

Trial Law TIPS

Roy D. Wasson's
TIP #13

ROY D. WASSON is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Amendments to Pleadings to Defeat Summary Judgment—Never Too Late

It is *never* too late to amend your complaint or another pleading in order to defeat a motion for summary judgment. I personally have set the record for last-minute motions to amend, so I can tell you from experience to never, never, never give up.

Although it was 20 years ago, I'll always recall that hangdog look on the face of my co-counsel (let's call him "Paul," because that *is* his name) as he shuffled toward the lobby past my office. "What's wrong, 'Paul'?" I asked him. He had that look on his face the associates in our firm wore when snagged by a partner to cover a doctor's depo. set to start at 4 p.m. on a Friday at some Hialeah hospital. But Paul was on his way to Key West for a summary judgment hearing (assumedly followed by a weekend of fun). Why so glum?

“I’m gonna lose this [bleeping] summary judgment hearing,” Paul lamented. “It’s on insurance coverage, and the policy is clearly against me.” Paul quickly explained that a key coverage provision which his client thought said one thing had been entered differently on the dec sheet. There was no ambiguity, just a policy which said the opposite of what the client expected.

“Reform the policy,” I counseled. “It probably was just a scrivener’s error on the part of whoever keyed-in the information on the declarations page.”

“Too late now,” Paul said resignedly. “The hearing has been set for a month and it’s tomorrow morning; I’m going to the Keys this afternoon.”

“Never too late,” I promised, grabbing the file from Paul to copy the style from some pleading. It was lunchtime and no secretary was in sight, so I rolled a sheet of 14-inch long legal paper into the nearest IBM Selectric typewriter (I told you it was long ago), and started tapping away with both of my index fingers: “Motion to Amend Pleadings.” Two or three sentences later and I was done. No case cites; I only cited Rule 1.190.

Paul looked at me like I was trying to resuscitate a cardiac arrest patient with a Band-Aid. He accepted my feeble typing effort, but still was resigned to losing, predicting: “Judge Lester never is going to grant this, on the day of the hearing.”

“I know,” I said. “But then I’ll reverse him on appeal.” Of course, the judge denied the motion. But I made good on my prediction and reversed him on appeal, taking special personal pride in one sentence from the opinion: “Leave to amend should be freely given when justice so requires, Fla. R. Civ. P. 1.190(a), *the more so when a party seeks such a privilege at or before a hearing on a motion for summary judgment.*” *Old Republic Ins. Co. v. Wilson*, 449 So. 2d 421, 422 (Fla. 3d DCA 1984)(emphasis added).

Check your complaint before the hearing on a defense motion for summary judgment (perhaps even the week before, instead of the day before), to see if there is a cause of action you could have pled but did not. Did the defense attorney move for summary judgment on a statute of limitations defense you could

avoid by pleading tolling in your Reply? (See Trial Law “TIP” No. 1). Maybe you named the wrong corporate defendant, or pled a claim barred by a contract provision, but now you have evidence of fraud in the inducement. *See Montero v. Compugraphic Corp.*, 531 So. 2d 1034 (Fla. 3d DCA 1988). Amend your pleadings now to defeat the summary judgment motion.

“But I’m already on my Third Amended Complaint,” you insist. “The judge never will allow another amendment.”

Wrong, Traversosaurus-breath. Maybe in the Pleistocene Epoch the “three strikes” rule of pleading meant something. No more. *See Alvarado v. Manro, Inc.*, 550 So. 2d 1174, 1175 (Fla. 3d DCA 1989), which cited my *Old Republic v. Wilson* case in reversing a summary judgment based on the trial court’s denial of a motion for leave to further amend the ***Fourth Amended Complaint!***

You can expect other TIPS concerning amendments to pleadings in this feature. My recurring theme is to get you in the habit of viewing your complaint and other pleadings as more than just forms you file at the beginning of a case and never look at again. As the facts of your lawsuit evolve, so must (or should) your pleaded theories of liability and avoidances to defenses. Take a minute or two to review the operative pleadings (including the defendant’s answer) in two or three of your cases. Then envision how you would have pled your claims if you knew then what you know now. Then amend.

Keep Tryin!

Roy