

No. SC20-1490

In the Supreme Court of Florida

IN RE AMENDMENTS TO FLORIDA RULE OF
CIVIL PROCEDURE 1.510

COMMENTS OF PUBLIX SUPER MARKETS, INC.

EDWARD G. GUEDES (FBN 768103)
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
2525 Ponce de Leon Blvd., Ste. 700
Coral Gables, FL 33134
(305) 854-0800
eguedes@wsh-law.com

*Counsel for Publix Super Markets,
Inc.*

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COMMENTS OF PUBLIX SUPER MARKETS, INC. REGARDING AMENDMENTS TO FLORIDA RULE OF CIVIL PROCEDURE 1.510

Pursuant to this Court’s opinion in *In re Amendments to Florida Rule of Civil Procedure 1.510*, No. SC20-1490, --- So. 3d ---, 2020 WL 7778179 (Fla. Dec. 31, 2020) (the “Opinion”), respondent, Publix Super Markets, Inc. (“Publix”), hereby submits its comments in response to the Court’s invitation.¹

COMMENTS

Initially, Publix respectfully commends the Court for aligning the summary judgment standard in state court proceedings with the standard employed in federal court proceedings pursuant to Federal Rule of Civil Procedure 56. For too long, the disfavored status of summary judgment in state courts as a mechanism for fairly and expeditiously resolving legal disputes has resulted in (i) the unnecessary protraction of litigation (and resulting expense and consumption of judicial resources), and (ii) forum shopping by defendants who perceived that the possibility of quickly resolving cases by summary judgment was more realistic in federal court.

¹ Certainly, Publix believes the Court *could* have chosen to amend Rule 1.510 by interpretation of the existing language in the rule and receding from prior precedents. However, the Court chose a different path, and having invited comments on the proposed amended rule (including potential improvements to the language), Publix is submitting its perspective.

Additionally, considerable ambiguity in existing state court summary judgment jurisprudence was resulting in a lack of predictably in litigation outcomes.

It has been long overdue that Florida courts reject the requirement that defendants be required to prove a negative—the absence of a potential claim by the plaintiff—without a corresponding obligation on the part of plaintiffs to oppose summary judgment through submission of evidence in support of their claims. *See, e.g., Vilardebo v. Keene Corp.*, 431 So. 2d 620, 622 (Fla. 3d DCA 1983) (“However, it is now clear from *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966), and the many summary judgment cases following it, that the burden is not on a plaintiff to prove his cause upon a defendant’s motion for summary final judgment. Rather, it is for the defendant, movant, to show affirmatively that there is no genuine material issue upon the defense that he, the defendant, is urging. ... Therefore, a plaintiff’s failure to prove cannot be a proper basis for a summary final judgment for a defendant.”) (citation omitted).

While the current iteration of Rule 1.510 calls upon parties opposing summary judgment to “identify, by notice served pursuant to Florida Rule of Judicial Administration 2.516 ... any summary judgment evidence on which the adverse party relies,” Fla. R. Civ. P.

1.510(c), Florida courts have been reticent, in light of *some* existing precedents, to interpret this provision as *mandating* a plaintiff's obligation to affirmatively come forward with evidence to support each element of plaintiff's case. Sadly, this reticence has resulted in seemingly inconsistent interpretations of the rule. *Compare, e.g., Vitelli v. Hagger*, 268 So. 3d 246, 248-49 (Fla. 5th DCA 2019) ("Although the Hagers assert that Appellants had the burden of bringing forward evidence to support their [position], '[a] party opposing a motion for summary judgment has no initial obligation to submit affidavits or proof to establish its [position].' [citations omitted] The obligation to do so occurs once the movant has properly met its burden of demonstrating the *nonexistence* of a genuine issue of material fact.") (emphasis added) with *Gonzalez v. Citizens Prop. Ins. Corp.*, 273 So. 3d 1031, 1036 (Fla. 3d DCA 2019) ("When [the movant] tenders evidence sufficient to support his motion, then the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue. The movant, however, does not initially carry the burden of exhausting the evidence pro and con....") (quoting *Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780, 782-83 (Fla. 1965)). *See also Phillips v. Hartford Cas. Ins. Co.*, 373

So. 2d 415, 416 (Fla. 4th DCA 1979) (“The cases are legion to say summary judgments should be granted rarely.”).²

Consequently, as the Court’s realignment and amendment of Rule 1.510 comes to fruition, certain concerns come to the foreground. First, to what extent may (and should) the Court provide guidance to the bench and bar on the effects of implementing the “federal standard”? And second, what guidance should be provided to overcome the inherent “inertia” associated with implementing the new standard so as *not* to defeat, at least for a protracted period of time, the benefits of aligning the state and federal summary judgment standards. Publix’s comments focus primarily on guidance that may be provided by the Court through its final written opinion implementing, post-commentary, the amended rule, whereas one suggestion targets the actual language of amended Rule 1.510.

² In contrast, the U.S. Court of Appeals for the Seventh Circuit frequently (and colorfully) describes the summary judgment juncture as a “put up or shut up” moment in litigation. See, e.g., *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003) (“Summary judgment in the ‘put up or shut’ moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.”). In truth, the use of that phrase to describe summary judgment began in the Sixth Circuit just a few years after *Celotex. Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989).

A. The language of the amended rule.

With one exception, Publix does not believe Rule 1.510 requires further textual amendment than is already reflected in the appendix to the Opinion. There is abundant federal jurisprudence explaining the meaning and effect of *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). To the extent the Court believes it useful, the Court could take the opportunity of final implementation to remind the bench and bar that existing federal summary judgment jurisprudence is instructive in implementing amended Rule 1.510. However, Florida law is already fairly clear that when interpreting state court parallels to federal laws, federal jurisprudence is persuasive. See, e.g., *Patterson v. Consumer Debt Mgm't and Educ., Inc.*, 975 So. 2d 1290, 1291 (Fla. 4th DCA 2008) (“As the definition of employer is essentially identical to that in Title VII of the Federal Civil Rights Act, see 42 U.S.C. § 2000e(b), interpretations of Title VII are persuasive in interpreting the Florida Civil Rights Act.”); *Green v. Burger King Corp.*, 728 So. 2d 369, 370-71 (Fla. 3d DCA 1999) (“It is well settled that when Florida statutes are adopted from an act of Congress, the Florida Legislature also adopts the construction placed on that statute by the federal courts insofar as that construction is not inharmonious with the spirit and policy of

Florida's general legislation of the subject") (citing *Kidd v. Jacksonville*, 120 So. 556 (1929); *City of Orlando v. Fla. Public Employees Relations Comm'n*, 435 So. 2d 275 (Fla. 5th DCA 1983); *Dorr-Oliver, Inc. v. Linder Indus. Mach. Co.*, 263 So. 2d 237 (Fla. 3d DCA 1972); *Delta Rent-A-Car, Inc. v. Rihl*, 218 So. 2d 467 (Fla. 4th DCA 1969); *McKean v. Kloeppel Hotels, Inc.*, 171 So. 2d 552 (Fla. 1st DCA 1965); *Jasson D. Radding, Inc. v. Coulter*, 138 So. 2d 380 (Fla. 2d DCA 1962)).

With respect to the textual exception noted above, Publix believes it would be prudent for the Court to include in amended Rule 1.510 the following language currently found solely in Federal Rule of Civil Procedure 56(a): "The court should state on the record the reasons for granting or denying the motion." At present, Florida jurisprudence does *not* allow for interlocutory review of orders denying summary judgment. The practical consequence of that reality is that trial judges may, in isolated instances and without expressly stating as much, refuse or be reluctant to apply the federal summary judgment standard. Such an unreviewable judicial posture would effectively eviscerate this Court's determination that Florida's summary judgment standard should align with the federal

standard.³ Such trial court reluctance would also expressly defeat this Court’s determination that adoption of the federal standard furthers the objective of securing “the just, speedy, and inexpensive determination of every action.” Opinion at *2.

Including the proposed language in the rule has at least two salutary effects. First, it requires the trial court to consider carefully the implications of applying the new federal standard and to *articulate* how its application renders the trial court’s ruling appropriate. Second, establishing this articulation requirement *now* lays the foundation for a possible, future amendment of Florida Rule of Appellate Procedure 9.130 to allow for limited interlocutory review of summary judgment denials.⁴ Absent a trial court’s

³ Clearly, the more effective mechanism for avoiding the consequences of this scenario would be to amend Florida Rule of Appellate Procedure 9.130 to allow *limited* review of summary judgment denials. That, however, remains a challenge for future consideration.

⁴ See, e.g., 28 U.S.C. § 1292(b) (“When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order....”).

expression of its reasoning for denying summary judgment, no principled mechanism could evolve for *limited* review of such decisions.⁵

Accordingly, Publix respectfully requests that the Court include in the text of Rule 1.510 that the trial court is required to articulate its reasons for granting or denying summary judgment.

B. Guidance to be provided through the Court's implementing decision.

The primary issue that arises from the forthcoming adoption of an amended Rule 1.510 is the effect it will have on existing litigation. A more than plausible argument can be made that the amended rule should be applied to *all* pending litigation, regardless of when the action commenced in relation to the effective date of the rule or when the legal injury occurred giving rise to the action.

Because the summary judgment rule does not address substantive duties and rights but rather concerns itself with “the means and methods to apply and enforce” duties and rights, it is procedural in nature and should be applied to pending cases. *See, e.g., Alamo Rent-A-Car v. Mancusi*, 632 So. 2d 1352, 1358 (Fla.

⁵ Plainly, a ruling that *grants* summary judgment is already reviewable once rendered in the form of a final order or judgment.

1994); *Evans v. Firestone*, 457 So. 2d 1351, 1354 (Fla. 1984) (stating “summary judgment is a procedural mechanism”).

More recently, this Court in *Love v. State*, 286 So. 3d 177 (Fla. 2019), considered an amendment to a statute that changed the burden of proof at pretrial immunity hearings with respect to the assertion of the “stand your ground defense” and required the State to meet a “clear and convincing” standard. *Id.* at 179-80. The Court stated, “We conclude that the trial court here and the Second District in *Martin [v. State]*, --- So. 3d ---, 2018 WL 2074171 (Fla. 2d DCA 2018) correctly concluded that ... a statute that imposes a new procedural ‘burden’ is procedural rather than substantive.” *Id.* at 185. The question of whether and how to apply the new procedural rule to a pending case “‘depends on the posture of the particular case.’” *Id.* at 187 (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 275 n.29 (1994)).

More germane to the forthcoming rule amendment, this Court in *Love* made the following observation: “A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial.” *Id.* at 187-88 (quoting *Landgraf*, 511 U.S. at 275 n.29). Based on the foregoing, it would appear that

amended Rule 1.510 should apply to any ongoing litigation or pending motions for summary judgment that have not yet been decided as of the May 1, 2021 effective date of the rule.⁶

Notwithstanding the Court’s observation in *Love* regarding the effect of adoption of a new rule on appellate proceedings, in *Wilsonart, LLC v. Lopez*, --- So. 3d ---, 2020 WL 7778226 (Fla. Dec. 31, 2020), the Court expressly stated that its unwillingness to reverse the Fifth District Court of Appeal’s decision was “without prejudice to the Petitioners’ ability to seek summary judgment under Florida’s new summary judgment standard, once our rule amendment takes effect.” While Florida law would appear to be well established that a trial court has the inherent authority to revisit any interlocutory ruling—including a summary judgment ruling—prior to entry of final judgment, *see, e.g., State v. Jackson*, 306 So. 3d 936, 939 (Fla. 2020) (citing *Silvestrone v. Edell*, 721 So. 2d 1173, 1175 (Fla. 1998)), the bench and bar would likely benefit from a gentle reminder in order to potentially forestall any unseemly attempts either to delay or rush trial court proceedings simply to

⁶ To the extent a pending motion for summary judgment has been fully briefed (but not decided), the trial court should, as necessary, require supplemental briefing from the parties to address the effect of the amended rule.

avail oneself or avoid the implications of the forthcoming amendment.

Naturally, trial courts should be afforded continued latitude and discretion in controlling their dockets. *See, e.g., Toscano Condo. Ass’n, Inc. v. DDA Eng’rs, P.A.*, 274 So. 3d 487, 490-91 (Fla. 3d DCA 2019) (“A trial court has broad discretion to manage its docket, but must do so within the confines of governing statutes and rules of procedure.”) (quoting *SR Acquisitions-Florida City, LLC v. San Remo Homes at Florida City, LLC*, 78 So. 3d 636, 638 (Fla. 3d DCA 2011)). But, at some level, trial courts should remain vigilant that there may be significant ramifications from the application of the forthcoming new summary judgment standard in a given case. To that end, overly rigid enforcement of an existing pre-trial scheduling order for the purpose of avoiding those ramifications would, at a minimum, be contrary to the spirit of this Court’s ruling in *Wilsonart* and its adoption of an amended Rule 1.510. *See* Opinion at *2 (“Our goals are simply to improve the fairness and efficiency of Florida’s civil justice system, to relieve parties from the expense and burdens of meritless litigation, and to save the work of juries for cases where there are real factual disputes that need resolution.”). Confirming a litigant’s ability to renew its motion for summary judgment under the new standard in all pending cases would guide

the bench and bar and reduce needless procedural trial court disputes.

Respectfully submitted,

EDWARD G. GUEDES, ESQ.
FLORIDA BAR NO. 768103
WEISS SEROTA HELFMAN
COLE & BIERMAN, P.L.
2525 Ponce de Leon Blvd.
Suite 700
Coral Gables, FL 33134
Telephone: (305) 854-0800

*Counsel for Publix Super Markets,
Inc.*

By: /s/ Edward G. Guedes
Edward G. Guedes

CERTIFICATE OF SERVICE

I certify that a copy of these comments were filed via E-portal on March 9, 2021.

/s/ Edward G. Guedes
Edward G. Guedes