The Utility of Requesting a Court Reporter in a Summary Judgment Hearing

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Depending on one's jurisdiction, it is not unusual for counsel to be asked prior to a hearing on a motion for summary judgment whether a court reporter is needed. The conventional wisdom of some lawyers, based upon the principle that motions for summary judgment are for the resolution of legal issues, not factual ones, is that transcribing argument at a summary judgment hearing is superfluous. However, often a court reporter's presence at a summary judgment hearing can be helpful on appeal.

While summary judgment practice varies widely from jurisdiction to jurisdiction, it is not uncommon for courts to dispense with hearings in open court altogether. For example, under the federal system, a court satisfies Federal Rule of Civil Procedure 56 and its requirement that a date be "fixed for the hearing" when it considers the written evidence and arguments "by submission" rather than by oral argument. See *Anchorage Associates v. Virgin Islands Board of Tax Rev.,* 922 F2d 168, 176 (3rd Cir. 1990). In jurisdictions where oral hearings are allowed, some rules provide that the hearing on summary judgment is for oral argument only, and no oral testimony is presented. See *Tanksley v. City Capital Commercial Corp*., 145 S.W.3d 760 (Tex. App. -- Dallas 2004). Thus, a trial court would err in holding an evidentiary hearing even on the limited issue of whether the non-movant received proper notice of the hearing. *Id.* In such jurisdictions, a trial court's ruling on the record on objections to summary judgment evidence, even if transcribed by the court reporter, does not preserve any error for review.

See *Manoogin v. Lake Forest Corp.*, 652 S.W.2d 816, 819 (Tex. App. -- Austin 1983). As a result of this procedural backdrop, an appellate court in the State of Washington recently observed, "Verbatim reports of summary judgment hearings often are not prepared." *Hinkson-Irizarry v. Children's Hospital*, 2004 Wash. App. LEXIS 964 (Wash. Ct. App. 2004).

However, other jurisdictions handle summary judgment hearings quite differently. For example, in Montana, in the ordinary case, parties have a right to a summary judgment hearing unless the hearing is explicitly waived. See *Cole v. Flathead County,* 771 P.2d 97, 101 (Mont. 1989). Further, in Montana, the parties are even allowed to present oral testimony at the summary judgment hearing in order to establish the existence of genuine factual issues. See *Konitz v. Claver*, 954 P.2d 1138 (Mont. 1998). Obviously, if one is allowed to present oral evidence at a summary judgment hearing, a court reporter is certainly not optional.

Interestingly, there is a certain amount of ambiguity on whether the parties can present oral testimony at the admittedly rare hearing on summary judgments in federal court. Federal Rule of Civil Procedure 56 is silent on whether oral testimony can be received at such a hearing. See *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984). However, some courts have suggested that the court's general power to accept testimony on motions authorizes the use of oral testimony at summary judgment hearings. *Id.* at n.2. However, other courts have referred to lengthy evidentiary hearings on summary

judgment as "unauthorized and improper." See *Smith v. City of Pittsburgh*, 764 F.2d 188, 1992 (3rd Cir.), cert. denied 474 U.S. 950, 88 L.Ed.2nd 297, 106 S.Ct. 349 (1985). However, the 3rd Circuit revisited such a procedure in 1993, reviewed a district court's acceptance of oral testimony at a summary judgment hearing, and observed, "although we view the procedure with concern, we cannot hold it was error here, particularly inasmuch as neither party objected in the district court to the procedure . . ." *Waskovich v. Morgano*, 2 F3d 1292, 1296 (3rd Cir. 1993). It appears that the receipt of oral testimony will be allowed by some federal courts if the purpose is solely to determine whether any material issues of fact exist. *Id.*

Even in jurisdictions where courts rarely look to what transpires in a summary judgment hearing, the transcribed arguments of counsel will occasionally be viewed as significant. For example, the Texas Supreme Court in *General Motors Corp. v. Hudiburg Chevrolet, Inc.,* 2006 W.L. 741552 (March 24, 2006), Docket Number 03-0987, reviewed the decision of an intermediate appellate court which had reversed a trial court's grant of a summary judgment. The appealing party at the Supreme Court complained in its brief that the court below's review of the summary judgment was lacking not only in its analysis of expert affidavits, but also because of statements made during the summary judgment hearing in the trial court by opposing counsel. *Id.* Instead of responding that summary judgment hearings are for argument only and not considered evidence, the Texas Supreme Court quoted from the interplay between counsel and the trial court in its opinion, and based its ultimate disposition upon "the entire record." *Id.*

While the court ultimately rejected the appealing party's argument, the fact that the Court was willing to analyze the reporter's record of the summary judgment hearing would indicate that requesting such a record is not a bad idea.

Nevertheless, in at least one case, not having a court reporter transcribe the hearing did not preclude a party from getting relief on a matter outside the summary judgment pleadings. In *Smith v. Smith*, 734 So.2d 1142, (Fla. Ct. App. 1999), summary judgment had been granted in favor of the defendant in an automobile negligence case on August 7, 1997. The only issue on appeal was whether the summary judgment hearing should have been continued for the plaintiff below to conclude a deposition which had been scheduled for after the summary judgment hearing. The appellate court noted that there was no transcript of the summary judgment hearing in the record. Thus, there was nothing in the appellate record but a legal memorandum in opposition to the motion for summary judgment asserting the right to take a deposition. *Id.* However, the able appellate advocate for the non-movant advised the Florida Court of Appeals during oral argument that the witness' deposition had been set by agreement to take place on August 12, 1997, in a verbal agreement with opposing counsel on June 19, 1997. Noting that counsel for the appellee did not contradict the statement during oral argument, the court noted that "It does not appear that [appellant] scheduled the deposition to delay the court's consideration of a summary judgment motion." As a result, the summary judgment was reversed.

As set forth above, summary judgment hearings are approached in a variety of ways. One might find no hearing allowed at all, one might find a hearing allowed only for oral argument, and one might find the opportunity to present oral testimony. Given the infinite number of ways what takes place during a summary judgment hearing can impact an appeal, as the cases cited in this article indicate, it is probably always prudent to request a court reporter. However, it would be equally prudent to secure any rulings via written order, even if a court reporter is transcribing the hearing.