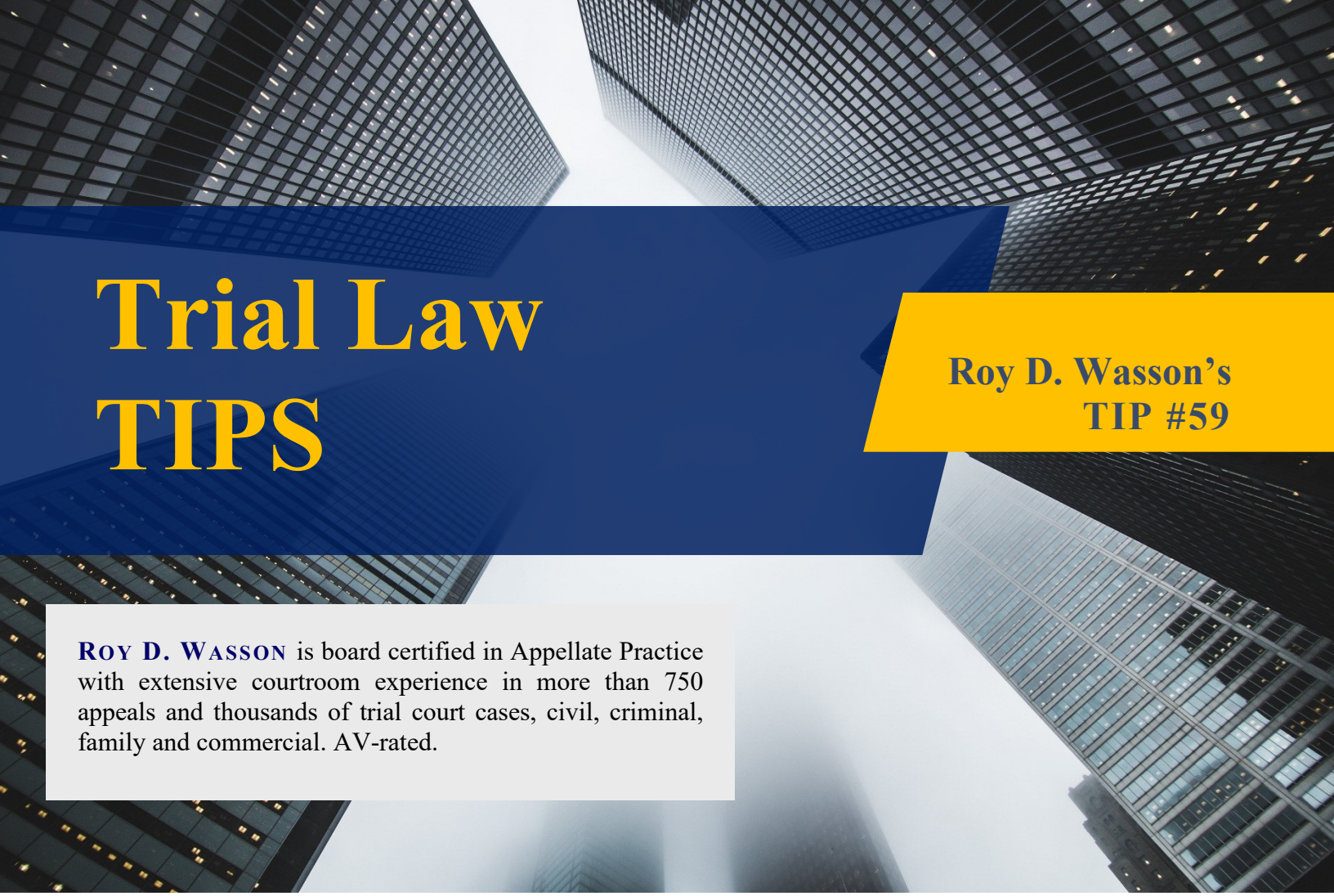

Trial Law TIPS

Roy D. Wasson's TIP #59

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.

Delaying Summary Judgment Hearings Due to Incomplete State of Discovery or Inability to Timely Get Refuting Affidavits

Introduction

For several years trial lawyers have regarded the first setting of a summary judgment hearing as a deadline no more enforceable than the purported thirty-day deadline for defendants to answer interrogatories. Trial judges throughout the State of Florida would routinely excuse us from having to file evidence opposing summary judgment motions before, or even at the time of, the first scheduled hearing. If we weren't ready to demonstrate a genuine factual issue by the time of that hearing, all we had to do was invoke the mantra: "Discovery is Incomplete."

We got a little lazy, relying on appellate decisions that made it sound like we could always delay a MSJ hearing; cases broadly

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stating propositions like this one: "Generally, it is an abuse of discretion for a trial court to grant summary judgment where the opposing party has not had an opportunity to complete discovery." *Crowell v. Kaufmann,* 845 So. 2d 325, 327 (Fla. 2d DCA 2003).

Admit it: how many times have you received the notice of hearing on the DA's summary judgment motion, and then set some deposition of a minor witness or sent out another RFP, so you could show the judge that there was discovery still outstanding? That was just about all you had to show in order for the hearing on the MSJ to be delayed a month or more. So easy was it to forestall SJ where any sort of discovery request remained unanswered by the Defendant, that some trial attorneys may have subconsciously held back their last round of discovery to use as a shield against having to argue the MSJ the first time it was set for hearing..

In the late 1990s the broad generalities about SJ being improper where ***any*** discovery remained incomplete gave way to a requirement that the non-movant for SJ demonstrate what facts they expect to uncover in discovery, and to show how those facts would be "material" in the sense of precluding judgment as a matter of law. Further, even the existence of assumedly-material facts that more discovery could yield is no longer enough to require trial courts to continue the MSJ hearing. A plaintiff opposing SJ must establish both an inability to have previously uncovered those material facts, and that such inability resulted from interference in the discovery process by the defendant, not any lack of diligence by plaintiff.

Nowadays when the DA files an MSJ, even relatively early in the case, counsel for the Plaintiff needs follow a careful four-step plan if he or she intends to seek a delay of the hearing. You still can get the additional time you need—assuming that you really need more time and are not just stalling—and finish limited discovery on the meat of the MSJ issue. But you need to be careful. This article will teach the formula of success to those of you unaware that there was such a formula, and reminds the rest of you what you know, but have not needed to follow. Apply these simple principles in order to maximize your chances of delaying the MSJ hearing, where you need to, and to make a record for reversal if the

judge should unfairly deny your request for more time to respond to the MSJ.

Step 1—Unfinished Discovery Must Be Shown To Be Material

During much of the 1980s and 1990s, the mere fact that discovery was incomplete was often (perhaps even usually) sufficient ground to require that a MSJ hearing be continued. Plaintiffs opposing an MSJ did not ordinarily need to demonstrate the specific evidence that a given interrogatory or deposition was expected to yield, much less convince the court that the hoped-for evidence would be enough to defeat summary judgment. *E.g., Collazo v. Hupert,* 693 So. 2d 631 (Fla. 3d DCA 1997), in which the court held: "Because discovery was still pending, the trial court should not have entertained a motion for summary judgment until such discovery was concluded. *Brandauer v. Publix Super Markets, Inc*., 657 So. 2d 932, 933 (Fla. 2d DCA 1995); *Sica v. Sam Caliendo Design, Inc.,* 623 So. 2d 859 (Fla. 4th DCA 1993); Singer v. Star, 510 So. 2d 637, 639 (Fla. 4th DCA 1987); *Danna v. Bay Steel Corp.,* 445 So. 2d 704, 705 (Fla. 4th DCA 1984).

It was the mere fact of outstanding discovery that precluded SJ under this body of law a few years ago, without any need to demonstrate that the evidence that discovery was hoped to uncover would (or even might) be enough to defeat the MSJ. See, e.*g., Sica, supra,* where the court reversed a summary judgment that had been entered while the deposition of a party's representative was pending, refusing to accept the DA's argument on harmlessness "because there is no way to determine what may or may not have been said during the course of the avoided deposition." The *Sica* court also quoted from an earlier case that stood for the proposition that SJ cannot be granted in a case where there is ***any*** pending deposition that had been noticed.: *"*In *Danna v. Bay Steel Corp*., 445 So. 2d 704, 705 (Fla. 4th DCA 1984), this court held that if a deposition has been properly noticed and there is no protective order, nor one sought, the plaintiff is entitled to a deposition before his lawsuit is summarily disposed of."

Over time, however, the DAs got wiser and began arguing that the Plaintiff's unfinished discovery should not preclude entry of SJ, because that discovery was either not material to the MSJ or,

if material, it was not likely to result in enough favorable relevant evidence to preclude summary judgment. The courts have followed suit and made it clear that the mere pendency of some discovery is not enough to continue the MSJ hearing; there must be a showing of what evidence might result from the discovery and that such evidence would render SJ erroneous. *E.g., Periera v. Florida Power & Light Co.,* 680 So. 2d 617, 618 (Fla. 4th DCA 1996)("In order to be entitled to a continuance under Fla.R.Civ.P. 1.150(f) the party opposing the motion for summary judgment should show . . . the existence and availability of additional evidentiary matter, ***what it is and its materiality . . . .***")(emphasis added).

This recent trend of requiring a showing of the content and materiality of untaken discovery in order to delay consideration of a MSJ is not all that new. Instead it reflects another swing of the pendulum back to the state of the law in this area more than forty years ago. *See McNutt v. Sherrill*, 141 So. 2d 309, 310-11 (Fla. 3d DCA 1962)("Generally, in order to be entitled to a continuance under rule 1.36(f) the party opposing the motion for summary judgment should show . . . availability of additional evidentiary matter, ***what it is and its materiality . . . ")(emphasis added).***

This first message is clear: to avoid SJ when discovery is incomplete, proffer what the expected answers to that discovery would be and inform the court how that evidence would create genuine issues of material fact, requiring denial of the MSJ.

Step 2—Don't Hold Discovery In Reserve to Delay MSJ

A showing of the expected content of unfinished discovery responses and the materiality thereof is necessary to warrant a continuance of a MSJ hearing, such a showing alone is not sufficient. The court must find that the party opposing the MSJ genuinely seeks the discovery and is not merely using incomplete discovery as a pretext for delay. Opposing counsel may not manipulate court schedules by holding back discovery requests or delaying depositions, just in case the DA is planning a MSJ. "[A]fter a motion for summary judgment is filed and scheduled, non-moving parties cannot thwart the summary judgment hearing

by initiating discovery." *Smith v. Smith,* 734 So. 2d 1142, 1144 (Fla. 5th DCA 1999)

Even if not sufficient to establish that a party is deliberately avoiding the completion of discovery, the timing of discovery requests shortly before a MSJ hearing makes it appear that the "outstanding discovery" argument is just a pretext. By way of example, in affirming the denial of a continuance of the MSJ hearing, the court in *Periera v. Florida Power & Light Co.,* 680 So. 2d 617 (Fla. 4th DCA 1996) expressed skepticism at the plaintiff's sincerity about the need for further discovery, as follows: "The outstanding discovery about which plaintiff complains was not initiated until three days before the summary judgment hearing. The trial court did not, therefore, err in refusing to continue the summary judgment hearing." *Id.* at 618.

This second lesson is to avoid the "pretext" claim by propounding all discovery that is imaginably necessary, well in advance of a MSJ. If it is all answered fully by the time of that MSJ, the motion can be argued on its merits. If, on the other hand, that discovery has not been fully and fairly provided by the time a MSJ is filed by the DA, opposing counsel then move to the third element of the analysis: casting the blame for the lack of timely responses.

Step 3—List the Defendant's Discovery Delays and Obstructions

As demonstrated above, you should send out discovery requests as early as possible and set depositions before learning that the DA is moving for SJ. If you set depositions and send out interrogatories and document requests early in the case, but the Defendant delays responding and forces you to cancel and reset depositions, that is the very type of situation where a continuance of the MSJ can and should be granted.. You should be prepared to document in detail the defendant's delaying tactics and failure to comply with discovery deadlines, in order to maximize your hopes of continuing the MSJ hearing due to such delays.

In *Giroux v. Ronald W. Williams Constr. Co.,* 705 So. 2d 663, 664-65 (Fla. 1st DCA 1998), the court reversed a summary judgment for defendant, holding that "Giroux's affidavit demonstrates his inability to complete discovery, his efforts to accomplish discovery, and that failure to complete discovery was not due to inaction on his part, but rather to the conduct of Williams Construction in failing to file answers to interrogatories." (Emphasis added). Demonstrate your client's diligence to the trial court, and you are one easy step away from avoiding a hearing on the merits of the MSJ.

Step 4—Support Motion for Continuance with Your Affidavit

A frequent (and often fatal) mistake many trial lawyers make in opposing a MJJ is that—instead of filing their own affidavit to provide evidentiary support for the need for further discovery—counsel merely argues at the hearing that additional discovery remains to be taken. Subsection (f) of Fla. R. Civ. P. 1.510, the rule on summary judgment procedure, expressly requires a factual showing (i.e., a verified and under oath) on the issue whether the MSJ hearing should be rescheduled because additional investigation and discovery is needed. Mere unsworn argument of counsel is not enough, as held by the First District:

> In order to be entitled to a continuance under Fla.R.Civ.P. 1.510(f) the party opposing the motion for summary judgment should show ***by affidavit*** the existence and availability of additional evidentiary matter, what it is and its materiality, what steps have been taken to obtain it, and that failure to have obtained such evidence sooner did not result from inexcusable delay. *McNutt v. Sherrill*, 141 So. 2d 309 (Fla. 3d DCA 1962). Accord, *CIA Ecuatoriana De Aviacion v. U.S. and Overseas Corp.*, 144 So. 2d 338 (Fla. 3d DCA 1962).
>
> Here, the ***motion for continuance was unverified, no affidavit supporting the motion was filed, and the requirements listed above were not met.*** Clearly, DeMesme failed to bring himself within

> Rule 1.510(f) and therefore had to rely upon the discretion of the trial court.

DeMesme v. Stephenson, 498 So. 2d 673, 676 (Fla. 1st DCA 1986).

"In order to be entitled to a continuance under Fla.R.Civ.P. 1.150(f) the party opposing the motion for summary judgment should show ***by affidavit*** the existence and availability of additional evidentiary matter, what it is and its materiality, what steps have been taken to obtain it, and that failure to have obtained such evidence sooner did not result from inexcusable delay." *Giroux v. Ronald W. Williams Constr. Co.,* 705 So. 2d 663, 664-65 (Fla. 1st DCA 1998)(emphasis added). This last step is easy, but one you should never forget.

Conclusion

When faced with a MSJ and discovery in incomplete, satisfy the four elements addressed herein to earn a continuance of the hearing. And if at first you don't succeed, just . . .

Keep Tryin!

Roy

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