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# Seven Summary Judgment Survival Skills



In federal and state court cases, the litigator's survival kit frequently has as its principal tool motions for summary judgment. For defendants, the winning case strategy frequently involves executing the summary judgment escape plan to survive the costs and risks of litigation. Conversely, for plaintiffs, "staying alive" for settlement and trial is quite often all about surviving the inevitable defense motion for summary judgment.

Therefore, summary judgment survival skills are crucial for litigators young and old. What follows are my seven sure-fire skills for winning or avoiding case dispositive summary judgment rulings.

## I. Stay Abreast of the Very Most Recent Summary Judgment Case Law

The case law on summary judgment is ever-evolving. And if you file your summary judgment papers unaware of that controlling hot new case, unlike Tom Hanks in the movie *Castaway*, you will be stranded in your losing case position unaware of recent developments.

For example, if you represent government officials and the summary judgment motion raises questions of qualified immunity, you'd better be familiar with [District of Columbia v. Wesby](#), 138 S.Ct. 577 (2018)<sup>1</sup> and the Supreme Court's "totality of the circumstances" protection for law enforcement officials who make reasonable inferences about allegedly unlawful conduct. See also *U.S. v. Perry*, \_\_ F.3d \_\_ (10th Cir. 11/15/18) (qualified immunity – yes); *Strand v. Minchuk*, \_\_ F.3d \_\_ (7th Cir. 11/8/18) (qualified immunity – no).

Your summary judgment life raft can be found in Chapters 43 and 44 of *The Wagstaffe Practice Guide: Federal Civil Procedure Before Trial* (Lexis Nexis 2018). And access to the saving graces of hot developments in this area is right at your fingertips with our companion Current Awareness online feature that captures the hot new case decisions on summary

judgment and all other procedural areas made available on a weekly basis.

## II. Plan the Summary Judgment Escape Route

Great litigators plan for summary judgment before filing or defending their state or federal lawsuits. This means lawyers at the outset must painstakingly evaluate the evidence and proof (or lack thereof) necessary to prevail when the ultimate summary judgment motion is presented.

The survival trick is the early outlining of the claims and defenses, while actually drafting **on Day 1** the jury instruction setting forth the required elements for the case. Toward this end, you should design your discovery to obtain the necessary evidence to prevail on the anticipated summary judgment motion.

By way of example, let's suppose there is a statute of limitations question in the case. The moving party defendant will perform summary judgment case planning at the outset, plead the affirmative defense, and then have defense counsel lead the plaintiff at deposition to acknowledge his or her actual or constructive knowledge of the alleged wrongdoing beyond the statutory period. There often is no better way to obtain summary judgment than through the sworn testimony of the potentially unsuspecting (or unprepared) plaintiff at his or her own deposition. See, e.g., [Migliaro v. Fidelity Nat. Indem. Ins. Co.](#), 880 F.3d 660 (3d Cir. 2018)<sup>2</sup> (rejection of proof of loss claim leading to filing of suit triggers bar of statute of limitations).

By the same token, to avoid summary judgment in this example, the plaintiff's lawyers not only will research the governing statute(s) and, if necessary, plead a tolling element (e.g. delayed discovery or fraudulent concealment), they will map out the plan (through interviews, written discovery and deposition) to provide oppositional evidence to be presented later on summary judgment. Know where the landmines are

located, plan allegations and present honest sworn testimony accordingly—all in service of surviving the big defense litigation moment called summary judgment. See, e.g., [Soto v. Sweetman](#), 882 F.3d 865 (9th Cir. 2018)<sup>3</sup> (court rejects equitable tolling of civil rights claim against government).

Bottom line: you wouldn't take a trip without knowing your destination and the same is true when approaching surviving the summary judgment process. And you've got the perfect "summary judgment GPS" in Chapter 44 of my Lexis Nexis Practice Guide as it provides detailed "road maps" in the application of summary judgment motions in a large variety of substantive areas of law.

### III. Master the "Most Favorable Light" Rule

You'll never win the summary judgment game if you think it is a substitute for trial or somehow a vehicle for "educating" your judge. After all, you don't get summary judgment unless there is nothing for the jury to do—meaning the evidence, given the most favorable light for the other side, shows no genuine issue of material fact. See Fed. R. Civ. P. 56(a).

Thus, the most important rule for summary judgment is that all inferences, the weight of all evidence and each credibility determination are to be made in favor of the non-moving party. This is what the Supreme Court calls the "axiom" of summary judgment, i.e., the judge's function on summary judgment is not to weigh the evidence but to view it in the light most favorable to the non-moving party. [Tolan v. Cotton](#), 134 S.Ct. 1861 (2014)<sup>4</sup>.

Survival for proponents and opponents of summary judgment, therefore means having more than the proverbial "strong" case. To the contrary, it must be plain that the moving party wins even if all inferences, weight and credibility are given to the other side. To ignore this survival tip means a lot of wasted time and expense, to say nothing of what one can read every day: appellate decisions reversing lower court grants of summary judgment. See, e.g., [Strothers v. City of Laurel](#), 895 F.3d 317 (4th Cir. 2018)<sup>5</sup> (manager's prior expressed wish to hire someone of another race supports inference of Title VII violation); [Minarsky v. Susquehanna Cty.](#), 895 F.3d 303 (3d Cir. 2018)<sup>6</sup> (explanation for plaintiff's failure to report alleged harassment could be believed by jury).

### IV. Play "Family Feud" Summary Judgment

In the game show Family Feud, host Steve Harvey seeks a focus on the successful answer most given to the posted

question. Applied to summary judgment motions, the Family Feud inquiry aims at the Number 1 ground for prevailing on such motions: if possible formulate your motion around a dispositive question of law and tell the court why its resolution compels victory for your client.



Judges naturally favor jury determinations of fact questions and, therefore, are most open to summary judgment motions when framed as a question of law. Frankly, those are the questions judges—not juries—decide in the first instance. As a survival tip and if possible, therefore, identify and raise questions of law when making summary judgment motions. Here are some examples of dispositive questions that are routinely resolved on summary judgment:

- Res judicata
- Statute of limitations
- Statute of frauds
- Meaning of unambiguous contract
- Plaintiff's status as a public figure

Following this Family Feud approach flows from the prism through which all such motions are viewed—to wit, is the moving party entitled to "judgment as a matter of law."<sup>4</sup> So, for example, the question whether the plaintiff is an "employee" under the FLSA is one of law, therefore, authorizing the court on summary judgment to evaluate the statutory balancing factors. [Xuedan Wang v. Hearst Corp.](#), 877 F.3d 69 (2d Cir. 2017)<sup>7</sup>.

### V. Imagine Your Summary Judgment Evidence is on the Witness Stand

Too many lawyers forget that on summary judgment the evidence submitted needs to be presented in an admissible form or with a showing that it will be admissible at trial. See TWG, sec. 43-VI[B][3]. So, my fifth survival tip on summary



judgment is to imagine that the declarations, affidavits, discovery excerpts and exhibits are being introduced on the witness stand at a live hearing.

This discipline reminds you that, as if at a testimonial hearing, objections can and should be made to evidence that is not properly authenticated or inadmissible. This will emphasize to each side they must have fully contained evidentiary submissions, and also should make page and line written objections to the other side's evidence.

This survival skill is vital on multiple levels as seen in many exemplar cases in recent years. These include the following:

- Conclusory declarations are subject to objection on summary judgment. See, e.g., [Mancini v. City of Providence](#), 2018 U.S. App. LEXIS 32962 (1st Cir. 11/21/18)<sup>8</sup> (conclusory assertion of disability); [Montgomery v. Risen](#), 875 F.3d 709 (D.C. Cir. 2017)<sup>9</sup> (conclusory recitation of falsity in defamation suit).
- Authentication and a proper foundation for evidence is also required on summary judgment. See, e.g., [Orr v. Bank of America](#), 285 F.3d 764 (9th Cir. 2002)<sup>10</sup> (attorney declaration without court reporter certificate insufficient to authenticate deposition transcript).
- Sham affidavits, i.e., ones containing statements that inexplicably contradict prior sworn testimony, are subject to being stricken on summary judgment. See, e.g.,

[Daubert v. NRA Group](#), 861 F.3d 382 (3d Cir. 2017)<sup>11</sup>.

- Evidence not properly disclosed in discovery can be excluded on summary judgment. See, e.g., [Vanderberg v. Petco](#), 906 F.3d 698 (8th Cir. 2018)<sup>12</sup> (failure to disclose expert testimony results in exclusion on summary judgment); [Karum Holdings LLC v. Lowe's](#), 895 F.3d 944 (7th Cir. 2018) (same).

And if imagining is hard, actually read your evidence out loud with a colleague at the ready to object as if at the evidentiary hearing. Be alert to all sorts of proper objections (e.g. hearsay, lack of personal knowledge, etc.) and then fix the evidence before submission. You can also try this out loud technique with the other side's evidence, converting it to written objection when justified.

## **VI. Don't Count on Changing Horses in Middle of Summary Judgment Stream**

It is vital to understand that, unlike a motion to dismiss, courts routinely rule on summary judgment motions without giving leave to amend either the pleading or factual record. In other words, don't count on surviving summary judgment by changing the then-existing case template.

This "don't change horses" survival skill conforms to established and recent case law holding that summary judgment generally cannot be avoided by seeking to add new and different factual or legal theories of the case. See [Chessie Logistics Co. v. KRINIS Holdings, Inc.](#), 867 F.3d 852

(7th Cir. 2017)<sup>13</sup> (court can deny summary judgment if non-moving party relies on facts beyond complaint).

By the same token, unless the motion is filed prematurely (e.g. well before close of discovery or when moving party is failing to comply with outstanding discovery), courts often will not continue the motion simply to allow further discovery. *Hodgin v. UTC Fire & Sec. America's Corp.*, 885 F.3d 243 (4th Cir. 2018)<sup>14</sup> (court rejects request for further discovery).

If, on the other hand, you find yourself behind the survival curve, you can ask the court to amend the complaint (if no unreasonable delay or prejudice) or alternatively for specified discovery that could not have been presented through due diligence. See Fed. R. Civ. P. 15, 56(d); see also *Jacobson v. U.S. Department of Homeland Sec.*, 882 F.3d 879 (9th Cir. 2018)<sup>15</sup> (plaintiff makes showing discovery could result in triable issue); *BRC Rubber & Plastics, Inc. v. Continental Carbon Co.*, 900 F.3d 529 (7th Cir. 2018)<sup>16</sup> (new legal theory could be pursued).

However, despite some potential openings, parties making and opposing summary judgment motions should proceed as if the factual and legal record is set. This is why pre-planning at an early stage (see above) is critical.

## VII. Ensure that the Motion and/or Opposition are User-Friendly for the Court and Staff

It is a fundamental survival skill on summary judgment to make the motion user-friendly for the Court and its staff. This

is best accomplished by being absolutely clear in citations to the docket and ensuring that the referenced exhibits and evidence are in the record and readily accessible.

The case law makes it clear that the court, when addressing summary judgment motions, has no duty to scan the record to find information and evidence. See, e.g., *Carlson v. Bos. Sci. Corp.*, 856 F.3d. 320 (4th Cir. 2017)<sup>17</sup> (opponent's a failure to cite to evidence allows granting of motion); TWG, sec 43-VIII[E][2]. Moreover, even the moving party cannot rely on unsupported generalizations, but rather must direct the court to the non-moving party's lack of sufficient evidence. *Nick's Garage, Inc. v. Progressive Cas. Co.*, 875 F.3d 107 (2d Cir. 2017)<sup>18</sup>.

In making your motion user-friendly for the Court, think about what it will be like to read the briefs and evidence. Try locating the supporting documents and references yourself, and if it's hard for you it will be even harder for busy judges and their clerks. Remember that winning at the motion level has two vital elements: 1) tell the court how you win, and 2) persuade the court why you ought to win. Clear and accessible briefs and supporting evidence will get these jobs done effectively.

## Conclusion

The seven tips in this article will help you survive the summary judgment process and with greater efficiency and clarity. And through the use of The Wagstaffe Group Practice Guide and Current Awareness you can not only survive, you just might prevail.



### Authority you can trust, James M. Wagstaffe

Renowned author James M. Wagstaffe is a preeminent litigator, law professor and expert on pretrial federal civil procedure. He has authored and co-authored a number of publications, including *The Wagstaffe Group Practice Guide: Federal Civil Procedure Before Trial*, which includes embedded videos directly within the content on Lexis Advance. As one of the nation's top authorities on federal civil procedure, Jim has been responsible for the development and delivery of federal law, and regularly educates federal judges and their respective clerk staffs. Jim also currently serves as the Chair of the Federal Judicial Center Foundation Board—a position appointed by the Chief Justice of the United States Supreme Court.

<sup>1</sup> *District of Columbia v. Wesby*, 138 S.Ct. 577 (2018)

<sup>2</sup> *Migliaro v. Fidelity Nat. Indem. Ins. Co.*, 880 F.3d 660 (3d Cir. 2018)

<sup>3</sup> *Soto v. Sweetman*, 882 F.3d 865 (9th Cir. 2018)

<sup>4</sup> *Tolan v. Cotton*, 134 S.Ct. 1861 (2014).

<sup>5</sup> *Strathers v. City of Laurel*, 895 F.3d 317 (4th Cir. 2018)

<sup>6</sup> *Minarsky v. Susquehanna Cty.*, 895 F.3d 303 (3d Cir. 2018)

<sup>7</sup> *Xuedan Wang v. Hearst Corp.*, 877 F.3d 69 (2d Cir. 2017)

<sup>8</sup> *Mancini v. City of Providence*, 2018 U.S. App. LEXIS 32962 (1st Cir. 11/21/18)

<sup>9</sup> *Montgomery v. Risen*, 875 F.3d 709 (D.C. Cir. 2017)

<sup>10</sup> *Orr v. Bank of America*, 285 F.3d 764 (9th Cir. 2002)

<sup>11</sup> *Daubert v. NRA Group*, 861 F.3d 382 (3d Cir. 2017)

<sup>12</sup> *Vanderberg v. Petco*, 906 F.3d 698 (8th Cir. 2018)

<sup>13</sup> *Chessie Logistics Co. v. KRINIS Holdings, Inc.*, 867 F.3d 852 (7th Cir. 2017)

<sup>14</sup> *Hodgin v. UTC Fire & Sec. America's Corp.*, 885 F.3d 243 (4th Cir. 2018)

<sup>15</sup> *Jacobson v. U.S. Department of Homeland Sec.*, 882 F.3d 879 (9th Cir. 2018)

<sup>16</sup> *BRC Rubber & Plastics, Inc. v. Continental Carbon Co.*, 900 F.3d 529 (7th Cir. 2018)

<sup>17</sup> *Carlson v. Bos. Sci. Corp.*, 856 F.3d. 320 (4th Cir. 2017)

<sup>18</sup> *Nick's Garage, Inc. v. Progressive Cas. Co.*, 875 F.3d 107 (2d Cir. 2017)