

**IN THE SUPREME COURT
OF FLORIDA**

CASE No.: SC19-1336

WILSONART, LLC and SAMUEL ROSARIO,

Petitioners,

v.

MIGUEL LOPEZ, as Personal Representative
of the Estate of JON LOPEZ, deceased,

Respondent.

AMICUS BRIEF OF THE AMERICAN BOARD OF TRIAL ADVOCATES

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STATEMENT OF IDENTITY AND INTEREST

The American Board of Trial Advocates (“ABOTA”) is a national association of experienced trial lawyers and judges that was founded in 1958. ABOTA consists of more than 7,600 lawyers—equally balanced between plaintiff and defense—and judges spread among 96 chapters in all 50 states and the District of Columbia. ABOTA is an invitation-only organization. Members must have at least 5 years of active experience as trial lawyers, and must have tried at least 10 civil jury trials to conclusion.

ABOTA and its members are dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to the United States Constitution. ABOTA’s mission is to foster improvement in the ethical and technical standards of practice in the field of advocacy to the end that individual litigants may receive more effective representation and the general public be benefited by more efficient administration of justice consistent with time-tested and traditional principles of litigation.

ABOTA’s interest in this case is narrow. ABOTA does not advocate for one summary judgment standard over another. Rather, ABOTA encourages the Court to go through the rules committee process prior to making any change to the current iteration of the rule.

SUMMARY OF THE ARGUMENT

For 75 years, this Court has used the committee process to allow judges and lawyers to assist in drafting rules of court. ABOTA urges the Court to follow the same practice in this case if the Court decides a rule change is appropriate.

In two recent cases, this Court amended a rule of court without using the committee process. But in each of those cases, the amendments were narrow in scope. The rule amendment proposed in this case, on the other hand, has the potential to impact every civil litigant in Florida in a wide variety of practice areas. Due to the sweeping nature of the proposed amendment in this case, this Court should avail itself of the opportunity to consider input from lawyers and judges via the committee process prior to changing Florida's summary judgment standard.

Finally, any change to Florida's summary judgment standard implicates the right to a jury trial enshrined in Florida's constitution. Allowing the committee process to run its course prior to amending Florida's summary judgment rule will ensure that the rule is amended in a manner consistent with Floridians' constitutional right to trial by jury.

ARGUMENT AND CITATIONS OF AUTHORITY

- I. **Any change to Florida’s summary judgment rule should be made only after practitioners and judges have the opportunity to provide input through the committee process.**

As explained in Respondent’s Answer Brief, for 75 years, this Court has used the committee process to allow judges and lawyers to assist in drafting rules of court. (AB at 33-37, 49). The rule in this case is too consequential to depart from this historical practice. While the Court has amended rules of court without using the committee process in two recent cases, the proposed amendment at issue here is categorically different from those two amendments.

In *In re Amendments to Florida Evidence Code*, 278 So. 3d 551 (Fla. 2019), this Court adopted the Legislature’s amendments to Florida’s evidence code to conform to the federal *Daubert* standard for assessing the admissibility of expert testimony. Over a vigorous dissent from then Justice Luck, this Court declined to follow the time-honored practice of soliciting input from practitioners and judges before amending a court rule.

But in *In re Amendments to Florida Evidence Code*, the Court was revisiting a decision on the same issue that was only two years old. And the prior decision was reached after the *Daubert* amendments had been

considered by The Florida Bar's Code and Rules of Evidence Committee. *Id.* at 552. The Committee "provided majority and minority reports against and in favor of the Court's adoption of the *Daubert* amendments." *Id.*

Moreover, the Board of Governors of The Florida Bar approved the Committee's recommendation, "and extensive comments were received in response to the published recommendation." *Id.* The Court also held oral argument regarding the pros and cons of adopting the *Daubert* amendments in the prior case. *Id.* In short, the Court justified its decision not to follow the committee process because it had done so only two years before:

Because of the extensive briefing and arguments on this issue previously made to the Court, and mindful of the resources of parties, members of The Florida Bar, and the judiciary, we revisit the outcome of the recommendation on the *Daubert* amendments without requiring the process to be repeated.

Id. Thus, the Court had the informational advantage the committee process provides when it reached its decision.

In this case, the Court does not have that informational advantage. And this case concerns a much broader issue than the narrow dispute it resolved in *In re Amendments to Florida Evidence Code*. Summary judgment is a critical step in virtually every civil case. If this Court amends Florida's summary judgment rule, it will impact family law cases, a wide

variety of personal injury cases, commercial and property disputes, consumer and class actions, and everything in between. As a result, any change this Court makes to the current standard will impact far more litigants and far more practice areas than were implicated by the dispute over whether to adopt the *Daubert* standard. A rule change in this case would be sweeping and far-reaching, and this Court should not forego the opportunity to draw on the informational advantage it had when it changed the *Daubert* standard.

As it did in *In re Amendments to Florida Evidence Code*, in *Florida Highway Patrol v. Jackson*, 288 So. 3d 1179 (Fla. 2020), this Court determined it was appropriate to amend a rule of court without initiating the committee process. The question in *Jackson* was whether a sovereign entity, the FHP, could take an interlocutory appeal under Florida Rule of Appellate Procedure 9.130(A)(3)(C)(XI). *Id.* at 1180. Based on the plain language of the appellate rule, the Court answered “no.” But in a separate opinion, and without the benefit of the committee process, the Court amended Rule 9.130 to expand the availability of appellate review of nonfinal orders denying sovereign immunity. *In re Amendments to Florida Rule of Appellate Procedure 9.130*, 289 So. 3d 866 (Fla. 2020).

The dispute this Court resolved in *Jackson* was even narrower than the *Daubert* issue. The only litigants impacted by the amendment to Rule 9.130 are those in controversies featuring a sovereign immunity defense. And the only procedural impact flowing from the Court's amendment to Rule 9.130 is the availability of appellate review of sovereign immunity determinations at an earlier phase of litigation than was previously permitted. As explained above, the implications of a change to Florida's summary judgment rule bear on a much wider litigant pool and a panoply of practice areas.

More important than what the Court did in *Jackson* when it amended Rule 9.130 to allow earlier appellate review of sovereign immunity decisions is what it did not do. The Court noted throughout the *Jackson* decision that the subsection of Rule 9.130 dealing with the appealability of sovereign immunity determinations contains identical language to the subsection of Rule 9.130 governing the appealability of workers' compensation determinations. *Id.* at 1184. Notwithstanding the identical language, while the Court amended the sovereign immunity subsections of Rule 9.130, it declined to amend the workers' compensation subsection. *In re Amendments to Florida Rule of Appellate Procedure 9.130*, 289 So. 3d at 867. Instead,

the Court asked “The Florida Bar’s Appellate Court Rules Committee to consider whether” the workers’ compensation immunity subdivision “should be similarly amended.” *Id.*

So what can be gleaned from this Court’s two recent cases involving a determination that it was appropriate to amend a rule of court without first adhering to the long-standing practice of soliciting input from attorneys and judges through the committee process? The take-away is that this Court will dispense with the committee process when the amendment is narrow in scope, or when it already has the informational advantage the committee process provides. In contrast, this case involves a proposed rule change that is wide in scope and will impact litigants and practitioners in multiple practice areas. This Court should proceed with caution and allow the committee process to unfold before amending Florida’s current summary judgment standard.

A final point should lead this Court to gain the benefit of advice through the committee process: article 1, section 22 of Florida’s constitution provides that the “right of trial by jury shall be secure to all and remain inviolate.” Art. I, § 22, Fla. Const. This Court has long-recognized that the “constitutional right to jury trial demands that particular care be accorded” to

summary judgment determinations, “to the end that controverted issues of fact be resolved not upon pleadings and depositions but by a jury functioning under proper instructions.” *Drahota v. Taylor Const. Co.*, 89 So. 2d 16 (Fla. 1956). Any change to Florida’s current summary judgment standard necessarily implicates the constitutional right Floridians have to a jury trial.

ABOTA is dedicated to the preservation and protection of the constitutional right to a jury trial. ABOTA applauds other amici that appear to share these same goals, as demonstrated by their careful explanation to this Court of why, in their view, the federal summary judgment rule honors the right to a jury trial. (*E.g.*, Fla. Health Care Assoc. Brief at 5-9). While ABOTA takes no position on the constitutionality of the federal summary judgment standards, ABOTA would note that an advisory committee has had a heavy hand in crafting the federal summary judgment rule and its many amendments over the years.¹ ABOTA strongly urges the Court to chart a similar path here in Florida and allow the committee process to run its

¹ The following websites contain helpful information about the federal rulemaking process: <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public>; <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works>; <https://www.uscourts.gov/rules-policies/about-rulemaking-process>.

course prior to amending Florida's current summary judgment standards to ensure maximum protection of Floridians' constitutional right to a jury trial.

CONCLUSION

This Court should adhere to the long-standing practice of allowing the committee process to run its course prior to amending Florida's current summary judgment rule.

DATED this 15th day of June, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 15, 2020, a copy of the foregoing has been electronically filed with this Court, and will be served via email to all parties listed on the Service List below.

/s/ Michael M. Brownlee

Michael M. Brownlee, Esquire

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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