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Silence Is Not Always Golden: Preserving the Record in Opposing Motions for Summary Judgment

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Although decided under Florida's new summary judgment rule, which tracks the federal rule in large part, but not entirely, a recent decision of Florida's Fourth District Court of Appeal offers important warnings to all practitioners about the importance of preserving the record in opposing motions for summary judgment. *Lloyd S. Meisels, P.A. v. Dobrofsky*, 4D21-2397, 2022 WL 2057777, at *1 (Fla. 4th DCA June 8, 2022). The case involved a dispute over the hospital's bill for treatment of the plaintiff's dog. The defendants moved for summary judgment on all claims, attached a deposition transcript affidavit, and the invoice detailing the services provided. The plaintiff submitted his own affidavit in opposition. The court granted the motion as to some, but not all, claims. Thereafter, the plaintiff moved for summary judgment on the remaining claims, attaching his affidavit and numerous documents. The defendants never responded. Although there was a hearing, no transcript was in the record. The court made findings of fact based on the *pro se* plaintiff's filings and granted his motion for summary judgment. The Fourth District affirmed. The foundation of its decision was Florida Rule of Civil Procedure 1.510 (c)(5), for which there is no direct analog in Federal Rule 5b(c), and which **requires** the nonmovant to serve a response to a motion for summary judgment at least 20 days prior to the hearing that includes nonmovant's "supporting factual positions" as provided in Rule 1.510 (c)(i). If the nonmoving party "fails to properly support or address a fact," the rule provides the trial court with discretionary options, including the discretion to "consider the fact as undisputed for purposes of the motion…." The trial court in *Dobrofsky* did exactly that, and the appellate court found nothing in the record showed that was an abuse of discretion. In so holding, the Fourth District Court explained that the mandatory requirement of a response was imposed "'to reduce gamesmanship and surprise and to allow for more deliberate consideration of summary judgment motions.'" The requirement of a response providing a "definite, detailed position" of the nonmovant "promotes deliberative consideration of the motion" by the trial court. Moreover, absent the required response, the nonmoving party "pursues a risky course by waving at the record, leaving the trial

court to mine" for an issue of fact requiring trial. Although the trial court may consider non-cited materials in record, it is not required to do so and need consider only the cited materials. In this regard, the court cited *Cole v. McAllister*, 548 F. Supp. 3d 985, 991–92 (D. Idaho 2021), where the federal district court emphasized it is the nonmovants' obligation to direct the trial court's "'attention to specific triable facts.'" Finally, the court declared that nothing in the record showed an abuse of discretion by the trial court in considering the facts set forth in the motion to be undisputed, as permitted in Rule 1.510(e)(2). Although the rule allows a trial court to provide the nonmoving party with an opportunity "to properly support or address the fact" when the party fails to do so by the mandated response, there was "no transcript of the summary judgment hearing to confirm that this rule came into play," and the defendants did not cite to that point of the rule. There are many lessons to be learned from this case with respect to opposing a motion for summary judgment even in jurisdictions other than Florida:

1. Read the entire rule upon which the motion is based and comply with your obligations under it.
2. Provide as much detail as possible in presenting your factual and legal points in opposition to the motion. Be wary of holding some back under a belief you can always expand those facts and arguments on appeal.
3. If there is a hearing on the motion and you intend to appeal, file the transcript.
4. Consider a targeted motion for reconsideration, asking the trial court to allow a supplemental filing, reminding the judge that this will assist her in making the best possible resolution of the motion.

Authored By

Sylvia H. Walbolt

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