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Preserving the Record: Summary Judgments and Judicial Notice

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In this presentation excerpt, Appellate Shareholder Dean Morande shares some quick tips on summary judgments and judicial notice, including what standards need to be met, what needs to be on the record in order to win summary judgment and ensure it is upheld on appeal, and how to get the evidence into the record.

Transcript:

Christina: Thank you for joining us for another Carlton Fields podcast. Dean Morande, an appellate shareholder in our firm's West Palm Beach office, shares some quick tips on summary judgments and judicial notice including: what standards need to be met, what needs to be on the record in order to win summary judgment and ensure it is upheld on appeal, and how to get the evidence into the record. Now, we'll turn it over to Dean.

Dean: I'm going to talk a little bit about summary judgments and just look at a couple of specific elements of summary judgment. The first is the standard that we're talking about, for example, between federal and Florida state courts. Well, basically the federal viewpoint and the minority viewpoint, which is what Florida has adopted. So knowing what standard you have to meet will help you understand what it is you need to have in the record in order to win your summary judgment and have it upheld on appeal.

In federal court, the other side has to demonstrate that there is evidence in the record to support each element in their claim. So in other words, as the movant, you can do as little as pointing out that there's no evidence in the record to support an element of the other party's claim or defense, whereas in Florida, which adopts the minority viewpoint, the burden remains on the movant the entire way. So, for example, the movant in Florida, for example, will have to demonstrate that there is no material issue of disputed fact as to any element or any defense with regard to the party's claim. And those are two very different standards, and they require evidence accordingly.

Now, the way you would get the evidence into the record is usually pretty straightforward. You're going to rely on depositions, affidavits, discovery responses, things like that, but occasionally you're going to use judicial notice to get certain things into

the record, and that's part of what I wanted to focus on here because it's an element that can often go overlooked. Everybody understands to look to, for example, Federal Rule of Evidence 201 (or in Florida you look at 9201 and the following sections) to determine what matters can be taken judicially noticed and the procedures you need to follow in order to get the court to take judicial notice of what it is that you'd like the court to recognize.

Now of course, obviously as with any element and any element of preserving the record, you need the court to make a clear ruling on it. What you also need in relation to judicial notice is making sure that there is, in the record, a copy of exactly what it is the court is taking judicial notice of, be it filing from another case, a statute, whatever it may be, you have to have a copy of that in the record on appeal, particularly if it's denied. If the court refuses to take judicial notice of something, you need to proffer whatever it is you wanted the court to take judicial notice of. And that can often get missed when you're preparing for trial, when you're gearing up for certain things, and of course when you're doing summary judgment. And again, this applies equally whether you're talking about whether your request is denied or granted. You need to have that in the record because more often than you'd think, as an appellate lawyer, I'm looking at appellate record and say oh great, the judge granted our motion for judicial notice, or request for judicial notice, and I can't find what it is that the court took judicial notice of. There's a discussion of it but an appellate court looking at the record needs to be able to see exactly what it is that the court took judicial notice of. And, if you can't find that in the record, there are ways to try to remedy that, but it can often rest with the discretion of the trial court or the appellate court, and that's just not a situation you want to be in. So whenever you're taking judicial notice, just make it a practice to make sure that you have whatever it is that you're attempting to have the court take judicial notice of, that it is in the record and appropriately preserved for review.

Now, occasionally there's situations where no judicial notice is taken in the trial court at all, and for one reason or another there's a fact that you want to get in on appeal. And there are certain circumstances under which you can ask the appellate court to take judicial notice in the first instance. Doesn't happen very often and it doesn't happen very regularly. You're going to see this more often when you do appellee, because you have a little more leeway in the sense that you can argue that the judgment is correct for any reason, regardless of whether that's the ground that the trial court ruled on.

But again, it's very limited when this can occur. One significant example would be mootness. Like let's say, for example, the claims below became moot and you're the appellee and you want to have the appeal dismissed. In certain circumstances you can have the appellate court take judicial notice for the first time of facts to circumstances that would render the appeal moot. But again, those are very limited circumstances and the major takeaway is not only do you have to follow the procedures for judicial notice, but you have to make sure that you have in the record exactly what it is the trial court is looking at because that is what the appellate court is going to be looking at as well.