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FLORIDA'S CONTROLLING SUMMARY JUDGMENT RULE 1.510(C) CONTRASTED WITH THE COMMON LAW-CREATED RULE GROUNDED ON TWO CONFLICTED FEDERAL CASES

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INTRODUCTION

Florida litigators, who are familiar with the Florida Rules of Civil Procedure, should not be surprised that the prescribed, controlling procedural rule to be followed as well as for a Florida state trial court to adjudicate a motion for summary judgment ("MSJ") is presumptively set forth within Rule 1.510 of the modern-day Florida Rules of Civil Procedure. The current rule expressly provides, in material part, "the judgment sought must be rendered immediately 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."[1] As such, the MSJ movant must carry a greater burden than the burden which the plaintiff must carry at trial, which is to demonstrate a negative or the absence of a genuine issue of any material fact, as well as entitlement to a judgment as a matter of law.[2]

Most Florida litigators may also be aware that Florida's summary judgment procedures were not available before the early 1950s,[3] and motions for summary judgment were a relatively newfound legal

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1. FLA. R. CIV. P. 1.510(c); FED. R. CIV. P. 56(a).

2. *See* Wills v. Sears, Roebuck & Co., 351 So. 2d 29, 30 (Fla. 1977) ("[T]he burden on parties moving for summary judgment is greater than the burden which the plaintiff must carry at trial, because the movant must prove a negative— the nonexistence of a genuine issue of material fact.").

3. *See* Reyes v. Roush, 99 So. 2d 586, 592 (Fla. 2d DCA 2012) (Altenbernd, J., concurring) (citing Lomas v. W. Palm Beach Water Co., 57 So. 2d 881 (Fla. 1952) (approving the procedure for summary judgment)).

phenomenon post *Lomas v. W. Palm Beach Water Co.*, 57 So. 2d 881 (Fla. 1952).[4] Thus, Florida common law jurisprudence concerning MSJs has essentially evolved over the past sixty-five years. Accordingly, the instant article explores the requirements of Rule 1.510 concerning motions for summary judgment, including its substantially-similar federal counterpart, the origin and evolution of the Florida common law heavier burden rule on MSJs, Florida's applicable common law jurisprudence and, ironically, a prognosticated decision for the Supreme Court of Florida, if the Supreme Court was squarely faced with the common law heavier burden rule on a MSJ. *A fortiori*, it is appropriate to initiate the instant analysis with a review of the principles that dictate the methodology necessary to properly interpret and apply the Florida Rules of Civil Procedure.

INTERPRETING THE FLORIDA RULES OF CIVIL PROCEDURE AND RULE 1.510

From time to time, the Florida Supreme Court has informed the Florida judiciary and The Florida Bar that the Florida Rules of Civil Procedure are to be interpreted and applied based upon the plain meaning of their plain language and the intermediate district courts of appeal, much more often than not, have properly followed Florida Supreme Court precedents.[5] The rule controlling motions for summary judgment is no different. In this regard, Rule 1.510(a)[6] concerning the earliest point during

4. *See id.*

5. *See* Lamb v. Matetzschk, 906 So. 2d 1037, 1038 (Fla. 2005) (providing "we . . . hold that the plain language of Florida Rule of Civil Procedure 1.442 mandates that offers of settlement be differentiated between the parties, even if a party's liability is purely vicarious"). *See, e.g.*, Boca Burger, Inc. v. Forum, 912 So. 2d 561, 566 (Fla. 2005) ("We hold that the plain language of the rule [1.190(a)] grants trial courts no such discretion."); Willis Shaw Express, Inc. v. Hilyer Sod, Inc., 849 So. 2d 276, 279 (Fla. 2003) ("We therefore hold that under the plain language of rule 1.442(c)(3), an offer from multiple plaintiffs must apportion the offer among the plaintiffs."); Abreu v. State, 660 So. 2d 703, 704 (Fla. 1995) ("The plain language of § 921.25 and Rule 1.800(b) prohibits us from announcing such a rule."); Becker v. Deutsche Bank Nat'l Trust Co., 88 So. 3d 361, 362 (Fla. 4th DCA 2012) (per curiam) (rejecting appellant's interpretation of rule 1.110(b) while holding "[w]e will not read more into the rule than its plain language dictates."); BAC Home Loan Servicing, L.P. v. Stentz, 91 So. 3d 235, 236–37 (Fla. 2d DCA 2012) ("Like the Fourth District, we will not read more into rule 1.110(b) than its plain language dictates.") (citing adopting reasoning in *Becker*); U.S. Bank, N.A. v. Wanio-Moore, 111 So. 3d 941, 942 (Fla. 5th DCA 2013) (providing "a court cannot read more into rule 1.110(b) than its plain language dictates") (citing *Stentz*, *Becker*); Trucap Grantor Tr. 2010-1 v. Pelt, 84 So. 3d 369, 372 (Fla. 2d DCA 2012) ("The plain language of rule 1.110(b) clearly requires residential mortgage foreclosure complaints to include verification language and allows the verification language set forth in that rule.").

6. FLA. R. CIV. P. 1.510(a). Rule 1.510 also contains sub-parts (b), (d), (e), (f) and (g). Sub-part (b) concerns a defending party moving for summary judgment. Sub-part (d) concerns when a case is not fully adjudicated on a motion for summary judgment. Sub-part (e) concerns

litigation that a motion for summary judgment may be filed in the trial court provides, in relevant part, that a party seeking to recover upon a claim may move for a summary judgment in that party's favor at any time after the expiration of twenty days from the commencement of the action.[7] Thus, it is prudent to examine and consider the entirety of the plain meaning of the plain language presently contained within Rule 1.510(c).[8]

> The motion must state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ("summary judgment evidence") on which the movant relies. The movant must serve the motion at least 20 days before the time fixed for the hearing, and must also serve at that time a copy of any summary judgment evidence on which the movant relies that has not already been filed with the court. The adverse party must identify, by notice served pursuant to rule 1.080 at least 5 days prior to the day of the hearing, or delivered no later than 5:00 p.m. 2 business days prior to the day of the hearing, any summary judgment evidence on which the adverse party relies. To the extent that summary judgment evidence has not already been filed with the court, the adverse party must serve a copy on the movant pursuant to rule 1.080 at least 5 days prior to the day of the hearing, or by delivery to the movant's attorney no later than 5:00 p.m. 2 business days prior to the day of hearing. The Judgment sought must be rendered forthwith 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.[9]

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affidavits and other testimony. Sub-part (f) concerns the situation when the opposing party cannot present an affidavit in opposition and sub-part (g) concerns affidavits made in bad faith.

7. *See* FLA. R. CIV. P. 1.510(a); *see also* Gick v. Wells Fargo Bank, N.A., 68 So. 3d 989, 990 (Fla. 5th DCA 2011) ("Florida Rule of Civil Procedure 1.510(a) permits a plaintiff to move for summary judgment twenty days after suit has been filed, even if the defendant has not filed an answer.") (citing Brakefield v. CIT Group/Consumer Fin., Inc., 787 So. 2d 115 (Fla. 2d DCA 2001)).

8. *See* Saia Motor Freight Line, Inc. v. Reid, 930 So. 2d 598, 599 (Fla. 2006) ("In resolving the conflict, we apply the plain language of Florida Rule of Civil Procedure 1.525."); *see also* Stuart Inv. Co. v. Westinghouse Electric Corp., 11 F.R.D. 277, 280 (D. Neb. 1951), *appeal dismissed*, 192 F.2d 938 (8th Cir. 1951) (per curiam).

9. FLA. R. CIV. P. 1.510(c); *see also* Duke v. HSBC Mortg. Servs, LLC, 79 So. 3d 778, 780 (Fla. 4th DCA 2011) (quoting most of Rule 1.510(c)); Scalice v. Orlando Reg'l Healthcare, 120 So. 3d 215, 216 (Fla. 5th DCA 2013) ("Summary judgment is proper only where no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law.") (citing FLA. R. CIV. P. 1.510(c); Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)).

The foregoing summary judgment rule addresses numerous procedural requirements for presenting a Florida trial court with a motion for summary judgment, as well as the evidence that may be filed.[10] Litigators naturally tend to focus on the second half of the second to last sentence of the rule whereas the focus here is on the first half ("The judgment sought must be rendered forthwith if the pleadings and summary judgment evidence on file . . . ."). [11] It should be clear from the plain meaning of the plain language of the rule that the pleadings and evidence must be actually on file with the clerk of court at least two days prior to the date of the MSJ hearing.[12]

Similarly, the primary counterparts of the current federal rule governing motions for summary judgment are Rule 56(a) and Rule 56(c), which expressly provide:

> A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense . . . on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.[13] The court should state on the record the reasons for granting or denying the motion.[14]
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> (1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
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> (A) citing to particular parts of 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; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.
>
> (2) *Objection That a Fact Is Not Supported by Admissible Evidence.*
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> 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.

10. *See* FLA. R. CIV. P. 1.510(c).

11. *Id.*

12. *See id.*; *see also* Spatz v. Embassy Home Care, Inc., 9 So. 3d 697, 698 (Fla. 4th DCA 2009) (per curiam) ("Despite the rule's requirements, plaintiff's counsel filed no response to the motion [for summary judgment] until the day prior to the hearing.").

13. FED. R. CIV. P. 56(a).

14. *Id.*; *see* Kernel Records Oy v. Mosley, 694 F.3d 1294, 1300 (11th Cir. 2012) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.") (quoting Rule 56(a)).

> (3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.[15]

The primary Florida rule on summary judgment, 1.510(c), is substantially the same as the federal rule from which the Florida rule was derived.[16] Unlike the Florida rule, the federal rule does not contain the words "on file" but does contain the materially equivalent words "in the record." Moreover, when faced with a motion for summary judgment, a Florida state court is limited to the issues raised by the pleadings.[17] Sound reason and logic along with the plain meaning of the plain language dictate that a party's responsive pleading or answer would have had to have been actually filed with the trial court to potentially have any effect on a motion for summary judgment.[18] Conversely, a pleading that has never been filed or some phantom defensive pleading should never have any effect on a motion for summary judgment, pursuant to the plain meaning of the plain language contained within Rule 1.510(c).

THE FLORIDA MSJ HEAVIER BURDEN RULE AROSE FROM A 1958 COMMON LAW DECISION

Notwithstanding the words "on file" expressly contained within Rule1.510(c) in 1958 as well as contained in the current Rule 1.510(c), all five of Florida's intermediate appellate courts have held that a much heavier burden must be carried by the MSJ movant when the movant presents their MSJ for adjudication to the trial court when the opposing party has not filed a responsive pleading or answer. The oldest, if not seminal, decision that originated the heavier burden rule in Florida on a motion for summary judgment, wherein the movant must refute all *possible* affirmative defenses when the opposing party has not filed a responsive pleading, appears to have been *Olin's, Inc. v. Avis Rental Car Sys. of Fla., Inc.*, 105 So. 2d 497 (Fla. 3d DCA 1958) (per curiam).[19] However, because

15. FED. R. CIV. P. 56(c).

16. *See* FLA. R. CIV. P. 1.510(c).

17. *See Spatz*, 9 So. 3d at 698 (per curiam) (citing Fernandez v. Fla. Nat'l Coll., Inc., 925 So. 2d 1096, 1102 (Fla. 3d DCA 2006), *rev. denied*, 941 So. 2d 367 (Fla. 2006)).

18. *See id.*

19. Ironically, the decision was the second time the case was before the Third District, since the initial merit's decision, Olin's, Inc. v. Avis Rental Car Sys. of Florida, Inc., 102 So. 2d 159 (Fla. 3d DCA 1958) (*Olin's* I), was quashed by the Florida Supreme Court. *See* Olin's, Inc. v. Avis Rental Car Sys. of Florida, Inc., 104 So. 2d 508, 511 (Fla. 1958) (providing "so the decision here reviewed should be and it is hereby quashed."). In *Olin's* I, the district court simply provided, "The assignment under which appellant contended that it was error for the court to entertain and rule on the plaintiff's motion for summary decree before the answer was filed, we hold is without merit." *See Olin's, Inc.*, 102 So. 2d at 163.

the adoption of the heavier burden rule on summary judgment when the opposing party has not filed a responsive pleading was the material equivalent of a procedural rule, it appears only the Florida Supreme Court with its exclusive rule-making authority could lawfully adopt such a rule.[20]

Unfortunately, the *Olin's* three-judge appellate panel did not appear to consider the dictates of the then controlling Florida Rule 1.510(c) concerning motions for summary judgment, which governing rule was not addressed implicitly or otherwise in the *Olin's* opinion.[21] The *Olin's* decision expressly provided, in material part:

> When a trial court has for consideration a plaintiff's motion for summary judgment before the defendant has answered, the summary judgment should not be granted unless it is clear that an issue of material fact can not be presented. *See* MOORE'S FEDERAL PRACTICE, § 56.07, p. 2044. *Cf. Ludlow Mfg. & Sales Co. v. Textile Workers Union*, D.C. Del., 108 F. Supp. 45, 51.
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> In dealing with such a question under the equivalent Federal Rule 56, 28 U.S.C.A., this point was elaborated on in *Stuart Inv. Co. v. Westinghouse Electric Corp.*, D.C. Neb., 11 F.R.D. 277, 280, as follows:
>
> *** But although a motion by a claimant for summary judgment, served before the service of answer to his complaint may not be denied on the ground that it is necessarily and inevitably tendered too early, the general cautions against the allowance of such motions mentioned in the preceding paragraph must be kept in view. And within their teaching, a court must not grant a summary judgment upon motion therefore tendered before the service of an answer, unless in the situation presented, it appears to a certainty that no answer which the adverse party might properly serve could present a genuine issue of fact.
>
> In the present circumstances, the court cannot with assurance and certainty reach that conclusion. On the contrary, without suggestively identifying them, the court can perceive more than one issue which the defendant in the instant case might tender by answer. And it will not abruptly and rashly intercept the presentation of any such defensive matter through the entry of a summary judgment.[22]

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20. *See* Boyd v. Becker, 627 So. 2d 481, 484 (Fla. 1993) ("While the Florida Constitution grants this Court exclusive rule-making authority, this power is limited to rules governing procedural matters and does not extend to substantive rights.") (citing Art. V, § 2(a), FLA. CONST.; Timmons v. Combs, 608 So. 2d 1 (Fla. 1992); Benyard v. Wainwright, 322 So. 2d 473 (Fla. 1975)).

21. *See* Olin's, Inc. v. Avis Rental Car Sys. of Fla., Inc., 105 So. 2d 497 (Fla. 3d DCA 1958) (per curiam).

22. *Id.* at 498–99.

Other than a citation to a federal treatise, the *Olin's* court cited and presumably relied upon only two federal district court decisions, *Ludlow* and *Stuart*.[23] Thus, it is appropriate and instructive to examine the underpinnings of *Olin's* in the same order the *Olin's* court cited the two federal cases. In its consideration of plaintiff's motion for summary judgment, which was based on a collective bargaining agreement, the *Ludlow* court expressly provided, in material part:

> It therefore seems that there is involved no material issue of fact and summary judgment should be entered for the plaintiff unless, indeed, such judgment should not be entered at the present state of the record. The present motion has been filed and is being considered before answer of the defendant. It is true that in considering the granting of a summary judgment any practical doubt respecting the existence of a germane issue upon a material fact should be resolved against the party seeking the summary judgment. This is especially true when no answer has been filed. In the present case the brief of the defendant only mentions an issue of fact to be raised by the answer as that appears in the affidavits filed and as hereinbefore considered. It is true that the court has been informed by counsel that the answer, if filed, would contain a number of facts, and it is intimated that these may be in addition to the facts submitted in the affidavits. It remains true, however, that as construed by the court there now remains before this court no controverted question of fact. A suggestion that facts, while not now present, might be subsequently injected in the case, by answer or otherwise, would not seem to prevent the operation of the rule concerning summary judgments.
>
> Rule 56(c), Rules of Civil Procedure,[24] 28 U.S.C. states that the judgment should be rendered 'forthwith' if the pleadings and other stipulated matters show that there is no genuine issue. This negatives the postponement of action on the motion awaiting the subsequent production of such issue.

Summary judgment on liability alone should be entered in favor of the plaintiff, leaving the matter of damages to be subsequently

23. *See* Ludlow Mfg. & Sales Co. v. Textile Workers Union, 108 F. Supp. 45, 51 (D. Del. 1952) (noting that "in considering the granting of a summary judgment any practical doubt respecting the existence of a germane issue upon a material fact should be resolved against the party seeking the summary judgment"); *see also* Stuart Inv. Co. v. Westinghouse Elec. Corp, 11 F.R.D. 277, 279 (D. Neb. 1951) (highlighting that "[i]f conditions appropriate for the entry of a summary judgment otherwise exist, its allowance may not be intercepted by the circumstance that the judgment sought will be declaratory in its nature").

24. *See* Benton-Volvo-Metaire, Inc. v. Volvo Southwest, Inc., 479 F.2d 135, 138 n.5 (5th Cir. 1973) (citing Rule FED. R. CIV. P. 56(c); Palmer v. Chamberlin, 191 F.2d 532, 540 (5th Cir. 1951)) ("The moving party bears the burden of showing both 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.").

ascertained.[25]

The *Ludlow* court properly confined itself and did not stray from the plain meaning of the plain language of the federal rule on motions for summary judgment,[26] upon which the Florida rule was founded.[27] Of course, long before the Delaware district court decided *Ludlow*, the Supreme Court of the United States had already adopted the federal summary judgment rule for the federal courts.[28] In contrast, the *Stuart* court's adjudication of plaintiff's summary judgment motion, based on a construction contract, provided in relevant, material part:

> On this occasion, the plaintiff demands a summary judgment in its favor before any answer has been filed. It is true that Rule 56 in its present form allows the presentation by a claimant of such a motion, 'at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party.' In its original language the rule allowed the making of such a motion only after the pleading in answer to the claim had been served. But although a motion by a claimant for summary judgment, served before the service of answer to his complaint may not be denied on the ground that it is necessarily and inevitably tendered too early, the general cautions against the allowance of such motions mentioned in the preceding paragraph must be kept in view. And within their teaching, a court must not grant a summary judgment upon motion therefore tendered before the service of an answer, unless in the situation presented, it appears to a certainty that no answer which the adverse party might properly serve could present a genuine issue of fact.
>
> In the present circumstances, the court cannot with assurance and certainty reach that conclusion. On the contrary, without suggestively identifying them, the court can perceive more than one issue which the defendant in the instant case might tender by answer. And it will not abruptly and rashly intercept the presentation of any such defensive matter through the entry of a summary judgment.[29]

The *Stuart* court was not as disciplined as the *Ludlow* court and adopted a rule on summary judgment when a responsive pleading has not

25. *Ludlow Mfg. & Sales Co.*, 108 F. Supp. at 51–52.

26. *See id.*

27. *See* Ioannides v. Romagosa, 93 So. 3d 431, 433 n.1 (Fla. 4th DCA 2012) ("Federal Rule of Civil Procedure 56 served as the foundation for Florida Rule of Civil Procedure 1.510."); *see also* Coast Cities Coaches, Inc. v. Dade Cty., 178 So. 2d 703, 706 (Fla. 1965) ("The foregoing is patterned and is substantially the same as Federal Rule of Civil Procedure 56(a).").

28. *See* Jackson v. Stinnett, 102 F.3d 132, 134 (5th Cir. 1996) ("Congress delegated some of this power in 1934 by passing the Rules Enabling Act, which gave the Supreme Court the power to promulgate rules of practice and procedure for United States courts.") (citation omitted).

29. Stuart Inv. Co. v. Westinghouse Electric Corp., 11 F.R.D. 277, 280 (D. Neb. 1951), *appeal dismissed*, 192 F.2d 938 (8th Cir. 1951) (per curiam).

been filed that was not supported by the federal summary judgment rule.[30] Indeed, the Nebraska district court reached its holding in *Stuart* without citation to any authority, binding or persuasive, and improperly focused on the former federal summary judgment rule rather than the then existing federal rule.[31] Accordingly, *Olin's, Inc. v. Avis Rental Car Sys. of Florida, Inc.*, 105 So. 2d 497 (Fla. 3d DCA 1958) was conflicted insofar as the federal, not Florida, decisions the *Olin's* court cited, and relied upon without discussion or analysis by the *Olin's* court, that may have resolved the conflict between the two federal district court decisions.[32] Thus, the underpinnings of *Olin's* left the *Olin's* opinion wanting for a well-grounded, non-conflicted foundational decision to support its holding.[33]

Notably, when *Olin's* was decided in 1958, summary judgment motions were already governed by the Florida Supreme Court-adopted Rule 1.510, which seemingly raised the question of the *Olin's* court's authority to create a common law rule, evidently, not consistent with Rule 1.510.[34] Unfortunately, the *Olin's* decision did not appear to conform to the plain meaning of the plain language contained within Rule 1.510 that had been adopted by the Florida Supreme Court four years before in 1954.[35] It seems that affirmative recognition of the words "on file" expressly contained within Rule 1.510 should have informed the *Olin's* court and its progeny that a responsive pleading or answer had to have been actually filed with the clerk of court to be judicially considered upon adjudication of a motion for summary judgment.[36] Now, a brief review of the Florida common law jurisprudential landscape post *Olin's*.

30. *See* FED. R. CIV. P. 56; *see also* FLA. R. CIV. P. 1.510(c).

31. *See Stuart Inv. Co.*, 11 F.R.D. at 279.

32. *See Olin's*, 105 So. 2d at 498.

33. *See id.* at 498–99; *see also* Provenzano v. State, 739 So. 2d 1150, 1156 (Fla. 1999) (Lewis, J., concurring) (providing, in relevant part "although we must have stability in legal precedent to respect the rule of law, we must never fear confrontation with precedent when the factual [or legal] underpinnings of such precedent lack validity").

34. *See* Osceola Farms Co. v. Sanchez, 238 So. 2d 477, 481 (Fla. 4th DCA 1970) (Reed, J., concurring, in part, dissenting, in part) ("In my opinion, these decisions are inconsistent with the 1954 Rules of Civil Procedure which districts courts of appeal have no jurisdiction to amend. This is reserved to the Florida Supreme Court under Article V. of the Florida Constitution, F.S.A.").

35. *See* North Shore Hosp., Inc. v. Barber, 143 So. 2d 849, 851 (Fla. 1962) ("This court, in 1954, adopted the Rules of Civil Procedure in substantially their present form.").

36. *See* FLA. R. CIV. P. 1.510(c) (providing, in material part, "[t]he judgment sought shall be rendered immediately if the pleadings and summary judgment evidence on file[.]").

LIKE A CALIFORNIA WILDFIRE OR PANDEMIC, *OLIN'S* ENGULFED FLORIDA MSJ COMMON LAW JURISPRUDENCE

In the nearly sixty years since *Olin's, Inc. v. Avis Rental Car Sys. of Florida, Inc.*, 105 So. 2d 497 (Fla. 3d DCA 1958) was decided, at least twenty-five reported Florida appellate decisions have cited and relied upon *Olin's*; collectively, the *Olin's* progeny.[37] As may be observed, the Third District's decision in *Olin's* during 1958 quickly permeated the fabric of Florida common law MSJ jurisprudence,[38] which has since been cited and

37. *See, e.g.*, Coast Cities Coaches, Inc. v. Dade Cty., 178 So. 2d 703, 706 (Fla. 1965) (citing *Olin's* in the majority opinion for a different point of law but Justice Barns' dissenting opinion relied on *Olin's*, and also cited *Ludlow* and *Stuart*); TRG Brickell Point NE, Ltd. v. Wajsblat, 34 So. 3d 53, 55 (Fla. 3d DCA 2010) (citing and relying on *Olin's*); Beach Higher Power Corp. v. Granados, 717 So. 2d 563, 565 (Fla. 3d DCA 1998) (citing and relying on *Olin's* and *Stuart*); Lakes of the Meadow Vill. Homes Condo. Maint. Ass'n, Inc. v. Arvida/JMB Partners, L.P., 714 So. 2d 1120, 1122 (Fla. 3d DCA 1998) (citing and relying on *Olin's*); Hughes v. Home Sav. of Am., F.S.B., 675 So. 2d 649, 651 (Fla. 2d DCA 1996) (citing and relying on *Olin's*); Burch v. Kibler, 643 So. 2d 1120, 1122 (Fla. 4th DCA 1994) (citing, agreeing with reasoning and relying on *Olin's*); Rodriguez v. Tri-Square Constr., Inc., 635 So. 2d 125, 126 (Fla. 3d DCA 1994) (citing and relying on *Olin's* and *Stuart*); Gutterman-Musicant-Kreitzman, Inc. v. I.G. Realty Co., 426 So. 2d 1216, 1218 (Fla. 4th DCA 1983) (citing and relying on *Olin's*); Balzebre v. 2600 Douglas, Inc., 273 So. 2d 445, 447 (Fla. 3d DCA 1973) (citing and relying on *Olin's*); Casteel v. Malisch, 189 So. 2d 252, 254 (Fla. 3d DCA 1966) (citing and relying on *Olin's*); Mut. Emp. Trade Mart v. Silverman, 178 So. 2d 616, 618 (Fla. 3d DCA 1965) (citing and relying on *Olin's*); Jackson v. Stelco Emp. Credit Union, Ltd., 178 So. 2d 58, 60 (Fla. 2d DCA 1965) (citing and relying on *Olin's*, *Ludlow* and *Stuart*); Robinson v. City of Miami, 177 So. 2d 718, 719 (Fla. 3d DCA 1965) (citing and relying on *Olin's*); Olin's, Inc. v. Avis Rental Car Sys. of Fla., Inc., 172 So. 2d 250, 252 (Fla. 3d DCA 1965) (per curiam) (citing *Olin's* 1958 decision for applying law of the case doctrine); Olin's, Inc. v. Bd. of Cty. Comm'rs of Dade Cty., 165 So. 2d 427, 428 (Fla. 3d DCA 1964) (citing and relying on *Olin's* 1958 decision); Wallens v. Lichtenstein, 159 So. 2d 912 (Fla. 3d DCA 1964) (citing and relying on *Olin's*, *Ludlow* and *Stuart*); Settecasi v. Bd. of Pub. Instruction of Pinellas Cty., 156 So. 2d 652, 654 (Fla. 2d DCA 1963) (citing and relying on *Olin's*); A. & G. Aircraft Serv., Inc. v. Drake, 143 So. 2d 703, 704 (Fla. 2d DCA 1962) (citing and relying on *Olin's*); Olin's, Inc. v. Avis Rental Car Sys. of Fla., Inc., 141 So. 2d 609 (Fla. 3d DCA 1962) (citing *Olin's*); Edgewater Drugs, Inc. v. Jax Drugs, Inc., 138 So. 2d 525, 529 (Fla. 1st DCA 1962) (citing *Olin's* and *Ludlow*); Olin's Rent-A-Car Sys., Inc. v. Avis Rental Car Sys. of Fla., Inc., 135 So. 2d 434 (Fla. 3d DCA 1961) (citing *Olin's* 1958 decision); Olin's, Inc. v. Avis Rental Car Sys. of Fla., Inc., 131 So. 2d 20 (Fla. 3d DCA 1961) (citing *Olin's* 1958 decision); Coast Cities Coaches, Inc. v. Whyte, 130 So. 2d 121, 125 (Fla. 3d DCA 1961) (citing and relying on *Olin's* and *Stuart*); Lehew v. Larsen, 124 So. 2d 872, 873 (Fla. 1st DCA 1960) (citing and relying on *Olin's*, *Ludlow* and *Stuart* as well as referring to *Olin's* as "the leading case"); Olin's, Inc. v. Avis Rental Car Sys. of Fla., Inc., 125 So. 2d 594 (Fla. 3d DCA 1960) (citing *Olin's* in per curiam, affirmed decision); Goldstein v. Fla. Fisherman's Supply Co., 116 So. 2d 453, 454 (Fla. 3d DCA 1959) (citing and relying on *Olin's*).

38. *See* Gick v. Wells Fargo Bank, N.A., 68 So. 3d 989, 989–90 (Fla. 5th DCA 2011) ("The Gicks appeal from a final summary judgment entered in this mortgage foreclosure proceeding. We reverse. Wells Fargo Bank filed its motion for summary judgment before the Gicks answered the complaint, but failed to meet its burden to conclusively establish that the Gicks could not plead or otherwise raise a genuine issue of material fact."); *see also* Greene v. Lifestyle Builders of Orlando, Inc., 985 So. 2d 588, 589 (Fla. 5th DCA 2008) ("Because Appellee filed the motion

relied upon by virtually every Florida appellate court including the Supreme Court of Florida (for a different point of law).[39] And undergirding the rule of law that *Olin's* established, which was almost exclusively grounded upon *Stuart Inv. Co. v. Westinghouse Elec. Corp.*, 11 F.R.D. 277 (D. Neb. 1951), *appeal dismissed*, 192 F.2d 938 (8h Cir. 1951), and to a much lesser extent *Ludlow Mfg. & Sales Co. v. Textile Workers Union of Am.*, 108 F. Supp. 45 (D. Del. 1952), were these two conflicted federal trial court decisions, each rendered by a lone sitting federal district court judge.

That a trial court must not grant a summary judgment motion before the service and filing of an answer, unless it appears to a certainty that no answer which the adverse party may properly serve and file could present a genuine issue of fact, unfortunately, does not appear to be a rule of law consistent with Florida Rule 1.510(c) governing summary judgment motions. Yet, the *Olin's* decision, evidently, has also materially influenced at least eighteen other Florida appellate decisions that did not cite the *Olin's* opinion.[40] The impact and influence the *Olin's* decision has had on Florida common law jurisprudence has been no less than profound.[41] Perhaps, the Second District best exemplified the much more difficult or heavier burden rule created by the *Olin's* decision in 1958, when the court held:

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for summary judgment before the answer was due and failed to meet its burden to establish conclusively that no answer could present a material issue of fact, we conclude that summary judgment was premature.").

39. *See* Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) ("This Court has stated that the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court.") (citing Stanfill v. State, 384 So. 2d 141, 143 (Fla. 1980)).

40. *See, e.g.*, Statewide Homeowners Sol.'s, LLC v. Nationstar Mortg., LLC, 182 So. 3d 676, 678 (Fla. 4th DCA 2015); McColman v. Deutsche Bank Nat'l Tr. Co., 112 So. 3d 668, 670 (Fla. 4th DCA 2013); Zervas v. Wells Fargo Bank, N.A., 93 So. 3d 453, 454 (Fla. 2d DCA 2012); Goncharuk v. HSBC Mortg. Servs., Inc., 62 So. 3d 680, 682 (Fla. 2d DCA 2011); Gick v. Wells Fargo Bank, N.A., 68 So. 3d 989, 989–90 (Fla. 5th DCA 2011); Sandoro v. HSBC Bank, 55 So. 3d 730, 732 (Fla. 2d DCA 2011); Getman v. Tracey Constr., Inc., 62 So. 3d 1289, 1291 (Fla. 2d DCA 2011); BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques, 28 So. 3d 936, 937–38 (Fla. 2d DCA 2010); Howell v. Ed Bebb, Inc., 35 So. 3d 167, 168–69 (Fla. 2d DCA 2010); Greene v. Lifestyle Builders of Orlando, Inc., 985 So. 2d 588, 589 (Fla. 5th DCA 2008); Brakefield v. CIT Group/Consumer Fin., Inc., 787 So. 2d 115, 116 (Fla. 2d DCA 2001); West Fla. Cmty. Builders, Inc. v. Mitchell, 528 So. 2d 979, 980 (Fla. 2d DCA 1988); E.J. Assoc., Inc. v. John E. & Aliese Price Found., Inc., 515 So. 2d 763, 764 (Fla. 2d DCA 1987); Valhalla, Inc. v. Carbo, 487 So. 2d 1125, 1126 (Fla. 4th DCA 1986); Hodkin v. Ledbetter, 487 So. 2d 1214, 1217 (Fla. 4th DCA 1986), *appeal dismissed*, 509 So. 2d 1118 (Fla. 1987); Devos v. Steel Fabricators, Inc., 473 So. 2d 1320, 1322 (Fla. 4th DCA 1985); South Fla. Water Mgmt. Dist. v. Muroff, 450 So. 2d 1258, 1259–60 (Fla. 4th DCA 1984); Madison v. Hayes, 220 So. 2d 44, 46 (Fla. 4th DCA 1969).

41. *See* Evans v. Thompson, 465 F. Supp. 2d 62, 71 n.6 (D. Mass. 2006) ("This is the most profound change in our jurisprudence[.]").

> As these cases show, a plaintiff moving for summary judgment before an answer is filed must not only establish that no genuine issue of material fact is present in the record as it stands, but also that the defendant could not raise any genuine issues of material fact if the defendant was permitted to answer the complaint.[42]

Arising from two conflicted federal trial court decisions, the *Olin's* common law heavier burden rule has amazingly withstood the so-called test of time for nearly sixty years,[43] and apparently garnered legal momentum in its wake. Accordingly, as the Supreme Court of Florida would have Florida trial courts and intermediate appellate courts consider, it is time to consider the Supreme Court's applicable common law jurisprudence concerning Rule 1.510(c) that governs motions for summary judgment.

THE FLORIDA SUPREME COURT'S JURISPRUDENCE WOULD LIKELY REJECT THE MSJ HEAVIER BURDEN RULE

The only time in which it appears that the question of the heavier burden rule on summary judgment, to refute all *possible* affirmative defenses when the opposing party has not filed a responsive pleading or answer, may have reached the Supreme Court of Florida, the majority opinion of the Supreme Court could have but did not adopt the heavier burden rule and merely informed the Florida courts that such a motion should only be granted with caution.[44]

> We must consider initially a question of procedure – whether or not a summary declaratory decree can be entered on plaintiff's motion therefor prior to the defendant filing answer. This is answered in the affirmative, with the qualification that to grant same it must be clear from the pleadings, depositions, admissions and affidavits on file that there can be no genuine issue as to any material fact and the moving party is entitled to the declaration sought as a matter of law.
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> . . . .
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> The foregoing [Rule 1.510] is patterned after and is substantially the same as Federal Rule of Civil Procedure 56(a).[45] The federal decisions

42. BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques, 28 So. 3d 936, 938 (Fla. 2d DCA 2010).

43. *See* Progressive Select Ins. Co. v. Lorenzo, 49 So. 3d 272, 276 (Fla. 4th DCA 2010) ("This requirement has withstood the test of time [80 years] and remains the law today."); *see also* Gonzalez v. State, 982 So. 2d 77, 82 (Fla. 2d DCA 2008) ("However, within the law, we quite reasonably give trust to solutions [12-member juries] that have withstood the test of time[.]").

44. *See* Coast Cities Coaches, Inc. v. Dade Cty., 178 So. 2d 703, 706 (Fla. 1965).

45. *See* FLA. R. CIV. P. 1.510(c); *see also* Duke v. HSBC Mortg. Servs., LLC, 79 So. 3d 778, 780 (Fla. 4th DCA 2011) (quoting most of Rule 1.510(c)); *see also* Scalice v. Orlando Reg'l

> uniformly hold that a plaintiff need not wait for a defendant to file answer before moving for summary decree. [Internal citation omitted]. Although this court has not previously ruled on this question, the First and Third District Courts of Appeal have had the question before them and have ruled as above stated. *See Olins, Inc. v. Avis Rental Car Sys. of Florida, Inc.*, 105 So. 2d 497 (Fla. 3d DCA 1958); *Goldstein v. Florida Fisherman's Supply Co.*, 116 So. 2d 453 (Fla. 3d DCA 1960); *Lehew v. Larsen*, 124 So. 2 872 (Fla. 1st DCA 1960); *Coast Cities Coaches, Inc. v. Whyte*, 130 So. 2d 121 (Fla. 3d DCA 1961). Initially, both the federal rules and the Florida rules specifically required the filing of an answer before a motion for summary judgment or decree could be filed, but both were subsequently amended to require only the expiration of 20 days from the commencement of the action. Such a motion is granted with caution, however.[46]

Supreme Court Justice Barns' dissenting opinion observed that a question presented on the Coast Cities Coaches' appeal was whether the lower court erred in holding, *sub silentio*,[47] that no answer which Coast Cities Coaches might properly serve could present a genuine issue of material fact.[48] According to Justice Barns, however, the heavier burden rule could not have been squarely before the Florida Supreme Court in Coast Cities Coaches' appeal because the issue only appeared *sub silentio*.[49] To the extent the question of the heavier burden rule on summary judgment when the opposing party had not filed a responsive pleading or answer may have been decided by the Supreme Court majority in *Coast Cities Coaches*, the Supreme Court merely reiterated the summary

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Healthcare, 120 So. 3d 215, 216 (Fla. 5th DCA 2013) ("Summary judgment is proper only where no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law.") (citing FLA. R. CIV. P. 1.510(c); Volusia Cty.. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)).

46. *Coast Cities Coaches, Inc.*, 178 So. 2d at 705–06.

47. *See Sub Silentio*, BLACK'S LAW DICTIONARY 1428 (6th ed. 1991) ("Under silence; without any notice being taken.").

48. *See Coast Cities Coaches, Inc.*, 178 So. 2d at 712 (Barns, J., dissenting) (stating that although the heavier burden rule on summary judgment was directly addressed by Justice Barns' dissenting opinion, of course, a dissenting opinion does not represent the law of Florida; moreover, the dissenting opinion relied upon and only cited the conflicted opinion in Olin's, Inc. v. Avis Rental Car Sys. of Florida, Inc., 105 So. 2d 497 (Fla. 3d DCA 1958); Ludlow Mfg. & Sales Co. v. Textile Workers Union, 108 F. Supp. 45 (D. Del. 1952) (holding to the contrary); and Stuart Inv. Co. v. Westinghouse Electric Corp., 11 F.R.D. 277 (D. Neb. 1951) (holding as such without authoritative or other legal citation)).

49. *See* Coast Cities Coaches, Inc. v. Dade Cty., 178 So. 2d 703 (Fla. 1965); *see also* FLA. R. CIV. P. 1.510(c); *see also* Duke v. HSBC Mortg. Servs., LLC, 79 So. 3d 778, 780 (Fla. 4th DCA 2011) (quoting most of Rule 1.510(c)); *see also* Scalice v. Orlando Reg'l Healthcare, 120 So. 3d 215, 216 (Fla. 5th DCA 2013) ("Summary judgment is proper only where no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law.") (citing FLA. R. CIV. P. 1.510(c); Volusia Cty.. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000)).

judgment standard then contained and codified within Rule 1.510(c); to wit: "it must be clear from the pleadings, depositions, admissions and affidavits on file that there can be no genuine issue as to any material fact and the moving party is entitled to the declaration sought as a matter of law."[50] The Florida Supreme Court expressly stated and relied on the pleadings and summary judgment evidence "on file."[51]

Notably, in the six decades since *Olin's, Inc. v. Avis Rental Car Sys. of Florida, Inc.*, 105 So. 2d 497 (Fla. 3d DCA 1958) was decided, the Florida Supreme Court has never adopted an amendment to Florida Rule of Civil Procedure 1.510 that may have codified the common law heavier burden rule, that has been repeatedly applied when the adverse party has not filed a responsive pleading or answer. It certainly would be reasonable to presume that the Florida Supreme Court could have amended Rule 1.510(c) to incorporate the heavier burden rule, given its exclusive rule-making authority.[52] Yet, during the six decades that have followed since *Olin's*, the Supreme Court has adopted numerous other amendments to the Rules of Civil Procedure including Rule 1.510 since the modern-day rules were first adopted in 1954.[53] Indeed, thirty years ago the Supreme Court reached the point of having recognized that there is no requirement that a motion for summary judgment under rule 1.510 be preceded by an answer.[54]

Accordingly, a summary judgment movant should not be compelled to become clairvoyant to somehow envision what an opposing party's

50. *Coast Cities Coaches, Inc.*, 178 So. 2d at 706; *see* Central Inc., Inc. v. Old S. Golf Util. Corp., 197 So. 2d 17, 19 (Fla. 4th DCA 1967) (quoting the former rule of 1.510, it expressly provided, in relevant part, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, 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").

51. *See Central Inc., Inc.*, 197 So. 2d at 19 (explaining the Supreme Court relied on pleadings and the summary evidence on file to show if there was a genuine issue as to material fact and the party moving for summary judgment was entitled to the decision).

52. *See* FLA. R. CIV. P. 1.510 (containing sub-parts (b), (d), (e), (f) and (g). Sub-part (b) concerns a defending party moving for summary judgment. Sub-part (d) concerns when a case is not fully adjudicated on a motion for summary judgment. Sub-part (e) concerns affidavits and other testimony. Sub-part (f) concerns the situation when the opposing party cannot present an affidavit in opposition and sub-part (g) concerns affidavits made in bad faith).

53. *See* Toler v. Bank of Am. Nat'l Ass'n, 78 So. 3d 699, 702–03 (Fla. 4th DCA 2012) ("In 1954 . . . the Florida Supreme Court adopted the modern rules of civil procedure[.]"); *see also* FLA. R. CIV. P. 1.510 (showing the Committee Notes amendments to rule 1.510 adopted in 1976, 1992, 2005, and 2012).

54. *See* Coral Ridge Prop.'s, Inc. v. Playa Del Mar Ass'n, Inc., 505 So. 2d 414, 417 (Fla. 1987) (providing, in relevant part, "there is no requirement that a motion for summary judgment under rule 1.510(b) be preceded by an answer[.]").

responsive pleading or answer may raise in some future pleading, not yet in the record of the cause.[55] The MSJ heavier burden rule that has evolved into the "plaintiff must essentially anticipate the content of the defendant's answer"[56] does not appear supported by Rule 1.510 that governs motions for summary judgment. It should further be noted that no other Florida Rule of Civil Procedure has ever been construed or interpreted in such manner to require the MSJ movant to prognosticate the contents of a possible future filing by his or her adversary. To the contrary, the Florida Rules of Civil Procedure as well as the Florida Rules of Appellate Procedure have always been concerned with matters and issues that are in the record of the cause of action and not with court papers that have never been filed in the action.[57] Matters that are dehors the record may not be considered on appeal.[58] Likewise, an unfiled pleading or phantom answer should not be considered by a trial court, or a Florida intermediate appellate court upon *de novo* review of an order entered on a motion for summary judgment. Citation to legal authority hardly seems necessary for the legal proposition that, in Florida state courts, summary judgment motions are governed by the plain meaning of the plain language contained within controlling Rule 1.510 of the Florida Rules of Civil Procedure.[59]

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55. *See* Dyson v. Dyson, 483 So. 2d 546, 547 (Fla. 1st DCA 1986) ("The pleadings must be sufficiently clear and direct to make it unnecessary for the respondent or the court to be clairvoyant in ascertaining the nature of the claim [or defense].").

56. McColman v. Deutsche Bank Nat'l Trust Co., 112 So. 3d 668, 670 (Fla. 4th DCA 2013) (quoting Goncharuk v. HSBC Mortg. Servs., Inc., 62 So. 3d 680, 682 (Fla. 2d DCA 2011)).

57. *See* In re Guardianship of Read, 555 So. 2d 869, 871 (Fla. 2d DCA 1989) ("Where there is no record of the testimony of witnesses or of evidentiary rulings and where a statement of the record has not been prepared, a judgment which is not fundamentally erroneous on its face must be affirmed."); *see also* Novom v. Novom, 513 So. 2d 789, 790 (Fla. 3d DCA 1987) (per curiam) ("We affirm the final judgment under review because, simply stated, there is no record of the final hearing in this cause . . . final judgment does not on its face reveal an abuse of discretion in these awards.").

58. *See, e.g.,* Zeltzer v. Zeltzer, 458 So. 2d 414, 416 (Fla. 4th DCA 1984) (Barkett, J., concurring) ("We obviously cannot consider these new circumstances since they are dehors the record."); *see also* McLean v. Bellamy, 437 So. 2d 737, 743 n.6 (Fla. 1st DCA 1983) ("Nowhere in the record of this case is there any indication of the machine votes cast in the primary and we are, of course, not at liberty to venture dehors the record."); State ex rel. Saunders v. Boyer, 166 So. 2d 694, 695 (Fla. 2d DCA 1964) ("We cannot consider matters dehors the record.").

59. *See, e.g.,* Jewett v. Letsinger, 655 So. 2d 1210, 1212 (Fla. 4th DCA 1995) ("Summary judgments are governed by rule 1.510(c) of the Florida Rules of Civil Procedure."); Ribak v. Centex Real Est. Corp., 702 So. 2d 1316, 1317 (Fla. 4th DCA 1997) ("Rule 1.510(c) of the Florida Rules of Civil Procedure governs the use of summary judgments."); Duke v. HSBC Mortg. Servs., LLC, 79 So. 3d 778, 780 (Fla. 4th DCA 2011) ("Florida Rule of Civil Procedure 1.510 governs summary judgment motions and proceedings."); Hatcher v. Roberts, 478 So. 2d 1083, 1087 (Fla. 1st DCA 1985) ("Summary judgments are governed by the provisions of Rule 1.510 RCP."); Spatz v. Embassy Home Care, Inc., 9 So. 3d 697, 698 (Fla. 4th DCA 2009) (per curiam) ("Florida Rule of Civil Procedure 1.510, which governs motions for summary

CONCLUSION

Perhaps, if the Florida common law-created heavier burden rule on motions for summary judgment when the adverse party has not filed a responsive pleading or answer had had a well-grounded pedigree, instead of *Stuart Inv. Co. v. Westinghouse Electric Corp.* (per curiam), the common law rule may have withstood objective legal scrutiny. The other decision cited by the *Olin's* court, *Ludlow Mfg. & Sales Co. v. Textile Workers Union*, reached a conclusion directly contrary to the *Olin's* court, yet the *Olin's* court cited *Ludlow* as if *Ludlow* supported the court's holding. It seems reasonably clear that a trial court should never, *sua sponte*, raise a phantom issue not raised in a party's filed pleading or a pleading contained in the record as the Nebraska federal district court improperly did in *Stuart* during 1951 to defeat that motion for summary judgment because a court is not an adversarial party in the litigation but, instead, is expected to be a neutral arbiter.[60] A court should not advance or defeat the interests of any party in litigation that the court is presiding over because doing so would unfairly favor one party over the other.

Given the plain meaning of its plain language, the controlling Florida summary judgment rule 1.510(c) is only concerned with the pleadings and summary judgment evidence *on file*, presumptively, with the clerk's office.[61] Examined with the bright, revealing lens of Rule 1.510(c), the Florida common law-created heavier burden rule on motions for summary judgment when the adverse party has not filed a responsive pleading or answer appears destined to be cast into the forgotten jurisprudential abyss as a resilient yet fatally-flawed common law rule; seemingly, a well-intentioned rule, albeit, a wayward relic of the past.[62]

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judgment[.]").

60. *See* Holley v. State, 48 So. 3d 916, 920 (Fla. 4th DCA 2010) ("The role of a trial court is to be a neutral arbiter and to rule on issues [properly] presented to it.").

61. *See* FLA. R. CIV. P. 1.510(c); *see also* Martin v. Morphonios, 580 So. 2d 196, 196 (Fla. 3d DCA 1991) ("These documents are presumptively on file with the clerk of the trial court.").

62. *See, e.g.*, Reyes ex rel. Barcenas v. Roush, 99 So. 3d 586, 592 (Fla. 2d DCA 2012) (Altenbernd, J., concurring) ("This rule is a relic of the past."); Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296, 307 (Fla. 4th DCA 2005) (Farmer, J., concurring) ("Nevertheless our rules for reading them are filled with relics of the English monarchy[.]"); U.S. v. Larios, 403 Fed. Appx. 437, 441 (11th Cir. 2010) ("As the Supreme Court has yet to cast *Almendarez-Torres* into the forgotten jurisprudential abyss, it continues to have a pulse . . . . We will join the funeral procession only after the Supreme Court has decided to bury it.").