MASSACHUSETTS Lawyers Weekly

Good summary judgment motions: special issues

By: Douglas H. Wilkins and Daniel I. Small February 27, 2020

We have discussed summary judgment so far by looking at the "forest." It is also worth looking at the trees. Some special issues arise frequently. We address here one procedural issue and two substantive ones.

Overlooked motion

In our last column, we pointed out that when it comes to summary judgment, underuse is a much smaller problem than overuse.

In part, that is because the deadlines turn out to be fairly forgiving if you have a meritorious motion. In practice, the deadlines are highly likely to bar only those motions that should probably not have been brought in the first place.

Suppose you have failed to file a summary judgment by the filing deadline. Suppose also that you have a meritorious motion, perhaps along the lines we discussed in our last column or later in this one. If so, the court likely will find ways to avoid an unnecessary trial. What judge has any interest in conscripting citizens to serve on a jury, when the trial's outcome is a foregone conclusion? Have you encountered a judge who is eager to devote public time and resources to the trial of such a dispute?

Where other legitimate actions — such as amending the complaint, impleading a third party, or filing a motion to dismiss — often occur after a deadline, why would a summary judgment motion be different?

The impact of missing a deadline is likely to bring a much greater focus on the question that should have governed your decision in the first place: Does the motion have sufficient merit to warrant the parties' and court's time and attention? If the court believes that your motion meets this criterion, you will likely have your day in court on summary judgment.

Instead of holding an unnecessary trial, the court will probably explore alternatives. The judge may well solicit a summary judgment motion, address dispositive legal issues through a motion in limine, or even direct a verdict on the opening statement.

Many lawyers are very familiar with another common practice: If dispositive problems with one party's case surface but the parties do not themselves seriously discuss settlement, the judge often will encourage such discussions. A party can suggest any of these alternatives to trial at any time, by appealing to the court's discretion.

We are not, of course, advocating missing the summary judgment deadline. We are saying that, as with other deadlines, form over substance may not be the best — or often just — result. Look for ways around it.

'No rational jury' and other negligence cases

Sometimes, the defense argues forcefully that no reasonable jury could find for the plaintiff. There is a line between this argument and improperly asking the judge to decide reasonableness, intent or other questions of fact. That line is a thin one, though.

Of note, "[e]ach element of the tort presents itself normally as an issue of fact; there is proper reluctance to withdraw the issue from the jury … ." *Or v. Edwards*, 62 Mass. App. Ct. 475, 490 (2004).

When we wrote about the rarity of summary judgment in negligence cases, we looked at the authority supporting summary judgment where no rational jury could find negligence. You can find reported opinions making that statement, but, at least in the last half-century, they appear most prominently in decisions that reverse summary judgment for the defendant. See e.g., *Mullins v. Pine Manor Junior College*, 389 Mass. 47, 56 (1982) ("Only when no rational view of the evidence warrants a finding that the defendant was negligent may the issue be taken from the jury") and cases cited.

A very recent decision is typical, in the sense that, while it makes that statement, it turns on another issue. *Borella v. Renfro*, __ Mass. App. Ct. __ (Dec. 2, 2019) (2-1 decision upholding summary judgment on absence of evidence of recklessness).

In the vast majority of cases, summary judgment motions in negligence cases should rely on identifiable questions of law, which usually involve duty or causation, rather than negligence itself. See *Jupin v. Kask*, 447 Mass. 141, 143, 146-156 (2006); *Davis v. Westwood Group*, 420 Mass. 739, 742-743 (1995). "Whether a defendant has a duty of care to the plaintiff in the circumstances is a question of law for the court, to be determined by reference to existing social values and customs and appropriate social policy." *O'Sullivan v. Shaw*, 431 Mass. 201, 203 (2000).

This has led some resourceful attorneys to try to shoe-horn the issues in their cases into the confines of "duty" or "causation." You can even find appellate decisions succumbing to this temptation, particularly if sympathetic facts push them in the direction of bad law, as well summarized in an article we have cited before. See T. Weigand, "Duty, Causation and Palsgraf: Massachusetts and the Restatement (Third) of Torts," 96 Mass. L. Rev. 55, 60 (April 2015) ("The Third Restatement is specific and deliberate in its belief that courts too often take cases away from a jury in determining negligence through the rubric of a finding of no duty, when it is truly one of whether the actor exercised reasonable care."), citing Restatement (Third) of Torts, §7, cmt. i.

Employment cases

Employment discrimination cases are harder to discuss, because there are many differing rules that may apply, depending on the circumstances. Still, the general principles just discussed are largely transferable. You will have to be careful in discerning what issues may legitimately form a basis for summary judgment.

Some issues, such as statute of limitations or failure to exhaust administrative remedies, may well meet the test.

Summary judgment challenging the plaintiff's prima facie case in employment suits was once fairly commonplace. That has changed, in light of a number of recent cases, including *Bulwer v. Mount Auburn Hospital*, 473 Mass. 672, 689 (2016). Summary judgment in employment discrimination cases are now more challenging.

By way of example, the law often requires an employee to prove "membership in a protected class, harm, discriminatory animus, and causation." *Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 39 (2005). Absence of the first element might support summary judgment but is rarely contestable.

Challenging the second element may be harder than previously thought. See *Yee v. City of Boston*, 481 Mass. 290 (2019) (reversing summary judgment, because, depending on the facts, the failure to grant a lateral transfer to a preferred position may constitute an adverse employment action).

The third element depends on proving state of mind. We have previously noted the controlling authority pointing out how rare it is to grant summary judgment on discriminatory state of mind. *Bulwer*, 473 Mass. at 689.

Causation may sometimes be a proper subject for summary judgment, particularly if the adverse employment action occurs long after the alleged discriminatory act, and there is no link between the two. See *Psy-Ed Corp. v. Klein*, 459 Mass. 697, 706-707 (2011), quoting *Mole v. University of Mass.*, 442 Mass. 582, 591-592 (2004).

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Given the recency of cases like *Bulwer*, it remains to be seen what role summary judgment can now play in employment discrimination cases. However, we do strongly advise counsel not to ignore or downplay the significance of those recent cases.

A good summary judgment motion in an employment case will frankly acknowledge the full impact of the recent case law and point out how your case differs — and nevertheless warrants summary judgment.

Final thoughts

No one can fault counsel for trying to win, even if it means stretching the law beyond what it should be (assuming a good faith argument, of course). But, like any attempt to "stretch," if you are caught, you do risk losing credibility by creating the impression that you cannot win on summary judgment, if the court applies the law properly. Walk that line, but with care.

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