

Using Florida's Amended Summary Judgment Standard as a Weapon to Win

“The supreme art of war is to subdue the enemy without fighting.” Sun Tzu, Art of War

By David B. Weinstein, Christopher Torres, and Kayli D. Smendec | April 21, 2023 | Association of Corporate Counsel Tampa Bay

The Florida Rules of Civil Procedure aim “to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹ For a corporate defendant, the difficulty of obtaining summary judgment in Florida state courts seemed anathema to that goal. Two years ago, however, the Florida Supreme Court amended its summary judgment standard to conform with the Federal standard.² The result is that corporate defendants facing litigation in Florida now have an effective weapon to achieve “the just, speedy, and inexpensive determination” of lawsuits filed in Florida state courts.³

Florida’s amended summary judgment standard lessens the burden on the moving party from requiring that it prove “the *non-existence* of a genuine issue of material fact” to “*no genuine dispute* as to any material fact.”⁴ Even more rigorous than the Federal standard, which provides that a court “should” state on the

¹ Fla. R. Civ. P. 1.010.

² Fla. R. Civ. P. 1.510; *In re Amends. to Fla. Rule Civ. Proc. 1.510*, 317 So. 3d 72 (Fla. 2021). In 2022, Greenberg Traurig attorneys wrote an article entitled “[Using Florida’s Amended Summary Judgment Standard in Litigation](#),” which highlighted the key changes to Florida’s summary judgment standard. This article focuses on ways to leverage these changes in practice.

³ *See, e.g., Mane FL Corp. v. Beckman*, 355 So. 3d 418, 426 (Fla. 4th DCA 2023) (recognizing that Florida’s old summary judgment standard’s general preclusion of summary judgment in fraudulent transfer cases no longer applies and granting summary judgment on fraudulent transfer claim under Florida’s amended standard where the evidence is one-sided).

⁴ Fla. R. Civ. P. 1.510(a) (emphasis added).

record the reasons for granting or denying the motion, the amended Florida standard mandates that courts “shall state on the record the reasons for granting or denying the motion.”⁵ Florida’s amended standard also requires “Supporting Factual Positions” to support a motion for summary judgment, thus providing a corporate defendant an important opportunity to address the factual issues necessary for summary judgment.

With these considerations in mind, a corporate defendant seeking to prevail on summary judgment should (1) capitalize on the Supporting Factual Positions, (2) connect the parties’ burdens at summary judgment with their ultimate burdens of proof at trial, and (3) remind the court of its obligation to rely on the record and render a meaningful ruling.

I. “In the midst of chaos, there is also opportunity.” - Sun Tzu, *Art of War*

Florida’s amended summary judgment standard provides that a party asserting that a fact cannot be or is genuinely disputed must support that assertion by:

- (A) 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
- (B) 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.⁶

Supporting Factual Positions—particularly when submitted in a separate, but single cohesive filing—provide a corporate defendant a powerful opportunity to win on the facts by telling its story of the case with admissible evidence when seeking summary judgment or when responding in opposition. This is crucial—as it is often the case—when the sides are telling two stories: “[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.”⁷ Supporting Factual Positions should be tailored to achieve the aims of a corporate defendant’s summary judgment motion: “if the nonmoving party must prove X to prevail [at trial], the moving party at summary judgment can either [1] produce evidence that X is not so or [2] point out that the nonmoving party lacks the evidence to prove X.”⁸ A corporate defendant should use the Supporting Factual positions to tell its story and set the record straight. This is where chaos can be turned into opportunity.

⁵ *Id.*

⁶ Fla. R. Civ. P. 1.510(c)(1)(A)-(B).

⁷ *In re Amends. to Fla. Rule Civ. Proc. 1.510*, 317 So. 3d at 75-76 (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

⁸ *Id.* at 75 (quoting *Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018)).

II. “If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.” – Sun Tzu, *Art of War*

While almost all litigants cite Florida’s amended summary judgment standard in papers, they should also discern and emphasize the parties’ burdens on summary judgment in relation to their ultimate burdens of proof at trial.

The Florida Supreme Court has recognized that “[w]here the nonmovant bears the ultimate burden of persuasion [at trial] on a particular issue . . . the requirements that Rule 56 imposes on the moving party are not onerous.”⁹ In fact, “the movant’s initial burden of production in this circumstance is ‘far from stringent’ and that it can be ‘regularly discharged with ease.’”¹⁰

Under both federal and Florida law, a movant with the burden of proof at trial is held to a higher summary judgment standard:

if the movant bears the burden of proof on a claim at trial, then its burden of production is greater. It must lay out the elements of its claim, citing the facts it believes satisfies those elements, and demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing. If the movant fails to make that initial showing, the court must deny the motion, even if the opposing party has not introduced contradictory evidence in response.¹¹

Florida courts follow the same standard for a movant with the burden of proof at trial:

“Summary judgment should only be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” The movant is entitled to summary judgment after irrefutably establishing that the nonmovant cannot prevail. And “it is only *after* the moving party has met this heavy burden that the nonmoving party is called upon to show the existence of genuine issues of material fact.”¹²

⁹ *Id.* at 77 (quoting *Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 2013)).

¹⁰ *Id.* (quoting *Bedford*, 880 F.3d at 996 (citation omitted)).

¹¹ Wright & Miller, 10A Fed. Prac. & Proc. Civ. § 2727.1 (4th ed.); *see also Hotel 71 Mezz Lender LLC v. National Retirement Fund*, 778 F.3d 593, 601 (7th Cir. 2015) (“Where, as here, the movant is seeking summary judgment on a claim as to which it bears the burden of proof, it must lay out the elements of the claim, cite the facts which it believes satisfies these elements, and demonstrate why the record is so one-sided as to rule out the prospect of a finding in favor of the non-movant on the claim. If the movant has failed to make this initial showing, the court is obligated to deny the motion.” (citations omitted)).

¹² *Beezley v. Deutsche Bank Nat’l Tr. Co. as Tr. for New Century Home Equity Loan Tr. Series 2004-A Asset Backed Pass-through Certificates, Series 2004-A*, 336 So. 3d 814, 816–17 (Fla. 2d DCA 2022) (internal citations omitted) (applies pre-amendment summary judgment standard to a movant with the burden of proof, which is the same as the federal standard for a movant with the burden of proof); *see also Harmon v. Cina*, Case No. 20-501-CA-DS, 2022 Fla. Cir. LEXIS 1152, at *9 (Fla. 5th Cir. Ct. Jan. 28, 2022) (“if the movant bears the burden of proof on a claim at trial, then its burden of production is greater. It must lay out the elements of its claim, citing the facts it believes satisfies those elements, and demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing. If the movant fails to make that initial showing, the court must deny the motion, even if the opposing party has not introduced contradictory evidence in response.”).

To know the difference in the summary judgment standards applicable a movant *with* the burden of proof at trial and a movant *without* the burden of proof at trial is to know the enemy and yourself.

III. “Advance knowledge cannot be gained from ghosts and spirits . . . but must be gained from [people] for it is the knowledge of the enemy’s true situation.” – Sun Tzu, *Art of War*

Florida’s amended summary judgment standard mandates a court to “state on the record the reasons for granting or denying the motion.”¹³ As explained, “[t]he court must state the reasons for its decision with enough specificity to provide useful guidance to the parties and, if necessary, to allow for appellate review. . . . [T]his requirement is critical to ensuring that Florida courts embrace the federal summary judgment standard in practice and not just on paper.”¹⁴ In other words, a court must make specific findings in its ruling. Where and to what degree this occurs is a matter of debate, but the basic obligation is unavoidable, and it must be reduced to reasoning that is conveyable.

A corporate defendant seeking a ruling on summary judgment should remind the court of its obligation to issue an order that states its reasoning, which should be supported by the undisputed material facts and grounded in the record evidence. When a corporate defendant at the summary judgment stage has already provided the court with a strong Supporting Factual Positions and has shown that the applicable burden has been met, the court will already have the tools it needs to issue a ruling in the corporate defendant’s favor. A corporate defendant may also ask to submit competing proposed orders to the court to seize the opportunity to affect the ultimate ruling. This can resolve a dispute at the trial court level, narrow the issues to be litigated, or provide a corporate defendant valuable intelligence to continue its defense of the action.

Conclusion

Corporate defendants should seize on every aspect of the amended summary judgment rule, which includes capitalizing on Supporting Factual Positions, exploiting the parties’ burdens at summary judgment in relation to their burdens of proof at trial, and making it easier for a trial court to make a meaningful summary judgment ruling. If strategized and executed correctly, Florida’s amended summary judgment rule should provide corporate defendants a crucial weapon to promote “the just, speedy, and inexpensive determination of every action and proceeding.”

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¹³ Fla. R. Civ. P. 1.510(a).

¹⁴ *In re Amends. to Fla. Rule Civ. Proc. 1.510*, 317 So. 3d at 77.