

SUMMARY JUDGMENT
Calhoun/Cleburne County Bar Association
By Shaun L. Quinlan, Esq.

1. Overview

- A. Applicable Rule
- B. Legal Standard For Granting/Denying A MFSJ
- C. Supporting Legal Authority and Evidence
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2. Rule 56 ARCP

- (a) **For claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
- (b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Bottom Line: Any party can file a motion for summary judgment.

- (c) Motion and proceedings thereon.

(1) Form of motion and statement in opposition thereto.

- The *motion shall be supported by a narrative summary* of what the movant contends to be the undisputed material facts.
- that *narrative summary may be set forth in the* motion or may be attached as an exhibit.
- The *narrative summary shall be supported by specific references to* pleadings, *portions of discovery materials*, or *affidavits* and may include citations to legal authority.
- Any supporting documents that are not on file shall be attached as exhibits.
- If the *opposing party contends* that material facts are in dispute, that party shall file and serve a statement in opposition supported in the same manner as is provided herein for a summary of undisputed material facts.

- (2) **Time.** The motion for summary judgment, with all supporting materials, including any briefs, shall be served at least ten (10) days before the time fixed for the hearing, except that a court may conduct a hearing on less than ten (10) days' notice with the consent of the parties concerned. ***Subject to subparagraph (f) of this rule, any statement or affidavit in opposition shall be served at least two (2) days prior to the hearing.***
- (3) **Judgment.** The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
- (d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.
- (e) **Form of affidavits; further testimony; defense required.**
- Supporting and opposing *affidavits* shall be made on *personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.*
 - Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.
 - ***When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against him.***
- (f) **When evidentiary matter is unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may deny the motion for summary judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

- (g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.
- (dc) **District court rule.** Rule 56 applies in the district courts except that the references to thirty (30) days and ten (10) days are reduced to fourteen (14) days and seven (7) days, respectively. (Amended eff. 8-1-92; Amended eff. 10-1-95.)

3. Legal Standard For Granting/Denying A MFSJ

A. Rule 56:

“ . . . [1] that there is no genuine issue as to any material fact and [2] that the moving party is entitled to a judgment as a matter of law.” This is a two tiered test.

B. Alabama Appellate Courts Applying This Standard.

In reviewing the standard for Summary Judgment, the trial and appellate courts must determine that: (1) There is no genuine issue of material fact; and (2) The moving party is entitled to judgment as a matter of law. Silk v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 437 So. 2d 112 (Ala. 1983); Ivey v. Frankle, 619 So. 2d 1277 (Ala. 1993).

Although the party moving for Summary Judgment bears the burden to show that it is entitled to one, once the moving party has made a **prima facie** showing or presented evidence that, if uncontested, would entitle him to judgment as a matter of law, the non-moving party must set forth specific evidence that would present a genuine issue of material fact for consideration by a jury in order to avoid Summary Judgment. Gillion v. Alabama Forestry Association, 597 So. 2d 1315 (Ala. 1992.)

The non-moving party must present **substantial evidence** supporting his or her position to avoid Summary Judgment. **Substantial evidence** is evidence of such weight and quality that a fair minded person in exercise of impartial judgment can reasonably infer the existence of facts sought to be proven. Lucas v. ALFA Insurance Company, 622 So. 2d 907 (Ala. 1993).

In opposing a Motion For Summary Judgment, a party cannot use conclusory allegations, speculation or subjective beliefs to satisfy the requirement of substantial evidence. Peterman v. Auto Owner's Insurance Company, 623 So. 2d 1059 (Ala. 1993).

Summary Judgment should only be denied when there are genuine issues of material fact, and an issue is genuine only if reasonable persons could disagree. Watson v. Auto Owner's Insurance Company, 599 So. 2d 1133 (Ala. 1992.) However, Summary Judgment is not only proper, but mandatory if no genuine issue of material fact exists and if, as a matter of law, Plaintiffs cannot prevail if proof of the alleged facts have been made. If there are only issues of law remaining which must be decided by a trial Court, then Summary Judgment is proper. See Watson, *supra*.

4. Supporting Legal Authority and Evidence

A. Know The Legal Elements That Apply To Your Case

- 1) Every cause of action has elements that a plaintiff must prove, whether contract, personal injury, etc.
- 2) Every defendant has affirmative defenses. *Use them.* If you don't, you waive them. See Rule 8(d) ARCP.
- 3) Set the law out for the Court in your Narrative Summary. See attachment as an example.

B. Evidence.

- 1) **Affidavits:** THEY MUST BE BASED ON *personal knowledge . . . facts as would be admissible in evidence*, AND *that the affiant is competent to testify to the matters stated therein.*
 - a. Read the affidavits carefully and know your rules of evidence.
 - b. You **MUST** file a separate motion to strike inadmissible evidence, e.g., hearsay. If you don't, chances are the Court will allow that "evidence."
 - c. Motion To Strike.
 - (1) Separately identify each portion you want stricken. Verbatim is always a good idea.
 - (2) Set out the evidentiary rule that applies. If you have case law supporting the evidentiary rule, cite it.
 - (3) Then a brief analysis why the Court should strike that portion of the affidavit, or the entire affidavit.
 - (4) Opponent who tries to create a triable issue of fact:

Assume that you served pre-trial discovery before filing your MFSJ (which is a good idea anyway), or took the deposition of the opposing party. The opposing party provides interrogatory responses, or statements in his deposition, that are adverse and make the basis of a MFSJ.

Assume you file your MFSJ and attach opposing party's adverse discovery responses or portions of their deposition. In response, opposing party files an affidavit trying to minimize those discovery/deposition responses, or tries to create a triable issue of fact with an affidavit. **WHAT DO YOU DO??** You file a motion to strike, citing this case:

Kessler v. Gillis, 911 So.2d 1072, 1080 (2004), the following with regard to this long-standing principal: "*It is settled that a party cannot create an issue of fact by filing a 'sham' affidavit, i.e., one that contradicts the party's earlier sworn testimony.* [Citations omitted].

5. Formatting the MFSJ

The overall considerations:

- Is it easy to read
- Have I set out my facts
- Is my legal authority quoted verbatim
- Do my argument headings incorporate the law with the facts

A. Is The MFSJ Easy To Read

- The Judge has enough to do . . . make it easy to read
- Short paragraphs with substance
- Use clearly defined headings (facts/applicable law/argument)

B. Setting Out The Facts

- Affidavits

Insure it is based on personal knowledge and competency

Keep hearsay out, unless you are prepared to offer a rule of evidence in response to a motion to strike

Draft the affidavit for client/witness. Then cut and paste it into your “undisputed” facts and convert into 3rd person

- Deposition Testimony

Paraphrase the testimony, then cite page/line numbers for each statement you refer to:
Example: “Plaintiff admitted running the redlight during her deposition. Page 20, L.1-7”

Attach the cover sheet of the deposition and each and every page from the deposition you refer to in the MFSJ

- Documents

Authenticate your documents with affidavits. Example of your client stating he/she signed a contract: “On January 1, 2014, I executed an agreement with the Defendant whereby the Defendant would perform work on my house. A true and correct copy of said agreement is attached hereto, marked as Exhibit 1, and incorporated by reference.”

Self-authenticating documents, such as those you might obtain from a State Agency can be referred to in your outline of undisputed facts. Example: *“Defendant/Plaintiff was not licensed by the Alabama Homebuilders Licensure Board as a residential homebuilder on the date the contract was entered into with Plaintiff/Defendant. A true and correct certified copy of an affidavit from John Doe of the AHLB stating that Defendant/Plaintiff was not licensed is attached hereto, marked as Exhibit 1, and incorporated by reference.”*

C. Citing Your Legal Authority

– Educate the Court regarding the applicable law that applies to your case.

— Set out the elements

— Focus on the element(s) that are undisputed. Concede where necessary, i.e., don’t argue each and every element if you don’t need to. Example: *– If your legal principle has multiple elements, i.e., prescriptive easement issue, then set out each and every element of prescriptive easement, then attack those elements that are undisputed.*

– Do not paraphrase some legal principle and then cite a case.

– Review the legal authority cited by your opponent. Often, it is misquoted, inapplicable and/or can be used against them.

– Cite the case, then quote the principle exactly as it appears in case. Single space the quote and block format it. If you highlight any aspect of the quote, then state “emphasis added” at the end.

Reason: You are quoting the law exactly as you state and highlighting (if necessary) the key point in the quote.

Practical pointer: Remember, a plaintiff must prove each and every element that constitutes their cause of action. A defendant does not have to prevail on each and every element. A defendant need only defeat one element to prevail.

D. The Argument

Incorporate your undisputed facts into each and every argument you make

Again, set out the fact(s) and law in the heading

Then, make a simple, detailed argument for the Court

6. Practical Considerations

A. When To File A MFSJ

Generally, after discovery is completed, i.e., after you have obtained the sworn testimony of the opposing party.

If its based entirely on legal requirement, i.e., Plaintiff is not licensed by the State, simply obtaining the affidavit from that licensure board would be sufficient.

B. Should You File A MFSJ

If you lose you motion, you will have identified your legal strategy

C. Arguing The MFSJ

Make a simple outline of the facts and applicable law prior to the hearing

Practical Pointer: Simply reading part or all of the motion becomes cumbersome.

If you wrote it, you should know it. Simple outline that you can refer to focusing on the threshold issue(s), i.e., the undisputed facts that demonstrate you are entitled to judgment as a matter law.

D. Can I Obtain Appellate Relief If The MFSJ Is Granted or Denied.

In State Court, no. EXCEPT: Mandamus is available if the Court denies a MFSJ in a state agency immunity case.

Appeal can only be taken once an order is issued granting the MFSJ and it becomes final by way of Rule 54(b) (multiple parties) or Rule 58.

7. Conclusion

A MFSJ is a very technical document, second only to an appellate brief.

It is subject to specific rules. Know and follow the rules outlined in 56 ARCP.

Draft the motion so it is easy to read.

Be prepared to object to inadmissible evidence by separate written motion, i.e., motion to strike.

At hearing, do not read the motion. Make a simple outline of the key facts and rules of law, and then argue why the motion should be granted or denied.