IN THE SUPREME COURT OF FLORIDA

CASE NO. SC19-1336
L.T. CASE NO. 5D18-2907

WILSONART, LLC and SAMUEL ROSARIO,

Petitioners,

v.

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

Respondent. /

BRIEF OF AMICUS CURIAE, PLAC IN SUPPORT OF DEFENDANTS/PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as amicus curiae in both state and federal courts, including this Court, on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

PLAC's interest in this case derives from its members' first-hand experience contending with different summary judgment standards in Florida and around the country. As such, PLAC has a broad perspective on how Florida's standard compares to the federal standard not only in theory, but in practice, and can provide guidance as to the effect Florida's standard has on companies like PLAC's members.

[1] *See* https://plac.com/PLAC/About_Us/Amicus/PLAC/Amicus.aspx.

SUMMARY OF THE ARGUMENT

PLAC submits that the first certified question should be answered in the affirmative. Florida should interpret its summary judgment rule in a manner that is consistent with Federal Rule of Civil Procedure 56, and the vast majority of states.[2]

Florida's summary judgment rule is not serving its intended purpose of eliminating claims where there is no genuine issue of material fact because the current standard requires a movant to meet a virtually impossible burden of proving a negative. Indeed, the current interpretation encourages claimants to file lawsuits in Florida knowing that they are unlikely to be dismissed before trial, which ultimately places pressure on the defendant to settle such cases regardless of the merits.

The federal summary judgment standard, which essentially mirrors the standard for a directed verdict, is in line with the Rule's goals. Moreover, the federal standard does not allow a party to avoid summary judgment by using speculation or impermissible inferences. If the federal standard is adopted in Florida as it has been in the vast majority of states, it will promote judicial economy, uniformity, and predictability, and it would avoid forum shopping.

[2] As to the second certified question, PLAC agrees with the Petitioner that there is no need to change the language of Florida Rule of Civil Procedure 1.510; rather, the necessary change is in the interpretation of the rule.

ARGUMENT

I. THE COURT SHOULD ADOPT THE FEDERAL COURT INTERPRETATION OF THE SUMMARY JUDGMENT RULE

When the United States Supreme Court adopted the current federal summary judgment standard in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), it relied upon the fact that the summary judgment procedure is "an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Id*. at 327 (quotation omitted).

Florida's summary judgment rule has the same purpose: to "obviate the expense and delay of summoning a jury in a case to try facts that are not in conflict." *Anderson v. Maddox*, 65 So. 2d 299, 300 (Fla. 1953). *See also Suggs v. Allen*, 563 So. 2d 1132, 1133 (Fla. 1st DCA 1990) (purpose is to also "to avoid the time and expense of a useless trial . . . ." (citing *Fish Carburetor Corp. v. Great Am. Ins. Co.*, 125 So. 2d 889, 891 (Fla. 1st DCA 1961).

Under the Court's current interpretation of Florida Rule of Civil Procedure 1.510, however, that purpose is not being satisfied. Although *Holl v. Talcott*, 191 So. 2d 40, 46 (Fla. 1966), stated it did not intend to "outlaw" summary judgments, that has been its practical effect. Summary judgments are a rarity, even where it is clear, indeed undisputed, that the case could not withstand a directed verdict.

PLAC submits that Florida should interpret its summary judgment rule as it is interpreted in federal court. Two aspects in particular should be addressed. First, the

standard for summary judgment should be consistent with the standard for obtaining a directed verdict. Second, the standard should not allow a party to avoid summary judgment by using speculation or inferences that would not be sufficient at trial.

These changes will eliminate claims that linger in the system long after it is clear that the litigation should be at an end, and would prevent the needless costs and burdens on the parties and legal system. And by bringing Florida in line with the federal courts and majority of state courts, it will prevent forum shopping.

A. Overview Of The Florida And Federal Standards

For more than 50 years, Florida has steadfastly adhered to the summary judgment standard announced in *Holl*, 191 So. 2d 40. Under that standard, the moving party has the burden of conclusively proving a negative, *i.e.*, the non-existence of any genuine issue of material fact. *Id.* at 43. The proof must overcome all reasonable inferences which may be drawn in favor of the opposing party. *Id.* If there is even a "scintilla" of evidence, or the "mere slightest doubt," summary judgment will be denied. Until the movant successfully meets this burden, the opposing party is under no obligation to show that issues remain to be tried. *Id.*

In contrast, the federal summary judgment standard tracks the standard for a motion for directed verdict under Federal Rule of Civil Procedure 50. Thus, summary judgment is proper if, after adequate time for discovery and upon motion, a party fails to make a showing sufficient to establish the existence of an element

essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Unlike Florida, there is no obligation on the movant to introduce evidence to negate the claim. *Celotex,* 477 U.S. at 323. Rather, the test is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

Once the initial burden is met, the non-movant must produce evidence of a genuine issue of material fact. *Id*. And unlike Florida, where a "scintilla of evidence" is enough; the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586.

The federal standard has been adopted by approximately 75% of the states. *See* Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments*, 76 Fla. B.J. 20, 21 (2002) (collecting cases); Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 Cal. L. Rev. 411, 476 (2018) (collecting cases). Florida, however, has maintained its minority position. *See 5G's Car Sales, Inc. v. Fla. Dept. of Law Enforcement,* 581 So. 2d 212, 212 (Fla. 3d DCA 1991) (stating *Celotex* does not represent the law in Florida).[3]

[3] Prior to *Holl*, Florida's interpretation of Rule 1.510 was consistent with the federal rule. *See, e.g., Harvey Bldg., Inc., v. Haley*, 175 So. 2d 780 (Fla. 1965) ("the

B. The Burden Of Proof At Summary Judgment Should Track The Burden Of Proof That The Party Will Carry At Trial

Because Florida requires the movant to affirmatively prove the nonexistence of a factual issue, cases that otherwise would be resolved at the close of discovery must proceed through trial before the litigation can be ended by directed verdict. The result is unnecessary time and expenses for the parties and the court system – the antithesis of what the summary judgment rule, is intended to accomplish.

The following products liability cases, which involve similar fact patterns but were decided in different procedural postures, demonstrate this point.

In *Rubley v. Keene Corp.*, 480 So. 2d 675 (Fla. 1st DCA 1985), the plaintiff sued several asbestos companies claiming that exposure to their products caused an asbestos-related disease. The trial court granted summary judgment based on the absence of proof that the plaintiff was exposed to the defendants' products. The First District reversed because the defendant did not offer affirmative evidence that its products were not used at the jobsite at the relevant time frame, and therefore the defendants did not establish the non-existence of a genuine issue of material fact. *Id.* at 676; *see also Vilardebo v. Keene Corp*., 431 So. 2d 620, 622 (Fla. 3d DCA 1983)

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summary judgment motion may be categorized as a 'pre-trial motion for a directed verdict.'"); *Locke v. Stuart*, 113 So. 2d 402, 405 (Fla. 1st DCA 1959) ("[I]f the party moving for summary judgment presents evidence which would require a directed verdict in his favor if presented at trial, the motion should be granted.").

(reversing summary judgment in an asbestos case, finding the plaintiff's failure to identify any products to which he was exposed would provide a basis for directed verdict, but not summary judgment); *Ward v. Celotex Corp.*, 479 So. 2d 294, 296 (Fla. 1st DCA 1985) (finding jury issue on exposure).[4]

On very similar facts, the result was different after a jury verdict. In *Reaves v. Armstrong World Indus.*, 569 So. 2d 1307 (Fla. 4th DCA 1990), the plaintiff was performing janitorial duties at a plant where asbestos-containing products manufactured by the three defendants' products as well as others were used. Neither the plaintiff nor coworkers could identify a brand name or manufacturer of the products he claimed he was exposed to at the plant. Nonetheless, the jury returned a verdict allocating fault between the three companies.

The trial court set aside the verdict and entered judgment for the defendants. In a lengthy order approved by the Fourth District, the trial court found that while "it was certainly permissible for the jury to infer that the plaintiff was exposed to asbestos dust," "the proof of whose asbestos dust and who manufactured those products was speculative at best." *Id.* at 1309. The court continued:

> It is incumbent upon the plaintiff to establish by the greater weight of the evidence that the plaintiff was exposed to the asbestos products of

[4] *Compare Claytor v. Owens-Corning Fiberglas Corp.,* 662 A.2d 1374, 1384 (D.C. 1995) ("A mere showing that appellants worked at jobsites where appellees' asbestos products were used at some point will not give rise to an inference, sufficient to defeat summary judgment, that appellants themselves may have been exposed to those products.").

> each of the three remaining defendants and that this exposure contributed substantially to producing the injury complained of.

Id. at 1309. Under the well-established "more likely than not," or "but for" causation standard, the plaintiff's evidence fell short when his expert could only state that the medical probability of causation based on three years of exposure was "conceivable." *Id.* Accordingly judgment was entered in favor of the defendants.

The problem these cases highlight is that by maintaining a different standard of summary judgment, courts are compelled to reach a different result at summary judgment than after trial even where the facts are essentially the same. In *Reaves,* the court specifically acknowledged this point:

> [*Ward, Rubley* and *Vilardebo*] are not appropriate for reliance here, since in a summary judgment determination, the defendant has the burden of showing the nonexistence of factual issues which may be proved at trial. By the time of directed verdict motions at trial, the trier of fact is constrained by the evidence actually presented, not what might have been shown. The burden of proof imposed on the defendant at summary judgment is transferred to the plaintiff, who must prove by competent evidence at trial all elements of the cause of action.

Id. at 1310; *see also Johnson v. Circle K Corp.*, 734 So. 2d 536, 537 (Fla. 1st DCA 1999) (noting significantly greater burden on summary judgment than the burden of proof on directed verdict); *Suggs*, 563 So. 2d at 1133 (citing *Rubley* to highlight the difference in the burden on summary judgment).[5]

[5] Indeed, that was the lesson learned from *Visingardi v. Tirone*, 193 So. 2d 601 (Fla. 1967):

The question, then, is what benefit is derived from allowing a case to proceed past summary judgment when it is apparent that the evidence is not sufficient to meet the plaintiff's burden of proof at trial, and thus the claim will not survive a directed verdict? The answer in federal courts and the majority of states has been that there is no benefit, and, in fact, that such a result is contrary to the purpose behind the summary judgment rule, which is "designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327.[6] The current

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> At the trial, to be sure, the plaintiff herein would have the burden of proving, not only the acts of negligence, but their causal relationship with the injury alleged. However, unless the record … otherwise shows the absence of such causal relationship, the plaintiff, who is opposing the motion [for summary judgment], is under no obligation to put in evidence showing such a causal relationship. In other words, causal relationship, as any other material issue, should be considered a triable issue that will preclude summary judgment until it is conclusively shown by affidavit or other permissible evidence, that no causal relationship exists and trial of it is no longer required.

Id. at 604-05 (emphasis added).

[6] To the extent the *Holl* Court suggested that the more stringent summary judgment rule was necessary to protect the constitutional right to a jury trial, that argument was dispelled in *Celotex* where the court explained that summary judgment is not a "disfavored procedural shortcut." 477 U.S. at 327. The Arizona Supreme Court summed up this point well in *Orme Sch. v. Reeves*, 802 P.2d 1000 (Ariz. 1990):

> Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists. *Id.* at 305 (quotation omitted); *see generally*, Leonard D. Pertnoy, *Summary Judgment in Florida: The Road Less Traveled*, 20 St. Thomas L. Rev. 69, 77-78 (2007); Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments*, 76 Fla. B.J. 20, 26 (2002).

interpretation encourages claimants to file lawsuits in Florida knowing that they are unlikely to be dismissed before trial, which clogs Florida's courts and ultimately places pressure on defendants to settle cases regardless of substantive merit.

Indeed, the Court in *Anderson* recognized that the two motions serve a similar purpose in that they resolve whether the evidence "is so one-sided that one party must prevail as a matter of law." 477 U.S. at 251-52*; see also Celotex,* 477 U.S. at 323-24 (allocating the burdens of proof on summary judgment to where they would lie at trial furthers this common goal – "isolate and dispose of factually unsupported claims or defenses.").

In short, there is no principled reason for applying one standard when reviewing a summary judgment and another standard when reviewing a directed verdict at trial. Rather, the federal interpretation makes sense because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323; *see also Humphreys v. Gen. Motors Corp.*, 839 F. Supp. 822, 825 (N.D. Fla. 1993), *aff'd*, 47 F.3d 430 (11th Cir. 1995) (it would be "nonsensical" to "place the burden on Defendant to affirmatively disprove the elements of Plaintiffs' cause of action"); *Kourouvacilis v. Gen. Motors Corp.*, 575 N.E.2d 734, 738 (Mass. 1991) (it makes "eminent good sense" to follow the *Celotex* framework).

Not surprisingly, Florida courts have expressed frustration with Florida's

standard because it forces the parties to proceed to trial only to have the trial result in the entry of a directed verdict, resulting in a needless expenditure of the parties' and judiciary's resources. *See, e.g., Martin Petroleum Corp. v. Amerada Hess Corp.*, 769 So. 2d 1105, 1108 (Fla. 4th DCA 2000) ("A party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict"); *Perez-Rios v. Graham Cos.*, 183 So. 3d 478, 479 (Fla. 3d DCA 2016) (same); Leonard D. Pertnoy, *Summary Judgment in Florida: The Road Less Traveled*, 20 St. Thomas L. Rev. 69, 75 (2007) ("[T]he consequences of [the Court's] 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 . . . .").

One case in particular, *Sylvester v. City of Delray Beach*, 486 So. 2d 607 (Fla. 4th DCA 1986), aptly demonstrates the needless expenditure of judicial resources caused by the current interpretation of the rule. There, the appellate court had overturned an order granting summary judgment, but after trial affirmed a directed verdict. In response to the argument that these two positions were contradictory, the court explained that the standards were different, and thus a directed verdict was proper even after the denial of summary judgment.

Commentators, too, have criticized the distinction between the standards for summary judgment and directed verdict. For example, in Logue & Soto, *supra.*, at

26, the authors noted:

> [S]ince summary judgment occurs only after the parties have had an adequate opportunity to complete their discovery, the parties have access at the summary judgment stage to the same evidence that they will present at trial. In this situation, there is no reason to ignore the parties' respective substantive burdens of proof at trial when reviewing a summary judgment motion.

Id.

Finally, numerous sister state courts have expressed this same view while following the federal standard:

- *Ex parte Gen. Motors Corp.*, 769 So. 2d 903, 909 (Ala. 1999) ("If the nonmovant cannot produce sufficient evidence to prove each element of its claim, the movant is entitled to a summary judgment, for a trial would be useless.") (quotation omitted).
- *Orme Sch. v. Reeves*, 802 P.2d 1000, 1008 (Ariz. 1990) ("[M]otions for directed verdict and for summary judgment serve the same purpose of expediting the business of the court by removing meritless claims. Although the two motions occur at different times during the trial process, they share the underlying theory that there is no issue of fact and that the movant is entitled to judgment as a matter of law.").
- *Aguilar v. Atl. Richfield Co.*, 24 P.3d 493, 506 (Cal. 2001), as modified (July 11, 2001) ("The purpose of federal summary judgment law, which is identical to the purpose of ours, is to provide courts with a mechanism to

cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." Further, "'[g]iven the difficulty of proving a negative, . . . a test' requiring conclusive negation 'is often impossibly high.'") (quotation omitted).

- *Anderson v. Serv. Merch. Co.*, 485 N.W.2d 170, 174 (Neb. 1992) ("A rationale for use of a summary judgment is the disposition and elimination of frivolous or baseless lawsuits that would otherwise necessitate unwarranted trials and consume valuable time, avoidable expense, and judicial resources better directed toward litigation that resolves real controversies, meritorious claims, and valid issues.").
- *Yahnke v. Carson*, 613 N.W.2d 102, 107 (Wis. 2000) ("The very object of summary judgment is to separate real and genuine issues from those that are formal or pretended, so that only the former may subject the moving party to the burden of trial.") (quotation omitted).
- *Rooks v. Robb,* 871 N.W.2d 468, 471 (N.D. 2015) ("The Supreme Court's holding [in *Celotex*] is a recognition of the difficulty of proving a negative. If the record, after discovery, contains no evidence to support an essential element of the plaintiff's claim, there is no "evidence" the defendant can point to in support of its assertion there is no such evidence. In such a case the rule allows the defendant to put the plaintiff to its proof, without the

necessity of a full trial, by merely 'pointing out' to the trial court the absence of evidence to support the plaintiff's case.") (quotation omitted).

- *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 262 (Tenn. 2015) (Summary judgment "simply embodies the common law's recognition that if there is no factual dispute, there is no need for trial.")

Consistent with the federal rule and other state cases, PLAC submits that the summary judgment and directed verdict standards should mirror each other. A proper application of the summary judgment rule would provide the tools needed to ensure that parties and the courts are not engaged in needless litigation.

C. Since Speculative Testimony Cannot Be Used To Support A Verdict, It Should Not Be Used To Avoid Summary Judgment

There is a second, but related, change that needs to be made to bring Florida in line with the federal courts and the well-reasoned opinions of other states. That is, not only must the plaintiff to present some evidence of the elements of its claims in order to survive a motion for summary judgment, but that evidence must consist of more than speculation or unsupported inferences.

Florida law is well settled that a verdict cannot be based on speculation. *See, e.g.*, *Reaves*, 569 So. 2d at 1309 ("[W]hen the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the Court to direct a verdict for the defendant.") (quotation omitted); *Vecta Contract, Inc. v. Lynch*, 444 So. 2d 1093, 1095 (Fla. 4th DCA 1984) (reversing for entry of

directed verdict where the plaintiff could not establish that the chair that allegedly collapsed was manufactured by the defendant or a predecessor: "[t]here is no legal justification for tipping the scales in favor of either alternative. The choice amounts to rank speculation. This a jury is not permitted to do."); *Husky Indust., Inc. v. Black*, 434 So. 2d 988, 995 n.11 (Fla. 4th DCA 1983) (directing verdict in favor of defendant where only evidence was "speculation and guesswork").

Stated another way, a party cannot prove its claim by the greater weight of the evidence if the inferences as to material facts are "evenly balanced." *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984). In other words, it is not enough to simply postulate that something might have occurred.

Yet, *Holl* has been interpreted to allow a party to rely on pure speculation to survive a motion for summary judgment, even though the same type of evidence would be insufficient to support a verdict. *See Doe v. N. Okaloosa Med. Ctr., Inc.*, 802 So. 2d 1202, 1203 (Fla. 1st DCA 2002) ("***even the possibility*** of a material issue of fact") (quotation omitted); *Carnes v. Fender*, 936 So. 2d 11, 14 (Fla. 4th DCA 2006) (***"scintilla of appreciable evidence"***); *Falco v. Copeland*, 919 So. 2d 650, 652 (Fla. 1st DCA 2006) ("***even the slightest doubt***"); *Nard, Inc. v. DeVito Contracting & Supply, Inc.*, 769 So. 2d 1138, 1140 (Fla. 2d DCA 2000) ("***merest possibility of the existence of a material fact.***").

Indeed, based on this standard, it appears that a plaintiff in Florida can avoid

summary judgment by essentially relying on its pleadings. *See, e.g., Tri-City Used Cars, Inc. v. Grim*, 566 So. 2d 922, 923 (Fla. 1st DCA 1990) ("When a defendant moves for summary judgment, the allegations made in the complaint must be accepted as true, unless affirmatively disproved."). Not so in federal court. *See Anderson*, 477 U.S. at 256 (a party opposing a summary judgment "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial"); *see also* Advisory Committee Notes to the 1963 amendment of Federal Rule 56 (recognizing that "[permitting] the pleadings themselves to stand in the way of granting an otherwise justified summary judgment . . . is incompatible with the basic purpose of the rule.")

Once again, some examples from product liability cases provide the practical perspective on this issue. In *Clark v. Gochenaur*, 623 So. 2d 561 (Fla. 1st DCA 1993), a worker sued a truss manufacturer after he fell from a roof truss that allegedly broke. The defendant examined what it believed to be the subject truss, and based on that inspection, provided affidavits opining that the truss was not defective, it had not been secured, and had it been secured, it would not have broken.

The plaintiff did not file a response, but argued there was conflicting evidence as to whether the truss the defense examined was the one the plaintiff fell from. The manufacturer replied that if the truss examined by the defense was the wrong truss, then the plaintiff had no evidence that ***any*** truss broke and caused his injuries.

The court found that since the defendant did not conclusively prove the identity of the truss from which the plaintiff fell, summary judgment was improper. Thus, even without any evidence of defect or that the defect caused his injuries, the plaintiff was permitted to get to a jury based on speculation that, although the only truss that was identified was not defective, there still might have been a defect.

Likewise, in *Lindsey v. Bell S. Telecommunications, Inc.,* 943 So. 2d 963, 964 (Fla. 4th DCA 2006), a tire changing machine malfunctioned, but the cause of the malfunction was unknown. *Id.* at 965. While the court agreed that the malfunction could have been caused by "improper use of the machine, improper maintenance, or simply worn out parts," it nevertheless stated that such possibilities were irrelevant because the moving party did not conclusively negate the plaintiff's case. *Id.*

Under the federal court standard, speculative testimony like that described in *Clark* and *Lindsay* would result in the entry of summary judgment. *Anderson*, 477 U.S. at 252 ("mere existence of a scintilla of evidence in support of [the non-movant's] position will be insufficient"); *Dowdy v. Suzuki Motor Corp.*, 567 F. App'x 890, 893 (11th Cir. 2014) (speculation is insufficient to establish a genuine issue of fact on causation); *Wolicki-Gables v. Arrow Int'l, Inc.*, 634 F.3d 1296, 1302 (11th Cir. 2011) (plaintiffs are required to present "more than a scintilla of evidence"); *Beauregard v. Cont'l Tire N. Am., Inc.*, 695 F. Supp. 2d 1344, 1353 (M.D. Fla. 2010), *aff'd*, 435 F. App'x 877 (11th Cir. 2011) (granting summary

judgment where evidence "amounts to impermissible speculation and conjecture"); *Colville v. Pharm, & Upjohn Co. LLC*, 565 F. Supp. 2d 1314, 1322 (N.D. Fla. 2008) ("probability and 'pure speculation' are not enough"); *Humphreys*, 839 F. Supp. at 830 (granting summary judgment on "speculative" claims); *Eveler v. Ford Motor Co.,* No. CV 15-14776, 2017 WL 3382460, at *1 (E.D. La. Aug. 7, 2017) (cannot show genuine issue with "unsubstantiated assertions" or a "scintilla" of evidence).

State courts around the country likewise rejected the use of speculative testimony to defeat summary judgment, when they decided to follow the federal rule. As just a few examples:

- *Wood v. Safeway, Inc.,* 121 P.3d 1026, 1031 (Nev. 2005) ("The nonmoving party 'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'");
- *Beatty v. Trailmaster Prod., Inc.,* 625 A.2d 1005, 1011-12 (Md. 1993) ("It is frequently said that summary judgment should not be granted if there is the 'slightest doubt' as to the facts. Such statements are a rather misleading gloss on a rule that speaks in terms of 'genuine issue as to any material fact, and would, if taken literally, mean that there could hardly ever be a summary judgment, for at least a slight doubt can be developed as to practically all things human. A better formulation would be that the party opposing the motion is to be given the benefit of all reasonable doubts in

determining whether a genuine issue exists.");

- *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 337 (W. Va. 1995) ("The evidence illustrating the factual controversy cannot be conjectural or problematic. It must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve. The evidence must contradict the showing of the moving party by pointing to specific facts demonstrating that, indeed, there is a "trialworthy" issue.").

Florida should follow the federal courts and its own rule on speculation at the summary judgment stage. This again would have the effect of limiting claims to those with merit and avoiding unnecessary litigation.

D. The Discrepancy Between Florida's Interpretation Of Its Summary Judgment Rule And The Interpretation Of Similar Rules Around The Country Leads To Forum Shopping

This Court has noted on multiple occasions the important interest of maintaining consistency between state and federal rules. *In re Amend. to Fla. Evidence Code*, 278 So. 3d 551, 554 (Fla. 2019), *reh'g denied*, No. SC19-107, 2019 WL 4127349 (Fla. Aug. 30, 2019) ("[T]he Daubert amendments will create consistency between the state and federal courts with respect to the admissibility of expert testimony and will promote fairness and predictability in the legal system, as well as help lessen forum shopping."); *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86, 88 (Fla. 1996) (noting the "disturbing results" where "lawsuits filed in Florida

courts can survive a forum non conveniens challenge that would result in dismissal at the federal-court level").

This is another area where that uniformity is critical. Indeed, those with meritless claims may compare Florida's state courts to its federal courts, and conclude that it is easier to pursue frivolous claims in state court. This must change.

CONCLUSION

For the reasons set forth herein, PLAC submits that the Court should answer the first certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of Court through the Florida Courts eFiling Portal and served via e-mail on this 16th day of December, 2019 to:

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