The Days of the "Scintilla" of Evidence Summary Judgment Standard in Florida Are Numbered

By Mihaela Cabulea

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Florida Rule of Civil Procedure 1.510, addressing summary judgment proceedings, is modeled after its federal counterpart, Federal Rule of Civil Procedure 56. Although the two rules are substantially similar, the state and federal case law interpreting them could not be more different. Under the federal case law, developed in the *Celotex* trilogy,[1] the summary judgment standard closely mirrors the directed verdict standard. Under the Florida case law, the "merest possibility" of genuine issues of material fact, or the "slightest doubt," or a "scintilla of evidence" opposing summary judgment, requires the denial of such a motion.[2]

The Federal Standard

The *Celotex* trilogy significantly changed the standard for summary judgment to mirror the evidentiary burdens the parties bear at trial. The *Celotex* Court emphasized that summary judgment should be "regarded not as a disfavored procedural shortcut, but rather 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.'"[3] The court interpreted rule 56(c) to mandate entry of summary judgment after the parties had adequate time for discovery and upon motion, against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and for which that party bears the burden of proof at trial.[4] Under such circumstances, there can be no genuine dispute as to any material fact because the complete failure to prove an essential element of the nonmoving party's case renders all other facts immaterial.[5] Thus, the court held the standard for granting summary judgment mirrors the one for a directed verdict.[6]

In *Anderson* and *Matsushita*, the Supreme Court further explained the burden the nonmoving party has to meet to defeat summary judgment. "[T]he 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."[7] Thus, in *Anderson* the court required the plaintiff to meet the "clear and convincing" evidentiary standard that the plaintiff would have to meet at trial on the merits, in order to defeat the defendant's motion for summary judgment. By doing this, the *Anderson* Court expanded the holding in *Celotex*, mandating courts to consider the sufficiency of the evidence in light of the burdens of proof the parties would bear at trial.[8] The *Matsushita* Court held that once the moving party carries its burden under Rule 56(c), the nonmoving party must present "specific facts showing that there is a *genuine issue for trial*."[9] The mere existence "of some metaphysical doubt as to the material facts" is not enough to oppose summary judgment.[10]

Florida's Summary Judgment Standard

The current restrictive summary judgment standard in Florida dates back to the Florida Supreme Court's 1966 decisions in *Holl v. Talcott*[11] and *Visingardi v. Tirone*.[12] In *Holl*, the court held that a party moving for summary judgment must conclusively "prov[e] a negative, i.e., the non-existence of a genuine issue of material fact" in order "to overcome all reasonable inferences which may be drawn in favor of the opposing party."[13] The court defended the need for such a conclusive showing by claiming that "the summary judgment procedure is necessarily in derogation of the constitutionally protected right to trial."[14] In *Visigardi*, the court specifically held that "the burden of a party moving for summary judgment is greater, not less than that of the plaintiff at trial. The plaintiff may prevail on the basis of a mere preponderance of the evidence. However, the party moving for summary judgment must show [c]onclusively that no material issues remain for trial."[15] Thus, the *Visingardi* Court rejected the principle that a party's burden on summary judgment should mirror that party's burden at trial.

EDITOR'S NOTE: The Florida Supreme Court recently ordered briefing on the issue of whether Florida should continue to adhere to a summary judgment standard dating back to 1966, or whether in the alternative it should adopt the standard in use in the majority of state and federal jurisdictions. This article concisely summarizes the arguments in favor of the majority rule.

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Before *Holl* and *Visigardi*, Florida courts used a summary judgment standard similar to the one articulated in the *Celotex* trilogy. For example, in *Harvey Building v. Haley*,[16] the Florida Supreme Court explained that the summary judgment standard resembled that for a directed verdict and that the movant was not required to "exclude every possible inference that the opposing party might have other evidence available to prove his case." Similarly, in *Food Fair Stores of Florida, Inc. v. Patty*,[17] the court held that summary judgment was properly granted because the plaintiff failed to carry her initial burden to sustain her complaint and "the defendant had no obligation to offer evidence to excuse itself."

Since *Holl* and *Visingardi*, however, Florida courts have often declined to recognize the similarities between summary judgment and directed verdict, and some have held that summary judgment is improper if there is the "merest possibility" of genuine issues of material fact, or the "slightest doubt," or a "scintilla of evidence" opposing summary judgment.[18] This approach unnecessarily prolongs litigation and burdens the court system.

For example, the Fourth District Court of Appeal in S*ylvester v. City of Delray Beach*[19] reversed the trial court's order granting summary judgment for the defendants, only to later affirm the trial court's grant of directed verdict for the defense, based on the same facts.[20] The court justified this contradictory outcome by pointing out that the standards were different: at the summary judgment stage the non-movant's pleadings are taken as true, whereas at the time of a directed verdict, the non-movant presented all the evidence.[21] This distinction should be abandoned as it has led to baseless litigation.[22]

Florida's Standard Is Currently Under Review

The Florida Supreme Court recently accepted jurisdiction in *Wilsonart, LLC v. Lopez*[23] to answer a certified question posed by the Fifth District Court of Appeal. In its order accepting jurisdiction, the court directed the parties to also brief the following issue:

> 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?

The appellants have already filed their initial brief. Seven amici curiae[24] have also filed briefs with the court. The unanimous position of the appellants and the amici curiae is that Florida should adopt the federal standard for summary judgment. The appellants and five of the amici curiae argued that the change does not have to be implemented by rule, because the state and federal rules are substantially similar and it is only the interpretation of those rules by case law that differs. Two amici curiae took no position as to whether the adoption of the federal standard for summary judgment should be by rule change or by opinion.

The briefs advance two kinds of reasons for urging the court to adopt the *Celotex* standard: (i) those that address the flaws and shortcomings of Florida's summary judgment standard; and (ii) those that emphasize the benefits of adopting the federal standard.

The flaws of Florida's summary judgment standard:

- it has increased litigation costs for Florida businesses and consumers by preventing resolution of meritless litigation prior to trial, even when the party opposing summary judgment could not succeed at trial as a matter of law;
- it has led to disparate results in state and federal courts on the same substantive issues;[25]
- it has provided a fertile environment for lawsuits by plaintiffs with frivolous claims, thus clogging Florida's state courts;
- it has allowed the nonmoving party to rely on sheer speculation to defeat summary judgment, even though the same type of evidence would be insufficient to support a verdict;
- it has led to forum shopping;
- it has made it impossible to shift the burden of proof to the nonmoving party by requiring the moving party to conclusively prove a negative, i.e., the non-existence of a genuine issue of material fact.

Why the *Celotex* standard is better and should be adopted:

- it is more efficient, because it forces parties to evaluate the discovery and applicable law prior to undertaking the substantial delay and expense of a trial;
- it tests the strength of the parties' cases and could prompt settlement when a nonmovant's claim survives summary judgment;
- it would conform Florida's standard with the majority of jurisdictions[26] that have adopted or cited positively to *Celotex*, thus promoting fairness and predictability in the legal system and discouraging forum shopping;
- it would help Florida achieve the policy goals behind the summary judgment rule, by promoting the just, speedy, and inexpensive resolution of cases;
- it is consistent with the right to trial by jury guaranteed by the Florida Constitution.

The appellant's and amici's position is not an isolated one. Long before taking the bench, the Honorable Thomas Logue of the Third District Court of Appeal co-authored an article with Javier Alberto Soto, advocating for the adoption of the *Celotex* trilogy standard in Florida.[27] Recently, Judge Logue authored an opinion explaining that "a party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict."[28]

In *Mobley v. Homestead Hospital, Inc.*,[29] Judge Logue wrote a concurring opinion to commend the majority for not

referencing the "scintilla" of evidence rule. He emphasized the similarities between summary judgment and directed verdict: the two are but "two sides of the same coin."[30] Both share the purpose of securing "the just, speedy, and inexpensive resolution of cases by avoiding a trial when there is not sufficient evidence for a jury to legally find for the non-movant."[31] The ultimate question at both stages is whether there is a factual issue for trial. In light of these similarities, the summary judgment standard, like that for directed verdict, should focus on whether the non-movant has presented sufficient evidence to support a finding in its favor on issues on which the non-movant bears the burden of proof at trial.[32] Judge Logue attributed the fact that the "scintilla" rule has resisted eradication and continues to distort the summary judgment standard in Florida on the lack of an opinion by the Florida Supreme Court that explicitly disavows the rule.[33] He concluded his concurring opinion with the remark that Florida's litigants, lawyers, and taxpayers would be better served by a restatement of the summary judgment motion to bring it in alignment with the best practices adopted by most jurisdictions, and to make it more analytical, predictable, uniform, and less subjective.[34]

Updating the Haley Standard

Given all the benefits of adopting the federal summary judgment standard and the many downsides of perpetuating the prevailing "scintilla of evidence" rule, Florida courts and litigants would be better served if the Florida Supreme Court were to specifically adopt the former standard and disavow the latter. The Florida Supreme Court's opinion in *Haley*[35] is still good law and provides a workable framework for articulating a summary judgment standard similar to the federal one.

The standard in *Haley* can be easily updated to fit the current version of the Florida Rule of Civil Procedure 1.510. Summary judgment is appropriate "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."[36] All doubts regarding the existence of an issue of material fact are resolved against the movant, and the evidence as well as any favorable inferences therefrom are liberally construed in favor of the non-movant.[37]

The moving party has the burden of establishing that there is no genuine issue as to any material fact.[38] If the moving party shows the absence of a genuine issue of material fact, that party is entitled to summary judgment, unless the non-movant comes forward with evidence sufficient to generate a genuine issue of material fact.[39] Thus, to defeat a motion for summary judgment supported by evidence that does not reveal any genuine issue of material fact, it is not sufficient for the nonmovant to merely assert an issue does exist.[40]

As the court noted in *Haley*, "When analyzed in this fashion the summary judgment motion may be categorized as a 'pre-trial motion for a directed verdict.' At least it has most of the attributes of a directed verdict motion."[41]

Conclusion

The fact that our Supreme Court *sua sponte* asked the parties in *Wilsonart* to brief the issue of whether Florida should adopt the federal summary judgment standard indicates that the court is seriously considering restating the summary judgment standard to bring it in line with the federal standard that has been adopted by a majority of jurisdictions. This optimism is supported by the court's recent amendment to the Florida's Evidence Code to adopt the federal *Daubert*[42] standard for the admissibility of expert testimony to create consistency between the state and federal courts.[43] Thus, it appears that the days of the "scintilla of evidence" standard are numbered and that Florida will soon join those jurisdictions that have adopted the federal summary judgment standard.

1 *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).
2 *See, e.g.*, *Piedra v. City of N. Bay Vill.*, 193 So. 3d 48, 51 (Fla. 3d DCA 2016); *Carnes v. Fender*, 936 So. 2d 11, 14 (Fla. 4th DCA 2006).
3 *Celotex*, 477 U.S. at 327 (citations omitted).
4 *Id.* at 322. On December 1, 2010, an amended version of Rule 56 of the Federal Rules of Civil Procedure became effective. As clarified in the Advisory Committee Notes:

> The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law. The amendments will not affect continuing development of the decisional law construing and applying these phrases.
>
> Subdivision (a). Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word--genuine "issue" becomes genuine "dispute." "Dispute" better reflects the focus of a summary-judgment determination.
>
> Adv. Comm. Notes to Fed. R. Civ. P. 56 (2010 Amends.)

5 477 U.S. at 323.
6 *Id.* at 322-23.
7 *Anderson*, 477 U.S. at 252.
8 *See id.* at 254-55.
9 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e))(emphasis in original).
10 *Id.* at 586.
11 191 So. 2d 40 (Fla. 1966).
12 193 So. 2d 601 (Fla. 1966).
13 *Holl*, 191 So. 2d at 43.
14 *Id.* at 48.
15 *Visingardi*, 193 So. 2d at 604.
16 175 So. 2d 780, 782-83 (Fla. 1965).
17 109 So. 2d 5, 7 (Fla. 1959).
18 *See* Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments*, 76 Fla. B.J. 20 (Feb. 2002), at *23 n.16 (citing *Keough v. Wimpy*, 585 So. 2d 302, 303 (Fla. 2d DCA 1991); *Johnson v. Circle K Corp.*, 734 So. 2d 536 (Fla. 1st DCA 1999); *Florida East Coast Ry. Co. v. Metro. Dade Cnty.*, 438 So. 2d 978 (Fla. 3d DCA 1983)); *see also Piedra*, 193 So. 3d 48; *Carnes v. Fender*, 936 So. 2d 11 (Fla. 4th DCA 2006).
19 431 So. 2d 738 (Fla. 4th DCA 1983) (*Sylvester I*).
20 *Sylvester v. City of Delray Beach*, 486 So. 2d 607 (Fla. 4th DCA 1986) (*Sylvester II*).
21 *Id.* at 608.
22 *See* Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments*, 76 Fla. B.J. 20 (Feb. 2002), at *21.
23 SC19-1336, 2019 WL 5188546 (Fla. Oct. 15, 2019).
24 The following entities have filed amici curiae briefs: the Chamber of Commerce of the United States of America and the Florida Chamber of Commerce; the Florida Justice Reform Institute and Florida Trucking Association; Florida Defense Lawyers Association; the Product Liability Advisory Council, Inc. ("PLAC"); the Federation of Defense & Corporate Counsel; Florida Health Care Association and Associated Industries of Florida; and the Business Law Section of The Florida Bar.
25 The U.S. Chamber and Florida Chamber of Commerce, and the Florida Defense Lawyers Association pointed out in their briefs that they are often confronted with disparate outcomes in bad faith cases against insurance companies when litigating in Florida state courts, which rarely if ever resolve the issue at the summary judgment stage. In contrast, federal courts applying the *Celotex* standard adequately recognize the parties' burdens at trial and grant summary judgment more often.
26 According to the amicus brief filed by the Florida Defense Lawyers Association, the following forty-one states have adopted or favorably cited the *Celotex* standard: Alabama, Arizona, Arkansas, California, Colorado,

Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, south Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

[27] *See* Logue & Soto, *supra* note 20.

[28] *Gonzalez v. Citizens Prop. Ins. Corp.*, 273 So. 3d 1031, 1035 (Fla. 3d DCA 2019), *review denied*, SC19-990, 2019 WL 6249341 (Fla. Nov. 22, 2019) (internal quotation marks and citations omitted).

[29] 45 Fla. L. Weekly D2 at *4-6 (Fla. 3d DCA Dec. 26, 2019) (Logue, J., concurring).

[30] *Id.* at *6.

[31] *Id.*

[32] *Id.*

[33] Id.

[34] *Id.*

[35] *Harvey Bldg., Inc. v. Haley*, 175 So. 2d 780 (Fla. 1965).

[36] Fla. R. Civ. P. 1.510(c).

[37] *See Haley*, 175 So. 2d at 782.

[38] *Id.*; *see also Celotex*, 477 U.S. at 323.

[39] *Haley*, 175 So. 2d at 782-83; *see also Celotex*, 477 U.S. at 324 (when a moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings to identify facts that show a genuine issue for trial).

[40] *Haley*, 175 So. 2d at 782; *compare with Anderson*, 477 U.S. at 249-52 and *Matsushita*, 475 U.S. at 586-87 & n.11 (summary judgment cannot be defeated with allegations in the complaint, or with unsupported conjecture or conclusory statements).

[41] *Haley*, 175 So. 2d at 783.

[42] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

[43] *In re Amends. to Fla. Evidence Code*, 278 So. 3d 551, 554 (Fla. 2019) ("[T]he *Daubert* amendments will create consistency between the state and federal courts with respect to the admissibility of expert testimony and will promote fairness and predictability in the legal system, as well as help lessen forum shopping.").

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EDITORIAL

By Barbara Busharis

or reliable methods. Your ophthalmologist or dentist is unlikely to be an expert in how infectious diseases spread across a population. The colleague to whom you refer estate planning issues is unlikely to be an expert on police practices or the penal system. Of course, they are entitled to their opinions — it's a free country, after all. That doesn't mean their opinions are as valuable as those of people with specialized knowledge, and it doesn't transform their opinions into evidence.

As advocates, we also know we are more effective when we admit what we don't know. Most of us have very little personal experience with events of the type we are witnessing now, but we have lots of experience with learning. And we have a head start on understanding evidence. Let's reject the grapevine of rumor and sensationalism and move forward with a "ruthless commitment to reality" in our communities.

[1] Len Niehoff, "Virus reveals we all need a class in evidence," Detroit Free Press (May 5, 2020), available at https://www.freep.com/story/opinion/contributors/2020/05/05/coronavirus-evaluating-evidence/3083768001/.

[2] *Id.*

[3] The words are those of Norman Whitfield and Barrett Strong, who wrote the song for Motown Records. See "I Heard It Through The Grapevine Lyrics," Lyrics.com, STANDS4 LLC (2020) available at https://www.lyrics.com/lyric/54727/Marvin+Gaye.

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