

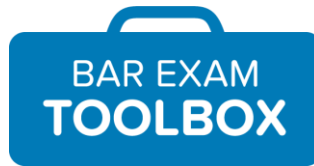


Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, as part of our “Listen and Learn” series, we’re discussing Civil Procedure – specifically, motions for summary judgment. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Hello, and welcome back to the “Listen and Learn” series from the Bar Exam Toolbox podcast. Today, we’re discussing Civil Procedure, and specifically motions for summary judgment. Today, most cases filed in court are resolved without a trial. Some are settled outside of court, and others are decided by the court based on the initial pleadings. This happens when a party files a successful motion to dismiss or motion for judgment on the pleadings. But a lot of cases – perhaps the majority of cases decided by courts – are resolved via motions for summary judgment. So, what is a motion for summary judgment and what is the procedure for filing and winning one?

Lee Burgess: A motion for summary judgment is a tool that litigants use to ask the court to decide a case or claim in their favor without a trial. Under Federal Rule of Civil Procedure 56, either party may file a motion for summary judgment at any time after a case is filed, up through 30 days after the close of discovery. Unlike a motion to dismiss, where the court only considers the allegations in the complaint, a party moving for summary judgment must offer evidence to support the movant’s claims. So, a motion for summary judgment allows the court to consider evidence filed by the parties to determine whether the case needs to go to trial.

Lee Burgess: If you think back to the first-year Civil Procedure class, you may remember that trials are used to decide issues of fact that affect the outcome of a case. So, if the plaintiff testifies that the light was red and the defendant testifies that the light was green, we will likely need a trial to determine who is telling the truth. But what if all the evidence submitted by the parties indicates that the light was green? Then the court may be able to decide the case based on a party’s motion for summary judgment.



Lee Burgess: Specifically, a court may grant a motion for summary judgment if the moving party proves there is no genuine dispute of material fact, and that the movant is entitled to judgment as a matter of law. Practically, the party moving for summary judgment must submit evidence to the court with their motion. By “evidence”, we mean information that would be admissible or could be reduced to admissible form at trial, such as authenticated documents and sworn affidavits, declarations, interrogatory answers, and deposition testimony.

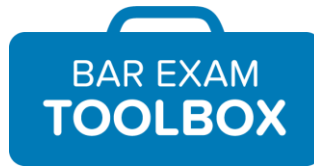
Lee Burgess: Once the moving party submits their motion and evidence to support their claim or defenses, the other side gets a chance to respond to the motion. To defeat the motion, the non-movant must also submit evidence to rebut the movant’s evidence. In other words, the non-movant can defeat summary judgment by showing that there are genuine issues of material fact that must be decided at trial.

Lee Burgess: In determining whether to grant a motion for summary judgment, the court must view all of the evidence submitted by the parties in the light most favorable to the non-moving party. This is consistent with the standard that the court must use to determine a defendant’s motion to dismiss. In that case, the court must accept the allegations in the complaint as true to determine whether to grant the defendant’s motion. Similarly, at the motion for summary judgment stage, the court must accept the non-movant’s evidence as true where that evidence conflicts with the moving party’s evidence.

Lee Burgess: Before we put these rules into practice with a few hypos, let’s think about the timing of a motion for summary judgment. We said that the Federal Rules of Civil Procedure allow either party to file a motion for summary judgment at any time after a case is filed, through 30 days after the close of discovery. Practically, parties usually file motions for summary judgment during or after the discovery period. This is because the parties usually have to use the discovery process to gather evidence to support their motions. But what if a party files a motion for summary judgment early in the litigation and the other party has not had time to file discovery requests or gather evidence? In that case, the non-moving party may ask the court for additional time to respond to the motion. And the court may allow the party time to obtain evidence.

Lee Burgess: Okay, now that we have made it through the basics of motions for summary judgment, let’s test our understanding with a hypo:

Lee Burgess: “Peter slips and falls while shopping at Gary’s Grocery Mart. Peter sues Gary’s Grocery for injuries he sustained from the fall. In his complaint, Peter alleges that Gary’s Grocery negligently failed to maintain a safe premises for customers.



In particular, Peter alleges that a Gary's Grocery employee had just finished mopping the tile floor and failed to put up a sign to warn customers like Peter that the floor was wet and slippery. Peter also alleges that the overhead lights above the spot where he fell were not working. So Peter alleges that he was not able to see that the floor was wet. Peter claims that if the overhead lights had been working or if Gary's Grocery had warned him that the floor was wet, he would have been more careful and likely not fallen.

Lee Burgess: Gary's Grocery files a motion for summary judgment. With the motion, Gary's submits affidavit testimony from three shoppers who witnessed Peter's fall. All three shoppers testify that:

1. The floor where Peter fell was not wet or slippery;
2. All of the overhead lights at Gary's were working at the time of Peter's fall; and
3. Peter fell because he tripped over his shoelace, which was untied.

Lee Burgess: In response to Gary's motion for summary judgment, Peter files an affidavit in which he testifies consistent with the allegations in his complaint. The court grants Gary's motion for summary judgment. Did the court err?"

Lee Burgess: The answer is "Yes". The court should have denied Gary's motion for summary judgment. At the motion for summary judgment stage, the court must view the evidence in the light most favorable to the non-moving party. Here, Peter's affidavit testimony, although arguably self-serving, is evidence that the court must consider. Peter's testimony conflicts with Gary's three witnesses' testimony, which creates a genuine dispute of fact. The facts in dispute – whether the lights were working and whether the floor was wet and slippery – are material because they affect the outcome of the case. So, Peter's affidavit is sufficient to rebut Gary's evidence and motion for summary judgment.

Lee Burgess: Let's look at a variation of this hypo. What if, instead of an affidavit, Peter offers authenticated video surveillance footage of his fall from Gary's Grocery? The video does not show the lights above the location where Peter fell. But, in the video, the location of the fall is clearly darker than the surrounding areas. The video does show Peter falling but only from the top half of his body up. He is standing behind an apple crate, walks forward, and then disappears from sight behind the apple crate. Peter uses the video evidence to argue that the lights above the location where he fell were not working, and that all of Gary's witnesses are mistaken or lying. In this case, should the court grant Gary's motion for summary judgment?



- Lee Burgess: The answer is still “No”. The video creates genuine issues of material fact that must be decided at trial. In particular, the video suggests that the lights above the location where Peter fell were not working and may have caused his fall. This is sufficient to rebut Gary’s motion for summary judgment.
- Lee Burgess: Let’s try one more variation. This time, instead of the affidavit or the video, Peter offers an affidavit from his wife as evidence to rebut Gary’s motion for summary judgment. In the affidavit, Peter’s wife testifies that when she got home several hours after Peter’s fall, Peter told her that he fell because the lights were not working and he could not see the floor was wet and slippery. The court grants Gary’s motion for summary judgment. Did the court err?
- Lee Burgess: The answer is “No”. This time the court properly granted Gary’s motion for summary judgment. Gary’s wife’s affidavit contains hearsay. So the court cannot consider the affidavit unless a hearsay exception applies that would allow Gary’s wife to testify consistent with the affidavit at trial. Peter may argue that the hearsay exception for excited utterances applies and his wife’s testimony would be admissible at trial. But that exception only applies if Peter were still under the stress of his fall when he told his wife about the circumstances. Here, the facts tell us that Peter did not tell his wife about the fall until several hours after it happened. This suggests that he was not still under the stress of the incident, making the excited utterance exception inapplicable. Since there is no hearsay exception that clearly applies to his wife’s testimony, the court can disregard the affidavit. And since that is the only thing Peter offered, all of the evidence indicates that Gary’s is entitled to judgment as a matter of law, and the court properly granted the motion for summary judgment.
- Lee Burgess: Now let’s practice with a second hypo. This hypo is adapted from the [Examples & Explanations for Civil Procedure, Eighth Edition](#):
- Lee Burgess: “Jones is arrested for vagrancy by Rogers, a police officer for the Town of Broadway. Rogers books Jones and places him in a cell. An hour later, Jones is found hanging from the bars of the cell, an apparent suicide. Kern, the administrator of Jones’s estate, sues Broadway for wrongful death, claiming that the town is liable for the failure of Rogers and other officers to take precautions to prevent Jones from taking his own life. Under applicable tort law, the Town would be liable if its employees, acting in the scope of employment, failed to take precautions to protect Jones from suicide, provided they knew or had reason to know of the particular risk that Jones might attempt suicide.
- Lee Burgess: The complaint properly alleges the necessary elements of the claim, including the requirement that the officers should have known of the risk that Jones



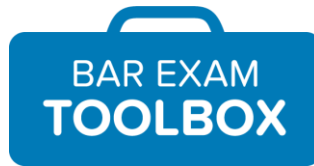
would attempt suicide. Broadway answers, denying that Rogers or the other officers knew or should have known of Jones’s suicidal tendencies. It then moves for summary judgment, supported by an affidavit of Rogers, the booking officer, in which he testifies that Jones was sullen and uncommunicative when arrested, that he never made any statement indicating an intent to take his life, and that Jones was strongly intoxicated and never said a word during the entire booking process. Kern opposes the motion, but does not submit any evidentiary materials with his opposition. Should the motion be granted?”

Lee Burgess: The answer is “No”. The Court should not grant Broadway’s motion for summary judgment based on Rogers’s affidavit. This is because Rogers’s affidavit is insufficient to establish Broadway’s version of the facts – that the officers had no reason to know that Jones was suicidal. Although Rogers indicates that Jones never stated that he intended to commit suicide, a jury could conclude that Jones’s sullen and uncommunicative manner during his arrest should have put the officers on notice of the risk. Remember that to determine a motion for summary judgment, the Court must view the evidence – here, Rogers’s affidavit testimony – in the light most favorable to the non-moving party. If the evidence could give rise to two reasonable inferences, one that would support the non-moving party, the Court must assume the jury would draw that inference and deny the motion for summary judgment.

Lee Burgess: Let’s try another variation of this hypo. In this variation, Broadway moves for summary judgment, supported by affidavits of all the police officers involved in the arrest and booking of Jones. Each testifies that Jones behaved normally during the process, cooperated with the officers, did not appear depressed, and made no statements suggesting that he might attempt suicide. Kern submits his own affidavit in opposition to the motion, in which he states under oath that Officer Rogers “knew or should have known from Jones’s behavior that Jones was depressed and suicidal.” Should the motion be granted?

Lee Burgess: This time the answer is “Yes”. The Court should grant Broadway’s motion for summary judgment. Here, Kern’s affidavit is insufficient to create a genuine issue of fact, because Kern’s statement that the officer knew or should have known of the risk is not a statement of fact. It is Kern’s opinion as to how the factual issue should be resolved. This statement would not be admissible at trial and Kern cannot rely on it to defeat Broadway’s motion for summary judgment.

Lee Burgess: Let’s try one more variation of this hypo. Suppose that Broadway again files a motion for summary judgment supported by affidavits of all the police officers involved in the arrest and booking of Jones. Again, each officer testifies that Jones behaved normally during the booking process. In response, Kern submits



an affidavit in opposition to the motion stating that the officers failed to take Jones's belt away from him, and that Jones hung himself with the belt. Broadway responds with a further affidavit of Rogers stating that Jones was not wearing a belt at the time of his arrest. Should the motion be granted?

Lee Burgess: Again, the answer is "Yes". The Court should grant Broadway's motion for summary judgment. This is because whether Jones was wearing a belt is not material to whether the officers knew or should have known that Jones was suicidal. So it does not matter that the evidence creates an issue of fact regarding whether Jones was wearing a belt. Kern's affidavit regarding this immaterial fact is insufficient to defeat summary judgment.

Lee Burgess: One final note on motions for summary judgment: Summary judgment issues often show up on exams in conjunction with another major issue. For example, exam characters frequently file motions for summary judgment based on claim or issue preclusion. So when you see a question asking if the court properly granted summary judgment, make sure that you address the summary judgment standard in light of any other issues implicated by the facts in the question.

Lee Burgess: And that wraps up our discussion of motions for summary judgment. Hopefully you found these hypos helpful examples of how to work through motion for summary judgment questions on your exams. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us on our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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