

Trial Law TIPS

Roy D. Wasson's
TIP #68

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.

Use of Discovery Materials on Summary Judgment Motions

It is very common to support or oppose motion for summary judgment by filing your opponent's discovery responses to establish a fact, or to establish that there is a genuine issue of material fact. Very rarely does the opposing party object to materials filed on a summary judgment motion. However, summary judgments have been reversed when such rare objections have been made, when a few simple steps could be used to insure that the trial court's ruling was not assailable.

To begin with, it is clear that your opponent answers to interrogatories and depositions taken in the case are admissible in support of, or opposition to motions for summary judgment. Fla. R. Civ. P. 1.510(c) specifically identifies the materials that may be filed by the movant or opposing party as: "affidavits,

answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence.” However, documents you receive in discovery from other parties or non-party are not automatically admissible at a summary judgment hearing.

In order to use a written document that is not in affidavit form, a party must file an affidavit laying the evidentiary foundation for the document, obtain an admission as to its admissibility, or demonstrate that the document has been sufficiently identified by deposition testimony so as to demonstrate its authenticity and non-hearsay character. Just because an opposing party provides you with some documents in response to a discovery request does not mean that the producing party agrees with the admissibility of that document into evidence.

The issue arose in *Buzzi v. Quality Service Station, Inc.*, 921 So. 2d 14 (Fla. 3d DCA 2006), in which a majority of the court held that the trial court properly based a summary judgment upon a document known as the “Motiva letter.” The Court held that the party opposing the motion for summary judgment “acknowledged the authenticity of the letter by admitting the allegations of paragraph four of the amended answer and counter claim in his motion to strike.” *Id.* at 16. However, in his descending opinion Judge Ramirez surveyed the law in this area and explained the necessity of establishing an evidentiary foundation for documents filed in connection with summary judgment motions as follows:

The use of the Motiva letter runs counter to a long line of Florida and federal jurisprudence holding that unsworn and unauthenticated documents cannot be used either to grant or deny summary judgment. See *First Union Nat.’l Bank of Fla.*, 785 So. 2d at 591, stating that “merely attaching an unsworn document, in this case the EEOC letter, to a motion for summary judgment does not, without more, satisfy the procedural

strictures inherent in Florida Rule of Civil Procedure 1.510(e).”); *Bifulco v. State Farm Mut. Auto. Ins. Co.*, 693 So. 2d 707, 709 (Fla. 4th DCA 1997) (“Merely attaching documents which are not ‘sworn to or certified’ to a motion for summary judgment does not, without more, satisfy the procedural strictures inherent in rule 1.510(e), Florida Rules of Civil Procedure. Moreover, rule 1.510(e) by its very language excludes from consideration on a motion for summary judgment, any document that is not one of the enumerated documents or is not a certified attachment to a proper affidavit.”)(footnote omitted); *Harris v. Wilson*, 656 So. 2d 512, 516-17 (Fla. 1st DCA 1995)(“The language of rule 1.510, Florida Rules of Civil Procedure, reflects a clear intent to allow courts to consider only that information which has been either admitted by the parties (i.e., admissions, interrogatories, or answers) or which establishes the existence or nonexistence of material facts in dispute through affidavits and information which has been timely presented. The documents submitted by the appellants do not comport with this intent of the rule as they were not timely filed nor were they accompanied by an affidavit. Appellants attempted to file, as an exhibit to their supplemental response to defendants’ motion for summary judgment, various documents purportedly obtained through discovery. No accompanying affidavit was provided with those documents, and the only discussion concerning what they allegedly represented was by the attorney in her own memorandum. As such, submission of the documents was not in compliance with rule 1.510, Florida Rules of Civil Procedure.”); *Tunnell v. Hicks*, 574 So. 2d 264, 266 (Fla. 1st DCA 1991)(“The Declaration

of Forfeiture was unauthenticated and was not filed prior to the hearing, pursuant to rule 1.510(c). The copy of the letter from Tunnell was an unauthenticated exhibit attached to the motion to dismiss, whereas the provisions of rule 1.510(c) require the court, in determining the propriety of a motion for summary judgment, to consider only ‘pleadings, depositions, answers to interrogatories and admissions on file together with affidavits.’ Tunnell failed to attach either document to affidavits that presumably would have ensured their admissibility.”(citations omitted); C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 2722 (1983) (under the comparable federal rule, exhibits may be considered only if authenticated by and made part of an affidavit); *Edward B. Marks Music Corp. v. Stasny Music Corp.*, 1 F.R.D. 720 (S.D.N.Y. 1941) (court correctly did not consider letter that was neither authenticated nor attached to affidavit).

Id. at 18-19.

Although there is a time deadline for serving upon one’s opposing party of documents filed in support of, or opposition to, motions for summary judgment (twenty days before the hearing for the movant’s deadline, and five days before the hearing for opposing documents by mail, or two days if served by hand delivery, there is no deadline under the rule for stating objections evidentiary matters as to which no proper foundation has been laid. Therefore, although it would seem to be somewhat unprofessional for a party to blindsides another litigant by waiting until the hearing to state an objection to unverified and unauthenticated evidence, there is no prohibition in the rules for such tactics. Therefore, counsel who need to use letters, contracts, or other documentary

evidence on motions for summary judgment should make sure to have foundational affidavits filed with the documents, request for admissions establishing the admissibility of the evidence, or at least a written agreement by opposing counsel that no objection to admissibility will be made.

Conclusion

If the trial court rules against your position because your motion for summary judgment or opposition to summary judgment, was based upon documentary evidence that was not authenticated and rendered admissible by deposition testimony, affidavits, answer to interrogatories, or other sworn material, ask the trial court for leave to submit “further affidavits” as permitted by Rule 1.510(e). Summary judgments on all or part of the case may be an effective tool to narrow the issues and streamline the trial, so if at first you don’t succeed, . . .

Keep Tryin!

Roy