>> ALL RISE.
HEAR YE, HEAR YE, SUPREME COURT
OF FLORIDA IS NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEAD,
DRAW NEAR, GIVE ATTENTION, YOU
SHALL BE HEARD.
GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA, THIS
HONORABLE COURT.
LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> MORNING.
WELCOME TO THE FLORIDA
SUPREME COURT.
THE FIRST CASE ON THE DOCKET IS
SEBO VERSUS AMERICAN HOME
INSURANCE.
COUNSEL?
>> MAY IT PLEASE THE COURT.
GOOD MORNING.
MY NAME IS ED CHEFFY.
I REPRESENT THE PETITIONER, BOB
SEBO.
I'M HERE WITH DAVID SULI, DAVID
BOYLE AND DEBBIE CROCKETT ALL
WHO TRIED THE CASE WITH ME.
THE ISSUE BEFORE YOU TODAY IS
WHETHER THE SECOND DCA WAS
CORRECT ABOLISHING THE
CONCURRENT CAUSE DOCTRINE IN ALL
FIRST PARTY INSURANCE CLAIMS.
WE'RE ASKING YOU TO REVERSE FOR
THREE SEPARATE REASONS.
AND TO SET THE STAGE FOR THOSE
REASONS, I WANT TO BRIEFLY GO
THROUGH THE ESSENTIAL FACTS
WHICH ARE VERY IMPORTANT AS THEY
RELATE TO THESE ISSUES.
IN 2005 MR. SEBO PURCHASED A
VERY EXPENSIVE HOME IN NAPLES,
FLORIDA.
THE SAME DAY HE CLOSED, HE
PURCHASED AN INSURANCE POLICY.
THE EVIDENCE AT TRIAL SHOWS THAT
HE WENT TO AN AGENT AND SAID, I
WANT TO BUY THE BEST POSSIBLE
INSURANCE.
HE WAS CHARGED ACCORDINGLY.
HE WAS CHARGED A PREMIUM OF
$50,000 IN EXCESS OF $50,000 PER
YEAR FOR THIS INSURANCE POLICY
IT WAS NO ORDINARY INSURANCE
POLICY NOT AN ISO FORM.
IT IS A MANUSCRIPT POLICY IT IS

AN ALL-RISK POLICY AND BEYOND
ANY QUESTION, IT COVERS DAMAGES
CAUSED BY WIND AND WATER
INTRUSION.
SHORTLY AFTER MR. SEBO CLOSED ON
THE HOUSE AND BOUGHT THE
INSURANCE POLICY, NAPLES WAS HIT
WITH HISTORIC RAINS.
A METEOROLOGIST TESTIFIED AT
TRIAL THAT IN MAY OF 2005, RIGHT
AFTER MR. SEBO HAD PURCHASED, WE
HAD ONE OF THE TOP THREE RAIN
EVENTS IN THE RECORDED HISTORY
OF NAPLES.
THE RAINS CONTINUED THROUGH THE
SUMMER CULMINATING IN HURRICANE
WILMA IN OCTOBER OF 2005.
BY THAT TIME MR. SEBO KNEW HE
HAD A PROBLEM.
HE HIRED A FORENSIC SPECIALIST
WHO CAME IN.
THE FORENSIC SPECIALIST FOUND
MASSIVE WATER INTRUSION
THROUGHOUT THE HOME AND ADVISED
MR. SEBO TO MAKE A CLAIM AGAINST
THE CARRIER.
MR. SEBO IT?
AD CLAIM.
>> LET ME ASK YOU THIS.
WE TALKED ABOUT THE WIND AND THE
WATER AND, WE UNDERSTAND THAT
THERE WAS DAMAGE FROM THAT BUT
CAN YOU ALSO ADD INTO THIS THE
PROBLEMS WITH THE ACTUAL
CONSTRUCTION AND PLANNING OF THE
ACTUAL RESIDENCE ALSO?
>> ABSOLUTELY.
YOUR HONOR.
THERE WERE CONSTRUCTION ISSUES,
WE PUT ON EVIDENCE AT TRIAL OF
THOSE CONSTRUCTION ISSUES.
THERE IS NO QUESTION THAT THIS
WAS, THE DAMAGES HE SUFFERED
WERE AS A RESULT OF A
COMBINATION OF CONSTRUCTION
DEFECTS AND WIND AND RAIN.
>> OKAY.
>> I KNOW YOU WANT, WE'RE VERY
FAMILIAR WITH THE FACTS AND YOU
BOTH LAID IT OUT, INCLUDING HOW
EXPENSIVE THIS HOUSE IS WHICH
I'M NOT REALLY HAS TO DO WITH
OUR QUESTION OF LAW BUT IT SEEMS
THAT IN THE CON CURRENT CAUSE
DOCTRINE THAT BOTH PARTIES AGREE

WITH THE CAUSES ARE INDEPENDENT,
AND THEN THEY COMBINE TOGETHER
AS OPPOSED TO THE CHAIN OF
EVENTS, YOU KNOW, THE FIRE LEADS
TO THE EXPLOSION, THAT THE
CONCURRENT CAUSE DOCTRINE
APPLIES.
COULD YOU ADDRESS WHY IN YOUR
VIEW, IS IT A MATTER OF FACT OR
LAW THAT THE TWO CAUSES, THE
RAIN, WHICH IS COVERED AND THE
CONSTRUCTION DEFECTS WHICH ARE
EXCLUDED, ARE INDEPENDENT
CAUSES?
BECAUSE IT SEEMS TO ME THAT--
>> SURE.
>> AND LOOKING AT PALUCCI CASE,
NOT THAT IT IS BINDING, THESE
ARE NOT TWO MUTUALLY EXCLUSIVE
DOCTRINES.
IT DEPENDS NOT WHETHER IT IS
FIRST OR THIRD PARTY BUT WHETHER
THEY'RE DEPENDENT OR INDEPENDENT
CAUSES.
DO YOU AGREE THAT IS SOMETHING
ESSENTIAL AS TO WHETHER--
>> I DO.
>> SO WHY ARE THEY IN YOUR VIEW
INDEPENDENT CAUSES?
>> WE NEED TO LOOK NO FURTHER
THAN WALLACH VERSUS ROSENBERG.
WALLACH SAYS WHEN YOU HAVE HUMAN
NEGLIGENCE AND WEATHER PERILS
THAT COMBINE TO CAUSE A LOSS,
AND THAT IS EXACTLY WHAT WE
HAVE.
THAT WHEN WALLACH SAID YOU APPLY
THE CONCURRENT CAUSE DOCTRINE.
WE HAVE CONSTRUCTION DEFECTS.
AS THE TRIAL COURT WROTE, THE
TRIAL COURT SAID THAT THE
CONSTRUCTION DEFECTS DID NOT
CAUSE THE WIN AND RAIN.
THE WIND AND RAIN DID NOT CAUSE
THE CONSTRUCTION DEFECTS.
THEY ARE INDEPENDENT CAUSES THAT
COMBINED, THAT INTERTWINED, THAT
INTERSECTED TO CAUSE THE DAMAGE.
THIS IS A CLASSIC INDEPENDENT
CAUSE SITUATION.
>> BUT THE SECOND DISTRICT,
DIDN'T THEY CHARACTERIZE THEM AS
DEPENDENT CAUSES?
>> NO THEY DID NOT.
>> OH, THEY NEVER--

>> RESPECTFULLY THEY SAID THEY
DID NOT.
WE DO NOT ADDRESS THAT ISSUE.
THEY DO NOT ADDRESS THAT ISSUE.
>> YOU AGREE WITH ONE, IF THERE
IS A CHAIN OF EVENTS, YOU MAY
HAVE A DIFFERENT SITUATION.
I GUESS WE HAVE THAT 1917 CASE
THAT TALKS ABOUT THE FIRE
LEADING TO THE EXPLOSION.
>> THE 1917 CASE IS A CLASSIC
DEPENDENT CAUSE SITUATION.
WHERE A FIRE CAUSES AN
EXPLOSION.
THAT'S CLASSIC DEPENDENT CAUSE.
IN, AGAIN IN WALLACH, THE
FOUNDATION IN THIS STATE OF THE
CONCURRENT CAUSE DOCTRINE, IT
WAS HUMAN NEGLIGENCE AND WEATHER
PERILS.
THAT IS EXACTLY WHAT WE HAVE IN
THIS CASE.
>> WHAT DID THE JURY HAVE TO
DECIDE?
IT LOOKED TO ME, I READ THE
JUDGE'S ORDER IN ADVANCE OF
TRIAL.
HE ACTUALLY OR SHE, PARSED OUT
THE RAIN.
THERE WAS THE MASSIVE RAIN EVENT
FIRST.
THEN THERE WAS THE HURRICANE.
>> CORRECT.
>> AND THEN AFTERWARDS THERE WAS
SOME OTHER RAIN.
AND HE OR SHE SAID THAT'S NOT
GOING TO BE PART OF WHAT YOU CAN
RECOVER.
COULD YOU EXPLAIN, AGAIN, MAYBE
GOING BACK, WITH THE DEFECTS--
I GUESS THE IDEA IS ANYWAY THAT
A WATERTIGHT HOUSE WILL NEVER
HAVE WATER DAMAGE, WHICH OF
COURSE THAT'S NOT THE CASE IN
FLORIDA BUT.
SO PROBABLY OFTEN WE'RE GOING TO
HAVE A COMBINATION OF SOMETHING
WRONG WITH THE CONSTRUCTION AND
THE RAIN EVENT?
SO WHAT WAS IT ABOUT THE
CONTINUING RAIN THAT THE JUDGE
SAID, WOULD NOT BE INCLUDED IN
YOUR ABILITY TO RECOVER?
>> THAT WAS A RULING THAT WE
ACTUALLY DID NOT AGREE WITH.

BUT THE RULING WAS, SHE WAS
LOOKING AT WHAT IS A FORTUITOUS
OCCURRENCE.
AND SO SHY DECIDED THAT THE
RAIN-- SHE DECIDED THAT THE
RAIN, UNTIL THE TIME MR. SEBO
BOUGHT THE HOUSE WOULD BE ONE
EVENT, THE HURRICANE WOULD BE
ANOTHER AND THE JURY WOULD
DECIDE THE DAMAGES.
>> SO THAT ISSUE IS NOT BEFORE
US WHETHER--
>> NO, IT IS NOT.
>> I THINK YOU NEVER MADE YOUR
THREE POINTS BECAUSE YOU WENT
INTO THE FACTS.
BETTER TO START WITH THE THREE
POINTS.
THE OTHER QUESTION I JUST HAVE
WHICH IS BROUGHT UP IN THE
ANSWER BRIEF IS, THERE WAS
SETTLEMENTS WITH ALL OF THE
DEFENDANTS THAT, THE ORIGINAL
DEFENDANTS THAT WERE RESPONSIBLE
FOR THE CONSTRUCTION OF THE
HOUSE.
DID THEY WANT TO GET IN THAT
EVIDENCE AS, AS EVIDENCE OF
LIABILITY?
BECAUSE THERE WAS A SET-- I
MEAN--
>> I THINK THEY DID.
>> BUT IS THERE A QUESTION ABOUT
WHETHER THERE SHOULD BE A
SET-OFF FOR THE SETTLEMENTS?
IS THAT BEFORE US OR WAS THAT--
>> I DON'T THINK, I DON'T
THINK--
>> YOU WOULD AGREE YOU DON'T GET
TO RECOVER TWICE FOR THE SAME
LOSS?
>> THAT'S CORRECT.
AND THE WAY THE INSURANCE
COMPANY DEALS WITH THAT THROUGH
THE SUBROGATION CLAUSE IN THE
POLICY.
>> SO ONLY THE ISSUE WHETHER THE
JURY SHOULD HAVE HEARD, BECAUSE
YOU SETTLED THERE MUST HAVE BEEN
CONSTRUCTION DEFECTS?
I'M TRYING TO THINK WHY IT WOULD
HAVE EVER BEEN RELEVANT TO COME
IN?
>> THE, WELL, THE ARGUMENT IS
THAT UNDER A CASE CALLED ASH,

UNDER THE VALUE POLICY LAW, AND
WHETHER THERE WAS CONSTRUCTIVE
TOTAL LOSS IT SHOULD HAVE COME
IN.
WE THINK THAT'S CLEARLY WRONG,
CLEARLY WRONG UNDER THIS COURT'S
DECISION IN SALIBI WHICH SAID
SETTLEMENT AGREEMENTS DO NOT
COME IN PERIOD AND ASH.
>> IS THERE ISSUE THE VALUE
POLICY LAW HAS NOT APPLICATION
HERE?
>> NO, IT DID APPLY.
>> SALIBI, HOW WE PRONOUNCE
THAT, HAS NOTHING TO DO WITH THE
VALUE POLICY LAW, DOES IT?
>> THAT IS CORRECT, JUSTICE
CANADY, THAT IS NOT A POLICY
CASE.
BUT SALIBI STANDS FOR A VERY
FIRM RULE, SETTLEMENT AGREEMENTS
AND BASED UPON STATUTE AND RULE
OF EVIDENCE WILL NOT COME INTO A
COURT TO A TRIAL.
THE REASON IS THERE IS STRONG
POLICY IN FAVOR OF INCURRING
SETTLEMENTS SO YOU DON'T BRING
THEM IN.
IN THE ARC CASE, IT WAS NOT A
SETTLEMENT.
THE COURT MAKES CLEAR.
I FIRST READ ASH.
THIS IS YEAR AFTER SALABI, WHY
ISN'T ASH ADDRESSING THE SALABI.
AND THE GOT TO THE END OF THE
CASE, THE COURT EMPHASIZED WHAT
THEY'RE TALKING ABOUT IS NOT A
SETTLEMENT SO THE RULE AND
STATUTE ON SETTLEMENTS IN SALABI
WOULD NOT BE IMPLICATED TO ME
THE ANSWER SHOULD SETTLEMENT
AGREEMENTS COMING IN IS IN
SALABI TO AVOID DOUBLE RECOVERY.
WE DON'T THINK THERE IS DOUBLE
RECOVERY WHAT IS HOLD DOCTRINE
EVEN IF MR. SALABI RECOVERED
EVERYTHING THE JURY AWARD.
HE HAS MASSIVE ADDITIONAL
EXPENSES AND COSTS.
THE WAY TO AVOID DOUBLE RECOVERY
IS THROUGH THE SUBROGATION
RIGHTS.
>> IN THIRD PARTY CASES IF THERE
ARE TWO INDEPENDENT CAUSE, YOU
CAN'T TELL WHAT CAUSE OR LOSS

THAT YOU ARE ENTITLED TO RECOVER
THE WHOLE, UNDER THE CONCURRENT
CAUSE DOCTRINE, WE'RE TALKING
ABOUT A FIRST PARTY INSURANCE
QUESTION WHERE THEY CLEARLY
EXCLUDED CONSTRUCTION DEFECTS,
AND AS YOU POINT OUT THEY COULD
HAVE WRITTEN ANTI-CONCURRENT
CLAUSE FOR THAT IF THEY, WHICH
THEY DID FOR POLLUTION.
>> EXACTLY, YES.
>> IS THERE A SITUATION, WE TALK
ABOUT THE HORRIBLE, INSURANCE
COMPANIES TALK ABOUT THE
HORRIBLES WHERE YOU HAVE A
LITTLE BIT OF RAIN AND THEN
YOU'VE GOT THE MOIST
DEFECTIVELY-CONSTRUCTED HOUSE IN
THE WORLD AND THE THREE PIGS,
THE HOUSE COLLAPSES.
BUT BECAUSE THERE WAS SOME RAIN,
THAT SET-- HOW DOES THAT WORK?
YOU KNOW, WHERE IT'S NOT A
SUB-- WHERE IT IS INCIDENTAL
CAUSE, IS THERE ANYTHING IN THE
LAW THAT WOULD PROTECT AGAINST
THAT WHICH WOULD REALLY BE--
>> SURE.
>> WOULD BE UNFAIR AND
INAPPROPRIATE?
>> I THINK THERE IS.
I THINK, INSURANCE LAW SIMPLY
CONTRACT LAW.
THAT IS ALL IT IS AND UNDER
CONTRACT LAW IN THE STATE OF
FLORIDA IT HAS GOT TO BE A
SUBSTANTIAL FACTOR TO BE ABLE TO
RECOVER.
SO I THINK THIS IDEA OF, IT
COULD JUST BE THIS LITTLE BIT OF
COVERED CAUSE AND THIS MUCH OF
AN EXCLUDED, I DON'T THINK
THAT'S REALITY.
I DON'T THINK THAT'S EVER
HAPPENED.
AND I DON'T THINK THAT IS A
RISK.
>> DID THE JURY RECEIVE AN
INSTRUCTION ALONG THAT LINE,
THAT YOU HAVE TO FIND THAT THE
RAIN EVENT WAS A SUBSTANTIAL
CAUSE OF THE LOSS?
>> NONE WAS REQUESTED BUT, LET
ME TELL YOU WHAT THE JURY DID
FIND.

THE JURY FOUND SPECIFICALLY, SET FORTH THOSE DAMAGES THAT THE DEFENDANT, AMERICAN HOME INSURANCE COMPANY, MUST PAY TO THE PLAINTIFF, QUOTE, AS A RESULT OF PHYSICAL DAMAGE FROM WATER INTRUSION.
THAT'S WHAT THE JURY DECIDED.
JUST THE DAMAGES FROM WATER INTRUSION.
ALL RIGHT.
MY THREE REASONS.
MY THREE REASONS THAT THIS COURT SHOULD REVERSE.
NUMBER ONE, WALLACH IS GOOD LAW.
WALLACH IS GOOD POLICY, WALLACH IS GOOD PRECEDENT.
THE REASONS GIVEN BY THE SECOND DCA, I WANT TO GET TO THIS, I'M GOING TO LIST MY THREE REASONS AND I WANT TO COME BACK TO THIS BUT THE REASON GIVEN BY THE SECOND DCA FROM DEPARTING FROM WALLACH IS FUNDAMENTALLY FLAWED, EASILY REFUTED.
I WILL COME BACK TO THAT IN JUST A MINUTE.
SECOND REASON IS, UNDER THE LANGUAGE OF OUR PARTICULARLY MANUSCRIPT POLICY, AND THIS COURT'S DECISIONS IN FIAD AND GARCIA WE HAVE COVERAGE IF YOU DON'T FOLLOW THE CONCURRENT CAUSE DOCTRINE.
WE HAVE STILL HAVE POLICY COVERAGE WITH FAYAD AND GARCIA.
THERE ARE A COUPLE CASES THAT DO THAT WITHOUT THE CONCURRENT CAUSE DOCTRINE.
THIRD, THIS ISSUE OF ABOLISHING THE CONCURRENT CAUSE DOCTRINE WAS NEVER RAISED IN THE TRIAL.
FIRST TIME WE READ ABOUT THE POSSIBILITY OF ABOLISHING THE CONCURRENT CAUSE DOCTRINE, FIRST TIME WE EVER HEARD ABOUT IT WHEN WE READ THE SECOND DCA DECISION.
THIS IS NOT PRESERVATION UNDER THIS COURT'S DECISION UNDER CHILES.
>> LET ME ASK YOU A QUESTION ABOUT THE CONCURRENT CAUSE DOCTRINE.
IN THIS CASE SEEMS TO BE CONCURRENT IF YOU GO TO TRIAL

WITH YOUR INSURANCE COMPANY
THERE HAS BEEN NO SETTLEMENT
WITH ANYONE ELSE.
THEY, THE PEOPLE WHO PLANNED IT,
ARCHITECT, ALL THESE PEOPLE ARE
NO LONGER AROUND.
SO THE ONLY PERSON YOU HAVE TO
SUE IS YOUR INSURANCE COMPANY.
WHAT IS THEIR LIABILITY UNDER
THE CONCURRENT CAUSE DOCTRINE?
THEY'RE LIABLE FOR THE WHOLE?
>> ONLY FOR DAMAGES RESULTING
FROM A COVERED CAUSE, WIND AND
RAIN.
ONLY THOSE DAMAGES.
NOW, THERE MAY HAVE BEEN A
CONCURRENT CAUSE WITH SOME OF
THOSE DAMAGES BUT CLEARLY NOT
FOR SOME INDEPENDENT
CONSTRUCTION ISSUE THEY'RE NOT
GROWING TO BE LIABLE.
AND AGAIN, IT IS IMPORTANT, THAT
WHAT THE JURY FOUND IN THIS
CASE, VERDICT FORM, ONLY, THEY
AWARDED SIGNIFICANT MONEY,
MILLIONS OF DOLLARS, FOR DAMAGES
AS A RESULT OF PHYSICAL DAMAGE
FROM WATER INTRUSION.
WE HAD TO PROVE THAT.
NOW--
>> SO YOU HAD TO PROVE SEPARATE
AND APART FROM WHAT DAMAGES WERE
CAUSED BY THE ACTUAL PLANNING,
FAULTY PLAN, FAULTY
CONSTRUCTION, YOU HAD TO PROVE
ONLY THOSE DAMAGES THAT WERE
CAUSED BY THE ACTUAL WATER OR
WIND?
>> THAT IS CORRECT AND IT GETS
EVEN MORE CERTAIN, JUSTICE
QUINCE, WITH YOUR POINT, BECAUSE
WE WERE MAKING THIS VALUE POLICY
LAW CLAIM AND THERE WAS AN
INSTRUCTION THAT SAID, IN
DETERMINING WHETHER THERE IS A
CONSTRUCTIVE TOTAL LOSS YOU WILL
LOOK ONLY, ONLY AT DAMAGES
RESULTING FROM A COVERED CAUSE.
YOU CAN NOT COMBINE EXCLUDED
CAUSE LOSSES, AND COVERED CAUSE
LOSSES FOR, UNDER THE VPL, FOR
THIS AS INSTRUCTED BY THE COURT.
SO THEN AGAIN WE ENDED UP WITH
THIS JURY FINDING AS TO THE
DAMAGES FROM, RESULTING FROM,

WATER INTRUSION, A COVERED
CAUSE.
ALL RIGHT.
LET ME, LET ME GO RIGHT TO WHAT
WE THINK IS THE FUNDAMENTAL FLAW
IN THE SECOND DCA'S REASONING.
THE SECOND DCA SAID THAT REALLY,
THE CRUX OF THEIR REASONING,
THEY SAID, TO APPLY THE
CONCURRENT CAUSATION ANALYSIS
WOULD EFFECTIVELY NULLIFY ALL
EXCLUSIONS IN ALL-RISK POLICIES.
THE.
THAT WAS THE RATIONALE, IF YOU
PLAY THAT LOGIC OUT, THEREFORE
THE INSURANCE COMPANY WOULD BE
LIABLE FOR COVERAGES IT NEVER
INTENDED TO ASSUME AND THE
COURT, IN ESSENCE WAS SAYING WE
NEED TO PROTECT THE INSURANCE
COMPANIES FROM THE RISK OF THE
CONCURRENT CAUSE DOCTRINE.
TWO FUNDAMENTAL PROBLEMS.
FIRST OF ALL, THERE IS NO
EVIDENCE THAT HAS HAPPENED.
JUST THINK ABOUT IT.
JUST THINK ABOUT IT.
IF IT WERE TRUE, THAT ALL
EXCLUSIONS HAVE BEEN NULLIFIED
IN ALL-RISK POLICIES SINCE 1988,
MORE THAN A QUARTER OF A CENTURY
AGO, WE WOULD HAVE SEEN CASE LAW
ADDRESSING THAT ISSUE.
THE SECOND DCA IRONICALLY NOTES,
THERE AREN'T MANY CASES IN
FLORIDA INVOLVING MULTIPLE
PERILS, ESPECIALLY COMPARED TO
LOUISIANA AND MISSISSIPPI, WHICH
HAVE THE EFFICIENT PROXIMATE
CAUSE RULE WHICH BREEDS
LITIGATION.
THE CONCURRENT CAUSE DOCTRINE
DOES NOT.
BUT THE OTHER THING IS, THERE
ARE NOT ONLY NO CASE, IF IN
FACT, IF IN FACT THE SECOND DCA
WERE CORRECT THAT ALL
EXCLUSIONS HAVE BEEN NULLIFIED
IN THE STATE OF FLORIDA SINCE
1988, THERE WOULD BE ARMY OF
LOBBYISTS DESCENDING UPON THIS
CITY, GOING ACROSS THE STREET TO
GET LEGISLATIVE RELIEF.
THAT HAS NOT HAPPENED.
NOW, THERE IS EVEN A MORE

FUNDAMENTAL PROBLEM WITH THE
SECOND DCA'S REASONING.
IF YOU CAN HAVE A PROBLEM MORE
FUNDAMENTAL THAN REALLY NO
EVIDENTIARY SUPPORT FOR YOUR
CONCLUSION, THE SECOND DCA SAYS
WE HAVE TO PROTECT THE INSURANCE
INDUSTRY FROM THE RISK OF THE
CONCURRENT CAUSE DOCTRINE.
BUT THE INSURANCE INDUSTRY IS IN
100% CONTROL OF THAT RISK.
HOW?
THEY CAN ADD, AS JUSTICE
PARIENTE MENTIONED, THEY CAN ADD
CONCURRENT CAUSE LANGUAGE ANY
PLACE, ANYTIME THEY WANT TO THE
WHOLE POLICY, TO A PARTICULAR
EXCLUSION.
THERE IS NO RISK TO THE
INSURANCE COMPANIES WITH A
CONCURRENT CAUSE DOCTRINE--
>> IN ANY CONCURRENT LANGUAGE.
>> ANTI-CONCURRENT CAUSE
LANGUAGE.
>> THAT IS EXACTLY WHAT I MEAN.
THEY CAN ADD ANTI-CONCURRENT
LAWS LANGUAGE.
SO WE THINK THAT THE SECOND
DCA'S RATIONALE IS FUNDAMENTALLY
FLAWED.
THERE IS NO GOOD REASON TO
DEPART FROM GOOD PRECEDENCE THAT
HAS EXISTED IN THE STATE OF
FLORIDA FOR 25 YEARS AND THAT IS
THE FIRST REASON YOU SHOULD
AFFIRM.
BUT LET ME--
>> YOU'RE WAY INTO YOUR
REBUTTAL.
>> OH, MY GOODNESS.
>> WHATEVER YOU WANT.
>> I WILL STOP THERE.
I DIDN'T REALIZE I WAS.
THANK YOU.
>> MAY IT PLEASE THE COURT.
RAOUL CANTERO FOR AMERICAN HOME
ASSURANCE COMPANY.
38 STATES HAVE ADOPTED THE
EFFICIENT PROXIMATE CAUSE
DOCTRINE.
IT IS NOT UNFAIR DOCTRINE IN
FIRST PARTY INSURANCE CASES.
THE COURTS HAVE DISTINGUISHED
BETWEEN FIRST PARTY INSURANCE
CASES WHICH IS A MATTER OF

CONTRACT AND THIRD PARTY
INSURANCE CASES WHICH IS
DESIGNED TO COVER A BROAD AND
UNKNOWN NUMBER OF RISKS BECAUSE
IT COVERS NEGLIGENCE.
>> JUST, IN LOOKING AT THE LIST,
WHAT I SAW WAS, IN A LOT OF THE
STATES THERE WAS A FEDERAL
DISTRICT COURT JUDGE THAT MUST
HAVE MADE A PRONOUNCEMENT THAT
IS OBVIOUSLY NOT THE STATES
COURT.
AND THERE WERE A LOT FROM, NOT
THAT THERE IS ANYTHING WRONG
WITH 1917 BUT FROM THE EARLY
1900s.
SO WITHOUT READING ALL THOSE
CASES WOULD YOU SAY THERE IS ONE
CASE OUT THERE IN THE REST OF
THE COUNTRY THAT, WE HAVE
WALLACH HERE, THAT REALLY SETS
FORTH, AND I KNOW YOU HAVE
CALIFORNIA, BUT OTHER THAN
CALIFORNIA, THAT WE COULD LOOK
TO SAY TO SAY, READING THAT,
THAT REALLY TELLS US WHY WE
SHOULD FOLLOW WHAT THE SECOND
DISTRICT SAYS?
>> WELL I THINK THERE ARE, FIRST
OF ALL YOU'VE GOT THE PHELPS
CASE FROM FLORIDA, 1974 THAT
APPLIED THE EFFICIENT PROXIMATE
CAUSE DOCTRINE AND THAT CASE
DEMONSTRATES JUST BECAUSE YOU'RE
APPLYING EFFICIENT PROXIMATE
CAUSE DOESN'T MEAN THE INSURER
WINS.
IT DOESN'T DETERMINE WHO WINS.
IT SAYS WHICH IS THE EFFICIENT
PROXIMATE CAUSE.
A LOT OF TIMES IT WILL BE
COVERED.
>> WOULD YOU SEE A REASON THAT,
WHAT THE LAST THING THAT
MR. CHEFFY SAID, THAT YOU CAN'T
HAVE IN A POLICY?
YOU'VE HAD WALLACH SINCE, WHAT
YEAR-- WALL LACK SINCE WHAT
YEAR?
>> 1988.
>> 1988.
THE COURT DID NOT TAKE
JURISDICTION OF THAT CASE,
DECLINED IT, THAT KNOWING
WALLACH IS THERE-- WALLACH IS

THERE ESPECIALLY CUSTOMIZED
POLLY LIKE HERE, YOU COULDN'T
WRITE SPECIFICALLY TO THE
CONSTRUCTION DEFECT PROVISION,
AN ANTI-CONCURRENT CLAUSE,
SEEING THAT IS PROBABLY THE
MOST, WOULD BE THE MOST COMMON
WAY THAT CONSTRUCTION DEFECTS
WOULD MANIFEST ITSELF WOULD BE
IN RAIN?
SO I, TELL ME WHY THAT'S NOT THE
ANSWER GOING FORWARD.
>> I WOULD LIKE, LIKE TO ANSWER
YOUR PRIOR QUESTION AS WELL AND
I THINK I CAN ANSWER BOTH.
>> YOU'RE ALWAYS GOOD AT DOING
THAT.
>> WITHOUT TRYING AT LEAST.
FIRST AS TO THE PRIOR QUESTION,
I THINK FRIEDBERG, WHICH THE
DISTRICT OF MINNESOTA, 2011,
ANSWERS BOTH QUESTIONS BECAUSE
FRIEDBERG TALKED ABOUT THE
EFFICIENT PROXIMATE CAUSE
DOCTRINE AND KIND OF EXPLAINED
THAT.
ALSO IN FRIEDBERG THERE WAS NO
ANTI-CONCURRENT CLAUSE LANGUAGE
AND IT SAID, WELL, WE'RE JUST
BACK TO THE PLAIN LANGUAGE OF
THE POLICY.
JUST BECAUSE THEY DIDN'T
CONTRACT OUT OF CONCURRENT CAUSE
THAT DOESN'T MEAN THE CONCURRENT
CAUSE DOCTRINE APPLIES.
WE'RE BACK TO WHAT THE PLAIN
LANGUAGE OF THE POLICY IS.
THE OTHER CASE THAT I WOULD
POINT OUT, AND REASON I CITE
THESE TWO CASES BECAUSE THEY ARE
SPECIFICALLY CONSTRUCTION
DEFECT, AND WATER INTRUSION
CASES.
THERE AREN'T ALL THAT MANY OF
THOSE.
THE OTHER CASE IS TMW FROM THE
SIXTH CIRCUIT, I BELIEVE 2010.
TMW IS INTERESTING.
IT REALLY DOESN'T GO THROUGH
EFFICIENT PROXIMATE CAUSE VERSUS
CONDITION CURRENT BUT IT GOES
THROUGH THE LANGUAGE OF THE
POLICY AND PROXIMATE CAUSE
ANALYSIS YOU TAKE TO THE
LANGUAGE.

POLICY AND THAT IS SIMILAR WHAT
WE HAVE HERE.
I WOULD ARGUE THERE IS NO
ANTI-CONCURRENT CAUSE LANGUAGE,
IT IS SAME RESULT BASED ON THE
LANGUAGE OF OUR POLICY BECAUSE
IT SAYS, AND I'M QUOTING FROM
PAGE 177 OF OUR APPENDIX, WE DO
NOT COVER ANY LOOSE CAUSED BY
FAULTY, INADEQUATE OR DEFECTIVE
DESIGN SPECIFICATIONS,
WORKMANSHIP, REPAIR,
CONSTRUCTION, RENOVATION,
REMODELING GRADING COMPACTION.
THEN AFTER IT TALKS ABOUT THE
OTHER THINGS, OF PART OR ALL OF
ANY PROPERTY WHETHER ON OR OFF
THE PREMISES.
>> LET ME ASK YOU ABOUT THE
IMPACT THAT THE POLLUTION OR
CONTAMINATION EXCLUSION
PROVISION IN THE POLICY HAS.
NOW THERE IS EXPRESS LANGUAGE,
ANTI-CONCURRENT CAUSE LANGUAGE
AND THAT'S IN THE POLICY.
WOULDN'T AN INSURER READING THIS
POLICY THINK IF YOU'RE
EXCLUDING, YOU'VE GOT, IF YOU'RE
EXCLUDING CONCURRENT CLAUSE IN
ONE PLACE THERE IS INFERENCE
THAT YOU'RE NOT DOING IT
ELSEWHERE?
I MEAN THE FACT THAT YOU'VE GOT
THAT IN THERE, WHY DOESN'T THAT
SUBSTANTIALLY WEAKEN YOUR
POSITION ABOUT THE
INTERPRETATION OF THIS
PARTICULAR POLICY?
>> TWO ANSWERS TO THAT JUSTICE
CANADY.
NUMBER ONE, WE HAD ANY LANGUAGE,
ANY LOSS CAUSED--
>> I HEARD THAT.
I'M NOT TALKING ABOUT THAT.
I'M TALKING ABOUT THE POLLUTION,
THIS EXPRESS PROVISION, THIS
EXPRESS ANTI-CONCURRENT CLAUSE
CON.
>> THAT ASSUMES CONCURRENT
CLAUSE WOULD APPLY OTHERWISE.
TO THE QUESTION WE HAD PHELPS IN
CONFLICT WITH WALLACH.
WALLACH WAS NOT NECESSARILY THE
LAW IN FLORIDA.
WE HAD CONFLICTING LAW IN

FLORIDA.
NOT NECESSARILY TRUE THAT THE
CONCURRENT CLAUSE DOCTRINE WOULD
CONCURRENT CLAUSE DOCTRINE WOULD
APPLY.
EARTHQUAKE AND EARTH MOVEMENT
EXCLUSIONS, BOTH OF THOSE HAVE
WHAT THEY CALL ENSUING LOSS
PROVISIONS WHICH SAY, HOWEVER WE
DO INSURE ENSUING COVERED LOSS
DUE TO THEFT, FIRE, GLASS
BREAKAGE, EXPLOSION OR UNLESS
OTHER EXCLUSION APPLIES.
BOTH OF THOSE EXCLUSIONS CONTAIN
THAT EXCEPTION.
THAT WASN'T CONTAINED IN THE
CONSTRUCTION DEFECT EXCLUSION.
SO YOU CAN DRAW THE SAME
INFERENCE.
THAT IF THAT LANGUAGE IS NOT
CONTAINED--
>> YOU HAVE DUELING INFERENCES
BASED ON THOSE TWO THINGS?
>> YES, CORRECT.
>> I GUESS, HERE IT GOES BACK TO
THIS ISSUE WHICH IS,
CONSTRUCTION DEFECT AND
SUBSTANTIAL-- HURRICANE,
SUBSTANTIAL RAIN.
MANY POLICIES IN SOUTH FLORIDA
YOU CAN'T EVEN GET COVERAGE FOR
HURRICANE, I MEAN, IT IS
SPECIAL, YOU GET SPECIAL
INSURANCE THAT IS COVERED.
HERE THEY WERE COVERING
HURRICANE DAMAGE, WATER
INTRUSION DAMAGE.
I DON'T KNOW, AND AGAIN, THIS
IS, MAYBE THEY WERE EXPERTS,
THAT THERE'S, IT WOULD SEEM TO
ME THAT A HOUSE, AGAIN WE SAW
THE HOUSE IN ARIZONA WASN'T
GOING TO HAVE DAMAGE, THAT
YOU'VE GOT, MAYBE THIS IS THE
QUESTION ABOUT DEPENDENT VERSUS
INDEPENDENT.
YOU HAD TWO THINGS ACTING
TOGETHER.
THE CONSTRUCTION DEFECT BUT, WE
DON'T HAVE MINIMAL WATER EVENTS.
WE HAVE, WHAT WAS DESCRIBED AS
UNUSUAL, BOTH THAT SUMMER AND
THAT WITH THE FOLLOWED BY
HURRICANE WILMA.
SO HOW-- YOU SAY THESE WERE

DEPENDENT CAUSES.
AND I THINK IN YOUR BRIEF YOU RECOGNIZE IF THEY'RE INDEPENDENT THAT THEY, THAT THE CONCURRENT CLAUSE DOES APPLY.
WHY AREN'T THESE INDEPENDENT CAUSES?
AND WITH A CASE WHERE YOU'VE GOT SUBSTANTIAL WATER EVENTS, WHICH ARE COVERED, HOW COULD WE SAY THAT THERE WOULD BE, YOU KNOW, THAT BECAUSE THERE'S ALSO DEFECTS WORKING TOGETHER THAT YOU DON'T GET THE WHOLE, THE DAMAGE FROM THE WATER?
SO THAT'S, YOU KNOW, DEPENDENT, INDEPENDENT, AND THAT WATER DAMAGE, AND WIND DAMAGE IS COVERED UNDER THIS POLICY?
>> LET ME GO TO THAT FIRST.
ON THE CONSTRUCTION DEFECT ISSUE, THE REASON THAT EXCLUSION IS THERE IS BECAUSE WE KNOW THAT IF THERE ARE CONSTRUCTION DEFECTS, THE INSURED HAS A REMEDY.
AS THE INSURED GOT IT HERE.
THE INSURED HAS A REMEDY AGAINST THOSE WHO BUILT THE HOUSE.
SO--
>> DON'T YOU AS AN INSURANCE COMPANY, IF YOU PAY FOR THE WATER DAMAGE AND THE CONSTRUCTION DEFECTS ARE A CAUSE, AS MR. CHEFFY SAID, YOU HAVE RIGHTS OF SUBROGATION?
>> ASSUMING THEY'RE INCLUDED IN THE POLICY NOT EXCLUDED HERE.
WE DENIED COVERAGE SO THE COURT HELD WE'RE NOT ENTITLED TO SUBROGATION.
THE COURT HELD ENTITLED WHEN YOU'RE DENY COVERAGE YOU'RE NOT ENTITLED TO SUBROGATION.
THE REASON WE DENIED IT IS EXCLUDED UNDER THE POLICY BECAUSE THEY HAVE A REMEDY AGAINST THOSE WHO BUILT THE HOUSE.
THAT IS WHY THAT EXCLUSION IS THERE.
THE WHOLE POINT OF BUILDING A HOUSE IS TO PROTECT AGAINST RAIN.
NOW REMEMBER THE JURY ONLY SAID

$30,000 OF THAT DAMAGE WAS DUE
TO THE HURRICANE, WHICH WOULD
HAVE PAID BUT IT WAS UNDER
DEDUCTIBLE.
IT WASN'T HURRICANE THAT CAUSED
THIS DAMAGE.
IT WAS RAIN.
EVERYBODY KNOWS IN FLORIDA, WE
HAVE RAIN.
>> DOESN'T THE JUDGE THOUGH
DECIDE THE RAIN AFTER THE
HURRICANE WAS NOT GOING TO BE
COVERED?
AND--
>> IT WAS UP TO THE JURY TO
DETERMINE WHAT DAMAGE WAS CAUSED
BY THE HURRICANE AND THE JURY
DETERMINED $30,000.
>> AND THEN THE UNUSUAL RAINS
BEFORE THAT, THAT WAS THE
MAJOR--
>> YES.
>> THEY DETERMINED THE MAJOR
CAUSE.
>> RIGHT.
>> BUT ANY DAMAGE AFTER, I
THOUGHT UNDER THE JUDGE'S ORDER,
PRETRIAL ORDER, SHE EXCLUDED
THEM BEING ABLE TO CLAIM THAT?
>> NO.
WHAT THE JUDGE SAID IS, THEY,
THE INSURER WILL BE LIABLE FOR
ANY INITIAL WATER-BASED
INTRUSION AND IT IS UP TO THE
JURY TO DECIDE WHAT THE PERIOD
WAS OF THE INITIAL WATER BASED
INTRUSION.
THE JURY DECIDED IT WENT FROM
APRIL 19 OF 2005 WHEN THE RAIN
STARTED TO OCTOBER 23 rd,
WHICH WAS THE DAY BEFORE THE
HURRICANE.
SO IT INCLUDED EVERYTHING IN
THAT INITIAL WATER-BASED
INCLUSION.
TO ANSWER YOUR QUESTION, JUSTICE
PARIENTE, ABOUT THE INDEPENDENT
VERSUS DEPENDENT--
>> I WAS LOOKING AT PART WHERE
SAID CONSEQUENTLY AND REPEATED
RAIN INTRUSION IS NOT A
FORTUITOUS EVENT AND THAT WOULD
BE NOT PART OF WHAT THEY COULD
CLAIM.
>> RIGHT.

THE JURY WAS INSTRUCTED AND THE
JURY, THE VERDICT FORM SAYS,
WHAT WAS THE PERIOD, NUMBER
THREE, QUESTION NUMBER THREE,
PLEASE IDENTIFY THE TIME PERIOD
DURING I WHICH THE INITIAL
RAIN-BASED WATER INTRUSION
PROPERTY DAMAGE TOOK PLACE.
AND THE JURY SAID APRIL 19,
2005, TO OCTOBER 23 rd, 2005.
SO THE JURY ESSENTIALLY SAID IT
COVERS ALL, EVERYTHING RIGHT
BEFORE THE HURRICANE.
>> I'D LIKE, I'D LIKE TO ASK YOU
ABOUT THE PRESERVATION ISSUE.
NOW, AM I CORRECT IN HAVING THE
IMPRESSION THE FOCUS OF THE
ARGUMENT ABOUT CONCURRENT CAUSE
IN THE TRIAL COURT WAS ON
INDEPENDENT VERSUS DEPENDENT.
>> YES, YOU ARE.
>> OKAY.
AM I CORRECT IN UNDERSTANDING
THAT WHEN YOUR CLIENT WENT TO
THE SECOND DISTRICT YOUR CLIENT
DID NOT ARGUE THAT WALLACH
SHOULD BE, WAS WRONGLY DECIDED,
AND THAT THE CONCURRENT CAUSE
DOCTRINE WAS WRONG?
>> YES, YOU'RE CORRECT.
>> WELL, WHY, WHY SHOULD YOU BE
ABLE TO COME UP HERE AND ARGUE
THAT THE SECOND DISTRICT SHOULD
BE, THAT THE SECOND DISTRICT WAS
RIGHT ON THAT WHEN THEY NEVER
PROPERLY CONSIDERED IT?
>> WELL, THE SECOND DISTRICT
ISSUED AN OPINION THAT ADOPTED
THE PROXIMATE CAUSE--
>> BUT WEREN'T THEY WRONG TO DO
THAT BASED ON AN ISSUE THAT HAD
NOT BEEN PRESERVED IN THE TRIAL
COURT AND THEN HAD NOT BEEN
PROPERLY PRESENTED TO THEM?
IT IS LIKE, IT IS LIKE A
DOUBLE--
>> DOUBLE-WHAMMY?
>> IT'S A DOUBLE WHAMMY OR A
DOUBLE INSULT TO THE INTEGRITY
OF THE-- AND, AGAIN I'M SURE
THEY WERE TRYING TO DO, MAKE THE
RIGHT DECISION BUT IT IS NOT
CONSISTENT WITH THE STRUCTURE OF
THE APPELLATE PROCESS, IS IT?
>> YES, YOUR HONOR.

I WOULD SUBMIT--
>> HOW SO?
>> I WOULD SUBMIT THAT THE, NEITHER THE APPELLATE COURT OR THIS COURT IS BOUND TO DETERMINING WHAT DOCTRINES OR LAW SHOULD APPLY IN THE STATE OF FLORIDA, THIS COURT IS NOT BOUND BY ARGUMENT OF COUNSEL.
IN FACT THIS COURT HAS RECEDED FROM CASES, HAS ADOPTED DOCTRINES WITHOUT ARGUMENT OF COUNSEL WHEN IT BELIEVES THAT THE LAW NEEDS TO BE CHANGED AND THE LAW SHOULD GO IN A CERTAIN DIRECTION.
>> BUT ISN'T A FUNDAMENTAL POINT OF THE APPELLATE PROCESS THAT APPELLATE COURTS DO NOT REVERSE THE JUDGMENTS THAT ARE BEFORE THEM ON THE BASIS THAT OF ARGUMENTS THAT ARE NOT PRESENTED TO THEM?
THAT THEY GO OUT AND GRAB ANOTHER ARGUMENT?
THAT NOBODY BEFORE THEM HAS HAD A CHANCE TO-- NOBODY HAS BROUGHT UP OR HAD A CHANCE TO ADDRESS, HOW CAN IT POSSIBLY BE FAIR TO THE PARTY ON THE OTHER SIDE WHO IS HAVING THEIR JUDGMENT, A JUDGMENT IN FAVOR OF THEM REVERSED, TO GET REVERSED WHEN THEY HAVE NEVER HAD AN OPPORTUNITY TO EVEN ADDRESS THE ISSUE?
>> TWO ANSWERS TO THAT, YOUR HONOR.
FIRST OF ALL, THIS IS A LITTLE BIT DIFFERENT BECAUSE THE PARTIES DID ARGUE WHETHER EFFICIENT PROXIMATE CAUSE APPLIES OR CONCURRENT CAUSE APPLIES.
IF THE CAUSES ARE DEPENDENT THEN EFFICIENT PROXIMATE CAUSE APPLIES.
IT IS LITTLE BIT DIFFERENT.
MORE THE REASON WHY IT SHOULD BE EFFICIENT PROXIMATE CAUSE VERSUS CONCURRENT, NOT WHETHER IT IS OR NOT.
SO THEY ARGUED THAT IN THE SECOND DISTRICT AND IN THE TRIAL COURT.

AND IN FACT IN THE TRIAL COURT,
IF YOU LOOK ON PAGE 27 TO 28 I
BELIEVE OF OUR MOTION FOR
SUMMARY JUDGMENT, WE DID TALK
ABOUT EFFICIENT PROXIMATE CAUSE.
WE DID CITE PHELPS NOT IN MANNER
I WOULD DO IN ARGUING AGAINST
WALLACH BUT WE DID ARGUE THE
DOCTRINE AND THE OTHER ANSWER TO
YOUR QUESTION, JUSTICE CANADY,
IS, THAT IS THE WAY I HAVE FELT
OFTEN IN THIS COURT WHERE WE
ARGUE AND WE SAY WELL THE LAW IS
THIS.
>> I CAN RELATE.
I CAN RELATE.
>> RIGHT.
THE LAW IS SUCH AND SUCH AND
THEN THE COURT SAYS, WELL WE'RE
GOING TO RECEDE FROM THE LAW
THAT CANTERO WAS RELYING ON AND
WE'LL GO THIS WAY.
A LOT OF TIMES THE PARTIES DON'T
KNOW THAT THE COURT IS GOING TO
GO IN A CERTAIN DIRECTION AND
THAT WAS NEVER BRIEFED BECAUSE
IT ASSUMES THAT A CERTAIN
DOCTRINE OF LAW APPLIES.
SO IT IS NOT UNUSUAL.
>> THAT IS REALLY -- TO SAY WE
RECEDE FROM WELL-ESTABLISHED
PRECEDENT WITHOUT PARTIES BEING
ABLE TO HAVE THE OPPORTUNITY TO
BRIEF IT, YOU KNOW, I'M NOT--
YOU CAN, I DON'T, I THINK SINCE
THIS IS BEING, THINK THAT IS NOT
A PROPER CHARACTERIZATION.
ANDS A YOU YOURSELF SAID ON THIS
COURT WE DO NOT RECEDE SUB-S
ILENCIO.
LET ME GET BACK, THE ISSUE THAT
WAS ARGUED WAS DEPENDENT VERSUS
INDEPENDENT.
MR. CHEFFY SAID THAT THE SECOND
DISTRICT DIDN'T DISCUSS THAT'S
BECAUSE THEY SAID CONCURRENT
CLAUSE DOESN'T APPLY.
WHY ARES THESE NOT UNDER THE WAY
WALLACH AND THE WAY PALUCCI
DISCUSS IT, INDEPENDENT CAUSES
OF THE LOSS, NOT DEPENDENT?
>> EVEN THE PLAINTIFFS WOULD
AGREE THAT THE INDEPENDENT
CAUSES ARE APPLYING IN LIMITED
CIRCUMSTANCES AND GETTING BACK

TO YOUR CITATION EARLIER OF THE
PALUCII CASE, THE PALUCCI CASE,
AN EXAMPLE OF INDEPENDENT CAUSES
WHEN AN EARTHQUAKE AND LIGHTNING
SIMULTANEOUSLY CAUSE DAMAGE.
SO THAT'S, IT IS WHEN THEY, FOR
EXAMPLE, EVEN WITHOUT THE
UNCOVERED CAUSE, THE COVERED
CAUSE STILL WOULD HAVE CAUSED
THAT DAMAGE.
THAT IS WHAT INDEPENDENT MEANS.
IT IS NOT, THAT THEY ORIGINATED
INDEPENDENTLY IT IS THAT THEY
INDEPENDENTLY CAUSED THE DAMAGE.
AND THAT'S WHY IT DOESN'T APPLY
VERY OFTEN.
>> WELL, I THOUGHT, I MEAN IN
WALL LACK YOU WOULD-- WALLACH
YOU WOULD AGREE THEY TAKE THIS
EXACT SITUATION AND THEY AGREE
THEY'RE DEPENDENT?
>> I WOULD AGREE THAT WALLACH
MISAPPLIED THE INDEPENDENT
CLAUSE.
>> THE WAY WALLACH, 1988, NOT
REVIEWED BY THIS COURT AND GO,
GOES ALONG UNTIL 2014 WITHOUT A
COURT SAYING WALLACH IS WRONGLY
DECIDED.
>> WELL, YOUR HONOR, I DISAGREE
THAT WALLACH WAS THE LAW IN
FLORIDA.
YOU TOOK THIS CASE, YOU TOOK
THIS CASE BASED ON CONFLICT WITH
WALLACH AND SEBO BUT I WOULD
SUBMIT PHELPS CONFLICTS WITH
WALLACH BECAUSE IN THE SAME KIND
OF CIRCUMSTANCES PHELPS APPLIED
THE EFFICIENT PROXIMATE CAUSE
RULE.
SO THERE WAS A CONFLICT IN THE
LAW OF FLORIDA UNTIL NOW.
AND SO--
>> THAT WAS THE FIRST DISTRICT,
1974 CASE?
>> YES.
SO WHAT THE CASES HAVE SAID AND,
AND AGAIN BECAUSE THE, EFFICIENT
PROXIMATE CAUSE DOCTRINE MOST
CASES STATES HAVE SAID APPLIES
WHEN IT'S FIRST PROPERTY, MOST
OF THE CASES IN FLORIDA RELATE
TO THE THIRD PARTY AREA.
>> LET ME SEE IF I UNDERSTAND
THE EFFICIENT PROXIMATE CAUSE

DOCTRINE YOU HAVE TO, THE LOSS
WOULDN'T BE COVERED UNDER YOUR
CLIENT'S INSURANCE POLICY WOULD
HAVE TO BE THE SUBSTANTIAL
REASON FOR THE LOSS?
>> YES, YOUR HONOR.
>> AND THAT IS THE ONLY TIME
THAT YOUR CLIENTS POLICY WOULD
COVER THE LOSS?
>> AND--
>> AND IT WOULD COVER HOW MUCH
OF THE LOSS?
>> EVERYTHING WOULD BE COVERED.
WHATEVER SUBSTANTIALLY CAUSED
THE LOSS.
WHAT WAS EFFICIENT PROXIMATE
CAUSE WOULD BE COVERED.
>> ENTIRE LOSS WOULD BE COVERED?
>> YES.
>> EVEN THOSE PORTIONS CAUSED BY
DEFECTIVE CONSTRUCTION,
DEFECTIVE PLANNING WHATEVER IT
IS?
>> YES, IF THE EFFICIENT
PROXIMATE CAUSE WAS A COVERED
CAUSE, YES.
THAT'S WHY 38 STATES APPLY THIS
DOCTRINE.
IT IS NOT AN ANTI-INSURED
DOCTRINE.
IT IS A FAIR WAY TO DETERMINE
WHAT THE CAUSE IS.
AND GETTING BACK TO THE
INDEPENDENT, DEPENDENT, THE
CASES IN FLORIDA, IN THE THIRD
PARTY CONTEXT-
>> I GUESS I DON'T UNDERSTAND
HOW THAT IS ANYMORE EFFICIENT
BECAUSE YOU STILL HAVE THE
INSURANCE COMPANY COVERING A
LOSS THEY NEVER BAR GAINED FOR?
>> BECAUSE THE SUBSTANTIAL CAUSE
OF LOSS WAS ONE THEY DID BARGAIN
FOR.
THAT IS THE TRADEOFF THAT THE
CASES MAKE IN THAT.
>> I GUESS IT SEEMS TO ME THAT,
IT MAKES A LOT MORE SENSE AT
LEAST TO ME THAT YOU HAVE TWO
CAUSES OF THE LOSS.
AND THAT YOUR COMPANY SHOULD BE
RESPONSIBLE FOR WHATEVER DAMAGES
WERE CAUSED THAT, UNDER THEIR
COVERED LOSS.
AND THE OTHER PEOPLE SHOULD BE

RESPONSIBLE FOR THEIRS.
WHY ISN'T THAT A BETTER SOLUTION
THAN ONE PERSON BEING ON THE
HOOK AND THE OTHER NOT BEING?
>> THAT IS A SOLUTION THAT THE,
MY TIME IS UP.
MAY I RESPOND?
>> SURE.
>> THAT IS A SOLUTION THAT TEXAS
HAS COME UP WITH.
IT IS THE MINORITY OF STATES BUT
TEXAS DOES HAVE THAT SOLUTION
WHERE IF THERE ARE TWO CAUSES,
THAT BOTH CAUSED A LOSS, YOU
DETERMINE WHICH LOSS IS
ATTRIBUTABLE TO COVERED AND
WHICH IS ATTRIBUTABLE TO
UNCOVERED LOSS.
THE PROBLEM IS THAT SOMETIMES
YOU CAN'T DETERMINE IT.
MAYBE THAT IS WHY MOST STATES
DON'T GO THAT WAY.
BY THE TIME YOU GET TO THE END
YOU REALLY CAN'T TELL WHICH WAS,
WHICH WAS BECAUSE OF THE
CONSTRUCTION DEFECTS AND WHICH
WAS BECAUSE OF--
>> YOU DON'T THINK--
>> AS FAR AS THE AMOUNT.
>> YOU ABOUT THE SUBSTANTIAL
ONE, YOU THINK IS EASIER TO DO
THAN, THAN PARSING OUT--
>> IT IS CERTAINLY EASIER IN A
SENSE OF THAT IS ALL WE'VE GOT.
WE'VE GOT THE PLAIN LANGUAGE OF
THE POLICY SAYS ANY LOSS CAUSED
BY.
AND JURIES DETERMINE CAUSATION
ALL THE TIME.
THAT IS THEIR RESPONSIBILITY TO
DETERMINE CAUSATION.
IT CERTAINLY CAN'T BE THAT, IF,
IF ANYTHING, IS CAUSED BY, NO
MATTER HOW SMALL, BY THE
COVERED.
THEN YOU'RE RESPONSIBLE FOR
EVERYTHING.
THAT IS WHERE YOU GET TO THE
POINT OF, IF YOU, IN THE CHAIN
OF CAUSATION, IF YOU CAN POINT
TO ANY LITTLE LOSS THAT HAPPENED
TO BE COVERED.
NOW THE ENTIRE LOSS IS COVERED.
>> LET ME ASK YOU BRIEFLY ABOUT
VALUED POLICY LAW AND HOW THAT

FIGURES INTO YOUR POSITION IN
THIS CASE.
>> THE VALUE POLICY LAW GOES TO
DAMAGES, NOT TO LIABILITY.
AND THAT'S WHY WE SUBMIT THAT IS
THE SALIBI DOESN'T APPLY.
768.01 APPLIES TO JOINT
TORT FEASORS.
THIS IS NOT A JOINT TORT FEASORS
CASE.
THE RULE, I THINK 89408-- 9408.
APPLIES TO LIABILITY.
YOU CAN'T INTRODUCED INTRODUCE
IT AS IS APPLIES TO LIABILITY.
ONCE YOU GET TO DAMAGES
LIABILITY HAS ONLY BEEN
DETERMINED.
ONCE YOU'RE UNDERVALUE POLICY
LAW YOU'RE AN TO COVER THE
ENTITLED INSURES VALUE.
CASES SAY IF THERE IS
CONSTRUCTIVE TOTAL LOSS YOU'RE
ALLOWED TO GET THE ENTIRE VALUE
OF THE PROPERTY, WHICH THE JURY
DETERMINED WAS 6.8 MILLION.
THE PROBLEM IS THE CASES LIKE
COX SAY, IN DETERMINING THAT
VALUE YOU ONLY DETERMINE GETTING
BACK TO JUSTICE QUINCE'S
QUESTION, THE TYPE OF DAMAGE
THAT WAS COVERED, NOT THAT WAS
UNCOVERED.
AND SO, WE SOUGHT TO INTRODUCE
EVIDENCE THAT THEY HAD
SETTLEMENTS UNDER ASH, THAT THEY
HAD SETTLEMENTS, AGAINST THE
CONSTRUCTION, AGAINST THE
BUILDERS, AND THE OWNER AND THE
EVERYBODY ELSE, TO SHOW THAT
THIS WAS NOT ALL COVERED LOSS.
THAT THERE HAD TO BE SOME
DEDUCTION FOR UNCOVERED DAMAGE.
I'M SORRY I'VE GONE OVER.
THANK YOU FOR YOUR INDULGENCE,
CHIEF JUSTICE.
>> MR. CHEFFY, I GIVE YOU
ADDITIONAL THREE MINUTES.
>> THANK YOU VERY MUCH.
I APPRECIATE THAT.
QUICKLY, FIRST POINT, PHELPS
CITED BY MR. CANTERO IS IN NO
WAY INCONSISTENT WITH WALLACH.
WALLACH I BELIEVES DISCUSSES
PHELPS.
PHELPS IS CLASSIC DEPENDENT

CAUSES CASE.
IT IS IN NO WAY INCONSISTENT.
THERE IS NO CONFLICT WITH
PHELPS.
THE FRIEDBERG CASE THAT
MR. CANTERO RELIED UPON, IS
DRAMATICALLY DISTINGUISHABLE,
DRAMATICALLY.
THE ONLY, THE ONLY OPINION
THAT'S DISCUSSED IN THEIR BRIEF
IS THE LOWER COURT OPINION.
THERE IS A, FEDERAL CIRCUIT
COURT OPINION AFFIRMING.
THE FEDERAL CIRCUIT COURT POINTS
OUT THE KEY TO FRIEDBERG, THERE
IS IN FACT THE FUNCTIONAL
EQUIVALENT OF ANTI-CONCURRENT
CAUSE LANGUAGE IN THAT POLICY.
THE DEFINITION OF CAUSED BY, IS
ESSENTIALLY A, AN
ANTI-CONCURRENT CAUSE PROVISION.
SO, FRIEDBERG IS DRAMATICALLY
DISTINGUISHABLE.
THE TMW CASE, OUT OF MICHIGAN
WAS THE OTHER ONE THAT
MR. CANTERO RELIED UPON.
DRAMATICALLY DISTINGUISHABLE.
IF YOU READ THAT CASE, IT IS
A, MICHIGAN DOES NOT FOLLOW THE
CONCURRENT CAUSE DOCTRINE.
THE DEFAULT RULE IN MICHIGAN IS,
IF A LOSS IS COVERED BY A
COVERED CAUSE AND EXCLUDED
CAUSE, IS THERE IS NO COVERAGE
PERIOD.
SO TMW DOES NOT HAVE ANYTHING TO
DO WITH THIS CASE.
I WANT TO CONCLUDE IN THIS CASE.
IN FAYAD THE CASE SAYS INSURANCE
COMPANY HAS TO INSURE LOSS AND
IF THEY DON'T IT IS COVERED BY
AN ALL-RISK POLICY.
>> HOW DO WE END UP HERE WHERE
WE CAN'T EVEN AGREE TO THE TWO
OF YOU WHETHER THESE ARE
DEPENDENT OR INDEPENDENT CAUSES?
>> WE JUST LOOKED AT WALLACH.
TO ME WALLACH IS ON ALL FOURS
WITH OUR CASE, ALL FOURS AND
PALUCCI--
>> THE OTHER QUESTION IS,
MR. CANTERO SAID THERE, EVEN
UNDER, IN THE EFFICIENT
PROXIMATE CAUSE, THE DAMAGES
HAVE TO BE A SUBSTANTIAL, I MEAN

THE CAUSE HAS TO BE SUBSTANTIAL
FACTOR IN THE DAMAGES.
YOU AGREE THAT IT IS, THAT THE
WATER EVENT HAS TO BE
SUBSTANTIAL.
>> I DO.
>> SO AGAIN WE'RE NOT REALLY,
DOESN'T SEEM THAT WE'RE THAT FAR
OFF ON, WHETHER THERE HAS TO BE
A SUBSTANTIAL FACTOR, RIGHT?
>> YEAH.
AGAIN I THINK THE JURY--
>> THE LAST THING HE SAID WAS
THAT THE HURRICANE DAMAGE WOULD
HAVE BEEN COVERED WHICH I DIDN'T
SEE THAT IN THE BRIEFS WHICH
I-- WAS THERE ABOUT WAS THERE
IS SEPARATE CLAUSE WITH
HURRICANE COMBINED WITH
CONSTRUCTION DEFECT.
>> NO.
IT IS ALL-RISK, IT IS ALL-RISK
UNLESS SOMETHING SECTION
CONCLUDED.
>> DID THEY MAKE THAT ARGUMENT
AT TRIAL, COVER THE HURRICANE
BUT NOT THE PREVIOUS WATER
INTRUSION?
>> JUDGE RULED, AS A MATTER OF
LAW THAT THE POLICY COVERS WATER
INTRUSION.
THAT WAS RULING AS A MATTER OF
LAW.
SO LET ME CLOSE WITH THIS
QUESTION, BASED ON FAYAD.
DID THE INSURANCE COMPANY
CLEARLY EXCLUDE THE LOSSES
SUFFERED BY MR. SEBO?
AND THE ANSWER IS, THERE IS NO
ANTI-CONCURRENT CAUSE LANGUAGE
AND THE CONSTRUCTION DEFECT
EXCLUSION USES THE PHRASE CAUSED
BY, AS OPPOSED TO ARISING OUT OF
IN GARCIA, THIS COURT SAID
CAUSED BY IS MUCH NARROWING THAN
ARISING OUT OF.
BASED ON THE ABSENT OF AT THIS
CONCURRENT CAUSE LANGUAGE, USE
OF CAUSED BY, LOSSES WERE NOT
CLEARLY EXCLUDED AND UNDER FAYAD
THEY WERE COVERED.
TWO CASES, BUSHER AND McGRAF,
MINNESOTA, ILLINOIS, WENT
THROUGH ON IDENTICAL FACTS
ALMOST IDENTICAL POLICY LANGUAGE

AND FOUND COVERAGE BASED ON TRADITIONAL RULES OF INSURANCE CONTRACT INTERPRETATION WITHOUT ANY REFERENCE TO THE CONCURRENT CAUSE DOCTRINE AND WE SUBMIT UNDER FAYAD AND GARCIA WE HAVE COVERAGE.

I THINK THIS POINT ALSO DEMONSTRATES THE CONCURRENT CAUSE DOCTRINE IS REALLY NOTHING MORE THAN A SPECIFIC APPLICATION OF THE TRADITIONAL RULES OF CONSTRUCTION SET FORTH BY THIS COURT IN FAYAD.