

IN THE FLORIDA SUPREME COURT

CASE NO.: SC19-1336

WILSONART, LLC and
SAMUEL ROSARIO,

Petitioners,

v.

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

Respondents.

AMICUS BRIEF OF
FLORIDA DEFENSE LAWYERS ASSOCIATION
IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST

The Florida Defense Lawyers Association (FDLA) is a statewide organization of civil defense attorneys formed in 1967, and it has approximately 1,000 members. The goal of the FDLA is to “bring industry leaders and defense counsel together and form a strong alliance that promotes fairness and justice in the civil justice system for all parties.” The FDLA maintains an active amicus curiae program in which members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts which involve significant legal issues that impact the interests of the defense bar or the fair administration of justice. The FDLA has actively participated in amicus briefing in numerous appellate cases with statewide impact on tort, insurance, or litigation issues.

This case carries statewide importance as it addresses the summary judgment standard in Florida. FDLA’s members actively litigate in courts across the state, prosecuting and defending motions for summary judgment. A decision from this Court on the standard will affect FDLA’s members and their cases.

SUMMARY OF ARGUMENT

FDLA urges this Court to adopt the Celotex Trilogy in this case. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). There is no need for the Florida Rules of Civil Procedure to be amended as analysis of the summary judgment standard has developed through case law.

Adoption of the Celotex Trilogy will have a substantial impact on bad faith jurisprudence in this state.

ARGUMENT

I. THE MAJORITY OF OTHER STATES HAVE ADOPTED THE CELOTEX TRILOGY VIA A COURT DECISION FROM ITS SUPREME OR HIGHEST COURT

The vast majority of states have adopted, or cited favorably, the Celotex Trilogy. Importantly, these states have primarily done so through a court decision issued by their supreme or highest court. The following is a chart setting forth the states that have adopted the Celotex Trilogy, or cited it favorably, and the method by which the states did so.

<u>State</u>	<u>Authority</u>	<u>Method Adopted</u>
Alabama	<u>Ex parte GMC</u> , 769 So. 2d 903 (Ala. 1999).	supreme court decision
Arizona	<u>Orme Sch. v. Reeves</u> , 802 P.2d 1000 (Ariz. 1990).	supreme court decision

Arkansas	<u>Short v. Little Rock Dodge, Inc.</u> , 759 S.W.2d 553 (Ark. 1988); <u>Wallace v. Broyles</u> , 961 S.W.2d 712 (Ark. 1998).	supreme court decision
California	<u>Aguilar v. Atl. Richfield Co.</u> , 24 P.3d 493 (Cal. 2001); Assemb. B. No. 498, Reg. Sess. (Cal. 1994); Assemb. B. No. 2616, Reg. Sess. (Cal. 1992).	legislation amending rule of civil procedure and supreme court decision
Colorado	<u>Cont'l Air Lines, Inc. v. Keenan</u> , 731 P.2d 708 (Colo. 1987).	supreme court decision
Connecticut	<u>Stuart v. Freiberg</u> , 116 A.3d 1195, 1197 (Conn. 2015).	supreme court decision
Delaware	<u>Burkhart v. Davies</u> , 602 A.2d 56 (Del. 1991).	supreme court decision
Georgia	<u>Ware Cty. v. Medlock</u> , 385 S.E.2d 429, 434 (Ga. Ct. of App. 1989); <u>First Union Nat'l Bank v. J. Reisbaum Co.</u> , 378 S.E.2d 317 (Ga. Ct. of App. 1989); <u>Kelson v Cent. of Ga. R.R.</u> , 505 S.E.2d 803, 808 (Ga. Ct. App. 1998).	intermediate court decisions
Hawaii	<u>Exotics Hawaii-Kona, Inc. v. E.I. du Pont de Nemours & Co.</u> , 172 P.3d 1021 (Haw. 2007); <u>First Hawaiian Bank v. Weeks</u> , 772 P.2d 1187, 1190 (Haw. 1989).	supreme court decision
Idaho	<u>Chandler v. Hayden</u> , 215 P.3d 485, 491 (Idaho 2009); <u>McColm-Traska v. Baker</u> , 88 P.3d 767 (Idaho 2004).	supreme court decision
Illinois	<u>Estate of Henderson v. W.R. Grace Co.</u> , 541 N.E.2d 805 (Ill. App. 3d 1989). <u>See</u>	intermediate court decisions

	<u>also Hutchcraft v. Indep. Mech. Indus.</u> , 726 N.E.2d 1171, 1174 (Ill. App. 3d 2000); <u>Zimmer v. Celotex Corp.</u> , 549 N.E.2d 881, 883 (Ill. App. 3d 1989).	
Kansas	<u>Bacon v. Mercy Hosp. of Ft. Scott</u> , 756 P.2d 416, 419-20 (Kan. 1988).	supreme court decision
Louisiana	<u>Hayes v. Autin</u> , 685 So. 2d 691 (La. App. 3d Cir. 1996). See also La. C.C.P. Art. 966, Comment (j); Section 4 of Acts 1997, No. 483; <u>Anders v. Andrus</u> , 773 So. 2d 289 (La. App. 3d Cir. 2000).	intermediate court decision and subsequent legislation amending rule of civil procedure
Maine	<u>Estes v. Smith</u> , 521 A.2d 682 (Me. 1987).	supreme court decision
Maryland	<u>Geisz v. Greater Baltimore Med. Ctr.</u> , 545 A.2d 658, 672 (Md. 1988).	highest court decision
Massachusetts	<u>Kourouvacilis v. Gen. Motors Corp.</u> , 575 N.E.2d 734 (Mass. 1991).	supreme court decision
Michigan	<u>McCart v. J. Walter Thompson, Inc.</u> , 469 N.W.2d 284 (Mich.1991).	supreme court decision
Minnesota ¹	<u>Rouse v. Dunkley & Bennett, P.A.</u> , 520 N.W.2d 406 (Minn. 1994). See also <u>DLH, Inc. v. Russ</u> , 566 N.W.2d 60 (Minn. 1997).	supreme court decision
Mississippi	<u>Galloway v. Travelers Ins. Co.</u> , 515 So. 2d 678 (Miss. 1987).	supreme court decision

¹ In Borg Warner Acceptance Corp. v. Shakopee Sports Ctr., Inc., 423 N.W.2d 390 (Minn. 1988), the Minnesota Supreme Court issued a similar briefing order as this Court.

Missouri	<u>Martin v. Washington</u> , 848 S.W.2d 487 (Mo. 1993); Mo. Sup. Ct. R. 74.04 (enacted 1987).	amendment to rules of procedure and subsequent supreme court decision
Montana	<u>Monroe v. Cogswell Agency</u> , 234 P.3d 79 (Mont. 2010).	supreme court decision
Nebraska	<u>Anderson v. Serv. Merch. Co., Inc.</u> , 485 N.W.2d 170 (Neb. 1992).	supreme court decision
Nevada	<u>Clauson v. Lloyd</u> , 743 P.2d 631 (Nev. 1987).	supreme court decision
New Hampshire	<u>Pennichuck Corp. v. City of Nashua</u> , 886 A.2d 1014 (N.H. 2005) (affirming opinion analyzing Celotex standard).	supreme court decision
New Jersey	<u>Brill v. Guardian Life Ins. Co. of Am.</u> , 666 A.2d 146 (N.J. 1995); N.J. Court Rules, R. 4:46-2 (amended 1996 and 1998).	supreme court decision and subsequent change to rule of procedure
New Mexico	<u>Goradia v. Hahn Co.</u> , 810 P.2d 798 (N.M. 1991). <u>But see Romero v. Philip Morris Inc.</u> , 242 P.3d 280, 287 (N.M. 2010).	supreme court decision
New York	<u>Duane v. Prescott</u> , 134 A.D.2d 560 (N.Y. App. Div. 1987). <u>But see Yun Tung Chow v. Reckitt & Colman, Inc.</u> , 950 N.E.2d 113 (N.Y. 2011) (Smith, J., concurring).	intermediate court decision
North Carolina	<u>Corum v. Univ. of N.C.</u> , 330 N.C. 761, 778, 413 S.E.2d 276, 287 (N.C. 1992).	supreme court decision
North Dakota	<u>Steinback v. State</u> , 658 N.W.2d 355 (N.D. 2003); <u>Black v. Abex Corp.</u> , 603	supreme court decision

	N.W.2d 182 (N.D. 1999).	
Ohio	<u>Dresher v. Burt</u> , 662 N.E.2d 264 (Ohio 1996); <u>Wing v. Anchor Media, Ltd. of Tex.</u> , 570 N.E. 2d 1095 (Ohio 1991).	supreme court decision
Pennsylvania	<u>Ertel v. Patriot-News Co.</u> , 674 A.2d 1038 (Penn. 1996).	supreme court decision
Rhode Island	<u>Lavoie v. N.E. Knitting, Inc.</u> , 918 A.2d 225 (R.I. 2007).	supreme court decision
South Carolina	<u>Baughman v. AT&T</u> , 410 S.E. 2d 537 (S.C. 1991).	supreme court decision
South Dakota	<u>U.S. Bank Nat'l Ass'n v. Scott</u> , 673 N.W.2d 646 (S.D. 2003).	supreme court decision
Tennessee	<u>Rye v. Women's Care Ctr. Of Memphis, MPLLC</u> , 477 S.W.3d 235 (Tenn. 2015).	supreme court decision
Utah	<u>Salo v. Tyler</u> , 417 P.3d 581 (Utah 2018).	supreme court decision
Vermont	<u>Poplaski v. Lamphere</u> , 565 A.2d 1326 (Vt. 1989). See also V.R.C.P. 56 (2012 amendments established uniformity with federal rules).	Supreme court decision and subsequent amendment to rules of procedure
Washington	<u>Young v. Key Pharm., Inc.</u> , 770 P.2d 182 (Wash. 1989).	supreme court decision
West Virginia	<u>Williams v. Precision Coil</u> , 459 S.E.2d 329 (W. Va. 1995); <u>Crain v. Lightner</u> , 364 S.E.2d 778 (W. Va. 1987).	supreme court decision
Wisconsin	<u>Yahnke v. Carson</u> , 613 N.W.2d 102 (Wis. 2000).	supreme court decision
Wyoming	<u>Harper v. Fid. & Guar. Life Ins. Co.</u> , 234	supreme court

	P.3d 1211 (Wyo. 2010); <u>Franks v. Olson</u> , 975 P.2d 588 (Wyo. 1999). <u>But see Bogdanski v. Budzik</u> , 408 P.3d 1156 (Wyo. 2018) (Hill, J., concurring in part, dissenting in part).	decision
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In sum, forty-one states have adopted the Celotex Trilogy or cited it favorably. Only Alaska,² Indiana,³ Iowa,⁴ Kentucky,⁵ Oklahoma,⁶ Oregon,⁷ Texas,⁸ and Virginia⁹ have not.

² Christensen v. Alaska Sales & Serv., 335 P.3d 514, 520-21 (Alaska 2014).

³ Jarboe v. Landmark Cmty. Newspapers, 644 N.E.2d 118, 123 (Ind. 1994) (explaining the differences between Indiana and federal standards).

⁴ Slaughter v. Des Moines Univ. Coll. of Osteopathic Med., 925 N.W.2d 793, 819 (Iowa 2019) (“In Iowa, unlike the federal courts, the burden of showing undisputed facts entitling the moving party to summary judgment rests with the moving party.”).

⁵ Steelvest, Inc. v. Scansteel Serv. Ctr., 807 S.W.2d 476, 481-82 (Ky. 1991) (explaining similarities and differences between Kentucky and federal standards).

⁶ Iglehart v. Bd. of Cty. Comm’rs, 60 P.3d 497, 501 (Ok. 2002) (“Oklahoma’s summary adjudication process is similar, but not identical, to that followed in the federal judicial system. In Oklahoma, the focus of summary process is not on facts a plaintiff might be able to prove at trial (i.e., the legal sufficiency of evidence that could be adduced), but rather on whether the evidentiary material, viewed as a whole, (a) shows undisputed facts on some or all material issues and whether such facts (b) support but a single inference that favors the movant’s quest for relief.”).

⁷ Jones v. GMC, 939 P.2d 608, 616 (Ore. 1997).

⁸ Huckabee v. Time Warner Entm’t Co., L.P., 19 S.W.3d 413, 421 (Tex. 2000) (“Although our recent adoption of the no-evidence summary judgment as an alternate procedure in Texas obviated, to some extent, the differences in summary judgment procedure between the two systems, our holding in Casso [v. Brand], 776 S.W.2d 551 (Tex. 1989) was also consistent with practical considerations, which remain valid today.”).

Thus, the FDLA urges this Court to follow suit and join the vast majority of states in adopting the Celotex Trilogy standard in its decision in this case. There is no need for this Court to refer this matter to the Civil Rules Committee or otherwise amend the rule of procedure.

II. **THE CELOTEX TRILOGY'S APPLICATION TO INSURANCE BAD FAITH CASES.**

Adoption of the Celotex Trilogy will have a substantial effect on the litigation of insurance bad faith claims in Florida. Many, if not a majority, of bad faith cases are litigated in federal court. See, e.g., Messinese v. USAA Cas. Ins. Co., 622 F. App'x 835, 836 (11th Cir. 2015); Mesa v. Clarendon Nat'l Ins. Co., 799 F.3d 1353, 1355 (11th Cir. 2015); Bell v. Geico Gen. Ins. Co., 489 F. App'x 428 (11th Cir. 2012); Aboy v. State Farm Mut. Auto. Ins. Co., 394 Fed. Appx. 655 (11th Cir. 2010); Valle v. State Farm Mut. Auto. Ins. Co., 394 F. App'x 555, 556 (11th Cir. 2010); Johnson v. Geico Gen. Ins. Co., 318 F. App'x 847 (11th Cir. 2009). Indeed, carriers often remove these cases to federal court after they are initiated. As a result, numerous cases and issues are analyzed under the Celotex Trilogy. These decisions provide sound framework and carriers rely upon them in the handling of claims.

⁹ Realstar Realtors v. Glenn, 56 Va. Cir. 179, 185 (Cir. Ct. 2001) (“The Virginia standard for granting summary judgment is different from that which applies in federal courts.”).

Nevertheless, in September 2018, in Harvey v. GEICO Gen. Ins. Co., the majority of this Court criticized federal courts' analysis in bad faith cases. 259 So. 3d 1, 7 (Fla. 2018) ("Federal case law interpreting our bad faith precedent does not always hit the mark."). Indeed, the majority discussed at length Novoa v. Geico Indem. Co., 542 F. App'x 794 (11th Cir. 2013), which was an appeal of an order granting summary judgment in favor of the insurance carrier. In a footnote, the majority recognized the differences between the two standards for summary judgment. Harvey, 259 So. 3d at 10 n.2 (Fla. 2018). Notably, the decision appears to drastically change the bad faith standard in Florida to one of negligence. See id. at 20 ("By adopting a negligence standard in all but name, ignoring the controlling conduct of the insured and the third-party claimant, and relying on unsupported assumptions, the majority incentivizes a rush to the courthouse steps by third-party claimants whenever they see what they think is an opportunity to convert an insured's inadequate policy limits into a limitless policy.") (Canady, C.J., dissenting).

Adopting the Celotex Trilogy will help bring Florida and federal cases in conformity with one another in bad faith jurisprudence. Insurance companies will not be left guessing applicable case law and precedent. Insurance companies which cannot remove to federal court will not be subject to different standards and precedent.

Adoption of the Celotex Trilogy will assist insurance companies to fulfill their good faith claims handling obligations and training its employees. It will further help to maintain a competitive and stable insurance industry in Florida, prevent lengthy litigation of meritless lawsuits and fraud, and reduce lawyer-driven bad faith setups¹⁰ to increase the value of claims and create limitless insurance policies—all of which will reduce insurance rates for Floridians and permit litigants to proceed with confidence in the judicial system in bad faith cases, no matter whether the case is filed in state or federal court.

CONCLUSION

This Court should adopt the Celotex Trilogy in this case. There is no need for this Court to refer the issue to the Rules Committee or to otherwise amend the rule.

WHEREFORE, FLORIDA DEFENSE LAWYERS ASSOCIATION respectfully requests this Court to expressly adopt the Celotex Trilogy in this case.

¹⁰ See Berges v. Infinity Ins. Co., 896 So. 2d 665, 685 (Fla. 2004) (Wells, J., dissenting); Barnard v. Geico Gen. Ins. Co., No. 5:10cv213/RS-CJK, 2011 U.S. Dist. LEXIS 56834, at *10 n.2 (N.D. Fla. May 25, 2011); Gwynne A. Young and Johanna W. Clark, The Good Faith, Bad Faith, and Ugly Set-up of Insurance Claims Settlement, 85 Fla. Bar. J. 8 (Feb. 2011); Stephen R. Schmidt, The Bad Faith Setup, 29 Torts & Ins. L.J. 705 (1994).

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/s/ Kansas R. Gooden
KANSAS R. GOODEN

CERTIFICATION OF COMPLIANCE

WE HEREBY CERTIFY that this Amicus Brief has been typed using the 14-point Times New Roman font as required by Rule 9.210(a) and 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/ Kansas R. Gooden
KANSAS R. GOODEN