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INSIDE

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How Little Is Enough?
Inferences and Defeating Summary Judgment in Light of *Napier*

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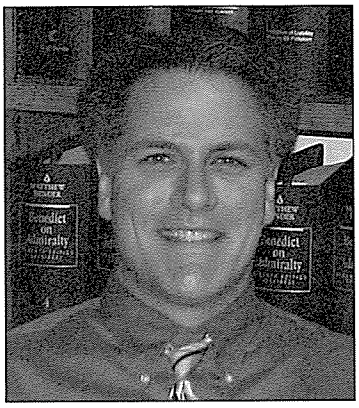

John J. Bromley

As trial attorneys, we recognize five courses inherent to every "litigory"[1] feast: complaint and responsive pleading; written discovery; depositions; summary judgment; and trial. The Rules of Civil Procedure is our cookbook. Prior drafts, pattern books, list servers, and occasional expert input serve as our prefabricated ingredients kept in a cupboard labeled "why reinvent the wheel"—an age-old and very necessary mantra. The trick: Our client's (and our) recovery is contingent upon serving all five courses with the fifth being "more probably than not" better than what the other side is serving.

Our approach to each case, not unlike the ultimate disposition, is necessarily specific to each case's set of facts. Unfortunately, however, there is another, more subconscious mantra that is also always in play with regard to the running of any business: "Good—Fast—Cheap: pick two at the expense of the third." This is reality, not criticism.

The interaction of these two mantras is a matter better left for professions that use other, more remote, portions of the brain. But for our purposes, it is generally agreed that when the evidence collected during courses one through three get us booted out of the restaurant during the fourth course, our contingency is failed and no one recovers. The good news: the other side of the fence is wed to the same mantras.

Lost to the Basics

Just like breathing, blinking, walking, and driving a car, the more often we do something, the less we think about it—until we get bronchitis, a sty, a blown hip, or become the middle of a five-car pileup. By the time we are forced to think more about it, the damage is already done.

Though we save time by grabbing our complaints, written discovery, and deposition prep out of the "why reinvent the wheel" cupboard, we also run the risk that evidentiary gaps may develop and go unnoticed until they appear before us in a motion for summary judgment. It is our job, therefore, to find the facts and inferences that are not *too* spread out or *too* remote to establish the "genuine issues of material fact" necessary to get us over the hump.

Rule 56 is pretty straightforward in that respect. What is not so straightforward is the Rule's silence with regard to the requirement that the elements of your case must be proven if challenged at this stage. Where a simple affidavit may give you the "disputed" fact(s) that you need, it may not be enough to establish your elements—especially with regard to causation.

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6. On propane, the heater would "overfire."

Reasonable Inference No. 3: The Heater Had a Defective Vent Safety Switch That Failed to Shut Down Every Ten Minutes as It Was Designed to Do.

1. During initial run testing, the heater is set up without a vent and, to pass, must shut off within ten minutes. The vent safety switch controls this process..
2. One of the reasons for having the vent safety switch is "[t]o assure these units are installed per the instructions and connected to a proper vent."
3. The heater was not vented at the time of installation and was never vented at any time between the time of the installation and the time of the fire.
4. The captain testified that the night prior to the incident the heater was on all night. When she arrived at the vessel on the date of the incident the forecastle area where the heater was located was warm.
5. It was the captain's practice to leave the heater running all night during the winter months. "All night" is longer than ten minutes.

Each of these facts is *genuine* in that a "reasonable jury could resolve the issue in [plaintiffs'] favor"[18] and *material* in that each has a very real "potential to affect the outcome of the suit."[19] Therefore, for purposes of avoiding summary judgment, plaintiffs carried their burden to establish by reasonable inference that the heater was the cause of the fire.

Napier faced two potential (i.e., admissible) yet unproven causes of his perforation: (1) *aspirin* based upon the captain's testimony that it was kept onboard, and (2) *cocaine and heroin* as noted in his medical records. It did not matter that one option was empirically more logical, sound, and rational as compared to the other. As stated in the punch list/standard, "[t]hroughout this process, the judge must remember that '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'"[20]

Therefore, there was only one potential cause of the fire: the heater. Most of the facts were easily admitted to and labeled "immaterial." The remaining facts were easily dispatched because the reports they were based upon were inadmissible. The last three along with their purported lack of cause were then nullified with fact-based inferences. Finally, as the judge agreed at oral argument, plaintiffs did not need an expert where the matter was not beyond the purview of a jury.

Only one conclusion remained: it was the heater because *there were no other potential causes in evidence.* Since the First Circuit held that the decision between the two potential causes of Napier's perforated ulcer was for a jury, and because plaintiffs here had met the same burden *with no alternative causes in the record*, the court properly denied summary judgment and allowed the F/V PHOENIX case to go to the jury.

Summary judgment is not a pattern-based event. It strictly adheres to the facts and circumstances unique to each case. As such, the effective opposition must be made to order, crafted on an *ad hoc* basis, and the cupboard should remain shut.

NAPIER	**The F/V PHOENIX**
Aspirin cannot be the cause of a perforated ulcer unless it is first ingested.	The heater cannot cause a fire (on its own) unless there is a defect.
The "availability" of aspirin was enough to infer that it was taken by Napier.	That the vent safety switch was defective (Inference No. 3) was enough to infer that it caused the fire.
The perforated ulcer occurred in an area of Napier's body where aspirin can cause an ulcer.	The fire began in an area of the vessel (Inference No. 1) where the defective heater was located and where such a heater can cause a fire.

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Notes

1. Yes, this is an entirely made up word.
2. *Hoffman v. Applicators Sales and Service, Inc.*, 439 F.3d 9, 14 (1st Cir. 2006) (quoting *Carmona v. Toledo*, 215 F.3d 124, 131 (1st Cir. 2000)) (requiring "the parties in their supporting affidavits '[to] set forth such facts as would be admissible in evidence.'"); *see also* Fed. R. Civ. P. 56(e).
3. 46 U.S.C. § 6308(a).
4. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990), (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-697 (1979)).
5. *See Smith v. Ithaca*, 612 F. 2d 215, 217 (5th Cir. 1980); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988).
6. Fed. R. Evid. 803(8)(C); 28 U.S.C. was enacted as part of "An Act to Establish Rules of Evidence for Certain Courts and Proceedings." *See* PL 93-595, January 2, 1975, 88 Stat 1926.
7. *See* National Fire Incident Reporting System 5.0, Complete Reference Guide (2008), *available at* http://nfirs.fema.gov/_download/NFIRS50CRG_011608.pdf (last accessed August 19, 2008).
8. *Id.*
9. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure Civil § 2722 (3d ed 2008) ("To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) *and the affiant must be a person through whom the exhibits could be admitted into evidence.*") (emphasis added).
10. *See* National Fire Incident Reporting System 5.0, supra note 7.
11. 454 F.3d 61, 66 (1st Cir. 2006).
12. *Id.*
13. *Id.* at 65.
14. *Id.* at 67.
15. *Id.* at 64.
16. *Id.* at 67.
17. All footnotes to the record have been removed.
18. Fajardo Shopping Ctr., S.E. v. Sun Alliance Ins. Co. of P.R., 167 F.3d 1, 7 (1st Cir. 1999).
19. *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 52 (1st Cir. 2000).
20. *Napier*, 454 F.3d at 66 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).