>> THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION.
CHIEF JUSTICE CANNADY PRESIDING.
>> WELCOME TO THE SESSION OF THE
FLORIDA SUPREME COURT.
ON TODAY'S DOCKET WE HAVE ONE
CASE, THE CASE OF WILSONART
VERSUS MIGUEL LOPEZ.
COUNSEL FOR THE PETITIONER IS
RECOGNIZED.
>> YOUR HONOR, MAY IT PLEASE THE
COURT, MY NAME IS SEAN MCDONOUGH
FROM WILSON ELSER MOSKOWITZ
ELDERMAN & DICKER AND WITH ME AS
JACQUELINE BERTELSEN.
WE REPRESENT THE PETITIONER
SAMUEL ROSARIO AND HIS EMPLOYER
WILSONART.
THE FACT BIG FOR SUMMARY
JUDGMENT.
MISTER ROSARIO'S – NVIDIA
REPUDIATED THE EVIDENCE THE
PLAINTIFF PUT FORTH IN RESPONSE
TO OUR MOTION FOR SUMMARY
JUDGMENT.
THE FIFTH DCA OPINION SHOWS IT
WANTED TO GRANT SUMMARY
JUDGMENT, GRAPPLED WITH HOW TO
GET IT.
THE FIFTH DIFFICULTY WAS CAUSED
BY THE UNWORKABLE STANDARD
CREATED BY FLORIDA CASE LAW
INTERPRETING RULE ONE.150 AND
THE PHRASE NO GENUINE ISSUE OF
MATERIAL FACT.
THE CURRENT STANDARD REPEATED IN
FLORIDA LAW REQUIRES MOVEMENT TO
SHOW THE NONEXISTENCE OF EVEN
THE SLIGHTEST DOUBT ABOUT ANY
MATERIAL FACT BUT RULE ONE.50
PLAINLY REQUIRES THE MOVEMENT TO
SHOW THERE IS NO GENUINE ISSUE
OF ANY MATERIAL FACT.
HOW DO WE INTERPRET THE RULE OF
PLAIN LANGUAGE?
THE KEY TERMS ARE GENUINE AND
MATERIAL AND THEY WERE PUT THERE
FOR A REASON.
IF THE STANDARD WAS NONEXISTENCE
OF SLIGHTEST DOUBT THE RULE

MAKERS WOULD NOT HAVE ANY NEED FOR THE WORDS GENUINE AND MATERIAL.
ONE.150 JUDGMENT SOUGHT MUST BE RENDERED IF THERE IS NO ISSUE AS TO ANY FACT.
WE ARGUE THE CURRENT STANDARD MANY FLORIDA COURTS EMPLOY IGNORE THE QUALIFIER GENUINE.
CONCEPTION OF THIS CURRENT STANDARD, THE HALL STANDARD, REQUIRED THE NONEXISTENCE OF ANY DOUBT ONCE COUNTED TO THE PLAIN LANGUAGE OF RULE ONE.150.
IT REQUIRED THE MOVING PARTY TO NEGATE SHE OPPONENT'S CASE TO WIN THE MOTION FOR SUMMARY JUDGMENT AND ELIMINATING THE SLIGHTEST DOUBT THAT AN ISSUE OF MATERIAL FACT EXISTED.
RULE ONE.150 SAID THE JUDGMENT MUST BE ENTERED IF THE EVIDENCE SHOWED THERE IS NO GENUINE ISSUE OF MATERIAL FACT.
>> SORRY TO INTERRUPT BUT HOW CAN YOU SAY IT IS A PLAIN LANGUAGE ISSUE WHEN FLORIDA COURTS AND FEDERAL COURTS AT DIFFERENT TIMES HAVE TAKEN DIFFERENT VIEWS OF WHAT A GENUINE ISSUE IS, THE FEDERAL COURT WENT A CERTAIN WAY AND THE MID 80s ADOPTION OF THE STANDARDS, FLORIDA COURT SEEMED TO BE FINDING CASES THAT DESCRIBE IT DIFFERENTLY.
HOW IS THAT A PLAIN LANGUAGE ISSUE?
>> THAT GOES TO THE HEART OF THE ISSUE ABOUT WHETHER THIS COURT WOULD RECEDE FROM PAUL VERSUS TALCAUGHT AND GO WITH THE FEDERAL COURT'S INTERPRETATION OF NO GENUINE ISSUE OF MATERIAL FACT.
I CAN'T EXPLAIN WHY AT DIFFERENT TIMES THERE ARE DIFFERENT INTERPRETATIONS, GOING BY THE PLAIN LANGUAGE OF THE RULE WOULD NOT HAVE ANY NEED FOR THE TERM

GENUINE IF WHAT THE CURRENT STANDARD IS SAYING, NO SLIGHTEST DOUBT.
THE FEDERAL COURT WENT 20, 30 YEARS WITHOUT LOOKING AT IT FROM A PLAIN LANGUAGE STANDPOINT.
>> IT SEEMS WHEN THE FEDERAL COURTS FINALLY SETTLED ON WHAT THEY HAVE NOW, THE WORDS HAD SOME CLEAR MEANING, SEEMED LIKE IT WAS MORE THAT THEY INTERPRETED THE RULES IN LIGHT OF THE PURPOSE OF SUMMARY JUDGMENT, THE OVERALL SORT OF PURPOSE OF THE RULES.
IT SEEMS MORE PRAGMATIC, THAT IS NOT CAUGHT -- NOT A COMMENT ON THE MERITS OF THE FEDERALIST STANDARD WHICH MAKE A LOT OF SENSE BUT THINKING FROM AN INTERPRETIVE PERSPECTIVE AND WONDERING HOW WOULD WE, WHAT WITH THE ARGUMENT BE?
I UNDERSTAND IF YOU ARE LOOKING AT IT IN A PROSPECT OF LEGISLATIVE RULEMAKING KIND OF WAY BUT HOW WOULD WE SAY AFTER DECADES OF FLORIDA COURT BEING ALL OVER THE MAP ON WHAT THIS MEANS AND COALESCING AROUND THIS NOTION OF FLORIDA HAS MORE DEMANDING STANDARD THAN A FEDERALIST STANDARD.
HOW WOULD WE SAY THE PLAIN MEANING IS THERE ALL ALONG, HAPPENS TO BE WITH THE FEDERAL STANDARD IS?
>> YOU DO THAT, THE VERY FACT THAT FLORIDA COURTS HAVE DIFFICULTY UNDERSTANDING HOW TO EMPLOY WHAT HALL VERSUS TALCAUGHT WAS ERRONEOUSLY HANDLED AND THE ISSUE COULD BE A SITUATION WHICH BAD EFFECTS MAKE BAD LAW.
YOU HAVE A SITUATION WHERE THE DOCTOR SUBMITTED VERY CONCLUSORY ALLEGATIONS TO SHOW THERE WAS NO GENUINE ISSUE OF FACT IN THE HALL COURT MAYBE OVERREACHED AND

DID NOT KEEP IN MIND NOT ONLY
THE PLAIN LANGUAGE OF THE RULE
BUT THE FACT THAT RULE 1.
WHICH IS PART OF RULE ONE.150,
TELL YOU TO CONSTRUE RULE
ONE.150 FOR THE INEXPENSIVE
DETERMINATION OF ANY ACTION.
WHAT WE HAVE SEEN SINCE HALL
VERSUS TOLCOTT AT ITS PROGENY,
THE INEXPENSIVE DETERMINATION OF
WHAT HAPPENED, PAUL MISSED THE
OPPORTUNITY OF BRINGING IN
ONE.150 152 CONSTRUE THESE
RULES.
TO KEEP THAT IN MIND.
>> CAN YOU TALK ABOUT THIS
PARTICULAR CASE.
THE CALLINGS HAD SEEMED THE
VIDEO, SUPPORTS WHAT YOU SAID
BUT FOLKS ON THE OTHER SIDE HAVE
A DIFFERENT ARGUMENT AS TO THE
GENUINE ISSUES THAT ARE IN
DISPUTE WOULD BE, CAN YOU
ADDRESS THAT?
>> YES.
SO IN THE TRIAL COURT LEVEL AND
THE FIFTH DCA THE REAL ISSUE WAS
DEFINITELY DOES THE VIDEO
EVIDENCE CONTRADICT THE
EYEWITNESS TESTIMONY AND THE
THEORY FROM THAT EYEWITNESS
TESTIMONY THERE WAS A SUDDEN
LANE CHANGE TO THE LEFT FROM THE
CENTER LANE BY MISTER ROSARIO
WHICH AS IT TURNS OUT IS
COMPLETELY REPUDIATED BY HIS OWN
DASHCAM VIDEO WHICH HAS HIM
GOING FOR 44 SECONDS STRAIGHT IN
THE CENTER LANE AND SLOWING TO A
STOP IN FRONT OF OTHER VEHICLES
THAT ARE STOPPING AT AN
INTERSECTION.
BEFORE HE GETS IMPACTED BY
MISTER WILKINS.
SO NOW, I THINK NOW AT THIS
LEVEL, AT THE SUPREME COURT
LEVEL AT THE FIRST TIME WE ARE
HEARING FROM THE RESPONDENT
THERE IS THE IDEA OF NEGLIGENCE
PER SE OF MISTER ROSARIO BASED

ON THE IDEA THAT THERE IS ONE
PORTION OF THE EXPERT AFFIDAVIT
THAT INDICATES BOX TRUCK GIVEN
BY MISTER ROSARIO WAS STRADDLING
THE RIGHT LANE.
I THINK THE VIDEO, SO AT THE
TRIAL COURT LEVEL I AM DEALING
WITH A CHANGE TO THE LEFT AND I
AM DEALING WITH HE IS STRADDLING
THE RIGHT LANE AND NEGLIGENT FOR
STRADDLING THE RIGHT LANE.
MY RESPONSE IS THERE IS NO
SUDDEN AND UNEXPECTED MOVEMENT
BY MISTER ROSARIO AS SHOWN IN
THE AFFIDAVIT.
THERE ARE FOUR EXPLANATIONS
RECOGNIZED IN THE PRESUMPTION OF
SITUATION OF EXCUSES FOR A
DRIVER WHO MAY BE FULFILLING HIS
OBLIGATIONS BUT NONETHELESS
REAR-ENDED THE LEAD DRIVER.
LET ME STEP BACK BECAUSE IT
REQUIRES A DISCUSSION OF
CLAMPETT WHICH TALKS ABOUT REAR
DRIVERS OBLIGATIONS, THE REAR
DRIVER'S OBLIGATIONS ARE TO
REMAIN ALERT, FOLLOW THE VEHICLE
IN FRONT AT A SAFE DISTANCE,
HAVE AN IMAGINARY CLEAR STOP
DISTANCE AND THE REASON FOR THIS
IS THE REAR DRIVER IS IN CONTROL
OF HIS OWN FOLLOWING DISTANCE.
THE FRONT DRIVER IS IN CONTROL
OF THAT, THE REAR DRIVER IS, THE
FOUR OTHER INSTANCES OR
EXPLANATIONS FOR WHY ARE REAR
DRIVER -- BASED ON THE IDEA THAT
THE REAR DRIVER COULD FULFILL
HIS OBLIGATIONS TO BE ALERT AND
KEEP A SAFE FOLLOWING DISTANCE
BUT BECAUSE OF WHAT HAPPENED IN
FRONT OF HIM HE CAN'T --
REAR-ENDED NONETHELESS.
IN THIS CASE, IN THIS CASE THE
VIDEO CLEARLY INDICATES FOR 44
SECONDS IF YOU TAKE THE EXPERT
AT HIS WORD, HIS OPINION THAT HE
IS STRADDLING THE RIGHT LANE HE
IS DOING SO FOR 44 SECONDS.
YOU CAN LOOK AT THE VIDEO AND

SEE THAT HE IS DRIVING STRAIGHT
AS AN ARROW.
444 SECONDS MISTER ROSARIO IS
PERHAPS, TAKEN IN THE LIGHT MOST
FAVORABLE TO THE RESPONDENT
DRIVING IN THE RIGHT LANE BUT
THAT IS NOT THE APPROXIMATE
CAUSE FOR WHY MIGUEL LOPEZ
REAR-ENDED HIM.
IT IS NOT A FIFTH SCENARIO TO
RECOGNIZE, NOT A SUDDEN LANE
CHANGE, NOT A SUDDEN STOP, NOT
AN ILLEGAL OR IMPROPER STOP AND
IT IS NOT MIGUEL LOPEZ HAVING
MECHANICAL FAILURE.
THERE IS NOTHING IN THE ACTIONS
OF MISTER ROSARIO THAT WOULD
CAUSE MIGUEL LOPEZ NOT TO BE
ABLE TO JUST STOP AS OTHER
VEHICLES WERE STOPPING FOR THE
RED LIGHT, MISTER LOPEZ FAILED
TO STOP AS A VEHICLE STOPPED.
>> THAT SOUNDS TO WHAT YOU HAVE
JUST GIVEN WOULD BE A
MAGNIFICENT ARGUMENT AS A MOTION
FOR DIRECTED VERDICT.
WHAT DIFFERENCE SHOULD THERE BE
UNDER YOUR WILL IS ANY FOR THE
COURT'S AND RORY AT SUMMARY
JUDGMENT AND THE COURT'S INQUIRY
UPON A MOTION FOR DIRECTED
VERDICT?
>> OUR POSITION WOULD BE THERE
WOULD BE, THERE WOULD BE NO
DIFFERENCE BETWEEN DIRECT
VERDICT AND SUMMARY JUDGMENT.
NO DIFFERENCE IN FEDERAL COURT
BETWEEN THAT.
ONE OF THE -- ONE GOOD REASON IS
BECAUSE OF RULE ONE.120 AND THE
IDEA OF SPEEDY AND INEXPENSIVE
DETERMINATION.
THERE IS NO DIFFERENT STANDARD,
WHY ARE WE HAVING PARTIES IN
THIS INSTANCE, IF SUMMARY
JUDGMENT WASN'T GRANTED, WE
WOULD GO THROUGH THE TIME AND
EXPENSE OF GOING TO A JURY,
PRESENTING A CASE BEFORE A JURY,
DEALING WITH THE JUDGE'S TIME.

>> SO -
>> WE HAVE NOWADAYS THERE SEEMS TO BE A VIDEO CAMERA EVERYWHERE SO I SUSPECT IN THE FUTURE THIS VIDEO CAMERA AND THE REPORTING'S ARE A MAJOR ROLE IN THESE POSITIONS.
I KNOW ABOUT THESE THINGS WHEN I SEE THEM AND IT SEEMS TO ME WHEN A VIDEO CAMERA CAPTURES WHATEVER THE ISSUE IS THERE IS A COUNTERARGUMENT THE VIDEO HAS BEEN TAMPERED WITH.
WHAT HAPPENS IN SITUATIONS IN A SITUATION FOR SUMMARY JUDGMENT WHERE YOU HAVE A VIDEO DEPICTING EVERYTHING THAT HAPPENED AND ENCOUNTERING THE MOTION FOR SUMMARY JUDGMENT THERE'S AN AFFIDAVIT SAYING THIS PARTICULAR VIDEO HAS BEEN TAMPERED WITH?
THE POINT IS HOW FAR CAN A TRIAL JUDGE GO IN NOT ACCEPTING THESE COUNTER AFFIDAVITS WITH A GENUINE ISSUE OF MATERIAL FACT?
>> THE TRIAL JUDGE WOULD BE FACED WITH A SITUATION OF NO GENUINE SCREWUP.
MATERIAL FACT THAT THE VIDEO IS NOT SOMEHOW TAMPERED OR ALTERED.
THAT WOULD BE AN ISSUE.
IT WAS NOT AN ISSUE IN THIS CASE BUT --
>> IT SEEMS TO ME THAT POSITION IS REQUIRING A LOT OF FACTUAL APPOINTMENTS TAKING A LOT AWAY FROM JURIES FOR THIS DECISION.
>> THE CASE IS PARTIES THAT MEANT THE VIDEO HAS NOT BEEN TAMPERED WITH WERE ALTERED IN ANY WAY.
YOU WILL BE DEALING WITH RARE INSTANCES ON THE NONMOVING SIDE THE SECOND THAT WAS TAMPERED WITH YOU CAN'T RELY ON THIS VIDEO SO I THINK IN THOSE RARE INSTANCES WHERE PARTIES ARE NOT AGREEING THE VIDEO IS TAMPERED WITH OR IS TAMPERED WITH THAT WOULD BE AN ISSUE THAT WOULD

PREVENT SUMMARY JUDGMENT.
THE OTHER ISSUE --
>> YOU ARE INTO YOUR REBUTTAL TIME.
YOU MAY KEEP GOING IF YOU WISH BUT YOU ARE CONSUMING REBUTTAL TIME.
>> THANK YOU, JUSTICE.
LET ME MAKE ONE POINT.
THERE IS THE ISSUE OF WHETHER THERE WAS INTERPRETATION ISSUE OF THE VIDEO.
IN THE WIGGINS CASE THERE WAS AN INTERPRETATION ISSUE.
YOU HAVE NOT HEARD THERE IS AN INTERPRETATION ISSUE WITH THE VIDEO ON MATERIAL ISSUE OF FACT.
THE ONLY ISSUE IS THE AFFIDAVIT OR EXPERTS SAYING IT LOOKS LIKE HE IS IN THE REAR RIGHT LANE AND THE FACT IS TRUE FOR PURPOSE OF SUMMARY JUDGMENT NOTION, THERE IS NO PROXIMATE CAUSATION.
WE DON'T HAVE AN ISSUE HERE OF ALTERED VIDEO, WE DON'T HAVE ANYONE HAVING INTERPRETATION ISSUE WITH THE VIDEO AND IT IS A CASE WHERE IT IS CLEAR SUMMARY JUDGMENT, IN SOME SHAPE OR FORM.
>> COUNSEL FOR THE RESPONDENT.
>> MAY IT PLEASE THE COURT, BRYAN GOWDY ON BEHALF OF WILSONART 2 -- MIGUEL LOPEZ AND HIS ESTATE.
I HEARD QUESTIONS ABOUT INTERPRETATION AND WHAT THE RULES SHOULD BE, WHETHER IT SHOULD BE THE SAME AS DIRECTED VERDICT.
I WANT TO EMPHASIZE AS MY BRIEF DOES THOSE ARE TWO DIFFERENT QUESTIONS.
AS NEIL GORSUCH NOTED THE LEGISLATIVE POWER INVOLVES WHAT IT SHOULD BE FOR EVERYONE IN THE FUTURE.
IN WRITING THAT SINCE THE JUSTICE EMPHASIZED THE WORD SHOULD.
THIS TODAY IS A JUDICIAL

DISPUTE, NOT A LEGISLATIVE
RULEMAKING AND I REPRESENT
MISTER LOPEZ IN THAT DISPUTE.
I WILL CONFINE MY ARGUMENTS TO
WHAT THE LAW IS NOT WHAT IT
SHOULD BE WHICH WOULD BE
SOMETHING APPROPRIATE FOR FULL
LEGISLATIVE AUTHORITY.
I WANT TO POINT OUT THERE ARE
FOUR PRELIMINARY ISSUES THE
COURT NEEDS TO ADDRESS BEFORE IT
GETS TO THE ISSUE OF THE MEANING
OF RULE ONE.150 THAT ARE LAID
OFF IN THE BRIEF.
DOES THE COURT HAVE
JURISDICTION?
THE DCA DID NOT PASS UPON ITS
SHOULD QUESTION BELOW.
I WOULD POINT THE COURT TO ITS
PRECEDENT, ON PAGE 17 OF OUR
BRIEF, SIMILAR TO THE CASE.
THE FIRST DCA ASKED WHETHER
STANDARD JURY INSTRUCTION WAS
CORRECT IN LIGHT OF A THEN
RECENT PRECEDENT OF THIS COURT
AND NEVER ANSWERED THAT QUESTION
AND DISMISSED THE CASE SAYING
THEY HAD NOT PASSED UPON THE
QUESTION AND ON ITS OWN MOTION,
AND ORDER WITHDRAWING THE
HORRIFIED STANDARD JURY
INSTRUCTION AND WHAT THE
DISTRICT COURT HAS ASKED SHOULD
THERE BE AN EXCEPTION, THAT IS
THE QUINTESSENTIAL LEGISLATIVE
QUESTION IN THE COURT'S
RULEMAKING.
THERE WAS NO INTERPRETIVE METHOD
EMPLOYED BELOW TO ASK IF THE
COURT'S PRIOR PRECEDENT
INTERPRETING RULE ONE.150 WERE
MISTAKEN WHERE THERE WAS
INTERPRETIVE LEGAL ARROW,
JUSTICE THOMAS'S VIEW WHETHER
THERE WAS A DEMONSTRABLE ERROR.
THERE WAS NO ANALYSIS OF THAT.
I WOULD SUBMIT THE COURT NEEDS
TO INSIST THE DISTRICT COURT OF
APPEAL THINK THE LAW SHOULD BE
CHANGED, THEY SHOULD NOT DO SO

IN A LEGISLATIVE MANNER BUT IN
THE MANNER OF POINTING OUT
INTERPRETIVE MISTAKES BY THE
COURT PREDECESSORS AND THERE WAS
NO BRIEFING ON THAT.
YOU HEARD EXTENSIVE ARGUMENT ON
THE HALL DECISION, YOU WILL NOT
FIND THE DECISION SLATED ONCE IN
ANY OF THE BRIEFS BELOW.
IT WAS NEVER ARGUED.
THIS CASE DOES NOT FALL UNDER
HALL AT ALL.
HALL DEALS WITH A MOVING PARTY'S
BURDEN AT SUMMARY JUDGMENT.
IT IS UNDISPUTED HERE, THE
PETITIONER MET ITS BURDEN IN
MOVING FOR SUMMARY JUDGMENT.
THE ISSUE HERE FALLS IN CASES OF
THE TRILOGY ABOUT NONMOVING --
>> COULD YOU GIVE US THE TEXTUAL
ARGUMENT, THE WAY FLORIDA LAW
APPEARS TO BE INTERPRETED, THE
CONCEPT OF A GENUINE ISSUE.
HOW IS THAT CONSISTENT?
>> THE GENUINE ISSUE OF
MATERIAL, THE ORDINARY MEANING
OF THE WORDS.
YOU KNOW WE LOOKED FOR
DICTIONARIES, THE RULE WAS
ADOPTED AND NOBODY, I FOUND NO
DICTIONARY CONTEMPORANEOUS, AND
MATERIAL FACT.
YOU FIND THE WORD GENUINE WHICH
MEANS THE SAME THING AS IT DOES
TODAY.
AS WE LAID OUT IN OUR BRIEF, YOU
HAVE WRITTEN ABOUT THIS, YOU
NEED TO LOOK AT THE OLD SOIL
CANNON, THAT LAID OUT IN
SUTHERLAND, ONE JURISDICTION
ADOPT ANOTHER JURISDICTION WILL
MOVE AND YOU DON'T LOOK AT HOW
THE ORIGINAL JURISDICTION IN
TERMS OF THE 36 YEARS LATER, AT
THE TIME OF ADOPTION.
THE ONLY CASES SUBMITTED TO THIS
COURT IN WHAT I WILL CALL THE
ADOPTION PERIOD, THE 1940s AND
THE 1950s, THEY USED THE
STANDARD FLORIDA COURTS ARE

USING.
>> IT SEEMS COMPLICATED.
I DON'T REMEMBER IF IT WAS
ANDERSON, WHEN THE COURT WAS
EXPLAINING THEIR UNDERSTANDING
OF THE CONCEPT, THEY WERE SATING
A CASE IN 1874 THAT WAS
REJECTING WHAT APPEARS TO BE ANY
POSSIBLE EVIDENCE, IF YOU VIEW
THAT IS A LEGAL TERM OF ART AS
IT WAS IN THE 1950s, THERE WAS
PRECEDENT FOR TREATING IT MORE
WHAT FEDERAL COURTS DO NOW.
>> YOU ARE REFERRING TO THE 1871
DECISION THAT DEALT WITH
DIRECTED BURDEN AND THE QUESTION
THAT WAS ASKED ABOUT WHETHER IT
SHOULD BE THE SAME THERE IS A
POLICY MATTER TODAY THE COURT
MAY WANT TO DECIDE BUT
HISTORICALLY THE DIRECTED
VERDICT WILL AND SUMMARY
JUDGMENT RULE DID NOT GROW UP TO
GATHER.
>> I HAVE THE SAME QUESTION FOR
YOU I HAD FOR OPPOSING COUNSEL.
WHAT IS THE LOGICAL DIFFERENCE
BETWEEN THE JUDICIAL INQUIRY AT
SUMMARY JUDGMENT AND DIRECTED
VERDICT.
MY QUESTION IS NOT WHAT IT
SHOULD BE IN SOME HYPOTHETICAL
WAY, IT IS WHAT IS IT IN FACT
AND WHAT IS THE RULE YOU ARE
ADVOCATING THAT IT OUGHT TO BE.
>> I AM NOT ADVOCATING WHAT
ABOUT TO BE BUT WHAT IT IS.
>> BUT YOU ARE.
YOU ARE ASKING TO ADOPT A RULE,
NOT TALKING ABOUT POLICY, BUT
LEGISLATION, TELL ME ABOUT THE
COOL, THE HOLDING YOU ADVOCATE
FOR AND WHETHER THERE IS ANY
LOGICAL DIFFERENCE BETWEEN THE
JUDICIAL PRODUCT AND SUMMARY
JUDGMENT?
>> APPLY PRINCIPLES OF
TEXTUALISM AND ORIGINAL IS IN,
DIRECTED VERDICT CAME INTO THE
LAW IN THE LATE 1600s AND WAS

ALWAYS A CONCEPT USED AFTER A
JURY TRIAL AND THE SUMMARY
JUDGMENT RULING CONTRAST, THERE
WAS ONE RULE IN 1732, IT DID NOT
DEVELOP AND THE LAW UNTIL THE
SECOND HALF OF THE NINETEENTH
CENTURY, FIRST TIME IT APPEARED
WAS 1855.
BY THE TIME YOU GOT TO 1938 WHEN
FEDERAL COURT ADOPTED THE
SUMMARY JUDGMENT RULE THEY
ADOPTED A SEPARATE RULE FOR
DIRECTED VERDICT.
SO IF YOU WANTED THESE RULES TO
BE THE SAME, IN 1958, TO ADOPT
THE LANGUAGE IN 50, INTO RULE 56
THEY DID NOT DO THAT.
THEY ADOPTED TWO DISTINCT RULES
AND THIS COURT IN 1950 FOLLOW
THE PATTERN.
IF YOU LOOK UP, MODELS ADOPTED
IN 1950 THERE WAS A, MODEL 40
AND A, MODEL 43, DESCENDENTS OF
RULE ONE.140 IN RULE ONE.150.
THEY ARE QUITE DISTINCT.
THE RULE ONE.140 THAT USED TO
BE, MODEL 40 USES THE WORDS
DIRECTED VERDICT.
IT DOESN'T SAY ANYTHING ELSE.
THE REASON WAS THAT CONCEPT WAS
WELL-ESTABLISHED IN COMMON-LAW
AT THE TIME AND THAT INCLUDED
THE 1871 OR 74 CASE JUSTICE
MUNIS WAS TALKING ABOUT.
IT WAS A RELATIVELY NEW CONCEPT
THAT CAME AROUND IN THE SECOND
HALF OF THE NINETEENTH CENTURY,
ORIGINALLY USED BY PLAINTIFFS
AND BUSINESS LITIGATION TO SPEED
UP GETTING A CASE TO TRIAL SO
HISTORICALLY CONTEXTUALLY AND
TEXTUALLY THESE RULES ARE
DIFFERENT SO IF YOU FOLLOW
TEXTUALISM AND ORIGINAL IS HIM I
DON'T SEE HOW THEY COULD BE THE
SAME.
>> IF YOU LOOK AT ANDERSON THE
COURT SAID SUMMARY JUDGMENT
SHOULD BE GRANTED WERE THE
EVIDENCE IS SUCH THAT IT WOULD

REQUIRE DIRECTED VERDICT AND
CITING A CASE FROM 1934 SO
SHOULDN'T THAT INFORM WHAT WAS
UNDERSTOOD IN THE 1950s?
>> I AM AWARE OF THAT CASE AND
REVIEWED IT LAST NIGHT.
THE OVERWHELMING WEIGHT OF
AUTHORITY IN THE 1940s WHICH I
DECIDED IN MY BRIEF USED THE
SLIGHTEST DOUBT STANDARD.
THE LEAD CASE IN THAT TIME WAS
FROM THE SECOND CIRCUIT, I HAVE
IT CITED IN MY BRIEF, ISOLATED
CASES FROM MULTIPLE FEDERAL
CIRCUIT COURTS IN THE LATE 1940s
AND EARLY 1950s.
I UNDERSTAND YOUR ARGUMENT BUT
YOU ARE HERE ON WHETHER TO
OVERTURN PRECEDENT, THEY HAVE TO
MAKE A SHOWING THAT THERE WAS
DEMONSTRABLE ERROR.
I DON'T SEE HOW OUR COURTS IN
THE 1950s, I CAN TRACE THIS TO
AFTER THE ADOPTION WITH THE
SLIGHTEST DOUBT STANDARD.
HOW THAT COULD HAVE BEEN A
DEMONSTRABLE ERROR WHEN YOU ARE
DOING THE SAME THING AS THE
FEDERAL CIRCUIT COURTS OF
APPEALS.
PERHAPS BACK THEN THEY COULD
HAVE DIRECTED THE VERDICT BUT
THEY DIDN'T AND SO IF YOU ARE
GOING TO ACT AS A JUDICIAL BODY
IN THIS PROCEEDING YOU CANNOT
SHOW THERE WAS SOME SERIOUS
INTERPRETIVE AIR ARE.
AS YOU POINTED OUT THE COURTS
HAVE HAD DIFFERENT
INTERPRETATIONS, THERE WAS NO
CLEAR DICTIONARY DEFINITION.
>> CAN I INTERRUPT YOU, I AGREE
WITH YOU, SAYING THE RULE IS
WRONG BECAUSE IT DOESN'T LEAD TO
THE JUST IN TIME RESOLUTION OF
CASES THAT IS A POLICY THING.
THE ONLY ARGUMENT FOR GOING BACK
AND CHANGING THE OLD STANDARD TO
A NEW STANDARD WOULD BE OUR
PRESIDENT IS CLEARLY ERRONEOUS.

YOU HAVE A COMPELLING ARGUMENTS FOR WHY IT IS NOT CLEARLY IRRELEVANT BASED ON THE ORIGINAL TEXTUAL PRINCIPLES.
IS THERE ANOTHER WAY TO LOOK AT THE CASE AND THAT IS WHEN WE PUT THE RULE IN PLACE, VIDEO EVIDENCE WAS NOT REALLY A THING, WHEN THE STANDARD WAS ADOPTED THE DRIVER, TESTIFYING WHAT HE THOUGHT WAS TRUE, THE EYEWITNESS TESTIFYING WHAT HE THOUGHT WAS TRUE AND NOBODY WOULD SAY ANY OTHER STANDARD, SUMMARY JUDGMENT WOULD BE APPROPRIATE AND THE CASE WHERE THERE IS EVIDENCE THAT IS NOT QUESTIONS, THERE IS NO SUGGESTION IT IS TAMPERED WITH THAT DECIDES THE CASE, THAT EVIDENCE IT DOESN'T SEEM LIKE WAS CONTEMPLATED.
WE ARE REALLY APPLYING THE RULE IN A SENSE TO A FACT PATTERN THAT IS COMMON TODAY THAT WASN'T REALLY CONTEMPLATED AS COMMON AT THE TIME.
IS THERE ROOM FOR A DIFFERENT APPLICATION WITHOUT GOING BACK AND SWITCHING THE STANDARD.
I KNOW IT'S A LONG QUESTION, THE CHIEF WILL GIVE YOU TIME BECAUSE I HAVE TAKEN SO MUCH OF YOURS.
>> I LIKE THE LONG QUESTIONS, YOUR HONOR.
THE ANSWER TO YOUR QUESTION IS NO.
IF YOU SEND US TO THE RULEMAKING PROCESS IT MAY LAST ANOTHER 70 YEARS.
NO ONE COULD PREDICT WHAT THE TECHNOLOGY WOULD BE LIKE IN 70 YEARS.
WE SEE THIS IN THE FOURTH AMENDMENT, UNREASONABLE SEARCHES AND SEIZURES YET JUSTICE SCALIA WAS ABLE TO APPLY THAT WHEN DEALING WITH A DEVICE TO DETERMINE THE AMOUNT OF HEAT IN YOUR HOME AND THEY MAKE A DETERMINATION.

I DON'T THINK THE TECHNOLOGY CHANGES THE THING, YOU WILL ALWAYS BE GRAPPLING WITH THIS.
I WANT TO BE CLEAR OUR EXPERT -
>> THIS LINE OF REASONING WOULD BE THE EYEWITNESS TESTIMONY DOESN'T CREATE A GENUINE ISSUE OF MATERIAL FACT IN LIGHT OF THE VIDEO THAT IS NOT QUESTIONS IN TERMS OF ITS RELIABILITY.
>> ANY TIME YOU LOOK, HERE'S PART OF THE PROBLEM.
THIS CASE HAS BEEN SET UP, THERE IS NOT AN INCONSISTENCY BETWEEN OUR EXPERT'S OPINION AND THE VIDEO.
THE INCONSISTENCY BETWEEN MISTER MENENDEZ'S TESTIMONY AND THE VIDEO DEALS WITH THE TIMING OF THE IMPACT.
OUR EXPERT DID NOT RELY ON THAT PORTION OF MISTER MENENDEZ'S TESTIMONY.
WHAT HE RELIED UPON WAS THE MOVEMENT OF THE VEHICLE.
YOU SEE THAT ON PARAGRAPH 7 OF THE EXPERT AFFIDAVIT.
THERE IS ANOTHER VIDEO NOT ON THE RECORD OF MISTER MENENDEZ, IN THE EXPERTS AFFIDAVIT.
WHETHER THE VEHICLE, WE NEVER ARGUED FOR SUMMARY JUDGMENT, NOT ONCE.
LOOK AT PAGE 184 OF THE RECORD, WE CITED 186, IF WE LOOK CLOSELY AT THE VIDEO AND YOU KNOW, IT HAS BEEN A TEST BY THE EXPERT, THE VIDEO TO THE CENTERLINE OF THE VEHICLE, IF YOU LOOK YOU CAN SEE A HECK OF A LOT MORE TO THE RIGHT THAN YOU CAN ON THE LEFT.
YOU CAN'T SEE DOWN THE LEFT SIDE OF THE VEHICLES IN FRONT OF YOU.
ON THE RIGHT SIDE OF THE VEHICLES OF ROSARIO, WE DON'T HAVE A CONFLICT.
IF YOU LOOK AT PARAGRAPH 8 --
>> ARE YOU SAYING EVEN IF YOU WERE IN FEDERAL COURT APPLYING A FEDERAL STANDARD, SUMMARY

JUDGMENT WOULD STILL BE DENIED?
>> THAT IS MY ENTIRE ARGUMENT.
YOU DECIDE THE STANDARD IN THIS CASE, BRING IT ALL OUT IN ARGUMENT BRIEF.
IT IS NOT A HALL CASE AND HAS NOTHING TO DO WITH HALL, WHY PETITIONERS NEVER ARGUED IT BELOW NOR DID THE FIFTH DCA ARGUE IT.
IT'S NOT A SUDDEN LANE CHANGE CASE, THAT IS A FICTION CREATED BY THE PETITIONERS.
WE NEVER ARGUED ONCE, WE ARGUED THE STATUTE, 186 OF THE RECORD OVER THE LANE.
THE EXPERTS OPINION, I WATCHED IT 100 TIMES.
THE GENUINE ISSUE OF MATERIAL UNDER THE FEDERAL OR STATE STANDARD.
THE WAY THE VEHICLE WAS HIT ON THE RIGHT REAR SIDE, THAT CAUSED IT TO MOVE TO THE LEFT.
WE ONLY NEED TO PROVE MISTER ROSARIO WAS ONE% AT FAULT.
>> OF FORWARD-LOOKING QUESTION, THE WISDOM ARE WHAT THEY ARE, THE FEDERALS ON THE PAGE, THE FEDERAL STANDARD IN FLORIDA STANDARD SEEM THE SAME.
IF YOU LOOK AT THE WISDOM OF THE FEDERAL SYSTEM AND OVERWHELMING APPROACH OF OTHER STATES THE CURRENT FLORIDA STANDARD SEEMS INDEFENSIBLE.
I AM CURIOUS IF YOU COULD HELP US THINK THROUGH PROSPECTIVELY WHY THAT IMPRESSION WOULD NOT BE ADEQUATE.
>> TRYING TO MAKE TWO POINTS.
I DISAGREE WITH THE PREMISE OF YOUR QUESTION.
RULE 56 E --
>> IT STILL CIRCLES BACK TO GENUINE ISSUE, RELATING TO NOT RELYING ON YOUR PLEADING.
THIS 5060 THING I DON'T THINK HELPS YOU.
>> THE SECOND POINT, A LOT OF

OTHER DIFFERENCES BETWEEN
FLORIDA AND FEDERAL RULES
ESPECIALLY WITH RESPECT TO THE
PROCEDURES HOW SUMMARY JUDGMENT
IS DONE.
YOU SAW THE VIDEO WAS NOT
PRESENTED TO THE DAY OF THE
HEARING WHICH WAS VIOLATION OF
THE WE SHOULD HAVE BEEN AFFECTED
TO BELOW.
BE THAT AS IT MAY OR RESPONDING
PARTY ALWAYS HAS TO PRESENT THE
EVIDENCE TWO DAYS, THE MOVING
PARTY IS PRESENTED 20 DAYS.
A LOT OF FEDERAL PRACTICE, BOTH
RULE 56 AND THE CORRESPONDING
LOCAL RULES WHICH TRIAL COURT'S
UNDER SECTION 2 A, THEY LAY OUT
A VERY DETAILED PROCESS FOR
BRINGING THIS TO THE JUDGE AND
YOU HAVE TWO BRIEFS, ONE FROM 14
RETIRED JUDGES, 309 YEARS OF
EXPERIENCE AND THE ORGANIZATION,
PLAINTIFFS AND DEFENSE TRIAL
LAWYERS, AND A HOLISTIC CHANGE
AND NOT JUST A CHANGE TO THE
STANDARD WHICH WON'T FIT, I SEE
THAT I AM OVER MY TIME.
>> I WILL GIVE YOU ANOTHER
MINUTE.
>> I WOULD LIKE TO ANSWER ANY
QUESTIONS.
I WANT TO POINT OUT THE OTHER
ISSUES IN THE BRIEF.
I POINTED OUT, THAT WAS NEVER
PASSED UPON, DON'T SEE HOW THIS
COURT HAS JURISDICTION IF YOU
REINFORCE THE PROVISION.
IF YOU HAVE JURISDICTION IT IS
BASED ON A FALSE IT OF FACTS.
THE MAIN THING THAT IS INCORRECT
IS IT SAYS THE EXPERTS OPINION
WAS BASED ON THE DEPOSITION OF
MISTER MENENDEZ.
THAT IS FALSE.
IN PARAGRAPH 8 IT WAS BASED ON
THAT.
>> IF YOU START FROM THE PREMISE
OF JUSTICE LAWSON'S QUESTION THE
FIFTH DCA SAID IS THERE AN

EXCEPTION ON THE EXISTING
EVIDENCE WHICH OBVIOUSLY THAT
WAS IMPLICITLY PASSED ON BY THE
FIFTH DCA.
IF YOU FOCUS NOT ON THE
PERSPECTIVE –
>> THE QUESTION --
>> WE TWO QUESTIONS ALL THE
TIME.
THEY ARE SAYING WE ARE LOOKING
AT EXISTING FLORIDA LAW AND
DON'T PERCEIVE THERE TO BE AN
EXCEPTION BUT UNDERSTANDING THE
TYPE OF QUESTION JUSTICE LAWSON
ASKED MAYBE THERE IS.
THE IDEA OF SCINTILLA OR NO
POSSIBLE EVIDENCE NEEDS TO BE
LOOKED AT DIFFERENTLY THAN IF
THEY WERE COMPETING WITH EACH
OTHER.
>> YOU TWEET THE QUESTION AFTER
YOU DETERMINED YOU HAD
JURISDICTION, YOU CAN'T TWEET TO
MANUFACTURED JURISDICTION.
IF YOU DO THAT IT WOULD ALLOW
THE COURT TO CREATE ITS OWN
JURISDICTION.
THE WORDING OF THE QUESTION IS
IMPORTANT AND MORE IMPORTANTLY,
THIS GOES MORE TO THE
DISCRETIONARY PART, THE COURT
SHOULD SEND A MESSAGE TO THE
DISTRICT COURT OF APPEAL THAT IF
THEY THINK THE LAW WAS WRONGLY
INTERPRETED IN A JUDICIAL MANNER
THEY ARE TO HAVE TEXTUAL
ANALYSIS OF THE OPINION TO GUIDE
THIS COURT.
THERE WAS NO TEXTUAL ANALYSIS
DONE UNTIL MY ANSWER BRIEF.
IT IS IMPORTANT TO SEND A
MESSAGE TO THE DISTRICT COURTS.
>> YOU NEED TO GO AHEAD, 15
SECONDS.
>> THE LAST POINT I MADE WAS
NONE OF THESE ARGUMENTS WERE
PRESERVED BELOW.
OPINIONS BY MANY OF YOU MAKING
THE POINT THIS COURT DOES NOT
ACT AS STANDBY COUNSEL AND I

WOULD ASK THAT THE COURT AFFIRM
OR DISMISS THE ALTERNATIVE IF
YOU CHANGE SUMMARY JUDGMENT
STANDARD, DUE PROCESS THAT
MISTER LOPEZ HAD THE ABILITY TO
PRESENT THE ADDITIONAL EVIDENCE
TO BE HEARD BY THE TRIAL JUDGE
IN THE FIRST INSTANCE, THANK YOU
FOR YOUR TIME.
>> THANK YOU.
WE WILL HEAR A REBUTTAL.
YOU NEED TO AMUSE, COUNSEL.
>> THANK YOU.
THE FIFTH DCA, THE ISSUE OF THE
SUDDEN LANE CHANGE THEORY WAS
VERY MUCH ARGUED AT THE SUMMARY
JUDGMENT HEARING BY THE
RESPONDENT.
THEY DID PASS ON THIS QUESTION.
SCOTT VERSUS HARRIS, A FEDERAL
CASE USING FEDERAL STANDARD
WHICH IS WHAT I RELY UPON IN MY
NOTION FOR SUMMARY JUDGMENT AT
THE TRIAL COURT LEVEL TIME I
FILED THE MOTION FOR SUMMARY
JUDGMENT AND ASKING ME QUITE A
BIT OF QUESTIONS ABOUT THE
FEDERALIST STANDARD.
I WANT TO GET TO THE CONTEXTUAL
ARGUMENT AND IT IS CLEAR GENUINE
ISSUE, HOW DOES THAT GET TO THE
HALL AND ITS PROGENY IDEA OF NO
EXISTENCE OF SLIGHTEST DOUBT.
IF THE RULE MAKERS WANTED TO
HAVE THAT AS THE STANDARD WHY
WOULD THEY HAVE PUT IN GENUINE?
THEY COULDN'T OF BEEN MORE
CLEAR.
>> SO YOU ARE ASKING US TO SEED
FROM PRIOR PRECEDENT
INTERPRETING THE RULE, CORRECT?
I THINK WHAT YOU NEED TO DO
UNDER OUR PRESIDENT IS
DEMONSTRATE THAT IT IS CLEARLY
ERRONEOUS SO YOU COULD NARROWLY
FOCUS NOT JUST ON WHY YOU MIGHT
DO IT DIFFERENTLY BUT WHY IT IS
OBVIOUS.
>> ONE WAY I TRIED TO DO IT IS
LOOK AT THE PLANE MEANING OF THE

WORD AND THEN I LOOK TO THINGS
SUCH AS SIR PROOF LEWIS --
SUPERFLUOUS.
OF THE STANDARD IS NO EXISTENCE
OF SLIGHTEST DOUBT, GENUINE
WOULD BE SUPERFLUOUS.
>> YOU HAVE A RESPONSE TO YOUR
OPPONENTS TEXTUAL LIST VIEW OF
THE.
>> FOR ONE I QUESTION WHETHER
TEXTUALISM APPLIES STRONGLY WHEN
YOU ARE INTERPRETING A RULE
PROMULGATED BY THIS COURT AS
OPPOSED TO STATUTES IN
CONSTITUTIONS PROMULGATED BY
ANOTHER GOVERNMENTAL BODY.
AND GOING BACK TO THE TIME WHEN
THE RULE WAS DRAFTED, HAS
SIGNIFICANCE WHEN INTERPRETING A
RULE PROMULGATED BY THIS VERY
COURT.
>> IF YOU ARE SAYING COURTS
SHOULD HAVE A COURT THAT HAS
WILL MAKING AUTHORITY SHOULD
HAVE MORE LEEWAY IN INTERPRETING
ITS OWN RULES THEN I WOULD THINK
THAT WOULD LEAD TO THE
CONCLUSION THAT IT WOULD BE
HARDER TO DETERMINE THE ORIGINAL
INTERPRETATION WAS CLEARLY
ERRONEOUS, RIGHT?
>> THE REASON WHY YOU COULD SAY
HALL VERSUS TOLCOTT WAS
ERRONEOUS, IT NEVER CONSIDERED
THE IDEA THAT WILL.120 WAS MADE
PART OF THAT RULE.
AND I THINK JUDGE REHNQUIST
TOUCHED ON THAT WHEN HE DECIDED
HE POINTED OUT IF SUMMARY
JUDGMENT WAS NOT THE DISABLED
SHORTCUT BUT AS AN INTEGRAL PART
OF FEDERAL RULES AS A WHOLE
WHICH WERE DESIGNED TO SECURE
THE JUST, SPEEDY AND AN
EXTENSIVE DETERMINATION OF EVERY
ACTION WHICH IS THE SAME AS
FEDERAL RULE ONE WHICH IS THE
SAME AS FLORIDA RULE ONE.130 AND
YOU GO TO THE RULE OF
CONSTRUCTION THAT THE FEDERAL

LAND STATE RULE ARE
SUBSTANTIALLY SIMILAR FOR
PERSUASIVENESS.
IT IS IGNORING RULE.100 THAT
SUPPORTS THE IDEA THE PAUL IS
CLEARLY ERRONEOUS.
>> YOU ARE NOW OVER YOUR TIME.
SINCE OPPOSING COUNSEL WENT OVER
BY ABOUT THREE MINUTES I WILL
GIVE YOU ANOTHER MINUTE AND A
HALF.
>> LET ME JUST IN CLOSING
SUMMARIZE WHAT WE ARE ASKING THE
COURT TO DO.
WE ARE ASKING THE COURT TO
OVERTURN THE FIFTH DCA AND
AFFIRM THE COURT'S SUMMARY
JUDGMENT.
HOW DO YOU DO THAT?
NUMBER ONE YOU COULD GO BACK AND
SAY AGREE WITH ARGUMENT AT THE
TRIAL COURT LEVEL THAT THE
EVIDENCE, THE VIDEO EVIDENCE
MADE THE EYEWITNESS TESTIMONY
AND EXPERT AFFIDAVIT NOT
SUBSTANTIAL BECAUSE IT VITIATED
THAT EVIDENCE.
OR YOU COULD GO WITH THE FIFTH
DCA CERTIFIED QUESTION WHICH
TOOK INTO CONSIDERATION BACK
WHEN THIS RULE WAS PROMULGATED
THE VIDEO EVIDENCE WAS NOT IN
EXISTENCE AND THERE IS
MODERNIZATION OF INTERPRETATION
OF THE RULE BECAUSE OF VIDEO
THAT COULD CLEARLY REPUDIATE
NONMOVING PARTIES EVIDENCE.
THE FEDERAL COURT IN 1986
CHANGED YOUR INTERPRETATION OF
THE PHRASE NO GENUINE ISSUE WITH
MATERIAL FACT WHICH HAS PLANE
MEANING, NOT SOME MEANING LIKE
NO SLIGHTEST DOUBT AND MAKES IT
MORE IN LINE WITH THROUGH.100
LIKE JUDGE REHNQUIST DID WITH
FEDERAL ONE.
THANK YOU.
>> THANK YOU BOTH FOR YOUR
ARGUMENTS IN THIS CASE.
THAT IS THE ONLY CASE ON THE

DOCKET SO THE PROCEEDINGS TODAY
THE EYEWITNESS TESTIFYING TO
WHAT HE THOUGHT WAS TRUE, AND
CLEARLY NOBODY WAS SAYING
SUMMARY JUDGMENT WOULD BE
APPROPRIATE.
BUT NOW THE COURTS ARE DEALING
WITH A CASE WHERE THERE IS
EVIDENCE THAT'S NOT QUESTIONED
IN TERMS OF ITS RELIABILITY.
THERE'S A VIDEO CAMERA, AND
THERE'S NO SUGGESTION THAT IT'S
BEEN TAMPERED WITH, THE VIDEO'S
BEEN TAMPERED WITH, THAT DECIDES
THE CASE.
AND THAT KIND OF EVIDENCE, IT
DOESN'T SEEM LIKE, WAS
CONTEMPLATED.
SO, I MEAN, WE'RE REALLY
APPLYING THE RULE IN A SENSE TO
A FACT PATTERN THAT IS VERY
COMMON TODAY BUT THAT WASN'T
REALLY CONTEMPLATED AS COMMON AT
THE TIME.
IS THERE ROOM FOR A DIFFERENT
APPLICATION WITHOUT GOING BACK
AND SWITCHING THE STANDARD?
I KNOW IT'S A LONG QUESTION, I'M
SURE THE CHIEF WILL GIVE YOU
MORE TIME BECAUSE I TOOK SO MUCH
OF YOURS.
>> I LIKE THE LONG QUESTIONS,
YOUR HONOR.
I THINK THE ANSWER TO YOUR
QUESTION IS, NO.
IF YOU SEND THIS TO THE
RULEMAKING PROCESS AND THIS RULE
MAY LAST ANOTHER 70 YEARS, AND I
DON'T THINK ANYONE CAN PREDICT
WHAT THE TECHNOLOGY WILL BE LIKE
IN 70 YEARS.
I MEAN, WE SEE THIS IN THE
FOURTH AMENDMENT, RIGHT?
IT'S JUST UNREASONABLE SEARCHES
AND SEIZURES, YET JUSTICE SCALIA
WAS ABLE TO APPLY THAT WHEN
YOU'RE DEALING WITH A DEVICE
THAT CAN DETERMINE THE AMOUNT OF
HEAT IN YOUR HOME AND MAKE A
DETERMINATION.

I DON'T THINK THE TECHNOLOGY
HERE CHANGES A THING, JUSTICE
LAWSON.
YOU'RE ALWAYS GOING TO BE
GRAPPLING WITH THIS.
AND I JUST WANT TO BE CLEAR, I
AM-- OUR EXPERT--
>> IN OTHER WORDS, I MEAN, THE
SORT OF LINE OF REASONING WOULD
BE THAT THE EYEWITNESS TESTIMONY
DOESN'T CREATE A GENUINE ISSUE
OF MATERIAL FACT IN LIGHT OF THE
VIDEO THAT'S NOT QUESTIONED IN
TERMS OF ITS RELIABILITY, HAS IT
BEEN TAMPERED WITH, THAT KIND OF
THING.
>> WELL, I THINK ANYTIME YOU'RE
GOING TO LOOK AT-- HERE'S PART
OF THE PROBLEM I HAVE.
THIS CASE HAS BEEN SET UP IN A
WAY THAT'S FACTUALLY FALSE.
THERE IS NOT AN INCONSISTENCY
BETWEEN OUR EXPERT OPINION AND
THE VIDEO.
THE INCONSISTENCY IN THE,
BETWEEN MR.MENDEZ'S TESTIMONY
AND THE VIDEO DEALS WITH THE
TIMING OF THE IMPACT.
OUR EXPERT DID NOT RELY ON THAT
PORTION OF MR.MENDEZ'S
TESTIMONY.
WHAT HE RELIED UPON WAS ON THE
MOVEMENT OF THE VEHICLE WHICH
YOU CAN SEE THAT IN PARAGRAPH 7
AND 8 OF THE EXPERT'S AFFIDAVIT.
AND, BY THE WAY, THERE'S ANOTHER
VIDEO NOT IN THE RECORD OF MR.--
FROM THE DASH OF MR.MENDEZ THAT
IS REFERENCING THE EXPERT'S
AFFIDAVIT.
BUT, SO THE ISSUE HERE IS
WHETHER THE VEHICLE-- AND, BY
THE WAY, WE NEVER ARGUED SUDDEN
LANE CHANGE IN OUR RESPONSE TO
THE MOTION OF SUMMARY JUDGMENT,
NOT ONCE.
AND THEY HAVEN'T REFUTED THAT.
LOOK AT PAGE 184 OF THE RECORD
AND GO FORWARD.
WE CITED ON PAGE 186 THE TRAFFIC

STATUTE THEY VIOLATED.
IF YOU LOOK CLOSELY AT THE VIDEO
AND YOU KNOW THAT THE, IT'S BEEN
ATTESTED TO BY THE EXPERT, THE
VIDEO WAS NEAR THE CENTER LINE
OF THE VIDEO.
IF YOU'LL LOOK, YOU'LL SEE YOU
CAN SEE A HECK OF A LOT MORE ON
THE RIGHT THAN THE LEFT.
YOU CAN'T SEE DOWN THE LINE OF
VEHICLES IN FRONT OF YOU.
YOU CAN SEE WELL DOWN THE RIGHT
SIDE OF THE VEHICLES.
SO WE DON'T HAVE A CONFLICT.
IF YOU LOOK AT--
>> BUT, MR.GOWDY, ARE YOU
SAYING THAT EVEN IF YOU WERE IN
FEDERAL COURT APPLYING A FEDERAL
STANDARD, THEN SUMMARY JUDGMENT
SHOULD STILL BE DENIED?
>> CORRECT.
THAT'S MY ENTIRE ARGUMENT THREE.
SO THIS WOULD ALL BE DICTA IF
YOU DECIDE TO ARGUE ON THE
STANDARD.
THIS CASE IS NOT A HULL CASE.
IT HAS NOTHING TO DO WITH HULL
WHICH IS WHY THE PETITIONERS
NEVER ARGUED IT BELOW, NOR DID
THE FIFTH DCA RELY ON IT.
THAT'S A FICTION CREATED BY THE
PETITIONERS.
WE-- NEVER ARGUED ONCE.
IT'S ON PAGE 186 OF THE RECORD.
[INAUDIBLE]
OVER THE LANE.
AND IT'S, THE EXPERT'S OPINION
WAS IF YOU LOOK AT THE VIDEO
LIKE I JUST DESCRIBED, I WON'T
GO THROUGH IT AGAIN-- AND I'VE
WATCHED IT A HUNDRED TIMES
PROBABLY-- HE'S OFF-CENTERED.
AT LEAST THERE'S AN ISSUE OF
GENERAL MATERIAL--
[INAUDIBLE]
UNDER THE FEDERAL OR STATE
STANDARD.
AND THEN THE WAY THAT THE
VEHICLE WAS HIT WAS ON THE RIGHT
REAR SIDE, AND THAT CAUSED IT TO

MOVE TO THE LEFT.
AND, YOU KNOW, WE ONLY IS HAVE THE PROVE HERE THAT MR.ROSARIO WAS 1% AT FAULT.
>> COUNSEL, I'M SORRY TO INTERRUPT YOU BECAUSE YOUR TIME'S GETTING SHORT.
COULD WE ASK YOU A FORWARD-LOOKING QUESTION?
SO IF WE THINK ABOUT KIND OF THE WISDOM, THE WORDS ARE WHAT THEY ARE.
THE FEDERAL'S-- ON THE PAGE THE FEDERAL STANDARD AND THE FLORIDA STANDARD SEEM LIKE THEY'RE, YOU KNOW, PRETTY MUCH THE SAME.
OBVIOUSLY, IN CASE LAW THEY AREN'T.
IF YOU LOOK AT SORT OF THE WISDOM OF THE FEDERAL SYSTEM AND THE OVERWHELMING APPROACH OF OTHER STATES, THE CURRENT FLORIDA STANDARD SEEMS INDEFENSIBLE.
AND I'M CURIOUS IF YOU COULD HELP US THINK THROUGH PROSPECTIVELY WHY THAT IMPRESSION WOULD NOT BE ACCURATE.
>> I HAVE, I'LL TRY TO MAKE TWO POINTS TO YOU ABOUT THAT, YOUR HONOR.
FIRST, THE LANGUAGE.
I DISAGREE WITH THE PREMISE OF YOUR QUESTION.
RULE 56E--
>> THE 56E THING, IT STILL CIRCLES BACK TO GENUINE ISSUE, AND THE 56E THING ONLY RELATES TO NOT BEING ABLE TO RELY ON YOUR PLEADING.
SO THE 56E THING, I DON'T THINK, HELPS YOU.
SO WHAT'S THE SECOND POINT?
>> OKAY.
THE SECOND POINT IS THAT THERE'S A LOT OF OTHER DIFFERENCES BETWEEN THE FLORIDA AND FEDERAL RULES ESPECIALLY WITH RESPECT TO THE PROCEDURES ABOUT HOW SUMMARY

JUDGMENT IS DONE.
AS YOU SAW IN THIS CASE, THE VIDEO WASN'T EVEN PRESENTED UNTIL THE DAY OF THE HEARING WHICH WAS A VIOLATION OF THE RULES TO WHICH WE SHOULD HAVE OBJECTED TO BELOW.
BE THAT AS IT MAY, A RESPONDING PARTY ONLY HAS TO PRESENT THE EVIDENCE TWO DAYS BEFORE THE HEARING.
THE MOVING PARTY HAS TO PRESENT IT 20 DAYS BEFORE THE HEARING.
IF YOU LOOK-- AND I DO A LOT OF FEDERAL PRACTICE-- BOTH RULE 56 AND THE CORRESPONDING LOCAL RULES WHICH TRIAL COURTS IN FLORIDA CAN'T HAVE LOCAL RULES UNDER SECTION 2A, THEY LAY OUT A VERY DETAILED PROCESS FOR BRINGING THIS TO THE JUDGE.
AND YOU HAVE TWO BRIEFS, ONE FROM, I THINK, 14 RETIRED JUDGES WITH 309 YEARS OF EXPERIENCE AND THE ORGANIZATION THAT REPRESENTS BOTH PLAINTIFFS AND DEFENSE TRIAL LAWYERS URGING YOU TO SEND THIS TO THE COMMITTEE TO MAKE A HOLISTIC CHANGE AND NOT JUST SOME CHANGE TO THE STANDARD WHICH WON'T FIT WITH THE REST OF THE RULE.
I SEE THAT I'M OVER MY TIME.
SO--
>> YOU CAN-- I'LL GIVE YOU ANOTHER MINUTE.
>> OKAY.
WELL, I WOULD LIKE TO ANSWER ANY QUESTIONS IF ANYONE HAS THOSE.
I DO, I DO WANT TO JUST POINT OUT THE OTHER ISSUES IN THE BRIEF.
I'VE ALREADY POINTED OUT THAT IT WAS NEVER PASSED UPON.
I HAVEN'T HEARD ANY ARGUMENT ABOUT THAT.
I DON'T SEE HOW THIS COURT HAS JURISDICTION IF YOU'RE GOING TO ACTUALLY ENFORCE THE PASSED-UPON PROVISION.

IF YOU DO DETERMINE YOU HAVE
JURISDICTION, IT'S ALL BASED ON
A FALSE SET OF FACTS THAT HAVE
BEEN SET OUT.
THE MAIN THING IN THE FIFTH DCA
OPINION THAT IS JUST, IS JUST
INCORRECT IS IT SAYS THAT THE
EXPERT'S OPINION WAS BASED IN
LARGE PART ON THE DEPOSITION--
[INAUDIBLE]
OF MR.MENDEZ.
THAT'S FALSE.
IT WAS IN PARAGRAPH 8, HIS
TESTIMONY WAS BASED ON THE
VIEWING OF THE--
[INAUDIBLE]
>> SO, COUNSEL, IS THERE-- SO
IF YOU SORT OF START FROM THE
PREMISE OF JUSTICE LAWSON'S
QUESTION, IF THE FIFTH DCA HERE
HAD SAID IS THERE AN EXCEPTION
UNDER EXISTING FLORIDA LAW FOR,
YOU KNOW, VIDEO EVIDENCE, I
MEAN, WHICH OBVIOUSLY THAT WAS
IMPLICITLY AT LEAST PASSED ON BY
THE FIFTH DCA, ISN'T THAT
BASICALLY WHAT WE'RE BEING ASKED
TO DECIDE?
IF YOU FOCUS NOT ON THE
PERSPECTIVE, BUT ON THE--
>>-- QUESTION TO PUT IT AS--
>> I MEAN, WE TWEAK THE
QUESTIONS ALL THE TIME.
BASICALLY WHAT THEY'RE SAYING IS
WE'RE LOOKING AT EXISTING
FLORIDA LAW, AND WE DON'T
PERCEIVE THERE TO BE AN
EXCEPTION.
BUT UNDERSTANDING THE TYPE OF
QUESTION JUSTICE LAWSON ASKED,
MAYBE THERE IS.
MAYBE THE VIDEO, MAYBE THE IDEA
OF A SCINTILLA OR, YOU KNOW, NO
POSSIBLE EVIDENCE NEEDS TO BE
LOOKED AT IN LIGHT OF THIS
VIDEO, YOU KNOW, DIFFERENTLY
THAN IT WOULD IF THERE WERE TWO
AFFIDAVITS COMPETING WITH EACH
OTHER.
>> YOU TWEAK THE QUESTION AFTER

YOU HAVE JURISDICTION.
YOU CAN'T TWEAK THE QUESTION TO MANUFACTURE JURISDICTION.
IF YOU WERE ALLOWED TO DO THAT, THEN THAT WOULD ALLOW THE COURT TO JUST CREATE ITS JURISDICTION.
SO I THINK THE WORDING OF THE QUESTION IS IMPORTANT.
AND MORE IMPORTANTLY, JUSTICE MUNIZ, AND MAYBE THIS GOES MORE TO THE DISCRETIONARY PART, THIS PROBABLY WOULD BE BETTER SERVED IF YOU SEND A MESSAGE TO DISTRICTS COURTS OF APPEAL THAT IF THEY THINK THAT THE LAW WAS WRONGLY INTERPRETED IN A JUDICIAL MANNER, THEN THERE OUGHT TO BE SOME TEXTUAL ANALYSIS TO GUIDE THE OPINION.
THERE WAS VIRTUALLY NO TEXTUAL ANALYSIS DONE HERE UNTIL MY ANSWER BRIEF AND ONE OF THE--
[INAUDIBLE]
SO I THINK IT'S IMPORTANT TO--
>> COUNSEL, YOU NEED TO GO AHEAD AND SUM UP IN ABOUT 15 SECONDS.
>> I JUST WANT TO POINT OUT THE LAST POINT I MADE WAS THAT NONE OF THESE ARGUMENTS WERE PRESERVED BELOW.
I CITED OPINIONS BY MANY OF YOU MAKING THE POINT THAT THIS COURT DOES NOT ACT AS STANDBY COUNSEL FOR COUNSEL, AND I WOULD ASK THAT THE COURT AFFIRM OR DISMISS.
AND THE ALTERNATIVE, IF YOU DO CHANGE THE SUMMARY JUDGMENT STANDARD, I THINK DUE PROCESS REQUIRES THAT MR.LOPEZ HAVE THE ABILITY TO PRESENT THE ADDITIONAL EVIDENCE HE HAS AND THAT BE HEARD BY THE TRIAL JUDGE IN THE FIRST--
[INAUDIBLE]
THANK YOU FOR YOUR TIME.
>> THANK YOU.
>> THANK YOU.
AND NOW WE'LL HEAR REBUTTAL.
YOU NEED TO UNMUTE, COUNSEL.

>> THANK YOU, YOUR HONORS.
FIRST OF ALL, THE FIFTH DCA--
OR, I SHOULD SAY THAT THE ISSUE
OF THE SUDDEN LANE CHANGE THEORY
WAS VERY MUCH ARGUED AT THE
SUMMARY JUDGMENT HEARING BY THE,
BY THE PRIOR-- BY THE
RESPONDENT.
I DO THINK THAT THE FIFTH DCA
DID PASS ON THIS QUESTION IN
THAT IT WAS FACED WITH SCOTT V.
HARRIS, A FEDERAL CASE
INTERPRETING-- USING THE
FEDERAL STANDARD WHICH IS WHAT I
RELIED UPON IN MY, IN MY MOTION
FOR SUMMARY JUDGMENT AT THE
TRIAL COURT LEVEL.
SO THE ISSUE OF THE FEDERAL
COURT STANDARD WAS VERY MUCH A
PART OF THIS CASE FROM THE TIME
I ACTUALLY FILED MY MOTION FOR
SUMMARY JUDGMENT AND, IN FACT,
JUDGE LAMBERT AT ORAL ARGUMENTS
AND AT THE FIFTH DCA WAS ASKING
ME QUITE A BIT OF QUESTIONS
ABOUT THE FEDERAL STANDARD.
SO, BUT I WANT TO GET TO THE
TEXTUAL ARGUMENT AND HOW, TO ME,
IT'S CLEAR THAT GENUINE ISSUE,
HOW DOES THAT GET TO THE HULL
AND ITS PROGENY IDEA OF NO
EXISTENCE OF SLIGHTEST DOUBT.
IF THE, IF THE RULE MAKERS
WANTED TO HAVE THAT AS THE
STANDARD, THAT-- WHY WOULD THEY
HAVE PUT IN "GENUINE"?
IN FACT, THEY COULDN'T BE MORE
CLEAR--
>> MR.McDONOUGH?
>> YES.
>> LET ME-- I THINK, SO YOU'RE
ASKING US TO RECEDE FROM PRIOR
PRECEDENT INTERPRETING THE RULE,
CORRECT?
>> RIGHT.
>> AND SO I THINK WHAT YOU WOULD
NEED TO DO UNDER OUR PRECEDENT
IS DEMONSTRATE THAT IT'S CLEARLY
ERRONEOUS.
SO IF YOU COULD MORE NARROWLY

FOCUS ON NOT JUST WHY YOU MIGHT
DO IT DIFFERENTLY, BUT ON OUR
PRECEDENT AROUND IT, THAT WOULD
BE HELPFUL.
>> YES.
AND ONE WAY I TRY TO DO IT IS
JUST BY LOOKING AT THE PLAIN
MEANING OF THE WORD.
AND THEN I LOOK TO THINGS SUCH
AS, YOU KNOW, SUPERFLUOUS-- IF
THE STANDARD WAS NO EXISTENCE OF
SLIGHTEST DOUBT, THEN GENUINE
WOULD BE SUPERFLUOUS.
YOU WOULDN'T NEED IT.
>> DO YOU HAVE A RESPONSE TO
YOUR OPPONENT'S MORE TEXTUALIST,
ORIGINALIST VIEW OF THE RULE?
>> YES.
FOR ONE, I QUESTION WHETHER
TEXTUALISM APPLIES AS STRONGLY
WHEN YOU ARE INTERPRETING A RULE
THAT WAS PROMULGATED BY THIS
COURT AS OPPOSED TO STATUTES AND
CONSTITUTIONS THAT WERE
PROMULGATED BY ANOTHER
GOVERNMENTAL BODY.
AND THEN JUST GOING BACK TO THE
TIME WHEN THE-- DOES GOING BACK
TO THE TIME WHEN THE RULE WAS
DRAFTED HAVE AS MUCH
SIGNIFICANCE AS WHEN THIS--
>> I THINK IF YOU'RE SAYING THAT
COURTS SHOULD HAVE A, A COURT
THAT HAS RULEMAKING AUTHORITY
SHOULD HAVE MORE LEEWAY IN
INTERPRETING ITS OWN RULES, THEN
I WOULD THINK THAT THAT WOULD
LEAD TO A CONCLUSION THAT IT'D
BE HARDER TO DETERMINE THAT THE
ORIGINAL INTERPRETATION WAS
CLEARLY ERRONEOUS.
CORRECT?
I MEAN--
>> WELL, I THINK THAT THE REASON
WHY YOU COULD SAY THAT HULL V.
TALCOTT WAS CLEARLY ERRONEOUS
WAS BECAUSE IT NEVER CONSIDERED
THE IDEA THAT RULE 1.010 WAS
NEVER MADE PART OF THAT RULE.
AND I THINK JUDGE REHNQUIST

TOUCHED ON THAT WHEN HE DECIDED
CELETEX.
HE POINTED OUT THAT SUMMARY
JUDGMENT WAS NOT A DISFAVORED
PROCEDURAL SHORTCUT BUT, RATHER,
PART OF THE RULES AS A WHOLE
WHICH ARE DESIGNED TO SECURE THE
JUST, SPEEDY AND--
[INAUDIBLE]
OF EVERY ACTION WHICH IS EXACT
SAME-- THAT'S FEDERAL RULE 1
WHICH IS THE ACT SAME AS THE
FLORIDA RULE 1.010.
AND YOU GO TO THE RULE OF
CONSTRUCTION THAT WHEN THE
FEDERAL RULE AND THE STATE RULE
ARE SUBSTANTIALLY SIMILAR, THAT
YOU CAN LOOK TO FEDERAL COURTS
FOR PERSUASIVENESS.
SO THAT-- IT'S THE, IT'S THE
IGNORING OF RULE 1.010 THAT
SUPPORTS THE IDEA THAT HULL IS
CLEARLY ERRONEOUS.
>> OKAY, COUNSEL, YOU ARE NOW
OVER YOUR TIME.
HOWEVER, SINCE OTHER-- OPPOSING
COUNSEL WENT OVER BY ABOUT THREE
MINUTES, I'LL GIVE YOU ANOTHER
MINUTE AND A HALF WHICH WILL PUT
YOU EVEN.
>> THANK YOU.
SO LET ME JUST, IN CLOSING, JUST
SUMMARIZE WHAT, WHAT WE'RE
ASKING THE COURT TO DO.
WE'RE ASKING THE COURT TO
OVERTURN THE FIFTH DCA AND
AFFIRM THE TRIAL COURT'S SUMMARY
JUDGMENT.
IT'S JUST HOW DO YOU DO THAT.
NUMBER ONE, YOU COULD GO BACK
AND SAY AGREE WITH MY ARGUMENT
AT THE TRIAL COURT LEVEL THAT
THE EVIDENCE, THE VIDEO EVIDENCE
MADE THE EYEWITNESS TESTIMONY
AND EVEN THE EXPERT AFFIDAVIT
NOT COMPETENT OVER SUBSTANTIAL
BECAUSE IT CLEARLY REPUDIATED
THAT EVIDENCE.
OR YOU COULD GO WITH THE
FEDERAL, WITH THE FIFTH DCA'S

CERTIFIED QUESTION WHICH TOOK
INTO CONSIDERATION THE FACT THAT
BACK WHEN THIS RULE WAS
PROMULGATED, THAT VIDEO EVIDENCE
WAS NOT IN EXISTENCE AND SO
THERE'S A MODERNIZATION, SO TO
SPEAK, OF THE INTERPRETATION OF
THE RULE BECAUSE OF VIDEO THAT
COULD CLEARLY, THAT COULD
CLEARLY REPUDIATE A NON-MOVING
PARTY'S EVIDENCE.
AND THEN ALSO YOU COULD DO LIKE
THE FEDERAL COURT DID IN 1986
AND CHANGE YOUR INTERPRETATION
OF THE PHRASE "NO GENUINE ISSUE
OF MATERIAL FACT" SO IT HAS ITS
PLAIN MEANING, NOT SOME MEANING
LIKE NO SLIGHTEST DOUBT AND
MAKES IT MORE IN LINE WITH RULE
1.010 JUST LIKE JUDGE REHNQUIST
DID WITH FEDERAL RULE 1.
>> ALL RIGHT.
>> THANK YOU.
>> ALL RIGHT.
WE THANK YOU BOTH FOR YOUR
ARGUMENTS IN THIS CASE TODAY.
THAT'S THE ONLY CASE ON THE
DOCKET, SO THE PROCEEDINGS TODAY
ARE CONCLUDED.