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RULE 3:20: SUMMARY JUDGMENT MATERIALS

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As every lawyer litigating in Virginia knows, the Commonwealth has a unique summary judgment rule--discovery deposition testimony is out of bounds. The rule differs from rules governing summary judgment proceedings in federal courts and in every state in the Union. The prohibition did not begin as a rule of court, but was a response to the will of the legislature. Virginia Code Section 8.01-420 reads as follows:

> **§ 8.01-420. Depositions as basis for motion for summary judgment or to strike evidence** -- No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used.

Rule 3:20 of the Rules of the Supreme Court of Virginia is a response to the statute, and provides additional guidance with regard to what *may* be used to support a motion for summary judgment, reading, in pertinent part, as follows:

> If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to summary judgment, the court shall enter judgment in that party's favor.

This facially clear rule and statute have generated considerable litigation, not only with regard to the use of deposition testimony to secure the summary dismissal of claims, but also with regard to the use and reliance on deposition testimony for other motions. This articles addresses these issues, and explores the courts' application of Rule 3:20 and Virginia Code Section 8.01-420 to summary procedures designed to end litigation prior to trial.

Depositions

Do depositions have any role in securing summary dismissal of a claim? The answer is no, but with an important caveat. The rule and the statute make clear that depositions may be considered, along with anything else, if the parties agree. In one case where a plaintiff sought reversal of a summary judgment ruling, the Supreme Court noted (with apparent surprise) that the parties had agreed to submit otherwise prohibited material for the trial court's consideration. *See Carson v. LeBlanc*, 245 Va. 135, 137 (1993) (because "the plaintiff did not object" we "have no alternative" but to consider the deposition testimony). Aside from this limited exception, the Supreme Court has consistently overturned any summary factual ruling based on deposition testimony.

Under what circumstances would a plaintiff agree to use deposition testimony in connection with a motion for summary judgment? When the plaintiff is faced with an expensive, lengthy trial and knows that the deposition testimony accurately reflects the facts that will be established at trial, agreeing to the use of the deposition testimony is an entirely appropriate procedure for testing the plaintiff's theory of the case. After all, if the plaintiff survives the motion, the case almost certainly will proceed to trial.

The prohibition on the use of deposition testimony applies not only to motions for summary judgment or to strike, but to any other fact-based motion intended to end the litigation prior to trial. In *Lloyd v. Kime*, 275 Va. 98 (2008) the Supreme Court considered "whether the trial court erred in using discovery deposition testimony from the plaintiff's expert witness to sustain a motion in limine excluding the witness's testimony and subsequently granting summary judgment for the defendant based on the plaintiff's lack of an expert witness." *Id*. at 103. The case involved a medical expert designated to testify concerning the standard of care in performing spinal surgeries. The defendant moved in limine to exclude the expert. The trial

court "read portions of the deposition" of both the challenged expert, as well as the defense expert, concluding that the plaintiff's expert "was not qualified to testify as to the standard of care" for any procedure at issue in the case. *Id*. at 105. The trial court also denied the plaintiff's request to file a supplemental expert designation to offer another expert to testify on the standard of care on the basis that the time for designating experts pursuant to the pretrial scheduling order had expired. *Id*. Once the court granted the motion in limine, the defense moved for (and the court granted) summary judgment on the ground that the plaintiff had no designated expert and therefore could not establish a *prima facie* case of medical malpractice. *Id*.

The Virginia Supreme Court recognized that the defense "did not offer the deposition testimony in support of his motion for summary judgment," but noted that he offered the testimony in a manner that was "functionally a motion for summary judgment." *Id*. at 106. The Court then stated as follows:

> We have held that Rule 3:20 and Code § 8.01-420 apply when a defendant files a motion in limine seeking the exclusion of the plaintiff's expert testimony, and the court's ruling excluding the testimony is followed by the defendant's motion for summary judgment predicated upon the exclusion. In such a case, the motion in limine is functionally a motion for summary judgment.

Id. at 107 (citation omitted). The Court concluded, based on the foregoing, that Rule 3:20 and Code Section 8.01-420 prohibit successful motions in limine based on deposition testimony when the motions are followed by motions for summary judgment.

The Supreme Court's rulings leave a number of unanswered questions. Does the ruling prohibit the use of deposition testimony in a motion in limine to exclude an expert? Or is the ruling more narrow, prohibiting the use of deposition testimony in the motion in limine only if it is followed by a motion for summary judgment predicated on excluding the expert? If the former, the holding emasculates the motion in limine to exclude expert testimony, as almost all such motions are based on deposition testimony since expert reports are not required under the

Rules of the Supreme Court of Virginia. If the latter, then the holding means that cases may proceed to trial notwithstanding that a plaintiff cannot establish a critical element of the claim.

The Supreme Court's holdings suggest that the prohibition on the use of deposition testimony applies to any motion that is the "functional equivalent" of a motion for summary judgment. In *Gay v. Norfolk & Western Railway*, 253 Va. 212 (1997), the Court considered the use of deposition testimony to support a motion to dismiss for lack of subject matter jurisdiction. *Id*. at 214. Concluding that the trial court erred in considering deposition testimony, the Supreme Court clearly agreed with the plaintiff's contention that the motion was "essentially a motion for summary judgment" which would justify an objection to the use of depositions. *Id*.

Waiver

The party opposing a summary disposition must object to the use of deposition testimony. In *Lloyd v. Kime*, the Supreme Court concluded that the trial court *did not* commit error in considering deposition testimony in connection with the motion in limine notwithstanding that the motion was followed by one for summary judgment because the Court found that the plaintiff had waived any opposition to the use of deposition testimony:

> However, based on the record of this case, [the plaintiff] did not object to the use of the depositions by [defendant] in support of the motion. Failure to object to the use of depositions is sufficient to establish acquiescence. Accordingly, based upon the record before us, the trial court did not err in using deposition evidence in the resolution of the motion in limine and subsequent motion for summary judgment.

275 Va. at 107-08 (citations omitted). The Court's reference to "the motion" is unclear. Is a plaintiff required to object to the use of deposition testimony in connection with the *motion in limine*, or in connection with the subsequent *motion for summary judgment*? Since deposition testimony routinely is considered in connection with motions in limine, it is unlikely that a plaintiff would object. However, once the motion is granted, and the plaintiff is faced with a motion for summary judgment, the expert is already excluded. Any right to object to the use of

deposition testimony in connection with a summary judgment motion at that time would be a Pyrrhic victory. After all, once the plaintiff's expert is stricken, opposing the summary judgment motion may be doing nothing more than delaying the inevitable.

The Court's construction of "waiver" in the context of using deposition testimony to support a summary judgment motion differs from such construction under other circumstances and is more akin to a Rule 5:25 failure to object. Normally, "waiver" applies when a party knowingly and intentionally relinquishes a right. In connection with the use of depositions in summary judgment proceedings, the Court seems content to apply a rule that finds waiver in the face of evidence that a plaintiff "acquiesced." And the court has specifically held that silence is acquiescence. *See Lloyd*, 275 Va. at 107-08 ("[f]ailure to object to the use of the deposition is sufficient to establish acquiescence"). In *Parker v. Elco Elevator Corp.*, 250 Va. 278 (1995), the Supreme Court considered a summary judgment motion based in part on prohibited deposition testimony, as the record reflected that the trial court reached its decision based on the deposition testimony of the plaintiff's expert. In a footnote addressing the trial court's conclusion, the Court stated as follows:

> We note that the trial court relied without objection on excerpts of Meese's discovery depositions as read into the record by Elco's counsel. The ruling on this issue was immediately followed by Elco's motion for summary judgment, which was granted. Rule 3:18 prohibits the use of discovery depositions "in whole or in part" in supporting a motion for summary judgment absent agreement of counsel. *See also* Code § 8.01-420. In the absence of a clear objection to the use of the discovery deposition in this manner, however, we review the court's decision in the posture presented to us.

Id. at 281 n.2.

A plaintiff who fails to object to the use of deposition testimony in connection with a summary judgment motion cannot raise the issue on appeal. In *Khanna v. Dominion Bank*, 237 Va. 242 (1989), the Supreme Court specifically dismissed a defendant's contention on appeal that the court had improperly used deposition testimony on a motion for summary judgment in

connection with a counterclaim. Not surprisingly, the court ruled that, since "this issue was not raised in the trial court" the Court "will not entertain it for the first time on appeal." *Id*. at 246.

What if a party objects *after* the introduction of deposition testimony, but *before* the court rules on the summary judgment motion? The Court has held that the objection is valid under these circumstances. In *Gay v. Norfolk & Western Railway*, the plaintiff objected to the use of deposition testimony, but the trial court concluded that he had "waived his objection because he did not raise it until after the motion was made, briefed, and argued." 253 Va. at 214. Noting that both the rule and the statute require that the parties "must agree to the use of depositions" before they can serve as a basis for a summary judgment motion, the Supreme Court noted that "this condition requires some showing of acquiescence in the use of a deposition." *Id*. Addressing the timing issue, the Court stated as follows:

> Gay unequivocally objected to the use of his deposition before the trial court entered judgment. We agree that the better practice would have been for Gay to have made his objection known earlier in the proceedings. Nevertheless, in the absence of any basis to conclude that Gay agreed to the use of his deposition, the trial court could not enter summary judgment based in whole, or in part, on that deposition.

Id. As a practical matter, unless a party consents to the use of deposition testimony, counsel should object to such use in connection with any motion that could result in the summary dismissal of a claim.

Supporting or Opposing the Motion

On its face, the prohibition of the use of discovery depositions applies only when it is offered to *support* the motion. Specifically, the rule states that no motion "shall be sustained" when based on discovery depositions. Courts in the Commonwealth routinely allow the use of deposition testimony *in opposition* to a motion for summary judgment. In *Lloyd v. Kime*, the Virginia Supreme Court addressed a defendant's contention that a plaintiff had acquiesced to the use of deposition testimony by quoting it in its opposition to the defendant's motions and in its

own motion to reconsider. 275 Va. at 107. Citing both the rule and the statute, the Court stated as follows:

> [D]iscovery depositions cannot be used to *support* a motion for summary judgment unless the parties agree. The Rule and statute do not apply to the use of depositions to *oppose* a motion for summary judgment.

Id. (emphasis in original). Similarly, in *Monahan v. Obici Medical Management Services, Inc.*, 59 Va. Cir. 307 (Suffolk 2002), then Circuit Court (now Court of Appeals) Judge Arthur Kelsey noted that, "[i]f discovery depositions play any role in the summary judgment analysis, it is as a weapon against the entry of summary judgment." *Id*. at 313 (citing W. Hamilton Bryson, *Virginia Civil Procedure* 384 (3d ed. 1997) ("On the other hand, there is no state statute or rule of court that prohibits the use of depositions to oppose a motion for summary judgment.").

Pleadings

Rule 3:20 specifically authorizes the use of "the pleadings" as support for a motion for summary judgment. Pleadings, of course, include both the Complaint as well as the Answer and Grounds of Defense. If a court could grant summary judgment based on the Complaint standing alone, then a demurrer would be appropriate. Moreover, if the Complaint states a cause of action that survives a demurrer, the Answer would be of little use in securing summary judgment as any affirmative defense presumably would raise questions of fact precluding summary dismissal of the claim. But what about Special Pleas that often are filed prior to or in conjunction with the Answer? Without question, Special Pleas are "pleadings" that the court may consider in ruling on a motion for summary judgment. However, as discussed above, to the extent that ruling on the Special Plea ends a case, the court *may not* consider deposition testimony as the Special Plea is tantamount to a motion either for summary judgment or to strike. *See Gay v. Norfolk & Western Railway*, 253 Va. at 214 (motion to dismiss for lack of jurisdiction).

Admissions

Without question, the most useful tool in securing summary judgment is the request for admission. Rule 4:11 provides that a party may serve a request for admission of the truth of matters that relate to "statements or opinions of fact or the application of law to fact, including the genuineness of any documents described in the request." The rule is specifically crafted to overcome boilerplate objections and other attempts to avoid a response. An answering party may not give "lack of information and knowledge" as a reason for failing to admit or deny unless the party states that he has made a "reasonably inquiry and the information known or readily available by him is insufficient" to answer the request. Nor can a party refuse to admit because the request "presents a genuine issue for trial." If a responding party refuses to comply in the face of a court order, it is not unusual for a court to determine that the matter is admitted.

The Supreme Court rules governing discovery related sanctions are specifically designed to give teeth to requests for admission. Rule 4:12 includes a specific provision addressing the "expenses on failure to admit." The Rule states, in pertinent part, as follows:

> If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 4:11, and if the party requesting the admission proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

Rule 4:12(c). Moreover, the rule is not entirely discretionary, as it specifically provides that the court "shall" enter the order unless it finds that the request was objectionable, the admission sought was not important, the party failing to admit had good grounds to believe he may prevail on the matter, or there was other good reason for the failure to admit.

As a practical matter, when used in connection with a motion for summary judgment, requests for admission are most useful in establishing the genuineness of documents and facts that are largely undisputed. With this in mind, some practitioners have attempted to use Rule

4:11 to secure the admission of deposition testimony. Courts have consistently held that, to the extent that requests for admission are based on deposition testimony, they cannot be used in support of a motion for summary judgment. *See, e.g., Martin v. Hackney*, 41 Va. Cir. 632 (Roanoke 1995); *Wolford v. Johnson*, 20 Cir. L18434 (Va. Cir. Ct. July 15, 1997)(CaseFinder). In *Martin v. Hackney*, Judge Robert Doherty set forth his understanding of the rule in a poetic, three paragraph opinion:

> Defendant has moved for summary judgment in this negligence action based on answers to requests for admissions. Plaintiff claims that the requests for admission are merely a reiteration of the discovery depositions, to which she objects, and that § 8.01-420 forbids summary judgment under those circumstances. I agree with the Plaintiff.
>
> A rose by any other name is still a rose. A discovery deposition by any other name is still a discovery deposition. The requests for admission in this case are nothing more than discovery deposition questions presented in another form.
>
> Summary judgment is expressly forbidden by § 8.01-420 when based in whole or in part on discovery depositions, unless all parties agree to their use. Accordingly, the motion for summary judgment is denied.

Martin, 41 Va. Cir. at 632.

The Supreme Court also has tacitly condemned the practice. In *Carson v. LeBlanc,* 245 Va. 135 (1993), the Court noted that summary judgment was granted based on requests for admissions that literally quoted the deposition testimony. *Id*. at 137. Citing Rule 3:18 (now 3:20), the Court reluctantly concluded that it had "no alternative" but to address the issues "on the facts as disclosed by the record" because "the plaintiff did not object to the use of the discovery depositions as a basis for the trial court's action on the motion for summary judgment nor is there an assignment of error challenging this prohibited procedural tactic." *Id*.

Other Material

Rule 3:20 states specifically what material *can* be used in support of a motion for summary judgment (pleadings, orders and admissions) and also states specifically what material

cannot be used in support of the motion (discovery deposition testimony). What about material that is neither specifically allowed nor specifically prohibited? For example, can a party submit interrogatories or affidavits to support a motion for summary judgment? How about stipulations that are entered in connection with a case, but not for the specific purpose of determining a motion for summary judgment? The Court has suggested in *dicta* that such material may be used, and also has suggested in *dicta* that it may not be used absent agreement.

In *Jackson v. Hartig*, 274 Va. 219 (2007) the Court made a curious statement that leaves one wondering whether interrogatories are acceptable as support for a motion for summary judgment. Specifically, the defendant's motion for summary judgment was based on a number of exhibits, including a copy of a Special Grand Jury report as well as the plaintiff's Answers to Interrogatories. While it is not entirely clear that the trial court relied on all of these documents in granting summary judgment, the Supreme Court seems to suggest that they were properly before the trial court on the motion. Specifically, the Court states as follows:

> In the context of this case, Jackson's defamation claim can survive summary judgment only if the pleadings, orders, admissions, *and answers to interrogatories* reveal a genuine dispute of material fact that would allow a reasonable fact finder to conclude that Hartig and Landmark published the November 1, 2003 editorial either knowing that the statements contained therein were false or entertaining serious doubt that they were true.

Id. at 228-29 (emphasis added). It is hard to determine whether the Court's wording is intentional. Does the statement mean that the Court may consider interrogatories in ruling on a motion for summary judgment or only as evidence in *opposition* to the motion. If for defense use only, then why would the Court omit any reference to depositions, which the Court clearly has held can be used to oppose such a motion? In light of the fact that the Court was reviewing a motion for summary judgment granted by a trial court considering interrogatories, it appears the Supreme Court in *Jackson v. Hartig* is holding that the material specifically listed in Rule 3:20 for use in support of a summary judgment motion is not exclusive, and that interrogatories may

be considered as well. This interpretation is supported by a number of other decisions that include "interrogatories" in the general description of materials allowed under Rule 3:20 in support of a motion for summary judgment. *See, e.g., Hansen v. Stanley Martin Cos.*, 266 Va. 345, 351 (2003) ("[O]ur review of the record is limited to the parties' pleadings, requests for admission, and interrogatories."); *Meador v. Rockingham Casualty Co.*, 23 Cir. CL0600169300 (Va. Cir. Ct. March 7, 2007)(CaseFinder) ("A motion for summary is determined solely on the parties' pleadings, requests for admissions, and interrogatories."); *Xtreme 4X4 Ctr., Inc. v. Howery*, 65 Va. Cir. 469 (Roanoke 2004) ("In deciding whether to grant summary judgment, the court may rely upon, *inter alia*, the pleadings, answers to admissions and answers to interrogatories… ."). However, it does not appear objections were made in any of these cases to the use of interrogatories in deciding a summary judgment motion.

But in another case, the Court suggests, again in *dicta*, that additional material is appropriate only if the parties agree. In *Andrews v. Ring*, 266 Va. 311 (2003), the Supreme Court considered an appeal of a summary judgment ruling, describing the standard as follows:

> A grant of summary judgment must be based upon undisputed facts established by pleadings, admissions in pleadings, and admissions made in answers to requests for admissions.

Id. at 318. However, the Court included a footnote to this reference which reads in its entirety, "Of course, the trial court may consider the stipulations of the parties, answers to interrogatories and deposition testimony if the parties agree." It is difficult to construe the footnote to mean anything other than that the material listed in Rule 3:20 is exclusive, and that extraneous material, such as stipulations and interrogatories, is in the same category as depositions--they can only be used if the parties agree. This position arguably is supported by a number of other Supreme Court decisions in which the general description of material that can be used to support summary judgment motions *does not* include "interrogatories." *See, e.g., Fultz v. Delhaize Am.,*

Inc., 278 Va. 84, 87 (2009) ("we examine the facts as presented in the pleadings, the orders made at a pretrial conference, and the party admissions."); *Klaiber v. Freemason Assocs.*, 266 Va. 478, 481 (2003) ("Our review of the facts is limited to pleadings, orders and admissions of the parties.") (citing *Andrews v. Ring*, 266 Va. at 316).

As a practical matter, courts may consider answers to interrogatories as "admissions," particularly if they are signed by a party under oath. After all, Rule 3:20 does not reference "responses to requests for admissions" but specifically allows courts to consider "the admissions, if any, in the proceedings… ." Nevertheless, the Court's footnote in *Andrews v. Ring* casts doubt on the propriety of using interrogatory responses to support a motion for summary judgment unless the parties agree.

Conclusion

The Supreme Court's construction of Rule 3:20 is that deposition testimony cannot be used to support a motion for summary judgment absent agreement, or at least acquiescence which may be established by silence. The prohibition applies not just to motions for summary judgment, but to any other motion that is the "functional equivalent" of a motion for summary judgment. While courts certainly may consider pleadings, orders and admissions in ruling on a motion for summary judgment, there does not seem to be a consensus with regard to other material not specifically listed under the Rule.

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