DIVISION D PROCEDURES FOR PLEADING, SCHEDULING AND HEARING NON-DEFAULT SUMMARY JUDGMENT MOTIONS

Introduction

Effective May 1, 2021, the Florida Supreme Court amended Rule 1.510 to harmonize Florida's summary judgment standard with the federal standard. The new standard for Summary Judgment in Florida is to "…be construed and applied in accordance with the federal summary judgment standard 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)." *In re Amends. To Fla. Rule of Civ. Pro. 1.510*, 309 So.3d 192, 196 (Fla. 2021); *see also* Fla. R. Civ. P. 1.510(a) ("The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard."). These cases are commonly referred to as the *Celotex* trilogy.[1] Under the current standard, the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part" of the rules aimed at 'the just, speedy and inexpensive determination of every action.'" Celotex, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

In adopting the federal standard, the Florida Supreme Court emphasized that it intended for the new rule to promote "efficiency" in the civil justice system. *In re Amends. to Fla. R. of Civ. P. 1.510,* 309 So.3d 192, 194 (Fla. 2020). The Court's goals in adopting the new rule were "simply to improve the fairness and efficiency of Florida's civil justice system, to relieve parties from the expense and burdens of meritless litigation." *Id*. Following the amendment, the Court has observed an increasing number of summary judgment motions filed, together with requests for hearing time. As a result, summary judgment hearings fill a significant portion of the Court's special set calendar. Unfortunately, the Court has observed some inefficiencies associated with pleading, scheduling, and hearing non-default summary judgment motions resulting in lost hearing time, continuances, and/or the need to schedule additional hearing time for the Court to consider all of the issues.

Therefore, these procedures are published to assist counsel for the moving and non-moving parties appearing in Division D for summary judgment proceedings by addressing routine issues that arise while litigating summary judgment motions and communicate the Court's expectations of counsel concerning pleading, scheduling and hearing non-default summary judgment motions that will increase efficiency. These procedures are not intended to relax or supplant the Florida Statutes, the Florida Rules of Court, local rules of Court, administrative orders, case specific court orders, the Rules Regulating the Florida Bar (including, without limitation, the Rules of Professional Conduct), or any other substantive or procedural law (collectively, the "Applicable

[1] *Celotex* trilogy refers to three United States Supreme Court opinions issued in 1986: *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). The trilogy can be summarized as follows: *Celotex* held that, the moving party does not have to disprove the non-moving party's case. If the non-moving party has zero evidence in support of its case, then summary judgment is appropriate; *Anderson* is the "scintilla of evidence" case. It said that the non-moving party's evidence has to be of a certain quality—enough that a jury could rely upon to reach a verdict in the non-moving party's favor; *Matsushita* said that, if all you have is circumstantial evidence, then the inferences arising from it must be enough to rebut the plausible inferences in the moving party's evidence.

Law, Rules and Procedure"). All Applicable Law, Rules and Procedure are intended to prevail, unless expressly stated otherwise.

Basic Black-Letter Principles

Citation to Materials Supporting/Opposing Factual Positions

All materials referenced in support of or opposition to the motion must be in the record, filed on the docket. Materials which have already been filed on the docket need not be refiled. If a deposition transcript is referenced, a complete copy must be filed on the docket which includes all exhibits.

The movant and nonmovant must cite to particular parts of materials in the record in the motion and response. Fla. R. Civ. P. 1.510(c)(1)(A). To increase the efficiency and ease in confirming whether materials are "in the record", the Court suggests that any materials the movant and nonmovant put in the record be timely filed with a "Notice of Filing Documents/Materials in Support of/Opposition to Summary Judgment" cover pleading that identifies the documents/materials being added to the record. The Court also suggests that any references to the materials in support of/opposition to the motion be in the form of a specific citation to the clerk's docket number, pdf pages, page/line of the deposition transcript, and the page number/paragraph number of pleadings and affidavits.

Facts Supporting or Opposing the Summary Judgment Motion Must be Admissible in Evidence

Affidavits. If affidavits or declarations are being used to support or oppose a motion, the rule states that they must be "made on personal knowledge, ***set out facts that would be admissible in evidence***, and show that the affiant or declarant is competent to testify on the matters stated." Fla. R. Civ. P. 1.510(c)(4) (emphasis added). The summary judgment rule expressly allows for the court to award fees and costs and hold counsel in contempt if the court finds – "after notice and a reasonable opportunity to respond" – that the affidavit or declaration was made in bad faith. Fla. R. Civ. P. 1.510(h).

Admissibility. Whether it is an affidavit or declaration, depositions, documents or other materials, the rule is explicit that "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fla. R. Civ. P. 1.510(c)(2). At the summary judgment stage, the parties need not submit evidence in a **form** admissible at trial. However, the **content or the substance** of the evidence must be admissible. *Hardy v. S.F. Phosphates Ltd.*, 185 F.3d 1076, 1082 n. 5 (10th Cir. 1999) (emphasis added). For example, a witness to a car accident could not submit his testimony at trial via affidavit because that statement would be hearsay. However, at the summary judgment stage, the affidavit is proper because its content – the eyewitness account of the affiant – is admissible. The Court frequently is required to rule on hearsay objections to statements contained in affidavits or depositions. Hearsay statements in an affidavit or deposition cannot be used to support or defeat a motion for summary judgment unless these hearsay statements are subject to an exception to the hearsay rule. *See Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 470 (3d Cir. 1989).

The Court Can Only Look at Things "In the Record"

The rule contains a provision that says "[t]he court need consider only the cited materials, …but it may consider other materials in the record." Fla. R. Civ. P. 1.510(c)(3). Whether cited or not to support or oppose a motion, rule is clear that only materials in the record can be considered by the judge. Fla. R. Civ. P. 1.510(c). This court does not consider this to be an invitation for the movant or nonmovant to sandbag at a summary judgment hearing — to make arguments based on something not in the record or conversely raising things at a hearing that were not cited in the motion or response (but are in the record) and requesting the court to consider such things. The movant and nonmovant are supposed to provide everything they are relying upon in support or opposition to the motion well in advance of the hearing based upon the timing considerations within Rule 1.510. In the event any party advocates the court consider such things not cited in the motion or response, the court will consider the objecting party's request for more time to address the new issue based upon the following language of Rule 1.510(e):

> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by rule 1.510(c), the court may:
>
> (1) ***give an opportunity to properly support or address the fact,***
> …
> (4) issue any other appropriate order. (emphasis added).

The Summary Judgment Timeline

The rule states you can move for summary judgment as soon as 20 days "from the commencement of the action." Fla. R. Civ. P. 1.510(b). Rule 1.050 states that an action "shall be deemed commenced when the Complaint or Petition is filed." Technically, a defendant can file a motion for summary judgment 20 days after the Complaint is filed, however, the Court will not hear premature motions (see below).

40 Days. At the time of filing a motion for summary judgment, the movant must serve the movant's supporting factual position as provided in subdivision (1) above." Fla. R. Civ. P. 1.51(c)(5). The "supporting factual position" is the "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials. Fla. R. Civ. P. 1.510(c)(1)(A). The rule states the moving party "must serve the motion for summary judgment at least 40 days before the time fixed for the hearing." Fla. R. Civ. P. 1.510(b).

20 Days. A non-moving party "must serve a response that includes the nonmovant's supporting factual position as provided in subdivision (1) above" at least 20 days before the time fixed for the hearing. Fla. R. Civ. P. 1.510(c)(5).

The Nonmovant Must Serve a Response

The rule expressly states that "the nonmovant ***must*** serve a response" and it "***must*** include the nonmovant's supporting factual position as provided in subdivision (1) above." Fla. R. Civ. P. 1.510(c)(5) (emphasis added).

If a party fails to properly support or address a fact as required by subdivision (c)(1), the amended rule provides discretionary options for the trial court:

> **(e) Failing to Properly Support or Address a Fact.** If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by rule 1.510(c), the court may:
>
> (1) give an opportunity to properly support or address the fact;
>
> (2) **consider the fact undisputed for purposes of the motion;**
>
> (3) grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it; or
>
> (4) issue any other appropriate order.

Fla. R. Civ. P. 1.510(e) (2021) (second emphasis added).

However, the amended summary judgment rule does not provide that summary judgment may be granted based solely on the nonmovant's failure to respond or otherwise properly support or address a fact as required by subdivision (c)(1). Rather, the rule provides that "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by rule 1.510(c), the court may, "among other things, "consider the fact undisputed for purposes of the motion," or "grant summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it[.]" Fla. R. Civ. P. 1.510(e) (2022); *see also Lloyd S. Meisels, P.A., v. Dobrofsky*, 341 So.3d 1131. 1134-36 (Fla. 4th DCA 2022) (recognizing that pursuant to rule 1.510(c)(5), the requirement of filing a response is mandatory, and if one is not filed, rule 1.510(e) "provides discretionary options for the trial court," including "grant[ing] summary judgment if the motion and supporting materials – including the facts considered undisputed – show that the movant is entitled to it").

Premature Summary Judgment Motions

The Florida Supreme Court clearly stated in the opinion adopting the amended summary judgment rule that it is "important to emphasize that, before being subjected to summary judgment because of the absence of evidence, the nonmovant must have been afforded 'adequate time for discovery.'" 317 So.3d 72, at 77 (quoting *Celotex*, 477 U.S. at 322). The "old soil" of the federal case law interpreting federal rule 56 "transplanted" into the amended state summary judgment

standard is clear that premature motions for summary judgment should not be permitted. The Fifth Circuit explained:

International Shortstop, Inc. v. Rally's Inc., 939 F.2d 1257, 1267 (5th Cir. 1991).

The amended summary judgment rule incorporates that principle in subsection (d). That subsection says:

> If a nonmovant ***shows by affidavit*** or declaration that, ***for specified reasons***, it cannot present facts essential to justify its opposition, the court may:
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

Fla. R. Civ. P. 1.510(d) (emphasis added).

The Fifth Circuit in *International Shortstop* explained that such an affidavit "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." 939 F.2d at 1267. The court reasoned that, "[i]f the additional discovery will not likely generate evidence germane to the summary judgment motion, the district court may, in its discretion, proceed to rule on the motion without further ado." *Id.* Conversely, the same court held that where discovery is sought which is in the movant's possession, that is a circumstance where the court should almost always grant the continuance:

> Oftentimes…the evidence which the non-moving party could offer to create a factual dispute is in the exclusive possession of the moving party. Where the party opposing the summary judgment informs the court that its diligent efforts to obtain evidence from the moving party have been unsuccessful, "a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course."

International Shortstop, 939 F.2d at 1267 (quoting *Sames v. Gable*, 732 F.2d 49, 51 (3d Cir. 1984)).

An appropriate affidavit or declaration should be attached to a motion to continue the hearing that explains:

- what discovery the nonmovant has not been able to conduct;
- what the nonmovant expects to discover;
- why the nonmovant has not been able to obtain the discovery so far; and
- how the anticipated discovery will defeat the summary judgment motion.

Scheduling a Summary Judgment Hearing

The procedure for scheduling a summary judgment hearing should be no different than scheduling any other routine motions or matters in Division D. See Division D Policies and Procedures Section III. The deadline for filing and hearing motion(s) for summary judgment are generally set forth in Division D's *Case Management Plan and Order and Order Setting Case for Trial and Directing Pre-Trial Compliance prior to the Pre-Trial Conference* and any subsequent orders modifying or amending the same. The Court's Judicial Assistant begins the request for summary judgment hearing time with a presumption that, in most cases, 30 minutes of hearing time will be sufficient. In light of the increasing volume of new motions for summary judgment being filed since the amendment to Rule 1.510, the Court's hearing calendar cannot accommodate counsel requesting 60-120 minutes of hearing time for each such motion hearing. As discussed above, the Court has experienced inefficiency, delays, objections and resulting continuances of substantive summary judgment hearings due to counsel's failure to comply with the express procedures of the amended rule. In an effort to complete **most** summary judgment hearings within the presumptive scheduled 30-minute hearing time without such inefficiencies, delay, objections, and continuances the Court is requiring the movant(s) and nonmovant(s) to satisfy a ***Pre-Hearing Meeting Requirement*** and file a ***Pre-Summary Judgment Hearing Stipulation*** prior to the hearing as more specifically described below.

Pre-Hearing Meeting Requirement

No later than twelve (12) days prior to the summary judgment hearing, counsel for the moving and non-moving parties must meet together to: confer regarding the summary judgment motion and response; discuss and cooperate with each other to prepare a **Pre-Summary Judgment Hearing Stipulation** to be filed with the Court no later than five (5) days prior to the summary judgment hearing with a courtesy copy emailed to the Court's Judicial Assistant; review the materials **in the record**, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials supporting the factual position(s) contained in the motion and the factual position(s) contained in the response, or that otherwise may be referred to during the hearing; and complete all other matters which may narrow the issues for the summary judgment hearing and facilitate an efficient use of the scheduled and available hearing time. **It is the responsibility of counsel for the moving party to schedule this meeting.**

Requirements of the Pre-Summary Judgment Hearing Stipulation

Counsel for the moving and non-moving parties shall prepare a **Pre-Summary Judgment Hearing Stipulation** ("Stipulation") which shall be filed with the Court **no later than five (5) days prior to the summary judgment hearing** with a courtesy copy emailed to the Court's Judicial Assistant and must contain the following:

1. Time to File a Summary Judgment Motion and Response Rule 1.510 (b) and (c)(5):

The Stipulation shall confirm whether there are any timing issues with the filing and service of the motion for summary judgment, including the movant's supporting factual position, and the

filing and service of the nonmovant's response, including the nonmovant's supporting factual position. Any timing issues shall be reduced to an appropriate written motion to be filed and heard **prior to the summary judgment hearing**.

2. Materials in the Record/the Materials Cited Fla. R. Civ. P. 1.510(c)(1)(A), (B);

The Stipulation shall confirm whether all materials, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials the moving and non-moving parties are relying on in support of their factual positions have been filed and, therefore, **are in the record**. To the extent such materials supporting the parties respective factual positions are **not** in the record, the parties shall either prepare a Consent or Agreed Order setting forth provisions to file such materials and make them part of the record to be considered by the Court or, in the event the parties are unable to resolve the issue(s), file an appropriate motion for the matter to be heard prior to or during the scheduled summary judgment hearing.

3. Admissible Evidence Fla. R. Civ. P. 1.510(c)(2) and (4):

The Stipulation shall contain a statement reflecting specific objection(s) stating legal grounds and specific reasons[2] why the material cited to support a dispute of fact cannot be presented in a form that would be admissible in evidence or why an affidavit or declaration to support or oppose a motion was not made on personal knowledge, did not set out the facts that would be admissible in evidence, and did not show that the affiant or declarant is competent to testify on the matters stated. Any such specific admissibility objections shall be reduced to an appropriate written objection or motion to be filed and heard prior to the summary judgment hearing.

4. Facts Unavailable to the Nonmovant Rule 1.510(d):

The Stipulation shall confirm whether the nonmovant will be showing by affidavit or declaration that it cannot present facts essential to justify its opposition to the summary judgment motion. Any such showing shall be reduced to an appropriate motion incorporating the nonmovant's affidavit or declaration to be filed and heard prior to the summary judgment hearing in the event the issue cannot be resolved by a consent or agreed order.

5. Failing to Grant all the Requested Relief Rule 1.510(g):

The Stipulation shall confirm whether, in the event the Court does not grant all of the relief requested by the motion, there are any material facts that are not genuinely in dispute that would be incorporated into the Pre-Trial Stipulation required by the Court's *Case Management Plan and Order and Order Setting Case for Trial and Directing Pre-Trial Compliance prior to the Pre-Trial Conference* within the "concise statement of facts which are admitted and will require no proof at trial."

[2] *See* s. 90.104(1)(a), Fla. Stat.; C. Ehrhardt, Florida Evidence §104.2 (2022 Edition).

6. Affidavit or Declaration Submitted in Bad Faith Rule 1.510(h):

The Stipulation shall confirm whether any of the parties are alleging that another party submitted an affidavit or declaration under this rule in bad faith or solely for delay, requiring the Court to retain jurisdiction following the entry of the order on the motion to hold a subsequent hearing to consider whether to order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result, or impose any other appropriate sanctions.

Proposed Orders Following Hearing

The amended rule requires that "[t]he court ***shall*** state on the record the reasons for granting or denying the motion [for summary judgment]." Fla. R. Civ. P. 1.510(a) (emphasis added). The Florida Supreme Court said that the findings have to be specific:

> To comply with this requirement, it will not be enough for the court to make a conclusory statement that there is or is not a genuine dispute as to a material fact. The court must state the reasons for is decision with enough specificity to provide useful guidance to the parties and, if necessary, to allow for appellate review. On a systemic level, we agree with the commenters who said that this requirement is critical to ensuring that Florida courts embrace the federal summary judgment standard is practice and not just on paper.

Amendment to Rule 1.510, 2021 WL 1684095, at 11.

With large hearing and trial dockets, a renewed emphasis on active case management by trial courts, and none of the full-time dedicated law clerks and support staff employed by federal courts, this Court requires the parties to prepare and submit to the Court proposed orders granting or denying the summary judgment motion following the hearing. The Court will give the movant(s) and nonmovant(s) specific instructions at the close of the hearing, but, in general, counsel for the parties should expect and be prepared to comply with the following requirements:

- file the respective proposed orders as exhibits attached to a "Notice of Filing Plaintiff's/Defendant's Proposed Order on Defendant's/Plaintiff's Motion for Summary Judgment" cover pleading;

- generally, the court will establish a reasonable deadline for filing the proposed orders within 7 days following the hearing;

- a courtesy copy of the filed respective proposed orders must be emailed to the Court's Judicial Assistant in Word format by the same deadline as the filing of the proposed orders;

- not as an additional written argument or legal briefing requirement, but to provide counsel an opportunity to plead any exceptions or objections to the form of opposing counsel's

proposed order (i.e., citing materials not in the record or citing to materials in the record, but not previously cited in the factual positions supporting the motion/response), generally, the Court will establish a reasonable deadline for filing the exceptions/objections pleading within 5 days following the filing of the proposed orders;

- a courtesy copy of any such filed exceptions/objections pleading must be emailed to the Court's Judicial Assistant by the same deadline as the filing of the same;

- the proposed orders granting/denying the summary judgment motion should contain at, a minimum the following three well-defined sections: (1) summary of facts with citations to particular parts of materials in the record supporting each fact with such specificity the Court could readily locate the portion of the materials supporting such factual positions in the record (i.e., depositions page(s)/line(s), location of materials, records, affidavits, and pleadings in the record by docket/line number together with page and paragraph number), (2) Applicable Law (i.e., general summary judgment standard caselaw, case specific caselaw relevant to any summary judgment issues or legal issues inherent to the cause of action/theory of liability), (3) Legal Conclusions (containing the application of the law to the facts, summary judgment analysis, and specific reasons for granting or denying the motion); and

- the proposed orders should also contain a section identifying, in the event the Court fails to grant all the requested relief, "any material fact – including an item of damages or other relief – that is not genuinely in dispute and treating the fact as established in the case." Fla. R. Civ. P 1.510(g). This provision allows the Court to "salvage some of the judicial effort involved in the denial of a motion for summary judgment and to streamline the litigation process by narrowing the triable issues." *D'Iorio v. Winebow, Inc.*, 68 F. Supp. 3d 334, 356 (E.D.N.Y. 2014) (citation omitted). The standard for finding a material fact undisputed is the same as the standard for summary judgment on the merits. Fed. R. Civ. P. 56, adv. comm. Notes (2010 amends.). Whether to enter an order treating an undisputed material fact as established is discretionary. *Id.* In the event the Court enters an order stating any material fact is not genuinely in dispute and treating the fact as established in the case, such established fact(s) would be incorporated into the Pre-Trial Stipulation required by the Court's *Case Management Plan and Order and Order Setting Case for Trial and Directing Pre-Trial Compliance prior to the Pre-Trial Conference* within the "concise statement of those facts which are admitted and will require no proof at trial."