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Civil Procedure—Summary Judgment—Fact Question Precludes Use

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the existence of a duty owed by defendant to the plaintiff, (2) a breach of that duty with (3) a resultant injury to the plaintiff, and (4) absence of contributory negligence.[5] Failure to establish these elements will lead to the withdrawal of the case from the jury either by dismissal of the complaint[6] or by directed verdict or judgment notwithstanding the verdict,[7] as appropriate.

In addition, the establishment of a jury question requires either a conflict in the evidence or uncontested evidence from which fair-minded men might draw more than one inference,[8] a mere scintilla of evidence being insufficient for this purpose.[9] The test applied where a motion for directed verdict was involved was whether the trier of facts could by any rational process find a verdict for the party moved against on the basis of the evidence presented.[10]

In *Rowland v. Parks*,[11] these elements of law were involved in relation to the problem of the establishment of a prima facie case. In keeping with traditional law on the subject, it was held that the case presented by the plaintiff showed a mere scintilla of evidence and therefore did not merit submission to the jury.[12]

Summary Judgment—Fact Question Precludes Use

A motion for summary judgment must be denied whenever the court determines that there are triable issues of fact presented in the pleadings.[13] On this basis, the Court of Appeals reversed the lower court decision in *O'Dowd v. American Surety Company of New York*.[14] They held that since an insurer's contractual liability depended upon the facts surrounding the accident for which liability compensation is claimed,[15] those facts must be alleged and established at trial.

5. Kimbar v. Estis, 1 N.Y.2d 399, 153 N.Y.S.2d 197 (1956); 6 BUFFALO L. REV. 228 (1956-57).
6. *Ibid.*
7. N.Y. CIV. PRAC. ACT §457(a).
8. Veihelmann v. Manufacturers Safe Deposit Co., 303 N.Y. 526, 104 N.E.2d 888 (1952).
9. FIFTEENTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF THE STATE OF NEW YORK: 1949, p. 250, states that:

> Insufficient evidence as presently understood, does not mean absolutely no evidence but evidence which is so slight as to be in the eyes of the law no evidence; or, differently stated, evidence which amounts to no more than a mere scintilla.

10. Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 54 N.E.2d 809 (1944); Wearever Upholstery & Furniture Corp. v. The Home Ins. Co., 286 App. Div. 93, 141 N.Y.S.2d 107 (1st Dep't 1955).
11. 2 N.Y.2d 64, 156 N.Y.S.2d 834 (1956).
12. Previous notes concerning the requirements for a prima facie case are found at 5 BUFFALO L. REV. 63 (1955-56) and 6 BUFFALO L. REV. 146 (1956-57).
13. N. Y. R. CIV. PRAC. 113.
14. O'Dowd v. American Surety Co. of New York, 3 N.Y.2d 347, 165 N.Y.S.2d 458 (1957).
15. Stonbrough v. Preferred Accident Insurance Co., 292 N.Y. 154, 155, 54 N.E.2d 342, 343 (1944).

The burden is upon the insured to establish that their claim for relief is authorized by the terms of the policy.[16] Since the insured did not properly allege the necessary degree of tort liability, to establish a prima facie claim for breach of the policy contract, his motion for summary judgment on the pleadings, must fail for insufficiency.

Insured further contended that insurer is estopped from denying liability under the policy because they undertook the defense of a prior action to determine insured's tort liability under the original claim for damages.[17] The Court rejected this assertion by pointing out that the insurer had in fact given notice of its intention to reserve claim before defending the action and was therefore not estopped.[18]

The Court had thus probed deeply into the facts surrounding a motion for summary judgment on the pleadings. Although summary judgment is an efficient, expedient measure to quickly eliminate ungrounded controversies from today's overcrowded court calendars, it must be used with utmost care and discretion. If this caution is not observed, we will open wide the dangerous door to denial of due process, in the guise of judicial expediency.

Summary Judgment—Determination Of The Nature Of The Action

In *Erbe v. Lincoln Rochester Trust Company*,[19] the plaintiffs brought an action against the executor-trustee of a trust which had been concluded nine years before, alleging certain wrongful acts of self-dealing which had taken place more than ten years before this action. The plaintiffs had unsuccessfully alleged bad faith on the part of the defendant in prior proceedings relating to the termination of the trust but brought the present action alleging newly discovered evidence of fraud, apparently resulting from a perusal of the Surrogate's Court records pertaining to the trust.

The complaint was dismissed in Special Term[20] on the grounds that the action, though for damages in fraud, was precluded by the six year statute of limitations[21] since the plaintiffs had sufficient knowledge of the events at the

16. Lavine v. Indemnity Insurance Co. of North America, 260 N.Y. 339, 183 N.E. 897 (1933).
17. Moore Construction Co. v. United States Fidelity & Guarantee Co., 293 N.Y. 119, 56 N.E.2d 74 (1944); Gerka v. Fidelity & Casualty Co. of New York, 251 N.Y. 51, 57, 167 N.E.169, 170 (1929).
18. Moore Construction Co. v. United States Fidelity & Guarantee Co., 293 N.Y. 119, 125, 56 N.E.2d 74, 76 (1944); Knauss Inc. v. Indemnity Ins. Co. of North America, 270 N.Y. 211, 215, 216, 200 N.E. 791-93 (1936).
19. 3 N.Y.2d 321, 165 N.Y.S.2d 107 (1957).
20. 1 Misc.2d 413, 145 N.Y.S.2d 788 (Sup. Ct. 1955).
21. N. Y. CIV. PRAC. ACT §48 (5).