

IN THE SUPREME COURT OF FLORIDA
Fla. S. Ct. Case No.: SC19-1336

DCA Case No: 5D18-2907 and L.T. Case No.: 2018-CA-000237

WILSONART, LLC and SAMUEL ROSARIO,

Petitioners,

vs.

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

Respondent.

REPLY BRIEF OF PETITIONERS,
WILSONART, LLC AND SAMUEL ROSARIO

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PRELIMINARY STATEMENT

In this Brief, the following symbols will be used to cite to the Records on Appeal and briefs:

(R.) – Trial court Record on Appeal;

(SR) – Index to Supreme Court Record;

(IB) – Petitioners’ Initial Brief on the Merits; and

(AB) – Respondent’s Answer Brief.

ARGUMENT

I. THIS COURT PROPERLY EXERCISED ITS DISCRETIONARY JURISDICTION.

The Florida Supreme Court is vested with the authority to “review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance.” Fla. Const. Art. V, § 3. “If jurisdiction is invoked under rule 9.030 (a)(2)(A)(v) (certifications of questions of great public importance by the district courts of appeal to the Supreme Court), no briefs on jurisdiction shall be filed.” Fla. R. App. P. 9.120.

Here, on July 12, 2019, the Fifth District issued an opinion wherein it determined that the case law interpreting Florida’s summary judgment standard compelled it to overturn the trial court’s entry of summary judgment in favor of Petitioners, despite agreeing that “the video evidence showing Rosario’s driving pattern is both compelling that [Defendants] were not negligent and directly contradictory to the Estate’s evidence in opposition to the summary judgment motion.” (SR 79, 83). As a result, the Fifth District certified a question of great public importance that addressed Defendants’ arguments that the video evidence rendered the Estate’s evidence “not competent” and asked the Florida Supreme Court if the present summary judgment *standards* (not rule), should include an exception for unaltered videotape evidence. (SR 84). The opinion also recognized that “technological advancements . . . increase the likelihood of video and digital

evidence being more frequently used” in our courts. (SR 83-4). On August 6, 2019, Petitioners filed a Notice to Invoke the Discretionary Jurisdiction of the Court based on the Fifth District’s certification of a question of great public importance. (SR 86).

On October 15, 2019, this Court accepted jurisdiction and ordered the parties to serve briefs on the *merits*. (SR 115). However, the Estate’s Response Brief attempts to divest this court of jurisdiction by arguing that the Fifth District failed to pass upon the issues it certified to this court. (RB 12). Because the Rule 9.120 of the Florida Rules of Appellate Procedure explicitly prohibits briefs on jurisdiction, the Estate’s arguments are not permitted in its Brief on the Merits.

Regardless, the opinion in this case satisfies the Court’s prerequisites for invoking its discretionary jurisdiction. In *Floridians for a Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 833 (Fla. 2007), the Court explained that discretionary jurisdiction based on a certified question requires that (1) “the district court of appeal pass upon the question certified by it to be of great public importance; (2) “there must be a district court ‘decision’ to review”; and (3) the question must be in fact "certified" by a majority decision of the district court. The Court explained that “where a district court is unable to reach a clear majority decision on an issue and elects to certify a question without resolving the merits, we are without jurisdiction to answer such a question under article V, section 3(b)(4) of the Florida Constitution.” *Id.* (citing *Boler v. State*, 678 So. 2d 319, 320 n.2 (Fla.

1996) (stating that if a district court is evenly split on a legal issue and specifically withholds a decision on the merits, there is no "decision" on which to base certified conflict review under article V, section 3(b)(4)).

In support of its argument the Estate relies on *Revitz v. Baya*, 355 So. 2d 1170 (Fla. 1977), an opinion wherein the district court *explicitly* stated that it did not reach the issue in its certified question, and *Pirelli Armstrong Tire Corporation v. Jensen*, 777 So. 2d 973 (Fla. 2001), a *per curiam* opinion. (RB 13) The district court's explicit statement in *Revitz* clearly demonstrated that the Florida Supreme Court lacked jurisdiction to entertain the question and justified the discharge of petitioner's writ. 355 So. 2d at 1171-72. The Court did not explain its basis for determining that *Jensen* failed to pass upon the certified question, but did cite *Gee v. Seidman & Seidman*, 653 So. 2d 384, 385 (Fla. 1995), another opinion wherein the district court specifically stated that it did not address the issue identified in the certified question.

Here, the Fifth District determined, without dissent, that the trial court's decision was contrary to the Florida summary judgment standard, as interpreted by the case law. (SR 109-10). The six-page opinion, which overturned summary judgment in Defendants' favor, expressed that the trial court's decision based on the compelling nature of the video when compared to the evidence presented by the Estate to oppose summary judgment was not unfounded when it expressed doubt that the case would survive directed verdict. (SR 110). The decision, therefore,

forced the parties to continue litigation based on a legal fiction of a genuine dispute.

The decision also highlighted Defendants' arguments that the video evidence rendered the Estate's evidence incompetent. (SR 108-9). Reading the opinion as a whole, and comparing it with the certified question, demonstrates that the Fifth District considered the issues contained in the certified question. The Fifth District determined that the summary judgment standard as articulated in the case law did not allow it, or the trial court, to value one piece of evidence over another (i.e. weigh the evidence) under any circumstance, even when some evidence was considered so compelling it was dispositive of the other party's case. Here, the certified question characterized the situation as making an "exception" in cases of video evidence, which the Fifth District determined it could not do by overturning the trial court's ruling.

Finally, this court is not limited to the question as phrased. It is not necessary to restrict the court's jurisdiction based on the particular phrasing of a certified question. This Court has "rephrased certified questions in the past to conform them more properly to the true issue...." *Gracey v. Eaker*, 837 So. 2d 348, 350 n.1 (Fla. 2002) (citing *Waite v. Waite*, 618 So. 2d 1360 (Fla. 1993); *see also Radiation Tech., Inc. v. Ware Constr. Co.*, 445 So. 2d 329, 330 (Fla. 1983) (answering what the Court "perceived to be the intended question of great public importance")). Therefore, it is unnecessary to engage in a detailed parsing of the question in an effort to deprive

this court of exercising its constitutionally granted discretion.

II. THE CERTIFIED QUESTION REFLECTS THE EVIDENCE AND ARGUMENT PRESENTED AT THE TRIAL COURT.

In a second effort to divest this Court of its jurisdiction, Respondent cites to single dissenting opinion and argues that Petitioners deceived the Fifth District about the nature of Respondent's arguments in opposition to summary judgment to the trial court. (RB 18).¹ Specifically, Respondent attempts to revise the Estate's arguments presented to the trial court and assert that the Estate's defense was not based on Mr. Rosario having made a sudden lane change prior to impact. (RB 18). However, the transcript from the summary judgment hearing reveals that Petitioners did not deceive the Fifth District about Respondent's arguments against summary judgment. (R. 209-227). Further, the Fifth District held oral argument and had a record of the proceedings from the trial court before it certified its question to this Court. Below are excerpts from the summary judgment hearing highlighting counsel for the Estate's statements to the trial court:

MR. BENNETT (counsel for the Estate): David Mendez who is -- you know, he's not just some guy off the street either or he's not just your average lay witness. I mean, from a review of his deposition, I mean, he's a commercial driver himself. He's held a CDL for 13 years. He was the delivery supervisor for the company he was working for where he trains other drivers how to operate safely. *He clearly states, as I read, that -- you know,*

¹ Petitioners also rely on and reassert the arguments citing the prohibition against jurisdictional briefs when the Court exercises its discretion to review questions certified to be of rate public importance. *Supra* §I.

what he witnessed, that he saw a sudden change prior to impact and, you know, he goes on to describe it multiple times. (R. 222)

...

MR. BENNETT (counsel for the Estate): According to the summary judgment evidence, it was the -- the decedent was in the center lane and then merging to the right. That's what the summary judgment evidence -- (R. 224)

In addition to relying on Mendez's sudden-lane change testimony at hearing, Respondents cited an Affidavit from their expert, Christopher M. Stewart, P.E. Mr. Stewart's Affidavit relies heavily on the testimony of Mr. Mendez:

THE COURT: The decedent was in the center lane, merging to the right lane.

MR. BENNETT: And the *defendant was in the center lane and then suddenly goes to the left*, which puts his -- Mr. Stewart testifies that it puts him out of position at the time of impact.

(R. 224). Mr. Stewart's affidavit states:

6. The eye witness, Mr. Mendez, stated in his deposition that he saw the Freightliner truck attempt a lane change to the left prior to impact....

7. The movements of the Freightliner, testified to by Mr. Mendez, would place the right rear of the Freightliner cargo box over the lane line separating the center lane from the right lane of W Vine Street.

...

10. The testimony provided by Mr. Mendez is consistent with the Freightliner drive cam in that the right rear of the Freightliner was in the right lane of W. Vine Street.

(R. 179-80). Thus, the record shows that the Estate’s counsel characterized David Mendez’s eye-witness testimony as supporting the argument that Mr. Rosario made a sudden lane change just before impact. The record also shows that the only other evidence the Estate relied on was an expert Affidavit that heavily relied on David Mendez’s testimony that Mr. Rosario made a sudden lane change just before impact. (SR 108).

A review of the language in the Fifth District’s opinion certifying the question to this court demonstrates how accurately the court framed the Estate’s arguments:

In response to Appellees' motion for summary judgment, the Estate presented the deposition of David Mendez, a witness to the collision, who testified that the freightliner suddenly changed lanes just prior to impact, swerving from the center lane to the left lane. The Estate also presented the affidavit of its expert, who concluded that part of the freightliner was in the right lane of the eastbound side when the collision occurred. This conclusion was based, in large part, on the deposition testimony of Mendez, the independent eye witness. (SR 107-08).

Therefore, the evidence and argument presented at summary judgment demonstrate that the factual premise underlying the Fifth District’s certified question is neither false nor “rests on a deception” by Respondents. This Court properly accepted jurisdiction.

III. THE ESTATE FAILED TO PRESENT ANY COMPETENT EVIDENCE TO REBUT THE REAR-END PRESUMPTION.

The Estate argues that the Fifth District’s opinion must be affirmed because it overcame the rear-end presumption. (RB 19). In support, the Estate cites its expert’s

affidavit opining that the vehicle operated by Mr. Rosario occupied two lanes of traffic. (RB 20). However, as explained above, the Estate's expert affidavit heavily relies on David Mendez's demonstrably inaccurate eye witness testimony.

Under the current Florida summary judgment standard courts have long held that disputed facts do not arise "because a party disagrees with the facts established by competent evidence" or "merely assert[s] that an issue does exist." *Noack v. Watters, Inc.*, 410 So.2d 1375, 1376 (Fla. 5th DCA 1982); *see also Landers v. Milton*, 370 So. 2d 368, 370 (Fla. 1979). The Florida Rules of Civil Procedure require a court to only consider competent evidence when ruling on a motion for summary judgment. *Daeda v. Blue Cross & Blue Shield of Florida, Inc.*, 698 So. 2d 617, 618 (Fla. 2d DCA 1997). Incompetent evidence is legally insufficient to create an issue of fact. *Landers*, 370 So. 2d at 370. "Evidence that is confirmed untruthful or nonexistent is not competent, substantial evidence. Competent, substantial evidence must be reasonable and logical." *Gonci v. Panelfab Prods., Inc.*, 179 So. 2d 856, 858 (Fla. 1965); *see also Atkins N. Am., Inc. v. Tallahassee MH Parks, LLC*, 277 So. 3d 1156, 1159-60 (Fla. 1st DCA 2019) (holding that "testimony that conflicts with valid documentary evidence is not legally sufficient to support findings or conclusions contrary to the documentary evidence" and citing *Wiggins v. Fla. Dep't of High. Saf. & Motor Veh.*, 209 So. 3d 1165, 1166 (Fla. 2017)).

Here, both the trial court judge and the Fifth District panel found that the video

evidence directly contradicted “the Estate’s evidence in opposition to the summary judgment motion.” Because only competent evidence is properly considered at summary judgment, the Estate’s did not, and cannot, overcome the rear-end presumption. Therefore, the trial court properly entered summary judgment in favor of Samuel Rosario and WilsonArt, LLC.

IV. ISSUES RELATED TO THE SUMMARY JUDGMENT STANDARD ARE PROPERLY PRESERVED.

The Estate ignores this Court’s order accepting jurisdiction and ordering the parties to address whether Florida should adopt the summary judgment standard articulated in the *Celotex* trilogy when it argues that Petitioners did not preserve the issues related to the change in the summary judgment standard at the trial court. (RB 27). The Estate further ignores Petitioners’ reliance on *Scott v. Harris*, 127 S. Ct. 1769 (2007), a federal case that relied on the federal summary judgment standard, and *Wiggins v. Florida Department of Highway Safety and Motor Vehicles*, 209 So. 3d 1165 (Fla. 2017), this Court’s review of a driver’s license suspension, to demonstrate how the court should apply the summary judgment standard to the compelling video evidence in this case. (R. 110-12).

Petitioners’ Motion for Summary Judgment’s citation to *Scott v. Harris* was intended to demonstrate how the highest court in the land evaluated video evidence when compared to conflicting witness testimony. Petitioners’ citation to *Wiggins* highlighted this court’s precedent for evaluating video evidence when compared to

conflicting witness testimony. Thus, Petitioners raised the federal issue at the trial level. In fact, the order granting summary judgment cited *Scott v. Harris*. (R. 197-98).

According to the Estate's arguments, the present Florida Summary Judgment Standard requires judges to suspend common sense and disregard compelling evidence in favor of clearly incompetent evidence. This rigid standard compelled the Fifth District to reach such an absurd result and motivated that it to seek guidance from our state's highest court through its certified question. This court then expanded the briefs to include whether or not Florida should adopt the federal summary judgment standard, which invited amici to participate and inform the court in a process that is akin to the rule making process this court has generally, but not always, employed for rule making purposes. Indeed, this case will allow the court to rule on the side of common sense under the former standard and also inform the court so it can announce a summary judgment standard that will prevent future absurdities.

This court does not have to apply the federal standard to grant summary judgment for Petitioners; it may do so under the present Florida standard. However, by clarifying that the Florida summary judgment rule should be interpreted like the federal summary judgment rule, it can ensure that lawsuits that lack genuine factual disputes, such as the one before, this court, no longer usurp valuable judicial

resources which will allow disputes that are genuinely within the province of a jury to proceed to trial.

V. THIS COURT CAN INTERPRET RULE 1.510 IN THIS LITIGATION.

The present litigation involves a dispute over the interpretation of Rule 1.510, not the creation of a new rule or the amendment of an existing rule. The Estate attempts to create a separation-of-powers type of conflict between the Court's authority to adopt rules for practice procedure and its judicial functions by engaging in a lengthy recitation of judicial philosophy discussing the legislative function of the Court when it acts in its rule-making capacity. (RB 33-36). However, not only does the argument lack merit based on the Court's constitutionally-authorized authority to make rules governing practice and procedure, the argument ignores the reality of the present dispute. Neither Petitioners, nor amici, advocate that the text of Florida Rule of Civil Procedure 1.510 should be amended in order to adopt the federal courts' interpretation of the summary judgment standard. Instead, Petitioners assert that the *interpretation* that has developed through the Court is incorrect.

A. The Plain Text of Rule 1.510 Mandates Adoption of the Federal Summary Judgment Standard.

Florida's rule was patterned after the Federal rule. The text of both the Florida rule and the Federal rule articulating the summary judgment standards are substantially similar. (IB §3). In addition to containing substantially similar

language, the rules have the same stated policy goals, “to secure the just, speedy, and inexpensive determination” of a cause of action. *Cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) and Authors’ Comment 1967 to Fla. R. Civ. P. 1.510. As explained by the Florida Justice Reform Institute and Florida Trucking Association:

It is well settled that the Florida Rules of Civil Procedure are construed in accordance with the principles of statutory construction.” *Koppel v. Ochoa*, 243 So. 3d 886, 891 (Fla. 2018) (quoting *Saia Motor Freight Line, Inc. v. Reid*, 930 So. 2d 598, 599 (Fla. 2006)); *see also Syndicate Props. v. Hotel Floridian Co.*, 114 So. 441, 443 (Fla. 1927). “When construing a statute, this Court...look[s] first to the actual language used in the statute and its plain meaning.” *Trinidad v. Fla. Pen-insula Ins. Co.*, 121 So. 3d 433, 439 (Fla. 2013). “[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.” *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (quoting *A.R. Douglass, Inc. v. McRainey*, 137 So. 157, 159 (Fla. 1931)).

In the context of the Florida rules, decisions by federal appellate courts applying a similar provision in the Federal Rules of Civil Procedure provide persuasive authority.” *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1268 (Fla. 2006); *see also Yisrael v. State*, 993 So. 2d 952, 957 n.7 (Fla. 2008); *Crump v. Gold House Rests., Inc.*, 96 So. 2d 215, 218 (Fla. 1957); *Rich v. Kaiser Gypsum Co.*, 103 So. 3d 903, 908 (Fla. 4th DCA 2012).

(*Amicus* Brief 5-6).

Despite the textual similarities and the rules of statutory construction, Florida’s similarly authored rule developed a more-restrictive standard making summary judgment nearly impossible. The distinction is inconsistent with the rules’

stated policies of achieving “just, speedy, and inexpensive determination” of disputes. Authors’ Comment 1967 to Fla. R. Civ. P. 1.510.

B. *Holl*, and Its Progeny, Conflict with the Text and Intent of Rule 1.510.

Stare decisis “bend[s] ‘where there has been a significant change in circumstances since the adoption of the legal rule or where there has been an error in legal analysis.’” *Robertson v. State*, 143 So. 3d 907, 910 (Fla. 2014) (quoting *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012)). (*Amicus* Brief of Florida Justice Reform Institute and Florida Trucking Association 17). *Holl*’s requirement that the moving party negate its opponent’s case and prohibition against summary judgment when the record raises the slightest doubt is inconsistent with the plain language of the rule that mandates summary judgment when “the pleadings and summary judgment 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.” Fla. R. Civ. P. 1.510. Finally, *Holl* has not achieved the “just, speedy, and inexpensive” resolution of disputes.

As demonstrated by this case, the Estate relied on eye witness testimony that Petitioners refuted with video evidence. Florida’s current interpretation of the summary judgment standard forced the Fifth District to create a legal fiction that a *genuine* issue of fact existed. This fiction needlessly prolonged litigation and increased litigation costs for both parties. Therefore, the interpretation conflicts with

the text of the law. The current interpretation also needlessly prolonged litigation, avoided judgment on the merits, and increased litigation costs for the parties, in conflict with the stated purpose of the Florida Summary Judgment rule.

VI. APPLYING THE FEDERAL SUMMARY JUDGMENT STANDARD IN THIS DECISION WILL NOT DEPRIVE MR. LOPEZ OF DUE PROCESS.

No State shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV, § I. Similarly, Article I, § 9 of the Florida constitution provides that “[no] person shall be deprived of life, liberty, or property, without due process of law.” The fundamental requirement of due process of law is the opportunity to be heard. *Greene v. Lindsey*, 456 U.S. 444, 449 (1982), *State Plant Bd. v Smith*, 110 So.2d 401, 407 (Fla. 1959). “In observing due process of law, the opportunity to be heard must be full and fair, not merely colorable or illusive.” *Tomayko v. Thomas*, 143 So. 2d 227, 230 (Fla. 3d DCA 1962). However, due process does not require a trial by jury in civil trials, unlike criminal trials. *Walker v. Sauvinet*, 92 U.S. 90 (1876); *New York Central R.R. v. White*, 243 U.S. 188, 208 (1917).

Without argument or explanation, Respondent’s Brief asserts that applying the federal summary judgment standard to the instant case would violate Mr. Lopez’s federal and state constitutional due process rights and that Mr. Lopez should have the opportunity to present additional evidence and arguments to the trial court.

(RB 50). However, Mr. Lopez has already engaged in discovery and been afforded multiple hearings. Further, the Estate never sought additional discovery to prove its claims or asserted that it was in possession of additional evidence to oppose summary judgment. Allowing the Estate to alter its theories in a subsequent summary judgment hearing when the Estate never expressed the need for the opportunity at the trial court level clearly contradicts the Estate's arguments against such revisionist tactics when it stated it is logical to require an argument to be raised first in the lower court because "our common law system generally affords litigants the opportunity and duty to choose which arguments to advance." (RB 28). Finally, remanding the case to the trial court would be futile. The trial judge found that the dash camera video footage plainly disproved the Estate's claims. No additional argument will change what the video footage shows: Mr. Rosario travelling in a straight line at the time of the impact and in the minutes leading up to the accident.

CONCLUSION

Petitioners request that this Honorable Court quash the decision of the Fifth District Court of Appeal and enter summary judgment in their favor. Petitioners submit that Florida should adopt the summary judgment standard articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), without amendment to Florida Rule of Civil Procedure 1.510.

Respectfully submitted and certified,

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CERTIFICATE OF SERVICE

I hereby certify on **July 20, 2020**, that a copy hereof has been furnished by electronic mail to all parties listed on the Service List below and filed via the Florida Courts e-Filing Portal.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font standards required
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