The Summary Judgment Framework
Civil Procedure—Gómez-Arostegui Fall 2023 REVISED

1. Who can seek SJ? And on what?

   a. π or ∂, or judge can propose *sua sponte*.
   b. On a claim or affirmative defense, by challenging at least one element of it.
   c. On a claim or affirmative defense, by establishing some or all the elements of it.

2. Standard

   a. **There is no dispute or no genuine dispute as to a material fact—this is the factual component (a.k.a. factual step).**

      i. Material Fact=a fact that could affect the outcome.

      ii. No Dispute=(a) the parties agree on a fact (usually before the motion), or (b) the party opposing the motion does not controvert a fact asserted by the moving party.

         (a). Parties can agree to a fact by filing a stipulation (at any time) or the parties might agree on the fact in other ways, *e.g.* (i) a ∂'s answer might admit a factual allegation in a complaint; (ii) a party might admit a fact in response to a request for admission or other discovery request; (iii) a party might involuntarily admit a fact as a sanction for failing to respond to a discovery request (or related court order) relating to that factual issue.

         (b). On a motion for summary judgment, a court will deem a fact undisputed if one side alleges and provides support for a fact that the other side does not contest in their response with their own evidence.

      iii. No Genuine Dispute=the parties dispute the fact, but no reasonable jury could find for the opposing party on the fact, considering:

         (a). the standard of proof (*e.g.*, preponderance of the evidence; clear and convincing evidence);

         (b). drawing all *reasonable* inferences in favor of the party opposing the MSJ; and

         (c). without assessing witness credibility or *comparatively* weighing the evidence.

            As the book notes on pages 814 and 817, despite language appearing in countless cases that courts are not to comparatively weigh the evidence, that is what judges often must do when ruling on a motion. After all, they are being asked to decide whether, based on the evidence in the record, a reasonable jury could come to only one conclusion on the material fact or could conclude in favor of either party on that material fact.

b. **Based on the undisputed facts and facts that are not genuinely disputed, a party is entitled to judgment under the law—this is the legal component (a.k.a. legal step).**

i. In other words, take the undisputed facts, and the facts that are not genuinely in dispute, and plug them into the elements of a claim or affirmative defense.

(a). For example, assume π is injured in an accident by a car driven by ∂ and assume that π sues solely on a theory of negligence per se, namely that ∂ had run a red light at a four-way intersection (+) and thereby violated a statute. Thus, one of the material facts in the case is whether ∂ actually ran a red light. If the ∂'s light was green or yellow then the ∂ will not have violated the statute, the ∂ will not have acted negligently, and the π's negligence per se claim will fail. During discovery, the parties depose each other. In her deposition, π testifies that her light at the intersection was green and that therefore the ∂'s light must have been red. The ∂ in his deposition states that his light was green. If this was the only evidence available at summary judgment then the court would deny the ∂'s motion for summary judgment. Reasonable jurors could conclude based on the evidence that the ∂'s light was either red or green. Now assume that ∂ had issued a third-party subpoena to two liquor stores operating on either corner of the intersection. Both have cameras showing the intersection lights and both videos clearly show the accident and that, oddly, both π and ∂ had green lights at the time of the collision. There must have been a glitch with the traffic light system. Could a reasonable juror conclude that ∂'s light was red, as π asserted? I don't think so. So the judge would treat the ∂'s light as being green, and then would enter summary judgment against the π on her negligence claim. And because that is the only claim in the lawsuit, this is summary judgment in the broadest sense. After issuing an order granting the ∂'s motion for summary judgment, the court will file a separate document in the docket called a "final judgment" against the π.

(b). Sometimes all the work on a summary-judgment motion is done on the legal component. For example, assume that after the parties exchange discovery in a personal-injury action that they end up agreeing on all the material facts, meaning that the material facts are undisputed. Assume also that both parties agree that the ∂ acted recklessly but did not act intentionally. This is the crux of the matter. If the law requires intent for the π's tort claim then the ∂ wins, but if recklessness suffices then the π wins. The parties file cross motions for summary judgment on what is essentially a purely legal issue. ("Cross motions" means that ∂ files a summary-judgment motion and π files a summary-judgment motion.) The judge will decide the issue of law and then take the undisputed facts and plug them into the law. If recklessness suffices, the court will grant the π's motion and deny the ∂'s motion. But if only intent suffices, then she will grant the ∂'s motion and deny the π's.

ii. Partial Summary Judgment: Note that not all motions for summary judgment seek "judgment" on a whole lawsuit. If a ∂ seeks summary judgment on all of π's claims, then that certainly is seeking summary judgment in the broadest sense. But if a ∂ seeks summary judgment on only a few of the π's claims, then strictly speaking that

is partial summary judgment, as there is still something left to do. And if a π seeks summary judgment on all her claims, we may call it summary judgment or partial summary judgment depending on the circumstances. If a π seeks summary judgment solely on liability on her claims, and the amount of damages remains in play, then that is partial summary judgment. But if a π seeks summary judgment on liability *and* the amount of damages, then that would be seeking summary judgment. But don't worry about these technicalities or labels. What is important is understanding the various types of potentially partial summary adjudication:

(a). *Knock out* a claim or affirmative defense.

The scenario identified as 1.b *supra* attempts to knock out a whole claim or affirmative defense, because if you knock out at least one element, then the whole claim or defense fails. The car accident example I laid out above attempts to knock out a whole claim, and because there was only one claim in that complaint that would have the effect of knocking out the whole lawsuit. Same with the example I gave involving recklessness versus intent.

(b). *Make out* a whole claim or affirmative defense.

The scenario identified as 1.c *supra* might attempt to make out a whole claim or affirmative defense, by establishing all the elements of it. The π in *Scofield v. Guillard* is attempting to do this right now on her two defamation claims against the ∂. We are still waiting to see if the court will grant π's motion for summary judgment. π technically seeks only partial summary judgment because the issue of damages would remain after the court summarily finds the ∂ liable, and π wants a jury trial on damages.

(c). Summarily adjudicate a fact or facts without knocking out or making out a whole claim or affirmative defense.

The scenario identified as 1.c *supra* also contemplates the possibility that a party might only seek to establish some of the required elements of a claim or affirmative defense. A π could, for example, seek partial summary judgment that element (1) of his claim has been satisfied—to ensure that element (1) is not given to and determined by the jury—while acknowledging that there is a genuine dispute on elements (2) and (3), which will therefore have to be given to the jury for their determination. If you think about it, this option is actually a summary-judgment motion that almost exclusively involves the factual component. The legal component (*i.e.*, the law) is relevant only insofar as it tells us which facts are material. Strictly speaking one could even seek summary adjudication of a disputed material fact that forms only part of a single element of a claim or affirmative defense. For example, perhaps all three elements of a claim will still go to the jury, but the court will instruct the jury to assume that the ∂ was bald at all relevant times for purposes of element (1) of the claim.

3. Burdens on the factual component/step:

    a. Moving party (a.k.a. movant or the party motioning for summary judgment):

        i. If the moving party does *not* have the burden of persuasion at trial on the issue—which is typical because ∂s tend to move for summary judgment on πs' claims—then point out the absence of evidence in the record relating to the material fact(s), in a more than conclusory way, and argue that reasonable jurors could only conclude in favor of the moving party on the fact(s) in issue.

            (a). *E.g.*, cite the depositions already taken, documents already exchanged, interrogatories already answered—in order to show a lack of evidence. Recall that local rules typically require the moving party to file a separate document alongside their brief with a chart that lays out the facts (with citations to the record) as the moving party sees them.

            (b). This did not become the approach until *Celotex* in 1986. Under the *Adickes* case in 1970, a ∂'s initial burden on summary judgment in this scenario (∂ moving for summary judgment on a π's claim) was more rigorous. Keep in mind that a ∂ can do more than the *Celotex* minimum to meet their burden.

        ii. If the moving party *does* have the burden of persuasion at trial on the issue, then the movant must present affirmative proof of the fact and argue that reasonable jurors could only conclude in favor of the moving party on the fact(s) in issue. This is typically difficult to do. π is trying to accomplish this in *Scofield v. Guillard* (albeit while hoping that discovery sanctions will do a lot of the heavy lifting here).

    b. Opposing party (a.k.a. non-movant, non-moving party):

        i. Cite to evidence in the record that creates a genuine dispute of material fact, recognizing that you can put evidence into the record that the moving party hasn't already cited, by attaching it as an exhibit to your opposition. Recall that local rules typically require the opposing party to file a separate document alongside their brief with a chart that responds to the moving party's separate chart point by point (with citations to the record), laying out the facts as the opposing party sees them;

            and/or

        ii. Ask for more time to conduct more discovery.

4. Evidence that can be considered—evidence must be admissible at a future trial, at least in another form. So a person could present testimony for summary judgment in one form, *e.g.*, a deposition or affidavit, recognizing that the deponent/affiant would then have to testify in person at trial. But if the testimony offered in the deposition or affidavit during summary judgment would, for example, be inadmissible hearsay at trial, then the court will have to disregard it on summary judgment.

5. A couple of other key points I expect you to know:

    a. There is no difference between using an unsworn declaration and a sworn affidavit for summary-judgment purposes. That's because someone who submits a declaration in federal

court still does so under penalty of perjury. Indeed, they declare at the end of the declaration: "I declare under penalty of perjury that the foregoing is true and correct." There is actually a federal statute, 28 U.S.C. § 1746, which I did not mention in class, that expressly states that declarations can be used wherever affidavits can be used. I expect you to know that declarations and affidavits carry the same weight on summary judgment.

b. Courts often say, as noted on page 814 of the casebook, that they can effectively ignore an opposing party's self-serving and uncorroborated testimony (whether it comes in the form of a deposition, affidavit, or declaration) when that person uses it in an attempt to defeat summary judgment. But this statement is too broad and does not represent the practice; thankfully, courts have been correcting those unduly broad statements. *E.g.*, Santiago–Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 53 (1st Cir. 2000) ("[A] 'party's own affidavit, containing relevant information of which he has first-hand knowledge, may be self-serving, but it is nonetheless competent to support or defeat summary judgment."); Payne v. Pauley, 337 F.3d 767, 773 (7th Cir. 2003) ("We hope this discussion lays to rest the misconception that evidence presented in a 'self-serving' affidavit is never sufficient to thwart a summary judgment motion. Provided that the evidence meets the usual requirements for evidence presented on summary judgment . . . a self-serving affidavit is an acceptable method for a non-moving party to present evidence of disputed material facts."); Williams v. Shields, 77 F. App'x 501, 503 (10th Cir. 2003) ("As long as an affidavit is 'based upon personal knowledge and sets forth facts that would be admissible in evidence,' ... such averment of a party is legally competent to oppose summary judgment, notwithstanding its inherently self-serving nature."); Harris v. J.B. Robinson Jewelers, 627 F.3d 235, 239 (6th Cir. 2010) ("A court may not disregard evidence merely because it serves the interests of the party introducing it."); C.R. Pittman Const. Co. v. Nat'l Fire Ins. Co. of Hartford, 453 F. App'x 439, 443 (5th Cir. 2011) ("[A]n affidavit based on personal knowledge and containing factual assertions suffices to create a fact issue, even if the affidavit is arguably self-serving."); United States v. Stein, 881 F.3d 853, 857 (11th Cir. 2018) ("[N]othing in Rule 56 (or, for that matter, in the Federal Rules of Civil Procedure) prohibits an affidavit from being self-serving. Indeed, as the Seventh Circuit observed, 'most affidavits submitted [in response to a summary judgment motion] are self-serving.' Not surprisingly, most of our cases correctly explain that a litigant's self-serving statements based on personal knowledge or observation can defeat summary judgment. . . . Nor does Rule 56 require that an otherwise admissible affidavit be corroborated by independent evidence.").

c. There is a special rule relating to "sham" affidavits or declarations. If a person says "X" in earlier testimony, like in a deposition, and then on a summary-judgment motion that same person submits a declaration or affidavit which now asserts that the fact is "not X," the court will typically disregard that later declaration or affidavit as a sham. The switch in testimony just looks way too suspicious. But if the person switching testimony can persuade the court that the change is not a sham—*e.g.*, the change came about because of newly discovered evidence—then the court may consider the declaration/affidavit.

d. Recall that some summary-judgment motions are accidental. A ∂ might file a motion to dismiss a complaint very early in the lawsuit and attach exhibits to that motion that were not already attached to the complaint by the π. Doing so requires the court to convert the motion to dismiss into a summary-judgment motion, and given how early the motion has been filed, the court may very well end up denying the MSJ as premature.