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 JONES DAY AND HILL WARD HENDERSON

Jones Day and Hill Ward Henderson routinely represent defendants in complex civil litigation before Florida courts. We write to express our support for this Court's decision to amend Florida Rule of Civil Procedure 1.510 to adopt the federal summary-judgment standard. We also write to urge the Court to replace existing Rule 1.510 in its entirety with the text of Federal Rule of Civil Procedure 56, and to clearly state how the rule applies to pending actions.

As this Court recognized in its opinion amending Rule 1.510, adopting the federal summary-judgment standard will ensure that Florida's summary-judgment standard "mirrors" its directed-verdict standard, reducing inefficiency and delay in the disposition of cases. *In re Amendments to Fla. Rule of Civil Procedure 1.510*, -- So. 3d --, 2020 WL 7778179, at *1 (Fla. Dec. 31, 2020) (per curiam) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Doing so will also clarify that a movant need not necessarily submit

materials "*negating* the opponent's claim," *id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (emphasis in original)); rather, "the extent of the moving party's burden [will] var[y] depending on who bears the burden of persuasion at trial," *id.* (quoting *Salo v. Tyler*, 417 P.3d 581, 587 (Utah 2018)). And adoption of the federal standard will impose a uniform and sensible test for what constitutes a genuine factual dispute barring entry of summary judgment: Whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at *2 (quoting *Anderson*, 477 U.S. at 248). Put plainly, adoption of the federal summary-judgment standard will promote the "just, speedy, and inexpensive" resolution of every action—something that, as this Court aptly put it, the "Florida courts' interpretation of [the pre-amendment] summary-judgment rule has … failed" to achieve. *Id.* (quoting Fla. R. Civ. P. 1.010). We agree that "the federal summary judgment standard is more rational, more fair," and more efficient. *Id.*

1. To ensure that the benefits of the federal summary-judgment standard are realized in practice, we urge the Court to adopt the entire text of Federal Rule of Civil Procedure 56, replacing

Rule 1.510 in its entirety instead of attempting to implement the federal standard by tinkering with the language of Rule 1.510. Complete adoption of the federal rule would be simpler to implement. And, more fundamentally, it would cleanly and clearly convey to Florida courts that they are to apply the federal standard, as it has been interpreted by federal courts, in all of the many and unforeseeable scenarios that will come before them.

As this Court recently recognized, when the text of a newly enacted statute "is identical" to an earlier statute, a reader "would be entitled to expect that the" text "bears the same meaning." *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020); *see also, e.g.*, *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1000 (11th Cir. 2007) (William H. Pryor, J.) (interpreting the Federal Arbitration Act in a manner consistent with interpretation of the earlier-enacted state law that the FAA was "transplanted from"). That rule is time-honored: As Justice Frankfurter observed, "[i]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Jackson*, 288 So. 3d at 1182–83 (quoting Felix Frankfurter, *Some Reflections on the Reading of*

Statutes, 47 Colum. L. Rev. 527, 537 (1947)). Justice Scalia and Bryan Garner likewise explain that "when a statute uses the very same terminology as an earlier statute[,] … it is reasonable to believe that the terminology bears a consistent meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 323 (2012). The upshot is that the simplest and best way to ensure that Florida courts treat the Florida summary-judgment standard as carrying the same meaning as its federal counterpart is to use the "very same terminology" as Rule 56. *Id.*[1]

2. We also suggest that the amended rule should expressly state that it effects procedural, rather than substantive, change and applies to pending actions. As this Court has already explained, "summary judgment is a procedural mechanism," *Evans v. Firestone*, 457 So. 2d 1351, 1354 (Fla. 1984) (per curiam); the rule providing for it concerns "the means and methods to apply and enforce" duties and rights, *Alamo Rent-A-Car v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994). As a procedural rule, the summary-

[1] If the Court has concerns that whole cloth adoption of Rule 56 might upset the current practice with respect to the timing of steps in the summary-judgment process, it could easily resolve those concerns by incorporating the timing rules in current Rule 1.510 into subsection (b) or (c) of Rule 56.

judgment standard should apply to pending cases. *See id.* ("Procedural or remedial statutes … are to be applied to pending cases."). We ask the Court to say so expressly to avoid unnecessary litigation and potentially conflicting results in different courts.

This Court has adopted a commonsense approach to determining whether and how a new procedural rule applies to pending actions. *See Love v. State*, 286 So. 3d 177, 187 (Fla. 2019) (following *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)). Under this practical approach, whether a new procedural rule applies to pending cases generally "depends on the posture of the particular case." *Id.* at 188 (quoting *Landgraf*, 511 U.S. at 275 n.29). For example, a "new rule of evidence would not require an appellate remand for a new trial." *Id.* (quoting *Landgraf*, 511 U.S. at 275 n.29).

Here, the common sense cut-off is for the new rule to apply to all cases for which trial (or retrial) has not yet commenced, even if a summary-judgment motion already has been adjudicated in the case. That approach is consistent with *Wilsonart, LLC v. Lopez*, 308 So. 3d 961, 964 (Fla. 2020), in which this Court declined to alter the summary-judgment standard outside the rulemaking process,

while specifically noting that the Court was doing so "without prejudice to the [defendants'] ability to seek summary judgment under Florida's new summary judgment standard, once [it] takes effect."

More important, applying the new rule to all cases in which trial or retrial has not commenced will promote efficiency in two ways. *First*, the proposed implementation will ensure that no trial proceedings are disrupted by attempted summary-judgment proceedings under the new rule. *Second*, providing for the rule to apply to all cases in which trial has not commenced will promote efficiency by ensuring that the new summary-judgment procedures will be widely available to prevent unnecessary trials—"reliev[ing] parties [and courts] from the expense and burdens of meritless litigation, and … sav[ing] the work of juries for cases where there are real factual disputes that need resolution." *In re Amendments to Fla. Rule of Civil Procedure 1.510*, 2020 WL 7778179, at *2. We therefore request that the Court state the following in its opinion concerning the rule change:

> The amendments described in this opinion shall apply in all pending and future cases, except for those in which trial or retrial

> proceedings are ongoing or in which a verdict or judgment has been rendered and remains in place. For cases in which trial or retrial proceedings are ongoing, or in which a verdict or judgment has been rendered and remains in place, the amendments described in this opinion shall apply if and to the extent the case for any reason becomes the subject of additional trial or retrial proceedings other than those proceedings that are ongoing or have come to a verdict or judgment that remains in place.

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We thank the Court for the opportunity to comment on the amendments to Rule 1.510.

Respectfully submitted,

s/ Troy A. Fuhrman
Troy A. Fuhrman
Florida Bar No. 985211
HILL WARD HENDERSON
101 East Kennedy Boulevard
Suite 3700
Post Office Box 2231
Tampa, FL 33601
(813) 221-3900
troy.fuhrman@hwhlaw.com

Brian C. Lea
Florida Bar No. 1011371
JONES DAY
1420 Peachtree Street, N.E.,
Suite 800
Atlanta, GA 30309-3053

(404) 521-3939
blea@jonesday.com

CERTIFICATE OF SERVICE

Pursuant to Fla. R. Jud. Admin. 2.140(b)(6) and 2.140(d), I certify that a true and correct copy of the COMMENTS OF JONES DAY AND HILL WARD HENDERSON has been served on the chair of the Florida Bar's Civil Procedure Rules Committee and Bar staff liaison.

Dated: March 15, 2021 /s/ Troy A. Fuhrman

CERTIFICATE OF COMPLIANCE

I certify that these COMMENTS OF JONES DAY AND HILL WARD HENDERSON comply with the font requirements established by Florida Rule of Appellate Procedure 9.045(b) because they are written in Bookman Old Style 14-point font.

March 15, 2021 /s/ Troy A. Fuhrman