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IN THE SUPREME COURT OF THE STATE OF FLORIDA
CASE NO. SC19-1336
L.T. CASE NOS. 5D18-2907 and 492018CA000237ANXXX

WILSONART, LLC and
SAMUEL ROSARIO,

Petitioners,

v.

MIGUEL LOPEZ, as Personal
Representative of the Estate of
JON LOPEZ, deceased,

Respondent.
_________________________/

ON APPEAL FROM THE FIFTH DISTRICT COURT OF APPEAL

AMICUS CURIAE **BRIEF OF THE BUSINESS LAW SECTION OF THE FLORIDA BAR**

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Statement of Identity of *Amicus Curiae*

The Business Law Section of the Florida Bar ("Section") consists of almost six thousand members of the Florida Bar who often represent parties in favor of – as well as parties opposed to - motions for summary judgment.

The Section is engaged in public service. Using its expertise in business law, the Section assists the Florida Legislature in drafting laws of interest to the public and the business community. The Section likewise serves the Bar by producing sophisticated CLE (continuing legal education) programs on the panoply of issues faced by business law practitioners. While not routinely engaged in the practice of filing amicus briefs, the Section has previously filed briefs when requested to do so by courts or when an issue substantially affects the practice of business law.

The Section is not associated with either the Petitioners or the Respondent and does not take a position as to which party should prevail in this appeal. Due to the diversity of its members' practices and the corresponding diverse views arising therefrom, the Section seeks only to answer the questions posed as an honest broker of the majority of the practices and views of its members.

Pursuant to Standing Board Policy 8.10(c)(4), the Executive Committee of the Florida Bar has expressly consented to the filing of this brief. Further, this brief is submitted solely by the Section and supported only by the separate voluntary resources of this voluntary organization.

Statement of Interest in the Case

The Section files this brief pursuant to Florida Rule of Appellate Procedure 9.370(b) to inform the Court of the Section's position on the question of whether the Court should adopt the *Celotex* summary judgment standard, i.e., the standard articulated by the United States Supreme Court in the *Celotex* Trilogy: *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986).

The Section has an interest in the fair and balanced application of the summary judgment standard such that litigants are given their day in court while unsustainable claims do not clog the court system and hinder legitimate business interests. Since the Court's decision in *Tiara Condominium Association, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399 (Fla. 2013), many untenable non-contract claims are now being filed alongside contract claims. The *Celotex* Standard allows courts to summarily dispose of untenable claims and focus on the true disputes between parties.

Accordingly, the Section supports adopting the *Celotex* Standard to promptly dispose of untenable claims. The Section further supports applying the *Celotex* Standard to all civil claims as non-contract claims now commonly accompany contract claims and the *Celotex* Standard allows trial courts to more quickly dispose of untenable claims and to focus on the true dispute between the parties.

Summary of Argument

The Section supports adoption of the *Celotex* Standard.

The present *Holl v. Talcott* standard does not really apply to business cases, but courts often mistakenly use it to decide business cases. To make matters worse, the Court's abandonment of the Economic Loss Rule has increased the number of flimsy "add-on" claims that accompany legitimate business disputes. The result has been additional and unsustainable claims - not resolvable by summary judgment – that clog the court system and slow down the resolution of business disagreements.

There is no legally defensible reason to have differing standards for summary judgment and directed verdict; speculative evidence that cannot support a verdict should not be a basis for denying summary judgment. A standard which permits a non-movant to escape dismissal of claims that can never be proven at trial makes no sense, and as can be seen by the *Sylvester* case, leads to needless litigation. A standard which gets rid of bad claims but permits good claims to proceed to trial frees up the court system and benefits all of Florida's citizens.

The Section takes no position whether the Court should adopt the *Celotex* Standard by court opinion or by rule. The federal and Florida rules on summary judgment are substantially similar and it appears the Court, in the exercise of its lawful jurisdiction, could adopt the new standard either by rule or court opinion.

Argument

I. FLORIDA SHOULD ADOPT THE *CELOTEX* STANDARD

Florida should adopt the summary judgment standard as articulated by the U.S. Supreme Court in the *Celotex* Trilogy of cases, also known as the *Celotex* Standard, for granting summary judgments. This standard is better suited to resolving business disputes, and by reducing court congestion due to unsupportable claims and unnecessary trials, is better for the citizens and businesses of Florida.

Specifically, the Section believes the Court should recede from application of the standard set forth in *Holl v. Talcott,* 191 So. 2d 40 (Fla. 1966) ("*Holl* Standard"), which standard has the effect of preventing the entry of summary judgment even when no reasonable jury could find for non-movant at trial. While the *Holl* Standard arose out of a medical malpractice case, it has been applied to other civil disputes, s*ee, e.g., D & M Jupiter, Inc. v. Friedopfer*, 853 So. 2d 485 (4th DCA 2003) (business fraud) (*citing Holl,* 191 So. 2d at 47 – 48), and this has created problems.

An unreasonable summary judgment standard harms Florida businesses by requiring unnecessary trials, i.e., trials where the only plausible outcome would be an involuntary dismissal or a directed verdict. Adopting the *Celotex* Standard would require litigants to demonstrate at an early stage the evidence that supports their claim or defense, and if their evidence is lacking, would allow a trial court to clear their calendars of those claims that would not survive to judgment.

There is, of course, a question whether *Holl* is applicable to business cases at all as "summary judgment is appropriate where the material facts are not in dispute and the judgment is based on the legal construction of documents." *Ball v. Florida Podiatrist Trust,* 620 So. 2d 1018, 1022 (Fla. 1st DCA 1993). As Judge Klein stated in *Martin Petroleum Corp. v. Amerada Hess Corp.*, 769 So. 2d 1105, 1108 (Fla. 4th DCA 2000):

> Although it is true that, generally speaking, issues of negligence cannot be resolved on summary judgment, commercial litigation is another matter. Where a claim such as this one is filed, and after full discovery there is no evidence to support the allegations and there are thus no genuine issues of material fact, summary judgment should be granted. A party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict.

And the *Celotex* Standard, were it to be adopted, can be implemented broadly. Other commercial litigation matters where summary judgments can be granted include insurance disputes, *Fireman's Fund Ins. Co. v. Vogel,* 195 So. 2d 20 (Fla. 2nd DCA 1967), actions to quiet title, *Benner v. Royce,* 354 So. 2d 142 (Fla. 1st DCA 1978), real property actions for specific performance, *Wells v. Wilkerson,* 391 So. 2d 266 (Fla. 4th DCA 1981), and mortgage foreclosure actions. *See City of Palm Bay v. Wells Fargo Bank, N.A.,* 57 So. 3d 226 (Fla. 5th DCA 2011); *Northside Bank of Miami v. La Melle,* 380 So. 2d 1322 (Fla. 3rd DCA 1980).

Nonetheless, existing *Holl* case law creates issues in many cases and wastes scarce judicial resources bringing cases to trial which should be disposed of summarily. The problem does not appear to be the Rule itself; Florida's summary judgment rule is similar to the Federal Rule. However, Florida case law interpreting the Rule makes it more difficult to obtain summary judgment. *See, e.g., Corbitt v. Kuravilla*, 745 So. 2d 545 (Fla. 4th DCA 1999) (appellate courts must draw every possible inference in favor of a non-movant for summary judgment).

This has created a situation where appellate courts will not affirm a summary judgment unless all inferences in opposition to summary judgment have been negated. An example is the early case of *Skaf's Jewelers, Inc. v. Antwerp Import Corp.*, 150 So. 2d 260, 261 (Fla. 2nd DCA 1963), where the court stated:

> If there is an issue of fact and the slightest doubt remains, summary judgment should not be granted. The record supporting summary judgment should be carefully searched, and all inferences of fact from the proof submitted must be drawn against the moving party. Conversely, the court should indulge all proper inferences in favor of the party against whom the motion for summary judgment is filed. (citation omitted)

In contrast, the federal *Celotex* Standard is more fair as it recognizes that "a mere scintilla of evidence in support of the [non-movant]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]" *Anderson*, 477 U.S. at 252.

Adopting *Celotex* will also correct the problem under *Holl* that requires a movant to disprove the non-moving party's theory of the case. This practice forces cases to trial even when it is clear the presiding judge will grant a directed verdict. A clear example is *Sylvester v. City of Delray Beach*, 486 So. 2d 607 (Fla. 4th DCA 1986), where the appellate court affirmed the grant of a directed verdict on the same facts on which it had earlier denied summary judgment in an appeal.

The *Holl* problem is exacerbated by the Court's opinion in *Tiara*. Since the decision in *Tiara*, it has become commonplace for non-business claims to be filed together with business claims. Many of these claims cannot be proven at trial but are filed for their presumed *in terrorem* effect on defendants. As a result of *Tiara*, however, these claims cannot be resolved at the motion to dismiss stage. And as a result of *Holl*, a party filing these claims does not have to bring forward evidence to sustain the claims short of a needless trial; all that is needed to defeat summary judgment is *Skaf's* "slightest doubt."

This backwards process was not always the case in Florida. Prior to *Holl*, Florida followed the standard set forth in *Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780 (Fla. 1965), where summary judgments were reviewed under a standard similar to a motion for directed verdict. *See* Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments*, Fla. B.J., February 2002 at 20, 28.

No logical reason exists to maintain different standards for summary judgment and directed verdict any longer. The reason most given for the different standard is that overworked trial judges (consciously or subconsciously) resort to granting summary judgments even when facts have not been sufficiently crystallized through discovery. This may have been an issue in the era when *Holl* was adopted, but it is no longer the case as Florida's jurisprudence has now developed to the point where insufficient discovery is a basis for not permitting summary judgment. *See, e.g., Skydive Space Center, Inc. v. Pohjolainen*, 275 So. 2d 825 (5th DCA 2019). The purported reason for the *Holl* Standard no longer exists.

Similar to the standard set forth in *Harvey*, the *Celotex* Standard mirrors a directed verdict standard, a standard which preserves scarce judicial resources and increases the efficiency of our state court system. The *Celotex/Harvey* Standard would rid the courts of *Sylvester* situations where an appellate court affirmed a directed verdict on the very same evidence on which it denied summary judgment. Florida's courts simply do not have the resources to conduct unnecessary trials, and requiring Florida businesses to endure unnecessary trials makes the Florida business climate uncompetitive.

Adopting *Celotex* is not just good for business cases, it is good for Florida's court system and Florida's citizens.

II. THE SECTION TAKES NO POSITION WHETHER *CELOTEX* SHOULD BE ADOPTED BY RULE CHANGE OR BY OPINION

Adopting *Celotex* begs the question whether Florida Rule of Civil Procedure 1.510 should be amended or a new standard adopted through court opinion. It is within the province of the Florida Supreme Court to determine how best to implement any new summary judgment standard it may choose to adopt, and the Section takes no position regarding whether Rule 1.510 should be amended to reflect any change in the standard. The Section notes, however, that clearly articulating any new standard that is adopted would assist the Bench and Bar in adapting to the new standard. Accordingly, the Section offers its analysis of the two rules.

Florida Rule of Civil Procedure 1.510 and Federal Rule of Civil Procedure 56 differ from each other by an additional section. While the Florida Rule and the Federal Rule are very similar, the Federal Rule contains language which is not included in the Florida Rule. This gist of this additional language arose from *Anderson, Celotex,* and *Matsushita* and reads:

> (e) If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the Court may:
> (1) give an opportunity to properly support or address the fact;
> (2) consider the fact undisputed for purposes of the motion;
> (3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or
> (4) issue any other appropriate order.

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There are also subtle differences. Federal Rule 56 states "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." On the other hand, Florida Rule 1.510 states that "the judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file 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." (emphasis supplied)

The Federal Rule's use of the word *shall* was restored to the Federal Rule 56 in 2010 in order to better signal to trial courts the lack of discretion to deny summary judgment when there is no genuine "dispute" as to any material fact. Similarly, the use of the word *dispute* in the Federal Rule places less burden on the motion's proponent when compared to use of the word *issue* in the Florida Rule. Thus, it appears the Federal Rule better clarifies the evidence required to be presented by a motion's proponent and what the non-movant must do to rebut that evidence.

The difference between the two rules appears procedural, and consequently, whether to change the Florida Rule or simply re-adopt *Harvey*/adopt *Celotex* by case law is at the discretion of the Florida Supreme Court. *See* Art. V, § 2, Fla. Const.. Adopting the *Harvey*/*Celotex* Standard would help Florida's businesses by allowing the rejection of frivolous claims and help Florida's citizens by unclogging the courts of these unsustainable claims.

Conclusion

Unreasonable case law has unnecessarily restricted the granting of summary judgments in Florida. The Florida Supreme Court should revise the summary judgment standard from the *Holl* Standard to the *Celotex* Standard to more correctly reflect the current state of Florida jurisprudence and to allow Florida courts to more clearly, quickly, and easily enforce the bargains into which parties have entered.

Dated December 27, 2019

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Certificate of Compliance

I hereby certify that this brief was prepared in Times New Roman 14-point font in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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Certificate of Service

I hereby certify that on December 27, 2019, a true and correct copy of the foregoing document was sent via email pursuant to Fla. R. Jud. Admin. 2.516 to all counsel of record on the attached Service List.

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