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Winning on summary judgment

Eighteen strategies to help plaintiffs win the motion for summary judgment

• **Complete your affirmative discovery before the motion is filed**

Before the summary judgment motion is filed, complete discovery on the elements of your claims while witnesses are available and their memories are fresh. Then after the motion is filed, you will be free to concentrate on discovery that rebuts the defendant's claims.

• **Rehabilitate your witnesses *during* deposition**

When your witness mistakenly gives a harmful answer in deposition, ask the witness to state the correct answer then and there. Do not wait until filing the witness's contrary declaration. A later declaration that contradicts prior deposition testimony is not "substantial evidence" and will be disregarded as "irrelevant, inadmissible, or evasive." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 20-22; *Archdale v. American Int'l Specialty Lines Ins. Co.* (2007) 153 Cal.App.4th 1510, 1522 [63 Cal.Rptr.3d 549].) Simply changing the deposition to conform to a later declaration will not avoid a fatal contradiction. (*Shapero v. Fliegel* (1987) 191 Cal.App.3d 842, 848 [236 Cal.Rptr. 696].) However, disregarding the later declaration is proper only if the declaration's contradiction of the deposition is clear and unambiguous. (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 861-862 [84 Cal.Rptr.2d 157].)

• **Ensure the complaint alleges all available theories; if not, move to amend**

If the motion for summary judgment shows that the complaint omits important theories of recovery, move to amend at once (though a motion to amend may be made at the hearing or even before entry of judgment). (*Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, 648 [32 Cal.Rptr.3d 266]; *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1652, 1663.)

Summary judgment addresses *material facts*. Code of Civil Procedure section 437c(b)(1), and the complaint determines what facts are material. Hence, the plaintiff may not normally defeat summary judgment by relying on theories of recovery not alleged in the complaint. (*Government Employees Ins. Co. v. Sup. Ct.* (*Sims*) (2000) 79 Cal.App.4th 95, 98 [93 Cal.Rptr.2d 820]) However, the objection that a new claim was not pleaded is waived if the opposing party fails to assert the pleading defect and instead opposes the motion on the merits. (*Superior Dispatch, Inc. v. Insurance Corp of N.Y.* (2010) 181 Cal.App.4th 175, 193 [104 Cal.Rptr.3d 508]; *Stalnaker v. Boeing Co.* (1986) 186 Cal.App.3d 1291, 1302 [231 Cal.Rptr. 323].)

Moreover, if the motion reveals that the complaint is deficient, the court may grant summary judgment when a demurrer or motion for judgment on the pleadings should have been granted. (*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.App.4th 1110, 1118 [51 Cal.Rptr.2d 251].) But amendment should be allowed if the defect in the complaint is curable. (*College Hosp., Inc. v. Sup. Ct.* (*Crowell*) (1994) 8 Cal.App.4th 704, 719.)

• **If you need more time for discovery, move promptly to continue the hearing, showing your due diligence to date**

When the opposing party shows that "facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court *shall* . . . order a continuance to permit affidavits to be obtained or discovery to be had. . . ." (Code Civ. Proc., § 437c(h) (emphasis added).)

Section 437c "*mandates* a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253 [19 Cal.Rptr.3d 810] (emphasis added); *accord, Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 34 [129 Cal.Rptr.2d 923] [continuance was justified]; *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395 [107 Cal.Rptr.2d 270] [continuance "virtually mandated" by showing that essential facts were needed].)

To obtain a continuance to obtain facts that are not yet available, the opposing party must show that (a) the facts sought are essential; (b) there is reason to believe such facts exist; (c) additional time is needed to obtain these facts. (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633 [15 Cal.Rptr.2d 780] [continuance for essential evidence that *may* exist].) The continuance request must be supported by declarations showing that facts raising a material issue may exist. (*Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1270 [72 Cal.Rptr.3d 171].)

The plaintiff's motion for continuance must show that plaintiff's counsel has exercised reasonable diligence. (*Tokai Bank of Calif. v. First Pac. Bank* (1986) 186 Cal.App.3d 1664,1669 [231 Cal.Rptr. 503]; *A & B Painting & Drywall, Inc. v. Sup. Ct. (Bohannon Develop. Co.*

See Smith, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2010 Issue

(1994) 25 Cal.App.4th 349, 356 [30 Cal.Rptr.2d 418].)

- **Don't save evidence for trial**

Omitting evidence from your summary judgment opposition may create an advantage at trial – but only if the summary judgment is denied.

The most important goal is defeating the summary-judgment motion and – if the motion is lost – winning reversal on appeal. Hence, the possible benefit at trial from omitting evidence from your summary-judgment opposition is probably outweighed by the attendant risks. For example, holding back evidence may cause the trial court to *grant* summary judgment. Second, the evidence that was held back cannot properly be added to the record by a motion for new trial because that evidence was not "newly discovered" despite the plaintiff's lawyer's earlier due diligence. Third, holding back evidence hampers the appeal because that evidence will be unavailable to persuade the appellate court to reverse the judgment.

- **Base your opposition on *Aguilar***

Base your opposition on the standards and rationales stated in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843-857. This decision is your best roadmap to current law on summary judgment, stating basic principles too numerous to discuss here.

- **Make sufficient objections to defendant's evidence, including expert declarations**

Make all reasonable objections to the defendant's evidence. For example, declarations must be based on personal knowledge, must show the declarant's competence to testify to the matters stated, and must contain admissible evidence. (Code Civ. Proc., § 437c(d); *L&B Real Estate v. Sup.Ct.* (*Schwab*) (1998) 67 Cal.App.4th 1342, 1348 [79 Cal.Rptr.2d 759].)

Requirements for objections

• Quote the specific evidence objected to.
• State all possible grounds – a new ground cannot be added later on appeal. (Code Civ. Proc., § 353(a); *People v. Mattson* (1990) 50 Cal.3d 826, 853-854 [286 Cal.Rptr. 802].)
• Address only one item of evidence at a time (no compound objections).
• Be in writing and be filed with your opposition, not at the hearing. Though section 437c allows objections at the hearing, by then it may be too late – the tentative ruling will have already issued, and the court will not appreciate having to consider new objections.

Written objections filed with the plaintiff's opposition satisfy the statutory requirement that objections be made "at the hearing." (Code Civ. Proc., § 437c(b)(5); 437c(d); *Reid v. Google* (2010) 50 Cal.4th 512, 530-532 [113 Cal.Rptr.3d 327] [court "must rule expressly on those objections."])

You may lodge a hearsay objection to documents attached to a declaration. (*Keniston v. American Nat'l Ins. Co.* (1973) 31 Cal.App.3d 803, 813 [107 Cal.Rptr. 583]; *DiCola v. White Bros. Performance Products* (2008) 158 Cal.App.4th 666, 680 [69 Cal.Rptr.3d 888].)

Expert declarations

Submit an expert's declaration where only an expert can establish a fact. For example, the plaintiff's declaration stating he is diabetic failed to refute the defense medical expert's declaration that plaintiff is not diabetic. (*Jambazian v. Borden* (1994) 25 Cal.App.4th 836, 846 [30 Cal.Rptr.2d 768]; *Hanson v. Grode* (1999) 76 Cal.App.4th 601, 607 [90 2d 396].) If the standard of care can be established only by an expert (e.g., the standard for professional negligence), plaintiff must submit a qualified expert's declaration to rebut the defendant's expert's declaration. (*Hanson v. Grode*, 76 Cal.App.4th at pp. 606-607.)

Expert declarations must show (1) that the expert is qualified (*Petrou v. South Coast Emergency Group* (2004) 119 Cal.App.4th 1090, 1094 [15 Cal.Rptr.3d 64] [expert needed "substantial professional experience" in emergency room care], and (2) that the factual bases for opinion are of a type reasonably relied on by experts (*In re Lockheed Litig. Cases* (2004) 115 Cal.App.4th 558, 563-564 [10 Cal.Rptr.3d 34].)

Expert declarations must state evidentiary facts, not just conclusions. (*E.g., Sesma v. Cueto* (1982) 129 Cal.App.3d 108, 113 [181 Cal.Rptr. 12] [doctor's opinion that fetus was "stillborn" did not support a wrongful-death claim]; *Ahrens v. Sup. Ct.* (*Pacific Gas & Elec. Co.*) (1988) 197 Cal.App.3d 1134, 1146-1147 [243 Cal.Rptr. 420] [conclusion that product was "customary and typical" failed to prove that product was not ultrahazardous]; *Krantz v. BT Visual Images, L.L.C.* (2001) 89 Cal.App.4th 164, 173 [107 Cal.Rptr.2d 209] [company executive's statements that alter ego allegations were untrue was conclusory]; *Golden Eagle Refinery Co., Inc. v. Associated Int'l Ins. Co.* (2001) 85 Cal.App.4th 1300, 1315 [102 Cal.Rptr.2d 834] [expert's declaration that a toxic spill was "sudden and accidental" was excluded]; *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742-743 [74 Cal.Rptr.3d 715] [medical opinion based on medical records not before the court was disregarded]; *Bay Area Rapid Transit Dist. v. Sup. Ct.* (*Etier*) (1996) 46 Cal.App.4th 476, 482 [53 Cal.Rptr.2d 906] [expert declaration attributing accident to "fault or failure" of train design was inadmissible for lack of supporting evidence]; *Bushling v. Fremont Med. Ctr.* (2004) 117 Cal.App.4th 493, 510 [11 Cal.Rptr.3d 653] [plaintiff's expert's opinion that it was "more probable than not" that plaintiff's injury arose from trauma during surgery was insufficient]; *Johnson v. Sup. Ct.* (*Rosenthal*) (2006) 143 Cal.App.4th 297, 307 [49 Cal.Rptr.3d 52] [defense expert's conclusion that defendant acted "within the standard of care" was insufficient]; *Towns v. Davidson* (2007) 147 Cal.App.4th 461, 472 [54 Cal.Rptr.3d 568] [plaintiff's expert's conclusion that defendant engaged in "recklessness" did not bar summary judgment]; *Leslie G. v. Perry & Assocs.* (1996) 43 Cal.App.4th 472, 487 50 Cal.Rptr.2d 785] [plaintiff's expert's conclusion that criminal assailants "typically" look for open gate to enter parking garage].)

An expert not listed by plaintiff in response to the defendant's demand under section 2034.210 may oppose summary judgment, but the expert is subject to deposition. (*Kennedy v. Modesto City*

See Smith, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2010 Issue

Hospital (1990) 221 Cal.App.3d 575, 582-583 [270 Cal.Rptr. 544].)

Technical defects in evidence

Technical defects may cause declarations or depositions to be inadmissible.

For example, a declaration's jurat may be deficient. A declaration executed in California must be signed under penalty of perjury and show that the place of execution was California. A declaration executed outside California must be signed under penalty of perjury "under the laws of the State of California." Or the declaration must indicate it was signed in California, under penalty of perjury. (Code Civ. Proc., § 2015.5; *Kulshrestha v. First Union Commerical Corp.* (2004) 33 Cal.4th 601 [15 Cal.Rptr.3d 793] [plaintiff's declaration executed in Ohio that did not state that it was signed under penalty of perjury under California law insufficient].)

A deposition from another case may be hearsay. Though depositions may be used in summary judgment motions (Code Civ. Proc. § 437c (b), depositions are subject to admissibility objections, including hearsay. The hearsay rule does not preclude former testimony if the declarant is (a) "unavailable as a witness" and (b) "[t]he issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing." (Evid. Code, § 1292.) Hence, a deposition taken in the case of plaintiff A and indicating that a manufacturer's were at the worksite is inadmissible hearsay in the suit by plaintiff B against that manufacturer where (a) the deponent was not shown to be unavailable, and (b) the interest of the attorneys defending asbestos manufacturers at the deposition was to show the presence, not the absence, of the products of the manufacturer sued by plaintiff. (*Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688 [75 Cal.Rptr.2d 523] [rejecting contrary language in *Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142, 149, fn. 3 [274 Cal.Rptr. 901].)

- **The so-called "Golden Rule" – focusing only on the separate statements – violates section 437c(c)**

Under the so-called "golden rule," the court may disregard evidence not included in the separate statements. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 335 [282 Cal.Rptr. 368].) But section 437c(c) requires courts to consider "*all* the papers submitted." (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 310-311 [125 Cal.Rptr.2d 499] (emphasis added) [dictum that it may be an abuse of discretion to ignore evidence called to the court's attention and known to all parties].)

- **Oppose an abusive motion or abusive objections with a motion to strike or for sanctions**

Two recent cases support objections to (and possibly sanctions for) abusive summary judgment motions and abusive evidentiary objections. In *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, the Supreme Court said abusive evidentiary objections represent a "disturbing trend," warranting "informal reprimands or formal sanctions for engaging in abusive practices." (*Id.* at 532.) (*Reid* cited with approval *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 [100 Cal.Rptr.3d 296], which, though not a sanctions case, warned that summary judgment motions in employment litigation are "being abused, especially by deep pocket defendants to overwhelm less well-funded litigants." (*Id.* at 248.) *Nazir* criticized the practice of "blunderbuss objections to virtually every item of evidence submitted," a practice that "unnecessarily overburdens the trial court." (*Id.* at 254, fn. 3 (citations and quotations omitted).) *Nazir* cited with approval *580 Folsom Associates v. Prometheus Development Co.* (1990) 223 Cal.App.3d 1, [272 Cal.Rptr. 227], which criticized a party's "indiscriminate assemblage of a mass of documents having little or no bearing on the discrete issues raised," ruling that submission to be "a deliberate, patent effort at obfuscation intended to overwhelm the trial judge...., a game the judicial system can no longer afford to play, if it ever could." (*Id.* at 25-26.)

- **Defendant's sole witness to a fact does not compel summary judgment.**

The court has discretion to deny summary judgment where a material fact asserted by the defendant was witnessed by only one person, or where a material fact is an individual's state of mind that can be established solely by the individual's declaration. (Code Civ. Proc., § 437c(e).)

- **The "clear and convincing" standard applies to plaintiff on summary judgment.**

When plaintiff must present "clear and convincing" evidence at trial, that burden applies also on summary judgment. (*Reader's Digest Ass'n, Inc. v. Sup.Ct.* (*Synanon Church*) (1984) 37 Cal.3d 244, 252 [208 Cal.Rptr. 137] [defamation claim of malice by a public-figure plaintiff]; *Basich v. Allstate Ins. Co.* (2001) 87 Cal.App.4th 1112, 1118-1121 [105 Cal.Rptr.2d 153] [punitive damages].)

- **Whether or not summary judgment is disfavored, key standards favor the plaintiff**

One court recently said summary judgment is no longer disfavored. (*Nazir v. United Airlines, Inc.*, 178 Cal.App.4th 286.) But another court recently said summary judgment is "drastic and should be used with caution." (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 352 [94 Cal.Rptr.3d 424].)

In any event, key standards favor the plaintiff. The facts in plaintiff's evidence and reasonable inferences from plaintiff's facts are "accept[ed] as true," plaintiff's evidence is viewed "in the light most favorable to plaintiff[]," and defendant's evidence is "strictly scrutinize[d]" "in order to resolve any evidentiary doubts or ambiguities in plaintiff['s] favor." (*Nazir,* 178 Cal.App.4th at 254 (citations and quotations omitted).) *Nazir* noted, however, that courts sometimes make determinations reserved for the fact finder by drawing inferences in the employer's favor and requiring employees to essentially prove their case at the summary judgment stage. (*Id.* at 248.)

See Smith, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
December 2010 Issue

• **Evidence not disclosed in discovery may defeat summary judgment**

Absent discovery abuse, the party opposing summary judgment may present evidence not disclosed during prior discovery proceedings – even if the opposing party had a duty to supplement responses, so long as the opposing party's failure to supplement did not willfully violate a court order. (*Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1329 [22 Cal.Rptr.3d 282].)

• **Credibility issues do not necessarily prevent summary judgment**

When the plaintiff attacks only the credibility of defense witnesses – without showing that a "material fact" is disputed – the court may grant summary judgment. (Code Civ. Proc., § 437c(e); *Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055, 1062 [74 3d 776].)

• **Res ipsa loquitur creates a presumption that the defendant must affirmatively rebut**

When res ipsa loquitur applies, the presumption of negligence must be affirmatively rebutted by the defendant. (*Elcome v. Chin* (2003) 110 Cal.App.4th 310, 316 [1 Cal.Rptr.3d 631] [presumption rebutted by declarations that defendant doctors met the standard of care and did not cause plaintiff's injuries].)

• **The reply may not present new evidence, but the objection may be waived**

The defendant's reply normally may not present new evidence. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 312-313 [due process rights of the opposing party]; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 [Code Civ. Proc., § 437c(b) does not provide for a separate statement with the reply].)

But if the plaintiff fails to object, the new evidence submitted with the reply may be considered. (*Gafcon, Inc. v. Ponsor & Assocs.* (2002) 98 Cal.App.4th 1388, 1426 [120 Cal.Rptr.2d 392].) The defendant's new evidence may be considered also if the plaintiff is allowed to depose the new witness and file amended opposition. (*Weiss v. Chevron* (1988) 204 Cal.App.3d 1094 [251 Cal.Rptr. 727].)

• **Know the scope of a motion for summary adjudication**

A motion for summary adjudication is proper only to eliminate a cause of action, a claim for damages (e.g., punitive damages), an affirmative defense (Code Civ. Proc., § 437c(f)(1)), or establish that a defendant "either owed or did not owe a duty to the plaintiff or plaintiffs." (Code Civ. Proc., § 437c(f)(1).) Defendants may seek summary adjudication that a particular source of duty (e.g., common law or statute) was not breached. (*Regan Roofing Co., Inc. v. Sup. Ct.* (*Pacific Scene*) (1994) 24 Cal.App.4th 425, 435 [29 Cal.Rptr.2d 413].)

But a court may not summarily adjudicate individual facts (e.g., an employer's discrete adverse actions) when the individual facts would not completely dispose of a cause of action. (*Nazir v. United Airlines, Inc.*, 178 Cal.App.4th at p. 251, fn. 1; but see, *Linden Partners v. Wilshire Linden Assocs.* (1998) 62 Cal.App.4th 508, 518 [73 Cal.Rptr.2d 708] [summary adjudication of seller's failure to provide accurate rental information; causation and damages remained to be determined].)

Summary adjudication may not be granted unless specifically requested in the motion. (*Homestead Savings v. Sup. Ct.* (*Dividend Develop. Corp.*) 179 Cal.App.3d 494, 498 [224 Cal.Rptr. 554].)

• **After summary judgment is granted, consider a motion for new trial**

If summary judgment is granted, a motion for new trial is available (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 858), and might be useful (1) if the trial judge misunderstood the law or the evidence and so might change his or her mind, or (2) if needed evidence could not be presented because the judge denied plaintiff's motion to continue the hearing to collect needed evidence, or (3) if newly-discovered evidence is uncovered that was not previously available despite plaintiff's due diligence.

The earlier in the litigation that summary judgment is granted, the less diligence in procuring evidence is required to warrant a new trial. (*Scott v. Farrar* (1983) 139 Cal.App.3d 462, 468 [188 Cal.Rptr. 823].)

The foregoing strategies should increase the plaintiff's chances of winning on summary judgment.

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