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IN THE SUPREME COURT OF FLORIDA
Fla. S. Ct. Case No.: SC19-1336
Lower Case No: 5D18-2907

WILSONART, LLC and SAMUEL ROSARIO,

Petitioners,

vs.

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

Respondent.

INITIAL BRIEF OF PETITIONERS, WILSONART, LLC AND SAMUEL ROSARIO

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PREFACE

Petitioners were the Defendants and Respondent was the Plaintiff in a civil action in the Circuit Court of the Ninth Judicial Circuit in and for Osceola County, Florida. Plaintiff appealed entry of summary judgment in favor of Defendants to the Fifth District Court of Appeal. The trial court transmitted a Record on Appeal to the Fifth District Court of Appeal which was filed with this Court. The Fifth District Court of Appeal created a separate Record on Appeal that was also filed with this Court. In this Brief, the following symbols will be used to cite to the Records on Appeal:

(R.) – Trial court Record on Appeal

(A.) – Fifth District Court of Appeal Record on Appeal

STATEMENT OF THE CASE AND FACTS

This is a wrongful death claim filed by the Estate of Jon Lopez (hereinafter "the Estate"), where the decedent, Jon Lopez, crashed his vehicle into the rear end of a vehicle owned by WilsonArt, LLC (hereinafter "WilsonArt") and operated by Samuel Rosario (together, the "Defendants"). (R. 13-17). The trial court granted summary judgment in favor of WilsonArt and Mr. Rosario based on the testimony and video evidence showing that Mr. Lopez was the sole legal cause of the crash. (R. 197-8).

On January 17, 2017, Mr. Rosario operated a Freightliner box truck, traveling in the eastbound center lane of a six-lane highway approaching an intersection in Kissimmee, Florida. (R. 14). At that time and place, Mr. Lopez drove a Ford F-250 pickup truck into the rear of Mr. Rosario's truck with enough force to push Mr. Rosario's vehicle forward into another vehicle. (R. 105-6). Mr. Lopez died at the scene. (R. 13-14). The Estate subsequently filed suit.

WilsonArt and Mr. Rosario filed a Motion for Summary Judgment based on the uncontroverted evidence that Jon Lopez was the sole legal cause of the crash. (R. 102-176). The Estate opposed the motion citing the deposition testimony of an eye witness, David Mendez, and the affidavit of its expert, Christopher Stewart, for the proposition that Mr. Lopez rear-ended Samuel Rosario because Mr. Rosario suddenly changed lanes. (R. 184-194). However, the testimony of Mr. Rosario and

Officer Pinnell, combined with dashboard video from the WilsonArt vehicle, conclusively established that Samuel Rosario never suddenly changed lanes. (R. 102-5). As a result, the trial court, relying on *Scott v. Harris*, 127 S. Ct 1769, 1776 (2007) and *Wiggins v. Florida Department of Highway Safety and Motor Vehicles*, 209 So. 3d 1165 (Fla. 2017), found that the "the video tape blatantly contradicts the eye witness testimony and the opinion of the plaintiff's expert" and granted summary judgment in favor of Defendants. (R. at 197-98). The Estate appealed. (R. 199-201).

On appeal, the Fifth District Court of Appeal overturned the trial court's ruling and held that, "the trial court erred when it concluded that the video evidence 'blatantly contradicts the eye witness testimony and the opinion of plaintiff's expert.'" (A. 82). The Fifth District held that the trial court applied the wrong standard for granting summary judgment, but agreed with the trial court that the cases it relied upon "stand for the proposition relied upon by the trial judge-that clear, objective, neutral video evidence can be so contradictory to the opposing party's evidence so as to render that evidence incompetent…." (A. 82). Recognizing that the use of video and digital evidence will be used more frequently in the courts, the court certified the following question as being one of great public importance:

> Should there be an exception to the present summary judgment standards that are applied by state courts in Florida that would allow for the entry of final summary judgment in favor of the moving party when the movant's video evidence completely negates or refutes any conflicting evidence presented by the non-moving party in opposition to the summary judgment motion and

> there is no evidence or suggestion that the videotape evidence has been altered or doctored?

(A. 84).

WilsonArt and Mr. Rosario then petitioned to invoke the discretionary jurisdiction of the Florida Supreme Court. (A. 86). This Court accepted jurisdiction and, in addition to the question certified by the Fifth District, required the parties to address the following questions:

> Should Florida adopt the summary judgment standard articulated by the United States Supreme Court in *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)? If so, must Florida Rule of Civil Procedure 1.510 be amended to reflect any change in the summary judgment standard?

(A. 115).

SUMMARY OF ARGUMENT

The trial court properly granted summary judgment in favor of Defendants because it is undisputed that Mr. Lopez rear-ended the WilsonArt vehicle operated by Mr. Rosario. Florida law presumes that Mr. Lopez, as the driver of the rear vehicle, is negligent. While the presumption can be overcome, the Estate failed to put forth any competent evidence of any conduct by Mr. Rosario to rebut the presumption at summary judgment.

This court should quash the Fifth District's decision reversing summary judgment in favor of WilsonArt and Samuel Rosario and reinstate the trial court's

ruling because the extensive body of summary judgment case law is clear that, in order for disputed issues of fact to arise, the counter evidence must be c*ompetent* and only reasonable inference may be drawn from the counter-evidence. Established summary judgment precedent vests a trial court judge with the power to determine whether a reasonable jury could believe the evidence or testimony presented. Since the Estate failed to put forth any competent evidence to rebut the presumption of negligence, the trial court properly entered summary judgment in favor of Defendants.

Finally, Florida should expressly adopt the federal summary standard as articulated in *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). Doing so would serve the same stated policy goals as Florida's summary judgment rule. However, it is not necessary to amend the current language of the rule to effectuate that change, because the current Florida standard is not based on a strict construction of the rule's language, but was, instead, developed through court interpretation.

ARGUMENT

I. STANDARD OF REVIEW.

Appellate courts review orders on motions for summary judgment de novo. *Chirillo v. Granicz*, 199 So. 3d 246, 252 (Fla. 2016); s*ee also Volusia Cty. v.*

Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000).

II. SUMMARY JUDGEMENT IN FAVOR OF PETITIONERS WAS PROPER UNDER THE CURRENT FLORIDA SUMMARY JUDGMENT STANDARD.

In Florida, summary judgment "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." Fla. R. Civ. P 1.510(c) (2019) (emphasis added). The moving party is "obligated to show conclusively the absence of any genuine issue of material fact." *Noack v. B. L. Watters, Inc.*, 410 So. 2d 1375, 1376 (Fla. 5th DCA 1982) (*citing Holl v. Talcott*, 191 So.2d 40 (Fla.1966)). The test is whether there are factual questions whose resolution would permit a *reasonable jury* to decide differently from the court. *See Moore v. Morris*, 475 So. 2d 666 (Fla. 1985) (emphasis added); *see also Chirillo v. Granicz*, 199 So. 3d at 253 (holding that "[i]f reasonable persons can disagree . . . summary judgment is not proper and the issue is for the jury to decide").

All facts should be considered in a light most favorable to the non-moving party. *Connolly v. Sebeco*, 89 So. 2d 482, 482 (Fla. 1956). Once a movant "tenders *competent* evidence to support his motion, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue." *Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979)(emphasis added); *Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780 (Fla. 1965); *Publix Supermarkets, Inc. v. Austin*, 658 So. 2d 1064 (Fla. 5th

DCA 1995).

A. Summary Judgment Was Properly Entered in Favor of Defendants Because the Competent Evidence Established There Were No Genuine Issues of Material Fact and Defendants Were Entitled to Judgment as a Matter of Law.

Disputed facts do not arise "because a party disagrees with the facts established by *competent* evidence" or "merely to assert[s] that an issue does exist." *Noack*, 410 So.2d at 1376 (emphasis added); *see also Landers*, 370 So. 2d at 370; *Daeda v. Blue Cross & Blue Shield of Florida, Inc.*, 698 So. 2d 617, 618 (Fla. 2d DCA 1997) (holding that the rules of civil procedure require a court to only consider competent evidence when ruling upon a motion for summary judgment). Instead, the opposing party "must demonstrate the existence of such an issue either by countervailing facts or *justifiable* inferences from the facts presented." *Harvey Bldg. Inc.*, 175 So. 2d at 783 (emphasis added). "If he fails in this, he must suffer a summary judgment against him." *Id.*

Once the movants meet their initial burden of demonstrating that the pleadings and evidence on file entitled them to judgment as a matter of law, the opposing party must "come forward with competent evidence revealing a genuine issue of fact." *Landers*, 370 So. 2d at 370. Incompetent evidence is inadequate to create an issue of fact. *Id.* (holding that it was error to shift "the burden of proof based on incompetent affidavits"). "Evidence that is confirmed untruthful or nonexistent is not competent,

substantial evidence. Competent, substantial evidence must be reasonable and logical." *Gonci v. Panelfab Prods., Inc.*, 179 So. 2d 856, 858 (Fla. 1965).

(1) The Estate Did Not and Cannot Overcome the Presumption of Negligence.

Under the rear-end collision rule, "the driver of a rear vehicle that collides with the back of the lead vehicle is presumed negligent unless the rear driver presents evidence that fairly and reasonably tends to show that the presumption is misplaced." *Alford v. Cool Cargo Carriers, Inc.*, 936 So. 2d 646 (Fla. 5th DCA 2006). A rear driver can overcome the presumption by presenting evidence of: (1) a mechanical failure in the rear driver's vehicle, (2) the lead driver's sudden stop, (3) the lead driver's sudden lane change, or (4) the lead driver's illegal or improper stop. *Seibert v. Riccucci,* 84 So. 3d 1086 (Fla. 5th DCA 2012) (citing *Dep't of Highway Safety & Motor Vehicles v. Saleme*, 963 So. 2d 969, 972 (Fla. 3d DCA 2007)); *Alford v. Cool Cargo Carriers, Inc.*, 936 So. 2d at 649–50; *Tozier v. Jarvis*, 469 So. 2d 884, 886–87 (Fla. 4th DCA 1985).

At hearing, Defendants relied on the deposition of Mr. Rosario, who testified that he was traveling in the middle lane and slowing to a stop when Jon Lopez struck him from behind. (R. 171-72). Mr. Rosario also testified that did not attempt to change lanes and that he intended to continue traveling straight ahead. (R. 173). His exact testimony is as follows:

A: I was traveling in the middle lane as I was traveling on 192.

> And as I seen the light, as I was approaching the light and slowing down, that's when I felt the hit in back. Rosario Dep. 37:25-38:3. (R. 171-2).
>
> Q. And you were in the middle lane?
> A: Middle lane, yes.
> Q. All right. What direction were you intending to travel?
> A: Straight 192. Rosario Dep. 38:20-2. (R. 172).
>
> Q: When you felt the impact and you were hit from the rear, in which direction were your wheels turned?
> A: Straight. Rosario Dep. 39:3-5. (R. 173).
>
> Q: When you were struck from behind, were you completely stopped or were you still moving?
> A: I was close to my full stop, approaching my full stop. Rosario Dep. 39:12-15. (R. 173).

Defendants also relied on corroborating video evidence from the camera mounted to Mr. Rosario's dashboard. The video, which recorded Mr. Rosario's driving from his last stop until the accident, clearly demonstrates that Mr. Rosario's testimony accurately described his operation of the vehicle. (R. 171-73, 197-98). The video demonstrates that Mr. Rosario did not swerve or attempt to change lanes, nor did he suddenly stop, immediately prior to being struck from behind. (R. 98). The Estate presented no evidence to call into question the validity, authenticity, or accuracy of the video evidence (as presupposed by the certified question).[1]

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1 Though not specifically argued at the hearing, Defendants' Motion for Summary Judgment relied on the testimony of the lead traffic homicide investigator, Officer Matthew Pinnell. (R. 103), who testified that he did not uncover any evidence that Mr. Rosario violated any traffic laws that contributed to the accident. (R. 103, 135).

Based on Mr. Rosario's testimony and the corroborating, objective video, Defendants established that there were no genuine issues of material fact and that they were entitled to judgment as a matter of law.

(2) The Evidence Relied on By The Estate to Oppose Summary Judgment Was Not Competent.

The Estate relied on the eye-witness testimony of Mr. Mendez and an affidavit from its expert, Mr. Stewart, to oppose Defendants' Motion for Summary Judgment. (R. 194-194, 220-23). The Estate argued that because the testimony of Mr. Mendez and Mr. Stewart contradicted Mr. Rosario's testimony, a genuine issue of material fact existed as to whether Mr. Rosario operated his vehicle in a way that would overcome the presumption of negligence. (R. 220-23). Specifically, the Estate contended that Mr. Rosario, the lead driver, suddenly changed lanes and caused, or contributed to, the collision. (R. 223-24).

(3) The Eye Witness Testimony was Not Accurate.

According to Mr. Mendez's testimony, Mr. Rosario attempted to turn into the left outside lane, may have side-swiped another vehicle, and then stopped suddenly, just before the crash:

> A. What I witnessed was, there was a box vehicle, box van is what we call them, larger vehicle, was merging from the center lane to the far -- or to the left outside lane. From what it seemed like, he was trying to make the turn lane and was obstructed by a vehicle perhaps he sideswiped, because the way that it seemed, there was a white vehicle – I'm not sure of the make. I believe it was a Ford Focus - veered off to the left into the turn lane to avoid

it, at which point the box vehicle stopped suddenly, and then the impact. Mendez Dep. 13:21-25 – 14:1-5. (R. 191-92).

Q. And you saw that vehicle merging towards the left prior to the impact?
A. Yes. He was in the center lane, and almost without warning just took the left lane, the outside left lane, as if he were to try to make the turn lane. I don't see any other reason why he would've, but I am not speaking for him. I'm just --
Q. Sure.
A. It was my observation. Mendez Dep. 14:15-21. (R. 192).

A. I -- once I was centered, I took a sip from my drink. If I can remember, I had my drink in my hand, so I took a sip. And when I glanced back up, I immediately saw the box truck in the merge process, he was at an angle, and then the bang. So I -- I saw the impact take place and -- like, before it happened. Mendez Dep. 27:10-15. (R. 205).

Q. And then did--did you--were--did you have any observations about what the white Ford truck was doing before the impact?
A. As far as in the cab? Like what he physically was doing or…
Q. No, no.
A. Oh, yeah.
Q. What the truck -- what that truck was doing.
A. Oh.
Q. Was it -- was it staying straight in the center lane?
A. He --
Q. Was it kind of merging to the right? Was it kind of –
A. No. He was -- he was -- I believe he came from the outside left lane to the center lane. But he was already in the center lane when I -- you know, my -- when I was going straight, he was from his left lane to the center lane and then -- but he was straight. He wasn't partially, he wasn't -- he was already in the center lane and then the impact took place within just seconds after.
Q. So when you first noticed the -- the white truck, it was in -- it was coming from the left lane?
A. From the left lane to the center lane. Mendez Dep. 39:1-25. (R. 217).

However, the video tells the real story. (R. 197.98). The video plainly shows that Mr. Rosario did not suddenly changes lanes or come to a sudden stop. He neither side-swiped, nor nearly side-swiped, a white car prior to being struck by Mr. Lopez. The video shows that Mr. Rosario was traveling straight in the center lane until Mr. Lopez collided with him. Importantly, Plaintiff never contended that the video was altered or not authentic. Because the video clearly and directly contradicted and refuted Mr. Mendez's version of the accident, the trial court appropriately considered Mr. Mendez's testimony incompetent. No reasonable jury could decide otherwise. It would have been error for the trial court to rely on it.

(4) The Expert Affidavit and Testimony Do Not Rebut the Presumption of Negligence.

Mr. Stewart's affidavit relied on the testimony of Mr. Mendez. (R. 180). However, the conclusions offered in Mr. Stewart's affidavit and subsequent deposition testimony, propose an alternate theory of how the accident happened, one that is at-odds with the Estate's attempt to overcome the presumption of negligence. Mr. Stewart's affidavit states:

> 6. The eye witness, Mr. Mendez, stated in his deposition that he saw the Freightliner truck attempt a lane change to the left prior to impact. Mr. Mendez also testified that the F-250 attempted to change lanes to the right prior to impacting the rear of the Freightliner.
>
> 7. The movements of the Freightliner, testified to by Mr. Mendez, would place the right rear of the Freightliner cargo box

> over the lane line separating the center lane from the right lane of W. Vine Street.
>
> 8….The Rosario drive cam video shows the Freightliner positioned to the right side of the center lane, with the right side of the Freightliner over the lane line separating the center lane and the right outside lane…
>
> 12. The Freightliner *failed to maintain his vehicle within a single lane*. *Had the subject Freightliner maintained a single lane, the subject F-250 could have completed the lane change without contact with the subject Freightliner*.[2]

(R. 180) (emphasis added).

Notably, Mr. Stewart's affidavit fails to propose a scenario that would overcome the presumption of negligence. Florida law recognizes four scenarios under which a rear driver can overcome the presumption of negligence in a rear-end collision: (1) a mechanical failure in the rear driver's vehicle, (2) the lead driver's sudden stop, (3) the lead driver's sudden lane change, and (4) the lead driver's illegal or improper stop." *Seibert*, 84 So. 3d at 1089. Mr. Stewart's affidavit merely concludes that Mr. Rosario failed to maintain a single lane (R. 180), which is not recognized as a scenario that can overcome the presumption of negligence in a rear-end collision.

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2 During the hearing, the Estate's counsel argued only Mr. Mendez's version, not Mr. Stewart's version. The Court gave him an opportunity to add any other argument besides Mr. Mendez's version, but the Estate's counsel confirmed there was no other argument. (R. at 226). The trial court deferred ruling, so it is presumed that the trial court considered Mr. Stewart's affidavit. (R. 220-21).

In addition, Mr. Stewart's deposition testimony[3] taken a day after the hearing confirms that he did not conclude that Mr. Rosario made a sudden lane change. Mr. Stewart's relevant deposition testimony follows:

> Q. [A]s the Freightliner initiated its lane change into the inside lane, the Freightliner impacted the passenger side of the passing Chevy. That's not your opinion now, is it?
> A. Correct.
> Q. And that the Freightliner stopped abruptly behind the Subaru on the center lane, that's not your opinion now, is it?
> Correct. Stewart Dep. 39:8-12. (R. 277).
>
> Q. Okay. And that video -- that dash cam video of Mr. Rosario's doesn't show this movement of his truck to the left and impacting the vehicle next to him in the left and then turning back into the center lane, it doesn't show that at all, does it?
> A. No, it shows it veering to the left after the collision, yes.
> Q. But before the collision, it is not veering into the left lane and coming back into the center lane?
> A. No.
> Q. And in fact, the dash cam video shows the -- doesn't show any veering left or right of that Freightliner as it approaches the vehicle in front of it and before the impact; correct?
> A. Correct. Stewart Dep. 40:10-24. (R. 278-79).
>
> Q. All right. So now, let me -- let's fast forward to now, what your opinions are now. Your opinions are now that the Freightliner had its right wheels into the right lane before the accident; right?
> A. Correct.
> Q. And since it was never veering left or right, he was in -- he was in that position where his right wheels were traveling over

3 Mr. Stewart's deposition was taken the day after the motion for summary judgment hearing (R. 236). However, the Estate filed the transcript with the trial court one week after the court entered its order granting summary judgment (R. 236) and relied on the deposition testimony in its briefs at the Fifth District. (A. 23, 67-72).

> the right -- into the right lane for some distance before he came -- started to come to a stop and then the accident happened; right?
> A. Correct.
> Q. So the Freightliner never made an abrupt lane change at all during the one minute -- I shouldn't say one minute -- 30 seconds before the accident; right?
> A. Not that I could see, no. Stewart Dep. 40:25-41:1-14. (R. 309).

> Q And so for quite some time driving down West Vine Street, Mr. Lopez could see, based on your analysis, that Mr. Rosario had part of his truck in the right lane?
> A The Freightliner would have been visible to Mr. Lopez as he was driving down the road, yes. Stewart Dep. 71:25-72:1. (R. 309).

Based on this testimony, Mr. Stewart concluded that Mr. Rosario was traveling with his right wheels over the right lane line for "some time" prior to the collision and never attempted a sudden lane change. (R. 279-80). He further agreed that the truck never veered left or right prior to being struck by Mr. Lopez. Thus, Mr. Stewart agreed that the video clearly shows that Mr. Rosario did not suddenly change lanes prior to the collision.

Since evidence that is illogical, unreasonable, and confirmed mistaken is not competent, Mr. Mendez's testimony does not constitute competent, substantial evidence. The unedited, real-time video evidence demonstrates that the versions of the event proposed by the Estate *could not and did not* happen. In addition, Mr. Stewart's affidavit and his subsequent deposition testimony do not describe a scenario that overcomes the presumed negligence of Mr. Lopez.

Therefore, the Estate failed to create a *genuine* issue of fact which would have permitted a *reasonable* jury to decide differently. As such, the trial court properly granted summary judgment in favor of Defendants and this Court should quash the Fifth District's decision.

B. This Court Should Recognize that Evidence which is Contradicted by Unedited and Unaltered Video Evidence Does not Create a Genuine Issue of Material Fact.

The Fifth District recognized that technological advancements in our society increase the likelihood that video and digital evidence will be used in both trial and pretrial situations. (A. 83-84). In recognition of this unavoidable reality, the court certified the following question as one of great public importance:

> Should there be an exception to the present summary judgment standards that are applied by state courts in Florida that would allow for the entry of final summary judgment in favor of the moving party when the movant's video evidence completely negates or refutes any conflicting evidence presented by the non-moving party in opposition to the summary judgment motion and there is no evidence or suggestion that the videotape evidence has been altered or doctored?

(A. 84).

Recognizing the exception as framed by the Fifth District would accomplish the stated purpose behind the summary judgment rule. It is also consistent with the plain language of rule 1.510 and with the Florida common law trend recognizing the evidentiary value of video evidence when there is no evidence that it has been edited or altered.

(1) Allowing Unaltered Video and Digital Evidence to Negate Conflicting Evidence Accomplishes the Purpose of Summary Judgment.

"The function of summary judgment procedure is to supply an efficient procedural device for the prompt disposition of actions, be they legal or equitable, if there be no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Its purposes are those expressed in rule 1.010, i.e. 'to secure the just, speedy and inexpensive determination' of the action. Authors' Comment 1967 to Fla. R. Civ. P. 1.510. "The object [of the summary judgment rule] is to shorten the trial by eliminating the fact issues shown to be without substantial controversy." Fla. R. Civ. P. 1.510 Authors' Comment to 1967 amendment. "The function of summary judgment procedure is to determine if there is sufficient evidence to justify trial upon the issues made by the pleadings, to expedite litigation, and to obviate expense." *Page v. Staley*, 226 So. 2d 129, 130 (Fla. 4th DCA 1969). It is intended to improve the administration of justice in the court system. *Baskin v. Griffith*, 127 So. 2d 467, 473 (Fla. 1st DCA 1961).

Video evidence is objective. When the parties do not challenge the accuracy or authenticity of a video, and the video depicts a materially different event than what is described by opposing testimony or evidence, it is counter to the policies underlying the summary judgment rule to require a court to discard common sense and reason to hold that a genuine dispute exists. Such a requirement needlessly

prolongs litigation. By prolonging litigation, or refusing to narrow the scope, when issues are conclusively established by video or digital evidence, both parties incur additional monetary expense and consume valuable judicial resources. Finally, forcing a judge to disregard the video evidence and recognize evidence that is clearly inaccurate, creates unnecessary delay in the administration of justice by refusing judgment when one party is plainly entitled to it.

(2) Allowing Unaltered Video and Digital Evidence to Negate Conflicting Evidence is Consistent with the Plain Language of Rule 1.510.

The Florida Rules of Civil Procedure state 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." Fla. R. Civ. P. 1.510. "The term 'genuine issue' as used in the rule means a real as distinguished from a false or colorable issue." *Harrison v. Consumers Mortg. Co.*, 154 So. 2d 194, 195 (Fla. 1st DCA 1963). According to *Black's Law Dictionary*, "genuine" means "authentic or real; having the quality of what a given thing purports to be or have." *Genuine, Black's Law Dictionary* (10th ed. 2014). The definition of "genuine issue of material fact" is "a triable, substantial, or real question of fact supported by substantial evidence." *Genuine Issue of Material Fact*, *Black's Law Dictionary* (10th ed. 2014).

Therefore, the plain language of the rule contemplates something more than the mere assertion that a factual dispute exists. The opposing party must present evidence that is authentic and presents a triable, substantial or real question of fact that is supported by competent evidence. When unaltered video or digital evidence plainly refutes the opposing party's counter-evidence at summary judgment, the plain language of the rule requires that the court disregard the opposing evidence.

(3) Allowing Unaltered Video and Digital Evidence to Negate Conflicting Evidence is Consistent with the Trend of Florida Courts Recognizing the Reliability and Value of Video and Digital Evidence.

In *Wiggins*, a decision involving certiorari review of a driver's license suspension, this Court, addressed the issue of "whether real-time video of events can operate to render mere verbal descriptions of purported events to be not 'competent, substantial' evidence when the real-time video of the events contradicts and refutes the verbal description." 209 So. 3d at 117. This Court answered that question affirmatively and held that the circuit court correctly rejected eyewitness testimony as being competent, substantial evidence when the testimony was contrary to and refuted by objective real-time video evidence. *Id.*

In *Wiggins*, a police officer's dashboard camera recorded Wiggins' driving pattern from the time the officer first saw the vehicle until the traffic stop. The officer, in both his arrest report and testimony, stated that Wiggins appeared to swerve from one lane to another and braked hard for no apparent reason. However,

"the real-time video evidence totally contradicted and refuted the testimony and arrest report of the officer." *Id.* at 1169. This Court explained:

> We would be remiss if we failed to acknowledge that at times, an officer's human recollection and report may be contrary to that which actually happened as evinced in the real time video. This is the reality of human imperfection; we cannot expect officers to retain information as if he or she were a computer. Therefore, a judge who has the benefit of reviewing objective and neutral video evidence along with officer testimony cannot be expected to ignore that video evidence simply because it totally contradicts the officer's recollection. Such a standard would produce an absurd result.

Id. at 1172.

Wiggins is not an outlier. The First District Court of Appeal relied on video evidence when it upheld the trial court's grant of summary judgment in *Brookie v. Winn-Dixie Stores*, a premises liability case involving a customer who tripped over a wooden pallet. 213 So. 3d 1129 (Fla. 1st DCA 2017). In *Brookie*, the plaintiff produced an expert affidavit averring that Winn-Dixie created an unsafe condition and the Plaintiff testified that he noticed the pallet after his third trip, when he fell over the prongs from the pallet lift protruding from under the pallet. *Id.* at 1130. Winn-Dixie offered still shots from its video surveillance showing that the Plaintiff did not trip over the prongs and actually "changed course and walked so as to avoid the [pallet] on three other occasions during the surveillance video…." *Id.* at 1131.

The trial court relied on the video evidence when it found that the condition was "so open, obvious, and ordinary that it was inherently not dangerous as a matter

of law" and granted summary judgment in favor of Winn-Dixie. Likewise, the First District expressly agreed with the trial court's ruling that the surveillance video footage "conclusively refute[d] Appellant's allegation that he tripped over the prongs" and that the video showed that "the Appellant changed course and walked so as to avoid the pallet on three other occasions…." *Id.* at 1131-32. As a result, the court found that the video established that "the facts [were] sufficiently crystallized" so as to support a finding of summary judgment. *Id.* at 1132.

As in *Brookie*, the Estate produced an expert affidavit and testimony describing what occurred at the date and time of the accident. Like the trial court in *Brookie*, the trial court here found that the factual scenario described by the Estate was conclusively refuted by the video. The trial court further found that the facts established by the video proved that WilsonArt and Mr. Rosario were not negligent as a matter of law. The Fifth District could have come to the same conclusion as the First District and held that the video rendered the facts "sufficiently crystallized" to present a question of law appropriate for resolution by the court.

Holding that unaltered video and digital evidence can negate conflicting evidence presented by a party opposing summary judgment, is consistent with the trend in Florida courts recognizing the reliability of video and digital evidence. It is also consistent with and reiterates this Court's previous observation that "video of events can operate to render mere verbal descriptions of purported events to be not

'competent, substantial' evidence when the real-time video of the events contradicts and refutes the verbal description." *Wiggins*, 209 So. 3d at 1175.

III. FLORIDA SHOULD EXPLICITLY ADOPT THE FEDERAL SUMMARY JUDGMENT STANDARD.

The Florida and Federal summary judgment rules are substantially the same. Rule 56 of the Federal Rules of Civil Procedure states that, "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." The corresponding Florida rule states, "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." Fla. R. Civ. P. 1.510. In addition, the rules share the same stated policy goals, "to secure the just, speedy, and inexpensive determination" of a cause of action. *Cf, Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) and Authors' Comment 1967 to Fla. R. Civ. P. 1.510.

However, despite these similarities, Florida courts inconsistently apply a more restrictive standard when determining whether summary judgment is appropriate. As discussed further below, Florida could accomplish its stated policy goals more effectively if it adopted the federal standard. Further, adopting the federal standard would increase meaningful access to courts and encourage the efficient use of judicial resources.

A. The Federal Standard Explained.

The United States Supreme Court articulated its application of the summary judgment rule in a series of cases commonly referred to as "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). In *Celotex*, an asbestos-exposure case, the Court announced its view of summary judgment "as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" 477 U.S. at 327.[4] The Court further held that courts should apply the same standard to summary judgment as to directed verdict:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

477 U.S. at 322-23.

In *Liberty Lobby*, the Court required a plaintiff to meet the "clear and convincing" evidentiary standard, the same burden it would have to meet at trial, in

4 Notably, the Florida Rules of Civil Procedure mimic these policy goals. *See supra* §I.B.i.

order to survive defendant's motion for summary judgment. The Court ruled, "The inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." 477 U.S. at 252. "It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and the standards and boundaries are in fact provided by the applicable evidentiary standards." *Id.* at 254-55. Finally, in *Matsushita*, an antitrust conspiracy case, the United States Supreme Court signaled that a trial court should, in fact, weigh evidence when it held that "if the factual context renders respondents' claim implausible [then] respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." 475 U.S. at 587.

Thus, the federal court system views summary judgment as a valuable tool for achieving "just, speedy and inexpensive" resolution of disputes. In order to accomplish these stated policy goals, it allows judges to utilize their own common-sense reasoning to draw inferences and determine whether the facts and evidence could support a party's claims. Further, the federal system utilizes the same standard for summary judgment standard as for directed verdict, which avoids the futile march to trial when issues could be resolved on the merits much sooner, preserving the parties', and the courts', resources.

B. Adopting the Federal Standard Will Help Florida Achieve the Stated Policy Goals Behind its Summary Judgment Rule.

As mentioned above, the federal rule and the Florida rule share the same policy goals, "to secure the just, speedy, and inexpensive determination" of a cause of action. *Celotex*, 477 U.S. at 327; Authors' Comment 1967 to Fla. R. Civ. P. 1.510. However, Florida courts are required to apply a more restrictive standard to determine whether summary judgment is appropriate, instead of the same standard that would be applied during trial on motion for directed verdict. The Fifth District alluded to this discrepancy in its certification of the question of great public importance when it stated:

> Here, the video evidence showing Rosario's driving pattern is both compelling that Appellees were not negligent and directly contradictory to the Estate's evidence in opposition to the summary judgment motion. However, in the event this case survives Appellees' inevitable motion for directed verdict at trial, then it would be the jury's job to assess the credibility of the Estate's witnesses as to the cause of the accident and to weigh and compare Appellees' conflicting evidence, including the videotape.

(A. 83).

Thus, the Fifth District recognized that the video evidence relied upon by WilsonArt and Mr. Rosario would likely not survive directed verdict, but that it was compelled to overturn the trial court's order due to the technical "conflict" in the evidence put forth by the parties. If the federal standard were in-place, the trial court's use of common-sense reasoning to determine that the evidence conclusively

established that Mr. Rosario did not unexpectedly change lanes and that a reasonable jury could not find otherwise would be entirely appropriate; the parties in this case would not be saddled with the expense of prolonged and likely pointless litigation.

In addition, the case would have been decided on its merits and the courts would have processed another case expeditiously. As the United Stated Supreme Court stated in *Scott v. Harris*, 550 U.S. 372, 380 (2007), after viewing video-tape evidence, "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Therefore, adopting the federal summary judgment standard would further Florida's stated public policy objectives of the "just, speedy, and inexpensive" resolution of disputes in its court system.

C. Adopting the Federal Standard Could Increase Access to Judicial Resources.

In *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1996), this Court expressed reservation about the use of summary judgment as a "derogation of the constitutionally protected right to trial." As a result, it articulated a restricted view of summary judgment and held that a party must make a "conclusive showing" that it is entitled to summary judgment. *Id.* at 45. In another decision the following year, the Court reiterated its narrow approach and held that the burden at summary judgment is not the same as at trial on directed verdict and that summary judgment is only appropriate when "the

record affirmatively showed that the plaintiff could not possibly prove her case, and not because she had simply failed to come forward with evidence…." *Visingardi v. Tirone*, 193 So. 2d 601, 605 (Fla. 1967).

However, this narrow view creates absurd results by forcing a trial judge to withhold summary judgment when factual issues are crystallized or when allowing a case to languish on the docket until it is tried in futility before a jury, only to be disposed of on directed verdict. On the other hand, adopting the federal summary judgment standard will allow a trial judge to exercise reasoned judgment to dispose of lawsuits when no genuine disputes of fact exist prior to trial, instead of requiring them to permit lawsuits to languish on the docket, utilizing scarce and valuable judicial resources that are best retained for disputes that present issues that actually require resolution by a jury.

IV. THE LANGUAGE OF FLORIDA RULE OF CIVIL PROCEDURE 1.510 DOES NOT NEED TO BE AMENDED TO REFLECT ANY CHANGE IN THE SUMMARY JUDGMENT STANDARD.

As explained above, Florida's summary judgment rule is modeled after the federal rule. The pertinent language in Florida's summary judgment rule and the federal summary judgment rule are substantially identical. The policy behind each rule is nearly identical. The professed distinction between the Florida and federal summary judgment standards developed in their respective courts.

Florida courts developed their current, distinctive gloss on the summary judgment standard through years of compounding case law interpretation, starting with *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1996). Likewise, the federal standard developed through case law interpretation arising out of the "Celotex Trilogy." This Court's request to address the federal/Florida dichotomy invokes the same federal case law that articulated the federal standard. Therefore, since the current Florida summary judgment standard also arose through interpretive case law, it is not necessary to amend the language of Rule 1.510 to align it with the substantially identical federal standard.

CONCLUSION

Based on the foregoing discussion, WilsonArt, LLC and Samuel Rosario respectfully request this Honorable Court quash the decision of the Fifth District Court of Appeal. Secondarily, WilsonArt, LLC and Samuel Rosario, submit that this court should explicitly adopt the federal summary judgment standard as articulated in *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), and that no amendment to Florida Rule of Civil Procedure 1.510 is necessary to do so.

Respectfully submitted and certified,

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CERTIFICATE OF SERVICE

I hereby certify on **December 4, 2019**, that a copy hereof has been furnished by electronic mail to all parties listed on the Service Lit below and filed via the Florida Courts e-Filing Portal.

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I HEREBY CERTIFY that this brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer-generated briefs.

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