV. P. 56(e) (Notes of Advisory Committee on 1963 Amendment).

rule did not encourage the piercing of the pleadings by requiring more reliable evidentiary proof regarding the existence of a factual dispute, the Supreme Court eliminated this possibility by amending federal rule 56 in 1963 to read as follows:

> 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.[127]

A similar amendment to rule 610 would be appropriate. The affidavits or other supporting documents are to assist the judge in determining if a material dispute exists. Rule 610 requires that these affidavits or other documents "set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."[128] Pleadings, which normally need not be verified, generally will not satisfy these requirements. A pleading need not be sworn to; it may include information based on inadmissible evidence; and it need not establish the speaker's ability to testify as to its allegations. Consequently, it presents a much less convincing guarantee of the truth of its allegations. Although affidavits lack the full tests of truth available at trial — cross-examination of credibility and observation of demeanor — they are a better test of truth than the mere allegations of a pleading. Summary judgment procedures can be effective if this higher level of truth telling is required. They mark the midpoint between bare allegations and the scrutiny allegations receive at trial and permit the weeding out of assertions that could not even stand the test of the affidavit's safeguards for truthfullness.

Attention must be paid to resolving the ambiguities of the case law and the shortcomings of the equivocal rule 610. It appears that the Court of Appeals intends to follow the federal procedure and to read into Maryland summary judgment procedures a stiffer requirement for the filing of affidavits or other supporting documents by both parties.[129] This is the only way the procedure can

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127. FED. R. CIV. P. 56(e). *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 n.20 (1970).

128. MD. R.P. 610(b).

129. Decisions under federal rule 56 are "especially persuasive" in interpreting rule 610 according to the Court of Appeals. *See* text accompanying note 55 *supra*.

function with full efficiency and fairness to all parties. It is quite possible that the Maryland court's failure to clarify this ambiguity is the result of an oversight — rule 610 has not been revised since federal rule 56, the rule upon which it is based, was amended in 1963.

### CONTENTS OF THE AFFIDAVIT

Affidavits filed in support of, or in opposition to, a summary judgment motion must "be made on personal knowledge," "set forth facts as would be admissible in evidence," and "show affirmatively that the affiant is competent to testify to the matters stated therein."[130] Unfortunately, many cases have come to the Court of Appeals in which these requirements have not been met. For example, an affidavit stating "to the best of his knowledge, information and belief" cannot be relied upon because it is not based on *personal* knowledge.[131] Affidavits that fail to assert the competency of the affiants to testify to the statements contained therein are ineffective[132] as are affidavits proffering inadmissible hearsay.[133] An affidavit that merely lists factual issues to be decided or legal or argumentative conclusions without the support of facts admissible into evidence and sworn to by a competent affiant cannot meet rule 610's standard.[134] Likewise, general allegations that do not detail the precise facts are insufficient to support or oppose summary judgment.[135] An affidavit opposing a motion for summary judgment need not, however, counter every fact averred or every issue set forth. It is sufficient for the opposing party to establish a single reason why a factual dispute remains unresolved or a single legal basis for rebutting the claim for judgment to defeat the motion.[136]

Sometimes a party might file an affidavit that contains information going beyond the scope of his pleadings. Because the pleadings set forth the outer bounds of the issues in a case, such an affidavit may be objectionable. Due to Maryland's very liberal amendment rule,[137] however, as long as these broader issues in the

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130. MD. R.P. 610(b).

131. *E.g.*, White v. Friel, 210 Md. 274, 280, 123 A.2d 303, 305 (1956); Fletcher v. Flournoy, 198 Md. 53, 58, 81 A.2d 232, 234 (1951).

132. *See, e.g.*, Ehrlich v. Board of Educ, 257 Md. 542, 546, 263 A.2d 853, 855 (1970).

133. *See* James v. Tyler, 269 Md. 48, 52, 304 A.2d 256, 259 (1973).

134. Fletcher v. Flournoy, 198 Md. 53, 60, 81 A.2d 232, 235 (1951).

135. *E.g.*, Brown v. Suburban Cadillac, Inc., 260 Md. 251, 257, 272 A.2d 42, 45–46 (1971). *See, e.g.*, Frush v. Brooks, 204 Md. 315, 320–21, 104 A.2d 624, 626 (1954).

136. *E.g.*, Jordan v. Morgan, 252 Md. 122, 128, 249 A.2d 124, 127 (1969); Whalen v. Devlin Lumber & Supply Corp., 251 Md. 51, 54, 246 A.2d 247, 249 (1968).

137 *See* MD. R.P. 320. *Cf.* MD. R.P. 610(d)(5) ("This Rule shall not limit or affect amendment of the pleadings at any stage of the proceedings.").

affidavit are within the bounds of permissible amendment to the pleadings, no serious objection may be sustained regarding such an affidavit.[138] The court at its discretion may also permit the filing of supplemental or additional affidavits by either party.[139] If the affidavits supporting or opposing the motion refer to other documents, "sworn, or certified or photostatic copies" must be attached to the affidavit, "or their absence satisfactorily explained."[140] The Court of Appeals has deemed a party's failure to obey this rule to be a "substantive deficiency" which may be reviewed on appeal even if the issue was not raised at trial.[141]

### FILING OTHER SUPPORTING DOCUMENTS AND EVIDENCE

Documents other than affidavits may also be used to show that no genuine issue as to a material fact exists.[142] For example, a party may file a deposition by a witness under oath who is competent to testify and whose statements are based upon personal knowledge[143] or file answers to interrogatories, admissions of fact, stipulations, or concessions.[144] The court can also be requested to take judicial notice of certain facts. Pleadings can be reviewed to help establish the absence of a factual dispute. They can also frame those issues about which there is apparently no factual dispute or demonstrate admissions, for example, when an allegation is admitted or deemed

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138. *See* 6 MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 56.11[3], at 56-249, -252 to -253.

139. MD. R.P. 610(b). The Court of Appeals has permitted the filing of an amended affidavit three years after the filing for summary judgment when no prejudice resulted from the delay. Ehrlich v. Board of Educ., 257 Md. 542, 546-47, 263 A.2d 853, 855-56 (1970). Thus, the filing of a movant's affidavit need not coincide with the filing of the motion.

140. MD. R.P. 610(b). *See, e.g.*, Fishman Constr. Co. v. Hansen, 238 Md. 418, 421-23, 209 A.2d 605, 607-08 (1965).

141. *E.g.*, Finance Co. of America v. United States Fidelity & Guar. Co., 277 Md. 177, 188, 353 A.2d 249, 255 (1976); Wyand v. Patterson Agency, Inc., 266 Md. 456, 461, 295 A.2d 773, 776 (1972). *Contra,* Fishman Constr. Co. v. Hansen, 238 Md. 418, 424, 209 A.2d 605, 608 (1965) (because this question was not raised below, it could not be presented for first time on appeal).

142. *See* Washington Homes, Inc. v. Interstate Land Dev. Co., 281 Md. 712, 717, 382 A.2d 555, 557 (1978); MD. R.P. 610(a)(3), (d)(1)-(2) (court may consider depositions, pleadings, and admissions on file as well as affidavits).

143. White v. Friel, 210 Md. 274, 280-81, 123 A.2d 303, 305-06 (1956); Vanhook v. Merchants Mut. Ins. Co., 22 Md. App. 22, 26-27, 321 A.2d 540, 543 (1974).

144. Washington Homes, Inc. v. Interstate Land Dev. Co., 281 Md. 712, 717, 382 A.2d 555, 557 (1978). *See* Khoyan v. Turner, 255 Md. 144, 257 A.2d 219 (1969) (interrogatory answers).

admitted.[145] Unverified facts that appear in the pleadings, however, cannot be used to establish the presence or absence of a genuine factual dispute.[146]

Trial courts, with the apparent approval of the Court of Appeals, have permitted oral testimony at the summary judgment hearing in order to further clarify the facts and issues.[147] When used in a limited fashion, this procedure might be helpful in obtaining oral admissions of fact,[148] but, if it were extensively employed, it would undermine the purpose of the summary judgment procedure — to avoid the delays of a trial and live testimony.

### INABILITY TO FILE COUNTERING AFFIDAVITS

In instances in which a party moving for summary judgment is required to file a supporting affidavit, rule 610 demands that the opposing party, if he wishes to contest the facts presented by the affidavit, respond with a countering affidavit.[149] If he fails to do so, the opposing party is deemed by rule 610 to have admitted for purposes of the motion all statements of fact in the moving party's affidavits.[150]

There are times, however, when an opposing party might find himself unable to file a countering affidavit because of an unreachable witness, the need for more discovery, or as is often the case, because the knowledge of the appropriate facts is primarily within the moving party's control. In such a situation, rule 610(d)(2) permits the opposing party to file an affidavit indicating that he

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145. *See* Washington Homes, Inc. v. Interstate Land Dev. Co., 281 Md. 712, 717, 382 A.2d 555, 557 (1978). There can still be situations in which the contents of a pleading could sufficiently contradict a moving party's claim that no factual dispute exists. An opposing party's pleading could be verified before a notary public, be based on the affiant's personal knowledge, consist of admissible evidence, and show that the affiant is competent to testify. Because the truth safeguards would have been met, such a pleading, if sufficiently precise and direct, would be the functional equivalent of a countering affidavit. *See* 6 MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 56.11[3], at 56-250 to -251.

146. *See* text accompanying notes 99 to 122 *supra*.

147. *See* Warren v. Allewalt, 228 Md. 141, 142, 179 A.2d 124, 125 (1962) (per curiam). *Cf.* Horst v. Kraft, 247 Md. 455, 459, 231 A.2d 674, 676 (1967) (court allowed evidence submitted in nature of oral testimony during summary judgment procedure but not transcribed or anywhere recorded). *See generally* 6 MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶¶ 56.11[1.-6], .11[8].

148. *See* 4 J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE ¶ 3212.05, at 32-127 (M. Waxner rev. 1969).

149. *See* text accompanying note 94 *supra*.

150. MD. R.P. 610(a)(3).

cannot "present by affidavit facts essential to justify his opposition."[151] The affidavit should explain which facts cannot be rebutted, the full reason for this inability, and the steps which the party has taken or intends to take to obtain this information.[152]

In response to an affidavit filed pursuant to rule 610(d)(2), the trial court may deny the summary judgment motion without prejudice to its later renewal, grant a continuance to permit affidavits, depositions, or further discovery to be developed, or "make such other order as justice may require."[153] Although the rules do not specify a time for filing such an affidavit, it is logically analogous to that of an opposing affidavit and should be filed "at or before the time of the hearing."[154] The trial court has much discretion in determining whether to grant a continuance of the summary judgment hearing,[155] and it should weigh both the timeliness of the motion[156] and the reasonableness of the opposing party's need for delay in reaching its decision.[157]

Few Maryland cases have dealt with rule 610(d)(2), but, because it is nearly identical to Federal Rule of Civil Procedure 56(f), the federal cases should provide substantial guidance to future Maryland courts.[158] Professors Wright and Miller state that the federal

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151. MD. R.P. 610(d)(2). *See* Brown v. Suburban Cadillac, Inc., 260 Md. 251, 257, 272 A.2d 42, 45 (1971).

152. The Court of Appeals observed:

> A person who claims the existence of a document which is material to his opposition to a motion for summary judgment, but which document is not in his possession . . . should explain in his affidavit why he cannot produce it, specifically stating his reasons, and thereby enlist the aid of the court under Rule 610 d 2. He cannot merely allude to its existence, and without more, hope to raise the specter of dispute over a material fact which would defeat the motion for summary judgment under Maryland Rule 610 d 1.

Brown v. Suburban Cadillac, Inc., 260 Md. 251, 256-57, 272 A.2d 42, 45 (1971).

153. MD. R.P. 610(d)(2).

154. MD. R.P. 610(a)(3).

155. *See* Mullan Contracting Co. v. International Business Mach. Corp., 220 Md. 248, 258, 151 A.2d 906, 912 (1959).

156. It is not an abuse of discretion for a trial judge to refuse a request for a continuance in order to obtain further discovery for a summary judgment proceeding when the request was made in the midst of argument on the motion. *See* Selected Risks Ins. Co. v. Willis, 266 Md. 674, 678, 296 A.2d 424, 426 (1972).

157. While the presence of unanswered interrogatories having a bearing on the summary judgment proceeding could provide a legitimate basis for postponement, the Court of Appeals held that a trial judge did not abuse his discretion by denying a continuance under this rule when a party had three and one-third months to commence discovery which might be used to thwart summary judgment and did nothing. *See* Basiliko v. Royal Nat'l Bank, 263 Md. 545, 548, 284 A.2d 227, 228 (1971).

158. *See* note 55 and accompanying text *supra*.

cases have applied the rule "with a spirit of liberality."[159] When a party has proceeded diligently but has failed to meet all the technical requirements of the rule, he should be given the rule's protection.[160] This liberality is particularly apt when the party seeking to invoke the rule is either incarcerated or proceeding pro se.[161]

### CROSS-MOTIONS FOR SUMMARY JUDGMENT

If two or more opposing parties to an action feel entitled to summary judgment, each may file such a motion.[162] These are commonly termed cross-motions for summary judgment. Typically, each party will agree that there exists no genuine issue as to any material fact, and each will assert opposing issues of law. If, indeed, no factual dispute exists and only a question of law remains to be resolved, one of the motions will generally be granted and the other denied, promptly and efficiently disposing of the case.

Because the parties are not the final arbiters of whether a factual dispute exists, however, cross-motions for summary judgment do not necessarily result in the court granting one motion and denying the other.[163] Even though the parties agree that there is no factual dispute, the court may find otherwise. In addition, the issues posed by the cross-motions may differ. A party's theory might not arise out of the same factual base as his opponent's. Thus, factual issues may remain unresolved in either or both parties' cross-motions. A variation that would require the denial of both motions occurs when one party establishes that there is no factual dispute but his legal claim is incorrect, while the other party may not be able to establish the absence of a factual conflict with respect to his legal issue. Cross-motions could also merely result in the granting of partial summary judgment.[164]

The rules permit a party moving for summary judgment to concede facts merely for the purpose of that motion. If the motion is denied, these facts could later be contested at trial.[165] Nevertheless, it

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159. 10 C. WRIGHT & A. MILLER, *supra* note 3, § 2740, at 724. *See* 6 pt. 2 MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 56.24, at 56-1425 to -1426.

160. *See* 10 C. WRIGHT & A. MILLER, *supra* note 3, § 2740, at 724-26.

161. *E.g.*, Bracey v. Herringa, 466 F.2d 702, 703 (7th Cir. 1972); Hudson v. Hardy, 412 F.2d 1091, 1094-95 (D.C. Cir. 1968).

162. MD. R.P. 610(a)(1).

163. MD. R.P. 610(d)(1).

164. *See* text accompanying notes 181 to 185 *infra*.

165. MD. R.P. 610(d)(4).

appears that these concessions would not carry over and help the opposing party's cross-motion.[166]

Finally, the rules permit the trial court, "where appropriate," to grant summary judgment for a party opposing the motion even if that party has not filed a cross-motion for summary judgment.[167] Because there would generally be a lack of adequate notice, it would probably be inappropriate for the court to grant such a sua sponte cross-motion regarding issues not raised by the moving party's motion.[168]

### BURDEN OF PROOF AND PRESUMPTIONS

The party moving for summary judgment has the dual burden of establishing to the court's satisfaction that there exists "no genuine dispute as to any material fact" and that "he is entitled to judgment as a matter of law."[169] The failure of the moving party to establish either prong of this twofold test should result in the denial of the motion.[170] If any doubts arise as to whether a genuine factual dispute exists or whether the case is otherwise ripe for summary judgment, such doubts must be resolved against the moving party. Therefore, if the facts are susceptible to more than one inference, "the inferences must be drawn in the light most favorable to the person against whom the motion is made . . . and in the light least favorable to the movant . . . ."[171] An appellate court reviewing the grant or denial of a motion for summary judgment must, of course, also draw inferences in this fashion.[172] Similarly, the facts set forth

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166. *See, e.g.*, M. Snower & Co. v. United States, 140 F.2d 367, 369-70 (7th Cir. 1944). *See generally* C. WRIGHT & A. MILLER, *supra* note 3, §2720, at 462-64.

167. MD. R.P. 610(d)(1).

168. *Cf.* Concord Co. v. Matherly, 216 Md. 453, 460, 140 A.2d 900, 903-04 (1958) (cross-motion for summary judgment filed by appellees on day of hearing on appellant's prior summary judgment motion limited to single issue was mistakenly considered at same time by chancellor who rendered judgment for appellees on all issues; court held judgment should have been limited to single issue raised by appellant, stating in dictum that chancellor could have rendered judgment in favor of appellees on all issues even if they had not made cross-motion *if appellant's motion had not been limited to a single issue).*

169. MD. R.P. 610(a)(1).

170. If the moving party does not establish a factual dispute but the court concludes that his opponent is entitled to judgment as a matter of law, it may grant summary judgment for the opponent. MD. R.P. 610(d)(1).

171. Lipscomb v. Hess, 255 Md. 109, 118, 257 A.2d 178, 183 (1969). *See* Washington Homes, Inc. v. Interstate Land Dev. Co., 281 Md. 712, 717-18, 382 A.2d 555, 557-58 (1978).

172. Washington Homes, Inc. v. Interstate Land Dev. Co., 281 Md. 712, 717-18, 382 A.2d 555, 557-58 (1978).

by the opposing party, if supported by a proper affidavit,[173] are presumed to be true. Thus, the opposing party's affiants are presumed to be credible witnesses. Conversely, if the moving party's affiants' statements raise issues of credibility,[174] they must be resolved in favor of the opposing party, and summary judgment generally will be denied. The jury will then become the trier of credibility.

Although the general rule, as illustrated above, is that presumptions operate against the party seeking summary judgment, there is one significant exception. If an opposing party fails to file countering affidavits challenging the moving party's factual statements when required by rule 610(a)(3), the moving party's factual statement, if credible, will be presumed to be true.[175] This means that although the moving party carries the initial burden of establishing the essence of a genuine factual dispute, he can discharge this burden and shift it to the opposing party by filing credible relevant affidavits. The burden is then on the opposing party to counter with opposing affidavits or other documents to undermine the moving party's claim.[176] Although no Maryland court has used this characterization, these presumptions, as a whole,

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173. The opponent's affidavit will be ineffective unless it meets certain minimum requirements. For example, it must show with some precision that there is a genuine dispute as to a material fact and not merely respond in a vague and indefinite fashion. *E.g.*, Sherman v. American Bankers Life Assur. Co., 264 Md. 239, 243, 285 A.2d 652, 654 (1972). The minimum standards of sufficiency are discussed at pp. 204-07 *supra*.

174. Unless the moving party's affidavits are not credible on their face, the burden typically will be on the opposing party to explain why the movant's affiants should not be believed. The opposing party has no right to avoid summary judgment on the mere hope that these witnesses may falter at trial; instead, he must establish a reason why this would happen. *See* 6 pt. 2 MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 56.15[4], at 56-524 to -525. To create a triable issue, it might be shown, for example, that the affiant has an interest in the subject matter of the litigation, Sartor v. Arkansas Natural Gas Co., 321 U.S. 620 (1944), that he was not in a position to observe the facts accurately, or that there exist other grounds to impeach the content of his affidavit statement. Professor Moore suggests that an opponent should not get to trial on such credibility issues if, for example, the movant's evidence does not lend itself to cross-examination, if it was based on documentary evidence, or if the opponent has failed to avail himself of tests of the affiant's credibility such as depositions or other discovery devices. 6 pt. 2 MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 56.15[4], at 56-512 to -513.

175. *See* text accompanying note 96 *supra*.

176. As the Court of Appeals observed: "Where . . . pleadings, exhibits and affidavits of the moving party set forth sufficient competent evidence to entitle him to summary judgment, it is incumbent upon the opposing party to present such evidence as will give rise to a triable issue of a material fact." Fishman Constr. Co. v. Hansen, 238 Md. 418, 422, 209 A.2d 605, 608 (1965). *See* Marshall v. Woods, 260 Md. 15, 20, 271 A.2d 357, 360 (1970).

indicate that the trial court should carefully scrutinize the moving party's papers while treating those of the opposing party with indulgence.[177]

### THE COURT'S OPTIONS IN RULING ON THE MOTION

A motion for summary judgment should be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law."[178] The granting of the motion, however, "does not itself constitute the entry of final judgment."[179] That final step must be accomplished as a follow-up procedure pursuant to the rules governing entry of judgment.[180] Aside from granting or denying a summary judgment motion outright, it can also be resolved in several other ways — partial summary judgment, an order limiting the issues, or summary judgment for the opposing party.

#### *Partial Summary Judgment*

If it appears that no genuine factual dispute as to a part of a claim or defense exists, partial summary judgment can be entered on that issue or issues.[181] The terminology "partial summary judgment" is somewhat misleading. Because the full case has not yet been resolved, the entry of a final judgment would be premature. This remedy might be more properly labeled a "partial summary adjudication."[182] The court has broad discretion in rendering a partial resolution of the issues: it may render judgment "upon such terms as it thinks fit."[183] If the court grants a partial summary judgment, the case would then proceed to the resolution of the remaining issues. If the full case had originally been within the court's jurisdiction, it retains jurisdiction even though the partial resolution has reduced the amount in controversy to a level below the trial court's jurisdictional amount.[184] If either the resolved or

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177. *E.g.*, Wittlin v. Giacalone, 154 F.2d 20, 22 (D.C. Cir. 1946); 6 MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 56.15[3], at 56-469 to -472. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-61 (1970).

178. MD. R.P. 610(d)(1).

179. Felger v. Nichols, 30 Md. App. 278, 279, 352 A.2d 330, 331 (1976).

180. *See* MD. R.P. 641, 671 (law and equity judgments respectively).

181. MD. R.P. 610(d)(1) & (3). *See* Concord Co. v. Matherly, 216 Md. 453, 459-60, 140 A.2d 900, 903-04 (1958). Rule 610(d)(1) specifically permits summary judgment with respect to liability even though the proper amount of damages remains in dispute.

182. *See* 10 C. WRIGHT & A. MILLER, *supra* note 3, § 2737, at 681.

183. MD. R.P. 610(d)(3).

184. *Id.*

unresolved portions of the case concerns amounts below the court's jurisdictional limit, a separate judgment for this amount recoverable in the district court may be entered, or the court may await the outcome of the disputed portions and permit execution on the combined judgment within its jurisdiction.[185]

*Order Limiting Issues*

When a summary judgment hearing fails to resolve all of the issues in the case, the court at that point should, "if practicable," render an order "specifying the facts that appear without substantial controversy" and those that are "actually and in good faith controverted."[186] This order by the court, which would closely resemble a pretrial order under rule 504(c),[187] is mandatory if at all practicable. The facts that "appear without substantial controversy" are then deemed established, and the trial of the disputed portions of the case then proceeds "as justice may require."[188]

*Summary Judgment for Opponent*

If it appears at the hearing that summary judgment should be rendered in favor of the party opposing the motion, the court may render summary judgment for that party "even though he has not filed a cross-motion for summary judgment."[189] Typically, this situation occurs when the court is convinced that no genuine dispute exists but that the legal issues should be resolved against the movant and in favor of the opposing party. This appears to be the only situation in which summary judgment can routinely be granted without the benefiting party requesting it first.[190]

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185. *Id. See also* MD. R.P. 653.

186. MD. R.P. 610(d)(4). The factual posture of the case is to be determined by the court "by examining the pleadings and the evidence before it and by interrogating counsel." *Id.*

187. MD. R.P. 540(c) provides:

> The court may make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel. Such order may thereafter be modified, either before or during the trial, as justice may require.

188. MD. R.P. 610(d)(4).

189. MD. R.P. 610(d)(1).

190. *See* text accompanying note 167 *supra.*

### MOTION OR AFFIDAVIT MADE IN BAD FAITH

Rule 610(e) contains a provision intended to penalize a party who abuses summary judgment procedures. If a motion or affidavit is "presented in bad faith or solely for the purpose of delay," the offending party can be ordered to pay to any other party "the amount of the reasonable expenses which the filing of the motion or affidavit caused him to incur, including reasonable attorneys' fees."[191] This provision is broader than its federal counterpart[192] in that the motion itself, not just its supporting or opposing affidavits, is included as a basis for the award,[193] and it should therefore give the Maryland courts more flexibility when invoking this remedy. Furthermore, it seems clear that rule 610(e) is broad enough to include affidavits filed pursuant to rule 610(d) in which an opposing party states reasons for not being able to present facts sufficient to justify its opposition.

Unlike federal rule 56(g), however, rule 610 does not specifically permit the court to hold either the offending party or his attorney in contempt on the basis of a motion or affidavit tendered in bad faith. The rule also does not allow the court to order offending attorneys, rather than their clients, to pay the expenses incurred due to their bad faith. Thus, it is solely the offending party who bears the brunt of this penalty. Although rule 610's apparently intentional omission of a contempt remedy indicates that this extreme sanction is not favored, the court's inherent power to invoke the contempt citation to preserve its orderly functioning[194] should, in extraordinary situations, supply the legal basis for a contempt order against either the party or his attorney. While no reported Maryland cases have yet applied rule 610(e), its similarity to the federal rule and the several federal cases that have imposed sanctions for bad faith pursuant to that rule should offer guidance to the courts regarding appropriate occasions for implementing the Maryland rule and the types of costs to be awarded.[195]

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191. MD. R.P. 610(e).

192. FED. R. CIV. P. 56(g). *See* 6 pt. 2 MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 56.25.

193. Because affidavits need not always be filed in support of a summary judgment motion, *see* pp. 202-10 *supra*, a narrower rule might fail to provide adequate sanctions for abuses of summary judgment procedures.

194. *See Ex parte* Sturm, 152 Md. 114, 121, 136 A. 312, 315 (1927); Muskus v. State, 14 Md. App. 348, 358-59, 286 A.2d 783, 788 (1972).

195. *See, e.g.*, Alart Assocs., Inc. v. Aptaker, 279 F. Supp. 268, 270 (S.D.N.Y.), *appeal dismissed*, 402 F.2d 779 (2d Cir. 1968); Clark v. Hancock, 45 F.R.D. 512, 514-15 (S.D. Ga. 1968).

SUMMARY JUDGMENT IN PARTICULAR CASES

Although earlier forms of summary judgment procedures were traditionally limited to particular categories of cases,[196] there is nothing in the present Maryland rule, the case law, or the logic of the summary judgment process that would prevent its application to any particular type of cause of action. The significant inquiry is not whether the action is based on contract or tort but, regardless of its legal label, whether there is a genuine dispute as to the material facts of the case. Because in practice certain types of cases pose factual disputes that can rarely be resolved without a fact-finding inquiry, however, it may be that summary judgment frequently cannot be invoked in such situations.[197]

Antitrust and tort cases are two types of cases that often involve contested versions of the facts. The Maryland Court of Appeals has warned that "[u]sually it is neither advisable nor practicable to enter a summary judgment in a tort action."[198] It has, however, approved the granting of summary judgment in tort cases in which all conditions of the rule were met, including, ironically, the case espousing the aforementioned caveat.[199] Because of the seriousness and frequent complexity of the issues posed by constitutional questions, the need for a full and complete factual hearing often precludes summary judgment in constitutional cases. In *Lawrence v. State Department of Health,*[200] for example, the Court of Appeals upheld the denial of summary judgment and warned that "[c]onstitutional issues are generally not to be decided on mere conclusions of the pleadings."[201] When the circumstances allow, however, summary judgment is appropriate in these cases as well.[202] Cases that

196. *See* pp. 189–93 *supra.*

197. For a brief study of summary judgment in various types of cases on appeal before the Fourth Circuit, see Guiher, *Summary Judgment — Tactical Problem of the Trial Lawyer,* 48 U. VA. L. REV. 1263 (1962).

198. Driver v. Potomac Elec. Power Co., 247 Md. 75, 79, 230 A.2d 321, 324 (1967). *See* 4 J. WEINSTEIN, H. KORN & A. MILLER, *supra* note 148, ¶ 3212.03, at 32-123 to -126.

199. Driver v. Potomac Elec. Power Co., 247 Md. 75, 230 A.2d 321 (1967). *Accord* Evans v. Johns Hopkins Univ., 224 Md. 234, 167 A.2d 591 (1961). *See* Burke v. Williams, 244 Md. 154, 158, 223 A.2d 187, 189 (1966) (dictum) ("In [tort] cases such as this one, where the facts are not in dispute and the plaintiff intentionally and voluntarily exposed himself to a known danger, we have sustained the granting of summary judgment . . . .").

200. 247 Md. 367, 231 A.2d 46 (1967).

201. *Id.* at 373, 231 A.2d at 49.

202. *E.g.,* Washington Suburban Sanitary Comm'n v. Buckley, 197 Md. 203, 78 A.2d 638 (1951). *See generally* 6 pt. 2 MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶ 56.17[10].

primarily raise issues of fraud or intent are also generally ill suited for summary judgment due to the need for greater than usual factual development,[203] but when there is no genuine issue of material fact, summary judgment may be appropriate.[204] In addition, a summary judgment motion can readily serve as a means by which a defendant may claim that the plaintiff's suit must be dismissed because of the running of the statute of limitations. Because a statute of limitations defense generally cannot be raised at law in Maryland by a demurrer,[205] summary judgment provides a prompt mechanism for resolving this issue if no dispute exists as to the relevant facts.[206]

Trial courts should heed the words of Mr. Justice Jackson in the Supreme Court's *Kennedy v. Silas Mason Co.*[207] decision when trying to apply summary judgment procedures to a legally and factually complicated case:

> We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.
>
> We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide.[208]

## TACTICAL USE OF SUMMARY JUDGMENT

The summary judgment procedure is neutral on its face, but like any procedure that provides a direct route to a judgment granting affirmative relief, it tends to favor the party who seeks a change in

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203. *See* 6 pt. 2 MOORE'S FEDERAL PRACTICE, *supra* note 2, ¶¶ 56.17[27], .17[41.-1].

204. *Id.* at 56-869 to -871, -930 to -932.

205. *See* Hoover v. Williamson, 236 Md. 250, 255-56, 203 A.2d 861, 864 (1964).

206. *E.g.*, Jordan v. Morgan, 252 Md. 122, 249 A.2d 124 (1969); MacBride v. Gulbro, 247 Md. 727, 234 A.2d 586 (1967).

207. 334 U.S. 249 (1948).

208. *Id.* at 256-57.

the status quo. Summary judgment was conceived as a plaintiff's offensive weapon[209] and in practice remains primarily a plaintiff's remedy except in the less frequent situations concerning counterclaims, cross-claims, and third-party claims. The procedure's major attraction is that if properly invoked, it should promptly resolve the parties' dispute without the expenditure of a great deal of time and money. Judicial determinations based on affidavits are much more efficient than those founded on the presentation of witnesses at trial.

Aside from these more obvious functions, the procedure provides its initiator with several other tactical advantages. In many cases a plaintiff might be able to tailor his claims so as to obtain a summary judgment more readily. If he has multiple legal grounds for the same claim, he could move for summary judgment based upon those not posing factual issues, thereby avoiding the need for a trial on the factually disputed grounds. Also, it is generally within a party's control to frame his claims so as to avoid factual issues or perhaps even to concede a claim in order to avoid the necessity of a factual hearing to resolve it. Because the plaintiff controls the limits of his claims, he can more readily maneuver to attain a summary judgment posture. This ability to play the dominant role in structuring a case can lead to several benefits for a plaintiff. In many instances an attorney may conclude that his case will be damaged by a trial. Recitation of the facts of the case through the austere and relatively emotionless medium of affidavits might be preferred to the more vivid picture painted by in-court testimony. Faced with the prospect of a trial, counsel might even concede minor issues in order to guarantee the absence of a factual dispute and thereby foreclose trial through the use of summary judgment.

A related strategy derives its value from the unpredictability of trial testimony. An affidavit prepared for the affiant by an attorney can be carefully worded. It eliminates the risks of the witness' uncertain choice of words or a change of mind at trial. Thus, an eloquently written affidavit is not only the more desirable medium, but it also eliminates the element of surprise which might aid an opponent with a weak case.

Summary judgment can also be used to induce a prompt settlement in a case. The filing of a summary judgment motion immediately puts the opponent at risk of losing the case. Pressing for resolution of the issue in this way will generally force an opponent to evaluate carefully the strength of his case. He must fully assess the validity of the proponent's legal issues, as well as weigh

209. *See* pp. 189–93 *supra*.

his ability to counter the factual proffers with affidavits of his own. This assessment of the probability of success should set the stage for a reasonable compromise position. Thus, a plaintiff who can persuasively present his claim as having no factual dispute may obtain a quick settlement through the effective use of summary judgment.

Summary judgment also has certain disadvantages for the plaintiff. A premature invocation of summary judgment, resulting in denial due to the existence of a factual dispute, could waste valuable attorney time and client money.[210] In a case in which the existence of a factual dispute presents a close question, the better strategy might be for counsel to forego the easy shortcuts to a quick victory in favor of the greater guarantee of victory after trial. Frequently, attorneys have tried to avoid trial by the summary judgment procedure only to have an appellate court find that a factual dispute existed and order a remand.[211] If a party is too impatient in invoking summary procedures, the ensuing appeal might cost more time and money than it could possibly have saved. Furthermore, this tactic, if unsuccessful, might procedurally prejudice the case as well as disappoint the client.[212]

Typically, the defendant will have numerous tactical reasons for wanting to avoid the summary judgment procedure. Because time and the status quo are most often on his side, the speed of summary judgment tends to provoke resistance. If a defendant is interested in delay, he must provoke a factual dispute, thereby necessitating a trial. If he has an emotional case, he will probably want the full force of his story conveyed by live witnesses. If he has a weak case, his only hope of success may be linked to the whims of the jury. On the other hand, an attorney with confidence in his case may be unwilling to have the truth determined by the less perfect device of an affidavit. It may be that his case would benefit from the personalities of his live witnesses or that his opponent's position would crumble under cross-examination, the truth-assuring mechanism not incorporated into the summary judgment procedure.

The complexity of summary judgment procedures might also lead a cautious or inexperienced counsel opposing summary judgment to misinterpret the rule. As has been demonstrated, Maryland's rule poses many perils for the unwary. An attorney

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210. *See* Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); 4 J. WEISTEIN, H. KORN & A. MILLER, *supra* note 148, ¶ 3212.03, at 32-123; Guiher, *supra* note 197, at 1266.

211. *See, e.g.*, Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946).

212. *See* Guiher, *supra* note 197, at 1268-70.

might file a deficient countering affidavit or, even worse, none at all. If his countering witness is unavailable or if the facts underlying the potential dispute are within the movant's knowledge or control, opposing counsel may not react appropriately. A vague motion and affidavit or one seemingly deficient might lull the opposing counsel into thinking that a strong countering affidavit is unnecessary. Because the opposing party generally has nothing to win and much to lose by summary judgment, these pitfalls pose a substantial risk.

## CONCLUSION

The summary judgment procedure, like any procedural device, bestows its bounties upon different parties at different times and, like any rule, is susceptible to abuse. Nevertheless, if its advantages were appreciated by the bar and uniformly applied by the bench, it would promote the interests of the parties and judiciary alike in their mutual pursuit of justice and the efficient resolution of cases.

## APPENDIX

**Maryland Rule of Procedure 610. Summary Judgment.**

a. *Motion for.*

1. When and by Whom Made.

In an action, a party asserting a claim, whether an original claim, counterclaim, cross-claim, or third-party claim, or a party against whom a claim is asserted, may at any time make a motion for a summary judgment in his favor as to all or any part of the claim on the ground that there is no genuine dispute as to any material fact and that he is entitled to judgment as a matter of law.

2. Effect on Time for Pleading.

A motion for summary judgment does not affect the time for pleading unless the court orders otherwise.

3. Use of Affidavits.

The motion must be supported by affidavit when filed with the pleading asserting the claim or before the adverse party has filed his initial pleading to it; otherwise the motion may be made with or without supporting affidavits. Unless the court shall otherwise order for good cause shown, where the motion is required to be supported by affidavit and the opposing party desires to controvert any statement of fact therein, he must file an affidavit or deposition in support of his answer to the motion. Such affidavit or deposition shall be filed before or at the time of filing his initial pleading unless the time for filing is extended pursuant to section a of Rule 309. The failure to file such opposing affidavit or deposition shall constitute an admission for purposes of the motion of all statements of fact in the affidavit of the moving party, but shall not constitute an admission that such motion or affidavit is legally sufficient. In all other cases the adverse party may file an opposing affidavit at or before the time of the hearing.

4. In Lieu of Hearing on Bill and Answer.

Cases formerly heard on bill and answer may be heard under this Rule.

b. *Form of Affidavit — Further Evidence.*

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn, or certified or

photostatic copies of all material papers or parts thereof referred to in an affidavit shall be attached thereto or filed therewith or their absence satisfactorily explained. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

c. *Time of Hearings.*

1. Motion Before Initial Pleading to Claim.

Where a claimant files the motion with his pleading asserting the claim, or thereafter but before the adverse party has filed his initial pleading to it, the motion, upon not less than fifteen days' notice by either party, may be heard at any time after the expiration of fifteen days after the return day in the action. Every such motion shall be accompanied by a notice to the adverse party (1) stating the time at or after which the motion may be heard, and (2) warning him that upon his failure to plead within the time allowed by law or rule of court, judgment will be entered against him.

2. Motion After Initial Pleading to Claim.

Where a motion is filed after the adverse party has filed his initial pleading to such claim, the motion, upon not less than ten days' notice by either party, may be heard at any time. The motion shall be accompanied by a notice stating the time at or after which it may be heard.

3. Absence of Defense.

After motion and notice and upon failure of the adverse party to plead to the claim within the time allowed by law or rule of court the court may, at any time thereafter, without hearing and without further notice to the adverse party, enter a judgment in conformity with section d of this Rule.

d. *Proceedings on Motion.*

1. Motion Granted.

The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine dispute as to the amount of damages. Where appropriate, the court on the hearing may render judgment for the opposing party even though he has not filed a cross-motion for summary judgment.

2. Affidavit of Defense Not Available.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as justice may require.

3. Part of Claim — No Genuine Issue.

If at the hearing it appears that there is no genuine dispute as to part of the claim or as to the defense to part of the claim, the court in its discretion may render judgment forthwith as to that part, upon such terms as it thinks fit. In such case, the action shall proceed on the disputed part of the claim, and the court shall retain jurisdiction of the action, even though the disputed part is below its jurisdictional amount, if the original claim was within its jurisdiction. If the summary judgment or judgment on the disputed portion is below the jurisdiction of the court, Rule 653 (Verdict Below Jurisdictional Amount) shall apply, except that execution on the combined judgments may issue from the court entering them, if their sum is within its jursidction.

4. Order Limiting Issues.

If on the motion judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, a party shall not be limited at the trial to the facts stated in his affidavit. But in such case, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in the controversy, and direct such further proceedings in the action as justice may require. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

5. Amendment Not Limited.

This Rule shall not limit or affect amendment of the pleadings at any stage of the proceedings.

e. *Bad Faith.*

Should it appear to the satisfaction of the court at any time that any motion or affidavit presented pursuant to this Rule is presented in bad faith or solely for the purpose of delay, the court shall forthwith order the offending party to pay to the other party the amount of the reasonable expenses which the filing of the motion or affidavit caused him to incur, including reasonable attorneys' fees.