THE FLORIDA BAR

December 1, 2013

House examines state and federal standards for summary judgment

BY MARK D. KILLIAN *Managing Editor*

A House panel November 6 discussed whether Florida should adopt the "less restrictive" federal standard for summary judgment.

Chair Larry Metz, R-Groveland House Civil Justice Subcommittee Chair Larry Metz, R-Groveland, said while the workshop topic was "not necessarily jazzy," it is important for those involved in the civil litigation system.

Teresa Ward, the committee's staff attorney, said while Florida Rule of Civil Procedure 1.510 and Federal Rule 56 are very similar, the difference is how they have been interpreted.

"The federal law has become more lenient as far as the movant goes and Florida's has been more restrictive," Ward said.

Florida honors the "slightest doubt rule," Ward said, which means if there is the slightest doubt in favor of the nonmoving party, summary judgment is not granted. The federal standard, she said, "is a bit looser."

The Florida standard has remained unchanged since 1966 while the federal standard was established in 1986. Thirty-five states have adopted the federal standard.

Israel Reyes, a former judge now in private practice in Coral Gables, said when he was on the bench carrying a caseload of 5,000 to 6,000 a month, he often thought many cases should have been disposed of via summary judgment, but he was restricted by Florida's interpretation of the rule.

Reyes said the federal rule allows for the disposition of a case at the summary judgment stage when — after the parties have had an opportunity to take necessary discovery — a party has no evidence to put at issue a material fact for which the party has the burden of proof at trial. He said under the current summary judgment standard in Florida, summary judgment is often denied, and the case sent to trial, only to have a judge direct a verdict.

"It really makes no sense to have a case go all the way through pretrial procedure when it is going to be resolved by means of a directed verdict anyway," said Reyes, adding that adopting the federal standard would preserve limited court resources by reserving the time-consuming and expensive process of a full-blown trial to those matters involving disputed, material issues of fact which can only be resolved by trial.

Charlie Wells, representing the Florida Justice Reform Institute, agreed.

"One thing I have become concerned about more and more as I have practiced law almost 50 years, is that one of — if not the greatest — impediment to the proper administration of civil justice is the expense and costs inherent in this system," said Wells, a former Supreme Court justice now practicing in Orlando, adding the legislative and judicial branches have a duty to work to hold down expenses

and improve efficiencies.

"I have come to believe that the federal rule. . . is an improvement to the rule that we have administering justice in Florida," said Wells, adding that if someone files a lawsuit that person should be in a position to show that they can prove each element of the cause of action.

"Our law in Florida, contrary to the federal rule, is that the burden always remains on the other party . . . to demonstrate that there is no issue," Wells said.

Wells said under Florida's standard, almost all bad faith cases brought against insurance companies go to the jury, whereas federal cases with "almost the identical facts" are granted summary judgment, which are routinely upheld on appeal.

Dan Gerber of Orlando, however, said no objective data — only anecdotal evidence — exists that cases would be ruled on differently in Florida using the federal standard.

"There is no doubt that summary judgments are granted in this state and that they are affirmed," said Gerber, albeit often via a per curiam affirmed decision with no written explanation for the ruling.

"I would say from a substantive law stand- point, the Legislature has the opportunity to help Florida judges and curtail litigation which may be excessive, but I also believe at this point we can find no evidence that a change in the rule of civil procedure would have any effect at all."

A subcommittee of The Florida Bar's Civil Procedures Rules Committee studied the issue in 2010, in an effort to determine if there was a need for a change in the current Florida summary judgment practice and procedure.

Ultimately, however, the subcommittee had no recommendations.

Wayne Hogan, of Jacksonville, who co-chaired the subcommittee with Gerber, said the panel surveyed the chief judges of all 20 circuits, as well as trial lawyer organizations, in an effort to determine whether there was an apparent need for a change in current Florida summary judgment practice and procedure. He said no consensus for change was discernable from the survey responses.

"If there was a real need for a change, I would have expected a more substantial response, a groundswell of response," Hogan said. "We did not have that kind of response."

Hogan did say, however, the subcommittee is still in place and in light of the House Civil Justice Subcommittee interest, will continue to review the issue.

Rep. Metz, a civil litigator for more than 30 years, said the House Civil Justice Subcommittee "may or may not be able to address this, but if nothing else we have drawn attention to an issue that perhaps was being worked on in a rules committee and might yet be worked on again."