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A New Practitioner's Practical Guide to Summary Judgment

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A New Practitioner's Practical Guide to Summary Judgment¹

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I. Introduction

72. Motions for summary judgment are tools used to streamline litigation by disposing of matters before trial that do not merit presentation to the trier of fact. When granted, summary judgment motions either narrow the issues to be presented at trial or eliminate

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the need for a trial altogether. This article will provide new advocates with a foundation to effectively take advantage of summary judgment in their practice. To begin, Section I will break down the standard to obtain summary judgment in Florida and outline the history of recent amendments to the rule governing motions for summary judgment. Section II will guide advocates on managing a case from its inception, determining when to use summary judgment, and preparing the case for a summary judgment motion. Finally, Section III will give advice on how to draft a motion for summary judgment.

II. Florida Rule of Civil Procedure 1.510 and the Summary Judgment Standard

73. Motions for summary judgment are governed by Florida Rule of Civil Procedure 1.510, which provides “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”⁴ On May 1, 2021, the Florida Supreme Court amended Rule 1.510 to have the summary standard articulated above construed and applied in accordance with the federal summary judgment standard.⁵ In doing so, obtaining a grant of summary judgment became easier as the federal standard was viewed as more relaxed in comparison to its Florida counterpart.⁶ New practitioners should approach Florida case law applying the summary judgment standard prior to the 2021 amendment with caution. To assist in navigating summary judgment case law, this section will highlight the main differences in application of the summary judgment standard before and after the 2021 amendment. In addition, this section will outline changes to response deadlines for summary judgments motions set to become effective January 1, 2025.

A. Disproving the Nonmovant's Theory of the Case

74. Prior to the 2021 amendment, a party moving for summary judgment did not eliminate any issue of fact, and thus was not entitled to judgment, unless they could conclusively disprove the nonmovant's theory of the case.⁷ This is no longer a requirement. Under the federal standard, it is not necessary for the movant to negate its opponent's

⁴ FLORIDA RULES OF CIVIL PROCEDURE [1.510\(a\)](#).

⁵ FLORIDA RULES OF CIVIL PROCEDURE [1.510\(a\)](#).

⁶ Gary Blankenship, *Court Amends State Summary Judgment Rule to Federal Standard*, [FLORIDA BAR NEWS](#) (January 5, 2021).

⁷ *In re: Amendments to. Florida. Rule of Civil Procedure 1.510*, [309 So. 3d 192, 193](#) (Fla. 2020); *Holl v. Talcott*, [191 So. 2d 40, 47](#) (Fla. 1966).

claim.⁸ Instead, the movant's burden to obtain summary judgment will vary depending on whether he or she will have the burden of proof for the claim at trial.⁹ While a movant must prove any claims for which he or she bears the burden of proof, there is no affirmative obligation when the burden lies with the nonmovant. When the nonmovant bears the burden of proof at trial, the movant can obtain summary judgment by merely indicating "there is an absence of evidence to support the nonmoving party's case."¹⁰ This application of the summary judgment standard creates a benefit for advocates who represent defendants. Instead of proving an affirmative defense or submitting evidence to disprove the plaintiff's case, a defendant now need only highlight an absence of proof for the claims against him or her to obtain summary judgment.

B. The Meaning of a Genuine Issue of Material Fact

75. Under old Florida case law, what constituted a genuine issue of material fact was such that "[t]he existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised."¹¹ This construction was favorable to nonmovants as it created a lower threshold for genuine issues of material fact sufficient to preclude summary judgment. The threshold that existed under Florida case law has been replaced with the federal standard. Now, the test is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."¹² In other words, an issue of fact is genuine if the record taken as a whole could lead a rational trier of fact to find for the moving party¹³ and an issue of fact is material if it might affect the outcome of the suit under the governing law.¹⁴ This means "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to award summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff."¹⁵

76. The federal standard raises the threshold of what is needed to show the existence of a genuine issue of material fact in comparison to previous Florida case law. The

8 *In re: Amendments to. Florida. Rule of Civil Procedure 1.510*, 309 So.3d 192, 193 (Fla. 2020); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

9 *In re: Amendments to. Florida. Rule of Civil Procedure 1.510*, 309 So.3d 192, 193 (Fla. 2020).

10 *In re: Amendments to. Florida. Rule of Civil Procedure 1.510*, 309 So.3d 192, 193 (Fla. 2020); *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986).

11 *In re: Amendments to. Florida. Rule of Civil Procedure 1.510*, 309 So.3d 192, 193 (Fla. 2020).

12 *In re: Amendments to. Florida. Rule of Civil Procedure 1.510*, 309 So.3d 192, 193 (Fla. 2020); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

13 *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

14 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

15 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

slightest doubt is no longer sufficient to defeat a summary judgment motion.¹⁶ Instead, the evidence presented by the nonmoving party will be evaluated on its credibility and substantiality to determine whether the issues of fact in dispute are genuine or material. Summary judgment may be granted if the nonmoving party presents evidence that is “merely colorable, or is not significantly probative.”¹⁷ Further, “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.”¹⁸

C. Case Management Orders and Their Impact on Response Deadlines under Rule 1.510

77. Following the COVID-19 pandemic, courts are required to issue case management orders at the start of a case which set forth various deadlines to ensure progression of the case.¹⁹ One of the deadlines contained therein is a deadline to file dispositive motions, which includes motions for summary judgment. “[T]o help ensure adherence to the deadlines set forth in case management orders,” the Florida Supreme Court further amended Florida Rule of Civil Procedure 1.510 on May 23, 2024.²⁰

78. The current version of Rule 1.510 ties the deadline to respond to a motion for summary judgment to the date of the hearing. Once the motion for summary judgment is served, the moving party must wait at least forty (40) days to hold a hearing.²¹ The deadline for the nonmovant to respond is governed by the hearing date. The response, and any supporting documentation upon which the nonmovant intends to rely, must be filed at least twenty (20) days before the hearing.²² Under the amended rule, the response and supporting documentation is due no later than sixty (60) days after service of the motion for summary judgment.²³ While the amendment removes the forty (40) day buffer before for the summary judgment hearing can be held,²⁴ time implications

16 *In re: Amendments to. Florida. Rule of Civil Procedure 1.510*, 309 So.3d 192, 193 (Fla. 2020) (“A party opposing summary judgment must do more than simply show some metaphysical doubt as to the material facts.”).

17 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986) (internal citations omitted).

18 *Scott v. Harris*, 550 U.S. 372, 380 (2007).

19 Fla. Admin. Order No. AOSC21–17, 20–26 (Fla. June 4, 2021).

20 *In re:Amends. Fla. R. Civ. P. 1.510 & New Fla. R. Civ. P. 1.202*, Case No. SC2024–0662, 2 (Fla. May 23, 2024).

21 FLORIDA RULES OF CIVIL PROCEDURE 1.510(b).

22 FLORIDA RULES OF CIVIL PROCEDURE 1.510(c)(5).

23 *In re:Amends. Fla. R. Civ. P. 1.510 & New Fla. R. Civ. P. 1.202*, Case No. SC2024–0662, 1–2 (Fla. May 23, 2024).

24 *In re:Amends. Fla. R. Civ. P. 1.510 & New Fla. R. Civ. P. 1.202*, Case No. SC2024–0662, 4 (Fla. May 23, 2024).

still apply. Movants will be required to set the hearing at least sixty (60) days out from service of the motion to provide sufficient time for the nonmovant to file his or her response. These changes will take effect on January 1, 2025.²⁵

III. Preparing Your Case for Summary Judgment

A. Evaluating the Viability of a Summary Judgment Motion

79. The viability of a summary judgment motion should be considered by a litigant at the inception of the case. Some cases will present potential summary judgment avenues at inception, while some cases are slower to develop the potential for a summary judgment motion. It is important in the early stages of a case to determine whether a case could appropriately be disposed of through a motion to dismiss, motion for summary judgment, or whether it needs to be decided by the finder of fact.

B. Motions to Dismiss v. Motions for Summary Judgment

80. A motion to dismiss is brought in response to the complaint, and if a party is served with a summons and complaint, the defendant's deadline to file the motion is synonymous with the responsive pleading deadline.²⁶ Motions to dismiss are governed by Florida Rule of Civil Procedure 1.140. Unlike motions for summary judgment, motions to dismiss are brought to challenge the legal sufficiency of a complaint²⁷ and limits the court to consider the four-corners of the complaint.²⁸ Additionally, the court must take all allegations of the complaint to be true, and all reasonable inferences are to be construed in favor of the non-moving party.²⁹ The standard for a motion to dismiss is whether the pleader could prove any set of facts in support of the claim.³⁰ Motions to dismiss can help dispose of a case in its entirety, although Florida courts have a strong preference for resolving cases on the merits³¹, and will typically order the plaintiff to amend the pleading to fix pleading defects. Despite the lenient pleading requirements³²,

25 *In re: Amends. Fla. R. Civ. P. 1.510 & New Fla. R. Civ. P. 1.202*, Case No. SC2024-0662, 3 (Fla. May 23, 2024).

26 FLORIDA RULES OF CIVIL PROCEDURE 1.140(a)(1).

27 *The Florida Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006).

28 *Pizzi v. Cent. Bank & Tr. Co.*, 250 So. 2d 895 (Fla. 1971) (citing *Kest v. Nathanson*, 216 So. 2d 233, 235 (Fla. Dist. Ct. App. 1968)).

29 *The Florida Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006).

30 *Wausau Ins. Co. v. Haynes*, 683 So. 2d 1123 (Fla. 4th DCA 1996).

31 *North Shore Hosp., Inc. v. Barber*, 143 So.2d 849, 853 (Fla. 1962).

32 *The Florida Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006).

moving to dismiss an action can be beneficial as it requires the plaintiff to show support for their claims and allows the judge to become familiar with issues which may be relevant later in a motion for summary judgment.

81. Motions for summary judgment on the other hand are designated to test the evidence³³ rather than the pleadings. Although, it is not uncommon for motion to dismiss issues to later present as summary judgment issues, particularly with motions to dismiss for failure to state a cause of action. However, moving to dismiss a case and losing can have a negative impact on summary judgment strategy. Specifically, a motion to dismiss will put the non-moving party on notice of pleading defects, may inform the opposing party of weaknesses in their cause of action, and will allow them to strengthen those weaknesses through discovery. Because motions to dismiss can impact a motion for summary judgment, a litigant should consider what impacts (if any) a motion to dismiss will have on their motion for summary judgment down the line.

C. Pros and Cons of Moving for Summary Judgment

82. Summary judgment is not appropriate in every case, and there are pros and cons to moving for summary judgment. While a motion for summary judgment is best known for its ability to dispose of a case in its entirety or dispose of certain claims, it can also impact a party's negotiating position in settlement discussions, impose time commitments and costs on the nonmoving party, and can help reveal arguments that would otherwise not be revealed until trial. On the other hand, moving for summary judgment can be time consuming and costly. Additionally, the pros of moving for summary judgment cut both ways in that the moving party will also have to reveal its themes and best arguments which may not have been revealed before trial, and while a strong motion for summary judgment can increase the moving parties' negotiating power, a weak summary judgment motion can decrease a party's negotiating power.

D. Timing is Key

83. First, the litigant must determine and calendar pertinent deadlines. Two main deadlines that need to be paid close attention to are discovery deadlines and the summary judgment or dispositive motion deadline. The discovery deadline in your case is perhaps the most important deadline outside of the actual dispositive motion deadline. The discovery deadline for a case is typically set forth in the court's case management or trial order. The time period to move for summary judgment is not limited to the time period after the close of discovery.³⁴ The timeline of moving for summary judgment is typically left to the litigant, although a court may require the parties to wait until after

33 *The Florida Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006).

34 *Colby v. Ellis*, 562 So. 2d 356 (Fla. 2d DCA 1990).

discovery closes to move for summary judgment through a case management order or through local rules.

84. There are advantages and disadvantages to moving for summary judgment before the close of discovery. Moving for summary judgment can help the parties avoid unnecessary and costly discovery. Additionally, early motions for partial summary judgment can help focus the parties and streamline discovery on the more viable allegations. Although it may be appropriate in some cases to bring a motion for summary judgment early, litigants should only bring early motions when it is appropriate. For example, a case where the plaintiff's testimony can single handedly posture the case for summary judgment, or cases where a niche legal issue comes up such a statute of limitations issue.

85. The non-moving party will likely argue that a motion for summary judgment prior to the close of discovery is premature. Generally, the trial court should not grant the moving party's motion for summary judgment if good faith discovery is still in progress.³⁵ However, if the non-moving party fails to act diligently in completing discovery or uses discovery methods to delay a hearing on a motion for summary judgment, the trial court is within its discretion to grant summary judgment even though discovery is still pending.³⁶

86. The non-moving party may move to continue a hearing on a motion for summary judgment, and it is well within the trial court's discretion on whether to grant a continuance.³⁷ The standard of review for trial orders denying a continuance of a motion for summary judgment hearing is reviewed for abuse of discretion.³⁸ The court considers a number of factors in determining whether to grant a continuance, one of them being whether the denial of a continuance would cause injustice for the movant.³⁹ A motion for summary judgment being decided prior to the nonmoving party being able to complete discovery would likely cause injustice to the party requesting a continuance.

87. If the continuance is not granted, the nonmovant party may show by affidavit or declaration that it cannot present facts essential to justify its opposition and request for additional discovery, and the court may defer considering the motion or deny it, allow time to obtain affidavits or declarations or take discovery, or issue any other appropriate

35 *Villages at Mango Key Homeowners Ass'n, Inc. v. Hunter Development Inc.*, 699 So.2d 337, 338 (1997) (citing *UFF DAA, Inc. v. Towne Realty, Inc.*, 666 So.2d 199, 200 (Fla. 5th DCA 1995)).

36 *Martins v. PNC Bank, Nat. Ass'n*, 170 So. 3d 932 (Fla. 5th DCA 2015).

37 *Spolski Gen. Contractor, Inc. v. Jett-Aire Corp. Aviation Mgmt. of Cent. Fla.*, 637 So. 2d 968 (Fla. 5th DCA 1994).

38 *Smith v. Smith*, 734 So. 2d 1142, 1144 (Fla. 5th DCA 1999).

39 *Fleming v. Fleming*, 710 So. 2d 601 (Fla. 4th DCA 1998).

order.⁴⁰ Due to the number of avenues the nonmoving party can take to delay a summary judgment hearing, waiting for discovery to close is appropriate in most cases and court will require the parties to rely on evidence already established in the case.

E. Summary Judgment Evidence

88. Next, once the litigant understands the legal standard for summary judgment, the litigant should identify the legal elements that are necessary to establish their claim or defense. This step will involve legal research in order to fully understand what facts will be relevant as the case progresses, and determine what discovery needs to be completed in order to help establish the facts needed for a successful summary judgment motion.

89. The party moving for summary judgment must support their assertion that there is no genuine issue of material fact by citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or by showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.⁴¹ The burden of proving that there is no genuine issue of material fact is perhaps the most challenging burden to meet when it comes to summary judgment, and the non-moving party is only required to produce counterevidence if the moving party meets their burden.⁴²

90. The admissibility of evidence is within the sound discretion of the trial court, and court's determination will not be disturbed on appellate review absent a clear abuse of that discretion.⁴³ Relevant evidence is evidence tending to prove or disprove a material fact.⁴⁴ Florida courts may not consider unauthenticated documents in ruling on a motion for summary judgment, even where it appears that such document, if properly authenticated, may have been dispositive.⁴⁵

F. Affidavits and Declarations

91. Affidavits and declarations are common tools used to establish facts that have not been established through discovery. The major difference between an affidavit and a

40 FLORIDA RULES OF CIVIL PROCEDURE [1.510 \(d\)](#).

41 FLORIDA RULES OF CIVIL PROCEDURE [1.510 \(c\)](#).

42 *Landers v. Milton*, [370 So. 2d 368](#) (Fla. 1979).

43 *Gosciminski v. State*, [132 So. 3d 678](#) (Fla. 2013) (citing *Hildwin v. State*, [951 So.2d 784](#) (Fla. 2006)); *Ray v. State*, [755 So.2d 604](#) (Fla. 2000).

44 FLA. STAT. [§90.401](#) (2024).

45 *Garbark v. Gayle*, [312 So. 3d 1286](#) (Fla. 1st DCA 2021) (citing *Booker v. Sarasota, Inc.*, [707 So. 2d 886, 889](#) (Fla. 1st DCA 1998)).

declaration is that an affidavit must be signed in the presence of a notary while a declaration only requires that the language of the document include “Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true”.⁴⁶ Affidavits must establish that the affiant has personal knowledge, the affidavit sets out facts that would be admissible in evidence, the affiant is competent to testify on the matters states, and the affidavit is not presented in bad faith or solely for the purpose of delay.⁴⁷ The personal knowledge requirement is meant to prevent the trial court from considering evidence which would otherwise be inadmissible hearsay.⁴⁸

92. When evaluating a motion for summary judgment, the court need consider only cited materials, but it may consider other materials in the record.⁴⁹ Additionally, a party may object to materials cited to support or dispute a fact that cannot be established through evidence that would be admissible. It is no longer an absolute prohibition for the trial court judges to weigh the credibility of a witness, the general rule remains that where disputes of fact arise within the record, the court may not weight conflicting evidence as credibility determinations and weighing evidence are functions for the jury not the judge.⁵⁰

93. Litigants must make sure that the evidence being cited to in their summary judgment are properly authenticated or else they will not be considered by the trial court. Once a litigant has completed and authenticated discovery, the litigant is ready to start (or continue) drafting.

IV. Drafting the Motion for Summary Judgment

94. Once evidence to rely upon is gathered and the appropriate timing has been determined, the next step is drafting the summary judgment motion. Before putting words on the page, the practitioner must have a strong grasp of the legal elements to be proven and should pre-determine how the evidence will be used to make the required showing. While those who have litigated the case from the outset will have familiarity with the facts and the evidence, the evidence will need to be re-examined to make strategic choices about what pieces to use. The choices go beyond merely identifying which documents are helpful but involve decisions such as isolating specific lines of deposition testimony or choosing individual interrogatory answers.

46 FLA. STAT. §92.525(2) (2024).

47 FLORIDA RULES OF CIVIL PROCEDURE 1.510(c)(4).

48 *Custom Design Expo, Inc. v. Synergy Rents, Inc.*, 327 So. 3d 427 (Fla. 2d DCA 2021) (citing *Fla. Dep’t of Fin. Servs. v. Associated Indus. Ins. Co.*, 868 So. 2d 600, 602 (Fla. 1st DCA 2004)).

49 FLORIDA RULES OF CIVIL PROCEDURE 1.510(c)(3).

50 *Gracia v. Sec. First Ins.*, 347 So. 3d 479, 482 (Fla. 5th DCA 2022) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

95. The summary judgment motion is generally comprised of the following sections:

1. Introduction
2. Statement of Material Facts⁵¹
3. Summary Judgment Standard
4. Arguments
5. Conclusion.

96. With the facts fresh, the statement of material facts can be a good place to start drafting. However, keep in mind, the method for drafting may look different in each case and for each practitioner. The purpose of the statement of material facts is to highlight facts the court must know to rule on the motion and tell a narrative that supports the legal theories of the movant's case. This section should include a citation to the document(s) supporting the fact as it is articulated. In deciding which facts to include, it is better to be over inclusive in the first draft. The facts will likely require editing after the legal arguments are flushed out, but it will be easier to remove than add to after the fact — especially if the citations (at least in rough form) are included in the initial draft. If any of the items cited to are not on the record (for example a deposition transcript, interrogatory answers, or documents obtained through discovery that are not on the docket), the movant will need to ensure the materials relied upon are properly placed into the record for the judge's consideration.

97. The most important section is the arguments section. How this section looks will vary depending on whether the movant is the plaintiff or defendant in the case. If the movant is the plaintiff, the motion will focus on how the legal elements of the claim have been proven. If the movant is the defendant, there is more flexibility in what direction the motion will go. A defendant can get summary judgment by proving an affirmative defense, disproving the plaintiff's case, or demonstrating an absence of evidence for plaintiff to prove its case. Regardless of how it is framed, each argument requires two pieces of information: an articulation of why the movant is entitled to judgment as a matter of law and a demonstration as to why there are no genuine issues of material fact in dispute. The goal is to educate the judge on the law governing the claim, apply that law to the undisputed facts, and provide a clear, straightforward path for the judge to rule in the movant's favor. When a fact is poignant to the point being made, it is helpful to provide another citation to evidence supporting that fact within the argument section.

98. The introduction, summary judgment standard, and conclusion should be short sections within the motion. The introduction should provide a brief description of the issues before the court. The summary judgment standard is just that: standard. While this section of the motion may require a few tweaks depending on the specific facts of the case

51 FLORIDA RULES OF CIVIL PROCEDURE [1.510\(c\)\(1\)\(A\)](#).

and arguments being made, the first section of this article should provide a practitioner with all the information needed to articulate the summary judgment standard. Finally, the conclusion should be a succinct statement of why the movant is entitled to judgment that ends with a prayer for relief.