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IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULE OF CIVIL PROCEDURE 1.510 NO. SC20-1490

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COMMENTS OF HAWKINS PARNELL & YOUNG LLP

My firm, Hawkins Parnell & Young LLP, represents defendants in litigation before the Florida courts, including asbestos litigation. We unequivocally support the Supreme Court's decision to amend Florida Rule of Civil Procedure 1.510 to incorporate the federal summary-judgment standard. This change in Florida law will improve the efficiency of Florida courts, conserve judicial resources, avoid the unnecessary waste of jurors' time, spare litigants unnecessary expenses, and make litigation in Florida courts fairer. Thus, we urge the Court to go forward with the amendment. In addition, we request that the Court provide express guidance regarding application of the amended rule to pending cases.

Florida's existing summary-judgment standard has engendered inefficiency, waste, and unfairness in Florida's court system. As the Court discussed in its opinion promulgating the revised rule, *In re Amendments to Florida Rule of Civil Procedure 1.510,* No. SC20-1490 (Fla. Dec. 31, 2020), Florida case law on the summary-judgment

standard has required the movant to prove a negative: *i.e.,* the case law has required the movant to disprove the nonmovant's case by presenting evidence negating one or more of the essential elements of the nonmovant's claim. In the absence of such evidence, a nonmovant can survive a motion for summary judgment even if the nonmovant has no evidence to support one or more of the essential elements of its claim. As a result, a claim lacking evidentiary support can linger on the court's docket, needlessly consuming the time, effort, and money of the court and the parties in continued trial preparation—and ultimately wasting the precious time of ordinary citizens called to jury service, if the nonmovant insists on proceeding to trial. Often, moreover, a defendant is forced to a pay a settlement in a meritless case because the amount of money required to vindicate itself at trial would far exceed the amount of the settlement.

The unfairness and waste caused by Florida's existing summary-judgment standard has been well-illustrated in Florida asbestos litigation. In order to prevail against a defendant at trial, an asbestos plaintiff must prove, *inter alia,* exposure to asbestos from that defendant's product. Nevertheless, a plaintiff who lacks any evidence of exposure to a defendant's products can withstand a

motion for summary judgment by that defendant, for mere absence of exposure evidence is not a sufficient basis for summary judgment. Instead, the courts have ruled that a defendant must present evidence affirmatively proving that the plaintiff could not have been exposed to asbestos from its products, such as by proving that its products were not present at the plaintiff's worksites.

In *Rubley v. Keene Corp.,* 480 So. 2d 675 (Fla. 1st DCA 1985), for example, the First District Court of Appeal reversed a trial court's decision granting summary judgment to two defendants on the ground that the plaintiffs lacked any evidence that the defendants' products were present at the jobsites in question. The First District ruled that this mere lack of evidence was insufficient to warrant summary judgment and that the defendants instead had to "offer affirmative evidence that their products were not used at the jobsites at the time in question or that for some reason it was impossible that Mr. Rubley was exposed to their products at those sites." *Id.* at 676.

As discussed in *Rubley,* moreover, the Third District rendered essentially the same ruling in another appeal from an order granting summary judgment in an asbestos case, *Vilardebo v. Keene Corp.,* 431 So. 2d 620 (Fla. 3d DCA 1983). In *Vilardebo,* the trial court

granted summary judgment to certain defendants on the ground that the plaintiff's evidence failed to identify any of those defendants' products as a source of his asbestos exposure. 431 So. 2d at 622. The Third District reversed:

> It is apparent that this ground would be a proper one for a directed verdict at trial. 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.

Id. (citation omitted). The Third District therefore ruled that a plaintiff's lack of any evidence of asbestos exposure from a defendant's products is not a sufficient basis for summary judgment. Instead, the court considered summary judgment warranted only in those "rare instances where it affirmatively appears from the pleadings, affidavits and discovery that a plaintiff will not at trial be able to prove his case as to one or another or all of the defendants." *Id.* (citations omitted).

Asbestos plaintiffs' attorneys have relied on *Rubley* and *Vilardebo* to defeat motions for summary judgment where they lack

exposure evidence, allowing them to maintain meritless claims against many defendants who should be dismissed. As a result, those defendants are forced to continue expending time, effort, and money in cases in which they have no liability. The continued presence of such defendants in a case also wastes judicial resources by unnecessarily multiplying the number of motions and other matters that the trial court must consider.

All too often, moreover, asbestos plaintiffs' attorneys have used Florida's difficult summary-judgment standard as leverage to extract nuisance settlements from defendants against whom they have no exposure evidence. Defendants will agree to settlements that are unwarranted by the evidence simply to avoid the burden and expense of continuing to litigate a case and prepare it for trial. Furthermore, this situation encourages asbestos plaintiffs' attorneys to routinely sue large groups of defendants in their cases even though they have evidence against only some of those defendants.

This Court's adoption of the federal summary-judgment standard, as represented by *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), and other cases, will remedy the above problems and thus make litigation in Florida courts more efficient, less costly, and much

fairer. When correctly applied, moreover, the federal standard will not infringe on a party's right to a jury trial. The role of a jury is to make findings of fact, and those findings must be based on evidence. Where a plaintiff cannot produce the evidence necessary for a jury to make the required findings of fact in its favor, granting summary judgment does not invade the jury's role or infringe on the plaintiff's right to a jury trial. Furthermore, Florida courts already apply essentially the same standard represented by *Celotex Corp. v. Catrett* at the directed-verdict stage during trial. If application of Florida's existing directed-verdict standard does not infringe on the right to a jury trial, then neither does application of the same standard at the summary-judgment stage. Therefore, adoption of the federal summary-judgment standard will not infringe on the right to a jury trial or any other rights. On the contrary, it will make litigation in Florida courts much fairer, as demonstrated above. For that reason and the considerations of efficiency and conservation of resources discussed above, the Court should go forward with adoption of the amended version of Florida Rule of Civil Procedure 1.510.

We further request that the Court provide express guidance on the application of the amended rule to pending cases. Because the

rule does not prescribe duties and rights but instead merely concerns "the means and methods to apply and enforce" duties and rights, it is procedural and thus should be applied to pending cases. *Alamo Rent-A-Car v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *see also Evans v. Firestone,* 457 So. 2d 1351, 1354 (Fla. 1984) ("summary judgment is a procedural mechanism"). We ask the Court to provide express guidance on the application of the amended rule to pending cases, however, in order to avoid unnecessary litigation over the issue in every case.

The question whether to apply a new procedural to rule to a particular pending case "will generally turn on the posture of the case, not the date of the events giving rise to the case." *Love v. State,* 286 So. 3d 177, 187 (Fla. 2019). In *Love,* this Court endorsed the U.S. Supreme Court's "commonsense" approach to the application of a new procedure in a pending case, as set forth in *Landgraf v. USI Film Prods.,* 511 U.S. 244 (1994). Under this commonsense approach, the question of whether and how to apply the new procedural rule to a pending case "'depends on the posture of the particular case.'" *Love,* 286 So. 3d at 187 (Fla. 2019) (quoting *Landgraf,* 511 U.S. at 275 n.29). "'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.'" *Love,* 286 So. 3d at 187-88 (quoting *Landgraf,* 511 U.S. at 275 n.29) (emphasis removed). In *Love,* the Court applied this commonsense approach to rule that a statute altering the burden of proof in immunity hearings under Florida's "Stand Your Ground" law applied to immunity hearings occurring on or after the statute's effective date. 286 So. 3d at 188. The Court characterized the immunity hearing as the "relevant event" for application of the amended statute to pending cases. *Id.* at 180.

We submit that the relevant event for applying the amended version of Florida Rule of Civil Procedure 1.510 to a summary-judgment motion in a pending case is the trial court's consideration of the motion. Thus, the amended rule should apply to any summary-judgment motion decided on or after the amendment's effective date of May 1, 2021. The amended rule will clearly apply to any summary-judgment motion filed on or after the amended rule's effective date. In addition, the amended rule should govern where a trial court has not yet disposed of a summary-judgment motion filed

before the amended rule's effective date. Of course, the parties should be allowed an opportunity to submit supplemental briefing on applying the new standard to the evidence in the case.

We further request that the Court provide express guidance regarding application of the amended rule where a party asks a trial court to revisit a summary-judgment motion that was denied under the old rule, whether by moving for rehearing or reconsideration or by filing a renewed motion. The Court indicated in *Wilsonart v. Lopez* that the defendant in that case could file a renewed motion for summary judgment under the amended rule when it takes effect. *Wilsonart v. Lopez* that Case No. SC19-1336, Slip Op. at 6 (Dec. 31, 2020) ("Our decision is without prejudice to the Petitioners' ability to seek summary judgment under Florida's new summary judgment standard, once our rule amendment takes effect."). This would seem to imply that parties in other cases who unsuccessfully moved for summary judgment under the old rule may likewise file renewed motions for summary judgment—or motions for reconsideration or rehearing of the previous denials—when the amended rule takes effect. Furthermore, it is well-established that a trial court has the authority to reconsider interlocutory orders, including an order

denying summary judgment, at any time prior to the entry of a final judgment or final order in a case. *See, e.g., Stepp v. State Farm Fire & Cas. Co.,* 656 So. 2d 494, 497 (Fla. 1st DCA 1995); *Whitlock v. Drazinic,* 622 So. 2d 142, 143-44 (Fla. 5th DCA 1993); *Bettez v. Miami,* 510 So. 2d 1242, 1242-43 (Fla. 3d DCA 1987).

To avoid unnecessary litigation over this issue, however, we request that the Court expressly state that a trial court may entertain a renewed motion for summary judgment—or a motion for reconsideration or rehearing of a previously denied motion for summary judgment—when the amended rule takes effect. A movant who was unsuccessful under the old rule should be allowed an opportunity to show that summary judgment is warranted under the amended rule. This would give more immediate effect to the goals that the Court is seeking to further in amending Rule 1.510, *i.e.,* "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." *In re Amendments to Florida Rule of Civil Procedure 1.510,* Slip Op. at 6-7.

We thank the Court for this opportunity to comment on the amendment to Rule 1.150.

Respectfully submitted this 29th day of January, 2021.

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CERTIFICATE OF SERVICE

Pursuant to Fla. R. Jud. Admin. 2.140(b)(6) and 2.140(d), I HEREBY CERTIFY that a true and correct copy of the within and foregoing COMMENTS OF HAWKINS PARNELL & YOUNG LLP has been served on the chair of the Florida Bar's Civil Procedure Rules Committee and Bar staff liaison.

This 29th day of January, 2021.

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CERTIFICATE OF FONT AND WORD COUNT COMPLIANCE

I HEREBY CERTIFY that the within and foregoing COMMENTS OF HAWKINS PARNELL & YOUNG LLP, which is written in Bookman Old Style 14-point font, complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b). The number of words is 2,106, excluding the caption, the certificates of service and compliance, and the signature block.

This 29th day of January, 2021.

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