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Summary Judgment in Florida: The Road Less Traveled

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Two roads diverged in a wood

and Florida chose the one less traveled by

and that has made all the difference[1]

OVERVIEW

At present, winning a motion for summary judgment[2] in Florida is extremely difficult to achieve, and the tool of summary judgment is not being used in a manner that is consistent with the intent behind the enactment of the statute[3] that created it. As a result, civil litigants must

1. *See* ROBERT FROST, *The Road Not Taken*, in MOUNTAIN INTERVAL (Henry Holt, 1916).
2. FLA. R. CIV. P. 1.510(c) (2005).
3. *See* 1931 Fla. Laws 60.

seek summary judgment with little expectation of success. Compared to the use of the comparable procedural rule in federal courts,[4] summary judgment in Florida appears to be, at best, a game of chance,[5] and, at worst, merely a formality for practitioners to use to avoid allegations of malpractice. This author's experience in civil litigation mirrors the frustration experienced by members of the bar, as well as the judiciary, that summary judgment is extraordinarily difficult to achieve, even when it is, likely to be reversed on appeal. This article is the result of one lawyer's exploration into the precarious and difficult situation surrounding summary judgment in Florida.

Unlike the federal court system and the majority of States, Florida has not traveled down the new path to a more efficient and better articulated summary procedure.[6] In 1986, the United States Supreme Court decided a trilogy of cases which significantly modified the then-existing standard for evaluating summary judgment in federal courts.[7] With these cases, the Court linked the burden of proof for a party in a summary judgment proceeding with that party's burden at trial.[8] By doing so, the Court delineated a procedural device that previously had not served its proper function. Equally as important, the Supreme Court articulated a clear modern standard for federal courts to decide (or "evaluate") motions for summary judgment.[9]

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4. *See* FED. R. CIV. P. 56 ("the Federal Rule").

5. *See generally* J.L. Frazee, *Origin and Operation of the Summary Judgment Rule*, 3 FLA. ST. ASS'N L. J. 6 (1930).

6. As of 2002, thirty-five states had adopted the *Celotex* trilogy of cases which serve as the bedrock of the current Federal Summary Judgment Standard. Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments*, 76 FLA. B.J. 20 (2002). A complete breakdown of the states is included in appendix A of the Logue and Soto article.

7. Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 FLA. ST. U. L. REV. 689, 690 (1996) (*citing* Celotex Corp. v. Catrett, 477 U.S. 317 (1986), *cert. denied*, 484 U.S. 1066 (1988); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)).

8. Gregory, *supra* note 7, at 690-91.

> Of particular note, the Court held that the governing standard of persuasion applied at the summary judgment stage; this meant that the plaintiff was typically required to proffer affirmative evidence to defeat a motion for summary judgment, while the defendant was required to adduce little proof in support of its motion. The Court equated its role in ruling on a motion for summary judgment with its role in ruling on a directed verdict and suggested that a court could properly use the summary procedure to assess the plaintiff's chances of prevailing at trial. The Court's decisions had the effect of requiring a plaintiff to try to her case in response to a motion for summary judgment, while they afforded courts a much broader role in assessing the merits of a plaintiff's case at the summary judgment stage.

Id.

9. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322-25 (1986).

The effectiveness of the Federal Rule following *Celotex* should encourage the Florida Supreme Court to revisit the current Florida standard,[10] as there is a strong argument for the application of *Celotex*.[11] Regardless of whether the Florida Supreme Court agrees with such an argument, it is obvious that the Florida standard needs to be updated. A brief review of the case law reveals fragmented and often contradictory methods in analyzing the summary judgment rule in Florida. In fact, one would be hard-pressed to attach a single analytical framework whereby summary judgment is evaluated on a consistent basis in Florida courts. The negative implications are many and include, *inter alia*, a poor use of judicial resources, clogged dockets, a delay in access to the courts for litigants with valid cases, *Erie* Doctrine conflicts, and an inconsistent application of the summary judgment procedure in the District Courts.

This author is optimistic that the Florida Supreme Court will reexamine the precedent previously established in *Holl v. Talcot*[12] in order to define a comprehensive analysis from which the district and trial courts can achieve clarity on how to interpret the language of Florida's summary judgment rule properly. By doing so, the Court will help rectify much of the negative impact and confusion which surrounds summary judgment.

This article will first explore the origins of summary judgment in the Florida courts. Next, the *Holl v. Talcot* standard (the "*Holl* standard") shall be discussed. The discussion then turns to arguments in favor of maintaining the *Holl* standard, including the great costs which arise by the application of the standard, and ultimately, a discussion debunking those arguments. Finally, partial summary judgment[13] shall be discussed, introducing its potential to assist the practitioner in achieving, in part, progress towards a more predictable and useful summary judgment process.

The overriding conclusions of this project are as follows: 1) the Florida Supreme Court should revisit and modify the existing summary judgment standard;[14] 2) the Florida Supreme Court should bring the standard inline with that of most states and the federal courts; and 3) even if the *Celotex* standard is not adopted, the Florida Supreme Court should

10. Gregory, *supra* note 7, at 691. Modern summary judgment was used to deal with rising costs and overcrowded dockets. *Id.*

11. Logue & Soto, *supra* note 6, at 28.

12. *See generally* Holl v. Talcott, 191 So. 2d 40 (Fla. 1966).

13. FLA. R. CIV. P. 1.510(d) (2005).

14. The argument to revisit the standard is not new. *See e.g.*, Logue & Soto, *supra* note 6, at 20; Charles H. Damsel, Jr., *Summary Judgment: Obsolete or a Useful Tool?*, 51 Fla. B.J. 535, 535 (1977).

articulate a clear analytical standard so that the district courts will have a consistent framework upon which to apply a factual analysis, thus enabling trial courts to make decisions that are not likely to be overturned on appeal.[15] By taking these steps, the courts may assure that civil practitioners will have a reasonable predictability while conducting civil litigation; and summary judgment will become an effective procedural tool—one which can be used to weed-out cases that cannot prevail at trial.

In the meantime, practitioners are not helpless to improve their chances of obtaining summary judgment. Through the strategic use of well-planned partial summary judgment motions, lawyers can provide trial court judges with the opportunity to grant such motions without the added concern for immediate appealability. These techniques may allow trial judges to cull needless issues from trial, or possibly stop cases that might not otherwise prevail at trial from being heard.

I. ORIGINS OF SUMMARY JUDGMENT IN FLORIDA

Florida Rule of Civil Procedure 1.150, the statute governing summary judgment, exists as a procedural mechanism to provide for the termination of cases without trial where it is evident there is no basis to continue. The summary judgment procedure has its roots in the common law where the court utilized its power to strike sham pleadings.[16] The summary procedural rule was first embodied in the United States by the Virginia Code in 1732.[17] The rule was first codified in England in the form of Summary Procedure on Bills of Exchange Act.[18] The Act was so successful that, in 1873, it was expanded to "all actions 'for liquidated demands' and for the 'recovery of lands' in actions between Landlords and Tenants."[19]

From a reading of discussions of early summary judgment proceedings, it is clear that the device was designed as a simple procedural

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15. Damsel, *supra* note 14, at 536. Such a framework must include thorough discussion of key concepts in the seemingly simplistic summary judgment standard such as: what is a "genuine issue," "material fact," and what burdens must the moving and non-moving parties meet in order to prevail under the motion. *Id.* Moreover, in light of the differences of the complexities in ascertaining "genuine issues" in cases of negligence relative to other civil actions, the Court should articulate any modifications to its Standard applicable to negligence cases. *Id.*

16. Frazee, *supra* note 5, at 6.

17. Damsel, *supra* note 14, at 535. *But see* Frazee, *supra* note 5, at 6 (indicating Virginia's introduction of summary judgment as later in time: 1849).

18. Frazee, *supra* note 5, at 6 (citing 18 and 19 Vict. C. 67). The act was designed to reduce frivolous and fictitious defenses in the collection of debts. *Id.*

19. *Id.* (quoting the English Judiciary Act of 1873).

means for plaintiffs to prohibit the use of frivolous defenses.[20] Also, summary adjudication provided a means to expedite recovery.[21]

As far back as 1930, the Florida Law Journal described the need for the procedural tool in Florida.[22] Each of the Journal's observations, paraphrased or quoted below, appear as relevant today as they must have been at the time of their drafting: the reluctance of courts to enforce judgments against defendants made the atmosphere ripe for the evasion of obligations;[23] the observation that "[t]he Courts have become the playthings of unfair litigants;"[24] "[a]n action at common law has become a test of wits and skill, and to a great extent a game of chance, so that many honest business men [Plaintiffs] had rather lose their stake than go into a Court of law to assert their rights."[25] "It is the duty of the Bar to put an end to this state of affairs which is bringing the bar and the courts into disrepute than all other factors combined."[26] The introduction of a Summary Judgment procedural device will remove "the distrust with which the people now regard" the courts and lawyers generally.[27]

Florida's first summary procedural device was adopted in 1930 as the Decree on Bill and Answer.[28] The statute was designed, much like those described above, as a mechanism for plaintiff debt-holders to avoid the stalling tactics of delinquent debtors.[29] By the 1950s, the summary procedure had firmly established its place in both the common and equity procedures of the state.[30]

At that time, the Florida Supreme Court addressed the role of summary judgment and its relevance:

> Forceful argument is made that appellant has been denied a trial and the case disposed of on affidavits. It is basic and fundamental that a

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20. *Id.* at 7.
21. Damsel, *supra* note 14, at 535.
22. *See* Frazee, *supra* note 5.
23. *Id.* at 7.
24. *Id.*
25. *Id.*
26. *Id.*
27. Frazee, *supra* note 5, at 7. Unfortunately, it appears as if the public's perception of lawyers has changed little over the past seventy years.
28. 1931 Fla. Laws 60.
29. Decree on Bill and Answer.
> The plaintiff may, within ten days after the filing of the answer, or within such time as the court may allow, move for a decree on bill and answer, and if the motion be overruled the plaintiff shall have the right to proceed to trial, notwithstanding the motion or order thereon . . . .

Id.
30. *See, e.g.*, Boyer v. Dye, 51 So. 2d 727 (Fla. 1951).

> right to a trial presupposes a real and genuine issue. If Equity Rule 40 is to serve other than a mere motion for decree on the pleadings we must allow the chancellor to receive documentary and oral evidence and with such evidence pierce the shield of the pleadings in search of a genuine issue. While our rule is relatively *new it is patterned after Federal Rules Civil Procedure Rule 56, 28 U.S.C.A.*, and the accepted practice under rules of this nature is to *accord the chancellor reasonable latitude in determining whether there is in fact a case to be tried.* The rule is not limited in its application to pleadings filed in bad faith. It may be used to inquire into the qualitative substance of any pleadings whether filed in good or bad faith.[31]

A review of opinions from this period reflects that the judiciary is comfortable with using the device. Also, it appears to have been utilized in a manner consistent with the rationalization offered prior to the enactment of the original statutes.[32] The common law and equity procedures were codified into the Florida Rules of Civil Procedure.[33]

In *Florida Should Adopt the Celotex Standard for Summary Judgments*, Thomas Logue and Javier Alberto Soto provide a detailed evaluation of the trends that developed in the application of the summary judgment procedure in the period from the late 1950's and 1960's.[34] From their detailed review of the law in this period, the authors found that two conflicting schools of thought had emerged: one which viewed the summary procedure unfavorably—as a degradation of Florida's constitutional right to access the courts; and the opposing view, which accepts the link between summary judgment and a directed verdict as a means by which to dispose of baseless litigation.[35] The first school, and ultimately the side that prevailed with a "remarkably restrictive view of summary judgment," was reflected in the opinions of *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966) and *Visingardi v. Tirone*, 193 So. 2d 601 (Fla. 1967).[36] The *Holl* standard is still "good law," and its restrictive view of summary judgment haunts the courts to this day.

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31. *Id.* at 728 (affirming the trial court grant of summary judgment under Fla. Equity Rule 40 and linking the rule to the Federal equivalent) (emphasis added).

32. *See generally* Yost v. Miami Transit Co., 66 So. 2d 214, 216 (Fla. 1953) (expediting litigation); Nat'l Airlines Inc. v. Fla. Equip. Co., 71 So. 2d 741, 744 (Fla. 1954) (avoiding delay and expense).

33. George Vega, Jr., *Procedure: Summary Judgment for Nonmoving Party*, 7 U. FLA. L. REV. 335, 335 n.2 (1954) (explaining that C.L. Rule 43 and Equity Rule 40 (1950) were codified substantially in FLA. R. CIV. P. 1.36 (1954)). The code was subsequently re-sequenced to the current numbering scheme.

34. Logue & Soto, *supra* note 6, at 20.

35. *Id.*

36. *Id.* at 22.

II. THE *HOLL* STANDARD AND ITS RESTRICTIVE INTERPRETATION OF SUMMARY JUDGMENT

Florida Rule of Civil Procedure 1.510(c) (the "Florida Rule") has a seemingly simplistic legal standard:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in 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.[37]

The text of the Rule, consistent with its aforementioned origins, is designed to circumvent the need for issues to proceed to trial, thus saving judicial resources when it is clear that no genuine issue of material fact exists. There is no need for a fact finder to render an opinion because there is no factual dispute. Unfortunately, Florida courts ascertain what constitutes a "genuine issue as to any material fact" using a standard that generally is largely in conflict with the Rule's goals.[38] Although the text of the Florida statute is substantially similar to Federal Rule of Civil Procedure 56, and the Florida Rule was designed to be consistent with the Federal Rule, the current interpretation of the Florida Rule varies significantly from that in the federal courts.[39]

The forty-one year old *Holl* standard[40] is derived from a case in which the analysis arguably was inadequate at the time of decision.[41] While the rule's dating is not problematic *per se*, its legacy has created, and continues to create, a burden on the courts and citizenry of the state. The *Holl* standard is inconsistent with the intent behind the enactment of summary proceedings. The consequences of its continued position as valid law has caused and continues to cause a burden on the civil litigation practice by, *inter alia*, increasing the burden on the court system, forcing parties to remain in litigation beyond a point that is justified, and creating possible *Erie* Doctrine conflicts.[42] In addition, its continued validity, in the absence of a more comprehensive statement of the standard, has resulted in the implementation of a convoluted legal standard in Florida's District Courts of Appeal.[43]

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37. FLA. R. CIV. P. 1.510(c) (2007) (emphasis added).
38. *Id.*
39. *See* discussion *infra* Part IV.
40. Holl, 191 So. 2d at 40.
41. Logue & Soto, *supra* note 6, at 22.
42. *See* discussion *infra* Part IV.
43. *See* cases cited *infra* Part IV.

The *Holl* standard says: "[t]he burden of proving the absence of a genuine issue of material fact is upon the moving party. Until it is determined that the movant has successfully met his burden, the opposing party is under no obligation to show that issues do remain to be tried." [44] The Court was prophetic in its *dicta* relating to its decision:

> Some may take what we have said here to mean that it will be virtually impossible for the defendant ever to obtain a summary judgment in a malpractice suit. We will not speculate as to how this opinion may be interpreted. We do say that it is not intended to outlaw summary judgment proceedings in such cases. There undoubtedly will be cases in which the issues are so clear, the proof of nonnegligence so obvious, or the causes of injury to the patient so clearly shown not to be the fault of the practitioner that no trial is required. In such cases summary judgment ought to be granted.[45]

Essentially, there is no need to assess the legal sufficiency of evidence against the non-moving party until the moving party successfully meets his or her "burden of proving a negative, i.e., the non-existence of a genuine issue of material fact . . . he must prove the negative conclusively."[46]

Ironically, not only has the *Holl* standard loomed over summary judgment proceedings in negligence cases, but the incredibly stringent standard has created a substantial obstruction in the functionality of summary proceedings in non-negligence cases. Over time, the question regarding whether the moving party has "successfully me[t] its burden" has become the area upon which the *Holl* standard deviates from the Federal standard. It is this interpretation of this issue which has resulted in such limited use of summary judgment.

"If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the *slightest doubt* that an issue might exist, summary judgment is improper."[47] Essentially, if there is any conceivable doubt that there may be a question of fact, summary judgment is prohibited in Florida. This is not the case in the federal system. As recent opinions have stated, *Celotex* and similar cases do not represent the law of Florida on the issue of summary

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44. Holl, 191 So. 2d at 43. The case involved a medical malpractice action where the Court concluded that the Defendant, doctors and hospitals, did not explain what was the cause of the plaintiff's injuries, despite the affidavits that all was done in accord with accepted practice; the sufficiency of the non-moving plaintiff's affidavits, in rebuttal, need not be evaluated for sufficiency. *Id.* at 45.

45. *Id.* at 46.

46. *Id.* at 43.

47. Holland v. Verheul, 583 So. 2d 788, 789 (Fla. Dist. Ct. App. 1991) (emphasis added).

judgment.[48] The Florida Supreme Court explicitly rejected a line of cases indicating that it was incumbent upon the non-moving party to rebut the motion for summary judgment rather than simply rely on his pleadings.[49]

Florida's summary judgment standard has not been reexamined comprehensively since 1966. Furthermore, decisions in the past forty years have done much to obscure the road to a more efficient summary judgment procedure. Ironically, the *Holl* standard was placed upon the courts in light of the litigation boom of the 1960s.[50] Now, however, the time has come for the Florida Supreme Court to reexamine the *Holl* standard and make it consistent with the Federal Rule. Courts should allow summary judgment to resume its place in practitioners' and judges' toolboxes in order to better the effectiveness of our legal process.

III. WHY HAS THE STANDARD BEEN SET SO HIGH?

"Man's Ability to Rationalize is Infinite."[51]

The following are a series of arguments which have been made to rationalize the *Holl* standard.

A. RIGHT TO TRIAL BY JURY

One argument for the *Holl* standard is that allowing for summary judgment in all but the most crystal clear cases is analogous to depriving a person of his or her "day in court." It appears that the Florida Constitution affirmatively addresses accessibility to courts. For example, the Constitution says: "[t]he courts shall be open to every person for redress of an injury, and justice shall be administered without sale, denial or delay;"[52] "[t]he right of trial by jury shall be secure to all and remain inviolate;"[53] and "[the] right to trial is not legal justification for denying summary judgment, inasmuch as the right comes into being only when a genuine

48. 5G's Car Sales, Inc. v. Florida Dept. of Law Enforcement, 581 So. 2d 212 (Fla. Dist. Ct. App. 1991); *accord* Green v. CSX Transp., Inc., 626 So. 2d 974 (Fla. Dist. Ct. App. 1993) (reversing trial court summary judgment because the defendant's moving party, use of an unsworn affidavit was insufficient to rebut the allegations of an unsworn Complaint; the court emphasized the need to conclusively disprove theory before the burden of proof shifts to the plaintiff).

49. *Holl*, 191 So. 2d at 43.

50. Judge William H. Herring, *Column: Letters Summary Judgment in Florida and Federal Courts*, 76 FLA. B.J. 4 (2002).

51. The author attributes this quotation to the late Professor William Perry, Professor of finance at Babson College, Wellesley, MA.

52. FLA. CONST. art. I, § 21 (access to courts).

53. FLA. CONST. art. I, § 22 (trial by jury).

issue of material fact exists between the parties."[54] However, the exact opposite is true. When used correctly, summary judgment protects, rather than diminishes the right to trial by jury by reserving it for those cases where a genuine issue of fact exists for the jury to decide.[55]

In addition, the Florida Supreme Court has held that summary judgment does not infringe upon the right to a jury trial.[56] However, it appears as if the Florida Supreme Court has made a deliberate effort to assist litigants, despite their earlier ruling.[57]

The *Celotex* Court directly addressed the relative rights of parties in civil litigation:

> [Summary judgment] must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by the Rule prior to trial, that the claims and defenses have no factual basis.[58]

Florida courts gain from acknowledging this reasoning. One's right of access to the courts does not imply his or her right to maintain their suit when doing so would be unjustified by the facts of the case. Cases should not be allowed to proceed when the claim is based upon "elements of chance and psychology."[59] According to the relaxed standard, the plaintiff risks the cost of legal fees and time while the defendant faces the cost of the defense and the possible exposure to damages, which possibly encourages settlement without regard for the merits of the case.[60]

"The present appellate interpretation of Fla. R. Civ. P. 1.510 defeats the purposes of the rule . . . [by] violat[ing] the basic constitutional right of the innocent defendants to enjoy life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property."[61]

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54. Robert T. Hyde, Jr., *The Procedural Mirage: Post-Holl Summary Judgment Law in Florida*, 27 U. FLA. L. REV. 729, 743 (1974-75).

55. Logue & Soto, *supra* note 6, at 26.

56. Hyde, *supra* note 54, at 743 n.119.

57. *Id.* at 743 (referring to: 1) placing the burden on the movant, 2) minimizing the non-movants burden, 3) distinguishing between the determination of the existence of issues and the adjudication of those issues, and 4) showing preference for directed verdicts after a close of the evidence).

58. Celotex, 477 U.S. at 327.

59. Damsel, *supra* note 14, at 537.

60. *See id.*

61. *Id.* at 536 (referring to FLA. CONST. art. I, § 2).

B. LACK OF JUDICIAL RESOURCES

An alternate explanation has been proposed attempting to rationalize the restrictive use of summary judgment: that money is a "significant road block" preventing the enactment of the *Celotex* standard.[62] As the theory suggests, Florida trial judges do not have the luxury of quality or quantity of law clerks available to the federal judiciary.[63] This reality, in combination with the busy dockets, prevents the drafting of quality orders that appellate courts require upon review.[64]

The weakness of the argument is obvious: if the courts are overburdened and a procedural device exists to help eliminate cases that should not be permitted to continue, then the standard should be restructured in a manner to facilitate the most flexibility to the courts to reduce unnecessary trials, thereby saving time. The very strict requirements of the *Holl* standard reinforce the busy docket problems, rather than provide a basis for judicial review. Certainly, a more abundant clerk staff would provide additional assistance to the trial bench; however, this fact does not diminish the need to have a workable standard.

An alternate lack-of-resources approach argues that the process of evaluating and rendering an opinion on summary judgment motions actually is more time consuming than conducting a trial on the very same matter.[65] Assuming *arguendo* that members of the judiciary find this to be true, such reasoning completely ignores the additional "costs" that a full-fledged trial creates. These include the time and costs consumed by legal counsel, trial preparation, experts, witnesses, and court staff. Moreover, the judicial reasoning and analysis underlying a ruling on a summary judgment motion can be made orally and incorporated into the trial record by means of in-court electronic recordings or the use of a court reporter.[66]

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62. Robert Michael Eschenfelder, *Column: Letters Summary Judgment in Florida and Federal Courts*, 76 FLA. B.J. 4 (2002).

63. *See id.*

64. *See id.*

65. Interview with Barry S. Seltzer, Fed. Magistrate Judge, in Ft. Lauderdale, Fla. (Apr. 2005).

66. The author is familiar with extensive electronic recording in the Broward County courthouse (Florida 17th Judicial Circuit) for recording proceedings in Magistrate, County, and Circuit Courts. With each of these examples, the most fundamental of all individual rights, personal freedom, is decided upon regularly. Certainly, if a record can be made electronically for matters of criminal law, it seems as if a similar process can be used to facilitate a valid record for District court review of summary judgment motions.

C. ELECTED JUDICIARY

The argument has been advanced that the elected judiciary in Florida results in a more plaintiff-oriented judiciary, thereby making summary judgment more difficult to achieve.[67] In opposition to the *Celotex* standard, one author has argued against its adoption "if for no other reason that it will limit recoveries and remove an obstacle which has been used to leverage for settlement because of the specter of inevitable trial even in the weakest cases."[68]

Each of the aforementioned arguments can be rebutted easily. Regardless of whether *Celotex* or another standard is adopted, the excuses do not rationalize stymieing summary judgment, a procedural mechanism that has been found to be valid under the Florida Constitution.

D. TRENDS IN THE LAW

Thomas Logue and Javier Alberto Soto argued compellingly that "unless [the Florida standard is brought in line with the Federal standard] a motion for summary judgment simply cannot serve its intended purpose to accurately determine whether a genuine issue of material fact exists to be tried."[69] The crux of the argument is that Florida should update the standard by "recognizing the fundamental correlation between a motion for a directed verdict and a motion for summary judgment."[70] With sufficient time for discovery, the standard should, like *Celotex*, take into account the burdens the parties must carry at trial.[71] Based upon the aforementioned discussion, the author agrees.

There is recognition that the *Holl* standard is producing the opposite of the intended effect. "Instead of reducing delay and costs in an overwhelming majority of cases . . . it produces additional expense and prolongs" cases.[72] One author has suggested that rather than a more liberal interpretation of the standard, a decreased use of summary judgment is preferable because a reduction in the use of the procedure would reduce the appellate load and ultimately wane the presumption of invalidity.[73]

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67. *Id.*
68. William N. Drake, Jr., *Column: Letters Adopting the Celotex Standard*, 76 FLA. B.J. 4 (2002).
69. Logue & Soto, *supra* note 6, at 20.
70. *Id.*
71. *See id.*
72. Hyde, *supra* note 54, at 753.
73. *See id.*

Such an argument is untenable. There are many procedural mechanisms specifically designed to limit access to the courts.[74] Judicial resources, like all other tangible resources, are finite. For each unit of time dedicated to a case which is absent a genuine issue, the Florida courts are depriving time and resources from parties in cases with real issues whose time is available and whose resources, like those of the states, are limited.

There is no logical or constitutional rationale for allowing a case to proceed when it is clear that there is no genuine issue. Moreover, the "slightest doubt" variation on the question of whether there exists a genuine issue does not constitute a genuine issue. For example, the "slightest doubt" does not even preclude the adjudication of a criminal defendant.[75]

IV. THE NEGATIVE IMPACT OF THE *HOLL* STANDARD

A. CONFLICTING RESULTS

The legal standard for summary judgment, that there is no genuine issue of any material fact such that the movant is entitled to judgment as a matter of law, is one drilled repeatedly into the minds of aspiring lawyers.[76] The seemingly simplistic language required through case interpretation to glean any semblance of a true "standard" as to neither a "genuine issue" or "any material fact" may exist. Unfortunately, there is "no comprehensive definition for the genuine issue requirement of section 1.510(c)."[77] The same is true also for the concept of "any material fact." The definitional uncertainty may account for the high reversal rate on summary judgment at the district court level.[78]

"The apparent simplicity of the rule often leads courts merely to reiterate elementary matters on the subject without adding anything new."[79] More specifically, a review of several district court of appeal opinions reveals an all too prevalent restatement of a rule of law and a conclusion therewith, rather than analysis to illuminate the judicial analysis.

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74. *E.g.*, FLA. STAT. § 95.11 (2006) (limitations of actions statute); FLA. STAT. § 57.105 (2003) (sanctions for raising unsupported claims or defenses); FLA. R. CIV. P. 1.140(b)(6) (providing for dismissal for failure to state a claim for which relief may be granted); FLA. R. CIV. P. 1.150 (providing the mechanism to strike sham pleadings).

75. "A reasonable doubt is not a mere possible doubt, a speculative, imaginary or forced doubt." Standard Jury Instructions in Criminal Cases (97-1), 697 So. 2d 84, 86 (Fla. 1997).

76. As a third year law student, this author recalls fondly the year-long process of learning the fundamentals of civil procedure.

77. Hyde, *supra* note 54, at 732.

78. *See id.* at 733.

79. *Id.* at 731 n.14.

Courts lack a contemporary statement of a summary judgment standard which results in convoluted results when applying the law. For example, the Fourth District Court of Appeal recently described the burden on summary judgment in a myriad of ways.

The moving party is required to tender "*competent evidence* to support [its] motion."[80] Once that burden is met, the burden shifts to the non-moving party.[81] "[A] movant for summary judgment has the initial burden of demonstrating the *nonexistence of any genuine issue* of material fact."[82] However, a *reasonable inference of negligence* was sufficient to reverse a lower court's granting of summary judgment in *Gulfstream Park Racing Associates., Inc. v. Gold Halics Spur Stable, Inc.*[83] Still, in another case, the same court implicitly concluded that three physicians' depositions and two affidavits, all asserting that the accident had not contributed to the death, which were at no point rebutted by the plaintiff, were sufficient to meet the moving party's burden of disproving negligence, warranting summary judgment.[84]

These examples are from only one of Florida's district courts of appeal over a four-year span. The powerful impact of the *Holl* standard continues to cast its shadow over all of the state appellate courts and every Florida court faced with summary judgment motions.

In addition to the varied logic used to evaluate summary judgment, it is not uncommon for reported cases from the district courts to reflect no analysis of any Rule 1.510 legal standard and no discussion of the burden shifting. These examples are indicative of the confusion that surrounds summary judgment at the district court level. "[There is a] seemingly surreal analysis which the Florida trial courts employ to deny summary judgment as a viable litigation tool."[85] Is it any surprise, then, that the elected judiciary chooses the less problematic stance of denying summary judgment motions rather than granting them?

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80. Glasspoole v. Konover Const. Corp. S., Inc., 787 So. 2d 937, 938 (Fla. Dist. Ct. App. 2001).

81. *Id.* (emphasis added).

82. Corbitt v. Kuruvilla, 754 So. 2d 545, 548 (Fla. Dist. Ct. App. 1999) (citing Buitrago v. Rohr, 672 So. 2d 646, 648 (Fla. Dist. Ct. App. 1996) (emphasis added)).

83. Gulfstream Park Racing Assoc., Inc. v. Gold Halics Spur Stable, Inc., 820 So. 2d 957, 961 (Fla. Dist. Ct. App. 2002).

84. *See* Spezzano v. Yoxall, 857 So. 2d 935 (Fla. Dist. Ct. App. 2003).

85. Eschenfelder, *supra* note 62, at 4.

B. POTENTIAL *ERIE* DOCTRINE PROBLEMS[86]

Although summary judgment is a procedural rule, it is a potentially dispositive one: it is a procedural rule with a substantive outcome. Because of the difference between the Florida standard and the Federal standard, litigants with identical fact patterns are likely to experience conflicting outcomes in state courts versus federal courts,[87] which is an affront to the dual aims of the *Erie* Doctrine.[88] Thus, summary judgment reform is more than a simple procedural debate; ultimately, it is about the administration of justice.[89]

For example, diverse defendants who wish to move for summary judgment have a strong incentive to remove a matter to federal courts, where Federal Rule of Civil Procedure 56 and the standards outlined in the *Celotex* trilogy provide a far less stringent basis for summary judgment.[90] In Florida, the courts are clear that the "slightest doubt" about a fact will prevent the entry of a summary judgment, while in federal court, the exact opposite is true.[91] As a result, the variance between the Florida and Federal standards for summary judgment promotes both forum shopping and unequal administration of the law, both of which violate the spirit of the *Erie* Doctrine.[92]

C. THE *HOLL* STANDARD PROMOTES JUDICIAL INEFFICIENCY

As Logue and Soto discuss, the failure to adopt a burden shifting mechanism renders the summary judgment rule largely ineffective: issues

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86. Erie R.R. v. Tompkins, 304 U.S. 64 (U.S. 1938).

87. This is the result of significant differences in the legal standards currently in Florida versus those in the Federal system. The requirements under the Federal summary judgment standard have been described as: "[i]n the modern era of summary judgment, the plaintiff is effectively required to put forth her entire case at summary judgment and persuade the court that a reasonable fact finder could rule in the plaintiff's favor; summary judgment is very close to a 'dress-rehearsal' of the ultimate trial . . . ." Gregory, *supra* note 7, at 692.

88. "[T]he twin aims of the Erie rule [are]: discouragement of forum-shopping and avoidance of inequitable administration of the laws." Hanna v. Plumer, 380 U.S. 460, 468 (U.S. 1965).

89. Mike France, *How to Fix the Tort System*, BUS. WK., Mar. 14, 2005, at 70, *available at* http://businessweek.com/magazine/content/05_11/b3924601.htm.

90. *See generally* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

91. "While [the Federal Courts] once denied summary judgment on the slightest possibility that the plaintiff could eventually advance a jury-submissible case, courts now insist upon proof that affirmatively establishes the plaintiff's entitlement to jury consideration." Gregory, *supra* note 7, at 718.

92. *See generally* Logue & Soto, *supra* note 6; Hyde, *supra* note 54.

and cases are needlessly being sent to trial while valuable judicial resources are wasted.[93] In addition, from a public policy standpoint, allowing a larger number of issues to be tried may have a tendency to negatively reinforce the perception that frivolous law suits are jeopardizing our judicial and economic systems.[94] Allowing issues to proceed to trial where there is no genuine factual dispute to warrant such a trial may promote unrealistic attitudes towards the judicial process, thus encouraging more litigation.[95]

Witness the "surreal analysis" which Florida Courts use to "deny summary judgment as a viable litigation tool."[96] The prevailing standard is far more favorable to plaintiffs "since there is a high degree of certainty in state court actions that 'at least [one will] get to the jury' where sympathy can often overcome good jury instructions."[97] These problems are not all new. One author describes summary judgment in Florida as follows: "[t]he state has an easier burden in convicting a man of first degree murder than that which faces an innocent civil defendant."[98]

Anecdotal evidence suggests that appellate treatment of the summary judgment standard significantly curtails the granting of such motions at the trial court level. In the process of gathering materials for this article, the author interviewed a sitting Federal Magistrate Judge and a Federal District Court Judge, both of whom previously served as judges in the Florida state court system. Both judges confirm the suspicion that the trial courts, at least in their cases, are cognizant of the very stringent standard that is followed by the appellate and Florida Supreme Court. Perception is reality in the state judiciary. There is the perception of a high likelihood of reversal of a granted motion for summary judgment.[99] This is unfortunate because "[t]rial judges should be trusted to filter out those cases which should not, due to insurmountable evidentiary problems, go to trial."[100] This is particularly true when the cost of maintaining the state judiciary continue to expand. "In 2000, it cost the state [of Florida] about $211,000 to add a circuit judgeship . . ." which included the cost of judges and

93. Logue & Soto, *supra* note 6, at 20 & 23.
94. *See generally* Damsel, *supra* note 14.
95. *See generally id.*
96. Eschenfelder, *supra* note 62, at 4.
97. *Id.*
98. Damsel, *supra* note 14, at 535.
99. Interview with Honorable Judge Kenneth A. Marra, Fed. Dist. Judge, S. Dist. of Fla., in Ft. Lauderdale, Fla. (May 2005).
100. Herring, *supra* note 50, at 4.

secretaries' salaries and benefits, but excluded the local costs of space and security.[101]

D. ADDITIONAL OBSERVATIONS

1. Poor Analysis

This author notes, with surprise, the stunning lack of legal analysis provided in opinions at the appellate level under the *de novo* review of summary judgment.[102] This reality is problematic for several reasons. First, the poor quality of legal analysis created poor case law for future courts to rely upon in drafting opinions. Second, logic suggests that the less well-reasoned the opinion appears to be, the more likely an appeals court will reverse the matter. Opinions must be drafted in such a way so as to ensure that the substance of any holding and its impact upon the body of common law is both legally sufficient and consistent with the proper standards, as articulated by the Florida Supreme Court.

2. Lack of Record Keeping:

As problematic as the convoluted and poorly documented legal analysis may be in summary judgment cases, Florida county court offices contribute to the continued problems with summary judgment motions. In order to effectively evaluate the broad impact of the summary judgment standards upon the court system, statistics regarding the number of summary judgment motions filed and subsequently granted, denied, or reversed on appeal would yield a significant body of data. Surprisingly, such records are not maintained, at least in the case of the Eleventh and Seventeenth Judicial Circuits.[103] In addition, a comprehensive statistical program to monitor the rate with which the Rule is moved for, granted and/or denied, appealed, and subsequent reversal rates would be instructive to the practitioner in evaluating the likelihood of success and the relative risk in pursuing the rule.

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101. Bar Issue Papers: *Alternative Dispute Resolution*, FLA. B. MEDIA RES., *available at* http://www.floridabar.org (last visited Nov. 2, 2007).

102. The author recognizes the substantial docket loads of county, circuit, and district judges. *See* Gregory, *supra* note 7, at 691. Yet, failing to provide adequate legal analysis ultimately is likely to create greater burdens upon the court system. *Id.*

103. The author was surprised to learn that in Florida's Eleventh and Seventeenth Judicial Circuits, the Court Administrators do not independently track motions for summary judgments. Such motions are tracked in combination with all judge granted motions.

3. Public Policy

Public policy weighs strongly in favor of a productive summary judgment mechanism consistent with that in the federal courts.

E. THE TORT REFORM MOVEMENT

Immense public attention has been focused upon the so-called tort reform debate. The President, Congress, the state legislature, the governor, and innumerable others have discussed the issue at length. In reality, not every claim is legitimate, nor is every claim baseless. However, the trial bar must accept some responsibility for the current crisis. "Despite their claims of being selfless safety advocates, plaintiffs' attorneys in 2005 are analogous to chief executives in 1999: Most of the players are making an honest living, but an unacceptably high percentage of them are stretching the rules."[104]

Summary judgment should provide a constitutionally sound, efficient method to help separate the "wheat from the chaff" in the civil litigation arena. Unfortunately, in Florida, the existing *Holl* standard as well as contradictory district court opinions prevent this from happening.

V. PARTIAL SUMMARY JUDGMENT AS A TOOL FOR CHANGE: THE DUAL-EDGED SWORD OF APPELLATE REVIEW.

With the significant challenges facing a litigant in the context of summary judgment motions, there is an area of hoped partial summary judgment. This is the relevant standard under the Florida Rules of Civil Procedure:

> (c) . . . 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.
>
> (d) Case Not Fully Adjudicated on Motion. On motion . . . if judgment is not rendered upon the whole case or for all the relief asked and a trial or the taking of testimony and a final hearing is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further

104. Mike France, *How to Fix the Tort System*, BUS. WK., Mar. 14, 2005, at 70.

> proceedings in the action as are just. On the trial or final hearing of the action the facts so specified shall be deemed established, and the trial or final hearing shall be conducted accordingly.[105]

It is clear that the possibility for the increased use of partial summary judgment, like that of "full" summary judgment, will be predicated upon the legal standards by which the courts evaluate summary judgment motions. However, the increased use of partial summary judgment as a procedural mechanism may encourage the judiciary to dispose of easily decided portions of the case. The difference in the availability of appellate review, compared to that of traditional summary judgment, may provide sufficient opportunity for the trial bench to cull "non-genuine" issues from cases without imminent fear of reversal.

Summary judgment, if granted, disposes of a cause of action, ultimately leading to a final judgment against the non-moving party, thereby providing a basis for immediate appeal.[106] At the same time, if summary judgment is denied, the matter is generally *not* immediately appealable.[107] Logic indicated that, all other factors being equal, a judge is likely to err on the side of denying summary judgment since such a decision has no basis for immediate appeal. However, the opposite is true: granting a summary judgment is very likely to present an issue for *de novo* review.[108]

Fortunately, however, the risk of judicial reversibility calculus is completely reversed in the context of a partial summary judgment. The granted partial summary judgment, much like the denial of summary judgment motion, is not directly open for appeal.[109] Litigants who wish to appeal a partial summary judgment must wait until a final judgment is entered, which will happen only after the remaining contested issues are

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105. FLA. R. CIV. P. 1.510(c)-(d).

106. Provided the proper steps were taken to preserve the matter for appeal.

107. Ramos v. Univision Holdings, Inc., 655 So. 2d 89, 92 (Fla. 1995) (holding a district court is generally without jurisdiction to review a nonfinal order denying a motion for summary judgment); *accord* Harte v. Palm Beach Biltmore Condo. Ass'n, Inc., 436 So. 2d 444, 445 (Fla. Dist. Ct. App. 1983). There is no review of the denial of a motion for summary judgment in a single count absent both a departure from establishing law and the lack of an adequate remedy by appeal. *Id.*

108. A final order granting summary judgment is subject to a *de novo* review at the appellate level. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000).

109. "It is well settled in Florida that piecemeal appeals will not be permitted where claims are interrelated, involve the same transaction, and the same parties remain in the lawsuit." SCI, Inc. v. Aneco Co., 410 So. 2d 531, 532 (Fla. Dist. Ct. App. 1982) (denying appellate review of a partial summary judgment entered on one count); *accord* Odham v. Mouat, 484 So. 2d 95 (Fla. Dist. Ct. App. 1986).

resolved by the court.[110] This reality should encourage litigants to look to partial summary judgment as a mechanism to weed-out matters that ultimately will discourage an opposing party from maintaining its action. Judges who properly recognize this distinction may be inclined to find case law to substantiate a decision to award partial summary judgment on a matter that is not likely to survive a directed verdict at trial. Judicial precedent and doctrine that does not make good sense tends to be ignored over time.[111] With luck, the trial courts will elect to look to case law that more closely reflects the *Celotex* standard of evaluation for summary judgment.

Practitioners have the ability to influence significantly the evolution of the use of the summary judgment via the increasing of the use of Rule 1.510(e) partial summary judgment device. This fact may encourage courts to "take the bait" and actually utilize the rule to its intended effect.

IV. CONCLUSION

In light of the rapid rise in the number of cases filed each year, the cost of operating the judicial system, judicial work loads, the amount of time required to bring a case to final adjudication, as well as the cost of litigation, it is obvious that Florida Supreme Court should make use of all constitutionally-sound procedural mechanisms which may reduce such congestion. This article has pointed out the many deficiencies of the current standard for evaluating summary judgment in Florida, which result in an under-utilization of summary judgment where it may be warranted.

While the most compelling need is for the articulation of a new, contemporary standard whereby the district and trial courts may have a reliable analytical structure to follow, there is a compelling argument to align Florida's standard with that of the federal system under the *Celotex* standard. Additional factors supporting such an idea are articulated above; however, adopting such a standard, although preferred to this author, is not the most pressing issue. The Florida Supreme Court must articulate a new standard so that the district courts, and ultimately the trial courts, begin to evaluate summary judgment and partial summary judgment in a more uniform and predictable manner.

The *Celotex* trilogy cleared a path of obstructions which impeded the productive use of summary judgment at the federal level. By allowing the burden at the summary judgment stage to more closely mirror that which

110. *See* Gregory, *supra* note 7, at 691.

111. Herring, *supra* note 50, at 5 (referencing Logue & Soto, *supra* note 6.)

occurs at trial, the Supreme Court freed the federal system from litigation that would otherwise have continued to clog federal courts' dockets. In light of the aforementioned factors showing the need to adopt a revised standard more in line with a *Celotex*-based test, the Florida Supreme Court should take its next opportunity to provide the Florida legal community with such a standard.

Fortunately, practitioners are not left to pine for the Florida Supreme Court to adopt such thinking. Through the increased use of the partial summary judgment mechanism, litigators can provide trial judges the opportunity to apply summary judgment to select issues in a case, thereby eliminating such issues at trial, while avoiding exposure to immediate appeals. This reality may encourage elected trial judges to grant more summary judgment, thereby limiting issues for trial and possibly encouraging the non-moving party to abandon matters that are not likely to have a chance of surviving a directed verdict in trial.

At bottom, this debate has as its core a conflict between whether or not the use of summary judgment can "stem the tide of unwarranted litigation."[112] This author joins the increasing body of opinions that believe a more contemporary and *Celotex*-like standard will do just that. It appears that, rather than make a formal contemporary determination that the *Holl* standard is, in fact, the most appropriate standard by which to evaluate summary judgment, the Florida courts have slowly wandered down an endless path with no destination. District by district and court by court, the law has continued to meander further and further away from an effective summary judgment analysis. While on occasion, attempts have been made to straighten the path, thus far, the courts have lacked the courage to conclude that Florida has, in fact, missed the "turn-off." By failing to acknowledge this error, summary judgment is not available to permit judges to properly dispose of cases, defendants are forced to maintain suits, the dockets remain crowded, and, as if more reason is needed, the public has one more reason to be cynical about the justice system.

Therefore, Florida courts should recognize the impact of the current summary judgment standard and correct the problem by allowing partial summary judgments to be used as a viable tool to help assist judges blaze a new path to a sensible, well-reasoned, and effective use of the summary judgment rule.

112. Damsel, *supra* note 14, at 535.