SMU | Dedman School of Law

SMU Law Review

Volume 20 | Issue 4 Article 16

1966

Reviewing Denied Motion for Summary Judgment - Remand or Rendition of Judgment by Appellate Court

Marcus Leslie Thompson

may be peripheral or merely one of several co-operative forces.[80] It may now be questioned whether a further development of the "state inaction" concept together with the concept of "peripheral state action" could result in federal prosecution of private individuals under section 241 by finding that a state's allowing or failing to prevent a violation of the equal protection clause rights is state action in violation of the fourteenth amendment.

Regardless of the answer to this question, the separate opinions of the Court may make moot the entire issue. A majority of the justices agreed that Congress may, pursuant to section 5 of the fourteenth amendment,[81] legislate to punish all conspiracies, with or without state action, that interfere with fourteenth amendment rights.[82] Thus, as a result of *Guest,* it is now possible that Congress may provide for federal control or supervision of many types of activity which would involve interference by private individuals, previously thought to be beyond the powers of the federal government.[83]

Steve Salch

Reviewing Denied Motion for Summary Judgment — Remand or Rendition of Judgment by Appellate Court

I. ACKERMAN v. VORDENBAUM[1]

Ernestine Vordenbaum brought an action in trespass to try title and, in the alternative, to set aside a deed executed by her to the defendant, Milton Ackermann. The plaintiff's motion for summary

[80] See text and authorities *supra* notes 42-48.

[81] "The Congress shall have the power to enforce this article by appropriate legislation." U.S. CONST. amend. XIV, § 5.

[82] In *Guest* a majority of the Court expressed the opinion that, pursuant to § 5 of the fourteenth amendment, Congress may, in its discretion, statutorily provide for punishment of private conspiracies to deprive persons of the equal protection of the laws, despite the lack of state action. United States v. Guest, 383 U.S. 745, 761 (1966) (concurring opinion of Clark, J.); *Id.* at 774 (Brennan, J., concurring in part and dissenting in part). Three members of the Court stated further that § 241 is legislation under § 5 and reaches private conspiracies even though no state action is involved in the conspiracy. United States v. Guest, 383 U.S. 745, 774 (1966) (Brennan, J., concurring in part and dissenting in part). *Cf.* Katzenbach v. Morgan, 384 U.S. 641, 649-51 (1966).

[83] This ramification of *Guest* has not gone unnoticed. See, *e.g.,* Time, Sept. 23, 1966, p. 76; New York Times, Sept. 14, 1966, p. 42, col. 3. As to possible limitations on this power, Mr. Justice Goldberg noted that the social rights of man should not be confused with his civil rights. Thus the constitution protects privacy and the choice of friends and business partners on the basis of personal prejudice so that social equality could never be imposed under any constitutional theory. Bell v. Maryland, 378 U.S. 226, 286, 312-13 (1964) (separate opinion of Goldberg, J.).

[1] 403 S.W.2d 362 (Tex. 1966).

judgment was overruled. The defendant then moved to strike the plaintiff's second amended original petition for failure to comply with rules relating to supplemental and amended petitions.[2] After six months delay, the court granted the motion, and the suit was later dismissed on the defendent's motion for lack of prosecution. The court of civil appeals reversed the dismissal and rendered judgment for the plaintiff, finding that the suit was improperly dismissed and that the previous motion for summary judgment had been incorrectly overruled. The defendant appealed. *Held, reformed and affirmed*: A reviewing court can reverse and render judgment only when cross-motions for summary judgment were made with one denied and the other granted. In all other cases a denied motion for summary judgment is not reviewable by an appellate court. *Ackermann v. Vordenbaum*, 403 S.W.2d 362 (Tex. 1966).

II. Development of Appellate Summary Judgment Procedure in Texas

Since the adoption in Texas of rule 166-A[3] in 1950, the courts have consistently reiterated the stock phrase that "the denial of a motion for summary judgment is interlocutory and no appeal will lie therefrom."[4] In 1954 the supreme court, by way of dicta in *Wright*

[2] See Tex. R. Civ. P. 46, 49.

[3] Tex. R. Civ. P. 166-A became effective March 1, 1950. It was adopted with minor textual changes from Fed. R. Civ. P. 56. [See note 19 *infra* for Fed. R. Civ. P. 56(c)]. Following is Tex. R. Civ. P. 166-A §§ (a)-(c) with 1966 amendment effective January 1, 1967:

> Summary Judgment
>
> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

[4] Some of the cases making this broad statement are: Rogers v. Royalty Pooling Co., 157 Tex. 304, 302 S.W.2d 938 (1957); Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955); Wyche v. Noah, 288 S.W.2d 866 (Tex. Civ. App. 1956) *error ref. n.r.e.*; City of S.W.2d 208 (Tex. Civ. App. 1954) *error ref. n.r.e.*; F. & T. Dev. Co. v. Morris, 248

v. Wright,[5] did say that it might be convenient to allow appellate courts to review the refusal of a motion for summary judgment and then render the judgment that the trial court ought to have entered. However, the court added that "since such a practice would be by way of exception to a general rule, any benefits might well be outweighed by the resultant confusion"[6] since this would be allowing an appeal from an interlocutory decision. Without considering its prior dicta in the *Wright* case, the supreme court in 1957 reaffirmed the prior position that a denied motion for summary judgment afforded no basis for the reviewing court to render judgment for the movant.[7]

The break from the consistently applied rule of nonappealability came in 1958. In *Tobin v. Garcia*[8] the supreme court again stated that a single denied motion for summary judgment is interlocutory and is not reviewable on appeal from a later final judgment; but it held that when there are cross-motions for summary judgment and one is granted, the denied motion becomes final and reviewable on appeal. The court relied on rule 434[9] as authority to allow the appellate court to render judgment, rendition being allowed under that rule unless "it is necessary that some matter of fact be ascertained." The court followed *Tobin v. Garcia* in 1959 in *Gulf, Colorado & Santa Fe Ry. v. McBride*.[10] This was also a case of cross-motions for summary judgment, but dicta in the case indicated that judgment might be rendered based on a prior denied motion for summary judgment followed by *any* final judgment.[11] In 1960 the supreme court in another case involving the granting of one of two opposing motions for summary judgment, citing *Tobin v. Garcia* and *McBride*, reversed and rendered judgment, reiterating the reasoning of *Tobin* that, since "admittedly there are no facts in dispute . . . ,"[12] the court as authorized to render the judgment that the trial court should have entered.[13]

San Antonio v. Crane, 275 S.W.2d 724 (Tex. Civ. App. 1955); Dyche v. Simmons, 264 S.W.2d 233 (Tex. Civ. App. 1952); Mellette v. Hudstan Oil Corp., 243 S.W.2d 438 (Tex. Civ. App. 1952) *error ref. n.r.e.*

[5] 154 Tex. 138, 274 S.W.2d 670 (1955).

[6] *Id.* at 674.

[7] Rogers v. Royalty Pooling Co., 157 Tex. 304, 302 S.W.2d 938 (1957).

[8] 159 Tex. 58, 316 S.W.2d 396 (1958). Tobin v. Garcia was noted in 4 So. TEX. L.J. 298 (1959), and the author there concluded that the gap in the Texas summary judgment system was closed by *Tobin*. The instant problem of a denied motion for summary judgment followed by a final judgment was not mentioned.

[9] See TEX. R. CIV. P. 434.

[10] 159 Tex. 442, 322 S.W.2d 492 (1959).

[11] For a general discussion of *McBride* and its potential effect, see also Note, 16 OKLA. L. REV. 335 (1963).

[12] Catholic Charities v. Harper, 161 Tex. 21, 337 S.W.2d 111 (1960).

[13] See also Dallas Teachers Credit Union v. Sweeney, 326 S.W.2d 244 (Tex. Civ. App. 1959) *error dism.*, where the court considered an appeal from a denied cross-motion for summary judgment but remanded since an issue of fact existed.

III. Analysis of Ackermann

Ackermann v. Vordenbaum limits the possible extension of *Tobin v. Garcia* implied in *McBride* and definitely establishes the rule that rendition of judgment can be granted by an appellate court only where cross-motions for summary judgment were presented in the trial court. The supreme court stated that any other view of the rule "could result in judgments which would be patently unjust."[14] The court reasoned that when there are cross-motions for summary judgment, both parties are saying that only an issue of law is present to be decided. While the existence of cross-motions alone does not insure that there is no fact issue, it does indicate that both parties are mainly concerned with the interpretations of law and that "they are prepared to present their respective contentions with reference [to the law]."[15] On the other hand, when a single motion for summary judgment is made, the party responding to the motion is endeavoring to establish, through affidavits and depositions, that an issue of fact does exist. Moreover, the court feared that the response to the motion might not disclose all the pertinent facts since "generally, the facts are more fully developed upon a conventional trial than they are by affidavits and depositions relied upon to support or defeat a motion for summary judgment."[16]

While the Texas courts may review a denied motion for summary judgment in the cases where cross-motions are made with one granted and one denied,[17] the courts must flatly refuse to review any single denied motion for summary judgment, even after the case has proceeded to a final judgment in the trial court. The only proper procedural step after reversal is to remand to the trial court for further action. The requirement of remanding is to be applied without reference to the existence or non-existence of a genuine issue of fact in the case before the appellate court.

IV. Federal Rule of Appealability

When deciding cases concerning summary judgment under Texas rule 166-A,[18] if there are no Texas cases in point, the Texas courts

[14] 403 S.W.2d 362 at 365.

[15] *Ibid.*

[16] *Ibid.*

[17] It is interesting to note that in 1961 the Austin Court of Civil Appeals in Southern Lloyds v. Jones, 345 S.W.2d 435 (Tex. Civ. App. 1961), completely overlooked *Tobin* and stated that it could not reverse and render on cross-motions for a summary judgment, citing Rogers v. Royalty Pooling Co. (*supra* note 7) as authority when, in fact, *Rogers* had been overruled by *Tobin* more than three years earlier.

often find precedent in federal cases arising under federal rule 56[19] (from which the Texas rule is adopted). In fact, in *Dunn v. Tillman*[20] a court of civil appeals quoted both the Texas and the federal rules in their entirety to show their substantial, if not literal, identity before deciding the case on the basis of prior federal decisions. In *Wright v. Wright*[21] the supreme court cited federal cases saying, "we see no good reason to take a different view for our own practice, which derives from the Federal Rules."[22] For this reason, even though no federal cases were mentioned in arriving at the *Ackermann* decision, it is pertinent to examine federal decisions in point before drawing conclusions as to the propriety of this new Texas rule for appellate review of a denied motion for summary judgment.

Denial of a motion for summary judgment can be based either on the existence of an issue of fact or on the application of the substantive law to the uncontested facts.[23] In either case the denial is interlocutory, and the case remains for trial. In federal appellate courts the order of denial is not immediately appealable[24] unless specifically made appealable by rule or statute.[25] For example, immediate appealability exists when the action involves multiple claims or multiple parties and the court enters the proper orders under rule 54(b)[26] or when the action fits within the interlocutory appeal situations enumerated in 28 U.S.C. § 1292.[27] The rule of non-appealability

---

[18] TEX. R. CIV. P. 166-A; see note 3 *supra*.

[19] FED. R. CIV. P. 56. Specifically rule 56(c), provides:

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

[20] 255 S.W.2d 933 (Tex. Civ. App. 1953).

[21] 154 Tex. 138, 274 S.W.2d 670 (1955).

[22] *Id.* at 674. Specifically the court relied on Atlantic Co. v. Citizens Ice & Cold Storage Co., 178 F.2d 453 (5th Cir. 1949) and Jones v. St. Paul Fire & Marine Ins. Co., 108 F.2d 123 (5th Cir. 1939).

[23] See 6 MOORE, FEDERAL PRACTICE ¶ 56 (2d ed. 1965) (hereinafter cited as 6 MOORE) for a general use of summary judgment. See also McDonald, *Effective Use of Summary Judgment*, 15 Sw. L.J. 365 (1961); and 3 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1231 (Wright ed. 1958) (hereinafter cited as 3 BARRON & HOLTZOFF).

[24] 6 MOORE ¶ 56.27.

[25] *Id.* at 56.20(1).

[26] FED. R. CIV. P. 54(b). See discussion of rule 54(b) at 6 MOORE ¶ 56.21(1) and 3 BARRON & HOLTZOFF § 1241.

[27] Interlocutory appeals are allowed under 28 U.S.C. § 1292(a) (1948) as of right in four situations: (1) interlocutory orders involving injunctions; (2) interlocutory orders appointing a receiver; (3) orders determining rights and liabilities in admiralty cases; and (4) judgments in civil actions for patent infringement which are final except for account-

of a denied motion for summary judgment had been applied consistently since the promulgation of rule 56, but the definition of non-appealability means only not immediately appealable.[28] It has no reference to whether or not the denial is reviewable when a final judgment in the case is before a higher court.

Texas courts have adopted from the federal practice the idea of non-appealability of a denied motion for summary judgment but have not accepted the modification promulgated by the federal courts that this denial remains interlocutory with other orders of the trial court only until there is a final judgment in the trial court.

While there is no federal case discussing exactly the same procedural problems as those in *Ackermann*, the distinction between the narrow use of summary judgment in Texas as opposed to the much broader use in federal courts can be seen from the holdings and dicta of similar situations in federal cases. These cases demonstrate not only the ability of a federal appellate court to reverse and render summary judgment but, more importantly, the guidelines followed in determining the propriety of rendering judgment. When federal courts decline to render judgment based on an earlier denied motion for summary judgment, they do so for one of two primary reasons. First, a genuine issue as to a material fact may clearly exist. To reverse and render judgment rather than to remand here would be to go against the express mandate of rule 56(c). Secondly, the parties may not have been given an opportunity to establish the existence of a genuine issue of material fact. To render judgment in this situation would possibly be to deny the losing party a jury trial on an issue of fact. There is no federal principle similar to the Texas principle that a single denied motion for summary judgment is not reviewable on appeal per se.

United States v. Fremont County[29] was one of the earliest federal cases where the appellate court rendered judgment based on a denied motion for summary judgment. The trial court, after overruling the plaintiff's motion for summary judgment, dismissed the plaintiff's cause of action on the merits.[30] Without discussing rule 56, the court

ing. Permissive appeal is also possible under 28 U.S.C. § 1292(b) (1948) from an interlocutory order. Generally see 3 BARRON & HOLTZOFF § 1242.

[28] See rule 56, note 19 *supra*. The consistency of the federal courts in refusing an immediate appeal of a denied motion for summary judgment can be seen in the following sample of cases: Valdosta Livestock Co. v. Williams, 316 F.2d 188 (4th Cir. 1963); Burleson v. Canada, 285 F.2d 264 (4th Cir. 1961); Atlantic Co. v. Citizens Ice & Cold Storage Co., 178 F.2d 453 (5th Cir. 1949); Jones v. St. Paul Fire & Marine Ins. Co., 108 F.2d 123 (5th Cir. 1939).

[29] 145 F.2d 329 (10th Cir. 1944), *cert. denied*, 323 U.S. 804 (1945).

[30] United States v. Fremont County, 53 F. Supp. 395 (D. Wyo. 1943).

of appeals found that there were no controverted material fact issues and reversed and rendered judgment for the plaintiff.[31] Perhaps the lack of discussion was because clearly all the facts were before the court, and, since they were uncontested, there was no need to remand for a trial court to decide issues of fact. It was certainly more expeditious for the appellate court to apply the law to the facts presented than to remand for that same purpose.

The Supreme Court in 1948 decided *Fountain v. Filson*[32] which has become the leading federal case setting out criteria limiting the power of an appellate court to render summary judgment. The defendant won in the trial court. The court of appeals reviewed the trial court findings of fact and made out a new cause of action for plaintiff which he had not previously pleaded. Having thus found a claim which apparently entitled plaintiff to win, the court ordered summary judgment entered accordingly. The Supreme Court reversed and remanded because the verdict of the court of appeals was based on a theory not presented to the trial court.[33] The Court stated that normally there would be no question of the propriety of granting summary judgment by the appellate court, but here the defendant would have been denied an opportunity to present her case with respect to the new claim found by the court of appeals. The defendant might have been able to present a triable issue of fact concerning this new claim. The Court indicated that if the plaintiff had presented this claim in the trial court, it would have been procedurally correct for the appellate court to reverse and render summary judgment for plaintiff. *Byrd v. Blue Ridge Elec. Co-op.*,[34] decided by the Supreme Court in 1958, restated that rendition will not be allowed when the losing party would be denied the right to a jury trial on an issue of fact. In that case the court of appeals held that a previously disallowed affirmative defense was good and, after applying the law to

[31] Note that federal appellate courts usually do not reverse and render per se but rather reverse and remand with instructions to enter judgment as directed. For the purpose of this Note the procedure will be referred to as "reverse and render" in order to use Texas terminology for comparison between federal and Texas cases.

[32] 336 U.S. 681 (1949).

[33] *Id.* at 683. Specifically the Court said that:

> Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact. There was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her.

[34] 356 U.S. 525 (1958).

the situation then presented, reversed and rendered summary judgment for defendant. The Supreme Court ordered the case remanded since the plaintiff had not been given an opportunity to develop the facts concerning the affirmative defense, allowed for the first time on appeal. Both the *Fountain* and *Byrd* cases show that summary judgment should not be granted by an appellate court in the area where judgment could be based on facts or issues not previously presented to a trial court.

The District of Columbia Circuit seemed to add a limitation to the power of an appellate court to render summary judgment in 1950. In that case,[35] the court declined to render judgment because the factual issues had not been sufficiently developed in the trial court. Actually, the court declined to render judgment since it was not clear that there was no genuine issue as to any material fact, as required by rule 56 before summary judgment can be rendered. In fact, the same court in 1957 reaffirmed[36] the federal position that an appellate court has the power to reverse and render judgment in accord with the incorrectly denied motion for summary judgment, when there is no genuine issue as to any material fact.

The existence of a properly admissible question of fact was, in effect, held to be the criterion for remand by the Supreme Court in 1963. That Court in *Florida Avocado Growers v. Paul*[37] held that it did not have the power to reverse and render a decision and that it could only reverse and remand, since on the record presented to the Court there was a conflict between the appellee and the appellant as to what constituted the admitted evidence in the case. In other words, the Court looked to the record and determined that a genuine issue of fact did exist.[38] Even though the defendant did not move for a summary judgment in the trial court, the Second Circuit in the 1962 case of *Procter & Gamble Ind. Union v. Procter & Gamble Mfg. Co.*[39] held that since no genuine controversy on the facts existed, it had the power to grant summary judgment for the defendant, loser in the trial court. The plaintiff had sued to compel the defendant to arbi-

[35] Elder v. Brannan, 184 F.2d 219 (D.C. Cir. 1950).
[36] Helms v. Duckworth, 249 F.2d 482 (D.C. Cir. 1957).
[37] 373 U.S. 132 (1963).
[38] *Id.* at 156. Specifically the Court stated:
> [to reverse and render judgment] would be, in effect, to admit the contested depositions and exhibits on appeal without ever affording the appellees an opportunity to argue their seemingly substantial objections. To assume the admissibility of the evidence under these circumstances would be to deny the appellees their day in court as to a disputed part of the case on which the trial court has never ruled because its view of the law evidently made such a ruling unnecessary.

[39] 312 F.2d 181 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963).

trate certain grievances and had moved for a summary judgment. The trial court found no express contractual duty to arbitrate, but it held that the existing employee-employer relation did create such a duty and thus granted the motion for summary judgment. The court of appeals reversed and rendered judgment for the defendant, holding that the duty to arbitrate could exist only by virtue of a contract. In a later Second Circuit case[40] the court of appeals reversed the plaintiff's summary judgment and dismissed the case as the defendant had requested earlier in the trial court.[41] The plaintiff's attorney neither maintained that all the facts were not before the court nor alleged that facts warranting a different decision would be alleged or proved. The court stated, "under these circumstances, we perceive no reason for not bringing this litigation to an end."[42]

V. CONCLUSION

The entire line of federal appellate cases decided by the Supreme Court and followed by the lower courts which discuss denying or granting the motion for summary judgment turn on the existence or nonexistence of a genuine issue of fact.[43] The federal cases do not state that a denied motion for summary judgment is not reviewable on appeal, but rather that denial is not immediately appealable because of its interlocutory character, except in certain instances.[44] In fact, the federal appellate courts do not require that the party deserving of the summary judgment must have made such a motion at the trial level. They require only that on the record presented there is to be no genuine issue as to any material fact and that the party deserving the judgment is entitled to it as a matter of law. As stated by the Third Circuit, "Since the record made below fairly presents the issue as to whether [the parties] are entitled to summary judgments, judicial economy will patently be served by an immediate determination of this issue rather than remanding these cases to the District Court for disposition."[45]

---

[40] Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965).

[41] Plaintiff had moved for a dismissal in the trial court under FED. R. CIV. P. 12(b)(6), "for failure to state a claim upon which relief can be granted."

[42] 348 F.2d 999 at 1002.

[43] Federal district court cases since Hooker v. New York Life Ins. Co., 66 F. Supp. 313 (N.D. Ill. 1946), have consistently held that a trial court cross-motion for summary judgment is not needed in order for the trial or appellate court to grant the summary judgment to the party entitled to it. For typical cases to date following *Hooker*, see Smith v. McDonald, 116 F. Supp. 158 (M.D. Pa. 1953); St. Louis Fire & Marine Ins. Co. v. Witney, 96 F. Supp. 555 (M.D. Pa. 1951); Roman v. Great Am. Indem. Co., 9 F.R.D. 49 (D.P.R. 1949).

[44] See note 27 *supra*.

[45] Smith v. Virgin Islands, 329 F.2d 135, 142 (3d Cir. 1964), *cert. denied*, 84 Sup. Ct. 1886 (1964).

The fear expressed by the Texas Supreme Court in *Ackermann v. Vordenbaum*[46] (and used as a reason for their decision setting up the Texas rule) was that injustice would result because factual issues which might have developed after denial of the motion would be disregarded by rendering judgment. The federal approach insures remand for jury trials only where factual issues do exist. If there are no factual issues before the federal appellate court, it will not automatically remand; rather, it will grant a summary judgment allowing an early end to useless litigation.

In both judicial systems, to obtain a summary judgment in a trial court, the movant has the burden of showing that no genuine issue of fact exists—and his position must be established to such a high degree of probability that the judge is convinced that further trial would be useless formality. In Texas the opponent of the motion generally need make no defense to the motion until this has been done.[47] Even then he need only show a suspicion that an issue of fact exists.[48] Since under the current Texas interpretation of the summary judgment rule the showing of the existence of an issue of fact can be so slight and still be sufficient to defeat the motion, an appellate court should have authority to render judgment if an opponent carelessly fails to defend sufficiently.

A denial of a motion for summary judgment followed by a final judgment of the trial court, either (1) by the granting of a cross-motion for summary judgment, (2) by a judgment on the merits after a full trial, or (3) by a dismissal on the merits before trial (as in *Ackermann*) is no longer interlocutory and should be a proper subject for review by an appellate court. If the court finds that no factual issues exist or are claimed to exist,[49] the court of civil appeals should have the authority under rule 434[50] (or the supreme court under rules 501, 502, and 505[51]) to reverse and render the judgment that would be rendered inevitably by the trial court on remand. Such a practice would lend strength to summary judgment procedure in

[46] 403 S.W.2d 362 (Tex. 1966).

[47] For a discussion of the defenses necessary against a motion for summary judgment see Bauman, *Summary Judgment: The Texas Experience*, 31 TEXAS L. REV. 866 (1953).

[48] For the small amount of defense necessary to defeat a motion for summary judgment in Texas, see Penn v. Garabed Gulbenkian, 243 S.W.2d 220 (Tex. Civ. App. 1951), *aff'd*, 252 S.W.2d 929 (1952), where defendant successfully contested plaintiff's motion for summary judgment by affidavits which merely repeated his pleadings. See also De La Garza v. Ryals, 239 S.W.2d 854 (Tex. Civ. App. 1951) *error ref. n.r.e.*, where a motion for summary judgment was denied because defendant's pleading and affidavits were sufficient to raise an issue of fact, the affidavit saying that defendant "*would show* the court . . . ."

[49] See note 48 *supra*.

[50] TEX. R. CIV. P. 434.

[51] TEX. R. CIV. P. 501-02, 505.

Texas, reinstate the prior Texas approach of looking to federal cases for precedent on summary judgment, and provide an expeditious end to useless litigation.

Marcus Leslie Thompson