APPLICATION FOR NOMINATION TO THE FIFTH DISTRICT COURT OF APPEAL

DAYTONA BEACH, FLORIDA

OCTOBER 12, 2020

CARRIE ANN WOZNIAK, B.C.S.

APPLICATION FOR NOMINATION TO THE FIFTH DISTRICT COURT OF APPEAL

Instructions: *Respond fully to the questions asked below. Please make all efforts to include your full answer to each question in this document. You may attach additional pages, as necessary, however it is discouraged. In addition to the application, you must provide a recent color photograph to help identify yourself.*

Full Name: Carrie Ann Wozniak **Social Security No.:**

Florida Bar No.: 12666 **Date Admitted to Practice in Florida:** 4/19/2005

1. Please state your current employer and title, including any professional position and any public or judicial office you hold, your business address and telephone number.

   Akerman LLP
   Partner
   420 South Orange Avenue
   Suite 1200
   Orlando, FL 32801
   407-419-8497

2. Please state your current residential address, including city, county, and zip code. Indicate how long you have resided at this location and how long you have lived in Florida. Additionally, please provide a telephone number where you can be reached (preferably a cell phone number).

   [redacted]

   I have resided at this location since 2014. I have lived in Florida since I was born in 1981. I attended college out of state from 1999 to 2002 but remained a Florida resident during this time.

3. State your birthdate and place of birth.

   May 5, 1981

   Winter Park, Florida

4. Are you a registered voter in Florida (Y/N)?

   Yes.

5. Please list all courts (including state bar admissions) and administrative bodies having special admissions requirements to which you have ever been admitted to practice, giving the dates of

admission, and if applicable, state whether you have ever been suspended or resigned. Please explain the reason for any lapse in membership.

United States Supreme Court – Admitted 03/02/09

Florida Supreme Court (Florida Bar) – Admitted 04/19/05

United States Eleventh Circuit Court of Appeals – Admitted 11/29/09

United States Court of Appeals for the Federal Circuit – Admitted 03/11/16

United States District Court in and for the Northern District of Florida – Admitted 01/11/13

United States District Court in and for the Middle District of Florida – Admitted 04/04/07

United States District Court in and for the Southern District of Florida – Admitted 07/20/07

I have not been suspended or resigned from admission to any of these courts.

6. Have you ever been known by any aliases? If so, please indicate and when you were known by such alias.

No.

EDUCATION:

7. List in reverse chronological order each secondary school, college, university, law school or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, the date the degree was received, class standing, and graduating GPA (if your class standing or graduating GPA is unknown, please request the same from such school).

Stetson University College of Law
Attended August 2002-December 2004
Juris Doctor *Cum Laude*, received on December 18, 2004
Class Rank 6/87
Graduating GPA 3.315

University of Michigan, Ann Arbor
Attended September 1999-April 2002
Bachelor of Arts, University Honors, Class Honors, received on April 27, 2002
Class not ranked
Graduating GPA 3.455

Bishop Moore High School
Orlando, Florida
Attended August 1995-May 1999
High School Diploma received on May 23, 1999
Class Rank 45/249

Graduating GPA 4.082

8. List and describe any organizations, clubs, fraternities or sororities, and extracurricular activities you engaged in during your higher education. For each, list any positions or titles you held and the dates of participation.

Federalist Society, Stetson University College of Law Chapter (September 2003-December 2004)

- Founding Member and Officer

Stetson Young Republicans (August 2002-December 2004)

- Member

Stetson Law Review

- Notes and Comments Editor (October 2003-December 2004)
- Associate (September 2003-October 2003)

Stetson University College of Law's *The Brief* (September 2003-December 2004)

- Staff Writer

Stetson University College of Law Class of 2004 Gift Committee (September-December 2004)

- Member

Phi Alpha Delta Law Fraternity, International

- Stetson University College of Law—Brewer Chapter (September 2002-December 2004)
  - Clerk (January 2003-December 2004)
- University of Michigan—Pre-Law (September 2000-April 2002)

Sixth Judicial Circuit Teen Court (September 2003-December 2004)

- Volunteer Judge and Jury Advisor

Student Mediation Services, University of Michigan

- Co-Executive Director (September 2001-April 2002)
- Certified Mediator (September 2000-April 2002)

Display Sales, *Michigan Daily*, University of Michigan

- Manager (April 2001-April 2002)
- Associate (December 2000-April 2001)

EMPLOYMENT:

9. List in reverse chronological order all full-time jobs or employment (including internships and clerkships) you have held since the age of 21. Include the name and address of the employer, job title(s) and dates of employment. For non-legal employment, please briefly describe the position and provide a business address and telephone number.

Akerman LLP
Associate (2007-2013), Partner (2013-present)
420 South Orange Avenue
Suite 1200
Orlando, Florida 32801

Supreme Court of Florida
The Honorable Harry Lee Anstead
Supervising Staff Attorney (August 2005-December 2006)
Staff Attorney (January 2005-August 2005)
500 South Duval Street
Tallahassee, Florida 32399

Supreme Court of Florida
The Honorable Barbara J. Pariente
Intern (Summer 2004) (full-time internship for course credit)
500 South Duval Street
Tallahassee, Florida 32399

United States District Court for the Middle District of Florida
The Honorable Elizabeth A. Kovachevich
Intern (January 2004-May 2004) (part-time internship for course credit)
Sam M. Gibbons United States Courthouse
801 North Florida Avenue
Tampa, Florida 33602

10. Describe the general nature of your current practice including any certifications which you possess; additionally, if your practice is substantially different from your prior practice or if you are not now practicing law, give details of prior practice. Describe your typical clients or former clients and the problems for which they sought your services.

I am an equity partner with Akerman LLP specializing in appellate practice. I am board-certified by the Florida Bar in Appellate Practice and am a member of the Florida Bar Appellate Practice Board Certification Committee. The appeals I generally handle arise from complex commercial litigation in state and federal courts; I have also handled appeals from family law, probate, and personal injury cases. For my first six years of private practice, I litigated in the trial courts often, handling various commercial disputes including breach of contract, noncompete issues, class actions, business torts, and commercial landlord/tenant law. As I advanced in my practice, I became more specialized and focused on appellate practice. I value my experience in the trial courts because I know firsthand how quickly trial judges must make decisions while juggling large caseloads, and the work and strategy that goes into preparing for and handling depositions and other discovery, evidentiary and non-evidentiary hearings, and trial. I have also handled litigation matters for Central Florida Transportation Authority d/b/a LYNX, for which my firm is General Counsel, on a variety of cases including pension plan disputes, public records issues, and employment issues.

I became General Counsel to the Florida Bankers Association in 2015. At that time, a significant part of my practice became drafting, revising, and commenting on many types of legislation that affect banks. I also draft, revise, and file amicus briefs in state and federal appellate courts, and I handle other legal issues that arise in the organization such as bylaw amendments, human resources issues, and drafting and reviewing contracts FBA enters into with partners and vendors.

11. What percentage of your appearance in court in the last five years or in the last five years of practice (include the dates) was:

Court		Area of Practice	
Federal Appellate	20 %	Civil	90 %
Federal Trial	10 %	Criminal	0 %
Federal Other	0 %	Family	5 %
State Appellate	60 %	Probate	5 %
State Trial	10 %	Other	0 %
State Administrative	0 %		
State Other	0 %		
TOTAL	100 %	TOTAL	100 %

If your appearance in court the last five years is substantially different from your prior practice, please provide a brief explanation:

Prior to 2013, my practice was more evenly split between litigation in the trial courts and appeals. Now my practice is more concentrated in appellate practice, which is reflected in the above percentages.

12. In your lifetime, how many (number) of the cases that you tried to verdict, judgment, or final decision* were:

Jury?	2	Non-jury?	2
Arbitration?	0	Administrative Bodies?	0
Appellate?	68		

*I interpret "final decision" in the realm of appellate practice to mean an appellate panel issued a decision on the merits in the appeal. I have not included voluntary dismissals due to settlement or otherwise, or involuntary dismissals of appeals, which at times occurred after briefing. When these appeals are included, the number of appeals I have handled is much higher. I have been lead counsel in two arbitrations, but they settled or were stayed prior to an award being entered.

13. Please list every case that you have argued (or substantially participated) in front of the United States Supreme Court, a United States Circuit Court, the Florida Supreme Court, or a Florida District Court of Appeal, providing the case name, jurisdiction, case number, date of argument, and the name(s), e-mail address(es), and telephone number(s) for opposing appellate counsel. If there is a published opinion, please also include that citation.

The cases in which I argued or substantially participated in oral argument in appellate courts are below:

BRNK Casselberry, LLC v. Albertson's, LLC
Florida Fifth District Court of Appeal
5D15-256
October 6, 2015
P. Alexander Quimby, Esq. (opposing counsel)
Baker Hostetler LLP
EMAIL: aquimby@bakerlaw.com
PHONE NUMBER: 407-649-3922
Per curiam affirmed

Central Florida Regional Transportation Authority d/b/a LYNX v. Post-Newsweek Stations, Orlando, Inc.
Florida Fifth District Court of Appeal
5D14-360
December 18, 2014
Edward Louis Birk, Esq. (opposing counsel)
EMAIL: ebirk@marksgray.com
PHONE NUMBER: 904-398-0900
Meagan Lindsay Logan, Esq. (opposing counsel)
EMAIL: meagan@douglasandcarter.com
PHONE NUMBER: 386-752-5511
Central Florida Regional Transportation Authority v. Post-Newsweek Stations, Orlando, Inc., 157 So. 3d 401 (Fla. 5th DCA 2015)

Sullivan v. FL Land Partners, LLC
Florida Fifth District Court of Appeal
5D12-2839
September 26, 2013
Patrick A. McGee, Esq. (opposing counsel)
McGee & Powers, P.A.
EMAIL: pmcgee@mcgeepowers.com
PHONE NUMBER: 407-422-5742
Per curiam affirmed

1700 Rinehart, LLC v. Advance America, Cash Advance Centers
Florida Fifth District Court of Appeal

5D09-3759
October 21, 2010
Matthew G. Brenner, Esq. (opposing counsel)
EMAIL: mgbrenner85@gmail.com
PHONE NUMBER: 407-443-8853
Ronald D. Edwards, Jr., Esq. (opposing counsel)
EMAIL: ronny.edwards@lowndes-law.com
PHONE NUMBER: 407-418-6244
1700 Rinehart, LLC v. Advance America, 51 So. 3d 535 (Fla. 5th DCA 2010)

City of Fort Pierce v. Australian Properties, LLC
Florida Fourth District Court of Appeal
4D14-2728
September 16, 2015
Harold G. Melville, Jr., Esq. (opposing counsel)
Vocelle & Berg, LLP
EMAIL: hmelville@vocelleberg.com
PHONE NUMBER: 772-562-8111
City of Fort Pierce v. Australian Properties, LLC, 179 So. 3d 426 (Fla. 4th DCA 2015)

Lucas Games, Inc. and Luc Marcoux v. Morris AR Associates, LLC
Florida Fourth District Court of Appeal
4D15-1516
May 10, 2016
Michael Ian Feldman, Esq. (opposing counsel)
EMAIL: mif@khllaw.com
PHONE NUMBER: 305-854-9700
Paul R. Regensdorf, Esq. (opposing counsel)
EMAIL: paul.regensdorf@gmail.com
PHONE NUMBER: 954-562-9598
Lucas Games Inc. v. Morris AR Associates, LLC, 197 So. 3d 1183 (Fla. 4th DCA 2016)

Vision Palm Springs, LLLP v. Coscan Palm Springs, LLC
Florida Third District Court of Appeal
3D17-200
December 13, 2017
Matthew P. Leto, Esq. (opposing counsel)
EMAIL: mleto@letolawfirm.com
PHONE NUMBER: 305-341-3155
Vision Palm Springs, LLLP v. Michael Anthony Company, 272 So. 3d 441 (Fla. 3d DCA 2019)

Stephen Hansel v. Greenberg Traurig, P.A., Greenberg Traurig, LLP, and Jay I. Gordon
Florida Second District Court of Appeal
2D18-3971
January 29, 2020 (I was second chair)
Stephen R. Senn, Esq. (opposing counsel)

EMAIL: ssenn@petersonmyers.com
PHONE NUMBER: 863-683-6511
Dennis Waggoner, Esq. (co-appellee's counsel and first chair)
EMAIL: dennis.waggoner@hwhlaw.com
PHONE NUMBER: 813-227-8426
Per curiam affirmed

Joel Edward Chandler v. SAP Public Services, Inc.
Florida Second District Court of Appeal
2D16-2002
June 20, 2017
Tyler K. Pitchford, Esq. (opposing counsel)
EMAIL: tyler.pitchford@gmail.com
PHONE NUMBER: 561-707-3020
Per curiam affirmed

Ring Power Corp., Diesel Construction Co., and Mark David Quandt v. Gerardo Condado-Perez and Nancy Rodriguez-Ventura
Florida Second District Court of Appeal
2D16-353
February 1, 2017
Barbara Green, Esq. (opposing counsel)
EMAIL: bg@caselawupdate.com
PHONE NUMBER: 305-442-0330
Ring Power Corp. v. Condado-Perez, 219 So. 3d 1028 (Fla. 2d DCA 2017)

Panzera v. O'Neal
Florida Second District Court of Appeal
2D14-4302
June 9, 2015
Brett C. Powell, Esq. (opposing counsel)
The Powell Law Firm, P.A.
EMAIL: brett@powellappeals.com
PHONE NUMBER: 305-232-0131
Panzera v. O'Neal, 198 So. 3d 663 (Fla. 2d DCA 2015)

14. Within the last ten years, have you ever been formally reprimanded, sanctioned, demoted, disciplined, placed on probation, suspended, or terminated by an employer or tribunal before which you have appeared? If so, please state the circumstances under which such action was taken, the date(s) such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No.

15. In the last ten years, have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements of any business or contractual arrangement? If so, please explain full.

No.

16. For your last six cases, which were tried to verdict or handled on appeal, either before a jury, judge, appellate panel, arbitration panel or any other administrative hearing officer, list the names, e-mail addresses, and telephone numbers of the trial/appellate counsel on all sides and court case numbers (include appellate cases). *This question is optional for sitting judges who have served five years or more.*

Stephen Hansel v. Greenberg Traurig, P.A., Greenberg Traurig, LLP, and Jay I. Gordon
Florida Second District Court of Appeal
2D18-3971
David F. Bayne, Esq. (co-counsel and trial counsel)
EMAIL: david.bayne@akerman.com
PHONE NUMBER: 212-880-3800
Robert E. Puterbaugh, Esq. (opposing counsel)
EMAIL: rputerbaugh@petersonmyers.com
PHONE NUMBER: 863-683-6511
Stephen R. Senn, Esq. (opposing counsel)
EMAIL: ssenn@petersonmyers.com
PHONE NUMBER: 863-683-6511
J. Davis Connor, Esq. (opposing counsel)
EMAIL: jconnor@petersonmyers.com
PHONE NUMBER: 863-683-6511
Dennis Waggoner, Esq. (co-appellee's counsel)
EMAIL: dennis.waggoner@hwhlaw.com
PHONE NUMBER: 813-227-8426
Joshua C. Webb, Esq. (co-appellee's counsel)
EMAIL: Joshua.webb@hwhlaw.com
PHONE NUMBER: 813-227-8426

Wilson v. Prevatt
Florida Fifth District Court of Appeal
No opposing appellate counsel
5D19-1344
Megan Costa DeVault, Esq. (co-counsel and trial counsel)
EMAIL: megan.devault@akerman.com
PHONE NUMBER: 407-423-4000
Allison P. Gallagher, Esq. (co-counsel and trial counsel)
EMAIL: allison.gallagher@akerman.com
PHONE NUMBER: 407-423-4000
Michael Ferrin, Esq. (opposing trial counsel)

EMAIL: ferrinlaw@yahoo.com
PHONE NUMBER: 407-412-7041
Victoria Anderson, Esq. (opposing trial counsel)
EMAIL: victoria@vandersonlaw.com
PHONE NUMBER: 407-412-7041

Person v. Wilds
Florida Fifth District Court of Appeal
5D19-0426
E. Ginnette Childs, Esq. (co-counsel and trial counsel)
EMAIL: ginny.childs@akerman.com
PHONE NUMBER: 407-423-4000
Monica McNulty Kovecses, Esq. (co-counsel and trial counsel)
EMAIL: monica.mcnulty@akerman.com
PHONE NUMBER: 407-423-4000
Eddie J. Bell, Esq. (opposing counsel)
EMAIL: ejb1140@gmail.com
PHONE NUMBER: 386-682-0876

Win-Development, LLC v. Barbeque Integrated, Inc.
Florida Fifth District Court of Appeal
5D18-1768
David S. Wood, Esq. (co-counsel and trial counsel)
EMAIL: david.wood@akerman.com
PHONE NUMBER: 407-423-4000
Monica M. McNulty, Esq. (co-counsel and trial counsel)
EMAIL: monica.mcnulty@akerman.com
PHONE NUMBER: 407-423-4000
J. Logan Murphy, Esq. (opposing counsel)
EMAIL: logan.murphy@hwhlaw.com
PHONE NUMBER: 813-221-3900
Scott A. McLaren, Esq. (opposing counsel)
EMAIL: scott.mclaren@hwhlaw.com
PHONE NUMBER: 813-221-3900
Shane T. Costello, Esq. (opposing counsel)
EMAIL: shane.costello@hwhlaw.com
PHONE NUMBER: 813-221-3900

Breakpointe, LLC v. Unicorp Colony Units, LLC, et al.
Florida Second District Court of Appeal
2D19-2519
Megan Costa DeVault, Esq. (co-counsel and trial counsel)
EMAIL: megan.devault@akerman.com

PHONE NUMBER: 407-423-4000
Paula J. Howell, Esq. (co-counsel and trial counsel)
EMAIL: paula.howell@akerman.com
PHONE NUMBER: 407-423-4000
Anthony J. Abate, Esq. (opposing counsel)
EMAIL: aabate@shumaker.com
PHONE NUMBER: 941-366-6660
Brett M. Henson, Esq. (opposing counsel)
EMAIL: bhenson@shumaker.com
PHONE NUMBER: 941-366-6660
Tammy N. Giroux, Esq. (opposing counsel)
EMAIL: tgiroux@shumaker.com
PHONE NUMBER: 941-366-6660

Vision Palm Springs, LLLP v. Coscan Palm Springs, LLC, et al.
Florida Third District Court of Appeal
3D17-200
Jonathan S. Robbins, Esq. (co-counsel and trial counsel)
EMAIL: jonathan.robbins@akerman.com
PHONE NUMBER: 954-463-2700
Matthew P. Leto, Esq. (opposing counsel)
EMAIL: mleto@letolawfirm.com
PHONE NUMBER: 305-341-3155
Vanessa Palacio, Esq. (opposing counsel)
EMAIL: palaciov@gtlaw.com
PHONE NUMBER: 305-579-0500

17. For your last six cases, which were either settled in mediation or settled without mediation or trial, list the names and telephone numbers of trial counsel on all sides and court case numbers (include appellate cases). *This question is optional for sitting judges who have served five years or more.*

Herman v. Culver, et al.
Florida Fifth District Court of Appeal
5D19-0165
E. Ginnette Childs, Esq. (co-counsel and trial counsel)
EMAIL: ginny.childs@akerman.com
PHONE NUMBER: 407-423-4000
Stacey A. Prince-Troutman, Esq. (co-counsel and trial counsel)
EMAIL: stacey.prince-troutman@akerman.com
PHONE NUMBER: 407-423-4000
Monica McNulty Kovecses, Esq. (co-counsel and trial counsel)
EMAIL: monica.mcnulty@akerman.com
PHONE NUMBER: 407-423-4000

Elizabeth Siano Harris, Esq. (opposing counsel)
EMAIL: elizabeth@harrisappellatelaw.com
PHONE NUMBER: 321-267-1766
Charles Nash, Esq. (counsel for co-personal representatives of estate)
EMAIL: Charlie@n-klaw.com
PHONE NUMBER: 321-984-2440
Truman Scarborough, Esq. (opposing counsel
EMAIL: trumanscarborough@att.net
PHONE NUMBER: 321- 267-4770
Christopher E. Broome, Esq. (opposing counsel)
EMAIL: ceb@cfl.rr.com
PHONE NUMBER: 321-269-5620

In Re: Estate of Fred H. Aaron
Florida First District Court of Appeal
Consolidated Case Nos.: 1D19-1188; 1D19-2481; and 1D19-2781
Stacey A. Prince-Troutman, Esq. (co-counsel)
EMAIL: stacey.prince-troutman@akerman.com
PHONE NUMBER: 407-423-4000
Monica McNulty Kovecses, Esq. (co-counsel)
EMAIL: monica.mcnulty@akerman.com
PHONE NUMBER: 407-423-4000
John A. Panyko, Esq. (co-counsel and trial counsel)
EMAIL: john.panyko@gmail.com
PHONE NUMBER: 850-438-7272
Robert O. Beasley, Esq. (opposing counsel)
EMAIL: rob@lawpensacola.com
PHONE NUMBER: 850-432-9818
Phillip A. Pugh, Esq. (opposing counsel)
EMAIL: papugh@lawpensacola.com
PHONE NUMBER: 850-432-9818

Flescher, et al. v. Oak Run Associates, Ltd., et al.
Florida Fifth District Court of Appeal
5D16-3453
W. James Gooding, Esq. (co-counsel)
EMAIL: jgooding@ocalalaw.com
PHONE NUMBER: 352-867-7707
Kansas R. Gooden, Esq. (opposing counsel)
EMAIL: kgooden@boydgen.com
PHONE NUMBER: 904-353-6241
Christopher V. Carlyle, Esq. (mediator)
EMAIL: ccarlyle@appellatelawfirm.com

PHONE NUMBER: 352-259-8852

Werther, et al. v. LSQ Funding Group, L.C.
Florida Fifth District Court of Appeal
5D17-0439
Sara A. Brubaker, Esq. (co-counsel)
EMAIL: sara.brubaker@akerman.com
PHONE NUMBER: 407-423-4000
London L. Ott, Esq. (co-counsel)
EMAIL: lott@volusia.org
PHONE NUMBER: 386-736-5950
Peter Valori, Esq. (trial counsel)
EMAIL: pvalori@dvllp.com
PHONE NUMBER: 305-371-3960
Amanda Fernandez, Esq. (trial counsel)
EMAIL: afernandez@dvllp.com
PHONE NUMBER: 305-371-3960
Jennifer R. Dixon, Esq. (opposing counsel)
EMAIL: jennifer.dixon@lowndes-law.com
PHONE NUMBER: 407-843-4600
Michael S. Provenzale, Esq. (opposing counsel)
EMAIL: michael.provenzale@lowndes-law.com
PHONE NUMBER: 407-843-4600

Skorman Berkowitz et al. v. Goldman
Florida Fifth District Court of Appeal
Consolidated Case Nos. 5D16-1629/5D16-1932 and 5D16-3443/5D17-642
Daniel Rosenthal, Esq. (co-counsel and trial counsel)
EMAIL: daniel@dbrlawfirm.com
PHONE NUMBER: 561-853-0991
Megan Costa DeVault, Esq. (co-counsel and trial counsel)
EMAIL: megan.devault@akerman.com
PHONE NUMBER: 407-423-4000
Sara A. Brubaker, Esq. (co-counsel and trial counsel)
EMAIL: sara.brubaker@akerman.com
PHONE NUMBER: 407-423-4000
John H. Pelzer, Esq. (opposing counsel)
EMAIL: john.pelzer@gmlaw.com
PHONE NUMBER: 954-527-2469
Michael E. Marder, Esq. (opposing counsel)
EMAIL: michael.marder@gmlaw.com
PHONE NUMBER: 407-425-6559
Victor Kline, Esq. (opposing counsel)

EMAIL: victor.kline@gmlaw.com
PHONE NUMBER: 407-425-6559
Edmund Loos, Esq. (opposing counsel)
EMAIL: edmund.loos@gmlaw.com
PHONE NUMBER: 407-425-6559
Brent D. Kimball, Esq. (opposing counsel)
EMAIL: brent.kimball@gmlaw.com
PHONE NUMBER: 407-425-6559

In re Estate of Joan Joesting
Eighteenth Judicial Circuit in and for Brevard County, Florida
Case No. 05-2014-CP-033802-XXXX-XX
Richard C. Milstein, Esq. (co-counsel)
EMAIL: richard.milstein@akerman.com
PHONE NUMBER: 305-374-5600
Dale Noll, Esq. (co-counsel)
EMAIL: dale.noll@akerman.com
PHONE NUMBER: 305-374-5600
Kevin P. Bailey, Esq. (opposing counsel)
EMAIL: kpbaileylaw@gmail.com
PHONE NUMBER: 321-799-9295
Kurt D. Panouses, Esq. (opposing counsel)
EMAIL: kurt@panouseslaw.com
PHONE NUMBER: 321-729-9455
David C. Brennan, Esq. (mediator)
EMAIL: dbrennan@thebrennanlawfirm.com
PHONE NUMBER: 407-893-7888

18. During the last five years, on average, how many times per month have you appeared in Court or at administrative hearings? If during any period you have appeared in court with greater frequency than during the last five years, indicate the period during which you appeared with greater frequency and succinctly explain.

On average over the last five years, I have appeared in Court approximately once a month. This is because a majority of my practice is appellate, and oral argument usually occurs once per appeal, if at all. I also appear in trial courts usually for preservation, post-judgment, and judgment collection issues, but also occasionally for general litigation issues. Further, I provide litigation and trial support, which involves preparing jury instructions, researching and drafting trial and post-trial motions, and related issues. More than five years ago, my trial court litigation practice was more expansive compared to my appellate practice, so I appeared in the trial courts more often.

19. If Questions 16, 17, and 18 do not apply to your practice, please list your last six major transactions or other legal matters that were resolved, listing the names, e-mail addresses, and telephone numbers of the other party counsel.

Not applicable.

20. During the last five years, if your practice was greater than 50% personal injury, workers' compensation or professional malpractice, what percentage of your work was in representation of plaintiffs or defendants?

Not applicable.

21. List and describe the five most significant cases which you personally litigated giving the case style, number, court and judge, the date of the case, the names, e-mail addresses, and telephone numbers of the other attorneys involved, and citation to reported decisions, if any. Identify your client and describe the nature of your participation in the case and the reason you believe it to be significant.

Security Footage and Statutory Interpretation

Central Fla. Regional Transp. Auth. v. Post-Newsweek Stations, Orlando, Inc., 157 So. 3d 401 (Fla. 5th DCA 2015)
Florida Fifth District Court of Appeal
5D14-360
Appeal proceeded in 2014 to 2015
Judges Wallis, Sawaya, and Cohen
E. Ginnette Childs, Esq. (co-counsel and trial counsel)
EMAIL: ginny.childs@akerman.com
PHONE NUMBER: 407-423-4000
Patrick Christiansen, Esq. (co-counsel and trial counsel)
EMAIL: pat.christiansen@akerman.com
PHONE NUMBER: 407-423-4000
Edward Louis Birk, Esq. (opposing counsel)
EMAIL: ebirk@marksgray.com
PHONE NUMBER: 904-398-0900
Meagan Lindsay Logan, Esq. (opposing counsel)
EMAIL: meagan@douglasandcarter.com
PHONE NUMBER: 386-752-5511

I represented Central Florida Regional Transportation Authority d/b/a LYNX, the public transportation system in the Central Florida area, in this case. A local television news station, WKMG, sought video and audio footage from security cameras located on LYNX's buses for journalism purposes. After LYNX declined to produce the recordings from its bus security system, citing exemptions to Florida's Public Records Act (chapter 119, Florida Statutes) concerning security systems, WKMG filed suit against LYNX in the Ninth Judicial Circuit in and for Orange County, Florida. WKMG sought, among other relief, an order compelling LYNX to produce the recordings. After two expedited hearings, the trial court held that the requested records were not confidential and exempt, and entered a declaratory judgment that the public records exemptions LYNX asserted do not apply to the recordings. The trial court reasoned that in a broad sense, the footage revealed and related to a security system (which matched the

language of the statutes), but then the trial court added and used a balancing test between the general public policy of public records disclosure versus the public policy of protecting the information for security purposes. This balancing test was not in the statutes.

LYNX appealed the trial court's ruling. On appeal, I argued on behalf of LYNX that sections 281.301 and 119.071(3)(a), Florida Statutes, unambiguously required LYNX to keep its security footage confidential and exempt, so it was prohibited by law from providing it to WKMG. The Legislature had weighed the policy considerations involved and prohibited the disclosure in the statutes, so it was not appropriate for the trial court to weigh policy considerations depending on the potential use of the footage. The Fifth District Court of Appeal agreed and reversed the trial court's decision, noting that when statutory language is clear and unambiguous, courts must read the statute as written and the statute's plain and ordinary meaning must control.

Interestingly, after the Fifth District's decision, the Legislature did amend the statute creating a "security and firesafety plan" exemption which preserved the exemption for security footage, but provided a mechanism for an agency to share such exempt records with another local, state, or federal agency in furtherance of that agency's official duties and responsibilities (such as law enforcement), or upon a showing of good cause before a court of competent jurisdiction.

While it would have been expedient for LYNX to turn over the recordings to the media, LYNX's leadership knew it was important to follow the public records exemption statutes carefully because they made such records confidential. This case was followed closely by many state agencies and discussed at length at various seminars because of the ubiquitous nature of public records requests for security camera footage. It was also important to me because the Fifth District's decision was a perfect example of judicial restraint. The Fifth District followed the plain language of the statutes and did not inject its own policy into its analysis, concluding with the correct result intended by the Legislature.

The Writ of Mandamus—Rarely Used But It Can Work

McKenzie Check Advance of Florida, LLC v. Wendy Betts
Decision not reported
Florida Supreme Court
SC09-270
Per Curiam
Petition for Writ of Mandamus pursued in 2009
Lawrence P. Rochefort, Esq. (co-counsel)
EMAIL: lawrence.rochefort@akerman.com
PHONE NUMBER: 561-653-5000
Virginia B. Townes, Esq. (co-counsel)
EMAIL: vtownes@losey.law
PHONE NUMBER: 407-579-3106
Claudia Callaway, Esq. (co-appellants' counsel)
EMAIL: claudia.callaway@kattenlaw.com
PHONE NUMBER: 202-625-3500
E. Clayton Yates, Esq. (opposing counsel)
EMAIL: cyates@feeyateslaw.com
PHONE NUMBER: 772-465-7990

F. Paul Bland, Jr., Esq. (opposing counsel)
EMAIL: pbland@publicjustice.net
PHONE NUMBER: 202-797-8600
Theodore J. Leopold, Esq. (opposing counsel)
EMAIL: tleopold@cohenmilstein.com
PHONE NUMBER: 561-515-1400
Christopher C. Casper, Esq. (opposing counsel)
EMAIL: ccasper@casperscompany.com
PHONE NUMBER: 813-287-2231

One of the most complex cases I worked on as an associate in private practice was a purported class action pending in the Fifteenth Judicial Circuit in and for West Palm Beach, Florida. My firm represented the defendant, a cash advance company, and the plaintiffs alleged usury and other claims related to cash advance transactions. The contracts at issue contained arbitration clauses with class waivers, and stated that the Federal Arbitration Act (FAA) applied to the transactions. Our client moved to compel arbitration and stipulated that the class waiver was not severable from the rest of the arbitration clause, i.e., there was no consent for class arbitration. After a two-day evidentiary hearing, the trial court found that while the class waivers within the arbitration clauses were not unconscionable, they violated public policy. Thus, the trial court denied the motion to compel arbitration because the class waivers were not enforceable. We appealed the trial court's ruling pursuant to Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv) as an order denying arbitration. The Fourth District Court of Appeal dismissed the appeal, reasoning that the class waiver was the issue decided and not arbitration, even though arbitration was denied and the FAA mandates that a party have an immediate right to appeal an order denying arbitration. My supervising partner asked me to find a way to have this order reviewed because we did not believe the dismissal was correct. After some research, I recommended a petition for writ of mandamus to the Florida Supreme Court.

In the petition for writ of mandamus, we argued that the Fourth District's dismissal of the appeal contradicted federal and state policy articulated by the legislative branch favoring arbitration, including the FAA, which mandates that a party denied arbitration has an automatic right to appeal that order, as reflected in Florida Rule of Appellate Procedure 9.130(a)(3)(C)(iv). The Florida Supreme Court granted the petition and directed the Fourth District to reinstate the appeal. Afterwards, our client lost the appeal in the Fourth District, but we sought review in the Florida Supreme Court under express and direct conflict jurisdiction and it was granted. In the meantime, the United States Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which held that the FAA preempts state laws that prohibit contracts from disallowing class-wide arbitration. The Florida Supreme Court held that it was bound by this precedent and quashed the Fourth District's decision, resulting in a win for our client after many years of litigation.

This case is important to me because it is an example of how important it is for courts to follow the plain meaning of statutes enacted by the Legislature. The FAA clearly gives a party denied arbitration the right to immediately appeal the decision, which the Florida Supreme Court followed in reinstating our appeal. If we did not have the appeal reinstated, we would not have been able to appeal the arbitration issue until years later, after class certification proceedings or later—to the great expense of all parties

involved. This would completely contradict the purpose of the FAA. Also, when I attend seminars describing the Florida Supreme Court and its jurisdiction to issue writs, it is often noted that successful petitions for writ of mandamus are very rare. I am able to say that I filed such a petition early in my career and won, which eventually led to an appellate victory for our client in a very large case.

Standing in the Stormwater

City of Fort Pierce v. Australian Properties, LLC, 179 So. 3d 426 (Fla. 4th DCA 2015)
Florida Fourth District Court of Appeal
4D14-2728
Appeal proceeded in 2014 to 2015
Judges May, Gross, and Taylor
Virginia B. Townes, Esq. (trial counsel)
EMAIL: vtownes@losey.law
PHONE NUMBER: 407-579-3106
Harold G. Melville, Jr., Esq. (opposing counsel)
Vocelle & Berg, LLP
EMAIL: hmelville@vocelleberg.com
PHONE NUMBER: 772-562-8111

I represented the City of Fort Pierce in appealing an order certifying a class in a case relating to its stormwater system. Plaintiff property owners filed the purported class action against the City, alleging that a City ordinance creating a Stormwater Management Utility ("SMU") was unconstitutional, and that the City inappropriately charged SMU user fees to purported class members whose properties allegedly did not drain through the City's stormwater system. This case was very important to the City because stormwater management constituted a large part of its budget. The plaintiffs sought declaratory relief that the City's SMU Code was unconstitutional and the SMU fees are invalid taxes, and damages in the form of a refund of SMU fees paid. After a three-day evidentiary hearing, the trial court certified a class and the City appealed.

On appeal, I argued on behalf of the City that the representative plaintiffs lacked standing for a variety of reasons, including the expiration of the statute of limitations. The Fourth District Court of Appeal agreed and reversed the trial court's class certification order, finding that the trial court abused its discretion in certifying the class when the representative plaintiffs did not have standing to pursue their claims. While it could have been tempting to affirm the class certification because the named plaintiffs presented a sympathetic (but probably incorrect) case on the merits, the Fourth District clearly followed the law that a prerequisite to class certification is the representative plaintiffs having standing. Because I am a lifelong learner, I enjoyed learning about the stormwater system at issue, something I definitely never learned about in law school. It was also one of the most complicated cases I have handled due to the nature of the claims, the factual background, and the procedural posture as a class action.

Perspective

Winthrop v. Castellano, 113 So. 3d 999 (Fla. 5th DCA 2013)
Florida Fifth District Court of Appeal
5D12-4759

Appeal proceeded in 2012 to 2013
Judges Evander, Lawson, and Cohen
Megan Costa DeVault, Esq. (trial counsel)
EMAIL: megan.devault@akerman.com
PHONE: 407-423-4000
Marcia K. Lippincott, Esq. (opposing counsel)
EMAIL: marcy@appellatepartner.com
PHONE NUMBER: 407-688-2700

My firm represented a father in an acrimonious paternity action involving a young child. Unfortunately, the child was diagnosed with cancer when she was seven years old, but the disputes between the parents continued concerning where the child would seek treatment (New York or Florida), visitation, and related issues. In late 2012, the child's medical condition worsened, and there were ongoing disputes that required court intervention concerning the child's treatment. Indeed, the disputes were so acrimonious and frequent that court intervention was required to determine where the child would spend Thanksgiving. During the hearing concerning this issue, the trial judge also ordered—without notice—that the father could only see his child in a "therapeutic setting," i.e., in professional counseling. I handled the appeal of this order.

On appeal, I argued that the father's due process rights were violated due to his lack of notice that the trial court would be considering and ruling on the "therapeutic setting" issue. While the appeal was pending, the child's condition worsened more, and the father's visitation rights remained restricted. Fortunately, the Fifth District Court of Appeal reversed the order concerning the restriction of the father's rights of contact with his daughter because of the due process violation, and he was able to visit with her during the last months of her life. The child passed away three months after the Fifth District's decision shortly before her fourteenth birthday, seven years after she was diagnosed with cancer. Although the child's life was unfairly short, she made a large impact on many people, becoming a YouTube star with her makeup tutorials and appearing on the Ellen Show. Due to the money the child made from these endeavors, it was necessary to pursue a guardianship over the assets, and I was involved in this litigation as well, both before and after the child passed away.

Most of my cases involve business disputes. This one was completely different. I got to know our client well and share in the most personal and tragic of parental circumstances. Because of our work, this client was able to spend priceless time with his daughter before she passed. And importantly, this case shows that the rule of law—in this case due process—must be followed carefully in reaching a ruling; a results-oriented approach can lead to devastating consequences for litigants. The intersection of tragic personal circumstances and the courts can be difficult and sterile, and this case taught me firsthand that real people are affected by court cases I advocate.

Stuck Between a Rock and a Hard Place

Lucas Games, Inc. v. Morris AR Associates, LLC, 197 So. 3d 1183 (Fla. 4th DCA 2016)
Florida Fourth District Court of Appeal
4D15-1516
Judges Ciklin, Warner, and Gerber
Appeal proceeded in 2015 to 2016

Jonathan S. Robbins, Esq. (trial counsel)
EMAIL: jonathan.robbins@akerman.com
PHONE: 954-759-8947
Michael Ian Feldman, Esq. (opposing counsel)
EMAIL: mlf@khllaw.com
PHONE: 305-854-9700
Paul R. Regensdorf, Esq. (opposing counsel)
EMAIL: paul.regensdorf@gmail.com
PHONE: 954-562-9598

This case involved an interesting issue of statutory and contract interpretation concerning the use of a leased premises. On appeal, I represented a tenant who operated an entertainment business called Vegas Fun, which employed a network of computers on which customers could play slot machine-style games and win prizes such as gift cards. The lease at issue provided that "Tenant's Business" was to be "[o]nly for the operation of an entertainment arcade for persons over the age of 18 years old and for no other use or purpose," i.e., an adult arcade, and was to operate only under the name "Vegas Fun." The computerized slot machines were legal until April 10, 2013, when section 849.16, Florida Statutes (2013), was amended to prohibit these types of games outside of designated casinos. The statute contained a safe harbor exception to the amendment for arcade amusement centers that utilized "coin-operated amusement games or machines . . . for the entertainment of the general public and tourists as a bona fide amusement facility," such as those used at Chuck E. Cheese. § 849.161, Fla. Stat. (2013). However, the lease at issue contained a provision prohibiting "coin-operated amusement devices." In the underlying litigation, the trial court granted summary judgment in favor of the landlord and against the tenant, rejecting the tenant's argument that its performance under the lease should be excused due to section 849.16's amendment preventing it from operating legally.

I handled the appeal from this judgment for the tenant, and argued that the 2013 amendment to the law rendered the lease illegal. Although the tenant could have retrofitted or changed the games at Vegas Fun to comply with section 849.161 by converting the game machines to coin-operated machines, the subject lease directly prohibited the use of coin-operated games. Thus, the tenant was stuck between a rock and a hard place and simply could not legally operate. The Fourth District agreed and reversed the trial court's decision against the tenant.

This was an important case for me because it helped sharpen my view that statutes and contracts should be interpreted as they are and not as a court believes they should be. The trial court agreed with the landlord that there must have been some type of business the tenant could legally engage in under the lease, but the Fourth District properly applied the plain language of the relevant statute as amended along with the lease, and concluded that when read together, there was simply nothing legal that the tenant could do.

22. Attach at least two, but no more than three, examples of legal writing which you personally wrote. If you have not personally written any legal documents recently, you may attach a writing sample for which you had substantial responsibility. Please describe your degree of involvement in preparing the writing you attached.

Initial Brief, *Central Fla. Regional Transp. Auth. v. Post-Newsweek Stations, Orlando, Inc.*, 157 So. 3d 401 (Fla. 5th DCA 2015). I drafted and revised this brief and handled oral argument in this appeal.

Initial Brief, *Lucas Games Inc. v. Morris AR Associates, LLC*, 197 So. 3d 1183 (Fla. 4th DCA 2016). I had primary responsibility in drafting and revising this brief along with two associates I supervised, and I handled oral argument in this appeal.

PRIOR JUDICIAL EXPERIENCE OR PUBLIC OFFICE

23. Have you ever held judicial office or been a candidate for judicial office? If so, state the court(s) involved, the dates of service or dates of candidacy, and any election results.

No.

24. If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name(s) of the commission, the approximate date(s) of each submission, and indicate if your name was certified to the Governor's Office for consideration.

Not applicable.

25. List any prior quasi-judicial service, including the agency or entity, dates of service, position(s) held, and a brief description of the issues you heard.

Not applicable.

26. If you have prior judicial or quasi-judicial experience, please list the following information:

(i) the names, phone numbers and addresses of six attorneys who appeared before you on matters of substance;
(ii) the approximate number and nature of the cases you handled during your tenure;
(iii) the citations of any published opinions; and
(iv) descriptions of the five most significant cases you have tried or heard, identifying the citation or style, attorneys involved, dates of the case, and the reason you believe these cases to be significant.

Not applicable.

27. Provide citations and a brief summary of all of your orders or opinions where your decision was reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, attach copies of the opinions.

Not applicable.

28. Provide citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, attach copies of the opinions.

Not applicable.

29. Has a complaint about you ever been made to the Judicial Qualifications Commission? If so, give the date, describe the complaint, whether or not there was a finding of probable cause, whether or not you have appeared before the Commission, and its resolution.

Not applicable.

30. Have you ever held an attorney in contempt? If so, for each instance state the name of the attorney, case style for the matter in question, approximate date and describe the circumstances.

Not applicable.

31. Have you ever held or been a candidate for any other public office? If so, state the office, location, dates of service or candidacy, and any election results.

No.

NON-LEGAL BUSINESS INVOLVEMENT

32. If you are now an officer, director, or otherwise engaged in the management of any business enterprise, state the name of such enterprise, the nature of the business, the nature of your duties, and whether you intend to resign such position immediately upon your appointment or election to judicial office.

I am on the Board of Directors of the Central Florida Foundation and the Central Florida Regional Housing Trust. The Central Florida Foundation makes grants to nonprofit organizations for various charitable purposes in Central Florida, across the United States and around the world. It provides scholarships for post-secondary education, and recommends grants to donors to help accomplish charitable goals, and manages advised funds and endowments.

The Central Florida Regional Housing Trust is a partnership between the Central Florida Foundation, City of Orlando, Orange County, developers, builders, bankers, nonprofit housing providers, University of Central Florida, Valencia College, and subject matter experts from planning and urban development. It offers more attainable prices on housing for renters and buyers as areas around Orlando redevelop and property values increase, to ensure secure and stable housing.

I intend to resign from both boards should I be appointed to judicial office.

33. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, explain and provide dates. If you received any compensation of any kind outside the practice of law during this time, please list the amount of compensation received.

Since being admitted to the Bar, I have not engaged in any occupation, business or profession other than the practice of law. The only compensation I have received other than through the practice of law is income from a rental property that I rented from 2014 through 2018 and sold in 2018.

POSSIBLE BIAS OR PREJUDICE

34. The Commission is interested in knowing if there are certain types of cases, groups of entities, or extended relationships or associations which would limit the cases for which you could sit as the presiding judge. Please list all types or classifications of cases or litigants for which you, as a general proposition, believe it would be difficult for you to sit as the presiding judge. Indicate the reason for each situation as to why you believe you might be in conflict. If you have prior judicial experience, describe the types of cases from which you have recused yourself.

None.

PROFESSIONAL ACCOMPLISHMENTS AND OTHER ACTIVITIES

35. List the titles, publishers, and dates of any books, articles, reports, letters to the editor, editorial pieces, or other published materials you have written or edited, including materials published only on the Internet. Attach a copy of each listed or provide a URL at which a copy can be accessed.

- Florida Bar Appellate Section, *The Record*, "Terms of Endearment for Appellate Clerks: How to Stay in an Appellate Court Clerk's Good Graces," with Pamela Masters, Esq., Clerk of Florida's Fifth District Court of Appeal, Summer 2014

  http://therecord.flabarappellate.org/2014/05/terms-of-endearment-for-appellate-clerks-how-to-stay-in-an-appellate-court-clerks-good-graces/

- *The Florida Bar Journal*, "Amicus Briefs: What Have They Done for Courts Lately?", June 2012

  https://www.floridabar.org/the-florida-bar-journal/amicus-briefs-what-have-they-done-for-courts-lately/

- International Council of Shopping Centers' Shopping Center Legal Update, "Zoning Contingency Clause: The Tipsy Coachman Saved the Tenant; Sober Drafting Might Have Helped the Landlord," Winter 2011

  A copy of this article is attached to this Application.

- *Stetson Law Review*, Difficult Problems Call for Unique Solutions: Are Guardians Proper for Viable Fetuses of Mentally Incompetent Women in State Custody? 34 Stetson L. Rev. 193 (2004)

  https://www.stetson.edu/law/lawreview/2004.php

  I won the Burton Award in association with the Library of Congress for this law review article.

As a Notes and Comments Editor on the *Stetson Law Review*, I was assigned certain articles to edit and prepare for publishing. They are listed below. The views expressed in these articles are solely those of the author.

- Beth Linea Carlson, *Stetson Law Review*, "Blood and Judgment": Inconsistencies between Criminal and Civil Courts When Victims Refuse Blood Transfusions, 33 Stetson L. Rev. 1067 (2004)

  https://www.stetson.edu/law/lawreview/2004.php

- CDR William A. Wildhack III, CHC, USNR, *Naval Law Review*, Navy Chaplains at the Crossroads: Navigating the Intersection of Free Speech, Free Exercise, Establishment, and Equal Protection, 51 Naval L. Rev. 217 (2005)

  https://www.jag.navy.mil/njs_publications.htm

- H. Brendan Burke, *Stetson Law Review*, A "Special Need" for Change: Fourth Amendment Problems and Solutions Regarding DNA Databanking, 34 Stetson L. Rev. 161 (2004)

  https://www.stetson.edu/law/lawreview/2004.php

From June 2013 to December 2016, I was an editor of the Orange County Bar Association's monthly magazine *The Briefs*. I edited most of the articles contained in the editions published during that time and they are available at the below URL:

https://www.orangecountybar.org/members/the-briefs/

36. List any reports, memoranda or policy statements you prepared or contributed to the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member. Provide the name of the entity, the date published, and a summary of the document. To the extent you have the document, please attach a copy or provide a URL at which a copy can be accessed.

Appellate Court Rules Committee Work

I was a member of the Florida Bar Appellate Court Rules Committee (ACRC) for two three-year terms, from 2012 to 2018. During that time, I worked on a variety of referrals to ACRC. Below is a list of memoranda I drafted or of which I participated in the drafting. Most of the documents are available at https://www.floridabar.org/committee-page/acrcmaterials/agendas-minutes/ and the below list includes the agenda date and page number where the document can be located. Any documents not available online are attached to this Application.

Pre-Vote Subcommittee Report Form, Record on Appeal Subcommittee, 16-AC-13, Overly Redacted Record on Appeal

Date: May 31, 2018

Location: ACRC January 19, 2018 Meeting Agenda (page 97) and ACRC June 15, 2018 Meeting Agenda (page 101)

Summary: We made recommendations as to the best approach to address the concern of circuit courts transmitting overly redacted records on appeal, requiring attorneys in the case to request the unredacted record in each case with mixed results.

Pre-Vote Subcommittee Report Form, Record on Appeal Subcommittee 16-AC-08, Time for Transmitting the Record on Appeal

Date: October 2, 2017

Location: ACRC October 13, 2017 Meeting Agenda (page 92)

Summary: Addresses Florida Rule of Appellate Procedure 9.110(e), which allows the record on appeal to be transmitted after the due date of the Initial Brief. Because clerks now prepare an electronic record and there is no need to keep a "hard copy" of the record with the trial court clerk while the parties are preparing their briefs, the Record on Appeal Subcommittee considered shortening the time for the electronic record to be transmitted to the appellate court.

Pre-Vote Subcommittee Report Form, Workgroup on Rule 9.180(f)(7)

Date: September 27, 2017

Location: ACRC October 13, 2017 Meeting Agenda (page 104)

Summary: Proposed making Florida Rule of Appellate Procedure 9.180(f)(7), which refers to "electronic image copy" in reference to preparation and transmission of the record on appeal in workers' compensation proceedings, consistent with other electronic record provisions in the Florida Rules of Appellate Procedure.

Pre-Vote Subcommittee Report Form, Civil Practice Subcommittee, 16-AC-15

Date: November 28, 2016 and May 31, 2017

Location: ACRC June 23, 2017 Meeting Agenda (pages 173, 192)

Summary: This was a referral from the Second District Court of Appeal in *Hewett v. Wells Fargo Bank, N.A.*, 197 So. 3d 1105 (Fla. 2d DCA 2016). The Second District asked the ACRC to consider whether an amendment to the Florida Rules of Appellate Procedure was necessary to define the time limit for filing a notice of appeal in a case affected by a bankruptcy stay under 11 U.S.C. § 362. We recommended no change should be made to prevent unintended consequences related to bankruptcy law.

Joint Rules of Judicial Administration Committee/Appellate Court Rules Committee Memo on Florida Rule of Judicial Administration 2.130

Date: May 13, 2016

Location: This document is attached to this Application.

Summary: I was a member of a special joint committee comprised of members of the Rules of Judicial Administration Committee and Appellate Court Rules Committee to consider the continued benefit of Florida Rule of Judicial Administration 2.130, which states (in summary) that the Florida Rules of Appellate Procedure shall control all proceedings in appeals. This memo summarized the various positions and provided comprehensive analysis on the issue.

Appellate Court Rules Committee Original Proceedings Subcommittee, Contemplated Rule 9.130 Amendment to Include Orders on Motions Enforcing or Setting Aside Settlement Agreements

Date: December 2014

Location: This document is attached to this application

Summary: I worked on a referral to consider whether orders ruling on (i) motions to enforce settlement agreements and/or (ii) motions to set aside settlement agreements should be added to the specifically enumerated interlocutory orders that are presently immediately appealable under Fla. R. App. P. 9.130. This work led to a rule amendment allowing such appeals of orders determining that, as a matter of law, a settlement agreement is unenforceable, is set aside, or never existed.

Commission on Orange County Business Court

In 2015-2016, I was a member of the Commission on the Orange County Business Court. Our task was to review the Business Court Procedures, identify areas in need of improvement or clarification, and propose amendments to then-Chief Judge Frederick Lauten. The Commission's recommendations were adopted on November 4, 2016 in Administrative Order 2004-03-02, available at the below URL. Unfortunately, the Business Court closed thereafter, rendering the Administrative Order "vacated," but the Business Court has since reopened in Orange County.

https://www.ninthcircuit.org/resources/admin-orders

Order Number 2004-03-02

Florida Bankers Association

As General Counsel to the Florida Bankers Association, I have filed amicus briefs in various courts that reflect the positions of FBA on a variety of issues. A list of the cases in which I have filed amicus briefs on behalf of FBA is below:

***Regions Bank v. Legal Outsource PA*, Case No. 17-11736 (Eleventh Circuit Court of Appeals)**

FBA filed a joint amicus brief with the American Bankers Association, Independent Bankers Association, Alabama Bankers Association, and Missouri Bankers Association in support of the district court's decision that the Equal Credit Opportunity Act's definition of "applicant" does not include spousal guarantors of a loan. The amici argued that under the plain language of the statute, a guarantor is not an applicant for credit, the creditworthiness analysis for a borrower versus a guarantor is completely different,

and marital property may be the sole basis for ascribing value to the guaranty. The Eleventh Circuit agreed and affirmed the district court's decision. *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184 (11th Cir. 2019).

https://ecf.ca11.uscourts.gov/docs1/01109908833

***Yaffa v. Sunsouth Bank*, Case No. 16-11759-DD (Eleventh Circuit Court of Appeals)**

FBA filed a joint amicus brief with the Alabama Bankers Association asserting that commercial lenders do not owe fiduciary duties to borrowers or guarantors unless there is a preexisting relationship of trust and confidence, which has been requested by the customer and voluntarily assumed by the bank. Imposing on commercial lenders a duty of disclosure whenever they are in a superior position of knowledge necessarily expands the circumstances in which commercial lenders owe a duty of disclosure to all commercial loan transactions. This is because banking regulations require banks to perform extensive due diligence before making a loan. Thus, banks are always in a position of superior knowledge with respect to at least some of the aspects of each commercial loan.

https://ecf.ca11.uscourts.gov/docs1/01109309646

***Restoration 1 of Port St. Lucie v. Ark Royal Insurance Co.*, SC18-1624 & SC18-1623 (Florida Supreme Court)**

The Florida Supreme Court accepted jurisdiction over a conflict between the Fourth and Fifth District Courts of Appeal concerning post-loss assignments of insurance benefits conditioned on a mortgagee's consent. FBA argued that allowing such conditions on post-loss assignments of benefits is consistent with the rule of law that mortgages are protected by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution. Further, a mortgagee has an insurable interest in mortgaged property and an equitable lien on homeowners' insurance benefits, which interests are also protected by the U.S. and Florida constitutions. The Florida Supreme Court discharged jurisdiction after briefing due to legislation enacted while the case was pending.

https://efactssc-public.flcourts.org/casedocuments/2018/1624/2018-1624_brief_132763_amicus20curiae20answer20brief2dmerits.pdf

***Hooker v. Hooker*, SC15-1881 & SC16-589 (Florida Supreme Court)**

In *Hooker v. Hooker*, 220 So. 3d 397 (Fla. 2017) the Florida Supreme Court held that a non-owner spouse's joinder in a conveyance of homestead property constitutes competent, substantial evidence that the homestead property is marital—and subject to equitable distribution—as a result of an interspousal gift, even though (1) the homestead property was purchased with the premarital assets of the other spouse and titled in the other spouse's name alone, and (2) the spouses executed a prenuptial agreement providing that, upon dissolution, each spouse would retain his or her premarital assets and any appreciation of those assets. FBA moved to appear as amicus to support a motion for rehearing and argued that the Florida Constitution requires non-owner spouses to join in conveyances of homestead property. Because the wife

had waived her rights in the husband's premarital estate by executing a prenuptial agreement, the wife's joinder in conveyances of a certain property should not be considered competent, substantial evidence of the husband's intent to gift the property to the wife. The Florida Supreme Court denied FBA's motion to appear as amicus in support of rehearing.

https://efactssc-public.flcourts.org/casedocuments/2015/1881/2015-1881_brief_124328.pdf

***City of Palm Bay v. Wells Fargo Bank, N.A.*, SC11-830 (Florida Supreme Court)**

FBA filed an amicus brief arguing that a municipal ordinance giving liens for code violation fines superpriority status was preempted by both the "first in time, first in right" principle articulated in section 695.11, Florida Statutes, and Chapter 162, Florida Statutes. The ordinance infringed on first mortgagees' due process rights because municipalities could impose high daily fines on homeowners while giving no notice to first mortgagees, making mortgages less secure and unable to be sold on the secondary market. The Florida Supreme Court held that a city ordinance that established a superpriority status for municipal code enforcement liens was both inconsistent with, and in direct conflict with, the general statutory scheme for priority of rights with respect to interests in real property created by the legislature, and thus, invalid. *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So. 3d 924 (Fla. 2013).

*This amicus brief is attached to this Application because it is not available electronically.

***Ober v. Town of Lauderdale-by-the-Sea*, 4D14-4597 (Florida Fourth District Court of Appeal)**

The Fourth District Court of Appeal held in its original opinion that the effect of a lis pendens recorded for purposes of a foreclosure action pursuant to section 48.23, Florida Statutes, terminates 30 days after a final judgment of foreclosure is rendered. FBA argued in an amicus brief supporting a motion for rehearing that foreclosures, being equitable in nature under Florida law, are different from other civil cases. Much remains to be accomplished after final judgment to effectuate the foreclosure's purpose—foreclosing junior liens and obtaining marketable title to the foreclosed property. This is only accomplished after the foreclosure sale occurs and the certificate of sale and certificate of title are issued, almost always later than 30 days post-final judgment. The court's original holding ensured that liens could be recorded against foreclosed properties during the time period between the final judgment and foreclosure sale, so re-foreclosures and title issues would most certainly arise. The Fourth District granted the motion for rehearing, withdrew its opinion, and held that liens placed on property between a final judgment of foreclosure and a judicial sale are discharged by section 48.23(1)(d), Florida Statutes. *Ober v. Town of Lauderdale-by-the-Sea*, 218 So. 3d 952, 953 (Fla. 4th DCA 2017).

https://edca.4dca.org/DCADocs/2014/4597/144597_161_09082016_05482758_e.pdf

***Rigby v. Bank of New York Mellon*, Case No. 1D16-665 (First District Court of Appeal)**

The First District Court of Appeal voted to decide en banc whether it should recede from the standing-at-inception rule in foreclosure cases and solicited the views of amicus curiae on the issue. FBA filed an amicus brief asserting that the "standing-at-inception" rule should be receded from in foreclosure

proceedings because they are equitable in nature and because the rule injects collateral proof issues that are irrelevant to the merits of a foreclosure plaintiff's *prima facie* case. When a lender is unable to meet its burden to prove "standing-at-inception," the action is dismissed without prejudice to re-file, which burdens the judiciary with a multiplicity of foreclosure proceedings and increases the attorneys' fees, costs, and expenses incurred by lenders and borrowers.

https://edca.1dca.org/DCADocs/2016/0665/160665_166_07172017_07023240_e.pdf

37. List any speeches or talks you have delivered, including commencement speeches, remarks, interviews, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place they were delivered, the sponsor of the presentation, and a summary of the presentation. If there are any readily available press reports, a transcript or recording, please attach a copy or provide a URL at which a copy can be accessed.

a. Title: Appellate Practice A to Z in the Fifth District Court of Appeal for Legal Aid and Pro Bono Attorneys

Role: Host of Seminar and Moderator for panel entitled "A Behind-the-Scenes View of the Fifth District Court of Appeal"

Date and Place: May 2017, Akerman LLP Orlando, Florida office

Sponsor: Akerman LLP

Summary: I hosted this seminar for Legal Aid and Pro Bono attorneys, which focused on best practices for brief-writing, oral arguments, motion practice, and other appellate issues. I moderated a panel with Fifth District Court of Appeal judges and law clerks discussing the Court's practices and preferences.

b. Title: Orange County Bar Association Diversity Symposium, "Diversity in the Judiciary and Judicial Nominating Commissions"

Role: Panelist

Date and Place: May 12, 2017, Orange County Bar Association, Orlando, Florida

Sponsor: I am not aware of a sponsor

Summary: I appeared on a panel discussing, in particular, diversity in the Judicial Nominating Commissions as I was then a member of the Fifth District Court of Appeal Nominating Commission. I encouraged the audience to apply for judicial nominating commissions.

c. Title: Appellate Practice A to Z in the Third District Court of Appeal for Legal Aid and Pro Bono Attorneys

Role: Panelist, "Appellate Practice 101"

Date and Place: August 2016, Akerman LLP Miami, Florida office

Sponsor: Akerman LLP

Summary: This seminar was attended by Legal Aid and Pro Bono Attorneys. I appeared on a panel discussing the steps to an appeal from filing the Notice of Appeal to post-opinion motions.

d. Title: Circuit Court Boot Camp (7th Annual): Learn the Do's and Don'ts

Role: Presenter, Motions Directed at Pleadings

Date and Place: April 28, 2017, Sheraton Hotel, Orlando, Florida

Sponsor: Pincus Professional Education

Summary: I presented on motions to dismiss, motions to strike, motions for more definite statement, and other motions made at the pleadings stage of civil litigation.

e. Title: Landlord-Tenant Law

Role: Presenter, Ethical Considerations in Landlord-Tenant Law

Date and Place: September 10, 2013, Crowne Plaza Hotel, Orlando, Florida

Sponsor: Sterling Education Services

Summary: I presented on ethical issues that arise in the landlord/tenant relationship including dealing with unrepresented parties, handling defaults, negotiating ethically, drafting leases, and related issues.

f. Title: *Stetson Law Review* Scholarship Dinner

Role: I presented my Law Review article (in progress at the time) Difficult Problems Call for Unique Solutions: Are Guardians Proper for Viable Fetuses of Mentally Incompetent Women in State Custody? 34 Stetson L. Rev. 193 (2004)

Date and Place: Spring Semester 2004, Stetson University College of Law

Sponsor: *Stetson Law Review*

Summary: I presented a summary of the factual background of my article and the relevant statutory and common law, and moderated a panel discussion with Professor Robert Davis (now Judge Robert Davis on the United States Court of Appeals for Veterans Claims), Professor Thomas Marks, and Professor Bruce Jacob. It was an honor to be selected to present my topic as only two authors were selected for this presentation each semester, and the discussion and commentary made my article a better finished product.

g. Title: *Issues on Appeal* Podcast

Role: Guest speaker for episodes entitled "RBG" and "APS Live!"

Date and Place: February 16, 2020 and September 27, 2020 (virtual)

Sponsor: I am not aware of a sponsor

Summary: In "RBG," which was a tribute episode to the late Justice Ruth Bader Ginsburg, I discussed Justice Ginsburg's friendship with Justice Antonin Scalia and her supportive relationship with her husband Marty Ginsburg. In the "APS Live!" episode, I discussed my involvement with the Florida Bar Appellate Section and advancement to leadership along with the other Section officers.

38. Have you ever taught a course at an institution of higher education or a bar association? If so, provide the course title, a description of the course subject matter, the institution at which you taught, and the dates of teaching. If you have a syllabus for each course, please provide.

a. Course Title: Appeals for the Pro Bono Practitioner

Description: This continuing legal education program covered the appeals process for pro bono lawyers. I delivered the section titled "Taking and Perfecting Appeals: Overview of the Appellate Process."

Institution: This course was presented by the Florida Guardian Ad Litem Program and Florida Bar Appellate Practice Section at the Florida Bar Winter Meeting.

Date: February 5, 2020

b. Course Title: Public Records Primer for the Business Law Practitioner

Description: I spoke about the Public Records Act, how to use the Public Records Act as a supplement to discovery, and the remedies available for failure to comply with Public Records Act obligations. Topics included identifying what is a public record, determining what an agency's obligations are (and what a person's rights are) with respect to public records, applying exemptions and confidentiality requirements, and learning how the attorney work product/attorney-client privilege exemptions under the Public Records Act differ from the work product/attorney-client privilege issues in discovery.

Institution: Orange County Bar Association Business Law Committee

Date: September 5, 2018

c. Course Title: "Appealing Wisely and Avoiding Un-Appealing Mistakes"

Description: As Chair of the Orange County Bar Association Appellate Practice Committee, I hosted this seminar. It included sections on appellate advocacy, guardian ad litem appeals, workers' compensation appeals, criminal appeals, and technology, and included a judicial panel from the Fifth District Court of Appeal.

Institution: Orange County Bar Association

Date: February 1, 2018

d. Course Title: Orange County Bar Association Bench and Bar Conference, "Professionalism and Ethical Implications from an Appellate Court Perspective"

Description: I moderated a panel of appellate judges for a discussion on professionalism and ethics in appeals.

Institution: Orange County Bar Association

Date: April 2016

e. Course Title: "Professionalism in Discovery: Advanced Techniques to Create and Follow an Ethical Roadmap to Litigation Success"

Description: As Chair of the OCBA Professionalism Committee, I hosted this seminar concerning the most effective techniques for creating an ethical roadmap to litigation from start to finish, and understanding that professionalism, ethics and civility are the traits of winners.

Institution: Orange County Bar Association, Ninth Judicial Circuit, and Fifth District Court of Appeal

Date: June 4, 2015

f. Course Title: Lessons from the Field: *The Florida Bar v. Roland Raymond St. Louis, Jr.*

Description: I spoke on a panel about professionalism in discovery practice.

Institution: Orange County Bar Association

Date: January 25, 2013

g. Course Title: "Strategy and Diplomacy: The Importance and Distinctions of Trial and Appellate Professionalism"

Description: I moderated a panel of appellate judges for a discussion on professionalism in appeals and distinctions between professionalism issues in the appellate and trial courts.

Institution: Orange County Bar Association, Fifth District Court of Appeal, and United States District Court for the Middle District of Florida

Date: June 10, 2011

39. List any fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement. Include the date received and the presenting entity or organization.

Fellow, Litigation Counsel of America (2017-present)

Best Lawyers in America, Appellate Practice (2020)

Selected for inclusion in the Florida Super Lawyers Rising Stars lists for Appellate and Commercial Litigation (2009-2020)

Volunteer Award Winner, Akerman LLP Give Back Impact Awards (2018)

Florida Trend's Legal Elite Up and Comer (2015 and 2017)

Orange County Bar Association's Elizabeth Susan Khoury Guardian Ad Litem Award of Excellence (September 23, 2016)

Orange County Bar Association President's Award (2016)

Selected as an *Orlando Business Journal* 40 Under 40 award winner (2014)

2005 Winner, Burton Award for Legal Achievement, in association with the Library of Congress, Washington, D.C. (June 6, 2005)

Stetson University College of Law Dean's List (Spring 2004, Fall 2004) and Honor Roll (Spring 2003, Fall 2003)

University of Michigan Lloyd Hall Scholars Program for excellence in writing (1999-2000)

National Society of Collegiate Scholars (1999-2002)

Delta Epsilon Iota Honor Society (1999-2002)

40. Do you have a Martindale-Hubbell rating? If so, what is it and when was it earned?

Yes, AV Preeminent. I earned this rating in 2016.

41. List all bar associations, legal, and judicial-related committees of which you are or have been a member. For each, please provide dates of membership or participation. Also, for each indicate any office you have held and the dates of office.

Fifth District Court of Appeal Judicial Nominating Commission, Vice Chair (July 2014-July 2018)

Florida Bar Appellate Practice Section
- Treasurer (2020-2021)
- Secretary (2019-2020)

- Programs Chair (2017-2019)
- Pro Bono Committee Chair (2013-2017)

Florida Bar Appellate Rules Committee (2012-2018)
- Record on Appeal Subcommittee Chair (2017-2018)
- Original Proceedings Subcommittee Vice Chair (2015-2017)

Florida Bar Appellate Practice Board Certification Committee (2018-present)

Florida Bar Professionalism Committee (2010-2012)

Florida Bar Real Property, Probate & Trust Law Section, Member (2010-present)

Florida Bar Business Law Section (2018-present)
- Member of Business Court Task Force (2018-present)

Orange County Bar Association (2007-present)
- Appellate Practice Committee Chair (2017-2018)
- Appellate Practice Committee Vice-Chair (2016-2017)
- Professionalism Committee Chair (2013-2014)
- Professionalism Committee Vice Chair (2012-2013)

George C. Young Inns of Court (2012-present)

Central Florida Association of Women Lawyers (2014-present)

Commission on the Orange County Business Court (2015-2016)

42. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in the previous question to which you belong, or to which you have belonged since graduating law school. For each, please provide dates of membership or participation and indicate any office you have held and the dates of office.

Central Florida Foundation (2018-present)
- Member of Board of Directors

Central Florida Regional Housing Trust (2019-present)
- Member of Board of Directors

The Federalist Society, Orlando Lawyers Chapter (2010-present)

Junior League of Greater Orlando (2007-present)
- Board of Directors (Nominating Director) (2016-2017)
- Assistant Chair, Nominating Committee (2015-2016)
- Chair, Corks for a Cause (2013-2014)

- Chair, Member Development (2012-2013)
- Chair, Healthy, Informed, Playful (HIP) Kids Committee for the Callahan Center (2010-2012)

Junior League of Tallahassee (2005-2006)

Coalition for the Homeless, Development Committee (2009-2011)

Florida Citrus Sports (2007-present)
- Scouting Team and Selection Committee (2007-present)
- Hospitality Committee (2010)
- Feast on the 50 Volunteer (2010-2016)

Member, Ninth Judicial Circuit Court of Florida Teen Court Advisory Board (2010-present)

St. John Vianney Catholic Church (1981-2012)

St. Margaret Mary Catholic Church (2012-present)

43. Do you now or have you ever belonged to a club or organization that in practice or policy restricts (or restricted during the time of your membership) its membership on the basis of race, religion (other than a church, synagogue, mosque or other religious institution), national origin, or sex (other than an educational institution, fraternity or sorority)? If so, state the name and nature of the club(s) or organization(s), relevant policies and practices and whether you intend to continue as a member if you are selected to serve on the bench.

I am a member of the Junior League of Greater Orlando, a charitable service and leadership development organization that restricts its membership to women. The Junior League of Greater Orlando is an organization of women committed to promoting volunteerism, developing the potential of women, and improving the community through the effective action and leadership of trained volunteers. Its purpose is exclusively educational and charitable. Women of all races, religions, and national origins who demonstrate an interest in and commitment to voluntarism are welcome to join. I was an active member holding various leadership positions from 2007 to 2017 and became a sustaining member in 2017. I plan to remain a sustaining member if I am appointed to judicial office unless doing so would violate any judicial canons or rules of ethics.

44. Please describe any significant pro bono legal work you have done in the past 10 years, giving dates of service.

a. I have been a judge and jury advisor for Orange County Teen Court since 2007, and before that I was a volunteer for the Leon County Teen Court in Tallahassee from 2005 to 2006 and the Sixth Judicial Circuit Teen Court from 2003 to 2004. I am also a member of the Orange County Teen Court Advisory Board.

b. I have been a guardian ad litem for children at the trial court level and the appellate level since 2014. The appeal I worked on was *A.S., mother of J.S. v. Department of Children and Families*,

5D17-3781. I am also currently the guardian ad litem for a child victim in a criminal sexual battery case pending in the Ninth Judicial Circuit in and for Orange County, Florida. I was also part of a guardian ad litem team that handled a dependency proceeding for three minor children, one of whom was an infant.

c. I am currently pro bono appellate counsel in *Rafaelita J. Edwards v. Michael A. Codrington*, 5D20-1966. My firm represents the mother of a child in a purported paternity action. The mother has no contacts with Florida or the United States while the child lives in Florida with his father. The trial court ordered that the mother submitted to the jurisdiction of Florida's courts and ordered her to comply with court orders, and we are appealing jurisdictional and forum non conveniens issues.

d. From 2014 through 2018, I was Chair of the Akerman LLP Orlando Office's Community Impact Team. Through this role, I led the Community Impact Team's planning for the firm's annual Give Back Days, which raised a total of $1 million firmwide for Court-Appointed Special Advocate (CASA) programs throughout the country, including the Guardian Ad Litem Program in Orange County. I also placed various Akerman attorneys in guardian ad litem roles and initiated a structure by which attorneys and non-attorneys in our office could work on guardian ad litem "teams." The non-attorneys on the team were able to be child advocates and attend interviews and home visits with the children and families, while the attorneys would appear in court as the official guardian ad litem. Due to this work, I was awarded the Orange County Bar Association's Elizabeth Susan Khoury Guardian Ad Litem Award of Excellence (September 23, 2016).

e. From 2013 to 2017, I was chair of the Florida Bar Appellate Section Pro Bono Committee. As part of this role, I fielded calls and inquiries from potential pro bono clients and connected volunteer attorneys from the Appellate Section with pro bono cases. I also helped initiate the working relationship between the Florida Bar Appellate Section and the Florida Statewide Guardian Ad Litem Office so attorney members of the Appellate Section could volunteer and work with the Guardian Ad Litem programs to represent them in appeals from termination of parental rights cases.

f. Finally, a very important endeavor for me has been to plan and conduct continuing legal education programs concerning appeals throughout the state for legal aid and pro bono attorneys. I coordinated these programs with the Florida Bar Appellate Section and my firm. We conducted these programs with an emphasis on the Third District of Appeal in Miami and the Fifth District Court of Appeal in Orlando with the intent to hold these programs in conjunction with every district court of appeal in the state. I firmly believe that it is important for attorneys to serve their communities, and this endeavor has helped put in place a structure for attorneys to do just that. It has been heartening to see how many attorneys want to help and work on pro bono cases, and they appreciate learning from appellate experts and judges to best help their pro bono clients. I also spoke at a similar statewide seminar in February 2020 at the Florida Bar Winter Meeting.

45. Please describe any hobbies or other vocational interests.

Reading, watching college football, traveling, exercise, and being a supportive wife to a husband whose ever-expanding list of hobbies includes outdoor adventure activities and repairing and racing various motor vehicles.

46. Please state whether you have served or currently serve in the military, including your dates of service, branch, highest rank, and type of discharge.

I have not served in the military.

47. Please provide links to all social media and blog accounts you currently maintain, including, but not limited to, Facebook, Twitter, LinkedIn, and Instagram.

https://www.instagram.com/carrieannwozniak/

https://www.facebook.com/carrieannwozniak

www.linkedin.com/in/carrie-ann-wozniak-049b353

FAMILY BACKGROUND

48. Please state your current marital status. If you are currently married, please list your spouse's name, current occupation, including employer, and the date of the marriage. If you have ever been divorced, please state for each former spouse their name, current address, current telephone number, the date and place of the divorce and court and case number information.

I am married to [redacted]. He is an attorney with Akerman LLP, and we married on March 10, 2012.

49. If you have children, please list their names and ages. If your children are over 18 years of age, please list their current occupation, residential address, and a current telephone number.

CRIMINAL AND MISCELLANEOUS ACTIONS

50. Have you ever been convicted of a felony or misdemeanor, including adjudications of guilt withheld? If so, please list and provide the charges, case style, date of conviction, and terms of any sentence imposed, including whether you have completed those terms.

No.

51. Have you ever pled nolo contendere or guilty to a crime which is a felony or misdemeanor, including adjudications of guilt withheld? If so, please list and provide the charges, case style, date of conviction, and terms of any sentence imposed, including whether you have completed those terms.

No.

52. Have you ever been arrested, regardless of whether charges were filed? If so, please list and provide sufficient details surrounding the arrest, the approximate date and jurisdiction.

No.

53. Have you ever been a party to a lawsuit, either as the plaintiff, defendant, petitioner, or respondent? If so, please supply the case style, jurisdiction/county in which the lawsuit was filed, case number, your status in the case, and describe the nature and disposition of the matter.

No.

54. To your knowledge, has there ever been a complaint made or filed alleging malpractice as a result of action or inaction on your part?

No.

55. To the extent you are aware, have you or your professional liability carrier ever settled a claim against you for professional malpractice? If so, give particulars, including the name of the client(s), approximate dates, nature of the claims, the disposition and any amounts involved.

No.

56. Has there ever been a finding of probable cause or other citation issued against you or are you presently under investigation for a breach of ethics or unprofessional conduct by any court, administrative agency, bar association, or other professional group. If so, provide the particulars of each finding or investigation.

No.

57. To your knowledge, within the last ten years, have any of your current or former co-workers, subordinates, supervisors, customers, clients, or the like, ever filed a formal complaint or accusation of misconduct including, but not limited to, any allegations involving sexual harassment, creating a hostile work environment or conditions, or discriminatory behavior against you with any regulatory or investigatory agency or with your employer? If so, please state the date of complaint or accusation, specifics surrounding the complaint or accusation, and the resolution or disposition.

No.

58. Are you currently the subject of an investigation which could result in civil, administrative, or criminal action against you? If yes, please state the nature of the investigation, the agency conducting the investigation, and the expected completion date of the investigation.

No.

59. Have you ever filed a personal petition in bankruptcy or has a petition in bankruptcy been filed against you, this includes any corporation or business entity that you were involved with? If so, please provide the case style, case number, approximate date of disposition, and any relevant details surrounding the bankruptcy.

No.

60. In the past ten years, have you been subject to or threatened with eviction proceedings? If yes, please explain.

No.

61. Please explain whether you have complied with all legally required tax return filings. To the extent you have ever had to pay a tax penalty or a tax lien was filed against you, please explain giving the date, the amounts, disposition, and current status.

I have complied with all legally required tax return filings.

HEALTH

62. Are you currently addicted to or dependent upon the use of narcotics, drugs, or alcohol?

No.

63. During the last ten years have you been hospitalized or have you consulted a professional or have you received treatment or a diagnosis from a professional for any of the following: Kleptomania, Pathological or Compulsive Gambling, Pedophilia, Exhibitionism or Voyeurism? If your answer is yes, please direct each such professional, hospital and other facility to furnish the Chairperson of the Commission any information the Commission may request with respect to any such hospitalization, consultation, treatment or diagnosis. ["Professional" includes a Physician, Psychiatrist, Psychologist, Psychotherapist or Mental Health Counselor.] Please describe such treatment or diagnosis.

No.

64. In the past ten years have any of the following occurred to you which would interfere with your ability to work in a competent and professional manner: experiencing periods of no sleep for two or three nights, experiencing periods of hyperactivity, spending money profusely with extremely poor judgment, suffering from extreme loss of appetite, issuing checks without sufficient funds, defaulting on a loan, experiencing frequent mood swings, uncontrollable tiredness, falling asleep without warning in the middle of an activity. If yes, please explain.

No.

65. Do you currently have a physical or mental impairment which in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner? If yes please explain the limitation or impairment and any treatment, program or counseling sought or prescribed.

No.

66. During the last ten years, have you ever been declared legally incompetent or have you or your property been placed under any guardianship, conservatorship or committee? If yes, provide full details as to court, date, and circumstances.

No.

67. During the last ten years, have you unlawfully used controlled substances, narcotic drugs, or dangerous drugs as defined by Federal or State laws? If your answer is "Yes," explain in detail. (Unlawful use includes the use of one or more drugs and/or the unlawful possession or distribution of drugs. It does not include the use of drugs taken under supervision of a licensed health care professional or other uses authorized by Federal or State law provisions.)

No.

68. In the past ten years, have you ever been reprimanded, demoted, disciplined, placed on probation, suspended, cautioned, or terminated by an employer as result of your alleged consumption of alcohol, prescription drugs, or illegal drugs? If so, please state the circumstances under which such action was taken, the name(s) of any persons who took such action, and the background and resolution of such action.

No.

69. Have you ever refused to submit to a test to determine whether you had consumed and/or were under the influence of alcohol or drugs? If so, please state the date you were requested to submit to such a test, the type of test required, the name of the entity requesting that you submit to the test, the outcome of your refusal, and the reason why you refused to submit to such a test.

No.

70. In the past ten years, have you suffered memory loss or impaired judgment for any reason? If so, please explain in full.

No.

SUPPLEMENTAL INFORMATION

71. Describe any additional education or experiences you have which could assist you in holding judicial office.

I am a native Floridian, and I was raised in Orlando by nurturing parents and extended family who instilled in me from a young age a profound appreciation of both the United States and Florida. This foundation helped me realize the importance of public service. I am principled and have firm beliefs as to the role of the judicial branch in our system of government and the requirement of judicial restraint in order for our three branches of government to function as intended—to serve the people and not the other way around. I developed these beliefs from a very early age, although I may not have been able to articulate them as clearly in childhood as I am able to do so now as a trained lawyer. I traveled outside of the United States with my family often as a child, including visits to our extended family members in Poland while it was under Communist rule, and later when Communism fell and Poland became a democratic country. The differences were stark, even to an elementary and middle school-age child. Under communism, my resilient and humble relatives lived on rations in very small living quarters but were always hopeful for a freer way of life. I visited Auschwitz and learned the horror an unrestrained government in the worst hands can do. These experiences helped me understand the unique freedom and opportunities we have in this country and appreciate the structure of government our founders intended.

Additionally, when I was in college, I had the unique experience of working in the British Parliament for a Member of Parliament (MP). The office was small so I was able to take on a lot of responsibilities, including researching and composing speeches and Parliamentary Questions for Parliamentary debates and meetings; corresponding with constituents on various issues including deportation hearings, animal rights, urban housing development, and child welfare; and attending Parliamentary Foreign Affairs and Ministry of Defense (spelled "Defence" in the UK) meetings to gain a better understanding of the British Parliamentary system and its cooperation with other countries. This invaluable firsthand experience of working for and temporarily living in a constitutional monarchy helped me appreciate our countries' similarities and history while valuing my country's republican form of government.

As is probably evident from my numerous activities and leadership positions outlined in this application, I am a lifelong enthusiastic learner who enjoys working on teams and putting in the effort to produce an excellent work product. As a practicing attorney, I strive to maintain a high level of competence in both my written work and oral advocacy, as well as a high level of professionalism with the courts, opposing counsel, and my clients. I take the role of being an officer of the court very seriously and understand that it is an attorney's most important role. I also firmly believe attorneys have an exceptional opportunity and duty to give back to their communities and be role models of the justice system to the community at large.

72. Explain the particular contribution you believe your selection would bring to this position and provide any additional information you feel would be helpful to the Commission and Governor in evaluating your application.

Given my experience as a private practitioner in a large firm and as a staff attorney/law clerk for the Florida Supreme Court, I have a large breadth of experience relevant to the work of the Fifth District Court of Appeal. First, I have significant experience in private practice handling complex commercial litigation and appeals. Many of the most complex issues that come before the Fifth District arise from these cases. Through my practice, I have learned a healthy respect for the complexities of the law, and "I know what I don't know" when beginning to analyze a new issue. My experience in private practice has also given me perspective into the need for clarity in legal opinions. Lawyers need to be able to advise their clients with some certainty when handling business and legal affairs, as well as the likelihood of success or exposure in litigation. Moreover, I have firsthand knowledge of the significant costs involved in civil litigation, particularly the costs of discovery and related issues, and the effects of those costs on the parties. I believe my perspective from private practice would benefit the Court.

Second, I clerked for the Florida Supreme Court for two years before entering private practice. While clerking, I analyzed complex legal issues for which there were no "simple" answers, regularly synthesizing complicated law and voluminous records to draft opinions, prepare the justices for oral argument, and make recommendations on rulings. I handled numerous criminal appeals, including many death penalty direct and postconviction appeals. These are frequently the most complex criminal cases in the state factually and legally, and my experience working on these cases will help me quickly learn the law and analysis required to consider criminal appeals in the Fifth District.

Third, my position as General Counsel to the Florida Bankers Association has afforded me many opportunities to work on policy issues with the legislative branch of the federal and state government. I have drafted, revised, and commented on legislation, and I have worked with legislators, legislative staff, and lobbyists to achieve results, i.e., laws and regulations, favorable to my client. I understand firsthand how vastly different this legislative process is from the work of the judicial branch, and it will remind me as a judge not to mix the two.

Fourth, I believe that judges are "ambassadors" of the judicial branch to the general public, and it is important for them to represent this branch with professionalism and accessibility. I have worked with numerous judges on continuing legal education, seminar panels, and other events and I would endeavor to appear at these types of events often as a sitting judge. I would also continue the work I do with the Florida Bar and other voluntary bar associations, including serving on and leading committees to the extent possible.

Finally, I will decide issues that come before the Court consistent with the rule of law. I am firmly committed to the separation of powers in our system of government, judicial restraint when deciding cases, and following the law as it is rather than my personal preference as to how it should be. Throughout my career, I have demonstrated my commitment to professionalism and treating others with respect. As a judge, I would be committed to analyzing each case and treating lawyers and litigants in a fair and humble manner.

REFERENCES

73. List the names, addresses, e-mail addresses and telephone numbers of ten persons who are in a position to comment on your qualifications for a judicial position and of whom inquiry may be made by the Commission and the Governor.

1. E. Ginnette Childs, Esq.
   Managing Partner, Orlando Office
   Akerman LLP
   420 South Orange Avenue
   Suite 1200
   Orlando, FL 32801
   Email: ginny.childs@akerman.com
   Phone: 407-419-8592

2. The Honorable James A. Edwards
   Fifth District Court of Appeal
   300 South Beach Street
   Daytona Beach, FL 32114

3. Richard Martin, Esq.
   Chief of Staff
   Florida Office of Attorney General
   The Capitol PL-01
   Tallahassee, FL 32399-1050
   Email: richard.martin@myfloridalegal.com
   Phone: 850-414-3300

4. Alejandro (Alex) Sanchez
   President and CEO
   Florida Bankers Association
   1001 Thomasville Road
   Suite 201
   Tallahassee, FL 32303
   Email: asanchez@floridabankers.com
   Phone: 850-933-1984

5. Kenneth Bell, Esq.
   Gunster
   215 South Monroe Street
   Suite 601
   Tallahassee, FL 32301-1804
   Email: kbell@gunster.com
   Phone: 850-521-1708

6. Jason Gonzalez, Esq.
   Shutts & Bowen LLP
   215 South Monroe Street
   Suite 804
   Tallahassee, Florida 32301

Email: JasonGonzalez@shutts.com
Phone: 850-241-1720

7. The Honorable Paetra Brownlee
   Ninth Judicial Circuit
   425 N. Orange Avenue
   Orlando, FL 32801

8. Kansas Gooden, Esq.
   Boyd & Jenerette, P.A.
   11767 S. Dixie Hwy, #274
   Miami, FL 33156
   Email: KGooden@boydjen.com
   Phone: 305-537-1238

9. Bethanie Barber, Esq.
   Legal Aid Society of the OCBA, Inc.
   Deputy Director, Pro Bono Coordinator
   Guardian ad Litem Program Director
   100 E. Robinson Street
   Orlando, FL 32801
   Email: bbarber@legalaidocba.org
   Phone: 352-256-8169

10. Carrie Cherveny, Esq.
    17235 Brian Way
    Jupiter, Florida 33478
    Email: carrie.cherveny@hubinternational.com
    Phone: 561-309-6886

CERTIFICATE

I have read the foregoing questions carefully and have answered them truthfully, fully and completely. I hereby waive notice by and authorize The Florida Bar or any of its committees, educational and other institutions, the Judicial Qualifications Commission, the Florida Board of Bar Examiners or any judicial or professional disciplinary or supervisory body or commission, any references furnished by me, employers, business and professional associates, all governmental agencies and instrumentalities and all consumer and credit reporting agencies to release to the respective Judicial Nominating Commission and Office of the Governor any information, files, records or credit reports requested by the commission in connection with any consideration of me as possible nominee for appointment to judicial office. Information relating to any Florida Bar disciplinary proceedings is to be made available in accordance with Rule 3-7.1(l), Rules Regulating The Florida Bar. I recognize and agree that, pursuant to the Florida Constitution and the Uniform Rules of this commission, the contents of this questionnaire and other information received from or concerning me, and all interviews and proceedings of the commission, except for deliberations by the commission, shall be open to the public.

Further, I stipulate I have read, and understand the requirements of the Florida Code of Judicial Conduct.

Dated this 12th day of October, 2020.

Carrie Ann Wozniak

Printed Name

Carrie Ann Wozniak

Signature

(Pursuant to Section 119.071(4)(d)(1), F.S.), . . . *The home addresses and telephone numbers of justices of the Supreme Court, district court of appeal judges, circuit court judges, and county court judges; the home addresses, telephone numbers, and places of employment of the spouses and children of justices and judges; and the names and locations of schools and day care facilities attended by the children of justices and judges are exempt from the provisions of subsection (1), dealing with public records.*

FINANCIAL HISTORY

1. State the amount of gross income you have earned, or losses you have incurred (before deducting expenses and taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

Current Year-To-Date: $139,246.05

Last Three Years: $274,234.88 $269,656.23 $241,948.32

2. State the amount of net income you have earned, or losses you have incurred (after deducting expenses but not taxes) from the practice of law for the preceding three-year period. This income figure should be stated on a year to year basis and include year to date information, and salary, if the nature of your employment is in a legal field.

Current Year-To-Date: $137,748.05

Last Three Years: $271,310.88 $269,656.23 $239,129.26

3. State the gross amount of income or losses incurred (before deducting expenses or taxes) you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.

Current Year-To-Date: $1,812.54

Last Three Years: $1,986.33 $427,978.12 $32,981.18

4. State the amount you have earned in the preceding three years on a year by year basis from all sources other than the practice of law, and generally describe the source of such income or losses.*

*Figures presented are gross earnings (without reduction for expenses or taxes or, in the case of the sale of rental property, without reduction for basis).

Current Year-To-Date: $126.60 (Regions Bank Account Interest) + $1,812.54 (UBS Brokerage Account realized gain, dividends, and interest) = $1,939.14

Last Three Years:

2019: $107.63 (Regions Bank Account Interest) + $1,878.70 (UBS Brokerage Account realized gain, dividends, and interest) = $1,986.33

2018: $416,000.00 (Sale of Rental Property) + $10,780.00 (Rental Property Income) + $89.89 (Regions Bank Account Interest) + $1,108.23 (UBS Brokerage Account realized gain, dividends, and interest) = $427,978.12

2017: $97.27 (Regions Bank Account Interest) + $32,340.00 (Rental Property Income) + $543.91 (UBS Brokerage Account realized gain, dividends, and interest) = $32,981.18

5. State the amount of net income you have earned or losses incurred (after deducting expenses) from all sources other than the practice of law for the preceding three-year period on a year by year basis, and generally describe the sources of such income or losses.

Current Year-To-Date: $126.60 (Regions Bank Account Interest) + $1,812.54 (UBS Brokerage Account realized gain, dividends, and interest) = $1,939.14

Last Three Years:

2019: $107.63 (Regions Bank Account Interest) + $1,878.70 (UBS Brokerage Account realized gain, dividends, and interest) = $1,986.33

2018: $15,259.00 (Sale of Rental Property) + $89.89 (Regions Bank Account Interest) + $1,108.23 (UBS Brokerage Account realized gain, dividends, and interest) = $16,457.12

2017: $97.27 (Regions Bank Account Interest) + $9,876.86 (Rental Property Income) + $543.91 (UBS Brokerage Account realized gain, dividends, and interest) = $10,518.04

FORM 6
FULL AND PUBLIC
DISCLOSURE OF
FINANCIAL INTEREST

PART A – NET WORTH

Please enter the value of your net worth as of December 31 or a more current date. [Note: Net worth is not calculated by subtracting your *reported* liabilities from your *reported* assets, so please see the instructions on page 3.]

My net worth as of October 8, 2020 was $975,923.77.

PART B - ASSETS

HOUSEHOLD GOODS AND PERSONAL EFFECTS:

Household goods and personal effects may be reported in a lump sum if their aggregate value exceeds $1,000. This category includes any of the following, if not held for investment purposes; jewelry; collections of stamps, guns, and numismatic items; art objects; household equipment and furnishings; clothing; other household items; and vehicles for personal use.

The aggregate value of my household goods and personal effects (described above) is $ 120,000

ASSETS INDIVIDUALLY VALUED AT OVER $1,000:

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)	VALUE OF ASSET
Residence at 1632 Elizabeth's Walk, Winter Park, FL 32789	985,500.00
Akerman LLP capital contribution	106,000.00
Fidelity Account (401(k))	294,032.69
UBS Brokerage Accounts	147,003.51
Voya Account (Retirement)	30,266.62
Regions Bank Accounts	9,874.21
Iberia Bank Account	6,155.27
Wells Fargo Accounts	7,322.45

PART C - LIABILITIES

LIABILITIES IN EXCESS OF $1,000 (See instructions on page 4): NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
Wells Fargo Home Loan	616,896.29
Wells Fargo Capital Contribution Loan	92,938.00

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE: NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
Not applicable.	

PART D - INCOME

You may ***EITHER*** (1) file a complete copy of your latest federal income tax return, *including all W2's, schedules, and attachments,* ***OR*** (2) file a sworn statement identifying each separate source and amount of income which exceeds $1,000 including secondary sources of income, by completing the remainder of Part D, below.

I elect to file a copy of my latest federal income tax return and all W2's, schedules, and attachments.

(if you check this box and attach a copy of your latest tax return, you need *not* complete the remainder of Part D.]

PRIMARY SOURCE OF INCOME (See instructions on page 5):

NAME OF SOURCE OF INCOME EXCEEDING $1,000	ADDRESS OF SOURCE OF INCOME	AMOUNT
Akerman LLP	420 South Orange Avenue, Suite 1200 Orlando, FL 32801	$139,246.05 (2020 income as of 10/8/20)
UBS Brokerage Accounts	6905 N. Wickham Road, Suite 200, Melbourne, FL 32940	$1,812.54 (2020 income as of 10/8/20)

SECONDARY SOURCES OF INCOME [Major customers, clients, etc., of businesses owned by reporting person—see instructions on page 6]

NAME OF BUSINESS ENTITY	NAME OF MAJOR SOURCES OF BUSINESS' INCOME	ADDRESS OF SOURCE	PRINCIPAL BUSINESS ACTIVITY OF SOURCE
Not applicable.			

PART E – INTERESTS IN SPECIFIC BUSINESS [Instructions on page 7]

	BUSINESS ENTITY #1	BUSINESS ENTITY #2	BUSINESS ENTITY #3
NAME OF BUSINESS ENTITY	Not applicable.		
ADDRESS OF BUSINESS ENTITY			
PRINCIPAL BUSINESS ACTIVITY			
POSITION HELD WITH ENTITY			
I OWN MORE THAN A 5% INTEREST IN THE BUSINESS			
NATURE OF MY OWNERSHIP INTEREST			

IF ANY OF PARTS A THROUGH E ARE CONTINUED ON A SEPARATE SHEET, PLEASE CHECK HERE

OATH

I, the person whose name appears at the beginning of this form, do depose on oath or affirmation and say that the information disclosed on this form and any attachments hereto is true, accurate, and complete.

Carrie Ann Wozniak

SIGNATURE

STATE OF FLORIDA

COUNTY OF Orange

Sworn to (or affirmed) and subscribed before me this 9th day of Oct., 2020 by Carrie Ann Wozniak

(Signature of Notary Public—State of Florida) Amellia Merrick

(Print, Type, or Stamp Commissioned Name of Notary Public)

Personally Known ✓ *OR* Produced Identification

Type of Identification Produced ____

AMELLIA MERRICK
Commission # GG 236841
Expires September 9, 2022
Bonded Thru Troy Fain Insurance 800-385-7019

INSTRUCTIONS FOR COMPLETING FORM 6:

PUBLIC RECORD: The disclosure form and everything attached to it is a public record. **Your Social Security Number is not required and you should redact it from any documents you file.** If you are an active or former officer or employee listed in Section 119.071(4)(d), F.S., whose home address is exempt from disclosure, the Commission is required to maintain the confidentiality of your home address ***if you submit a written request for confidentiality.***

PART A – NET WORTH

Report your net worth as of December 31 or a more current date, and list that date. This should be the same date used to value your assets and liabilities. In order to determine your net worth, you will need to total the value of all your assets and subtract the amount of all of your liabilities. Simply subtracting the liabilities reported in Part C from the assets reported in Part B will not result in an accurate net worth figure in most cases.

To total the value of your assets, add:

(1) The aggregate value of household goods and personal effects, as reported in Part B of this form;

(2) The value of all assets worth over $1,000, as reported in Part B; and

(3) The total value of any assets worth less than $1,000 that were not reported or included in the category of "household goods and personal effects."

To total the amount of your liabilities, add:

(1) The total amount of each liability you reported in Part C of this form, except for any amounts listed in the "joint and several liabilities not reported above" portion; and,

(2) The total amount of unreported liabilities (including those under $1,000, credit card and retail installment accounts, and taxes owed).

PART B – ASSETS WORTH MORE THAN $1,000

HOUSEHOLD GOODS AND PERSONAL EFFECTS:

The value of your household goods and personal effects may be aggregated and reported as a lump sum, if their aggregate value exceeds $1,000. The types of assets that can be reported in this manner are described on the form.

ASSETS INDIVIDUALLY VALUED AT MORE THAN $1,000:

Provide a description of each asset you had on the reporting date chosen for your net worth (Part A), that was worth more than $1,000 and that is not included as household goods and personal effects, and list its value. Assets include: interests in real property; tangible and intangible personal property, such as cash, stocks, bonds, certificates of deposit, interests in partnerships, beneficial interest in a trust, promissory notes owed to you, accounts received by you, bank accounts, assets held in IRAs, Deferred Retirement Option Accounts, and Florida Prepaid College Plan accounts. You are not required to disclose assets owned solely by your spouse.

How to Identify or Describe the Asset:

— Real property: Identify by providing the street address of the property. If the property has no street address, identify by describing the property's location in a manner sufficient to enable a member of the public to ascertain its location without resorting to any other source of information.

— Intangible property: Identify the type of property and the business entity or person to which or to whom it relates. **Do not list simply "stocks and bonds" or "bank accounts."** For example, list "Stock (Williams Construction Co.)," "Bonds (Southern Water and Gas)," "Bank accounts(First

National Bank)," "Smith family trust," Promissory note and mortgage (owed by John and Jane Doe)."

How to Value Assets:

— Value each asset by its fair market value on the date used in Part A for your net worth.

— Jointly held assets: If you hold real or personal property jointly with another person, your interest equals your legal percentage of ownership in the property. However, assets that are held as tenants by the entirety or jointly with right of survivorship must be reported at 100% of their value.

— Partnerships: You are deemed to own an interest in a partnership which corresponds to your interest in the equity of that partnership.

— Trusts: You are deemed to own an interest in a trust which corresponds to your percentage interest in the trust corpus.

— Real property may be valued at its market value for tax purposes, unless a more accurate appraisal of its fair market value is available.

— Marketable securities which are widely traded and whose prices are generally available should be valued based upon the closing price on the valuation date.

— Accounts, notes, and loans receivable: Value at fair market value, which generally is the amount you reasonably expect to collect.

— Closely-held businesses: Use any method of valuation which in your judgment most closely approximates fair market value, such as book value, reproduction value, liquidation value, capitalized earnings value, capitalized cash flow value, or value established by "buy-out" agreements. It is suggested that the method of valuation chosen be indicated in a footnote on the form.

— Life insurance: Use cash surrender value less loans against the policy, plus accumulated dividends.

PART C—LIABILITIES

LIABILITIES IN EXCESS OF $1,000:

List the name and address of each creditor to whom you were indebted on the reporting date chosen for your net worth (Part A) in an amount that exceeded $1,000 and list the amount of the liability. Liabilities include: accounts payable; notes payable; interest payable; debts or obligations to governmental entities other than taxes (except when the taxes have been reduced to a judgment); and judgments against you. You are not required to disclose liabilities owned *solely* by your spouse.

You do not have to list on the form any of the following: credit card and retail installment accounts, taxes owed unless the taxes have been reduced to a judgment), indebtedness on a life insurance policy owned to the company of issuance, or contingent liabilities. A "contingent liability" is one that will become an actual liability only when one or more future events occur or fail to occur, such as where you are liable only as a partner (without personal liability) for partnership debts, or where you are liable only as a guarantor, surety, or endorser on a promissory note. If you are a "co-maker" on a note and have signed as being jointly liable or jointly and severally liable, then this is not a contingent liability.

How to Determine the Amount of a Liability:

— Generally, the amount of the liability is the face amount of the debt.

— If you are the only person obligated to satisfy a liability, 100% of the liability should be listed.

— If you are jointly and severally liable with another person or entity, which often is the case where more than one person is liable on a promissory note, you should report here only the portion of the liability that corresponds to your percentage of liability. *However*, if you are jointly and severally liable for a debt relating to property you own with one or more others as tenants by the entirely or jointly, with right of survivorship,

report 100% of the total amount owed.

— If you are only jointly (not jointly and severally) liable with another person or entity, your share of the liability should be determined in the same way as you determined your share of jointly held assets.

Examples:

— You owe $10,000 to a bank for student loans, $5,000 for credit card debts, and $60,000 with your spouse to a saving and loan for the mortgage on the home you own with your spouse. You must report the name and address of the bank ($10,000 being the amount of that liability) and the name and address of the savings and loan ($60,000 being the amount of this liability). The credit cards debts need not be reported.

— You and your 50% business partner have a $100,000 business loan from a bank and you both are jointly and severally liable. Report the name and address of the bank and $50,000 as the amount of the liability. If your liability for the loan is only as a partner, without personal liability, then the loan would be a contingent liability.

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE:

List in this part of the form the amount of each debt, for which you were jointly and severally liable, that is not reported in the "Liabilities in Excess of $1,000" part of the form. Example: You and your 50% business partner have a $100,000 business loan from a bank and you both are jointly and severally liable. Report the name and address of the bank and $50,000 as the amount of the liability, as you reported the other 50% of the debt earlier.

PART D – INCOME

As noted on the form, you have the option of either filing a copy of your latest federal income tax return, including all schedules, W2's and attachments, with Form 6, or completing Part D of the form. If you do not attach your tax return, you must complete Part D.

PRIMARY SOURCES OF INCOME:

List the name of each source of income that provided you with more than $1,000 of income during the year, the address of that source, and the amount of income received from that source. The income of your spouse need not be disclosed; however, if there is a joint income to you and your spouse from property you own jointly (such as interest or dividends from a bank account or stocks), you should include all of that income.

"Income" means the same as "gross income" for federal income tax purposes, even if the income is not actually taxable, such as interest on tax-free bonds. Examples of income include: compensation for services, gross income from business, gains from property dealings, interest, rents, dividends, pensions, IRA distributions, distributive share of partnership gross income, and alimony, but not child support. Where income is derived from a business activity you should report that income to you, as calculated for income tax purposes, rather than the income to the business.

Examples:

— If you owned stock in and were employed by a corporation and received more than $1,000 of income (salary, commissions, dividends, etc.) from the company, you should list the name of the company, its address, and the total amount of income received from it.

— If you were a partner in a law firm and your distributive share of partnership gross income exceeded $1,000, you should list the name of the firm, its address, and the amount of your distributive share.

— If you received dividend or interest income from investments in stocks and bonds, list only each individual company from which you received more than $1,000. Do not aggregate income from all of these investments.

— If more than $1,000 of income was gained from the sale of property, then you should list as a source of income the name of the purchaser, the purchaser's address, and the amount of gain from the sale. If the purchaser's

identity is unknown, such as where securities listed on an exchange are sold through a brokerage firm, the source of income should be listed simply as "sale of (name of company) stock," for example.

— If more than $1,000 of your income was in the form of interest from one particular financial institution (aggregating interest from all CD's, accounts, etc., at that institution), list the name of the institution, its address, and the amount of income from that institution.

SECONDARY SOURCE OF INCOME:

This part is intended to require the disclosure of major customers, clients, and other sources of income to businesses in which you own an interest. It is not for reporting income from second jobs. That kind of income should be reported as a "Primary Source of Income." You will ***not*** have anything to report ***unless***:

(1) You owned (either directly or indirectly in the form of an equitable or beneficial interest) during the disclosure period, more than 5% of the total assets or capital stock of a business entity (a corporation, partnership, limited partnership, LLC, proprietorship, joint venture, trust, firm, etc., doing business in Florida); and

(2) You received more than $1,000 in gross income from that business entity during the period.

If your ownership and gross income exceeded the two thresholds listed above, then for that business entity you must list every source of income to the business entity which exceeded 10% of the business entity's gross income (computed on the basis of the business entity's more recently completed fiscal year), the source's address, the source's principal business activity, and the name of the business entity in which you owned an interest. You do not have to list the amount of income the business derived from that major source of income.

Examples:

— You are the sole proprietor of a dry cleaning business, from which you received more than $1,000 in gross income last year. If only one customer, a uniform rental company, provided more than 10% of your dry cleaning business, you must list the name of your business, the name of the uniform rental company, its address, and its principal business activity (uniform rentals).

— You are a 20% partner in a partnership that owns a shopping mall and your gross partnership income exceeded $1,000. You should list the name of the partnership, the name of each tenant of the mall that provided more than 10% of the partnership's gross income, the tenant's address and principal business activity.

PART E – INTERESTS IN SPECIFIED BUSINESS

The types of businesses covered in this section include: state and federally chartered banks; state and federal savings and loan associations; cemetery companies; insurance companies; mortgage companies, credit unions; small loan companies; alcoholic beverage licensees; pari-mutuel wagering companies; utility companies; and entities controlled by the Public Service Commission; and entities granted a franchise to operate by either a city or a county government.

You are required to make this disclosure if you own or owned (either directly or indirectly in the form of an equitable or beneficial interest) at any time during the disclosure period, more than 5% of the total assets or capital stock of one of the types of business entities listed above. You also must complete this part of the form for each of these types of business for which you are, or were at any time during the year an officer, director, partner, proprietor, or agent (other than a resident agent solely for service of process).

If you have or held such a position or ownership interest in one of these types of businesses, list: the name of the business, its address and principal business activity, and the position held with the business (if any). Also, if you own(ed) more than a 5% interest in the business, as described above, you must indicate that fact and describe the nature of your interest.

JUDICIAL APPLICATION DATA RECORD

The judicial application shall include a separate page asking applicants to identify their race, ethnicity and gender. Completion of this page shall be optional, and the page shall include an explanation that the information is requested for data collection purposes in order to assess and promote diversity in the judiciary. The chair of the Commission shall forward all such completed pages, along with the names of the nominees to the JNC Coordinator in the Governor's Office (pursuant to JNC Uniform Rule of Procedure).

(Please Type or Print)

Date: October 9, 2020

JNC Submitting To: Fifth District Court of Appeal

Name (please print): Carrie Ann Wozniak

Current Occupation: Attorney

Telephone Number: 407-701-8672 Attorney No.: 12666

Gender (check one): ☐ Male ☒ Female

Ethnic Origin (check one):
- ☒ White, non-Hispanic
- ☐ Hispanic
- ☐ Black
- ☐ American Indian/Alaskan Native
- ☐ Asian/Pacific Islander

County of Residence: Orange

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

DISCLOSURE PURSUANT TO THE
FAIR CREDIT REPORTING ACT (FCRA)

The Florida Department of Law Enforcement (FDLE) may obtain one or more consumer reports, including but not limited to credit reports, about you, for employment purposes as defined by the Fair Credit Reporting Act, including for determinations related to initial employment, reassignment, promotion, or other employment-related actions.

CONSUMER'S AUTHORIZATION FOR
FDLE TO OBTAIN CONSUMER REPORT(S)

I have read and understand the above Disclosure. I authorize the Florida Department of Law Enforcement (FDLE) to obtain one or more consumer reports on me, for employment purposes, as described in the above Disclosure.

Carrie Ann Wozniak
Printed Name of Applicant

Carrie Ann Wozniak
Signature of Applicant

Date: October 9, 2020

Question 22

Initial Brief, *Central Fla. Regional Transp. Auth. v. Post-Newsweek Stations, Orlando, Inc.*, 157 So. 3d 401 (Fla. 5th DCA 2015).

IN THE FIFTH DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

CASE NO.: 5D14-360

L.T. NO.: 2013-CA-012476-O

CENTRAL FLORIDA REGIONAL TRANSPORTATION AUTHORITY, D/B/A LYNX,

Appellant,

v.

POST-NEWSWEEK STATIONS, ORLANDO, INC., D/B/A WKMG-TV LOCAL 6,

Appellee.

INITIAL BRIEF OF APPELLANT, CENTRAL FLORIDA REGIONAL TRANSPORTATION AUTHORITY, D/B/A LYNX

PATRICK T. CHRISTIANSEN (146230)
E. GINNETTE CHILDS (0298130)
CARRIE ANN WOZNIAK (12666)
Akerman LLP
420 South Orange Avenue
Suite 1200
Orlando, FL 32801-4904
Telephone: (407) 423-4000
Facsimile: (407) 843-6610
pat.christiansen@akerman.com
ginny.childs@akerman.com
carrieann.wozniak@akerman.com

Attorneys for Appellant

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STATEMENT OF CASE AND FACTS[1]

Introduction

Appellant/Defendant, Central Florida Regional Transportation Authority, d/b/a LYNX ("**LYNX**") appeals errors in a final judgment entered by the Ninth Judicial Circuit in and for Orange County, Florida in this public records action brought by Appellee/Plaintiff Post-Newsweek Stations, Orlando, Inc., d/b/a WKMG-TV Local 6 ("**WKMG**").

The case centers on WKMG's numerous public records requests to LYNX, an agency of the State of Florida that provides bus transportation to the Central Florida area, to produce video and audio recordings from LYNX's security system.[2] After LYNX declined to produce video and audio recordings from its bus security system, citing exemptions to Florida's Public Records Act (chapter 119, Florida Statutes) concerning security systems, WKMG filed suit against LYNX in the Ninth Judicial Circuit in and for Orange County, Florida, seeking among other relief an order compelling LYNX to produce the recordings. WKMG alleged that LYNX violated the Public Records Act by failing to produce the security system recordings and improperly relying on three exemptions within the Public Records

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[1] All references to the electronic Record are by page (*e.g.*, [R. 1] references record page 1).

[2] The facts presented in the trial court on the issues in this appeal are largely undisputed.

Act.[3] WKMG sought injunctive relief enjoining LYNX from ever claiming in the future that its security system's video and audio recordings are confidential and exempt under the Public Records Act. After two expedited hearings, the trial court held that the requested records are not confidential and exempt, and entered a declaratory judgment that the exemptions LYNX asserted do not apply to the recordings. The trial court limited its ruling's application to security system recordings from LYNX buses like those WKMG requested, and not recordings produced from security system equipment attached to LYNX's stationary buildings and facilities such as a bus station, even though LYNX's security system spans its buses and stationary buildings as a comprehensive unit. LYNX asserts in this appeal that the trial court erred in holding that LYNX's security system recordings from its buses are not confidential and exempt from the Public Records Act and should be produced.

Background

A. LYNX's Services And Security System

LYNX provides public transportation services for Orange, Seminole, Osceola, and Lake counties along with small portions of Polk and Volusia Counties. LYNX's daily fixed-route local bus service provides more than 85,000

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[3] The three exemptions LYNX relied upon are contained in sections 119.071(2)(d), 119.071(3)(a), and 281.301, Florida Statutes. The exemptions contained in sections 119.071(3)(a) and 281.301, Florida Statutes, are at issue in this appeal.

passenger trips each weekday, and LYNX maintains a comprehensive security system involving cameras, microphones, and other components in its buses, bus stations, and other facilities and property. [R. 373 ¶¶5-6] LYNX's current comprehensive security system was installed in part with grant money obtained from the United States Department of Homeland Security. [*Id.*] LYNX's Chief Executive Officer, John M. Lewis, Jr., regularly receives briefings from the Transportation and Security Administration ("TSA") as to threats that may affect LYNX and its property and facilities, including its buses. [*Id.* at ¶5] In his capacity as LYNX's Chief Executive Officer, Mr. Lewis has been briefed by and given direction to LYNX security staff concerning coordinated security efforts with the TSA's Visible Intermodal Prevention and Response team (VIPR). [R. 373-74 ¶¶5-7] He has also participated in a joint training exercise with the Orlando Police Department Special Weapons and Tactics Division (SWAT), Emergency Services Unit (ESU), and Crisis Negotiating Team (CNT), focusing on preventing, deterring, and—when necessary—responding to criminal and terrorist attacks in mass transit. [*Id.*] LYNX's bus security cameras and the rest of its security system were used and accessed as part of this exercise, and LYNX's security cameras are regularly used and accessed by law enforcement. [R. 374 ¶8]

Historically, LYNX has safeguarded its security system and its recordings and treated them as confidential and exempt from the Public Records Act. The

statutory exemptions LYNX has relied upon include section 281.301, Florida Statutes:

> Information relating to the security systems for any property owned by or leased to the state or any of its political subdivisions, and information relating to the security systems for any privately owned or leased property which is in the possession of any agency as defined in s. 119.011(2), including all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to or revealing such systems or information, and all meetings relating directly to or that would reveal such systems or information are confidential and exempt from ss. 119.07(1) and 286.011 and other laws and rules requiring public access or disclosure.

§ 281.301, Fla. Stat. (2012) (emphases added). The other statutory exemption LYNX has relied upon, section 119.071(3)(a), includes similar language:

> A security system plan or portion thereof for: a. Any property owned by or leased to the state or any of its political subdivisions; or b. Any privately owned or leased property held by an agency is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This exemption is remedial in nature, and it is the intent of the Legislature that this exemption apply to security system plans held by an agency before, on, or after the effective date of this paragraph.

§ 119.071(3)(a)(2), Fla. Stat. (2012) (emphases added). When LYNX has been a party to litigation in Florida courts, it has taken steps to maintain the confidentiality of its security system recordings. [R. 335-36 ¶¶4-10; 345-47 ¶¶4-14] Since 2010, when LYNX security footage has been requested during the course of litigation, LYNX's counsel has objected on the grounds that such footage is sensitive information relating to the security of LYNX buses, facilities,

employees, and passengers. [R. 345 ¶4; 335 ¶5] In the course of discovery in these cases, LYNX's counsel has allowed opposing counsel to view requested surveillance video at LYNX's counsel's office on LYNX's counsel's laptop or at the LYNX office because proprietary software is needed to play the video. [R. 335-36 ¶6; 345 ¶5; 347 ¶10] In the instances in which LYNX has been ordered to turn over surveillance video in court proceedings, LYNX personnel prepared the video copy limited to the material relevant to the case, and opposing counsel were required to execute and abide by a document entitled "Acceptance and Terms of Use for Confidential and Security Sensitive Materials." [R. 336 ¶7]

Other state agencies have determined that their facilities' security system recordings are confidential and exempt from the Public Records Act. For example, in his recent Amended Administrative Order Governing Security Cameras In All Courthouses Within The Ninth Judicial Circuit, Administrative Order No. 2013-19-01 (Oct. 4, 2013), Chief Judge Belvin Perry of the Ninth Judicial Circuit acknowledged that "security cameras are an integral part of the security system; and . . . in an effort to ensure the safety and security of all persons within the courthouses of the Circuit, it is necessary to restrict all records and information pertaining to the security system, including any image captured and/or recorded by the security cameras and swipe card terminals as confidential and exempt from

public disclosure . . ." [R. 282] Chief Judge Perry ordered (in part) that, effective immediately:

> 1. Each courthouse within the Ninth Judicial Circuit is designated as a secure facility.
>
> 2. The security systems operation and function, including all individual components and data/image capture and recording do contain information that would jeopardize the safety of individuals and significantly impair the prompt and efficient administration of justice and the security program if said information was not deemed confidential and exempt from public disclosure.
>
> 3. Pursuant to section 281.301, Florida Statutes, section 119.071(3),[4] Florida Statutes, and rule 2.420(c)(7), Florida Rules of Judicial Administration, all records and information pertaining to the security system are confidential and exempt from section 119.07(1), Florida Statutes, and s. 24(a) Art. I of the State Constitution.
>
> 4. The security cameras and swipe card terminals are an integral part of all courthouses within the Circuit and as such, any and all information in connection with such system or any individual component, including data/image capture and recording at any time is confidential and exempt from public disclosure pursuant to section 281.301, Florida Statutes.

[R. 283 (emphasis added)]

B. WKMG's Public Records Requests And The Underlying Action

Since December 2010, WKMG's employees have made multiple public records requests to obtain recordings from LYNX bus cameras. [R. 17 ¶18] Each

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[4] These statutes are the same statutes upon which LYNX has asserted its security recordings are confidential and exempt from the Public Records Act.

time, LYNX asserted that the recordings requested were confidential and exempt.[5] [R. 17-18 ¶19-22] On October 14, 2013, WKMG initiated this action in a Verified Complaint against LYNX alleging various violations of Article I, section 24 of the Florida Constitution and the Public Records Act. [R. 14-168] The Complaint contained four counts: Count I (Violation of Chapter 119, Florida Statutes—Reliance on Inapplicable Exemptions), Count II (Violation of Chapter 119, Florida Statutes—Requests Must Be In Writing), Count III (Violation of Chapter 119, Florida Statutes—Requestors Must Identify Themselves), and Count IV (Violation of Chapter 119, Florida Statutes—Failure to Respond to Requests or Produce Public Records in a Timely Manner). [R. 25-30] Count I is at issue in this appeal whereas Counts II and III are at issue in WKMG's cross-appeal.[6]

Count I alleges that as an agency of the State of Florida subject to the Public Records Act's provisions, "LYNX has an obligation to make available for

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[5] LYNX produced still screen shots of a driver using his cell phone while driving contained in a disciplinary file of an employee—a public record, *see, e.g.*, *Mills v. Doyle*, 407 So. 2d 348, 351 (Fla. 4th DCA 1981) (grievance records subject to disclosure)—in response to WKMG's request for records detailing the last 12 employees found to have committed "gross misconduct." [R. 18-19 ¶¶24-25] When WKMG requested the security video (not contained in the disciplinary file) from which the screen shots were made, LYNX asserted that such video was confidential and exempt and did not produce it. [R. 19 ¶28]

[6] Count IV, which concerns alleged unreasonable delays in LYNX's responses to WKMG's public records requests, remains pending in the trial court. LYNX believes Count I, which concerns the applicability of statutory public records exemptions, to be separate and distinct from Count IV.

inspection or copy any public record within its custody or control, except when a clearly stated statutory exemption applies." [R. 25] WKMG asserted that LYNX "unlawfully refused to produce to WKMG-TV the recordings requested" and "unlawfully relied on exemptions pursuant to sections . . . 119.071(3)(a), and 281.301, Florida Statutes," thereby violating section 119.07(1)(a), Florida Statutes, and Article I, Section 24(a) of the Florida Constitution. [*Id.*] WKMG further alleged that it was irreparably injured by LYNX's refusal to supply the requested records and has no adequate remedy at law; that it has a clear legal right to inspect, copy, and photograph the records; and that it is entitled to its attorneys' fees and costs. [*Id.*]

LYNX defended the action, asserting among other affirmative defenses that WKMG's claims are barred because sections 281.301 and 119.071(3)(a), Florida Statutes, not only make the records requested exempt from the public records laws, but also make them confidential.

C. The Hearings

Expedited hearings on WKMG's Complaint including Count I were held on October 23 and November 14, 2013. At the first hearing, WKMG argued a narrow view of the exemptions LYNX asserted—that the plain meaning of the security system exemptions do not encompass security equipment or data gathered from such equipment; instead they only refer to operational plans "that agencies develop

over time and put in place to respond in the future to any type of terrorist attack." [R. 582-83] In contrast, LYNX argued that the security video and audio recordings showing the range, capabilities, and vulnerabilities of its security system reveal and directly relate to the physical security of LYNX's buses and their passengers, fitting squarely into the statutory exemptions. [R. 603] LYNX also stressed that cameras mounted in its buses are not separate pieces from cameras and other security equipment at LYNX's stationary facilities; the cameras on the buses, stations, and other facilities constitute one comprehensive security system. [R. 603-04] Keeping the security recordings confidential and exempt from the Public Records Act is the only way to protect the safety and security of the passengers and employees of LYNX. [R. 607]

Summarizing the extent of the ruling to be made, the trial court inquired of WKMG's counsel whether the court should rule only on the specific requests in the Complaint or whether the court should issue a more blanket ruling that would apply to all LYNX security audio and video recordings requested at any time:

> THE COURT: Before you wrap up, just refresh my memory here. Am I ruling on specific requests that your client has made or are you looking for something more general?
>
> MR. BIRK: . . . Well, we've used specific requests as the vehicle to put the issue in front of your Honor. And we believe the Court is empowered to make a declaratory judgment, whether this exemption applies for bus video, the specific recordings made by LYNX in this case.
>
> THE COURT: In general, as opposed to specifically the ones that you're interested in?

MR. BIRK: Yes – yes, your Honor.

[R. 632-33]

During the second hearing, WKMG's counsel noted that a balancing test of the public policy in favor of open government versus the public policy of security is not appropriate in a judicial determination concerning whether the records are confidential and exempt: "There can be no public policy consideration with determining whether an exemption applies to a public records request in the usual course of business." [R. 510] LYNX's counsel asserted that while there is generally a strong public policy in favor of open government, because the records are confidential and exempt, the legislature already has spoken clearly in sections 119.071(3)(a) and 281.301 and found a stronger public policy in favor of public security that courts must follow: "[O]ur position is that the Court should not get into the policy of trying to figure out how somebody could use this information." [R. 537]

When LYNX's counsel addressed the Ninth Judicial Circuit's Administrative Order concerning the confidential and exempt nature of the courthouse security systems and their recordings, the trial court differentiated a courthouse from a bus:

> That's a whole different area because the courthouse, I think, is somewhat different than a Lynx bus. I mean, the courthouse, number one, houses a number of public officials. A courthouse is an area where emotions run high, be it in domestic court, criminal court, civil court. There have been instances of disruptions in court, and to me it's a different—it's a different arena here.

> We are talking about a public bus. People get on, get off, there's no magnetometer, no security check points to get on the bus, whereas at the courthouse here we have a rather elaborate security system before anybody can even get in here. I think that tells you it's a little bit different scenario here than talking about a public bus.

[R. 532-33]

The trial court did agree that the recordings generated by LYNX's security system relate to the security system: "I mean, it's a product of the security system, obviously the cameras generate the tapes. I think in a broad sense it relates to the security system." [R. 539] However, the court then added and used a balancing test between the general public policy of public records disclosure versus the public policy of protecting the information for security purposes. [R. 539-40] The trial court also differentiated between LYNX's buses and its bus stations: "I'm not dealing with the bus station now. That's one reason I wanted to make that clear at the outset. The only thing we are talking about at this hearing are the videos from the buses." [R. 544]

The trial court concluded the hearing by ruling:

> I think it is a close question dealing with statutory interpretation, but I'm going to ask counsel for Channel 6 to prepare a proposed order for my review that finds that the bus videos are generally public records and subject to disclosure, finding that they do not disclose or reveal a security system, that if it is deemed that they relate to the security system, that the concerns raised by Lynx are de minimis and not sufficient to overcome a strong public policy of open government, and also that there is some doubt as to whether or not these exemptions apply. So given that doubt, I have to rule in favor of disclosure.
> . . .

> I think it's a close question. It would be a good idea to have the Fifth DCA take a look at it. . . . It could be an issue of great public importance and I think it's important the Fifth DCA take a look at it.

[R. 566-69]

D. The Judgment And Notice Of Appeal

On January 2, 2014, the trial court entered its Order on Plaintiff's Verified Complaint for Mandamus to Enforce Florida's Public Records Act and for Declaratory, Injunctive and Monetary Relief ("Judgment"). [R. 468-76] In the Judgment, the trial court found that the "video and audio recordings do not fall within the scope of a 'security system plan' as defined by section 119.071(3)(a) or within the scope of section 281.301. Moreover, they do not 'relat[e] directly to' or 'reveal' LYNX's security systems." [R. 472 ¶18] The trial court reasoned that "[r]ecordings of events that occurred in the past, do not relate directly to the physical security of LYNX buses or their 'security system' or 'security system plan.' " [*Id.*] The trial court then used the balancing test it discussed during the hearings: "To the extent that the recordings would 'reveal' or 'relate to' an open and obvious security system, this Court finds that LYNX's stated security concerns are *de minimus* and not sufficient to overcome a strong public policy in favor of access to public records." [*Id.* at ¶19] The trial court concluded: "Based upon the plain language of these exemptions, the Court finds that the exemptions relied upon by LYNX, as contained in sections 119.071(3)(a) and 281.301, do not exempt or

make confidential the video and audio recordings at issue here." [*Id.* at ¶20] Accordingly, the trial court entered declaratory judgment that the statutory exemptions to the Public Records Act asserted by LYNX do not apply, but the trial court limited the Order to security recordings on LYNX buses: "This Order is limited to the types of bus recordings requested by WKMG and does not apply to recordings produced from equipment attached to LYNX's stationary buildings and facilities." [R. 473 ¶23] On January 30, 2014, LYNX filed its Notice of Appeal of the Judgment. This Initial Brief follows.

SUMMARY OF THE ARGUMENT

The trial court erred in ruling that the video and audio recordings of LYNX's security system on LYNX buses are not confidential and exempt from disclosure under sections 281.301 and 119.071(3), Florida Statutes. To be confidential and exempt under these statutes, records must either (1) relate directly to **or** (2) reveal the security system for property owned by or leased to the state or any of its political subdivisions such as LYNX. The statutes use the word "or" in the disjunctive; consequently, a record must meet only one of the requirements—relate directly to **or** reveal—in order for it to be confidential and exempt. The recordings relate directly to the security system because they are the direct product of the system, as the trial court noted. Also, because the video and audio recordings clearly illuminate the security system's capabilities and limitations, they

necessarily reveal the security system. Disclosing the security video and audio recordings to the public at large defeats the Legislature's intent and public policy findings in favor of public security in enacting the statutes.

The trial court also erred in reasoning that recordings of past events cannot relate directly to the physical security of LYNX buses or their security system. All recordings necessarily are of past events and nothing in the statutory exemptions asserted differentiates between past, present, or future events. Further, the trial court erred in inserting and using a balancing test between the general public policy in favor of producing public records on the one hand and public security on the other hand, finding LYNX's security concerns to be *de minimis*; as WKMG's counsel admitted, the statutes do not allow for a balancing of public policies by the court. Public records either meet the definition of records to be confidential and exempt or they do not. The trial court also erred in differentiating between LYNX's stationary buildings and facilities compared to LYNX's buses, when LYNX's security system is a comprehensive unit encompassing its buses and stationary buildings.

THE VIDEO AND AUDIO RECORDINGS RECORDED BY LYNX'S SECURITY AND SURVEILLANCE SYSTEM ON LYNX'S BUSES ARE CONFIDENTIAL AND EXEMPT UNDER SECTIONS 281.301 AND 119.071(3), FLORIDA STATUTES.

Standard of Review

The standard of review of a trial court's interpretation and application of a statute is de novo. *Heilman v. State*, 135 So. 3d 513, 513 n.2 (Fla. 5th DCA 2014) (citing *State v. Wonder*, 128 So. 3d 867 (Fla. 4th DCA 2013)); *see also Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So. 3d 828, 843 (Fla. 2011) (reviewing de novo the application of a statutory presumption as it "is also a matter of statutory interpretation") (citing *Fla. Birth–Related Neuro. Injury Comp. Ass'n v. Dep't of Admin. Hearings,* 29 So. 3d 992, 997 (Fla. 2010)).

Argument

"The Florida Constitution provides that the public shall have full access to government records, though exemptions may be enacted by a two-thirds vote of each house of the Legislature." *Rameses, Inc. v. Demings*, 29 So. 3d 418, 421 (Fla. 5th DCA 2010). "[T]he right of access to public records is virtually unfettered, save for statutory exemptions designed to achieve a balance between an informed public and the ability of the government to maintain secrecy in the public interest." *Id.* (citing *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985)). Indeed, the Legislature has enacted a number of exemptions to the general requirement that each state agency has a duty to provide access to its public records. *See, e.g.*, §

119.071, Fla. Stat. (2012). As a state agency, it is LYNX's burden to demonstrate that a statutory exemption applies. *Weeks v. Golden*, 764 So. 2d 633, 635 (Fla. 1st DCA 2000).

LYNX's security video and audio recordings are confidential and exempt from the Public Records Act pursuant to two statutory exemptions: (1) section 281.301, Florida Statutes and (2) section 119.071(3)(a)(2), Florida Statutes. These exemptions preclude production of records which either relate to **or** reveal security systems and expressly make such records confidential. As noted above, section 281.301, enacted in 1987, provides:

> Information relating to the security systems for any property owned by or leased to the state or any of its political subdivisions, and information relating to the security systems for any privately owned or leased property which is in the possession of any agency as defined in s. 119.011(2), including all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to or revealing such systems or information, and all meetings relating directly to or that would reveal such systems or information are confidential and exempt from ss. 119.07(1) and 286.011 and other laws and rules requiring public access or disclosure.

§ 281.301, Fla. Stat. (emphases added).

Following the terrorist attacks on September 11, 2001, the Florida Legislature enacted section 119.071(3)(a), Florida Statutes; section 281.301 was not repealed and remains in effect. *See* House of Representatives Select Committee on Security: Analysis of Bill # CS/SB 16-C (Dec. 3, 2001). As a result,

while the security-related exemption contained in section 281.301 remains in place, section 119.071(3)(a) is its companion security exemption and the statutes are often cited jointly. Section 119.071(3)(a)(2) provides:

> A security system plan or portion thereof for: a. Any property owned by or leased to the state or any of its political subdivisions; or b. Any privately owned or leased property held by an agency is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. This exemption is remedial in nature, and it is the intent of the Legislature that this exemption apply to security system plans held by an agency before, on, or after the effective date of this paragraph.

§ 119.071(3)(a)(2), Fla. Stat. (emphases added). Thus, section 119.071(3)(a) makes confidential and exempt a security system plan or portion thereof, and "security system plan" includes all "Records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to the physical security of the facility or revealing security systems." § 119.071(3)(a)(1), Fla. Stat. (emphasis added).

In short, both sections 281.301 and 119.071(3)(a) make confidential and exempt records that "relate directly to" **or** "reveal" a security system or any part thereof. As "or" is used in the disjunctive in both statutes, LYNX must show that the records WKMG requested **either** relate directly to LYNX's security system **or** reveal LYNX's security system. Although meeting only one of the terms is required, the records requested in fact meet both, and the statutes make

confidential and exempt the video and audio recordings from LYNX's security system cameras and prohibit their disclosure.

A. The Trial Court Erred In Holding That LYNX's Bus Security Video and Audio Recordings Do Not Relate To Or Reveal LYNX's Security System And Security System Plan Under Sections 281.301 And 119.071(3)(a), Florida Statutes.

1. The Plain Meaning Of The Statutes Makes The Security Video And Audio Recordings Confidential and Exempt.

LYNX's video and audio recordings are confidential and exempt under the Public Records Act because they relate directly to and reveal LYNX's security system under section 281.301. The recordings also relate directly to and reveal LYNX's security system plan for its property under section 119.071(3)(a). In constructing and applying these statutes to LYNX's security recordings, "[l]egislative intent is the polestar that guides [the] analysis." *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 367 (Fla. 2013) (citing *Bautista v. State*, 863 So. 2d 1180, 1185 (Fla. 2003)). An analysis of legislative intent begins with the plain meaning of the statute; if statutory language 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) (citations omitted). "[S]ignificance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as

mere surplusage." *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 606 (Fla. 2006) (citing *Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003), which rejected a party's interpretation of a statute as it would require the Court to ignore language in another sentence of the same statute). As sections 281.301 and 119.071(3)(a) are both valid statutes with clear and unambiguous language, a court must give weight to all terms in both statutes without resort to statutory interpretation and construction. Indeed, case law interpreting and applying these statutes cites and analyzes them jointly. *See, e.g., Critical Intervention Servs., Inc. v. City of Clearwater*, 908 So. 2d 1195, 1196-97 (Fla. 2d DCA 2005).

Section 281.301 exempts "[i]nformation relating to the security systems for any property owned by or leased to the state or any of its political subdivisions" including "all records, information, photographs, audio and visual presentations . . . relating directly to or revealing such systems or information." *Id.* (emphasis added). LYNX buses are clearly property owned or leased by LYNX, a political subdivision of the state, and they have security system equipment installed on them. While "records" and "information" are not defined, a "public record" (presumably encompassing a smaller universe of documents than "records") is defined in chapter 119 as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material,

regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." § 119.011(12), Fla. Stat. (emphasis added); *see also Rameses*, 29 So. 3d at 420 n.1 ("Videotape recordings fall within the ambit of chapter 119, Florida Statutes" as the definition of "public records" includes "sound recordings, films, photographs and tapes") (quoting § 119.011(12), Fla. Stat. (2008)). Additionally, assuming arguendo that video and audio footage do not constitute a "record", the statute also encompasses photographs and audio and visual presentations, which would encompass the recordings.[7] Based upon the plain wording of section 281.301, the recordings—at most—must *relate directly to*[8] security systems or *reveal* security systems in order for such recordings to fall within the exemption. The security video and audio recordings, direct products of LYNX's security system that reveal the capabilities and vulnerabilities of the

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[7] The description of what falls within the ambit of the statutes begins with the word "including" for section 281.301 and "includes" for section 119.071(3)(a). The word "include" is a term of enlargement, not of limitation, and conveys that there are other items that fit within the definition though not specifically enumerated by statute. *Samantar v. Yousuf*, 560 U.S. 305, 317 (2010) ("use of the word 'include' can signal that the list that follows is meant to be illustrative rather than exhaustive"); *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968) ("The word 'includes' is usually a term of enlargement and not of limitation. . . . It therefore conveys the conclusion that there are other items includable, though not specifically enumerated by the statutes.") (citations omitted).

[8] The terms "relating to" and "relating directly to" are both used in section 281.301.

system by disclosing areas of the bus and timeframes recorded, relate directly to and reveal LYNX's security system. Likewise, under section 119.071(30(a), to constitute a "security system plan" for property owned by or leased to the state and therefore be deemed confidential and exempt, LYNX's security recordings must *relate directly to* the physical security of LYNX's facilities[9] or *reveal* LYNX's security system. § 119.071(3)(a)(1), Fla. Stat.

The cameras—and resulting video and audio footage—on LYNX's buses and at its other facilities and stations necessarily relate directly to LYNX's security system under sections 281.301 and 119.071(3)(a); they are an integral part of a security system LYNX employs to protect its customers, employees, and property including buses. LYNX installed the comprehensive security system in part using grant money obtained from the United States Department of Homeland Security. [R. 373 ¶6] LYNX recently participated in a joint training exercise with the Orlando Police Department Special Weapons and Tactics Division (SWAT), Emergency Services Unit (ESU), and the Crisis Negotiating Team (CNT), which focused on how to prevent, deter and, when necessary, respond to criminal and terrorist attacks in a mass transit environment. [R. 373 ¶7] The cameras were used and accessed as part of this exercise. [*Id.*] The cameras and their recordings are

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[9] For definitions of "facility," *see infra* Part D of this Brief.

also regularly used and accessed by law enforcement. [R. 374 ¶8] Thus, the cameras and the recordings they create relate directly to LYNX's security system.

The cameras and their footage also reveal LYNX's security system. LYNX has installed placards on its buses notifying passengers that they may be subject to video and audio recording. Some of its cameras may be in plain sight but may be encased in enclosures used to obscure the cameras and their objects of focus. These enclosures may also be used for deterrence purposes if cameras are missing or inoperable. Other cameras and recording devices may be completely hidden and imperceptible to the public. As such, producing security video and audio footage from the cameras to the public (or having to reveal that there is no video or audio footage in certain cases) would reveal the security systems in place because it would reveal: (1) whether there actually is a camera where one appears to be; (2) whether there is a camera where one does not appear to be; (3) whether a camera is working; (4) what specifically a particular camera is recording (including whether there is a blind spot inside or outside of a bus); and (5) whether cameras can zoom, pan or focus on a particular objection, record images in dim light or no light conditions, or record audio.[10] Furthermore, the cameras themselves are not the

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[10] Likewise, LYNX's use of or supplying video in other court proceedings does not waive the confidential and exempt status of the recordings. *See Rameses*, 29 So. 3d at 422-23 (finding defendants not entitled to unredacted undercover videotapes

only security devices that LYNX employs as part of its security system. Additional layers of security may be in place (both technological as well as human), which could be revealed by the security video and audio recordings. Thus, the security video and audio recordings reveal LYNX's security system for purposes of the security exemptions in sections 281.301 and 119.071.

The Second District Court of Appeal addressed the definition of "security system plan" and what it means to reveal security systems in *Critical Intervention Services.* In that case, a security services provider sought from the City of Clearwater the identity of security system permit holders who had been levied a penalty for violating the city's alarm ordinance for false alarms as well as records showing the amount of fines or service charges levied. 908 So. 2d at 1195. The information sought would disclose which businesses and residences are protected by security systems and which are not. *Id.* at 1196. Reasoning that disclosing the requested information would imperil the safety of persons and property, the Second District affirmed the trial court's dismissal of the complaint and held that sections 281.301 and 119.071, Florida Statutes, make confidential and exempt such information, precluding its disclosure. *Id.* at 1196-97.

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through later public records request that they were entitled to through discovery in criminal action against them).

Applying the exemption to "all records revealing a security system" as required by sections 281.301 and 119.071, the Second District adopted the opinion of the Florida Attorney General stating:

> [O]ne of the most fundamental rules of statutory construction is that a court must give a statutory term its plain and ordinary meaning. The term "all" means "every; any whatever" and would appear to provide no limitation on the type or form of information that may fall within the statute's coverage, if such information "reveals" a security system. To "reveal" is "to make something publicly known; divulge."

Id. at 1196-97 (quoting Op. Att'y Gen. 04-28 at 3). The Court held that by providing the information requested—the list of security system permit holders—individuals who do not have security systems are also revealed. *Id.* This is LYNX's valid concern as well—producing the security video and audio recordings would expose the security system's capabilities and vulnerabilities; to be able to see where the cameras are recording allows one to know where they are not recording.

Further, nowhere in section 119.071(3)(a)(1)'s non-exhaustive list of records and information that constitute security system plans is a mention of, or information relating to, security system permit holders. Nevertheless, the Second District correctly identified that, in defining the term "security system plan," the Legislature made the term apply to all records and information that reveal security systems and not just those records and information identified in the non-exclusive list contained in the statute. Just as records and information identifying alarm

permit holders would reveal their security systems, so too would video and audio recorded by LYNX's cameras.

In the trial court proceedings, WKMG relied in part on the First District Court of Appeal's opinion in *Marino v. University of Florida*, 107 So. 3d 1231 (Fla. 1st DCA 2013), as support that LYNX's security camera video and audio recordings should be produced. *Marino* involved a public records request for records concerning the physical location of non-human primates used in research at the University of Florida. *Id.* at 1232. The First District found that such records are not confidential and exempt. *Id. Marino* is inapplicable to this case because *Marino* required the university to disclose the physical location of public animal research facilities, as the location of such facilities was not part of a security system or plan. *Id.* at 1232-34. The First District also discussed that the Legislature created a specific exemption under section 381.95, Florida Statutes, to exempt the location of certain facilities from the Public Records Act, but animal research facilities were not included in the list of facilities exempted. *Id.* at 1233-34. By contrast, LYNX's security video and audio recordings fall squarely under the applicable statutes and, as with the Second District Court of Appeal in *Critical Intervention Services*, this Court should read the term "all records [and] information" to mean recordings that reveal the capabilities (or the lack thereof) of LYNX's security systems and plan.

LYNX's approach has been taken by Florida's Ninth Judicial Circuit with respect to its own security cameras and surveillance video. As noted above, the Amended Administrative Order Governing Security Cameras In All Courthouses Within The Ninth Judicial Circuit, No. 2013-19-01 (Oct. 4, 2013), acknowledged that "security cameras are an integral part of the security system; and . . . . in an effort to ensure the safety and security of all persons within the courthouses of the Circuit, it is necessary to restrict all records and information pertaining to the security system, including any image captured and/or recorded by the security cameras and swipe card terminals as confidential and exempt from public disclosure . . ." [R. 282] The Administrative Order ordered:

> The security cameras and swipe card terminals are an integral part of all courthouses within the Circuit and as such, any and all information in connection with such system or any individual component, including data/image capture and recording at any time is confidential and exempt from public disclosure pursuant to section 281.301, Florida Statutes.

[R. 283 (emphasis added)] Like the cameras in the Ninth Judicial Circuit's courthouses, LYNX's cameras and their footage are confidential and exempt because the cameras are part of a comprehensive security system. Disclosure of any portion of that system, including video or audio captured from that system, would compromise the integrity of the security system. Moreover, sections 281.301 and 119.071(3) do not distinguish between security systems or security system plans for different public agencies, i.e., courthouses, bus terminals or buses,

or other public agencies. Therefore, treating public agencies differently concerning their security systems or security system plans (or any information revealing them) contravenes the rules of statutory construction and is inappropriate.

2. Because The Video and Audio Recordings Are Confidential And Exempt, LYNX Cannot Produce Them To WKMG And Redactions Cannot Be Made To The Recordings.

Not only do sections 281.301 and 119.071(3)(a) make LYNX's security video and audio recordings exempt; the Legislature also designated such records to be confidential.[11] The meaning of "confidential and exempt" in the context of the Public Records Act was addressed by this Court in *WFTV, Inc. v. School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004):

> There is a difference between records the Legislature has determined to be exempt from The Florida Public Records Act and those which the Legislature has determined to be exempt from The Florida Public Records Act and confidential. *If information is made confidential in the statutes, the information is not subject to inspection by the public and may only be released to the persons or organizations designated in the statute . . .*

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[11] Section 281.301 states that all records falling within the exemption are "confidential and exempt from ss. 119.07(1) and 286.011 and other laws and rules requiring public access and disclosure." § 281.301, Fla. Stat. (emphases added). Likewise, section 119.071(3)(a) states that records falling within the stated exemption are "confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution." § 119.071(3)(a)(2), Fla. Stat. (emphases added).

> If records are not confidential but are only exempt from the Public Records Act, the exemption does not prohibit the showing of such information.[12]

WFTV, 874 So. 2d at 53-54 (emphasis added).[13] This distinction was more recently noted by the Florida Attorney General, stating that "the Legislature's removal of a reference to 'confidentiality' [in the context of a change to the exemption for law enforcement photographs in section 119.071(4)(d), Florida Statutes] and the insertion of a reference to 'exempt status' and 'exemption' appears to reflect the Legislature's intent to clarify that the information is exempt from the mandatory disclosure provisions of Chapter 119, Florida Statutes, rather than confidential." Fla. Att'y Gen. Informal Advisory Legal Op. to Hon. Don R. Amunds, Chair, Okaloosa County Bd. of County Comm'rs (Jun. 8, 2012), available at 2012 WL 2168293.

To the extent WKMG argues—as it did in the trial court proceedings—that confidential information from the security recordings can be redacted and then

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[12] The same distinction was acknowledged in the legislative history to the 2006 reauthorization of section 119.071(3)(a), Florida Statutes. *See* House of Representatives Staff Analysis: Bill # HB 7033 n.1 (Mar. 22, 2006).

[13] In *WFTV*, a television station sued the school board seeking disclosure of video recordings of students on school buses filed and retained as education records and transportation student discipline forms. 874 So. 2d at 48-50. This Court agreed with the school board that the records were confidential and exempt from production under section 228.093, Florida Statutes, and could not be produced even with redactions because the video recordings and discipline forms themselves were confidential and exempt. *Id.* at 53-54.

produced or that any previous disclosure of records relating to the security video and audio recordings—such as contracts for security systems or still photographs—destroyed the recordings' confidential and exempt status, such an argument is unsupported by the law. An agency cannot waive the confidential status of a document. *Fla. St. Univ. v. Hatton*, 672 So. 2d 576, 579 (Fla. 1st DCA 1996). Further, the recordings cannot be redacted and then produced because the recordings themselves in this case are confidential and exempt. *See WFTV*, 874 So. 2d at 53-54 (surveillance videotapes could not be redacted and produced because videotapes themselves were confidential and exempt); *Hatton*, 672 So. 2d at 579 (statute did not provide for release of edited information in confidential and exempt records). Nothing in sections 281.301 or 119.071 permits confidential public records to be released to anyone other than those persons or organizations designated in the statutes. *WFTV*, 874 So. 2d at 53-54. WKMG is not a person or organization designated in the statute to receive records made confidential. Accordingly, because the video and audio recordings directly relate to and reveal LYNX' security system, they are confidential and exempt under sections 281.301 and 119.071(3)(a), Florida Statutes, and cannot be produced.

B. The Trial Court Erred In Determining That Security System Recordings Of Past Events Do Not Relate Directly To LYNX's Security System Or Plan.

In its Judgment, the trial court held: "Recordings of events that occurred in the past, do not relate directly to the physical security of LYNX buses or their 'security system' or 'security system plan.' " [R. 472 ¶18] Such a holding imposes an artificial distinction between historical records, which are not confidential and exempt under the trial court's reasoning, and future events or operational plans for the future, which would be confidential and exempt. This reasoning is contradicted squarely by the plain language of the exemptions, which exempt all records that relate directly to or reveal a security system or a security system plan. Indeed, if the trial court's reading of the statutes was correct, then the Ninth Judicial Circuit's Administrative Order exempting its own historical records from its security cameras would be of no force and effect, as that Administrative Order applied to historical video and/or audio recordings ("data/image capture and recording at any time is confidential and exempt"), not security plans for future use. Thus, the trial court's distinction is unworkable and case law does not support it. In *Critical Intervention Services*, the Second District held that records disclosing alarm permit holders who had been levied a penalty or fine disclosed the identity of a security system owner at a specific moment in time—in the past—and therefore revealed a security system. 908 So. 2d at 1196-97. An illustration

demonstrating the unworkable effect of the trial court's holding is that an individual could leave an item on a bus to determine whether a security camera records it and reveals it as a test for a future event, such as planting a bomb on a bus. This is a "past event" that directly relates to a possible future event, but the video recording of the event would not be confidential and exempt.[14]

If the Legislature had intended for records of past events not to be confidential and exempt, it would have stated so, as it did in section 1012.31, Florida Statutes (2012), at issue in *Morris Publishing Group, LLC v. Florida Department of Education*, 133 So. 3d 957, 959-61 (Fla. 1st DCA 2013). This statute states that public school system employee evaluations shall be confidential and exempt only "until the end of the school year immediately following the school year in which the evaluation was made." § 1012.31(3)(a)(2), Fla. Stat. (2012). The Legislature also limited the timeframe for confidential and exempt records in section 456.073(10), Florida Statutes, at issue in *Department of Health v. Poss*, 45 So. 3d 510 (Fla. 1st DCA 2010), which states:

> The complaint and all information obtained pursuant to the investigation by the [Department of Health] are confidential and exempt from s. 119.07(1) until 10 days after probable cause has been found to exist by the probable cause panel or by the department, or

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[14] Video recordings of past events can also play an integral role in catching perpetrators and solving crimes; they tell us how a crime happened, why it happened, and who is responsible.

> until the regulated professional or subject of the investigation waives his or her privilege of confidentiality, whichever occurs first.

§ 456.073(1), Fla. Stat. (2009). No such time limitation on past events exists in the statutes at issue and the trial court erred in implementing one. In addition, section 119.071(3)(a) is remedial in nature and applies to security systems already in place on the effective date, recognizing the confidential nature of "past" recordings and other records already in existence. Thus, the trial court erred in reasoning that the exemptions do not apply to recordings of past events.

C. The Trial Court Erred In Employing A Balancing Test Between The General Public Policy In Favor Of Access To Public Records On The One Hand And Public Security On The Other Hand. The Legislature Already Conducted A Balancing Test Of Public Policy In Deeming Such Records Confidential And Exempt.

In its reasoning, the trial court implemented a public policy balancing test not written in sections 281.301 or 119.071(3). The trial court ruled: "To the extent that the recordings would 'reveal' or 'relate to' an open and obvious security system, this Court finds that LYNX's stated security concerns are *de minimus* and not sufficient to overcome a strong public policy in favor of access to public records." [R. 472 ¶19] This is the incorrect standard to decide whether LYNX's security recordings should be produced. Nowhere in the statutes is a balancing test discussed or referenced, as WKMG's counsel in fact pointed out to the trial court. Further, utilizing a balancing test as the trial court did significantly diminishes the clear intent of the statutes.

In enacting sections 281.301 and 119.071(3)(a), the Legislature pronounced a public policy in favor of public security for records relating directly to or revealing security systems or security system plans, and declared that this public policy outweighs the public policy of open government. Thus, under these statutes, the court's role is to determine solely whether a public record is confidential and exempt or not. If a record relates directly to or reveals a security system or plan, it meets the statutes' standard and it cannot be disclosed, regardless of the level of security concern compared to the general public policy in favor of producing public records.[15] Thus, the trial court erred in using a balancing test of

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[15] The First District has employed a balancing test between the judicially-enacted procedural rules of discovery and the confidential and exempt nature of certain public records in pending actions involving administrative proceedings, unlike the present case, which is an action solely concerning whether records should be produced (and thus invokes no procedural rules to be weighed). In *Poss*, the First District held: "Exemption from disclosure under section 119.071(1) does not also exempt a public record from discovery in administrative proceedings," but the Court noted: "Where confidentiality has been at issue, however, our decisions have turned on the presence or absence of statutory language limiting or defining the types of proceedings in which confidential public records may be disclosed and used, and a balancing of the parties' interests or competing public policies." 45 So. 3d at 512-13 (summarizing its decisions on appeal from administrative proceedings including *Hatton*, 672 So. 2d at 576, an administrative action concerning confidential student conduct code violation records, and *H.J.M. v. B.R.C.*, 603 So. 2d 1331 (Fla. 1st DCA 1992), a medical malpractice action involving confidential information held by the Department of Professional Regulation, and citing *E. Cement Corp. v. Dep't of Envtl. Reg.*, 512 So. 2d 264, 265-66 (Fla. 1st DCA 1987), an administrative action discovery dispute involving confidential trade secrets). In contrast, this case does not involve discovery in litigation—administrative or

competing public policies in determining that the video and audio recordings should be produced.

D. The Trial Court Erred In Differentiating Between LYNX's Buses And LYNX's Stationary Buildings And Facilities In Determining Whether The Security System Exemptions Apply.

The trial court expressly limited its Judgment "to the types of bus recordings requested by WKMG and [stated that it] does not apply to recordings produced from equipment attached to LYNX's stationary buildings and facilities." [R. 473 ¶23] The applicable statutes do not make a distinction between stationary buildings and buses appropriate; the statutes simply concern the security systems and security system plans for property and facilities owned by the state. The trial court's ruling would draw an improper artificial distinction between Sunrail and other trains and stations, airplanes and airports, and the like.

Buses and stationary buildings constitute both facilities and property owned by LYNX, a political subdivision of the state. "The term 'facility' is defined as '[s]omething that is built or installed to perform some particular function."[16]

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otherwise—so a balancing test between procedural rules and statutory confidentiality is inappropriate.

[16] A "facility" has been defined in other scenarios to include motor vehicles. *Fla. E. Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1333 (11th Cir. 2001) (noting amendment to Interstate Commerce Act of definition of "transportation to 'include cars and other vehicles and all instrumentalities and facilities of shipment or carriage' ") (emphasis added); *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 85 F.3d 1514, 1520 (11th Cir. 1996) (noting that the Comprehensive

Williams v. State, 618 So. 2d 323, 325 (Fla. 3d DCA 1993) (quoting *Black's Law Dictionary* 531 (5th ed. 1979)). Buses are built to transport passengers, a particular function. Even if buses do not meet the definition of "facility," they are surely "property owned by or leased to the state or any of its political subdivisions" and have security systems, fitting the definition of sections 281.301 and 119.071(3). "Property" is "The right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel)." Black's Law Dictionary 1335 (9th ed. 2009). The statutes do not allow for an artificial separation between buses and their stations just because the buses left the station. As such, the trial court erred in drawing an artificial distinction between LYNX's buses and stationary buildings in ordering the bus security recordings to be produced.

CONCLUSION

For the reasons expressed above, LYNX requests that this Court find that the records requested are confidential and exempt under the applicable statutory provisions.

Environmental Response, Compensation, and Liability Act (CERCLA) defines a "facility" to include "any building, structure, installation, equipment, pipe or pipeline . . . , well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft") (emphasis added); *see also* 28 C.F.R. § 35.104 (2012) (in regulations concerning nondiscrimination on basis of disability in government services, "*Facility* means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located") (emphasis added).

Respectfully submitted,

/s/ Carrie Ann Wozniak
PATRICK T. CHRISTIANSEN (146230)
E. GINNETTE CHILDS (0298130)
CARRIE ANN WOZNIAK (12666)
Akerman LLP
420 South Orange Avenue
Suite 1200
Orlando, FL 32801-4904
Telephone: (407) 423-4000
Facsimile: (407) 843-6610
pat.christiansen@akerman.com
ginny.childs@akerman.com
carrieann.wozniak@akerman.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of May, 2014, I served the foregoing document via e-mail to Edward L. Birk, Esq., Marks Gray, P.A., 1200 Riverplace Blvd., Suite 800, Jacksonville, FL 32207, ebirk@marksgray.com and Tyler J. Oldenburg, Esq., Marks Gray, P.A., 1200 Riverplace Blvd., Suite 800, Jacksonville, FL 32207, toldenburg@marksgray.com.

/s/Carrie Ann Wozniak
CARRIE ANN WOZNIAK

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/Carrie Ann Wozniak
CARRIE ANN WOZNIAK

Question 22

Initial Brief, *Lucas Games Inc. v. Morris AR Associates, LLC*, 197 So. 3d 1183 (Fla. 4th DCA 2016).

IN THE FOURTH DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA

CASE NO.: 4D15-1516

L.T. NO.: 13000952CAAXMX

LUCAS GAMES, INC. and LUC MARCOUX,

Appellants,

v.

MORRIS STUART ASSOCIATES, LLC,

Appellee.

INITIAL BRIEF OF APPELLANTS, LUCAS GAMES, INC. AND LUC MARCOUX

CARRIE ANN WOZNIAK (12666)
Akerman LLP
420 South Orange Avenue
Suite 1200
Orlando, FL 32801-4904
Telephone: (407) 423-4000
Facsimile: (407) 843-6610
Email:
carrieann.wozniak@akerman.com
Email:
karilynn.alhasnawi@akerman.com

JONATHAN S. ROBBINS (989428)
Akerman LLP
Las Olas Centre II - Suite 1600
350 E. Las Olas Boulevard
Ft. Lauderdale, Florida 33301
Telephone: (954) 463-2700
Facsimile: (954) 463-2224
Email:
jonathan.robbins@akerman.com

Attorneys for Appellants

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STATEMENT OF CASE AND FACTS[1]

Introduction

Defendants/Appellants, Lucas Games, Inc. ("**Lucas Games**") and Luc Marcoux ("**Mr. Marcoux**") appeal errors in a Final Judgment in favor of Plaintiff/Appellee Morris Stuart Associates, LLC ("**Morris**") entered by the Nineteenth Judicial Circuit in and for Martin County, Florida in the instant action.

This case arises out of Lucas Games' inability to perform its contractual obligations under a lease following material changes to Florida's gambling laws. The trial court granted Morris's motion for summary judgment, finding that Lucas Games' affirmative defenses—illegality, impossibility of performance, and frustration of purpose—failed and Morris was entitled to judgment as a matter of law. The trial court erred in holding that the doctrines of illegality, impossibility of performance, and frustration of purpose did not release Lucas Games from its obligations under the lease.

Background

Morris, as Landlord, and Mia Gaming LLC, former owner/operator of Vegas Fun, as Tenant, entered into a lease ("the Lease") on November 1, 2008 for premises located in Stuart, Florida for the purpose of operating an adult

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[1] All record references are to volume and page number (*e.g.* [V1 1] references Record Volume 1, page 1).

entertainment arcade. [V1 20-73] On March 1, 2010, Mia Gaming assigned the Lease with Morris's consent to Barrick Enterprises, Inc., another entity who thereafter operated Vegas Fun on the leased premises. [V1 74-75] On February 5, 2013, Lucas Games bought Vegas Fun and the Lease was assigned to Lucas Games from Barrick Enterprises, Inc. with Morris's consent. [V1 79-80]

The Lease contains the following requirements:

(1) The leased premises could be used "[o]nly for the operation of an entertainment arcade for persons over the age of 18 years old and for no other use or purpose" [V1 23 § 1.1(p); 38 § 8.1];

(2) The tenant was required to conduct business under the trade name "Vegas Fun and no other name" [V1 23 § 1.1(q); 38 § 8.1];

(3) Vegas Fun must "continuously operate Tenant's Business [an adult entertainment arcade] under Tenant's Name [Vegas Fun] in the entire Premises during each hour of the Lease Term when Tenant is required to be open for business . . . , fully staffed, stocked, and fixtured" [V1 23 § 1.1(r); 38 § 8.2]; and

(4) The operation of "coin-operated amusement devices [or] games" in the leased premises is prohibited. [V1 39 § 8.4; 60 § 10]

Vegas Fun utilized a network of computers on which customers could play slot machine-like games and win prizes such as gift cards. [V4 610] Such a

business was legal until April 2013, when the Florida Legislature amended section 849.16, Florida Statutes, (the "2013Amendment") to ban certain types of gaming machines—those based on chance and those that involve slot machine style gameplay like those located in Vegas Fun—outside of designated casinos (Vegas Fun was not a designated casino). *See* § 849.16, Fla. Stat.[2]

After the 2013 Amendment's enactment and in an effort to determine a way to remain in business and legally perform its obligations under the Lease, Lucas Games contacted Martin County law enforcement to discuss the possibility of altering its gaming machines to comply with the new law. [V5 947] While retrofitting the gaming machines was physically possible, the Martin County Sheriff's office told Lucas Games that retrofitted machines would not comply with the law, that Vegas Fun could not operate legally, and that it would be shut down in the event it attempted to reopen. [V3 477; 610-13] On June 13, 2013, Lucas Games sent Morris a letter explaining the impact of the recent legislation on its ability to perform under the Lease. [V5 949 ("Due to circumstances beyond its

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[2] The law provided an exception for skill-based "amusement games . . . which operate by means of the insertion of a coin," so long as these amusement games did not award prizes worth more than seventy-five cents and were "operated for the entertainment of the general public and tourists." *See* § 849.161, Fla. Stat. (2013) However, the Lease prohibited operation of "coin-operated amusement" devices and games. [V1 39 § 8.4; 60 at § 10 ("Tenant shall not permit any coin-operated amusement devices and games in the Premises.")]

control Lucas Games, Inc. has had to shut its doors permanently, to do otherwise would violate Florida law.")]

Procedural History

Morris filed suit against Lucas Games, Mr. Marcoux, and other parties not involved in this appeal in June 2013. Morris's Amended Complaint, the operative pleading in the trial court proceedings, alleged in relevant part breach of the Lease against Lucas Games (Count I); breach of guaranty against Mr. Marcoux (Count II); and foreclosure of Morris's security interest (Count IV). [V2 380-92] Lucas Games and Mr. Marcoux answered the Amended Complaint, denying that Lucas Games was required to continue paying rent after section 849.16, Florida Statutes, was amended and alleging illegality, impossibility of performance, and frustration of purpose as affirmative defenses. [V2 398-404]

In December 2014, Morris moved for final summary judgment, agreeing that section 849.16 was amended to make "certain types of arcade games (those that function like slot machines) illegal to use outside of legally approved casinos," and the new statute defined illegal games "as those that are operated by a coin, device, code, etc., and allow the user to be entitled to any item of value as a result of any 'element of chance.' " [V3 435, 439] Morris argued that the doctrines of illegality, impossibility of performance, and frustration of purpose did not excuse Lucas Games' obligations under the Lease because Lucas Games could still perform

under the Lease, even if a business that would be legal under the new statute would be profitless and burdensome. [V3 443] Lucas Games and Mr. Marcoux opposed the motion for summary judgment, arguing that the Lease clearly specifies the only type of operation Vegas Fun was able to engage in, including the name of the business, which clearly indicated casino games, and the Lease provided no option to operate in another fashion. [V5 932] Thus, Lucas Games had no choice but to shut down operations, and illegality, impossibility of performance, and frustration of purpose excused performance under the Lease. [V5 935-36]

After a hearing, the trial court granted Morris's motion for summary judgment and entered a partial final summary judgment against Lucas Games and Mr. Marcoux, finding in relevant part that the "affirmative defenses of frustration of purpose, impossibility of performance and illegality fail as a matter of law." [V6 1011] The trial court found that Lucas Games and Mr. Marcoux breached the Lease and Guaranty due to their failure to pay rent for May 2013 and all subsequent months, and entered judgment in Morris's favor in the amount of $681,603.43, including accelerated rent. [V6 1011-12] This appeal followed.

SUMMARY OF THE ARGUMENT

Lucas Games' and Mr. Marcoux's performance under the Lease and Guaranty at issue is excused due to a 2013 change to Chapter 849, Florida Statutes, which expanded the definition of outlawed slot machines or devices to include

"any machine or device or system or network of devices" which, upon activation by insertion of money, coins, or the like, entitles a user to receive any piece of money, credit, or the like or secure additional chances or rights to use the machine. § 849.16, Fla. Stat. (2013). This expanded definition includes Vegas Fun's system of computers, making the operation of Vegas Fun illegal. While the statutory scheme contained a limited safe harbor provision for games of skill using coins for activation at the time when Lucas Games stopped paying rent and prior to July 2015, the Lease forbade coin-operated amusement games. Lucas Games also could not change its business due to the restrictions in the Lease that the premises be used only for an adult entertainment arcade. Therefore, Lucas Games could not comply with the Lease and the law.

Lucas Games' nonperformance should also be excused due to impossibility of performance and frustration of purpose. The impossibility doctrine applies when the purpose for which the contract is made has become impossible to perform. Frustration of purpose applies when a party finds that the purpose for which it bargained, which purpose is known to the other party, has been frustrated because of a failure of consideration or impossibility of performance. The change in law made it impossible for Lucas Games to be in compliance with the Lease's terms and the law, and the purpose for which Lucas Games bargained, namely operating an adult entertainment arcade, was frustrated due to the change in law.

Thus, summary judgment in Morris's favor was inappropriate and should be reversed.

STANDARD OF REVIEW

A *de novo* standard of review applies to a grant of summary judgment. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000) The same standard applies to a trial court's decision construing a contract, *Smith v. Shelton*, 970 So. 2d 450, 451 (Fla. 4th DCA 2007) (citation omitted), and to interpretation of a statute. *Brown v. City of Vero Beach*, 64 So. 3d 172, 174 (Fla. 4th DCA 2011) (citing *Tasker v. State*, 48 So. 3d 788, 804 (Fla. 2010)).

ARGUMENT

I. LUCAS GAMES' NONPERFORMANCE UNDER THE LEASE IS EXCUSED BECAUSE THE LEASE IS VOID AS AN ILLEGAL CONTRACT.

A. The Amendments To Chapter 849, Florida Statutes.

Section 849.16, Florida Statutes, defines machines outlawed by the provisions of the larger anti-gambling statutory scheme. Before the 2013 Amendment at issue in this appeal, the last substantive amendment to section

849.16 occurred in 1989.[3] The 1989 version defined a slot machine or device as follows:

> Any machine or device . . . that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other outcome of such operation unpredictable by him, may:
>
> (a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade; or
>
> (b) Secure additional chances or rights to use such machine, apparatus, or device, even though it may, in addition to any element of chance or unpredictable outcome of such operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value."

§ 849.16, Fla. Stat. (1989). Systems or networks of devices such as Vegas Fun's were not contemplated by this statute and therefore were legal.

The pre-2013 statutory scheme included a safe harbor provision that rendered the anti-gambling statutes inapplicable to "amusement games" as defined in section 849.161, Florida Statutes. The safe harbor provision provided protection for family arcades by defining amusement games as

> games or machines which operate by means of the insertion of a coin and which by application of skill may entitle the person playing or

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[3] A 1997 amendment removed gender-specific references to human beings. § 849.16, Fla. Stat. (1997).

> operating the game or machine to receive points or coupons which may be exchanged for merchandise only, excluding cash and alcoholic beverages, provided the cost value of the merchandise or prize awarded in exchange for such points or coupons does not exceed 75 cents on any game played.

§ 849.161, Fla. Stat. (1996).

The statutes' pre-2013 language was effective in the 1980's, but with the advent of computers and the internet, it became antiquated. Computers enabled gaming centers to have casino-style games without needing to fit under the safe harbor "amusement games" section at all; this is because the anti-gambling statutes did not ban computer games that, when operated on a system or network platform, mimicked slot machines. As such, internet cafes and adult amusement arcades sprung up to fill the demand for this type of gaming. In the midst of an internet café money-laundering scandal, on April 10, 2013, the 2013 Amendment was signed into law.

The 2013 Amendment changed the language of section 849.16 so that the definition of slot machine or device included not only machines or devices, but also systems or networks of devices:

> (1) As used in this chapter, the term "slot machine or device" means any machine or device or system or network of devices that is adapted for use in such a way that, upon activation, which may be achieved by, but is not limited to, the insertion of any piece of money, coin, account number, code, or other object or information, such device or system is directly or indirectly caused to operate or may be operated and if the user, whether by application of skill or by reason of any

> element of chance or any other outcome unpredictable by the user, may:
>
> (a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade; or
>
> (b) Secure additional chances or rights to use such machine, apparatus, or device . . .

§ 849.16(1), Fla. Stat. (2013). This extended the statutory scheme to prohibit not only the lever-operated slot machines popular in the 1980's (when section 849.16 was last substantively amended) but also the more modern substitutes for slot machines: computers that, rather than mechanically randomizing a selection of images like literal slot machines, showed moving images that a player could halt with the touch of the button. The result was that arcades such as Vegas Fun and internet cafes that used computer networks to simulate casino-style games could no longer do so legally.

The 2013 Amendment also outlawed games of skill in addition to games of chance. Chapter 849's safe harbor provision from the 1980's remained available for those gaming centers that used coin-operated machines; however, many amusement arcades (such as Chuck E. Cheese) originally protected by the safe harbor provision had swapped coins for more convenient cards, making the safe harbor provision inapplicable to them, and their businesses therefore technically

illegal as well under the 2013 Amendment. This was not an issue pre-2013 Amendment because the pre-2013 definition of a slot machine outlawed by section 849.16 did not include games of skill as opposed to chance, so amusement arcades could operate Pac-Man, skee ball, and the like without needing to comply with the coin-operation requirement of the safe harbor section. § 849.16, Fla. Stat. (1989). However, the 2013 Amendment changed the scope of activities outlawed in section 849.16 to not only games of chance, but skill-based games as well. § 849.16(1), Fla. Stat. (2013) ("whether by application of skill or by reason of any element of chance . . ."). Thus, the only way to operate a skill-based game legally after the 2013 Amendment was to use a coin-operated machine. § 849.16 (1); 849.161, Fla. Stat. (2013). Such "coin-operated amusement devices [or] games" were prohibited by the Lease at issue. [V1 39 § 8.4; 60 § 10]

The 2013 Amendment left modernized amusement arcades like Vegas Fun deemed illegal under the new section 849.16, which prohibited using computer games to circumvent the anti-gambling rules as the arcades had done previously.[4]

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[4] Section 849.16 included in its definition of outlawed games those devices, networks, and systems that "may be operated" in such a way that the "application of skill" or "any element of chance" could result in the user receiving anything of value or securing additional rights to use the device, which technically banned smart phones and the internet, which could be used, in theory, to gamble. *See* Heather Kelly, *Did New Florida Law Make Computers and Phones Illegal?*, CNN (July 9, 2013) http://www.cnn.com/2013/07/09/tech/gaming-gadgets/florida-slot-machine-law/index.html.

More than 1,000 arcades like Vegas Fun became illegal immediately after the passage of the 2013 Amendment. Gary Fineout, *Rick Scott Signs Florida Law Banning Internet Café Gambling*, Huffington Post (June 10, 2013), http://www.huffingtonpost.com/2013/04/10/florida-internet-cafe-law-signed-rick-scott_n_3054466.html. In July 2015, over two years after Vegas Fun closed due to the 2013 Amendment, the outdated section 849.161 safe harbor was repealed and replaced with a new safe harbor provision, the Family Amusement Games Act, which shelters amusement arcades like Chuck E. Cheese that had abandoned coins in favor of more convenient methods of operation, such as a "card, coupon, slug, token, or similar device." § 546.10, Fla. Stat. (2015). The new safe harbor provision deliberately excludes casino-style games like Vegas Fun's games, so they maintain their illegal status. § 546.10(3)(a), Fla. Stat. (2015).

B. The 2013 Amendment Rendered The Continuing Operation Of Vegas Fun Illegal Under The Lease.

By rendering performance under the Lease illegal, the 2013 Amendment voided the Lease at issue. "A contract which violates a provision of the constitution or a statute is void" and cannot be enforced in Florida courts. *Harris v. Gonzalez*, 789 So. 2d 405, 409 (Fla. 4th DCA 2001). Accordingly, if "a lease restricts and limits the use of premises let to a particular specified purpose, and thereafter, because of the enactment of a valid statute, such use becomes unlawful,

the subject-matter of the contract is destroyed, and the covenants of such lease will not be enforced against either party thereto." *Christopher v. Charles Blum Co.*, 82 So. 765, 767 (Fla. 1919) (citations omitted). With good reason, public policy demands that illegal contracts be held unenforceable:

> Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties. Because of this the defendant may assert the invalidity of the contract even though he is a participator in the wrong. This is so for the reason that one who has entered into a contract or undertaking which is violative of public policy owes to the public the continuing duty of withdrawing from such an agreement.

Local No. 234 of United Ass'n of Journeymen and Apprentices of Plumbing v. Henley & Beckwith, Inc., 66 So. 2d 818, 823 (Fla. 1953) (internal citation omitted); *see also L & L Doc's, L.L.C. v. Fla. Div. Of Alcoholic Beverages And Tobacco*, 882 So. 2d 512, 515 (Fla. 4th DCA 2004) (noting that if illegal slot machines were the subject of a contract, that contract would be illegal and a party would have no cause of action on the contract).

Florida law forbids the operation of slot machines, and the 2013 Amendment amended the definition of "slot machine" to include Vegas Fun's operations on the leased premises: "As used in this chapter, the term 'slot machine or device' means any machine or device or system or network of devices . . . " § 849.16(1), Fla. Stat. At the time Vegas Fun ceased operations and until July 2015, the statutory scheme provided a safe harbor provision protecting coin-operated "amusement

games or machines" involving an application of skill and allowing points or coupons as an award not to exceed 75 cents on any game played, § 849.161(1)(a), Fla. Stat. (2013), but the Lease prohibited operation of "coin-operated amusement" devices and games. [V1 39 § 8.4; 60 at § 10 ("Tenant shall not permit any coin-operated amusement devices and games in the Premises.")] Thus, Vegas Fun could not operate coin-operated games under the statutory exception and comply with the Lease. The Lease also required Lucas Games to continuously operate Vegas Fun, so Lucas Games could not shut down Vegas Fun and continue to comply with the Lease. [V1 38 at § 8.2] Performance under the Lease's terms became illegal and this voided the contract.

Lucas Games shut its doors in an attempt to comply with the law, and it violates public policy to penalize it for doing so. Here, Lucas Games had good reason to believe its continued contractual performance under the express terms of the Lease would violate the law because it took steps to determine whether it could comply with the law and remain operating. [V4 619-20] The 2013 Amendment altered the statutory definition of slot machines to include Vegas Fun's gaming machines. Indeed, the legislature enacted the 2013 Amendment to prevent "the conduct of casino style gambling." *See Boardwalk Bros., Inc. v. Satz*, 949 F. Supp.

2d 1221, 1232 (S.D. Fla. 2013).[5] The 2013 Amendment made clear that Vegas Fun could no longer operate legally, making the Lease void.

C. The 2013 Amendment Precluded Lucas Games From Changing Its Business To Comply With The Law While Also Acting Within The Confines Of The Lease.

The 2013 Amendment not only made Vegas Fun's continuing operations illegal, it also prevented Lucas Games from altering Vegas Fun's operations to comply with both the law and the Lease. In *De Lage Landen Fin. Servs., Inc. v. Cricket's Termite Control Inc.*, 942 So. 2d 1001 (Fla. 5th DCA 2006), the Fifth District Court of Appeal held that although the use of an automatic dialer for sales calls was illegal, the lease for the automatic dialer was not void, because the dialer could still be used for charitable or other non-sales purposes. *Id.* at 1006. Significantly, the dialer needed no alterations in order to be used legally. *Id.* Here, in contrast, the Lease only permits the premises to be used for an adult entertainment arcade "and for no other use." The name "Vegas Fun" itself connotes casino-style games, and it is the only business name allowed under the Lease. Additionally, Lucas Games, unlike the lessee in *De Lage*, cannot choose to

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[5] Notably, the *Boardwalk Bros.* court held that "casino-style gaming" had a common and ordinary meaning, and that it included all games that are "commonly played in a casino." *Id.* at 1230 (citing *State ex rel. Chwirka v. Audino*, 260 N.W.2d 279, 284 (Iowa 1977)). As such, even if Lucas Games could retrofit its games to comply with the statute, doing so would have been impracticable, as any game it operated could be outlawed if it became commonly played in casinos.

use the premises for a charitable purpose because the Lease requires Lucas Games to "conduct its business to maximize Gross Sales in the Premises." [V1 38 at § 8.3] Lucas Games cannot both maximize sales, as required by the Lease, and use its machines exclusively for non-sales purposes. In any event, the statutory scheme does not permit slot machines to be used for charitable purposes. *See* § 849.0935, Fla. Stat. (2013) (permitting only charity drawings or raffles).

In addition to preventing the leased premises from being used for another purpose, the Lease also prohibits Lucas Games from retrofitting its machines to comply with the law. The Florida Supreme Court has addressed lease validity following a material change in law in the alcohol prohibition context. *See Christopher*, 82 So. at 765. In *Christopher*, the plaintiff landlord sued the defendant tenant for failure to pay rent; the defendant tenants had stopped paying rent after Florida law outlawed drinking establishments, forcing them to close the bar they were leasing from the plaintiff. *Id.* at 766. The Court held the lease was valid, and its decision turned on the distinction between restrictive and permissive lease terms. *Id.* at 767. The Court found that the lease provision at issue was permissive with respect to operating a drinking establishment, but it specifically noted the result would be different if the lease restricted performance to an illegal activity. *Id.* at 768. Here, the Lease clearly restricts Lucas Games to one use of the premises: it allows only the operation of an adult entertainment arcade and

forbids the coin-operated games permitted under the safe harbor provision in the law pre-July 2015. Retrofitting to fit within the safe harbor provision would have violated the Lease. Further, retrofitting may not have been legally permissible or economically feasible: the Florida Attorney General advised that even the salvaging or out-of-state sale of forfeited contraband "slot machines" is impermissible. *See* Fla. Att'y Gen. Op. 2002-64 (2002). Thus, the Lease terms are restrictive, making performance under the Lease after the 2013 Amendment illegal.

D. Although Morris Suggested Alternative Performance Options Below, They Violate Either The Law Or The Lease.

Morris's motion for summary judgment filed in the trial court focused on the "persons over the age of eighteen years old" requirement in the Lease, arguing, for example, that because an adult can play pinball, pinball machines would comply with the Lease. [V3 445] While Lucas Games does not dispute that adults can play pinball or that Lucas Games could install pinball machines, skee ball, or other arcade games on the leased premises and operate legally, such games are only legal under the safe harbor pre-July 2015 if they are coin-operated, and coin-operated amusements are not permitted by the Lease. [V1 39 § 8.4; 60 § 10] Indeed, the safe harbor provision in Chapter 849 and the "Operation by Tenant" requirements in section 8.4 of the Lease are mutually exclusive and contradictory—the former permits only coin-operated games, and the latter prohibits coin-operated games.

[*Id.*] Although adults *can* play coin-operated games like pinball, Lucas Games is not allowed to put those games on the leased premises.[6]

Morris also emphasized the option of operating games of skill—skee ball and the like—implying that such games would be legal under the statute's safe harbor provision. However, even if skilled games are permitted under the Lease, they were only legal in 2013 if they were coin-operated, and coin-operated amusements games were not allowed under the Lease. *See Rowe v. County of Duval*, 975 So. 2d 526, 528 (Fla. 1st DCA 2008) (determining applicability of the safe harbor provision to amusement games and noting: "On this record, whether skill wins the prizes is disputed, but the dispute is material only if the machines 'operate by means of the insertion of a coin.' "). Plainly, "machines that *do not take coins* cannot bring an arcade amusement center within the safe harbor provision." *Id.* Thus, the only way to operate under the pre-July 2015 safe harbor provision

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[6] Morris was correct to point out that Chuck E. Cheese remains in business, but it appears their operations were illegal as well pre-July 2015, just not enforced. *See, e.g.*, Brad Tuttle, *Chuck E. Cheese: Where a Kid Can Gamble Like an Adult*, TIME (May 14, 2013) http://business.time.com/2013/05/14/chuck-e-cheese-where-a-kid-can-gamble-like-an-adult/ (noting "it's unclear exactly why certain businesses get a free pass"); Mary Ellen Klas, *Senate Committee Supports Bill Carving Arcades Out of Internet Café Ban*, Tampa Bay Times (March 10, 2014) http://www.tampabay.com/news/politics/legislature/senate-committee-supports-bill-carving-arcades-out-of-internet-cafe-ban/2169540 ("Arcades like Dave & Busters and Chuck E Cheese will no longer be in violation of state law when they operate their coinless games under a bill that won unanimous support Wednesday in the Senate Gaming Committee.").

would be for Lucas Games to retrofit its machines to be coin-operated games of skill, and the Lease expressly forbade coin-operated games.[7] [V1 39 § 8.4; 60 § 10] Because there was no course of action Lucas Games could take that would comply with both the law and the Lease, the Lease is void and unenforceable.

II. LUCAS GAMES' NONPERFORMANCE SHOULD BE EXCUSED BECAUSE THE 2013 AMENDMENT RENDERED LUCAS GAMES' PERFORMANCE IMPRACTICABLE UNDER THE LEASE.

Even if the Lease was not voided by its illegality, both impossibility and frustration of purpose excuse Lucas Games' nonperformance under the Lease. The doctrines of impossibility and frustration of purpose can excuse nonperformance of a contract. *Mailloux v. Briella Townhomes, LLC*, 3 So. 3d 394, 396 (Fla. 4th DCA 2009) (citations omitted). The doctrines are very similar, and the facts giving rise to each frequently overlap; courts and textbooks alike tend to use them interchangeably. *Valencia Center, Inc. v. Publix Super Markets, Inc.*, 464 So. 2d

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[7] Morris also proposed that Lucas Games should have continued maintaining the games on the leased premises so that Morris could seize them, but this would have been illegal as well. Florida law not only forbids businesses from permitting illegal gambling; it also forbids them from being in possession of the machines themselves. *See* § 849.01, Fla. Stat.; *Cooper v. City of Miami*, 36 So. 2d 195, 196 (Fla. 1948). If Lucas Games abandoned the machines, exposing them to sale, that too would violate the law. § 849.15(1)(a), Fla. Stat. Consequently, the illegality of the Lease extends even to the removal provision in section 9.2 and the security interest provision in section 9.5. [V1 41-42 §§ 9.2, 9.5] Further, Lucas Games could not even give the games to Morris: selling or even giving away what the 2013 Amendment termed a "slot machine" would have been illegal.

1267, 1269 (Fla. 3d DCA 1985); *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.*, 174 So. 2d 614, 617 (Fla. 2d DCA 1965).

The impossibility doctrine "refers to those factual situations, too numerous to catalog, where the purposes, for which the contract was made, have, on one side, become impossible to perform." *Crown Ice.*, 174 So. 2d at 617. The doctrine of frustration of purpose "refers to that condition surrounding the contracting parties where one of the parties finds that the purposes for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party." *Id.* (citations omitted).

A. The Impossibility Doctrine Excuses Lucas Games' Breach Of Contract Because The Change In Law Rendered Performance Legally Impossible.

The 2013 Amendment rendered the performance and purpose of the Lease impossible to achieve, and this impossibility excuses Lucas Games' nonperformance. Courts will excuse contract performance when the purposes on one side of a contract become impossible to achieve. *Crown Ice*, 174 So. 2d at 617. When evaluating an impossibility of performance defense, courts ask "whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract. " *Ferguson v. Ferguson*, 54 So. 3d 553, 556

(Fla. 3d DCA 2011) (quoting 6 Williston, Contracts (Rev. ed.) § 1931 (1938)). If a supervening event radically changes "the world in which the parties were expected to fulfill their promises," such that holding them to their bargain would be unwise, courts permit the nonperforming party to raise an impossibility defense. *Cook v. Deltona Corp.*, 753 F.2d 1552, 1558 (11th Cir. 1985).

In order to succeed on an impossibility defense, the claimant must establish an adverse change in circumstances that occurred after the agreement was executed. *Zephyr Haven Health & Rehab Ctr, Inc. v. Hardin*, 122 So. 3d 916, 920 (Fla. 2d DCA 2013). It is well-established that "contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority." *Louisville & Nashville RR. Co. v. Mottley*, 219 U.S. 467, 482 (1911) (citation omitted). Governmental action can give rise to a legal impossibility defense. *Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354, 1367 (M.D. Fla. 2008). Thus:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Leon County v. Gluesenkamp, 873 So. 2d 460, 463 (Fla. 1st DCA 2004) (citing Restatement (Second) Law of Contracts § 261-64). "It is a basic assumption on

which the contract was made that the law will not directly intervene to make performance impracticable." *Id.* (internal quotations omitted). Therefore, for purposes of the doctrine, the passage of a law that makes performance impracticable "is an event the non-occurrence of which was a basic assumption on which the contract was made." *Id.*

At the time it purchased Vegas Fun, Lucas Games received no such advice and after the purchase, it was only aware of proposed legislation that may or may not have passed. [V4 606-07][8] Importantly, while the impossibility of continuing the lease *after the definition had changed* was immediately apparent, *the change in the definition of slot machine itself* could not have been foreseen by Lucas Games. Further, it is clear from the Lease, which both requires the continuous operation of an adult entertainment arcade and prohibits coin-operated machines, that this change in law was unanticipated. Morris has indicated that it would find games like pinball acceptable, so it appears that had the change in law been foreseeable, it would not have forbidden a coin-operated pinball machine that comes within the statute's safe harbor provision. Instead, the parties agreed to the operation of an

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[8] At the time of the assignment, the proposed 2013 Amendment had not had its first reading; it was on the Select Committee on Gambling's agenda for the first time on March 13, 2013. *See* Bill Tracking, Prohibition of Electronic Gambling Devices, Fla. H.R. 155, 23rd Leg., 1st Sess. (Westlaw 2013). Surely Lucas Games, a private business owner, cannot be held to a higher standard than the legislators themselves when it comes to assessing the likelihood of a bill becoming a law. Lucas Games could not foresee how the legislators would vote before the bill had been read.

adult entertainment arcade that did not have coin-operated games on the leased premises. It became impossible to comply with this agreement after the 2013 Amendment, because the law provides that a gaming machine is illegal if "(i) it does not operate by the insertion of a coin; (ii) it awards points or coupons worth more than seventy-five cents on any game played; and (iii) it is a casino-style game." *Boardwalk Bros.*, 949 F. Supp. 2d at 1226. This radically changed the world in which the parties were expected to fulfill their promise. Insofar as holding the parties to their bargain would require them to violate the law, performing under the Lease is impossible.

B. Even If Performance Under The Lease Was Legally Possible, The Chapter 849 Amendment Frustrated The Purpose Of The Contract.

Frustration of purpose excuses Lucas Games from paying rent because it is unable to continuously operate the intended business through no fault of its own. The doctrine of frustration of purpose provides that a contract is rendered unenforceable when "the purpose for which the subject contract was formed became entirely frustrated . . . due to no fault of either party." *Equitrac Corp. v. Kenny, Nachwalter & Seymour, P.A.*, 493 So. 2d 548, 548 (Fla. 3d DCA 1986). Frustration excuses performance when a change in circumstances results in an unreasonable expense so great that it effectively destroys the value of one party's

performance. *Hopfenspirger v. West*, 949 So. 2d 1050, 1053-54 (Fla. 5th DCA 2006).

Accordingly, the frustration of purpose doctrine voids leases if the leased premises "could not be used for its only intended purpose." *1700 Rinehart, LLC v. Advance America*, 51 So. 3d 535, 537 (Fla. 5th DCA 2010). Courts applying the doctrine have found repeatedly that a subsequent zoning event prohibiting the intended use of the leased property excused the tenant from any lease obligations. *See, e.g., Christopher*, 82 So. at 767 (holding that when the terms of a lease restrict the use of the premises to a particular purpose and a subsequent statute makes that use unlawful, the lease will not be enforced against either party); *Simon v. Fla. Mem'l College*, 498 So. 2d 459, 460 (Fla. 3d DCA 1986) (holding that a lease is unenforceable when a governmental agency declares leased premises unfit for the specific purpose enumerated in the lease).

Frustration of purpose requires that the change in circumstances negate the purpose, not merely modify it. *Lee v. Bowlerama Enterprises, Inc.*, 368 So. 2d 913, 916 (Fla. 3d DCA 1979) (finding no frustration of purpose where change in law merely decreased the capacity of the lessee's nightclub and where lessee did not seek available alternative license). Additionally, the frustration doctrine is inapplicable where performance of the contract merely becomes burdensome or a "poor bargain." *Valencia Ctr., Inc. v. Publix Super Markets, Inc.*, 464 So. 2d 1267,

1269 (Fla. 3d DCA App. 1985) (rejecting frustration excuse where lessor alleged increased taxes frustrated the purpose of the lease). The realization of normal business risks, such as the increased cost or decreased availability of insurance, does not excuse performance under frustration of purpose. *Home Design Ctr.--Joint Venture v. Cnty. Appliances of Naples, Inc.*, 563 So. 2d 767, 769-70 (Fla. 2d DCA 1990) (holding that, where lessee did not show it was unable to obtain insurance, difficulty in obtaining insurance did not excuse performance).

Here, the purpose under the lease was to operate an adult entertainment arcade called Vegas Fun. [V1 23 § p-q] Because of the change in law, Lucas Games could not comply with the Lease while also operating legally. There was no way for Lucas Games to use the leased premises for which it bargained. The inability to legally operate Vegas Fun financially devastated Lucas Games, and it frustrated the sole purpose—and only permissible use—of the Lease.

The Florida Supreme Court excused performance where a change in zoning ordinances frustrated the contracting parties' purpose, which was the operation of a used car lot on leased premises, because of a failure in consideration. *Marks v. Fields*, 36 So. 2d 612, 612 (Fla. 1948). In *Marks*, the lease at issue provided that the premises were to be used for "the sale of second hand automobiles." *Id.* Although the tenants were initially told "that the zoning ordinance of the city did not prohibit the use of the property for that purpose," they later "discovered that the

representation was false." *Id.* The Court concluded that the "consideration wholly failed" in such circumstances, regardless of "[w]hether both [parties] or either [party] knew of such zoning law," because "the parties contracted for the use of a property which use was not allowed by law." *Id.* at 615. The Third District Court of Appeal likewise excused performance where zoning ordinances frustrated the purpose of the lease. In *La Rosa Del Monte Express, Inc. v. G.S.W. Enterprises Corp.*, the operative lease required the premises to be used "for the purpose of operating a moving and storage business." 483 So. 2d 472, 472 (Fla. 3d DCA 1986). However, the tenant was subsequently notified that the operation of such a business on the premises was in violation of the City of Miami's zoning laws. *Id.* The Third District relied on *Marks* to conclude that the tenant was excused from its lease obligations, reasoning as follows:

> Where parties contract for the use of a property which use is not allowed by law, the consideration wholly fails, and the money paid for the contract should be returned and the parties mutually released.
>
> * * * *
>
> It was uncontradicted at trial that the use of the property as prescribed in the lease was in violation of Miami's zoning ordinances. We find, as the court did in *Marks*, that the lease is wholly lacking in consideration. Accordingly, the parties should be mutually released and [the tenant's] security deposit returned.

Id. at 473. In a more recent case, the Third District declined to excuse nonperformance when existing zoning ordinances prevented the lessee's intended use of the premises. *E. Coast Adver., Inc. v. Wiseheart*, 862 So. 2d 734, 735 (Fla.

3d DCA 2003). The court drew a distinction between the case before it, where the lessee knew of the existing ordinances, and *Marks*, where the prohibitive ordinance existed at the time of contract, but the parties were unaware of the ordinance. *Id.*

The instant case is substantially similar to *Marks* and *La Rosa*. Here, a change in the law prevented Lucas Games from continuing to operate its adult entertainment arcade. Lucas Games and Morris contracted for the operation of an adult entertainment arcade without coin-operated games; this is a use not allowed by law. The Lease specifically provides that Lucas Games was allowed to use the Leased Premises "[o]nly for the operation of an entertainment arcade for persons over the age of 18 years old and for no other use or purpose." [V1 23 § p] However, this use is "not allowed by law" because the subsequent 2013 Amendment to section 849.16 banned operation of such adult entertainment arcades. Because of the change in law, the value of Morris's performance for Lucas Games was destroyed. Therefore, the Lease necessarily fails for lack of consideration under the frustration of purpose doctrine.

CONCLUSION

For the reasons expressed above, Lucas Games and Luc Marcoux request that this Court reverse the final judgment.

Respectfully submitted,

/s/ Carrie Ann Wozniak

Jonathan S. Robbins, Esq.
Florida Bar No.: 989428
Akerman LLP
Las Olas Centre II - Suite 1600
350 E. Las Olas Boulevard
Ft. Lauderdale, Florida 33301
Tel: (954) 463-2700
Fax: (954) 463-2224
Email: jonathan.robbins@akerman.com

Carrie Ann Wozniak, Esq.
Florida Bar No. 12666
Akerman LLP
Post Office Box 231
420 South Orange Avenue
Suite 1200
Orlando, FL 32802-0231
Phone: (407) 423-4000
Fax: (407) 843-6610
Primary Email:
carrieann.wozniak@akerman.com
Secondary Email:
karilynn.alhasnawi@akerman.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing has been furnished this 27th day of July, 2015, by electronic mail to:

Michael I. Feldman
Krinzman, Huss & Lubetsky LLP
800 Brickell Avenue, Suite 1501
Miami, Florida 33131
Tel: (305) 854-9700
Fax: (305) 854-0508
Email: mif@khllaw.com
Secondary: sorellana@khllaw.com
Attorneys for Plaintiff, Morris Stuart Associates LLC

Alexandra Marcoux, Esq.
The Law Office of Alexandra Marcoux, P.A.
2550 N Federal Hwy Ste 3
Ft Lauderdale, Florida 33305-1621
Tel: (954) 341-5454
Fax: (954) 337-6415
Trial Counsel for Defendants, Lucas Games, Inc. and Luc Marcoux

/s/ Carrie Ann Wozniak
CARRIE ANN WOZNIAK

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

/s/Carrie Ann Wozniak
CARRIE ANN WOZNIAK

Question 35

International Council of Shopping Centers' Shopping Center Legal Update, "Zoning Contingency Clause: The Tipsy Coachman Saved the Tenant; Sober Drafting Might Have Helped the Landlord," Winter 2011

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International Council of Shopping Centers, Inc.
1221 Avenue of the Americas, 41st floor, New York, NY 10020-1099
Phone (646) 728-3800

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In Depth

From Canada

Zoning Contingency Clause: The Tipsy Coachman Saved the Tenant; Sober Drafting Might Have Helped the Landlord

*Eric D. Rapkin**
Akerman Senterfitt
Ft. Lauderdale, FL

*Carrie Ann Wozniak***
Akerman Senterfitt
Orlando, FL

> [I]n some circumstances, even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling. This longstanding principle of appellate law, sometimes referred to as the "tipsy coachman" doctrine, allows an appellate court to affirm a trial court that reaches the right result but for the wrong reasons....[1]

A recent Florida appellate case (successfully argued on appeal by Ms. Wozniak, one of the authors) upheld the tenant's right to terminate a commercial lease agreement due to the failure of a zoning contingency in the lease. The case is interesting to practitioners for a number of reasons, not the least of which is that the tenant prevailed at the trial court; the landlord appealed; and although the appellate court held that the trial court's holding was wrong, the trial court's judgment for the tenant was nonetheless affirmed on other grounds.

The facts of *1700 Rinehart, LLC v. Advance America, Cash Advance Centers, Etc.*, 51 So. 3d 535 (Fla. 5th DCA 2010), are relatively straightforward. In May 2007 the parties entered into a lease agreement in which the sole permitted use was a cash advance store. The parties knew that such use might not be permitted by the city; in August 2007, several months after the lease was signed, the parties amended the lease, making the tenant responsible for confirming that the tenant's use was compatible with zoning. The amendment contained the following termination provision:

> In the event Tenant, after using best efforts, is unable to obtain all permits and approvals necessary for Tenant to open and operate its business in the Premises within ninety (90) days from the mutual execution of this Lease, Tenant shall have the right, upon written notice to Landlord, to terminate the Lease, in which event all rents and deposits paid to Landlord shall be refunded to Tenant provided, however, that Landlord shall have the right on behalf of Tenant to attempt to obtain all permits and approvals for Tenant and if Landlord is unsuccessful, then Tenant shall have the right to terminate the Lease.

The tenant promptly submitted applications to the city for the necessary permits; in January 2008, more than 90 days after the lease amendment was executed, the city denied the tenant's application. The following day, the tenant sent a notice to the landlord, terminating the lease under the 90-day termination provision. The landlord responded that the tenant had failed to terminate within 90 days of executing the lease, as it claimed was required, and denied the tenant's right to terminate the lease and receive a refund of its security deposit. The landlord then sued the tenant and guarantor for unpaid rent, including accelerated rent through the lease's five-year initial term.

On cross-motions for summary judgment, the trial court ruled that the lease was void for "want of consideration" or "frustration of purpose" because the space could not be used for its only intended purpose. Further, the trial court rejected the tenant's argument that it properly terminated the lease pursuant to the 90-day termination provision.

The appellate court found this ruling to be legally incorrect, as well as the trial court's ruling that the tenant could not rely on the 90-day termination provision; but, relying on the tipsy coachman rule, the appellate court affirmed the trial court, holding that the tenant properly terminated the lease under the 90-day termination provision.

The appellate court quickly explained that the lack of consideration doctrine had no application in this case because "the particular potential obstacle was not only foreseen by the parties, but as to which they specifically bargained, with the risks of its occurrence divided by and between the parties in the agreement itself." In *1700 Rinehart*, the parties specifically inserted a provision allowing the tenant to terminate the lease if it was unable to use the property for the permitted use.

Instead, the appellate court analyzed the 90-day termination provision and the tenant's actions, and held that the tenant properly and timely invoked the termination provision—even though the termination did not occur for nearly five months after the execution of the lease amendment. The court held that despite the tenant's clear use of its best efforts, the tenant was unable to open and operate its business within 90 days after the execution of the lease amendment. The landlord's argument (with which the trial court agreed) was that the termination notice was ineffective because it did not occur within the 90-day period. The appellate court, however, held that the "clear language" of the lease amendment shows that the 90-day period refers to the tenant's ability to lawfully conduct its business on the premises—and not to the tenant's ability to terminate the lease.

The court cited language from a number of other cases in which the parties clearly expressed a time limitation on a termination right, including *United Artists Theatre Circuit, Inc. v. Sun Plaza Enterprise Corp.*, 1998 WL 938732 (E.D.N.Y. 1998). ("If the Tenant will not be considered as a bankable Tenant by any lending institution and/or the Landlord will not be able to secure a construction loan based on this Lease, and, in that event, the *Landlord shall have the right, only within the period of 90 days after the execution of this Lease, to cancel this Lease,* provided the Landlord used his best efforts to secure financing.") [e.s.]; *Commonwealth v. Vartran*, 733 A. 2d 1258, 1260 (Penn. 1999) ("If within 60 days from the execution of this Lease Tenant has not received such resolutions, enactments or other approvals as Tenant, in its sole opinion, deems appropriate, Tenant shall have the right, *exercised n [sic] writing not later than five business days after the end of such 60 day period,* to terminate this Lease by written notice to Landlord . . .") [e.s.]; and *Grossman v. Sharp Air Freight Servs., Inc.*, 1994 WL 902889 (Mass. Sup. 1994) ("If, notwithstanding such diligent efforts, [Sharp] is unable to obtain such approval on or before sixty (60) days following the execution of this lease, [Sharp] shall have the option to terminate this lease; provided, *however, that such option shall be exercised (if at all) by notice to [the Grossmans]* not later than seventy (70) days following the date of execution of this lease."). Indeed, in reviewing the language in the termination rights in these other cases, the *1700 Rinehart* court stated that "[t]he contrast between the contract terms in these cases and this one is decisive." [e.s.]

Contrary to the landlord's argument that this interpretation would mean that there is no time limit whatsoever on the tenant's right to terminate the lease, the court stated that the law is clear in Florida and elsewhere that when a contract fails to specify a particular period, the law implies a reasonable time under the circumstances. Moreover, in this specific instance, the tenant's zoning application was still pending on the 90th day, so the tenant would have had to abandon its reasonable efforts to secure the ability to use the premises. The court stated that it would not infer that the parties to the lease intended such a "self-defeating result."

Practical Implications

What are some practical implications for lease negotiators regarding a retail tenant's intended use of the premises?

Of primary importance is the need for due diligence. As opposed to a multitenant office building, where a new user can often be comfortable that general office use is permissible under applicable land use laws, retail tenants cannot be assured that their specific use is permissible simply because their use will be in a shopping center housing other retail tenants. It is incumbent on tenant's counsel to be certain that the tenant's intended use is permissible, and if not, what would need to be accomplished to allow the tenant's intended use. Similarly for the landlord: While it is normally the tenant's responsibility to confirm the compatibility of a tenant's use with applicable zoning, the landlord is typically in a better position than the tenant at the outset of negotiations to know what is and is not permissible at the property. If the landlord knows that the tenant's use is not permissible without some type of zoning approval, the landlord would be prudent to advise the tenant, rather than simply remaining silent. For negotiations in which the tenant has bargaining strength, the tenant will often ask for a representation in the lease that the tenant's use is permissible under applicable zoning.

If the intended use is not permissible under zoning, a contingency for governmental approvals for the tenant's use needs to be included in the lease.

First, the parties need to address whose responsibility it will be to obtain the governmental approvals. More often than not, it will be the tenant's responsibility, although lease negotiators will often also include a requirement for the landlord (at no cost to the landlord) to cooperate with the tenant in pursuing such approvals.

In addition, the zoning contingency should define what efforts are required to be undertaken.

In *1700 Rinehart*, the tenant was required to use "best efforts" to obtain the necessary permits and approvals. Lease negotiators would be cautioned to research the governing state law to determine what would be involved in a party's duty to use best efforts. The parties probably intend that the tenant is required to use reasonable diligence, as opposed to being required to make every conceivable effort—even if it means bankrupting the tenant. But even if "best efforts" is determined to be synonymous with reasonable diligence, the parties could disagree about what exactly would be required. For example, if the tenant promptly files all required applications and diligently pursues the approval process, but the application is denied, would best efforts require the tenant to pursue a zoning appeals process? Most drafters typically insert the efforts standard without much definition. Perhaps care should be taken in defining with a bit more precision what steps are required to be taken in order to meet the efforts standard, and conversely what steps would not be required to be pursued. For a discussion on the concept of best efforts, see Kenneth A. Adams, *Understanding "Best Efforts" And Its Variants (Including Drafting Recommendations)*, The Practical Lawyer, August 2004, 11.

The time frame set forth in a zoning contingency clause can help determine the parameters for what can and cannot be accomplished. For example, in the *1700 Rinehart* case, the tenant had 90 days to obtain all necessary permits and approvals. If only the initial application process would be expected to take 90 days, then it is unlikely that the parties could have intended that the tenant's best efforts included pursuing an appeal from a denial of the application.

Lease drafters should include two distinct time frames: (1) the time period within which the contingency is to be satisfied; (2) the time period within which the lease can be terminated, should the contingency not be satisfied within the first time period. As noted in the *1700 Rinehart* case, when a contract fails to specify a particular period, the law typically implies a reasonable time under the circumstances. Neither party should have to rely on what a court might determine to be a reasonable time to terminate a lease for failure of a contingency.

In conclusion, although the tenant's termination right was saved by the tipsy coachman, the landlord may have had a better chance to prevail on its claims, had it undertaken a bit more "sober" drafting and negotiating of the lease.

*ERIC D. RAPKIN is a Shareholder in Akerman Senterfitt's Fort Lauderdale office and a member of this newsletter's Editorial Board. erapkin@akerman.com.

**CARRIE ANN WOZNIAK is an Associate in Akerman Senterfitt's Orlando office. cwozniak@akerman.com

[1]*Robertson v. State*, 829 So. 2d 901, 906-07 (Fla. 2002).

Question 36

Joint Rules of Judicial Administration Committee/Appellate Court Rules Committee Memo on Florida Rule of Judicial Administration 2.130

Appellate Court Rules Committee Original Proceedings Subcommittee, Contemplated Rule 9.130 Amendment to Include Orders on Motions Enforcing or Setting Aside Settlement Agreements

Amicus Brief of Florida Bankers Association, *City of Palm Bay v. Wells Fargo Bank, N.A.*, SC11-830 (Florida Supreme Court)

INTRODUCTION

This is a joint subcommittee of the Rules of Judicial Administration Committee ("RJAC") and Appellate Court Rules Committee ("ACRC") formed to address a suggestion from RJAC member Paul Regensdorf that Rule 2.130 be repealed. The Rule provides:

RULE 2.130. PRIORITY OF FLORIDA RULES OF APPELLATE PROCEDURE

The Florida Rules of Appellate Procedure shall control all proceedings in the supreme court and the district courts, and all proceedings in which the circuit courts exercise their appellate jurisdiction, notwithstanding any conflicting rules of procedure.

Tom Hall is chair of this joint subcommittee. The chairs of RJAC (Amy Borman) and ACRC (Judge Kent Wetherell) each appointed members from their respective committees to serve on the joint subcommittee.

Mr. Regensdorf's proposal was made orally at an RJAC meeting, and is contained in an email to the joint subcommittee dated February 4, 2015.

The subcommittee had its initial organizational meeting on February 5, 2015, at which it was agreed that the members of the subcommittee would be divided into pro-repeal and con-repeal workgroups by random assignment. The sub-subcommittee assignments were as follows:

Pro Removing 2.130	**Con Removing 2.130**
Chrissy Davis Graves	Woody Clermont
Keri Joseph	Tracy Gunn (Chair)
Michael Korn (Chair)	Jeff Kuntz
Craig Leen	Hon. David Monaco
Hon. Robert Luck	Paul Regensdorf
Kristin Norse	Sarah Rumph
Hon. Stephanie Ray	Michael Sasso
Andy Stanton	Carrie Ann Wozniak
Tom Ward	Stephanie Zimmerman
Stephanie Zimmerman	

Each sub-subcommittee held a number of meetings to identify, discuss and analyze the points supporting their assigned position. In order to allow full participation by those who were unavailable at the scheduled call times, work was conducted by both phone conference and group email.

The full joint subcommittee also held a number of telephone conferences to jointly discuss the issues, hear updates from both sub-subcommittees, and set the procedure and timeline for work on the project.

Both sub-subcommittees presented their analysis to the full joint subcommittee in the format of a written brief. The two briefs are combined below, with the pro-repeal side first followed by the con-repeal side.

Joint subcommittee chair Tom Hall determined that this issue warranted an in-person meeting, and the subcommittee members agreed. The joint subcommittee is scheduled to meet on May 13, 2016, at The Florida Bar offices in Tampa.

ARGUMENTS THAT SUPPORT THE REPEAL OF FLA. R. JUD. ADMIN. 2.130

CREATION AND PURPOSE OF THE FLORIDA RULES OF JUDICIAL ADMINISTRATION

On July 1, 1978 the Florida Rules of Judicial Administration ("RJA") went into effect subject to revision following comments submitted by interested persons. In re Fla. Rules of Judicial Admin., 360 So. 2d 1076 (Fla. 1978). At that time, the Florida Supreme Court explained:

> These rules are a compilation and consolidation of the rules of judicial administration contained in the Florida Rules of Appellate Procedure, Florida Rules of Civil Procedure, Florida Rules of Criminal Procedure and Transition Rules. Obsolete provisions have been deleted and only minor substantive and style and drafting changes have been made.

Id.

In sum, the purpose of the RJA was "to secure the speedy and inexpensive determination of every proceeding to which they are applicable." *Id.* The rules were to apply "to all of the court administrative matters in all courts to which the rules are applicable by their terms." *Id.* The Court also noted in describing the

scope, "These rules shall supersede all conflicting rules and statutes." Id.; see also Fla. R. Jud. Admin. 2.010. In a subsequent opinion, the Court wrote:

> "[T]he Court promulgated new Florida Rules of Judicial Administration designed to update and consolidate a number of related provisions that had previously appeared throughout the Court's civil, criminal, appellate, and transition rules."

In re Fla. R. Jud. Admin., 372 So. 2d 449, 449 (Fla. 1979) (footnote omitted).

CREATION AND PURPOSE OF THE SUPREME COURT RULES ADVISORY COMMITTEE

In 1978, the RJA simultaneously created a Supreme Court Rules Advisory Committee (the "Committee") whose designated purpose was to "conduct a continuous study of all rules of procedure adopted by the Court pursuant to Article V of the Florida Constitution and [] make such recommendations to the Supreme Court concerning the same, and all proposed amendments or additions thereto, as are deemed advisable." In re Fla. R. Jud. Admin., 360 So. 2d at 1090.

The Committee was ultimately replaced in 1980 because it existed separate and apart from the normal bar committee structure for proposing and adopting rules. See Fla. R. Jud. Admin. 2.140 cmt. note (1980) ("Rule 2.130 [renumbered as 2.140 in 2006] is entirely rewritten to codify the procedures for changes to all Florida rules of procedure as set forth by this court in In re Rules of Court: Procedure for Consideration of Proposals Concerning Practice and Procedure, 276 So. 2d 467 (Fla. 1972), and to update those procedures based on current practice. The Supreme Court Rules Advisory Committee has been abolished, and the Local Rules Advisory Committee has been established.").

CREATION OF FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.130 [INITIALLY RULE 2.135]

The current rule 2.130 first appeared on October 24, 1996 (effective January 1, 1997), but was at that time numbered as Rule 2.135. Amendments to the Florida Rules of Judicial Admin., 682 So. 2d 89 (Fla. 1996). Rule 2.135 provided that "the Rules of Appellate Procedure control when rules conflict in appellate proceedings." *Id.* at 90. Rule 2.135 was eventually renumbered to Rule 2.130 on September 21, 2006. See In re Amendments to the Florida Rules of Judicial Admin.—Reorganization of the Rules, 939 So. 2d 966 (Fla. 2006).

The Florida Supreme Court decision adopting "Rule 2.135" noted that "the Committee has proposed sixteen substantive changes, which affect ten of the rules." Amendments 682 So. 2d 89 at 90. Of those 16 proposed changes, the Supreme Court adopted changes to only seven of the ten rules.[1] This is significant because (i) RJA proposed the rule in the first place and (ii) while the Supreme Court heavily scrutinized RJA's proposed rule changes, it found "Rule 2.135" worthy of approving.

PURPOSE FOR CREATING FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.130

The Court does not mention what the Committee's inspiration was for initially proposing this rule. See Amendments, 682 So. 2d 89 at 90. It only explains "Rule 2.135" as simply "provid[ing] that the Rules of Appellate Procedure control when rules conflict in appellate proceedings." Id. It is significant that nothing more was mentioned about this rule either in the majority opinion (which discussed, in depth, the flaws of some of the rejected rule proposals) or Justice Wells' concurring opinion (which was also critical of some of the rule). What that significance is, however, is up for debate.

Those who would advocate to see the rule remain in place could argue the lack of scrutiny meant that the Supreme Court felt such a rule was so uncontroversial and obviously necessary that nothing more needed to be articulated. However, those who advocate for the rule's removal could argue that the Supreme Court did not focus significant attention on this rule at the time because its focus was on the more controversial proposals to Rule 2.050 (rotation plans and term limits for chief judges) and Rule 2.070 (regarding court reporters).

It has been suggested that Rule 2.130 was enacted solely to solve a narrow issue concerning whether Florida Rule of Civil Procedure 1.630 or Florida Rule of Appellate Procedure 9.100 governed certiorari proceedings in circuit courts. Support for this theory comes from the pre-adoption comments to the Rules 2.135 and 9.100 made by Henry P. Trawick, Jr. (opposing adoption of Rule 2.135) and the Appellate Court Rules Committee ("ACRC") (favoring adoption). Rule 2.135 effectively resolves this conflict by elevating the appellate rule over the civil procedure rule. But since no rationale is articulated in the Supreme Court's

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1. Rules 2.030, 2.052, 2.055, 2.065, 2.135, 2.180 and some of the proposed changes to 2.050. Amendments, 682 So. 2d 89 at 91.

decision adopting Rule 2.135, it cannot be stated with any certainty whether the Rule 1.630 versus Rule 9.100 conflict was the genesis for the creation of Rule 2.135.

Further, Rule 2.130 was adopted to address a conflict with Rule of Civil Procedure 1.630 concerning certiorari proceedings in the circuit court. The basis for that conflict, however, has been completely eliminated by a recent amendment to the Rules of Civil Procedure. See In re Amendments to Florida Rules of Civil Procedure, 131 So. 3d 643 (Fla. 2013) ("Rule 1.630 has been amended to remove any reference to certiorari proceedings, which instead are governed by the Florida Rules of Appellate Procedure. The Florida Rules of Appellate Procedure apply when the circuit courts exercise their appellate jurisdiction."). Whatever arguments may be made in favor of the primacy of appellate rules, the original purpose of Rule 2.130 has evaporated.

The Supreme Court adopted extensively revised appellate rules in 1977. In re Proposed Florida Appellate Rules, 351 So. 2d 98 (Fla. 1977). Rule 9.010 stated: "These rules shall supersede all conflicting rules and statutes." The following year, the Court adopted the Rules of Judicial Administration. In re Florida Rules of Jud. Admin., 360 So. 2d 1076, 1076 (Fla. 1978). The Court stated that, "These rules are a compilation and consolidation of the rules of judicial administration contained in the Florida Rules of Appellate Procedure, Florida Rules of Civil Procedure, Florida Rules of Criminal Procedure and Transition Rules." The Court subsequently explained that these rules were, "designed to update and consolidate a number of related provisions that had previously appeared throughout the Court's civil, criminal, appellate, and transition rules." Rule 2.010 provided: "These rules shall supersede all conflicting rules and statutes."

ELIMINATION OF BLANKET APPELLATE RULE SUPERIORITY

The Supreme Court later eliminated appellate rule supersedence. See In re Amendments to Florida Rules of Appellate Procedure, 609 So. 2d 516 (Fla. 1992). In 1989, the Court had decided In the Interest of E.P., 544 So. 2d 1000 (Fla. 1989), which involved a certified question involving a conflict between the Rules of Juvenile and Appellate Procedure. *Id.* at 1001. The appellate rules provided that a timely motion for rehearing tolled the time for appealing an order, while the juvenile rules specifically stated that a motion for rehearing, "shall not toll the timing of the taking of an appeal." The Supreme Court held that the juvenile rules controlled:

> It is clear from the face of the two rules that they conflict, at least regarding appeals from juvenile proceedings. However, because this is a juvenile case, any conflict must be resolved in favor of the rules of juvenile procedure.

Id. at 1001. In response, the Committee proposed—and the Court adopted—an amendment eliminating Appellate Rule precedence over other *rules*: "These rules shall supersede all conflicting ~~rules and~~ statutes." The Committee Note explains:

> **1992 Amendment.** This rule was amended to eliminate the statement that the Florida Rules of Appellate Procedure supersede all conflicting rules. Other sets of Florida rules contain provisions applicable to certain appellate proceedings, and, in certain instances, those rules conflict with the procedures set forth for other appeals under these rules. In the absence of a clear mandate from the supreme court that only the Florida Rules of Appellate Procedure are to address appellate concerns, the committee felt that these rules should not automatically supersede other rules. See, e.g., In the Interest of E.P. v. Department of Health and Rehabilitative Services, 544 So. 2d 1000 (Fla. 1989).

In re Amendments to Florida Rules of Appellate Procedure, 609 So. 2d 516 (Fla. 1992).[2]

It was after this that the ACRC became concerned about a conflict between *Fla. R. Civ. P.* 1.630 ("Extraordinary Remedies.") and the Rules of Appellate Procedure. In Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993), the Court held, that review of quasi-judicial action of local governing agencies, boards and commissions was by way of certiorari. *Id.* at 474. Anticipating an increase in circuit court certiorari petitions, the ACRC investigated the appropriate procedures, finding that 1.630 and 9.100 were inconsistent. See Reply to Response to Petition Filed by Henry P. Trawick, Jr., Case No. 87,134. Both rules claimed to govern writ proceedings in the circuit court. The ACRC contacted the various circuits and found that most applied 9.100, while one applied 1.630. *Id.*

The ACRC proposed Rule 9.100(f) to clarify that the appellate rules should apply when the circuit court was acting in its appellate capacity. Report of the Florida Bar Appellate Court Rules Committee, Case No. 87, 134. The ACRC also

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2 The district courts have continued to apply E.P. See, e.g., M.S. v. Florida Dept. of Children and Families, 100 So. 3d 1282 (Fla. 1st DCA 2012).

presented its concern to the RJA Committee, which proposed Rule 2.130, stating: "This rule change is submitted at the specific request of the Appellate Rules Committee to address the problem of conflicting rules provisions in the area of appellate practice." Report of The Florida Bar Rules of Judicial Administration Committee, Case No. 87,678. The ACRC also petitioned the Court to amend Rule 9.010 to state: "These rules shall supersede all conflicting statutes and. as provided in Florida Rule of Judicial Administration 2.135. all conflicting rules of procedure." In describing the proposed 9.100(f), the Committee explained:

> Clarifies procedure for original writs filed in circuit court when seeking review of lower tribunal action. This change in conjunction with Rules 2.135 and 9.010 designed to eliminate the conflict between Rules 9.100 and 1.630.

Appellate Rules Committee Report, p. 17.

The Court adopted the proposed revisions. See Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103 (1996); Amendments to the Florida Rules of Judicial Admin., 682 So. 2d 89 (Fla. 1996). Discussing 9.100(f), the Court stated: "We agree with the Committee that this amendment will clarify when Florida Rule of Civil Procedure 1.630 applies and when rule 9.100 applies in the circuit court." In a comment to the rule, it stated:

> Subdivision (f) was added to clarify that in extraordinary proceedings to review lower tribunal action this rule, and not Florida Rule of Civil Procedure 1.630, applies and to specify the duties of the clerk in such proceedings, and to provide a mechanism for alerting the clerk to the necessity of following these procedures. If the proceeding before the circuit court is or may be evidentiary in nature, then the procedures of the Florida Rules of Civil Procedure should be followed.

696 So. 2d at 1122.

The adoption of 2.130 and amendments to 9.010 and 9.100 were expressly and solely intended to resolve the conflict between 1.630 and 9.100. That conflict has since been eliminated. In 2013 the Supreme Court excised all references to certiorari from Rule 1.630. See In re Amendments to Florida Rules of Civil Procedure, 131 So. 3d 643 (Fla. 2013). The Committee Notes to the amendment explain:

> **2013 Amendment.** Rule 1.630 has been amended to remove any reference to certiorari proceedings, which instead are governed by the Florida Rules of

Appellate Procedure. The Florida Rules of Appellate Procedure apply when the circuit courts exercise their appellate jurisdiction.

Id. at 651.[3]

APPLICATION OF FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.130 SINCE ITS INCEPTION

Since this rule was first promulgated as Rule 2.135, it has been cited in three contexts in appellate decisions or rules:

First, Rule 2.135 is cited in the Committee Notes regarding the 1996 Amendment to Florida Rule of Appellate Procedure 9.140 to explain that Rule 9.140(b)(6)(E) is intended to adopt Florida Rule of Criminal Procedure 3.851(b)(2) and to supersede that rule. After this change was effective, however, Rule 3.851(b)(2) was not deleted from the printed rules. This resulted in some confusion among inmates and their attorneys. In Mann v. Moore, 794 So. 2d 595, 598 (Fla. 2001), the Florida Supreme Court noted the confusion and permitted habeas relief as a result of it. The same opinion made clear, however, that as of January 1, 2002, the new rule would control even in habeas petitions.

Second, Rule 2.130 was invoked in a criminal case regarding a faulty transcript of the proceedings, Moorman v. Hatfield, 958 So. 2d 396, 401-02 (Fla. 2d DCA 2007) (Altenbernd, J., concurring). In Moorman, the transcript had been prepared using a "transcriptionist" instead of a court reporter. The resulting transcript had serious errors, but remaining portions of the record were sufficient to show that reversal of the conviction was required. Id. at 397. Nonetheless, the defendant also sought mandamus relief "to compel better transcripts." Id. at 398. The Second District concluded that mandamus relief was not appropriate. In a concurring opinion, Judge Altenbernd agreed that mandamus was not proper, but wrote to address what the rules of procedure required for a proper transcript. In this context, Judge Altenbernd noted that the Florida Rules of Appellate Procedure controlled under Rule 2.130, and that the appellate rules did not recognize "transcriptionists"; they only recognized court reporters who, unlike transcriptionists, are considered officers of the court. Judge Altenbernd noted, "It may not be essential that the Florida Rules of Appellate Procedure have a valid and logical reason to require the use of court reporters for those rules to override rule

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3 Among the advocates of this change was John Hamilton who filed thorough and enlightening comments.

2.535(g)(3) [permitting transcription by persons other than court reporters], but it is reassuring to understand the importance of using court reporters for all transcripts used in appellate proceedings."

Third, Rule 2.130 has been cited to require a separate procedure for disqualification of presiding judges in appellate proceedings in circuit court. Clarendon Nat. Ins. Co. v. Shogreen, 1 So. 3d 366, 367 (Fla. 3d DCA 2009). The procedure and standard for disqualification of a trial judge is set forth in Florida Rule of Judicial Administration 2.330. In an appellate proceeding, however, the Florida Supreme Court's decision in In re Carlton, 378 So. 2d 1212, 1216 (Fla. 1979), controls and applies a different standard.

AMENDMENTS OF FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.130 SINCE ITS INCEPTION

Rule 2.130, renumbered from rule 2.135, has only been amended once to date. In 2008, the Florida Supreme Court approved a proposal from RJA to change the title of the rule from "Priority of Conflicting Appellate Rules" to "Priority of Florida Rules of Appellate Procedure." In re Amendments to the Florida Rules of Judicial Admin., 986 So. 2d 560, 561 (Fla. 2008).

It has been suggested that the significance of the title change is that it increases the weight of the appellate rules by reconfirming that the appellate rules control in all situations, not just in the event of a "conflict." In reality, however, the title change appears to be merely an editorial correction. The RJA provided the following explanation for the title change as part of its three-year-cycle report (SC08-135):

> **RULE 2.130 PRIORITY OF CONFLICTING APPELLATE RULES**
>
> The body of this rule reads as follows:
>
> The Florida Rules of Appellate Procedure shall control all proceedings in the supreme court and the district courts, and all proceedings in which the circuit courts exercise their appellate jurisdiction, notwithstanding any conflicting rules of procedure.
>
> The title of the rule is proposed to be amended to read Priority of ~~Conflicting Appellate Rules~~ Florida Rules of Appellate Procedure. *This scrivener's change is suggested (without a formal vote, but reflecting the unanimous consensus of the Committee) in order to avoid any implication that there are*

internal conflicts within the Rules of Appellate Procedure. (Emphasis added).

Similarly, in the RJA's request for comments on its proposed amendment to the rule, it explained that the amendment is a "[s]crivener's change to title of rule to clarify the intent of the rule and avoid any implication of conflicts within the appellate rules." (See Publication Notice). Consistent with this reasoning, the Court explained in its opinion that the amendment was intended "to clarify the intent of the rule and avoid any implication of conflicts within the rules." In re Amendments to the Florida Rules of Judicial Admin., 986 So. 2d at 561.

EFFECT OF THE CHANGE TO THE NAME OF FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.130

There has been only one reported decision that cited to rule 2.130 after the January 1, 2009, effective date of the title change. In Clarendon National Insurance Company v. Shogreen, 1 So. 3d 366, 367 (Fla. 3d DCA 2009), the court applied the holding of a related prior opinion that the appellate disqualification standard applies to circuit court judges sitting in three-judge appellate panels, rather than the standard applicable to circuit court judges in their capacity as trial judges. The new title of rule 2.130 was not referenced in the opinion.

As noted above, there has been only one reported decision that cited to rule 2.130 after the January 1, 2009, effective date of the title change. In that case, the Third District Court of Appeal's application of the rule was consistent with its prior holding in a related case. Compare Clarendon National Insurance Company v. Shogreen, 1 So. 3d 366 (Fla. 3d DCA 2009) with Clarendon National Insurance Company v. Shogreen, 990 So. 2d 1231 (Fla. 3d DCA 2008).

JUSTIFICATION TO ELIMINATE FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.130 JUST 8 YEARS AFTER THE SUPREME COURT CHANGED ITS NAME

As discussed above, the title change was an editorial revision, and not a substantive one designed to provide uber-supremacy to the appellate rules. Even if an enhanced prominence of the appellate rules can be inferred from a textual comparison of the titles, it should not be viewed as an endorsement from the Court of allowing an individual rules committee to override or trump general concepts of practice that should be consistent for all areas and levels of practice before the courts. While there may be certain areas where there is a legitimate need for a specialized rule of appellate procedure (and hence one that would necessarily

control over a conflicting general rule), those areas should be discrete and limited to the peculiarities of appellate practice. Eliminating rule 2.130 as a mechanism for a rules committee to argue that it has carte blanche to opt out of or veto procedures of general applicability will foster predictability and uniformity of practice throughout the state.

JUSTIFICATION TO ELIMINATE FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.130 WHEN RJA COULD HAVE ELIMINATED IT 8 YEARS AGO

There's no indication that the RJA or the Court considered eliminating or narrowing the scope of rule 2.130 at the time of the title change. However, in the cycle report that generated the title-change (SC08-135), the RJA recommended amendments to rule 2.140 to require that the rules committees provide copies of final proposed rule changes to the RJA within 30 days of passage of the proposal, rather than by June 15th of the rules cycle. It was explained that this change would give the RJA more time to review and react to proposals from the committees, and to coordinate with other affected committees as approvals occur. The Court's adoption of this amendment seems to reflect an enhanced appreciation and recognition of the need for RJA to act, at a minimum, as a coordinating body, and perhaps to take on an even larger role in the future.

FORESEEABLE RESULTS IF FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.130 WERE ELIMINATED

It appears that the appellate rules explicitly reference applicable RJA rules in most circumstances where they apply. For example, rule 9.020(k) refers to RJA rule 2.515(c) for the definition of when a document is "signed." Rule 9.040(i) provides that requests to determine the confidentiality of appellate records are governed by RJA rule 2.420. Similarly, rule 9.050(a) requires parties to comply with RJA rule 2.425 when filing a brief that contains private information. Rule 9.440 refers to RJA rule 2.510 for attorneys needing to be admitted to the appellate court pro hac vice.

The appellate rules, however, do not refer practitioners to the only RJA rules that apply to them. For example, the current appellate rules do not specifically reference RJA rule 2.505, which addresses the appearance of attorneys (although a proposed amendment that has been approved by the full ACRC does); RJA rule 2.526, which addresses accessibility of information and technology; or RJA rule 2.550, which addresses calendar conflicts.

Having some appellate rules that explicitly state that they are governed by an RJA rule and others that do not may cause confusion to the unwary practitioner. While FRAP rule 9.020(h) provides that the RJA rules "are applicable in all proceedings governed by these rules, except as otherwise provided in these rules. . .," confusion may still arise by not having one uniform set of rules that applies to the proceeding.

ARGUMENT AGAINST THE REPEAL OF FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.130

FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.130 SHOULD NOT BE REPEALED

HISTORY OF RJA

RJA Was Intended To Apply To Court Administration

In its 1978 opinion creating the Rules of Judicial Administration ("RJA"), the Florida Supreme Court explained: "These rules are a compilation and consolidation of the rules of judicial administration contained in the Florida Appellate Rules, Florida Rules of Civil Procedure, Florida Rules of Criminal Procedure and Transition Rules. Obsolete provisions have been deleted and only minor substantive and style and drafting changes have been made." In re Florida Rules of Judicial Administration, 360 So.2d 1076 (Fla. 1978).

The newly created RJA contained sections regarding the Florida Supreme Court and the District Courts of Appeal, addressing topics such as internal government of the court, court administration, the role of the chief judge, the clerk, the librarian and the marshal. Provisions relating to appellate practice and procedure, as opposed to court administration, were expressly left in the rules of appellate procedure.

The RJA supremacy provision, which is now in Rule 2.010 and which purports to make RJA supersede all conflicting rules and statutes, was not discussed at all by the Court.

In the same section, the scope of RJA is expressly limited to "administrative matters." ("They shall apply to all of the court administrative matters in all courts to which the rules are applicable by their terms."). There is no indication that the Court intended the Rules of Judicial Administration to supersede other conflicting rules outside the scope of "court administrative matters."

RJAC'S ROLE AS THE "COORDINATING COMMITTEE": IDENTIFY AND REFER CONFLICTS

The role of the Rules of Judicial Administration Committee ("RJAC") as "coordinating committee" was established in the 1984 amendments. The Florida Bar Re: Rules of Judicial Administration, 458 So.2d 1110 (Fla. 1984). The Florida Supreme Court explained the scope and intent of this function:

> A new rule, Rule 2.130(b)(5), has been submitted which provides for a coordinating function of all rule proposals to be assigned to the Judicial Administration Rules Committee. The intent is to identify how proposed changes in one set of rules inter-relate with existing and proposed rules in other areas. This coordinating function provides a means for determining the potential impact of rules changes on rules in other areas of the law.

458 So.2d at 1110–11

The 1984 version of Rule 2.130(b)(5) expressly states that the RJAC's role as coordinating committee involves identifying conflicts and referring them to the applicable committees for resolution. The rule read as follows:

> (5) The Judicial Administration Rules Committee shall also serve as a Rules Coordinating Committee. Each rules committee shall have at least one of its members appointed to the Judicial Administration Rules Committee to serve as liaison. All proposed rules changes shall be submitted to the Judicial Administration Rules Committee *which shall then refer all proposed rules changes to those rules committees that might be affected* by the proposed change. All proposed changes shall be submitted by June 30 of each year of the rules cycle. (emphasis supplied)

The petition filed by RJAC requesting the amendment making it the "coordinating committee" likewise confirms that the intent of this role was to identify conflicts and refer those conflicts to the relevant rules committees, not to supersede other committees. The stated "reason for proposed amendment" in the RJAC petition was: "This rule provides for a coordinating function to be assigned to the Judicial Administration Rules Committee. The intent is to insure that all proposed changes are referred to a rules committee that might be affected by a proposed change in a rule on another rules committee. The committee felt this function was important to provide adequate review of the potential impact of a rules change in one area upon other rules." RJA Proposed Amendments for cycle ending July 1, 1984, (appendix to petition), page 5.

The RJAC proposal states that there is a need for a coordinating committee consisting of members from each of the other rules committees so that rules committees will be aware if a proposal by another rules committee affects that committee's work, presumably so that the affected committees can then consider the issue themselves. Notably, RJAC's petition provides one example, a rule proposed by one committee that would have affected appellate jurisdiction, and RJAC states that such a proposal "should be reviewed by the Appellate Rules Committee." Petition, page 2.

There is no indication in the filings by RJAC or the Court's opinion that the proper role of RJAC would be to resolve these conflicts, or to mandate rules for any of the other rules committees' areas of practice.

ACCURATE HISTORY OF FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.130

Proponents of repeal have suggested that Rule 2.130 exists solely because of a limited issue regarding certiorari proceedings in circuit courts. This argument is not supported by the plain language of the rule, which by its terms applies to all proceedings in the District Courts of Appeal and Florida Supreme Court, and all appellate proceedings in circuit court. This all-encompassing language was proposed by RJAC and approved by the Florida Supreme Court.

In addition to the broad language chosen for Rule 2.130, the actual history of the Rule contradicts the argument that it was intended solely to solve a small issue regarding certiorari in circuit courts. The certiorari issue arose because of Civil Rule 1.630, "Extraordinary Remedies." Rule 1.630 established certain procedures for actions in circuit court for the issuance of writs of mandamus, prohibition, quo warranto, certiorari, and habeas corpus.

The Court Commentary to the 1984 adoption of Rule 1.630 explains:

> Rule 1.630 replaces rules and statutes used before 1980 when the present Florida Rules of Appellate Procedure were adopted. Experience has shown that rule 9.100 is not designed for use in trial court. The times for proceeding, the methods of proceeding, and the general nature of the procedure is appellate and presumes that the proceeding is basically an appellate proceeding. When the extraordinary remedies are sought in the trial court, these items do not usually exist and thus the rule is difficult to apply. The uniform procedure concept of rule 9.100 has been retained with changes making the procedure fit trial court procedure. []

Problems arose because Rule 1.630 conflicted with Rule 9.100, the appellate rule of procedure for original proceedings. After several years, both the Civil Procedure Rules Committee and Appellate Court Rules Committee ("ACRC") became convinced that the appellate rule should control certiorari review proceedings in circuit court.

The proposal first came from Civil Procedure Rules Committee.[4] For the four-year cycle ending in 1992, the Civil Procedure Rules Committee proposed an amendment to Rule 1.630 to provide that certiorari would instead be controlled by the appellate rule, Rule 9.100. The proposed Committee Note stated "Certiorari proceedings are essentially appellate and should be governed by Rules of Appellate Procedure." There was one comment filed in opposition to the proposal. The supreme court declined to adopt the amendment "at this time," without elaboration. In re Amendments to the Florida Rules of Civil Procedure, 604 So.2d 1110 (Fla. 1992).

The ACRC's work at the same time demonstrates that both practitioners and the clerks of various circuit courts were seeing a number of negative effects from the confusion regarding whether circuit courts exercising their certiorari jurisdiction were governed by the civil rule or the appellate rule. See Appellate Court Rules Committee Agenda September 9, 1994. These problems included an inability to obtain timely relief, a lack of consistency in matters such as whether a summons or show cause order would be issued and whether a petitioner was required to provide a record, and unnecessary hearings with the associated waste of time and expense. The ACRC conducted a survey of circuit court clerks, which revealed that they preferred to use the appellate rule. The ACRC noted that the Civil Procedure Rules Committee had attempted to clarify that Rule 9.100 instead of Rule 1.630 would control certiorari proceedings, and ACRC undertook to coordinate with and support the Civil Procedure Rules Committee in that effort. See August 18, 1994 memo from Kitty Pecko (included in September 1994 ACRC agenda).

It is therefore clear that both the ACRC the Civil Procedure Rules Committee found the conflict between Rule 1.630 and Rule 9.100 in certiorari

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[4] The Civil Procedure Rules Committee had previously noted that appellate rules should control at least some aspects of all extraordinary writ filings. See In re Rules of Civil Procedure, 391 So.2d 165 (Fla. 1980) (repealing Rules 1.640, "certiorari," 1.660, "mandamus," and 1.680 "constitutional stay writs," all with Committee Notes stating that those Rules had been superseded by the Florida Rules of Appellate Procedure).

proceedings to be significant, and that both Committees concluded that such proceedings were appellate in nature and therefore the appellate rule should control.

Notably, however, the appellate supremacy rule, Rule 2.130, did not arise from the work of these committees on the specific issue of the conflict between Rule 1.630 and Rule 9.100 in circuit court certiorari cases. In addition to identifying this area of conflict between appellate and civil rules regarding circuit court certiorari, the ACRC had at around the same time noted other significant areas of conflict between appellate and other rules, including, for example, the deadlines for and tolling effect of rehearing motions and the appealability of certain orders in criminal cases. These conflicts appeared in family, probate, criminal, and workers' compensation rules; they were not limited to Civil Rule 1.630.

In order to address these conflicts, the ACRC established a "Consolidation Subcommittee," the function of which included "incorporating all rules of appellate procedure, wherever found in the Florida Rules of Court and elsewhere, into the Florida Rules of Appellate Procedure." The Consolidation Subcommittee determined that the issue was important enough to present its proposals in the form of "Resolutions."

Resolution I stated a number of key declarations and findings:

1. The Florida Rules of Appellate Procedure constitute the main body of appellate procedural rules in the state courts of Florida.
2. Rules governing appellate procedural matters are also found in other areas of Florida Rules of Courts, some of which are inconsistent with the corresponding Florida Rules of Appellate Procedure.
3. The placement of rules governing particular aspects of appellate procedure in sets of rules other than the Florida Rules of Appellate Procedure serves no useful purpose but constitutes a trap for the unwary.
4. Departures from otherwise-applicable provisions of the appellate rules for particular types of cases can be best served by placing them within the Rules of Appellate Procedure.
5. It is desirable that all rules relating to appellate procedure be in the Appellate Rules.

Based on these findings, Resolution 1 determined that

1. The Consolidation Committee should identify all rules affecting appellate procedure and propose Appellate Rules which consolidate all rules relating to appellate procedure in the Appellate Rules.
2. The Consolidation Committee should coordinate with the other rules committees to determine whether there is a valid reason for departing from the otherwise applicable Appellate Rule.
3. The Appellate Court Rules Committee should call upon The Florida Bar to require that all rules affecting appellate procedure be included within the Appellate Rules.
4. The Appellate Court Rules Committee should call upon The Florida Bar to establish a policy that any proposed new or amended rules directly affecting appellate procedure should be presented to the Florida Supreme Court for consideration as an appellate rule.

Resolution I was passed unanimously and in full by the ACRC in September 1994.

Resolution II stated that "consolidation is desirable to ease the burden on lawyers, judges and clerks, and eliminate traps for the unwary." Recognizing that reviewing appellate rules in other court rules sections could require knowledge of the relevant substantive subject area, the Consolidation Committee recommended that the ACRC's membership be reconstructed to create standing subcommittees on the subjects of Civil Procedure, Criminal Procedure, Probate, Workers' Compensation, Juvenile, Family, and Administrative Law.

While provisions of Resolution II dictating certain membership of the standing subcommittees did not pass at the September 1994 meeting, the concept of standing subcommittees did pass, along with a motion to task those standing subcommittees with implementing Resolution I. These standing subcommittees remain the framework of the ACRC today.

APPELLATE SUPREMACY: FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.130

The very next year, RJAC considered the issue of appellate supremacy. RJAC materials refer to the issue as "Rule Regarding Supremacy of Appellate Rules." A subcommittee of RJAC proposed a new Rule 2.135, "Priority of Conflicting Appellate Rules," to state "The Florida Rules of Appellate Procedure shall control for all proceedings in the supreme court and in the appellate courts, notwithstanding any conflicting rules of procedure." See minutes of April 7, 1995 RJA meeting and June 7, 1995 letter from subcommittee chair Bruce Berman.

This language was presented to RJAC at the June 22, 1995 meeting. The minutes of that meeting reflect that there was "a great deal of discussion" regarding whether the rule should provide absolute supremacy of the Appellate Rules in all matters of appellate procedure or whether the rule should provide only that the Appellate Rules control in the event of a conflict with another rule of procedure. By a straw vote of 15-3, RJAC directed that the rule should provide for the absolute supremacy of the Appellate Rules on all matters of appellate procedure, and referred the matter back to the subcommittee. The meeting agenda for the September 6, 1995, RJAC meeting reconfirms that "June 22, 1995 referred back to subcommittee with directions that any new rule should provide for absolute supremacy of Appellate Rules on all matters of Appellate Procedure." See RJAC Final Notice and Agenda for 9/6/1995 meeting, P. 3.

After extensive discussion, the following language was approved in final form (23-0) by the RJAC at its September 1995 meeting:

> Rule 2.135. Priority of Conflicting Appellate Rules. The Florida Rules of Appellate Procedure shall control all proceedings in the Supreme Court and the District Courts, and all proceedings in which the Circuit Courts exercise their appellate jurisdiction, notwithstanding any conflicting rules of procedure.

RJAC's four-year cycle report adding Rule 2.135 states "This new rule provides that as to all appellate proceedings, in the event of a rule conflict, the Rules of Appellate Procedure shall be controlling. This rule change is submitted at the specific request of the Appellate Rules Committee to address the problem of conflicting rules provisions in the area of appellate practice." Case 87,678 "Amended Four Year Cycle Report of the Florida Bar Rules of Judicial Administration Committee," (submitted by Menendez and Harkness, no date).

The Court adopted new rule 2.135 without discussion but with the description that it "would provide that the Rules of Appellate Procedure control when rules conflict in appellate proceedings." Appellate supremacy was one of many Rules submitted by RJAC in that report. Not all of them were approved; the Florida Supreme Court rejected about half the RJAC proposals in that report. See In re Amendments To The Florida Rules Of Judicial Administration, 682 So.2d 89 (Fla. 1996). The Court's approval of the appellate supremacy rule should be considered intentional.

The rule was renumbered without change in 2006 as part of a wholesale reorganization and renumbering of RJA. In re Amendments to The Florida Rules

Of Judicial Administration, 939 So.2d 966 (Fla. 2006). There was no discussion of repeal at that time.

In 2008, the Florida Supreme Court approved a proposal from RJAC to change the title of the rule from PRIORITY OF CONFLICTING APPELLATE RULES to PRIORITY OF FLORIDA RULES OF APPELLATE PROCEDURE. In re Amendments to The Florida Rules Of Judicial Administration, 986 So.2d 560 (Fla. 2008). The Court explained "The title of rule 2.130 is changed to 'Priority of Florida Rules of Appellate Procedure' to clarify the intent of the rule and avoid any implication of conflicts within the appellate rules." Again at that time, neither RJA nor the Court considered repealing Rule 2.130. The change in title appears to increase the weight of the appellate rules, reconfirming that the appellate rules control in all situations, not just in the event of a "conflict."

1995 APPELLATE RULES FOUR-YEAR CYCLE REPORT

The ACRC had its own four-year cycle report, including the consolidation subcommittee's resolutions, pending in the Florida Supreme Court at the same time as the RJAC report which included Rule 2.130. The 1995 ACRC Report (Case No. 87,134) further demonstrates that Rule 2.130 was not directed only to certiorari in circuit court, because that issue had a separate resolution.

The 1995 ACRC Report advises the Court of its consolidation project, and the Committee's resolutions. The report states that ACRC reviewed each section of the Florida Rules of Court and "decided there was a need to bring consistency to the procedures for handling appeals in various areas of substantive law" and "to include all rules relating to appellate review in the Rules of Appellate Procedure." The ACRC explained that it had identified many rules relating to appeal or review procedure that were located outside the Appellate Rules, and that these rules, because of their placement outside the Appellate Rules "loom as a malpractice trap to the unwary practitioner" and the differences "have resulted in devastating consequences, including the dismissal of an appeal."

The ACRC Report next states that to eliminate rules affecting appellate procedure appearing outside the Appellate Rules and the resulting trap, the ACRC requested The Florida Bar to recommend to the Florida Supreme Court that all Florida Rules of Court affecting appellate procedure must be included within the Florida Rules of Appellate Procedure. *Notably, the ACRC report explains that the intent of RJA 2.130 was to effectuate these ACRC resolutions*: "The Florida Rules of Judicial Administration Committee has adopted a new proposed rule to that

effect, to be included in their four-year cycle submission." ACRC Report, case number 87,134, P.2.

Recognizing that specific practice areas may require specific procedures for appeal, the ACRC report also states that ACRC created 7 "blue-ribbon" subcommittees (civil, criminal, administrative, workers' compensation, family, juvenile, and probate) to incorporate rules for the specialized areas in the proper section of the Appellate Rules.

The Report does not state in any way that Rule 2.130 was intended to address only the certiorari issue upon which the proponents of repeal now rely. Instead, in a separate section of the report, the ACRC explained that the new proposed Rule 9.100(f) was intended to clarify the procedures applicable to certiorari proceedings in circuit court, and to address the confusion created by Civil Rule 1.630.

Henry Trawick filed a response in opposition to the ACRC petition (case number 87,134, March 1, 1996). His comments were directed to proposed Rule 9.100(f), and objected only to the concept that circuit court certiorari proceedings would be subject to Rule 9.100 instead of Rule 1.630. Significantly, Trawick did not oppose the ACRC consolidation resolutions, and expressly agreed that the Rules of Appellate Procedure should control in appellate court. His comments are as follows:

> The Appellate Rules Committee has the mistaken concept that all appellate proceedings should be governed by the appellate rules, regardless of the court in which the proceedings are filed. This is an erroneous concept because the circuit court procedures are unlike those of the Supreme Court and the district courts of appeal. Many of those procedures simply will not fit in circuit court procedure because the circuit court is primarily a trial court. The proper concept is to have all matters in a particular court conform to the rules generally applicable to that court. In other words, the appellate rules should apply to those courts that exercise only appellate jurisdiction. While the extraordinary writs are original proceedings in the Supreme Court and in the district courts of appeal, they are appellate in nature and appellate rules can easily apply. The same thing is not true of the circuit court in which most of the procedure deals with trial matters. The procedure should then conform to what that court is used to and equipped to do.
>
> If this is an attempt to repeal Rule 1.630, it should be done directly and not indirectly so that everyone will know about it.

Trawick also filed a similar response to the simultaneously pending RJAC report, claiming that Rule 2.135 is a "corollary" to proposed Rule 9.100(f), and "[t]he reason for both proposals is that the ACRC seems to believe that the procedure in a matter should be governed by the name of the proceeding instead of the ability of the court in which it is being processed to handle it. It is an attempt sub rosa to eliminate Rule 1.630." Despite the record of discussion at three separate RJA meetings, including "a great deal of discussion" at the June meeting, Trawick accused "It does not appear that the RJAC has given it any consideration."

It therefore appears that the perception that Rule 2.130 exists because of the specific circuit court certiorari issue came more from Mr. Trawick than from either of the involved Rules Committees. To the contrary, the record of both Committees reflects that Rule 2.130 was intended to address the much broader problem of having rules controlling appellate proceedings appear in different sections of the rule book. These concerns exist to the same degree today. The purpose of Rule 2.130 and appellate supremacy has not changed.

In its opinion on the ACRC report, the Florida Supreme Court noted with approval the "theme that all rules dealing with appellate review should be contained in the Rules of Appellate Procedure." In Re Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103, 1106 (Fla. 1996).

Approving the amendment to Rule 9.100 in a separate part of the opinion, the Court stated "We agree with the Committee that this amendment will clarify when Florida Rule of Civil Procedure 1.630 applies and when rule 9.100 applies in the circuit court." In Re Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103, 1103 (Fla. 1996). Notably, this is a separate part of the opinion dealing with the amendment to 9.100, and does not define the scope or intent of Rule 2.130.

FLORIDA RULE OF APPELLATE PROCEDURE 9.010

Appellate Rule 9.010 originally stated that the appellate rules supersede all conflicting rules. Following a 1989 case regarding a conflict between the appellate rule and the juvenile rule on the tolling effect of a rehearing motion on time for filing notice of appeal, Rule 9.010 was amended in 1992 to delete this general supremacy provision. See, e.g., In the Interest of E.P. v. Department of Health and Rehabilitative Services, 544 So. 2d 1000 (Fla. 1989). The Committee Note to the 1992 amendment notes that significant issues (such as the timeliness of an appeal in the E.P. case) can arise due to conflicts with other rules, and states that "[i]n the absence of a clear mandate from the supreme court that only the Florida Rules of

Appellate Procedure are to address appellate concerns, the committee felt that these rules should not automatically supersede other rules."

It appears that the change was not a concession that appellate rules should not control, but a recognition that conflicts between appellate and other rules could result in a deprivation of substantive rights if the Court were unwilling to "mandate" that appellate rules control.

In 1996, the ACRC received that clear mandate in the form of the Court's approval of RJA 2.130. In response, Rule 9.010 was amended to again provide that the appellate rules shall supersede all conflicting rules. The Committee Note to the 1996 amendment states "Rule of Judicial Administration 2.135 now mandates that the Rules of Appellate Procedure control in all appellate proceedings." Like RJA 2.135, the 1996 amendment to Rule 9.010 was approved by the Court without reservation.

CONTINUING NEED FOR APPELLATE SUPREMACY

It is vital to accurately understand that the broad intent of Rule 2.130 goes well beyond a limited issue regarding circuit court certiorari. The concerns which caused the ACRC to recommend consolidation of all rules that apply in appellate proceedings are as important now as they were at adoption. Allowing rules relating to appellate practice to appear in sections outside of the Appellate Rules would create the same trap for the unwary that the ACRC, the RJAC and the Florida Supreme Court all sought to avoid twenty years ago. Rule 2.130 provides needed certainty for appellate judges and practitioners. See, e.g., Byle v. Pasco County, 970 So. 2d 366 (Fla. 2d DCA 2007); McAlevy v. State, 947 So. 2d 525 (Fla. 4th DCA 2006); and Melkonian v. Goldman, 647 So. 2d 1008 (Fla. 3d DCA 1994).

It is logical and fair that the rules controlling appellate proceedings should be located in one place, and should be considered, proposed, and revised by appellate judges and appellate specialists. Practitioners handling an appellate proceeding will (and should be able to) expect to find all rules governing that proceeding in one location. Practitioners from around the country are familiar with this concept because the Federal Rules of Appellate Procedure control all proceedings in federal appellate court. See *Fed.R.App.P.* Rule 1(a)(1) ("These rules govern procedure in the United States courts of appeals.").[5]

[5] The Historical Note to the federal rules explains that the history was similar to Florida's: when the Supreme Court adopted rules for appellate procedure, it

At least one well regarded jurist has expressly relied on Rule 2.130, and confirmed that appellate rules supersede conflicting rules of judicial administration "in review proceedings before the district courts of appeal and the Florida Supreme Court." Moorman v. Hatfield, 958 So.2d 396, 401 (Fla. 2d DCA 2007)(Altenbernd, J., concurring).

Likewise, in Clarendon Nat. Ins. Co. v. Shogreen, 990 So.2d 1231 (3d DCA 2008), the court held that Rule 2.130 made rules regarding appellate procedure superior to conflicting rules of judicial administration, even if the appellate "rule" was established by case law instead of the rules of appellate procedure. In Shogreen, the court held that the caselaw establishing the standard for disqualification of appellate judges supersedes the conflicting judicial administration rule when the issue involves appellate judges and circuit judges sitting in their appellate capacity. 990 So.2d at 1233-34.

Rule 2.130 establishes a clear priority, which helps both judges and attorneys, and allows certainty in decisions. In contrast, there is no reported case or even any referral from a court, clerk, judge or practitioner in which Rule 2.130 and the supremacy of appellate rules has been identified as a problem. It appears that repeal of Rule 2.130 has not been proposed to solve any problem with appellate rule supremacy in practice, but because an undetermined number of RJAC members (it may be very few) dislike the fact that the ACRC departed from two provisions in the RJA, the 5-day rule and the limited appearance rule.

The history of the 5-day rule conflict as a precursor to the proposal to repeal appellate rule supremacy is important. When the e-service rules were proposed, computation of time was a big issue. RJAC obtained approval of e-service by assuring practitioners that computation of time would be the same for service by e-mail as service by mail. After obtaining approval of e-service, RJAC changed its position and sought to eliminate the 5 mailing days. ACRC objected to RJAC deleting the 5 days, and ACRC's objections were rejected. RJAC assuaged opponents of deleting the 5-day rule by stating that other committees remained empowered to determine how to handle the issue. ACRC did just that, and ultimately made the determination that Appellate Rules were best served by keeping the 5 mailing days for service by e-mail. Some members of RJAC voiced opposition to ACRC "opting out," and have now proposed to eliminate the Rule that allowed ACRC to do so.

"abrogated several rules relating to appellate procedure formerly contained in the Rules of Criminal Procedure for the District Courts and the Rules of Civil Procedure for the District Courts."

Some proponents of repeal have suggested it would have been easier for ACRC to just change the due dates for briefs from 20 to 25 days and accept the loss of the 5-day rule. In addition to noting that 25 days is not same as 20 plus 5 days in calculating due dates, the ACRC identified 34 rules that would have to be changed. It seems unreasonable to require a Committee and the Court to change 34 rules instead of keeping the existing 5-day rule.

Like the approximately 20 rule conflicts that were identified by the ACRC in its 1995 consolidation project, there are a number of rules in other sections of the rule book that would conflict with Appellate Rules if Rule 2.130 is repealed. Several members of this sub-subcommittee did an exhaustive review, and found numerous conflicts just in part 5 of the RJA. These conflicts are catalogued in the attached table, and include matters ranging from appearance and withdrawal of counsel to method of service to formatting and font size. Members of this subcommittee have stated that while matters such as e-filing may be within the scope of "court administration," issues such as method of service and computation of time are matters of procedure.

The failure to follow the correct procedure on appeal can affect a client's substantive rights. Practitioners need to know that they can protect their clients' rights by complying with the appellate rules. Pro se appellants need the same (or more) protection. Likewise, ACRC receives many referrals from appellate court clerks and judges. The clerks and judges of the appellate courts need to be able to identify the procedures that work best in their own courts. These may be different than the procedures that work best in circuit court.

The technology used in appellate court by the clerks and judges is different than that used in circuit court. For example, appellate court filings are in a different format and can be bookmarked, while trial court filings cannot. If another committee were to dictate the format of filings, the appellate courts would lose an important tool.

Likewise, the appellate rules have long dictated a 14-point font size for appellate filings, a requirement which was specifically requested by the appellate courts. However, when RJAC recently considered font size, some members disliked the appellate rule and advocated for a 12-point font. A controlling RJA on font size could eliminate the longstanding preference of appellate judges, for no reason. The appellate courts must be able, through ACRC, to determine the procedures that work best for the appellate clerks, judges, and practitioners.

Rule 2.130 addresses a general type of proceeding that could apply to every substantive category of case—i.e. appeals. In a sense, the appellate rules are the

RJA for appeals. There can be an appeal of a traffic case, an appeal of a civil case, an appeal of a criminal case, an appeal of a workers' compensation case, and an appeal of a probate case. The appellate rules govern all those diverse cases, and this is a property unique to the appellate rules among the specific rules sets (other than RJA). It is therefore important to emphasize that the appellate rules take precedence over those other specific substantive rule sets, in order to avoid ambiguity and confusion in an appeal. One subcommittee member noted that Rule 2.130 is exactly where it belongs, in the RJA rules (along with the companion rule that is similar in the appellate rules). Rule 2.130 essentially establishes as a matter of general application that where appellate rules conflict with another rule set (it could be any procedural rule set) in an appeal, the appellate rules govern.

CONTINUING NEED FOR CIRCUIT COURT GUIDANCE

If an extraordinary writ in circuit court challenges judicial or quasi-judicial action, the appellate rules apply. Sub-subcommittee members who regularly practice in circuit court review proceedings felt strongly that Rule 2.130 provides needed authority and guidance to circuit courts sitting in their appellate or review capacity.

Florida law indicates that circuit courts acting in their appellate capacity should act like appellate courts. See Byle v. Pasco County, 970 So.2d 366 (Fla. 2d DCA 2007) (certiorari petition filed in circuit court is appellate in nature); McAlevy v. State, 947 So.2d 525 (Fla. 4th DCA 2006); Melkonian v. Goldmian, 647 So.2d 1008 (Fla. 3d DCA 1994)(circuit court should sit in three judge panel to consider petition for writ of certiorari). In Sheley v. Florida Parole Commission, 720 So.2d 216 (Fla. 1998), the Florida Supreme Court explained the function of circuit court appellate review and second tier district court review, including the fact that the circuit court must act like an appellate court, not like a trial court, when sitting in its review capacity. A circuit court acting in its appellate capacity which reevaluates the credibility of evidence or reweighs conflicting evidence departs from the essential requirements of law. See, e.g., State v. Wiggins, 151 So.3d 457 (Fla. 1st DCA 2014); City of Deland v. Benline Process Color Co., Inc., 493 So.2d 26 (Fla. 5th DCA 1986); Pompano Beach Police and Firemen's Pension Fund v. Franza, 405 So.2d 446 (Fla. 4th DCA 1981); Board of County Commissioners of Pinellas County v. City of Clearwater, 440 So.2d 497 (Fla. 2d DCA 1983). See also Siegal v. Career Service Commission, 413 So.2d 796 (Fla. 1st DCA 1982).

Conflicts between the appellate rules and other rules cause confusion in circuit court review proceedings. From issues regarding whether a petitioner has a

right to an evidentiary hearing, see Spaziano v. Florida Parole Commission, 46 So.3d 576, 579 (Fla. 1st DCA 2006), to whether a motion for rehearing was due within 10 days or 15 days, Bramblett v. State, 15 So.3d 839 (Fla. 1st DCA 2009), important rights can be affected and results can be inconsistent. See Brown v. Perrine, 855 So.2d 157 (Fla. 1st DCA 2003); Newell v. Moore, 826 So.2d 1033 (Fla. 1st DCA 2002).

As a practical matter, some practitioners and even some judges still have confusion regarding the fact that appellate rules control review proceedings in circuit court. Rule 2.130 puts parties on notice that for all documents filed in circuit court seeking appellate review, the rules of appellate procedure control. In the event of a dispute, it gives the parties and the judges a clear path.

In 2013, Rule 1.630 was amended to remove any reference to certiorari proceedings. In re Amendments to Florida Rules of Civil Procedure, 131 So.3d 643 (Fla. 2013). The Committee Note to the 2013 amendment states: "Rule 1.630 has been amended to remove any reference to certiorari proceedings, which instead are governed by the Florida Rules of Appellate Procedure. The Florida Rules of Appellate Procedure apply when the circuit courts exercise their appellate jurisdiction." This appears to resolve any conflict for certiorari proceedings, but Rule 2.130 remains necessary in other writ proceedings (mandamus, habeas, prohibition and other writs). Rule 2.130 provides needed clarity because it expressly applies to "all proceedings in which the circuit courts exercise their appellate jurisdiction," regardless of the type of proceeding.

PROPOSED AMENDMENTS TO FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.140

It is apparent that RJAC has attempted to expand its role as a "coordinating committee" beyond the originally approved task of identifying conflicts and referring them to the relevant rules committees for resolution. Coordinating does not mean dictating, and does not make RJAC superior over other Committees.

There is pending a proposed amendment to RJA 2.140 which attempts to further expand the powers of RJAC as the "central" coordinating committee.

> (6) The Rules of Judicial Administration Committee shall also serve as ~~a~~the central rules coordinating committee. The Rules of Judicial Administration Committee's consideration of a rule proposal shall assess specifically whether the rule proposal addresses a matter of general or common application and shall include recommendations for reconciling competing or inconsistent rules, avoiding conflicts, ensuring consistency,

limiting redundancy, and minimizing repetition among rules. The Rules of Judicial Administration Committee shall communicate regularly and promptly with other affected rules committees regarding the Rules of Judicial Administration Committee's considerations. Each rules committee shall ~~have at least 1 of its members appointed to the Rules of Judicial Administration Committee to serve as liaison. All committees shall~~ provide a copy of any proposed rules changes to the Rules of Judicial Administration Committee within 30 days of a committee's affirmative vote to recommend the proposed change to the supreme court. The Rules of Judicial Administration Committee shall ~~then~~acknowledge promptly each rule proposal approved by a rules committee and refer all proposed rules changes to those rules committees that might be affected by the proposed change. The Rules of Judicial Administration Committee may issue a formal response to each rule proposal approved by a rules committee within 30 days after the next regularly-scheduled meeting of the Rules of Judicial Administration for regular-cycle submissions and within 30 days after formal approval by a rules committee for out-of-cycle submissions. Unless a deadline established by the supreme court or by the board of governors does not permit, the Rules of Judicial Administration Committee's response to a rules proposal shall be included and may be addressed in the submission of the rule proposals to the board of governors and to the supreme court.

Many issues with this proposal have been identified by the ACRC, and the ACRC intends to comment on the RJAC proposal.

One issue with the proposal is that anyone can already comment on a rules proposal submitted by any committee. While simply allowing a "response" from RJAC seems benign at first glance, adding an unnecessary provision to specifically empower RJAC to comment seems designed to expand RJAC's authority and make it superior over other Rules Committees.

The ACRC has expressed opposition to the proposed amendments to Rule 2.140, but the Chair of ACRC at the time expressed frustration that RJAC did not appear to give real consideration to input from ACRC. See Loquasto memo 12/23/14. This is significant not only because the proposal appears to expand the authority of RJAC, but also because proponents of repealing Rule 2.130 have argued that RJAC's role as "coordinating committee" still allows meaningful input from other rules committees. In practice, this does not appear to be the case.

In contrast, ACRC has demonstrated an ability to work with other committees to resolve identified areas of conflict or potential conflict. See, e.g., In

Re Amendments to The Florida Rules Of Criminal Procedure, 167 So.3d 395 (Fla. 2015) (criminal submission joined by appellate to jointly address conflict between rules regarding rendition). When RJAC serves its intended function as "coordinating committee," identifying conflicts and referring them to the relevant committees, the process works.

If Rule 2.130 is eliminated, the ACRC's authority to propose rules governing appellate practice could be undermined by RJAC proposing a conflicting rule. RJAC could expand its scope outside of general practices and court administration, and could begin to regulate the appellate process, including such principles as which interlocutory orders are appealable, the tolling effect of motions, the preparation and transmittal of the record, what briefs are allowed, the contents of briefs, the time for service of briefs, page limits of briefs, procedures for oral argument, procedures for motion practice including fees and costs motions on appeal, and any number of other issues.

Some of the advocates for repeal respond that there is no risk that RJAC would attempt to dictate procedures specific to appeals. However, there is no consensus even in this relatively small subcommittee regarding what rules or concepts are "appellate" in nature and should be controlled by the ACRC and what rules or concepts are of "general application" and could be mandatory for all cases in all courts despite a contrary appellate rule. Conflicts on issues that appear appellate to most members of this subcommittee have caused problems in the past. See 1995 ACRC Report; A.L. v. State, 983 So.2d 597, 598-99 (Fla. 2d DCA 2007) (certifying a case to the Florida Supreme Court for immediate review because of that court's "superior ability to resolve conflicts among the Florida Rules of Appellate Procedure, the Florida Rules of Judicial Administration, and local administrative rules and orders" that affect several classes of constitutional or state officers).

Notably, while courts have applied the established rule of construction that specific rules control over general rules in the event of a conflict, the Rules of Judicial Administration do not appear to acknowledge this principle. Rather, Rule 2.110 broadly provides that RJA "shall supersede all conflicting rules and statutes."

Proponents of repeal state that allowing Appellate Rules to supersede RJA invites other Committees to do the same. In fact, Rule 2.130 ensures the opposite, because the combination of Rules 2.110 and 2.130 makes clear that only appellate rules will supersede. This concern becomes an issue only if Rule 2.130 is repealed.

RJAC was correct in 1995 when it determined by an overwhelming majority after substantial discussion that appellate rule supremacy should be "absolute"—i.e., it should apply not only in the event of a conflict but in all situations. If Rule 2.130 is repealed, courts and litigants will face expense and uncertainty even in determining the threshold issue of when an actual "conflict" exists, a question about which there is often room for debate. A number of subcommittee members agree that the fact that RJA may have a different rule is in many cases not really a "conflict" because appellate rules apply only to appellate proceedings.

Furthermore, the possibility of conflicting rules for appeals is not limited to RJA if Rule 2.130 is repealed. Any rules set (i.e., Civil, Criminal, Family) could develop its own procedure for appeals arising in those cases. Prior to the rules establishing supremacy of the Appellate Rules in appellate proceedings, there were conflicting rules governing appeals in the criminal, juvenile, family and workers' compensation rules. This is one of the dangers that appellate rule supremacy was intended to avoid.

In proposing the amendments to Rule 2.140, several members of RJAC stated that it is not RJAC's intent to make RJAC a controlling or superior committee. If this is true, Rule 2.130 cannot be repealed.

COMPROMISE OPTIONS

The con-repeal sub-subcommittee has discussed, and might be willing to consider, a compromise option which does not involve the wholesale repeal of Rule 2.130.

Two suggestions have been considered. The first is that the Appellate Rules Committee would adopt by reference RJA rules that both Committees agree are of general application. This allows RJA to maintain consistency across courts where needed while allowing lawyers in appellate proceedings to look to one set of rules. Several members of the sub-subcommittee noted that the family law rules committee has implemented a similar procedure with good results. Maintaining Rule 2.130 would remain important because it allows a clear resolution in the event of a conflict.

The second suggestion was to make appellate supremacy apply only to those courts that are solely appellate courts, i.e., the District Courts of Appeal and the Florida Supreme Court. One sub-subcommittee member referred to this as "horizontal" organization. This would allow consistency in circuit court proceedings regardless of the nature of the case, while allowing appellate courts, clerks and practitioners to determine different rules that work best for the different

nature of appellate courts. Removing circuit courts from Rule 2.130 would eliminate the subject of the sole objection (Trawick) filed when the precursor to Rule 2.130 and the concept of appellate supremacy were considered by the Florida Supreme Court. A similar procedure appears to apply in federal court. Rule 1 of the Federal Rules of Appellate Procedure establishes the appellate rules as controlling on appeal, but further states that "[w]hen these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court."

It is noted, however, that a new appellate rule requires 3-judge panels for circuit court appellate and review proceedings. This eliminates many of the objections to imposing appellate rules on circuit courts, including Trawick's original objections, because the circuit courts will truly act like appellate courts when sitting in their appellate capacity or exercising review jurisdiction. Additionally, sub-subcommittee members who regularly practice in circuit court review proceedings felt strongly that Rule 2.130 provides needed authority and guidance to circuit courts sitting in their appellate or review capacity.

One member of this sub-subcommittee has written a separate document for the pro-repeal sub-subcommittee proposing as an alternative to repeal of Rule 2.130 that RJAC identify certain rules that cannot be superseded. This appears to be a separate referral. This subcommittee strongly suggests that this proposal should be considered by a joint group consisting of representatives from each rules committee, not just ACRC.

CONCLUSION

APPELLATE COURT RULES COMMITTEE

Original Proceedings Subcommittee

To: Tracy Gunn, Subcommittee Chair

From: John Little, Thomas S. Ward and Carrie Ann Wozniak

Subject: Executive Summary of Contemplated Rule 9.130 Amendment Concerning Settlement Agreements

Date: December 30, 2014

Recommendation: The Original Proceedings Subcommittee (the "Subcommittee") recommends the amendment of Rule 9.130(a)(3)(C) to include a subpart "(xii)" that would make immediately appealable all non-final orders that, "as a matter of law, determine a settlement agreement is unenforceable, is set aside, or never existed."[1]

Policy Support for the Proposed Amendment: While amendments expanding the list of appealable non-final orders in Rule 9.130 are generally discouraged, Florida's public policy strongly encourages settlements. In the event a court were to enter an order finding that a settlement was no longer in place, this public policy could be cited to justify an immediate appeal. Additionally, there already exist a number of subparts to Rule 9.130 that contemplate an immediate appeal of discreet issues when determined "as a matter of law," whether on summary judgment or otherwise (*e.g.*, subsections (a)(3)(C)(v) (workers' compensation immunity) and (a)(3)(C)(viii) (qualified immunity in civil rights claim arising under federal law)). This too would justify the existence of a subpart to the rule addressing settlement agreements.

Supporting Memorandum: The December 15, 2014 memorandum that is attached to this Executive Summary was the result of (i) the feedback from the Fall Meetings; (ii) discussions within the Subcommittee; (iii) discussions with individual members of the Appellate Court Rules Committee (the "ACRC"); and (iv) a great deal of legal research. The memorandum seeks to explain, both in words and diagrams, how a proposed new rule would work in practice. Specifically, it addresses the following concerns at the Fall Meeting (i) settlements can be reached pre-suit; (ii) the various scenarios that occur when settlements are reached during a suit (*e.g.*, the suit can be involuntarily dismissed; they can be presented to the court and incorporated into an order approving an retaining jurisdiction; etc.); (iii) what authority trial courts have to enforce and set aside settlement agreements; (iv) the different burdens a movant has depending

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[1] The proposed amendment is to subpart (xii) because Florida Supreme Court Order 0038 adds Rule 9.130(a)(3)(C)(x) and (xi), effective January 1, 2015. *See In re Amendments to Florida Rules of Appellate Procedure 9.130,* --- SC13-1493 --- (Fla. Nov. 13, 2014).

on whether the relief sought is to enforce or set aside a settlement agreement; and (v) what relief is presently available in these scenarios, if any.

Subcommittee's Analysis of the Memorandum and Proposed Amendment: Following the December 17, 2014 conference call among the Subcommittee, a straw vote was taken in which all members on the call (save one) agreed to advance a proposed rule change to the ACRC. In so voting, a few members of the Subcommittee expressed some concern about the scope and impact the rule may have, while others were comfortable with its effect. Accordingly, the takeaway from the call is that the focus seems to have moved from ***whether*** there should be an amendment concerning orders affecting settlement agreements to ***what*** the scope and wording of the inevitable amendment should be. To that end, the language of the proposed amendment differs slightly from what was initially proposed—and extensively analyzed—in the December 15 memorandum.

Conclusion: In sum, orders granting motions to enforce settlement agreements and orders denying motions to set aside settlement agreements are final orders immediately appealable because the judicial labor of the trial court is finished, which would not be affected by the proposed amendment. Orders denying motions to enforce settlement agreements and orders granting motions to set aside settlement agreements mean there never was a settlement agreement or that such a settlement agreement should be set aside, leaving litigation to continue. These two types of orders are non-final, which would become immediately appealable if the following proposed amendment were adopted:

RULE 9.130

(a) [No Change]

. . .

(3) [No Change]

. . .

(C) [No Change]

. . .

(xii) that, as a matter of law, a settlement agreement is unenforceable, is set aside, or never existed.

EXHIBIT "A"

APPELLATE COURT RULES COMMITTEE

Original Proceedings Subcommittee

To: Tracy Gunn, Subcommittee Chair

From: John Little, Thomas S. Ward and Carrie Ann Wozniak

Subject: Contemplated Rule 9.130 Amendment to Include Orders on Motions Enforcing or Setting Aside Settlement Agreements

Date: December 15, 2014

The purpose of this memorandum is to consider whether orders ruling on (i) motions to enforce settlement agreements and/or (ii) motions to set aside settlement agreements should be added to the specifically enumerated interlocutory orders that are presently immediately appealable under *Fla. R. App. P.* 9.130. For the reasons stated below, we have concluded that rule 9.130 should be amended to include both (i) orders denying motions to enforce settlement agreements and (ii) orders granting motions to set aside settlement agreements.

Most Nonfinal Orders Are Not Immediately Appealable.

Nonfinal orders are generally reviewable only on appeal of the final order disposing of a case, with rule 9.130 designating "those few types of nonfinal orders deemed important enough for immediate review." *Fassy v. Crowley*, 884 So. 2d 359, 362-63 (Fla. 2d DCA 2004). The thrust of rule 9.130 is to restrict the number of appealable nonfinal orders because appellate review of nonfinal orders typically wastes court resources, needlessly delays final judgment, and piecemeal review is discouraged. *Travelers Ins. Co. v. Bruns*, 443 So. 2d 959, 961 (Fla. 1984); *Cotton States Mut. Ins. v. D'Alto*, 879 So. 2d 67, 69 (Fla. 1st DCA 2004); *see also Alascia v. State*, 135 So. 3d 402, 405 (Fla. 5th DCA 2014) ("The purpose of [rule 9.130] is to limit the number of appealable non-final orders.").

Previous Attempts to Expand the Categories of Immediately Appealable Nonfinal Orders.

Over the years, other proposed additions to rule 9.130 have been rejected at the Appellate Court Rules Committee level for a variety of reasons, including: (i) an adequate remedy exists in the form of original proceedings (*e.g.*, filing a petition for writ of certiorari); (ii) the only harm is potentially unnecessary litigation expenses, which are generally not characterized as "irreparable harm"; (iii) the influx of appeals could be burdensome for courts; (iv) foreseeable abuse.

Current Law Concerning Settlement Agreements.

For public policy reasons, Florida law encourages settlements. *Saleeby v. Rocky Elson Const., Inc.*, 3 So. 3d 1078, 1083 (Fla. 2009); *Shuster v. S. Broward Hosp. Dist. Physicians' Prof'l Liab. Ins. Trust*, 570 So. 2d 1362, 1368 (Fla. 4th DCA 1990). "Settlement agreements are contractual in nature and are therefore, interpreted and governed by contract law." *Commercial Capital Res., LLC v. Giovannetti*, 955 So. 2d 1151, 1153 (Fla. 3d DCA 2007). To be enforceable, a settlement agreement "must be sufficiently specific and mutually agreeable as to every essential element." *Barone v. Rogers*, 930 So. 2d 761, 764 (Fla. 4th DCA 2006).

A settlement agreement does need not be in a writing signed by the parties. It may be reached solely via emails. *See, e.g., Miles v. Nw. Mut. Life Ins. Co.*, 677 F. Supp. 2d 1312, 1315 (M.D. Fla. 2009) (holding that e-mail setting forth terms of counteroffer for settlement, which opponent accepted via e-mail, constituted a complete, binding, and enforceable settlement agreement without the need to execute a formal, written settlement agreement). It need not even be written, but may orally announced in open court. *Cohen v. Cohen*, 629 So. 2d 909, 910 (Fla. 4th DCA 1993). And it may be reached orally outside of court so long as the subject matter and terms of the agreement do not run afoul of the statute of frauds. *Boyko v. Ilardi*, 613 So. 2d 103, 104 (Fla. 3d DCA 1993); *C.f., City of Delray Beach v. Keiser*, 699 So. 2d 855, 856 (Fla. 4th DCA 1997) (interpreting *Fla. R. Civ. P.* 1.730(b) to require settlement agreement ***reached at mediation*** to be in writing and signed by the parties thereto as a condition precedent to its enforceability).

Regardless of the medium used to convey the terms and the parties' agreement thereto, the enforceability of a settlement agreement is not based "on the parties having meant the same thing but on their having said the same thing." *Robbie v. City of Miami*, 469 So. 2d 1384, 1385 (Fla. 1985). Accordingly, the trial court must use an objective test to determine whether an enforceable settlement agreement was reached. *See id.*; *Lunas v. Cooperativa de Seguros Multiples de Puerto Rico,* 100 So. 3d 239, 241 (Fla. 2d DCA 2012). If the trial court finds that all material terms were agreed to, then it does not have the authority to ignore those terms or substitute its judgment for that of the parties, but must enforce their agreement. *See Andersen Windows, Inc. v. Hochberg*, 997 So. 2d 1212, 1213 (Fla. 3d DCA 2008); *see also Churchville v. GACS Inc.*, 973 So. 2d 1212, 1216 (Fla. 1st DCA 2008) (holding that courts "are unable to rewrite the clear and unambiguous terms of a voluntary contract . . . even when contractual terms bind a party to a seemingly harsh bargain"); *Barco Chemicals Div., Inc. v. Colton*, 296 So. 2d 649, (Fla. 3d DCA 1974) (holding that a "trial judge may not refuse to enforce a valid contract upon a general finding that enforcement will produce 'unjust results'").

A court need not approve of a settlement in order for it to be enforceable. But if a court (i) incorporates a settlement agreement into a final judgment or approves it by order and (ii)

expressly retains jurisdiction to enforce its terms, then the court has the jurisdiction to enforce the terms of the settlement agreement. *Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 802-03 (Fla. 2003). In that case, the scope of trial court's retained jurisdiction is limited solely to the terms of the agreement, regardless of whether its articulated terms are more or less expansive than the remedies sought in the pleadings. *See id.; Sarhan v. H & H Investors, Inc.*, 88 So. 3d 219, 220 (Fla. 3d DCA 2011).

What Authority Does a Court Have to Enforce a Settlement Agreement?

Settlements entered into after a lawsuit is filed can be enforced by motion—Case law authorizes a party to pending litigation who believes it entered into an enforceable settlement agreement to move for an order enforcing the agreement. *See, e.g., Sheldon Greene & Associates, Inc. v. Holstein*, 629 So. 2d 1009, 1010 (Fla. 4th DCA 1993) (affirming trial court's denial of motion to enforce settlement agreement that had never been approved or incorporated into court order in pending suit that had never been dismissed). A flow chart depicting this scenario appears in **APPENDIX ONE** following this memo. This motion to enforce cannot be resolved without an evidentiary hearing. *Bennett v. Berges*, 32 So. 3d 771, 771-72 (Fla. 4th DCA 2010); *McFadden v. Alliance Med. Practices, Inc.*, 931 So. 2d 225, 226 (Fla. 1st DCA 2006).

Case law also authorizes a party to a dismissed suit to move for the enforcement of a settlement agreement if the court approved or incorporated the agreement into an order prior to the dismissal. *Paulucci*, 842 So. 2d at 803; *see also M-I LLC v. Util. Directional Drilling, Inc.*, 872 So. 2d 403, 405 (Fla. 3d DCA 2004) ("When the underlying litigation was settled, the trial court approved the settlement agreement and retained jurisdiction to enforce it. Where that is so, it is permissible to seek enforcement of the settlement agreement by motion."). In this circumstance, a motion to enforce does not trigger an evidentiary hearing.[1] *Paulucci*, 842 So. 2d at 803. A flow chart depicting this scenario appears in **APPENDIX TWO** following this memo.

Pre-suit settlements (and post-suit settlements dismissed without a court order adopting the settlement) are enforced by filing a separate action—If settlement is reached

[1] This motion is essentially a "motion to require compliance" with an agreement the parties already presented to the court and that the court approved, rather than a "motion to determine whether a settlement ever existed." *See Boca Petroco, Inc. v. Petroleum Realty I, LLC*, 993 So. 2d 1092, 1095 (Fla. 4th DCA 2008) ("By enforcing a contract, it is assumed that the contract has continuing validity and a party is ordered to comply with its terms. A breach of contract action presupposes that the contractual relationship is at an end because of a material breach by one party and damages are sought by the non-breaching party as a substitute for performance.").

after the suit is filed, but the suit is voluntarily dismissed without a court order approving or incorporating the agreement, then enforcement of the settlement requires the filing of a new lawsuit. *Paulucci*, 842 So. 2d at 802-03. This scenario is depicted in **APPENDIX THREE**. Similarly, if a person or entity who believes he/she/it entered into an enforceable, pre-suit settlement agreement, then that person or entity must file suit for breach of contract or a declaratory judgment in order to obtain a court ruling on whether a settlement agreement had been reached.[2] *See MCR Funding v. CMG Funding Corp.*, 771 So. 2d 32, 35 (Fla. 4th DCA 2000) (holding "the parties would ordinarily have to pursue a new breach of contract action to enforce the settlement agreement"). This scenario is depicted in **APPENDIX FOUR**. In either scenario, the plaintiff may seek to enforce the settlement agreement by filing a motion to enforce or a motion for summary judgment.

What Authority Does a Court Have to Set Aside a Settlement Agreement?

Rule 1.540 motion within one year of the judgment or final order approving or incorporating the agreement—Rule 1.540 authorizes a court to set aside a settlement agreement that was approved or incorporated into a judgment or final order for a variety of reasons, including a clerical mistake, excusable neglect, newly discovered evidence, fraud, misrepresentation, or misconduct of an adverse party (*e.g.*, overreaching, concealment, duress, etc.). As depicted in **APPENDIX FIVE**, a rule 1.540 motion to vacate must be filed within ***one year*** of the entry of the order approving and/or incorporating the settlement agreement. *See Williams v. Williams*, 939 So. 2d 1154 (Fla. 2d DCA 2006) *(citing Macar v. Macar, 803 So. 2d 707, 713 (Fla. 2001))* ("Florida Rule of Civil Procedure 1.540 'provides the framework for challenging settlement agreements entered into after the commencement of litigation and utilization of discovery procedures.'"). An evidentiary hearing is required to resolve a motion to set aside a mediated settlement agreement or a rule 1.540 motion to vacate an order approving or incorporating a settlement agreement. *Casteel v. Maddalena,* 109 So. 3d 1252 (Fla. 2d DCA 2013); *Bock v. Marchese Servs., Inc.*, 42 So. 3d 325, 326 (Fla. 4th DCA 2010); *Moree v. Moree*, 59 So. 3d 205, 207 (Fla. 2d DCA 2011).

Separate action based on "extrinsic fraud" at any time—Rule 1.540(b) also states, in part, that it "does not limit the power of a court to entertain an independent action to relieve a party from a judgment, decree, order or proceeding to set aside a judgment or decree for fraud upon the court." This separate action, which is also depicted in **APPENDIX SIX**, is not subject to the one year limitation in the rule, but can be brought at "any time." *Guerriero v. Schaub,* 579 So. 2d 370 (Fla. 4th DCA 1991). Its subject matter, however, is limited to setting aside the

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[2] Other causes of action are foreseeable if one party fully performed their obligations under the agreement (*e.g.*, quantum meruit, civil theft, FDUTPA, injunctive relief).

judgment or final order approving and/or incorporating the settlement agreement due to "extrinsic fraud," which is defined as the "prevention of an unsuccessful party [from] presenting his case, by fraud or deception practice by his adversary," including "falsely promising a compromise." *See Cerniglia v. Cerniglia,* 679 So. 2d 1160 (Fla. 1996); *see also Lefler v. Lefler,* 776 So. 2d 319, 321 (Fla. 4th DCA 2001) *(citing DeClaire v. Yohanan, 453 So. 2d 375 (Fla.1984)).*

Separate action based on other grounds within the applicable statutes of limitation—But what if, as depicted in **APPENDIX SEVEN**, a suit was pending, but was voluntarily dismissed per rule 1.420(a)(1) (*i.e.,* without a judgment or order expressly retaining jurisdiction to enforce the settlement)? Or what if, as depicted in **APPENDIX EIGHT**, a suit was pending, but the settlement agreement was never presented to the court and the suit remained pending at the time one of the parties sought to set it aside? In each of those cases, there would not be an order upon which a party seeking to set aside the agreement could direct a rule 1.540 motion to. Therefore, the attack on the settlement agreement would need to be filed in a new lawsuit. *See, e.g., Masilotti v. Masilotti*, 29 So. 2d 872, 874 (Fla. 1947) (holding burden was on plaintiff to prove fraud in suit against executor to set aside property settlement agreement); *Campbell v. Campbell*, 416 So. 2d 44, 44-45 (Fla. 3d DCA 1982) (affirming judgment entered in lawsuit to set aside the property settlement agreement that had been approved by court in previous lawsuit). The party seeking to set the agreement aside in the new lawsuit would have ***five years*** from the execution of the agreement to file suit to preserve all legal and equitable claims (*e.g.,* declaratory judgment; accounting; civil conspiracy; etc.), ***four years*** from the execution of the agreement to raise claims seeking rescission, and ***four years*** from the time the party knew or should have known that the agreement was procured by fraud to file suit (*e.g.,* a forged signature on a settlement agreement that your client never knew existed; a misrepresentation about a material term your client relied on when agreeing to the settlement; etc.). *See Fla. Stat. §§* 95.11(2)(b)*;* 95.11(3)(j), (l); *see also Goodwin v. Sphatt*, 114 So. 3d 1092, 1094-95 (Fla. 2d DCA 2013) (interpreting the fraud statute of limitations imposed by *Fla. Stat. §* 95.11(3)(j) as commencing when the plaintiff "knew or should have known" of the defendant's misrepresentations).

Distinguishing Motions to Enforce Settlements From Motions Setting Them Aside.

Motions to enforce settlement agreements are not the same as motions to set them aside. A motion to enforce a settlement agreement requires the movant to establish that a "sufficiently specific" agreement has been made between the parties on "every essential element." *Barone,* 930 So. 2d 761 at 764. Accordingly, the movant must establish that both parties specifically agreed to all material terms. *Hamilton v. Florida Power & Light Co.*, 48 So. 3d 170, 171-72 (Fla. 4th DCA 2010) ("A party seeking to enforce a settlement agreement bears the burden of

showing that the attorney proposing the settlement had the clear and unequivocal authority from his client to do so"); *Carroll v. Carroll*, 532 So. 2d 1109, 1110 (Fla. 4th DCA 1988) (reversing order granting motion to enforce because "there was no evidence demonstrating that Mrs. Carroll had ever ratified, authorized, or otherwise assented to the agreement"); *Don L. Tullis & Associates, Inc. v. Benge*, 473 So. 2d 1384, 1386 (Fla. 1st DCA 1985) (holding that "to be enforced, the agreement must be sufficiently specific and mutually agreeable on every essential element").

On the other hand, a motion to set aside a settlement agreement is typically predicated on the premise that all specific, material elements exist in the agreement, but that because of subsequently occurring events or subsequently revealed information, the movant should be excused from the agreement. *See, e.g., Griffith v. Griffith*, 860 So. 2d 1069, 1074 (Fla. 5th DCA 2003) (holding "the inquiry on a motion to set aside an agreement reached through mediation is limited to whether there was fraud, misrepresentation in discovery, or coercion"). Accordingly, the movant needs to establish either (i) all required terms were never present or (ii) that while they were present, the movant is entitled to be excused from the agreement (*i.e.,* duress, coercion, fraud, etc.). *See, e.g., Fisher v. Fisher*, 199 So. 2d 338, 339 (Fla. 4th DCA 1967) (holding the burden was upon the party moving to set aside a settlement agreement "to establish fraud, deceit, duress and coercion by competent evidence").

The Types of Orders Under Consideration in this Memorandum.

This memorandum addresses four different orders concerning settlement agreements, which are illustrated in the graph below. As detailed in the graph, orders granting motions to enforce settlement agreements (Category I) and orders denying motions to set aside settlement agreements (Category IV) constitute final orders that are immediately appealable per *Fla. R. App. P.* 9.110.

It therefore logically follows that any potential amendment of *Fla. R. App. P.* 9.130 to permit an immediate appeal would only be applicable to orders denying motions to enforce settlement agreements (Category II) and orders granting motions to set aside settlement agreements (Category III), which are both non-final. Accordingly, the remainder of this memorandum only focuses on these two categories.

	Motions to enforce settlement agreements	**Motions to set aside settlement agreements**
Orders granting	**Category I**—This order would likely end the lawsuit,[3] making it an immediately appealable final order per *Fla. R. App. P.* 9.110.	**Category III**—This order would reopen a lawsuit that already ended per a final order,[4] thereby making it a non-final order that is not presently immediately appealable (unless it could somehow be shoehorned into one of the limited categories in *Fla. R. App. P.* 9.130).[5]
Orders denying	**Category II**—The lawsuit would continue after this order is entered, thereby making it a non-final order that is not presently immediately appealable (unless it could somehow be shoehorned into one of the limited categories in *Fla. R. App. P.* 9.130).[6]	**Category IV**—This order would presumably defeat an attempt to reopen a lawsuit that already ended per a final order[7] or voluntary dismissal, with the end result being that the lawsuit would still be over, making it an immediately appealable final order per *Fla. R. App. P.* 9.110.[8]

[3] The order would not end the lawsuit if it enforced a settlement agreement that either (i) resolved less than all issues or claims in the lawsuit or (ii) resolved all claims against less than all of the parties. The latter scenario, which totally disposes of an entire case as to one or more parties, creates an order that must be appealed by those parties within 30 days of the order's rendition. *See Fla. R. App. P.* 9.110(k).

[4] This would be the case where, for example, the lawsuit concluded via an agreed final judgment or an order approving the settlement agreement and dismisses the lawsuit while retaining jurisdiction to enforce settlement agreement.

[5] This would be the case if, for example, the order setting the settlement agreement aside either required one of the parties to immediately return settlement monies to the other because money has been interpreted as "property" as that term is used in *Fla. R. Civ. P.* 9.130(a)(3)(C)(ii). *See Florida Disc. Properties, Inc. v. Windermere Condo., Inc.*, 763 So. 2d 1084, 1084 (Fla. 4th DCA 1999); *5361 N. Dixie Highway, Inc. v. Capital Bank*, 658 So. 2d 1037, 1037 (Fla. 3d DCA 1995). It may also apply if it eliminates one of the party's executory rights to immediately receive future installments of settlement payments from the other.

[6] See footnote six.

[7] See footnote five.

[8] This would not apply if the circumstance described in footnote four is applicable.

Category II—Orders Denying Motions to Enforce Settlement Agreements.

In circumstances where the settlement agreement was entered into after a lawsuit was filed but before the suit is dismissed (*i.e.*, **APPENDIX ONE**), since the order denying the motion to enforce is non-final, is not immediately appealable and not addressable via certiorari, but would become immediately appealable upon a proposed rule change ("Candidate One").[9] *See Naghtin*, 680 So. 2d 573 at 575 (holding "[w]e are unwilling to open the floodgates to reviewing all non-final orders construing stipulations [for settlement] in pending cases"); *see also Delmas v. Harris,* 806 So. 2d 578, 579 (Fla. 4th DCA 2002) (holding that "an order refusing to enforce an alleged settlement agreement is not an appealable order under rule 9.130(a)," or reviewable by common law certiorari to avoid the expense of trial). Accordingly, the order granting the motion to enforce would be a final order appealable under rule 9.110 assuming it does not leave any judicial labor pending and therefore would not be affected by a rule change.

In circumstances where the court retained jurisdiction to enforce the agreement before dismissing the suit (*i.e.*, **APPENDIX TWO**), an order denying the motion to enforce is final and appealable per rule 9.110. *See M-I LLC v. Util. Directional Drilling, Inc.*, 872 So. 2d 403, 404 (Fla. 3d DCA 2004). So too is an order granting the motion, though that order is also addressable via certiorari if the circuit court exceeds its jurisdiction in enforcing the agreement. *See Olen Properties Corp. v. Wren,* 109 So. 3d 263 (Fla. 4th DCA 2013). This scenario would not be affected by a rule change.

In circumstances where a settlement is reached mid-suit, but the suit is then dismissed without the court retaining jurisdiction, an order denying summary judgment in the new suit to enforce the agreement (*i.e.*, **APPENDIX THREE**), is non-final and is not immediately appealable, but would become immediately appealable upon a proposed rule change ("Candidate Two"). If summary judgment is granted, the final summary judgment is a final order appealable under Rule 9.110.

The final scenario is very similar to the previous one. Specifically, in circumstances where a settlement is reached pre-suit, an order denying summary judgment in the new suit to enforce the agreement (*i.e.*, **APPENDIX FOUR**), is non-final and is not immediately

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[9] Orders determining that no settlement agreement exists to enforce are also not immediately appealable, but are distinguishable from a Rule 1.730(c) motion to enforce a settlement agreement reached at mediation. The latter circumstance is addressed in *Croteau v. Operator Serv. Co. of S. Florida*, which treats the order denying the motion to enforce as "a partial final judgment within the meaning of Florida Rule of Appellate Procedure 9.110(k), which may be appealed when the order is entered, or after the final judgment in the entire case." 721 So. 2d 386, 387 (Fla. 4th DCA 1998).

appealable, but would become immediately appealable upon a proposed rule change ("Candidate Three"). If summary judgment is granted, the final summary judgment is a final order appealable under rule 9.110.

Accordingly, the proposal to elevate orders denying motions to enforce settlement agreements to the select group of immediately appealable non-final orders would specifically affect Candidates One, Two and Three, with the latter two being orders denying summary judgment motions.

Addressing Concern That Amendment Would Make Some Orders Denying Summary Judgment Immediately Appealable[10]—The immediate reaction may be to reject the amendment (or narrowly tailor it) because Candidates Two and Three are orders denying a summary judgment motion, which are largely categorized as non-final and non-appealable. *See Gionis v. Headwest, Inc.*, 799 So. 2d 416, 417 (Fla. 5th DCA 2001). But rule 9.130 has been amended over the years to add subsections (a)(3)(C)(v)—making non-final orders denying summary judgment on the ground that a party is not entitled to workers' compensation immunity immediately appealable if the order specifically states that a party will not be able to raise this defense as a matter of law—and (a)(3)(C)(viii)—making non-final orders denying summary judgment based on a claim of qualified immunity in a civil rights claim arising under federal law immediately appealable if the order specifically states that defense is not available as a matter of law. *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 821 (Fla. 2004); *Gionis*, 799 So. 2d at 417. Accordingly, these amendments provide some precedent to an amendment that would include non-final orders denying summary judgment on the ground that no enforceable settlement agreement exists as a matter of law. And since Florida's courts have consistently articulated the importance of enforcing settlement agreements where possible, it would stand to reason that the Florida Supreme Court would be open to creating a similar carve-out for this subject matter.

When considering how a potential amendment would be applied in practice, it is worth considering the Florida Supreme Court's interpretation of another amendment: Rule 9.130(a)(3)(C)(v). Specifically, the Court held that a non-final order denying summary judgment without explanation does not become immediately appealable under Rule 9.130(a)(3)(C)(v). *See Reeves,* 889 So. 2d at 821 ("Under our current law and rules, interlocutory appeals of a simple

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[10] Rule 9.130(a)(4) will be amended, effective January 1, 2015, to remove the final sentence, which currently states: "Other non-final orders entered after final order on authorized motions are reviewable by the method prescribed by this rule." *See In re Amendments to Florida Rules of Appellate Procedure,* --- So. 3d ---, 2014 WL 5714099, *7 (Fla. Nov. 6, 2014). Therefore, beginning January 1, 2015, the proposed amendment would also serve to rebut an argument that any of the Candidates detailed herein are among the non-immediately appealable non-final orders entered after final order.

denial of a motion for summary judgment in this context are not authorized"). This is because, the Court explained, an appellate court's jurisdiction to review the non-final order per Rule 9.130(a)(3)(C)(v) only exists if "the trial court's order explicitly states that the defendant will not be entitled to present a workers' compensation immunity defense at trial." *Id.* Applying this analysis to a potential amendment concerning settlement agreements, if summary judgment were denied because of (i) a genuine factual dispute, (ii) an unrelated legal issue, or (iii) any reason not articulated in the order, then it would appear that the Florida Supreme Court would similarly hold the order is not immediately appealable under the amended rule.

Addressing Concern That Amendment Could Be Burdensome On Courts—Another concern articulated in response to the proposal to make motions to enforce immediately appealable is that the additional appellate filings based on the amendment could be burdensome for courts. There are three responses to this concern.

First, if a party felt that it had a settlement that was so advantageous that it was willing to file a motion and attend an evidentiary hearing to enforce it (*i.e.,* Candidate One) or file a new lawsuit (*i.e.,* Candidates Two and Three), then it is likely that the party will appeal at the end of the case if the motion is denied. Since the ruling will likely eventually make its way to the appellate court anyway, it is unlikely an amendment to Rule 9.130 would result in a dramatic increase in the number of appellate filings.

Second, as addressed above, it is likely that Candidates Two and Three should not be responsible for many new appeals in light of the Florida Supreme Court's current holding that vanilla denials of summary judgment motions are not appealable under the existing Rule 9.130 categories. Accordingly, unless the order contains specific language expressly stating that no settlement agreement exists as a matter of law—which presumably would be rare—the order will not be appealable.

Third, it is likely that Category One would also not be responsible for many new appeals in light of the applicable standard of review. Specifically, if parties were permitted to immediately appeal Candidate One, then the lower court's factual findings in that order would presumably be reviewed for competent, substantial evidence. *Hamilton v. Florida Power & Light Co.*, 48 So. 3d 170, 172 (Fla. 4th DCA 2010). In other words, the order denying the motion to enforce would be affirmed only the appellant could establish on appeal that the record (including the evidentiary hearing) was devoid of any evidence to support a finding that all required settlement elements and the assent of all parties to those terms were not present. Since this is a rather onerous standard of review, it would be unlikely (notwithstanding abuse) that such an order would be immediately appealed without a reasonable likelihood of success.

Addressing Concern That Amendment Could Be Abused—The final concern articulated by the Rules Committee was that parties or their counsel could abuse the rule to cause delay, add additional litigation expenses, and create settlement leverage (*i.e.,* the potential for mischief). Following the entry of a non-dispositive, but otherwise important ruling (*e.g.,* a partial summary judgment that disposes of the opponent's strongest claims or defenses), an adversely affected party may suddenly assert that an exploratory email from the opposing party created a binding settlement. Alternatively, a baseless motion to enforce a non-existent settlement agreement may be filed on the eve of a summary judgment hearing. In either scenario, once the frivolous motion is denied, the ensuing order could be immediately appealed, which, in some cases, would effectively halt all non-collateral activity in the trial court until the appeal concluded.[11] Having said that, the aforementioned standards of review should serve as a deterrent. If not, the frivolous appeal could be accelerated (i) by filing a motion to expedite the appeal; (ii) filing a motion for sanctions if the appeal is not voluntarily dismissed;[12] or (iii) if the appellate court summarily affirms the order pursuant to *Fla. R. App. P.* 9.315.

Category III—Orders Granting Motions to Set Aside Settlement Agreements.

In circumstances where the court retained jurisdiction to enforce the agreement in a judgment or final order before dismissing the suit, an order granting or denying a timely Rule 1.540 motion to vacate (*i.e.,* **APPENDIX FIVE**) is non-final and immediately appealable per rule 9.130(a)(5). *See Potucek v. Smeja,* 419 So. 2d 1192, 1193 (Fla. 2d DCA 1982) (holding that rule 9.130 "unequivocally specifies that orders entered under rule 1.540 constitute nonfinal orders which are subject to review under that rule"). Accordingly, this scenario would not be affected by a rule change.

In circumstances where the court retained jurisdiction to enforce the agreement in a judgment or final order before dismissing the suit, but a separate action is filed more than a year later per rule 1.540 to challenge the judgment or final order due to "extrinsic fraud, an order

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[11] While a trial court is authorized to continue the litigation and take all actions other than entering a final order pending a non-final appeal, in practice trial courts usually halt the proceedings entirely pending the non-final appeal. Moreover, while initial briefs in non-final appeals are due within 15 days of the filing of the notice, extensions are typically liberally granted. *See Fla. R. App. P.* 9.130(e).

[12] *Fla. Stat. §* 57.105; *Fla. R. App. P.* 9.410(b); *see Boca Burger, Inc. v. Forum*, 912 So. 2d 561 (Fla. 2005); *see also Reznek v. Chase Home Finance, LLC,* 3D14-1499 (Fla. 3d DCA December 10, 2014) (holding section 57.105 and Rule 9.410(b) sanctions motions are premature until the opposing party files a "paper, claim, defense, contention, allegation or denial").

denying summary judgment in the new suit to enforce the agreement (*i.e.*, **APPENDIX SIX**), is non-final and is not immediately appealable, but would become immediately appealable upon a proposed rule change ("Candidate Four"). Note that since Rule 9.130(a)(5) only makes "orders on an authorized and timely ***motion*** for relief from judgment" immediately appealable, an order denying summary judgment in an authorized, separate Rule 1.540 ***action*** does not qualify. But if summary judgment is granted, then the final summary judgment is a final order appealable under Rule 9.110.

Similar to Candidate Two, in circumstances where a settlement is reached mid-suit, but the suit is then dismissed without the court retaining jurisdiction, an order denying summary judgment in the new suit to set aside the agreement (*i.e.*, **APPENDIX SEVEN**), is non-final and is not immediately appealable, but would become immediately appealable upon a proposed rule change ("Candidate Five").[13] If summary judgment is granted, the final summary judgment is a final order appealable under Rule 9.110.

Similar to Candidate One, in circumstances where one party believes a settlement was reached after a lawsuit was filed but before it was dismissed (*i.e.*, **APPENDIX EIGHT**), an order granting the motion to set aside is non-final and would result in litigating resuming, but would become immediately appealable upon a proposed rule change ("Candidate Six"). So too would an order denying the motion to set aside ("Candidate Seven"), which would also result in a non-final order permitting litigation to resume, but now acknowledging the existence of an enforceable settlement agreement.

Accordingly, the proposal to elevate orders granting motions to set aside settlement agreements to the select group of immediately appealable non-final orders would specifically affect Candidates Four, Five, Six and Seven, with the first two being orders denying summary judgment motions.

---

[13] There is one decision that granted certiorari to reinstate a settlement agreement that a trial court had set aside. *See Western Waste Industries, Inc. of Florida v. Achord*, 632 So. 2d 680, 681 (Fla. 5th DCA 1994). In *Achord*, the trial court vacated an agreement reached in mediation in order to sanction one of the parties who violated a court order by failing to send representatives to mediation who had "full authority" to settle. *Id.* Although the Fifth District held that certiorari would lie to review the sanction (it held there would be no adequate remedy on appeal since the petitioners would have been "required to continue litigating the case prior to appealing this order"), it characterized the order on review as an "order imposing sanctions" rather than an order granting a motion to set aside a settlement agreement. *Id.* It is therefore distinguishable and should not be relied on as authority that certiorari lies to obtain appellate review for the latter.

Addressing Concerns—As detailed in the previous section, there is good reason to believe the Supreme Court would be willing to authorize an amendment to account for the overarching policy to ensure settlements are enforced, but would interpret it in a way that would only trigger jurisdiction on the appellate courts upon the timely appeal of an order denying summary judgment that expressly articulates the settlement agreement issue is being determined as a matter of law (*e.g.,* Candidates Four and Five). The explanations in the previous section to the concerns of a potentially increased burden on the courts and a potential abuse by parties and practitioners are also applicable here too. Accordingly, we do not feel that these concerns are outweighed by the advantages to amending the rule.

An additional reason to amend to include orders granting motions to set aside settlement agreements is that it may result in the resurrection of lawsuits that had concluded long before. *See* **APPENDICIES SIX AND SEVEN**. This distinction conjures up some of the public policy concerns typically mentioned in connection with statutes of limitation: *i.e.,* prejudice caused by stale and fraudulent claims, which unfairly force defendants to litigate issues for which evidence is often lost due to a combination of the lapse of time, defective memory, and the death of witnesses. *Foremost Properties, Inc. v. Gladman*, 100 So. 2d 669, 672 (Fla. 1st DCA 1958). It is for these very reasons that it would seem appropriate to provide a party informed that the case he/she had settled is now active again with the opportunity to immediately get an appellate ruling before resuming litigation that it appeared had been settled.

Specific Recommendation.

The graveyard of rule 9.130 expansion is littered with categories whose candidacy was premised solely on the attempt to avoid the expense incurred and time lost by unnecessary litigation that could be avoided if that category of orders could be immediately appealed. But the categories of non-final orders discussed herein are distinguishable from their predecessor candidates because the former are also supported by Florida's public policy favoring settlement. *Saleeby v. Rocky Elson Const., Inc.*, 3 So. 3d 1078, 1083 (Fla. 2009). While policy decisions are outside the scope of the Rules Committee, if an amendment to rule 9.130 that includes these non-final orders is ultimately adopted by the Florida Supreme Court, then it would be the Florida Supreme Court who would be amending the rules to reflect that public policy.

Since we feel the concerns surrounding the amendment are adequately addressed and do not outweigh the benefits expected to be derived from the amendment, we recommend the following amendment to rule 9.130:

RULE 9.130

(a) [No Change]

. . .

(3) [No Change]

. . .

(C) [No Change]

. . .

(xii)[14] that, as a matter of law, a settlement agreement is enforceable, is set aside, or never existed.

---

[14] The proposed amendment is to subpart (xii) because Florida Supreme Court Order 0038 adds Rule 9.130(a)(3)(C)(x) and (xi), effective January 1, 2015. *See In re Amendments to Florida Rules of Appellate Procedure 9.130,* --- SC13-1493 --- (Fla. Nov. 13, 2014).

APPENDIX ONE

Motion to Enforce Settlement Agreement That Was Entered Into After a Lawsuit Was Filed

Lawsuit Filed

|

v

One party believes a settlement is reached and, when opposing party disagrees, files a motion to enforce settlement

|

v

Evidentiary hearing is held

/ \

v v

Order denying motion to enforce "Candidate One"

[Non-final order; not presently immediately appealable]

|

v

Litigation resumes . . .

Order granting motion to enforce

[Final order immediately appealable per Rule 9.110]

APPENDIX TWO

Motion to Enforce Settlement Agreement That Was Entered Into After a Lawsuit Was Filed and Was Both (i) Approved by Court or Incorporated into Final Order of Dismissal or Final Judgment and (ii) Court Retained Jurisdiction to Enforce

Lawsuit Filed

|

v

A settlement is reached and the court enters an order (i) approving the agreement or incorporating it into the final order of dismissal and (ii) retaining jurisdiction to enforce the agreement

|

v

Lawsuit is dismissed

|

v

A motion to enforce settlement is filed in the old case

/ \

v v

Order denying motion to enforce

[Final order immediately appealable per Rule 9.110]

Order granting motion to enforce

[Final order immediately appealable per Rule 9.110 OR via writ of certiorari if trial court acted in excess of its jurisdiction]

APPENDIX THREE

Motion to Enforce a Settlement Agreement Entered Into After a Lawsuit Was Filed, But Was Not Presented to the Court Before Lawsuit Was Voluntarily Dismissed

Lawsuit Filed

|

v

A settlement is reached and either (i) the plaintiff files a voluntary dismissal per Rule 1.420(a)(1) or (ii) the court enters an order dismissing the action without approving or incorporating the settlement agreement and without retaining jurisdiction to enforce its terms

|

v

Lawsuit is dismissed

|

v

New lawsuit filed seeking to enforce the settlement agreement (declaratory judgment, breach of contract, etc.)

|

v

Plaintiff moves for summary judgment

/ \

v v

Final summary judgment

[Final order immediately appealable per Rule 9.110]

Order denying summary judgment

"Candidate Two"

[Non-final order; not presently immediately appealable]

|

v

Litigation resumes . . .

APPENDIX FOUR

Motion to Enforce Settlement Agreement That Was Entered Into Before a Lawsuit Was Filed

One party believes a settlement is reached and, when opposing party disagrees, files suit for breach of contract and/or declaratory judgment

|
v

Plaintiff moves for summary judgment

/ \
v v

Final summary judgment

[Final order immediately appealable per Rule 9.110]

Order denying summary judgment
"Candidate Three"

[Non-final order; not presently immediately appealable]

|
v

Litigation resumes . . .

APPENDIX FIVE

Timely Rule 1.540 Motion to Set Aside Settlement Agreement That Was Entered Into After a Lawsuit Was Filed and Was Both (i) Approved by Court or Incorporated into Final Order of Dismissal or Final Judgment and (ii) Court Retained Jurisdiction to Enforce

Lawsuit Filed

|

v

A settlement is reached and the court enters an order (i) approving the agreement or incorporating it into the final order of dismissal and (ii) retaining jurisdiction to enforce the agreement

|

v

Lawsuit is dismissed

|

v

Party seeking to set agreement aside files Rule 1.540 motion within a year to vacate dismissal order approving or incorporating settlement agreement *(evidentiary hearing necessary if fraud sufficiently stated in Rule 1.540 motion).*

/ \

v v

Order granting motion to vacate

[Non-final immediately appealable per Rule 9.130(a)(5)]

Order denying motion to vacate

[Non-final immediately appealable per Rule 9.130(a)(5)]

APPENDIX SIX

Separate Lawsuit to Set Aside a Settlement Agreement Per Rule 1.540 Due to "Extrinsic Fraud" More Than a Year After it Was (i) Approved by Court or Incorporated into Final Order of Dismissal or Final Judgment and (ii) Court Retained Jurisdiction to Enforce

Lawsuit Filed

|

v

A settlement is reached and the court enters an order (i) approving the agreement or incorporating it into the final order of dismissal and (ii) retaining jurisdiction to enforce the agreement

|

v

Lawsuit is dismissed

|

v

New lawsuit filed more than a year later per 1.540 challenging the previous order approving the settlement agreement based on "extrinsic fraud"

|

v

Plaintiff moves for summary judgment

/ \

v v

Final summary judgment

[Final order immediately appealable per Rule 9.110]

Order denying summary judgment

"Candidate Four"

[Non-final order; not immediately appealable]

|

v

Litigation resumes . . .

APPENDIX SEVEN

Motion to Set Aside a Settlement Agreement Entered Into After a Lawsuit Was Filed, But Was Not Presented to the Court Before Lawsuit Was Voluntarily Dismissed

Lawsuit Filed

|

v

A settlement is reached and either (i) the plaintiff files a voluntary dismissal per Rule 1.420(a)(1) or (ii) the court enters an order dismissing the action without approving or incorporating the settlement agreement and without retaining jurisdiction to enforce its terms

|

v

Lawsuit is dismissed

|

v

New lawsuit filed seeking to set aside the settlement agreement (declaratory judgment, fraud, etc.)

|

v

Plaintiff moves for summary judgment

/ \

v v

Final summary judgment

[Final order immediately appealable per Rule 9.110]

Order denying summary judgment

"Candidate Five"

[Non-final order; not presently immediately appealable]

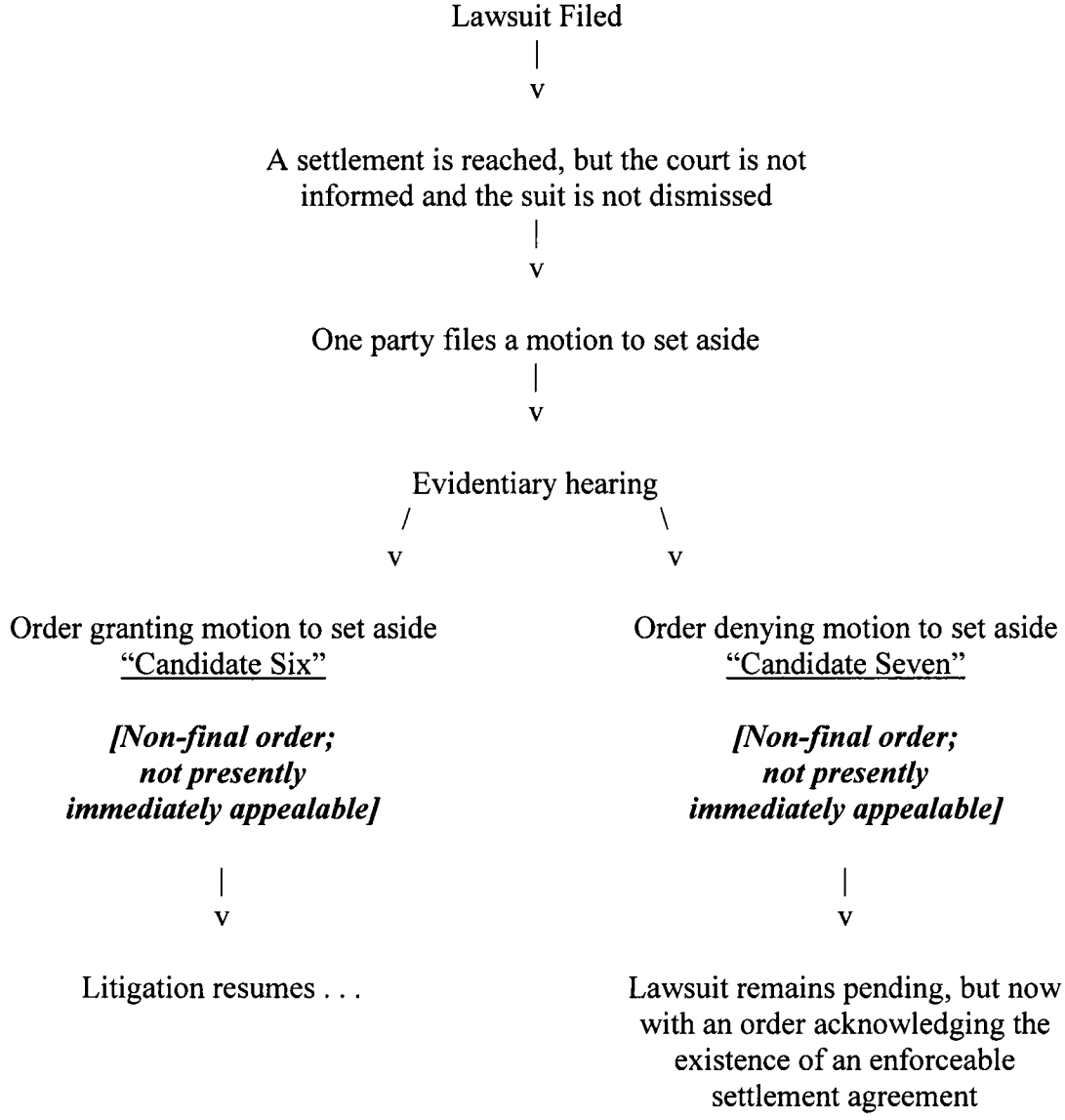
|

v

Litigation resumes . . .

APPENDIX EIGHT

Motion to Set Aside a Settlement Agreement Entered Into After a Lawsuit Was Filed, But Lawsuit Remained Pending



IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11-830

L.T. Case No. 5D09-1810

CITY OF PALM BAY,

Petitioner,

v.

WELLS FARGO BANK, N.A.,

Respondent.

AMICUS CURIAE BRIEF OF THE FLORIDA BANKERS ASSOCIATION IN SUPPORT OF RESPONDENT'S ANSWER BRIEF

Virginia B. Townes, Esq.
Carrie Ann Wozniak, Esq.
AKERMAN SENTERFITT
420 South Orange Avenue
Post Office Box 231
Orlando, FL 32802-0231
Tel.: 407-423-4000
Fax: 407-843-6610
E-mail:
virginia.townes@akerman.com
carrieann.wozniak@akerman.com

Attorneys for *Amicus Curiae*, Florida Bankers Association

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STATEMENT OF INTEREST

Amicus Curiae, Florida Bankers Association ("FBA"), is a voluntary organization that represents the interests of lenders in Florida and is composed of more than 300 banks and financial institutions ranging in size from small community banks and thrifts, to medium sized banks operating in several parts of the state, to large regional financial institutions that are headquartered in Florida or outside the state. The FBA regularly represents the interests of its members before all branches of the government and frequently appears as *Amicus Curiae* in the state and federal courts, including this Court, in order to present the interests of its membership on issues of great import.

The issue in this appeal is of particular importance to the FBA and its members because a large part of FBA members' business is making loans to homebuyers throughout the state of Florida. For better or worse, this business also involves instituting foreclosure actions when borrowers default on their obligations. Financial institutions' home loans are usually secured solely by the homes purchased with the loans. Individual municipalities' "superprioritizing" their liens for code enforcement violations prejudices lenders' ability to sell their loans on the secondary market because the profits of these sales are used to make new loans. This harms the lending market, and in turn, the housing market. "Superprioritizing" loans also prejudices lenders' ability to foreclose their interests

when borrowers default on their loans. Thus the proper resolution of this case is of great interest to the FBA.

SUMMARY OF THE ARGUMENT

Ordinance 97-07 of the Palm Bay City Code of Ordinances is preempted by both the "first in time, first in right" principle articulated in section 695.11, Florida Statutes, and Chapter 162, Florida Statutes. Further, the Legislature did not intend for local governments to grant code enforcement liens superiority. When the Legislature has intended to grant liens superiority, it has specifically done so, and it has not done so in this case because granting code enforcement liens superiority leads to nonsensical results.

Ordinance 97-07 provides a low-cost revenue stream to municipalities, but at the same time infringes on first mortgagees' due process rights and embodies imprudent public policy. Municipalities can impose high daily fines on homeowners while giving no notice to first mortgagees. Ordinances like Ordinance 97-07 harm financial institutions because they make mortgages less secure; mortgages will not be sold on the secondary market due to the mortgages' insecurity, which could cause home lending to shut down in Florida.

STANDARD OF REVIEW

Amicus Curiae agrees with Respondent that the standard of review is *de novo.*

ARGUMENT

In this case, the City of Palm Bay (the "City") has attempted to enforce two liens in the amount of $28,600.00 for homeowners' failure to repair their fence and cut the grass on their property, and to claim that these liens are superior to Wells Fargo Bank, N.A.'s prior recorded mortgage memorializing a loan in the amount of $115,531.00. The City relied on Ordinance 97-07 of the Palm Bay City Code of Ordinances[1] to claim that its liens were superior to Wells Fargo's mortgage even though it provided no notice to Wells Fargo of the code violations, and it would be unable to foreclose the liens absent Wells Fargo's mortgage foreclosure action because the property to be foreclosed was homestead property. Fla. Stat. § 162.09(3). The trial court correctly ruled that the City's liens were not superior to Wells Fargo's mortgage interest in the subject property because code enforcement board liens have ordinary "first in time, first in right" priority, and because due process required the City to notify Wells Fargo of the code violations when they occurred. The Fifth District Court of Appeal properly affirmed the trial court's

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[1] Ordinance 97-07 provides:

> Liens created pursuant to a Board order and recorded in the public record shall remain liens coequal with the liens of all state, county, district and municipal taxes, superior in dignity to all other liens, titles and claims, until paid, and shall bear compound interest annually at a rate not to exceed the legal rate allowed for such liens and may be foreclosed pursuant to the procedure set forth in Fla. Stat. Ch. 162.

decision, holding that Ordinance 97-07 conflicts with section 695.11, Florida Statutes, which codifies the "first in time, first in right" rule. *City of Palm Bay v. Wells Fargo Bank, N.A.*, 57 So. 3d 226, 227 (Fla. 5th DCA 2011). On the City's motion for certification of a question of great public importance, the Fifth District certified the following question:

> Whether, under Article VIII, section 2(b), Florida Constitution, section 166.021, Florida Statutes and Chapter 162, Florida Statutes, a municipality has the authority to enact an ordinance stating that its code enforcement liens, created pursuant to a code enforcement board order and recorded in the public records of the applicable county, shall be superior in dignity to prior recorded mortgages?

City of Palm Bay v. Wells Fargo Bank, N.A., 67 So. 3d 271, 271 (Fla. 5th DCA 2011).

This Court should answer the certified question in the negative. It is not within local governments' power under the Florida Constitution or the Florida Statutes to enact ordinances like Ordinance 97-07 that give superpriority to liens recorded due to local code enforcement violations. If municipalities like the City are able to "superprioritize" their liens for code enforcement violations, such local ordinances will place enormous burden on financial institutions extending loans to homebuyers. They will also make an already tenuous housing market completely unstable in the state of Florida because it will be impossible for lending institutions to sell the loans on the secondary market, and, in turn, banks will have no revenue with which to make new loans. Only the Legislature has the ability to enact such

superpriority laws; it has not done so with regards to code enforcement liens and, in all probability, does not intend to do so because of the negative effects it would cause, illustrated by the facts of the case under review.

First, the FBA will demonstrate that the Legislature properly grants liens "superpriority" status, not individual local governments. Second, the FBA will establish that the Legislature did not intend for local governments to "superprioritize" their code enforcement liens. Third, the FBA will provide reasons why ordinances like Ordinance 97-07 tend to violate due process and embody imprudent public policy because they harm lenders, and in turn homeowners and Florida's housing market.

I. THE LEGISLATURE, NOT LOCAL GOVERNMENTS, DETERMINES THE PRIORITY OF CODE VIOLATION LIENS.

A. The Principle Of "First In Time, First In Right" Articulated In Section 695.11, Florida Statutes, Preempts Ordinance 97-07.

It is a longstanding principle of Florida law that the priority of competing liens on real property is mandated by the principle of "first in time, first in right." *Holly Lake Ass'n v. Federal Nat'l Mortg. Ass'n*, 660 So. 2d 266, 268 (Fla. 1995). Thus, where a mortgage on real property is recorded, it has priority over all liens recorded thereafter, with limited exceptions. *People's Bank of Jacksonville v. Arbuckle*, 90 So. 458, 460 (Fla. 1921). This rule is "both logical and fair, and affords both stability and certainty." *Lamchick, Glucksman & Johnston, P.A. v.*

City Nat'l Bank of Fla., 659 So. 2d 1118, 1120 (Fla. 3d DCA 1995). Financial institutions have relied on this rule in extending and securing loans throughout the state. The first in time, first in right rule is codified in section 695.11, Florida Statutes:

> **Instruments deemed to be recorded from time of filing.**—All instruments which are authorized or required to be recorded in the office of the clerk of the circuit court of any county in the State of Florida, and which are to be recorded in the "Official Records" as provided for under s. 28.222, and which are filed for recording on or after the effective date of this act, shall be deemed to have been officially accepted by the said officer, and officially recorded, at the time she or he affixed thereon the consecutive official register numbers required under s. 28.222, and at such time shall be notice to all persons. The sequence of such official numbers shall determine the priority of recordation. An instrument bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series.

Lenders, as well as other businesses and individuals, rely on this statute as mandating that all persons are on constructive notice of an instrument once it is recorded, and an instrument with a lower official register number has priority over any instrument bearing a higher official register number. *Lamchick*, 659 So. 2d at 1120 ("Where real property is concerned, it is a firm, long standing principle, that priorities of liens on real property are established by date of recordation. . . . This principle is statutorily embodied in section 695.11 which exclusively establishes priorities between judgments.").

It is for the Legislature to decide exceptions to section 695.11, not municipalities. In fact, the Legislature has created statutory exceptions to the first in time, first in right rule, including section 197.122(1), which provides that tax liens are superior to all other liens. There is no statutory exception for a municipality's code enforcement liens, and therefore Ordinance 97-07 is preempted, as the Fifth District correctly held.

B. Chapter 162, Florida Statutes, Preempts Ordinance 97-07.

Ordinance 97-07 and other ordinances of its kind are also preempted by Chapter 162 Florida Statutes. The Local Government Code Enforcement Boards Act (the "Act") contained in section 162.01-162.13, Florida Statutes, is an alternative provided by the Legislature for local governments to avoid using the court system to resolve code enforcement violations. This alternative is provided on a take-it-or-leave-it basis and a municipality cannot customize the penalties to prejudice financial institutions. Section 162.03, Florida Statutes, states: "Each county or municipality may, at its option, create or abolish by ordinance local government code enforcement boards as provided herein." Fla. Stat.§ 162.03(1). "[A]s provided herein" confirms the take-it-or-leave-it nature of the Act; therefore, the Legislature clearly preempted the specific field of code enforcement boards created pursuant to the Act. *See City of Tampa v. Braxton*, 616 So. 2d 554, 556 (Fla. 2d DCA 1993) ("municipalities derive no home rule power from article VIII,

section 2(b), of the state constitution to impose any duties or requirements on their code enforcement boards or otherwise regulate the statutorily required enforcement procedures"). As such, the Legislature creates a uniform code enforcement procedure, to be used throughout the state. This forbids local governments from converting code enforcement violation liens into superpriority liens that displace lenders who recorded mortgages first.

Preemption also exists because section 162.09(3) is so comprehensive with respect to code enforcement liens that it preempts local regulation regarding such liens, including Ordinance 97-07. Section 162.09 articulates penalties, including liens, that a code enforcement board may impose. It directs how liens may be created, how they are to be calculated, what property they cover, how and when they can be foreclosed, in whose favor they run, and who can execute a satisfaction or release. In the present case, there is no dispute that, absent Ordinance 97-07, Wells Fargo's prior recorded mortgage has priority over the City's code enforcement liens, which are "enforceable in the same manner as a court judgment." Fla. Stat. § 162.09(3). Because section 695.11 gives judgments priority in the order they are recorded, and because section 162.09(3) only permits the City's liens to be enforced "in the same manner as a court judgment," Ordinance 97-07 cannot give the City's liens priority over a lender's prior recorded

mortgage without conflicting with section 695.11. Thus, Ordinance 97-07 is preempted by this comprehensive regulation concerning liens for code violations.

II. THE LEGISLATURE DID NOT INTEND TO ALLOW LOCAL GOVERNMENTS TO GRANT CODE ENFORCEMENT LIENS SUPERPRIORITY.

The Legislature did not intend for municipalities to enact ordinances like Ordinance 97-07, and, therefore, they are invalid. When the Legislature desires liens to have superpriority status, it enacts statutes to that effect. For example, the Legislature has enacted legislation that tax liens are to be superior to other liens. Fla. Stat. § 197.122(1) ("All taxes imposed pursuant to the State Constitution and laws of this state shall be a first lien, superior to all other liens, on any property against which the taxes have been assessed . . ."). Further, the Legislature has balanced the interests of lenders and associations in the context of liens resulting from nonpayment of condominium association and homeowners association dues. A first mortgagee's liability for unpaid assessments that became due before the first mortgagee's acquisition of title is limited to the lesser of (a) unpaid assessments accrued or came due during the twelve months preceding the acquisition of title and for which payment in full has not been received, or (b) one percent of the original mortgage debt. Fla. Stat. §§ 718.116(1)(b); 720.3085(2)(c). In contrast, the City simply intends to give its liens for code violation fines a superpriority (like that for tax liens), no matter the amount of the fine compared to the mortgage debt.

In the present case, the liens' total value is $28,600.00. There is nothing to prevent this amount from rising much higher to a point where it is worth more than the collateral, leaving the lender with nothing to recoup if it forecloses. This is a nonsensical result the Legislature did not intend.

Another nonsensical result of Ordinance 97-07 is that a municipality cannot foreclose on its lien if the property at issue is homestead property, Fla. Stat. § 162.09(3), but it can assert its lien on the same homestead property if a lender brings a foreclosure action first.[2] It is unreasonable that the Act permits municipalities to possess a superior interest in homestead property that remains dormant and unenforceable until a lienholder with a prior recorded interest, such as a financial institution that recorded its mortgage in the public records, acts on its right to foreclose when the borrower defaults. *See* Fla. Const. Art. X, § 4(a). Municipalities cannot place mortgage lenders in the perilous position of either not enforcing their mortgage interests, or going through the time and expense of enforcing them only to have previously unenforceable code enforcement liens, possibly worth more than the mortgage debt, jump in priority.

[2] As noted in Wells Fargo's Answer Brief, the property at issue in this case was homestead property.

III. ORDINANCE 97-07 PROVIDES LOW-COST REVENUE TO LOCAL GOVERNMENTS AT THE EXPENSE OF FIRST MORTGAGEES' DUE PROCESS RIGHTS AND EMBODIES IMPRUDENT PUBLIC POLICY.

On top of the Legislature not allowing or intending local governments to enact ordinances like Ordinance 97-07, these types of ordinances, while guaranteeing low-cost revenue to municipalities, infringe on first mortgagees' due process rights and embody imprudent public policy. The present case is a perfect example—the City allowed large fines to accrue on real property for fairly minor code violations without notifying Wells Fargo, and then imposed liens of significant value, claiming they were superior to Wells Fargo's prior recorded mortgage. Put another way, Wells Fargo loaned the homeowners $115,531.00 in 2004, and the City imposed a lien with superpriority to recover $28,600.00—nearly a third of the value of the mortgage—because grass was not mowed and a fence not repaired. Add in the drop in Florida's property values since 2007, and Wells Fargo may be left with very little, if any, recovery after it completes the foreclosure process. *CTX Mortg. Co., LLC v. Advantage Builders of America, Inc.*, 47 So. 3d 844, 846 (Fla. 2d DCA 2010) (recognizing the bottom of the Florida real estate market had begun to drop out of the "overheated" housing market in mid-2007).

Some amici supporting the City assert that ordinances like Ordinance 97-07 are needed "to give teeth to their code enforcement efforts and . . . to ensure that

they recover the costs they are forced to incur repairing noncompliant properties." Amicus Brief of City of Casselberry, et al. p.8; *see also* Amicus Brief of City of Palmetto p.4 ("local governments rely on the prioritization of their liens to ensure that the defaulting property owner and the mortgagee cannot disregard the local government's efforts to *correct a dangerous condition or a blighted property*") (emphasis added). However, the City in this case made no effort to fix the fence or mow the lawn; it appears that it simply used Ordinance 97-07 to collect revenues lost due to the economy's downturn. Municipalities may impose high daily fines on property owners under these ordinances, and it is the continuing accrual of these fines that permits municipalities to supplement their revenues for the cost of merely seeking out code violations, not remedying them.[3] As such, this case is not about a local government's right to fix or maintain nonconforming property; it is about a local government's right to collect fines as a low-cost revenue stream and impose a lien with superpriority in the amount of these fines, at the expense of first mortgagees with a prior recorded interest.[4]

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[3] Additionally, Ordinance 97-07 already entitles the City, if it prevails in enforcing a code violation before the Code Enforcement Board, "to recover all costs incurred in enforcing the case before the Board, and in any appeals from the Board's order. Such costs include but shall not be limited to: investigative costs, administrative costs, prosecution costs, and preparation of the record on appeal."

[4] This issue is widespread considering the number of ordinances similar to the City's Ordinance 97-07. The City's Motion for Certification of a Question of Great Public Importance filed in the Fifth District Court of Appeal lists over eighty such

In addition to harming lenders who are first mortgagees, these ordinances will dramatically alter the mortgage market in Florida for the worse. Ordinances like Ordinance 97-07 lead to a lack of certainty as to priority, which inhibits the sale of mortgages in the secondary market. Banks do not hold and service the mortgages they sell; rather, they are sold in the secondary market to Fannie Mae or Freddie Mac, or securitized to private investors. The banks, in turn, use the proceeds of these sales to make other loans, and this stream of revenue keeps the economy growing. It is not unrealistic to predict that home lending could shut down in Florida if these ordinances are deemed valid due to the level of uncertainty superpriority liens create.

Finally, Ordinance 97-07 violates Article I, section 18, of the Florida Constitution by imposing an unauthorized penalty on banks who lend to homeowners. Article I, section 18 prohibits any administrative agency from imposing any penalty that is not authorized by the Legislature. Nowhere in the Florida Statutes has the Legislature authorized code enforcement boards to impose superpriority liens for code violations. While homeowners may not be penalized directly by these liens, as the City argues in its Initial Brief, financial institutions, and any other owners of prior recorded interests, are penalized by Ordinance 97-07 when homeowners fail to comply with code because they lose the priority of their

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similar ordinances from local governments throughout Florida and states that this is a representative, and not a complete, list.

mortgages, the only security for their loans. While the City argues that lenders are on notice under Ordinance 97-07 that liens for code violations can be imposed, this ignores the true problem—lenders have no idea *when* a code violation is alleged and *how high* the fines will go before a lien is imposed. If a lender received notice, it could possibly rectify the situation promptly to avoid the imposition of a lien, but this would defeat the municipality's goal—revenue.[5] While the City believes that lenders could monitor public records pertaining to code violations to ensure that none of their collateral properties are in violation, this itself would be a penalty due to the great resulting financial burden; it is also impossible practically given the tremendous number of homes financed within the state of Florida and the securitization of loans.

The City's goal is to shift the burden of enforcing its own ordinances to third parties who have no ability—and no duty—to enforce the City's standards of property maintenance. Nothing in Florida law, and nothing in public policy, is furthered by allowing municipalities to duck their own responsibilities and to foist

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[5] Notice of code violations to lenders may help in limited situations, but probably not in most due to securitization. Typically, mortgages are returned to the original lenders when and if mortgagors stop making payments on the underlying notes and they go into default; the original lender may have no interest in the loan at the time of the actual default. Alternatively, securitized mortgages are placed with a servicer who has specific contractual obligations and limitations of authority; the servicer may have no delegated authority from the owner(s) of the securitized mortgage to take action upon receiving notice of a code violation. Thus, it is not clear to whom notice would be given, and this is another example why ordinances of this type are completely unworkable.

the role of "enforcer" onto a financial institution that has neither the ability nor the authority to interfere with municipal governance. The citizen at least has standing to protest the adoption of the ordinance or to seek its repeal. The financial institution is without representation or remedy if the City adopts an ordinance it cannot enforce without infringing the rights of non-residents. Thus, Ordinance 97-07 and other ordinances like it are invalid.

CONCLUSION

For the reasons expressed in this *Amicus Curiae* Brief and the Answer Brief filed by Respondent, Wells Fargo Bank, N.A., Florida Bankers Association, the *Amicus Curiae,* respectfully requests that this Court answer the question certified by the Fifth District Court of Appeal in the negative.

Respectfully submitted,

Virginia B. Townes, Esq.
Carrie Ann Wozniak, Esq.
AKERMAN SENTERFITT
420 South Orange Avenue
Post Office Box 231
Orlando, FL 32802-0231
Tel.: 407-423-4000
Fax: 407-843-6610
E-mail:
virginia.townes@akerman.com
carrieann.wozniak@akerman.com

Attorneys for *Amicus Curiae,*
Florida Bankers Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 14, 2011, a true and correct copy of the foregoing was furnished by U.S. Mail to:

Matthew J. Conigliaro, Esq.
Leah A. Sevi, Esq.
Carlton Fields, P.A.
200 Central Avenue, Suite 2300
St. Petersburg, FL 33701-4352
Counsel for Respondent

Michael K. Winston, Esq.
Carlton Fields, P.A.
525 Okeechobee Blvd., Suite 1200
West Palm Beach, FL 33401-6350
Counsel for Respondent

Steven Brannock, Esq.
Brannock & Humphries
100 S. Ashley Drive, Suite 1130
Tampa, FL 33602
Counsel for Petitioner

Jamie A. Cole, Esq.
Susan L. Trevarthan, Esq.
Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
200 E. Broward Blvd., Suite 1900
Ft. Lauderdale, FL 33301
Counsel for Amici Curiae
Florida League of Cities

Andrew P. Lannon, Esq.
City of Palm Bay
5240 Babcock Street., NE, Suite 201
Palm Bay, FL 32905
Counsel for Petitioner

Edward G. Guedes, Esq.
Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
2525 Ponce de Leon Blvd., Suite 700
Coral Gables, FL 33134-6045
Counsel for Amici Curiae
Florida League of Cities

Erin J. O'Leary, Esq.
Catherine D. Reischmann, Esq.
William Reischmann, Esq.
Usher L. Brown, Esq.
Brown Garganese Weiss & D'Agresta
111 N. Orange Ave., Suite 2000
Orlando, FL 32801
Counsel for Amici Curiae Cities of Casselberry, Palm Coast, and Winter Park

Mark K. Barnebey, Esq.
Scott E. Rudacille, Esq.
Kurt E. Lee, Esq.
Kirk Pinkerton, P.A.
Post Office Box 3798
Sarasota, FL 34230
Counsel for Amici Curiae City of Palmetto

Carrie Ann Wozniak

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the *Amicus Curiae* Brief of Florida Bankers Association, complies with the requirements of Rule 9.210, Fla. R. App. P., and is printed in Times New Roman 14-point font.

Carrie Ann Wozniak, Esq.
Florida Bar No.: 12666

Question 38

a. Appeals for the Pro Bono Practitioner (Powerpoint)

b. Public Records Primer for the Business Law Practitioner (Powerpoint)

c. "Appealing Wisely and Avoiding Un-Appealing Mistakes" (Seminar Flyer)

d. Orange County Bar Association Bench and Bar Conference, "Professionalism and Ethical Implications from an Appellate Court Perspective" (No Materials)

e. "Professionalism in Discovery: Advanced Techniques to Create and Follow an Ethical Roadmap to Litigation Success" (Seminar Flyer)

f. Lessons from the Field: *The Florida Bar v. Roland Raymond St. Louis, Jr.* (No Materials)

g. "Strategy and Diplomacy: The Importance and Distinctions of Trial and Appellate Professionalism" (Seminar Flyer)

Taking and Perfecting Appeals: An Overview of the Appellate Process

Carrie Ann Wozniak
Akerman LLP

1

What is an appeal?

The complaint to a superior court of an injustice done or error committed by an inferior one, whose judgment or decision the court above is called upon to correct or reverse.

-Black's Law Dictionary

- An appeal is not a retrial.
- Most cases are entitled to one, and only one, level of appellate review.

2

APPELLATE JURISDICTION

Florida Supreme Court

Limited jurisdiction

3

Florida Supreme Court

Narrow mandatory jurisdiction under Art. V, §§ (3)(b)(1)-(3)(b)(2), Fla. Const., implemented by Fla. R. App. P. 9.030(a)(1).

- **Death Penalty**
- **Bond Validation**
- **Actions of Statewide Agencies Relating to Rates or Service of Utilities providing Electric, Gas, or Telephone Service**
- **Decision from District Court of Appeal declaring invalid a state statute or constitutional provision**

4

Florida Supreme Court

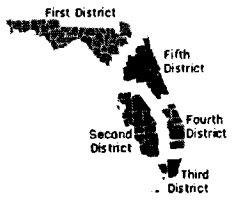
Discretionary jurisdiction to review District Courts of Appeal decisions under Art. V, §§ 3(b)(3)-3(b)(6), that:

- **expressly declare valid a state statute or expressly construe a provision of the state or federal constitution**
- **expressly affect a class of constitutional or state officers**
- **expressly and directly conflict with a decision of another DCA or Supreme Court on the same question of law**
- **certify a question of great public importance**
- **certify conflict with a decision from another DCA**

Original Jurisdiction—Extraordinary Writs

5

District Courts of Appeal



6

District Courts of Appeal

- First District Court of Appeal - (1st, 2nd, 3rd, 4th, 8th and 14th Circuits)
- Second District Court of Appeal - (6th, 10th, 12th, 13th and 20th Circuits)
- Third District Court of Appeal - (11th and 16th Circuits)
- Fourth District Court of Appeal - (15th, 17th and 19th Circuits)
- Fifth District Court of Appeal - (5th, 7th, 9th and 18th Circuits)

7

Mandatory appellate jurisdiction:

- Final orders of trial courts not directly reviewable by Florida Supreme Court or circuit court. Art. V, § 4(b)(1), as implemented by Fla. R. App. P. 9.030(b)(1)(A)
- Non-final orders of circuit courts listed in Fla. R. App. P. 9.130
- Certain administrative action

8

Discretionary jurisdiction:

- Final orders of a county court certified to be of great public importance. Fla. R. App. P. 9.030(b)(4)

9

Certiorari and Original jurisdiction:

- Writs of certiorari. Fla. R. App. P. 9.030(b)(2)
- Final orders of circuit courts acting in their review capacity. Fla. R. App. P. 9.030(b)(2)
- Other writs (original jurisdiction). Fla. R. App. P. 9.030(b)(3)

10

Circuit Courts

- Traditionally, final orders of county courts have been appealed to the circuit courts. Fla. R. App. P. 9.030(c)(1)
- As of January 1, 2020, appeals of county court orders or judgments with an amount in controversy exceeding $15,000 will be heard by the applicable DCA. § 26.012, Fla. Stat.
- Temporary and expires on January 1, 2023.
- Circuit courts also have original jurisdiction to issue writs. Fla. R. App. P. 9.030(c)(3)

11

How do I appeal?

- Final Orders: Follow Fla. R. App. P. 9.110
- Non-Final Orders: Follow Fla. R. App. P. 9.130
- Timely file notice of appeal with the clerk of the lower tribunal (generally 30 days).
- Original Proceedings: File petition (not notice!) directly in reviewing court.

12

Beware the definition of RENDITION in Fla. R. App. P. 9.020(h):

- When a signed, written order is filed with the clerk of the lower tribunal
- Certain motions may toll rendition of an order. Fla. R. App. P. 9.020(h)(1)
- The filing of an **authorized and timely** motion for new trial or rehearing, clarification, or certification; to alter or amend; for judgment notwithstanding verdict or in accordance with prior motion for directed verdict, or in arrest of judgment; or a challenge to the verdict postpones rendition of an order.

13

Briefs

- Review briefing deadlines carefully!
- Final Orders: Fla. R. App. P. 9.110(f) and 9.210
- Non-Final Orders: Fla. R. App. P. 9.130(e) and 9.210
- Original Proceedings: Fla. R. App. P. 9.100
- Follow Fla. R. App. P. 9.210 for required contents and page limits

14

Record or Appendix?

- Appeals from final orders are decided on the record of the trial court proceeding. Follow Fla. R. App. P. 9.200.
- Appeals from non-final orders and original proceedings use appendices. Fla. R. App. P. 9.130, 9.100.

15

Oral Argument

- Not always granted and courts have varying policies
- Read (and reread!) your court's administrative orders on oral argument and the notice of oral argument

16

Decision Time!

- Victory? Congratulations!
- Defeat
  - Consider post-opinion motions, and use them only where appropriate. Fla. R. App. P. 9.330 and 9.331.
  - File motions for rehearing sparingly.

17

Appellate Practice Resources

- The Florida Bar Appellate Practice Section Pro Bono Committee
  - Joe Eagleton, Brannock and Humphries (Chair)
- Florida Appellate Practice (Philip J. Padovano) West's Florida Practice Series
- Fla. Jur. on Appellate Review
- Florida Appellate Practice (The Florida Bar CLE Manual)
- Federal Court of Appeals Manual (David G. Knibb), published by West
- Advanced Appellate Practice and Certification Review (The Florida Bar CLE)
- The Florida Bar Appellate Practice Section's CLEs

18

A Business Lawyer's Guide to Public Records in Florida

Carrie Ann Wozniak
James F. Goldsmith
Akerman LLP

1

- "It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency."
- § 119.01(1), Fla. Stat.
- Art. I, § 24(a), Fla. Const.

2

What is a public record?

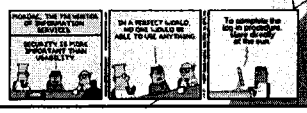
"Public records" means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

§ 119.011(12), Fla. Stat.

3

What is a public record?

- All materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.
- Drafts (records do not need to be in final form!)
- Electronic files
- E-mail
- Facebook
- Text messages



4

Access to Public Records

- Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records. § 119.07(1)(a), Fla. Stat.
- "Reasonable conditions" does not mean conditions that must be fulfilled before review; it means reasonable regulations permitting the records custodian to protect the records from alteration, damage, or destruction.

5

Access to Public Records

- An agency cannot require a written request, and in-person request, or a physical mailing address from the requestor, or *even a name*.
- A requestor is not required to explain the purpose or reason for a public records request.
- An agency must produce the records requested regardless of the number of records involved or possible inconvenience.
  - BUT section 119.07(4)(d), Florida Statutes, authorizes a records custodian to charge, in addition to duplication charges, a reasonable service charge if extensive use is required due to the volume or nature of the requested records.

6

Access to Public Records

- An agency is not required to create NEW records or reformat electronic records and provide in a certain form.

Wooton v. Cook, 590 So. 2d 1039 (Fla. 1st DCA 1991); *Seigle v. Barry*, 422 So. 2d 63 (Fla. 4th DCA 1982).

7

Who is subject to Public Records Act?

- "Agency" means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

§ 119.011(2), Fla. Stat.

8

Who is subject to the Public Records Act?

- A private entity "acting on behalf of any public agency" is subject to the Public Records Act. § 119.011(2), Fla. Stat.
- For example, a private corporation operating and maintaining a county jail pursuant to a contract with the county is "acting on behalf of" the county. *Times Publishing Co. v. Corrections Corp. of Am.*, No. 91-429 CA 01 (Fla. 5th Cir. Ct. Dec. 6, 1991).
- Must assume a governmental obligation. *News and Sun-Sentinel Co. v. Schwab*, 596 So. 2d 1029 (Fla. 1992).

9

More On Private Entities. . .

- If your private entity client enters into a contract with an agency and is acting on behalf of the agency, your client is a "contractor." § 119.0701(1)(a), Fla. Stat.
- Section 119.0701 contains contract requirements re: public records including exact language that MUST be included in the contract.
- Requests for public records must still be made to the agency, not the contractor.
- A civil action may be filed against the contractor to compel production of public records, and reasonable costs and attorneys' fees can be awarded against the contractor! § 119.0701(4), Fla. Stat.

10

Exemptions and Confidentiality

- The general purpose of chapter 119 "is to open public records to allow Florida's citizens to discover the actions of their government." *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997). The Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose. See *NCAA v. Assoc. Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009).
- An agency claiming an exemption from disclosure bears the burden of proving the exemption's applicability. See *Barfield v. Sch. Bd. of Manatee County*, 135 So. 3d 560, 562 (Fla. 2d DCA 2014).
- "Courts cannot judicially create any exceptions, or exclusions to Florida's Public Records Act." *Board of County Comm'rs of Palm Beach County v. D.B.*, 784 So. 2d 585, 591 (Fla. 4th DCA 2001).

11

"Exempt" vs. "Confidential and Exempt"

There is a difference between records the Legislature has determined to be exempt from The Florida Public Records Act and those which the Legislature has determined to be exempt from The Florida Public Records Act and confidential. *If information is made confidential in the statutes, the information is not subject to inspection by the public and may only be released to the persons or organizations designated in the statute . . .*

If records are not confidential but are only exempt from the Public Records Act, the exemption does not prohibit the showing of such information.

WFTV, Inc. v. School Board of Seminole, 874 So. 2d 48 (Fla. 5th DCA 2004)


12

Some Exemptions

- "General exemptions" are listed in section 119.071
  - Bank account/credit card/social security numbers
  - Sealed bids and proposals per competitive solicitation (for a limited time)
  - Body camera recordings recorded in private residences or other facility (health care, etc.) that a person would reasonably expect to be private are confidential and exempt
  - 911 calls are not exempt except that the name, address, and other identifying information of person requesting emergency services are confidential and exempt

13

Attorney-Client Communications

- Do not count on attorney-client privilege!
- The Public Records Act applies to communications between attorneys and governmental agencies.
  - Attorney-client privilege is judicially-created and does not override the Legislature's Public Records Act. *Walt v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979).
  - Attorney invoices are not privileged.

14

Attorney Work Product

- Records prepared by, or at the express direction of, an agency's attorney which reflect a mental impression, conclusion, litigation strategy, or legal theory of the attorney or agency, and which were prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings, or in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings are exempt from disclosure UNTIL the conclusion of the litigation or adversarial administrative proceedings.

§ 119.071(1)(d), Fla. Stat.

15

Attorney Work Product

- ONLY records reflecting a mental impression, conclusion, litigation strategy, or legal theory are included.
- Narrower than the work product doctrine recognized in court for private litigants.
- Records prepared for other purposes may not be converted into exempt material simply because they are also used in or related to litigation. *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007).
- Does not apply to tapes, witness statements, and interview notes taken by police investigation of drowning incident at city summer camp. *Sun-Sentinel Co. v. City of Hallandale*, No. 95-13528(05) (Fla. 17th Cir. Ct. Oct. 11, 1995).
- Claims File exemption might apply.

16

Attorney Work Product

- The exemption is TEMPORARY and exists only until the "conclusion of the litigation or adversarial administrative proceedings," even if disclosure of the information in the concluded case could negatively impact the agency's position in related cases or claims. *Lightbourne v. McCollum*, 969 So. 2d 326 (Fla. 2007).

17

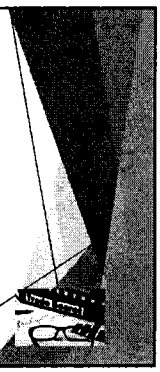
Claims Files

- Under section 768.28(16)(b), Florida Statutes, Claims Files are confidential and exempt.
- Applies to a broad set of documents which are not defined in the statute (only the legislative history!).
- Because work product exemption only applies to attorneys' mental impressions, this exemption covers claims evidence.
- The statute does not specify when a claims file comes into existence, i.e., prior to or after receipt of a notice of claim, BUT section 768.28(16) exempts risk management programs from Sunshine Law only AFTER claim is filed.

18

Trade Secret Records

- Trade secret information as defined in section 812.081, Florida Statutes, is confidential and exempt. It is a felony for the agency to disclose such records!
- Trade secret records must be marked as confidential at the time of delivery to the agency for the exemption to apply. *Sepro Corporation v. Florida Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003).
- Practice Tip: Beware of private parties identifying everything as "confidential". If representing an agency and private party requests contractual confidentiality, consider requiring indemnification if records are mismarked.



19

Fees

- Special service charges are allowed when extensive use of information technology or clerical assistance is required. § 119.07(4)(d), Fla. Stat.
- Must be based on labor/costs actually incurred and reasonable.
- Copy fees up to 15 cents per page (5 cents extra for two-sided) and $1.00 per copy for a certified copy. § 119.07(4), Fla. Stat.

20

How Long Can An Agency Take?

- A records custodian must acknowledge requests to inspect or copy records promptly. § 119.07(1)(c), Fla. Stat.
- The Public Records Act does not contain a specific time for response.
- The only delay permitted "is the limited reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt." *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984).
- An unreasonable and excessive delay can constitute an unlawful refusal to provide access to public records. *Hewlings v. Orange County*, 87 So. 3d 839 (Fla. 5th DCA 2012).

21

Requests are not continuing

- An agency must only produce those responsive documents in its custody at the time of the request.
- Nothing requires an agency to respond to a "standing" or "continuing" request for production of public records that it may receive or produce in the future.

22

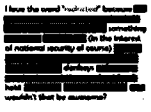
Beware of Confidentiality Agreements

- An agency cannot bargain away its Public Records Act duties with promises of confidentiality in settlement agreements. *NCAA v. Assoc. Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009).
- Practice Tip: Nothing prohibits an agency from agreeing to keep confidential records that it is not under an obligation to disclose (trade secret records, social security numbers, HIPAA protected records, etc.).

23

Redactions

- A custodian who contends a record or part of a record is exempt from inspection must state the basis for the exemption including the statutory citation to the exemption. § 119.07(1)(e), Fla. Stat.
- Where a public record contains some exempt information, the custodian must redact only that portion(s) for which an exemption is asserted and provide the remainder of the record. § 119.07(1)(d), Fla. Stat.



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Civil Action to Obtain Records

- Under section 119.11, Florida Statutes, a person denied the right to inspect and/or copy public records may bring a civil action against the agency to enforce Chapter 119.
- Before filing the lawsuit, the petitioner must have furnished a public records request to the agency. *Villarreal v. State*, 687 So. 2d 256 (Fla. 1st DCA 1996).
- Under section 119.11(1), Fla. Stat., actions brought under Chapter 119 are entitled to an immediate hearing taking priority over other cases.
- Court may inspect records *in camera*.

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Attorneys' Fees and Costs

- Under section 119.12, Fla. Stat., if a civil action is filed against an agency to enforce chapter 119 and the court determines that the agency unlawfully refused to permit a public record to be inspected/copied, the court SHALL assess and award against the agency the reasonable costs of enforcement *including reasonable attorneys' fees*. *Wisner v. City of Tampa Police Dep't*, 601 So. 2d 296 (Fla. 2d DCA 1992).
- A pro se litigant is entitled to an award of reasonable costs. *Weeks v. Golden*, 846 So. 2d 1247 (Fla. 1st DCA 2003).
- "New" 2017 "improper purpose" exception in section 119.12(3), Florida Statutes.

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Retention Schedule

- Division of Library Services promulgates records retention schedules that dictate how long an agency must maintain its public records.
- Do not count on an agency maintaining its public records indefinitely!
- For example, employee disciplinary records are held for 5 years, but surveillance recordings (including red light cameras) are held for only 30 days.

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Resources

Government-in-the-Sunshine Manual, 2018 ed., vol. 40

Public Records, a Guide for Law Enforcement Agencies, 2018 ed.

Both available at:

http://www.myfloridalegal.com/sun.nsf/sunmanual

Chapter 119, Florida Statutes (Public Records)

Records retention schedules available at:

https://dos.myflorida.com/library-archives/records-management/general-records-schedules/

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The Orange County Bar Association Appellate Practice Committee Presents

Appealing Wisely and Avoiding Un-Appealing Mistakes

Speakers include:

The Honorable Brian D. Lambert, *Fifth District Court of Appeal*

The Honorable Eric J. Eisnaugle, *Fifth District Court of Appeal*

The Honorable Daniel P. Dawson, *Ninth Judicial Circuit*

The Honorable Thomas Sculco, *Office of Compensation Claims*

The Honorable Margaret Sojourner, *Office of Compensation Claims*

Join judges, law clerks, and experienced practitioners for a day of learning the ins and outs of appellate practice, including civil, criminal, guardian ad litem, and workers' compensation appeals. Every attendee will learn new material, from a new lawyer to a board-certified appellate practitioner.

February 1, 2018

Registration: 8:30 a.m., Program: 9:00 a.m. – 4:30 p.m.

RSVP: www.orangecountybar.org/store by January 29

Members: $40; Student/Government: $25; Non-members: $50

8.0 General, including 1.0 Technology, 8.0 Appellate Practice

Breakfast Sponsored by:

RJ Wolfe Publications, LLC.

Lunch Sponsored by:

HOLLIFIELD LEGAL CENTRE

Orange County Bar Association
880 N. Orange Avenue,
Orlando, FL 32801
407-422-4551
www.orangecountybar.org

ORANGE COUNTY BAR ASSOCIATION

JUNE 4, 2015 MAJOR SEMINAR

Professionalism in Discovery: Advanced Techniques to Create and Follow an Ethical Roadmap to Litigation Success

JOINTLY PRESENTED BY THE PROFESSIONALISM, TECHNOLOGY, AND APPELLATE COMMITTEES

9:00 A.M. TO 4:30 P.M. AT THE OCBA CENTER
880 NORTH ORANGE AVENUE
ORLANDO, FLORIDA 32801

At this unique seminar, you will learn the most effective techniques for creating an ethical roadmap to litigation from start to finish. You will understand that professionalism, ethics and civility are the traits of winners. Our speakers and panelists were chosen based on their specific knowledge, expertise, and vantage points that will be shared with you. Breakfast and lunch will be provided.

FEATURED SPEAKERS

Honorable James Edwards, Honorable John Marshall Kest, and Honorable Donald Myers

PRESENTATIONS

9:00am - 10:00am	Creating Your Ethical Roadmap in Litigation
10:00am - 11:00am	Professionalism and Ethics in Written Discovery
11:15am - 12:15pm:	Professionalism and E-Discovery: Why Counsel Must Work Together
12:15pm - 1:15pm:	Lunch with Ethics and Attorney Grievance Process Presentation by Bar Attorneys
1:15pm - 2:15pm:	Maintaining Professionalism in Appellate Review of Discovery Issues
2:30pm - 3:30pm:	Depositions of Parties: Keeping Your Cool and Your Ethics
3:30pm - 4:30 pm:	Maintaining Professionalism and Civility during Depositions of Experts

REGISTRATION FEE: $40.00 for OCBA members, $50.00 for non-members, $25.00 for government and student OCBA members. Registration fee includes breakfast, program, and lunch.

CLE (pending) 8.5 General, 7 Ethics upon approval by the Florida Bar

REGISTER & RSVP through the OCBA Store at www.orangecountybar.org/store. Deadline to RSVP is May 29, 2015

Due to limited available parking, participants are encouraged to take the LYMMO to the Marks St. stop across the street from the OCBA Building.

War and Peace: Negotiating Battles and Peace Treaties in ADR, Business Litigation, Appellate Courts, and the Legislature

A CLE sponsored by the Business Law, Appellate, and Professionalism Committees of OCBA

June 10, 2011
Orange County Bar Association Center
880 North Orange Avenue
Orlando, FL

8:30-8:50 Late Registration

8:50-9:05 General Welcome & Introductions by Sponsoring Committees

9:05-9:10 Introduction by Business Law Committee Chair – Christopher A. Pace

9:10-10:00 Business Law Committee presents Confrontation and Accord: Secrets to Success in Mediation and Arbitration by Gregory S. Martin

Is ADR simply a hurdle in the path to trial or is it an opportunity to limit risk? How do you balance being an aggressive advocate of your client's position while being a counselor serving their needs? How do you negotiate towards a resolution without diminishing your trial readiness? Rather than being seen as the antithesis to trial, ADR should be embraced as a natural extension of a trial practice. Topics will include preparation, presentation and negotiating strategies which, while not a guarantee of success, will significantly increase the likelihood.

10:00-10:30 Business Law Committee presents Tactics and Ethics: Conducting Ethical and Effective Discovery in Modern Business Litigation by Adam C. Losey

Mr. Losey, an attorney and adjunct professor at Columbia University, where he teaches electronic discovery as part of Columbia's Information and Digital Resource Management Master's Program, will provide an overview on metadata, ethical rules on metadata mining and scrubbing, and conducting effective and ethical discovery in modern business litigation.

10:30-10:40 Break

10:40-10:45 Introduction by Appellate Practice Committee Chair – Elizabeth C. Wheeler

10:45-11:35 Appellate Practice Committee presents Checks and Balances: Legislative Proposals to Fundamentally Alter the Judicial Branch by Former Florida Supreme Court Justice Charles T. Wells, and Attorneys John R. Hamilton, Barbara A. Eagan, and Nicholas A. Shannin, Moderated by Attorney Stacy J. Ford

This panel presentation will review the history of the relationship between two of Florida's three branches of government - the Legislature and the Judiciary, recent legislative proposals to fundamentally alter the judicial branch, the Florida

Supreme Court's power to review constitutional amendments proposed by the Legislature, as well as the significant court funding challenges of recent years. It will include topics such as the Supreme Court's rule-making powers, the process of nomination and selection of appellate court judges, merit retention, and the composition and jurisdiction of the Florida Supreme Court.

11:35-12:05 Business Law Committee presents Conflicts and Cooperation: Maximizing Client Benefits Through Business Court Procedures by the Honorable Frederick J. Lauten

As one of the Circuit Judges assigned to the Business Court Division and the current Administrative Judge of the Circuit Civil Division, Judge Frederick Lauten will provide an overview of the Ninth Judicial Circuit's Business Court. The discussion will regard Business Court Procedures and how they are used in practice to benefit litigants in Business Court, as well as the important distinctions between Business Court and General Circuit Civil.

12:05-12:20 Break (pick up box lunches)

12:20-1:10 Appellate Practice Committee presents Strategy and Diplomacy: The Importance and Distinctions of Trial and Appellate Professionalism by a Panel of Former and Current District Court Judges, Moderated by Attorney Carrie Ann Wozniak

In this ethics and professionalism presentation, our distinguished panel of present and former judges of our state appellate courts will discuss the importance and distinctions of trial and appellate professionalism. Topics will include examples of good appellate advocacy performed ethically and professionally, "motion practice" on appeal, common mistakes that lead to show cause orders, and steps that trial and appellate practitioners should take to ensure a "fair appeal" to all parties involved. The entire 50 minutes will involve discussion of ethical and professional issues.

1:10-1:20 Break (discard box lunches)

1:20-1:25 Introduction by Professionalism Committee Chair – James A. Edwards

1:25-2:15 Professionalism Committee presents Strategy and Diplomacy: Professionalism's Impact on Persuasion and Performance in Business Court Litigation by the Honorable Thomas B. Smith

As one of the Circuit Judges assigned to the Business Court Division and a former commercial litigator, Judge Tom Smith will explain how adherence to Business Court Procedures, compliance with the OCBA Standards of Professionalism, following the Ninth Circuit's Courtroom Decorum Policy and conducting yourself in a civil and professional manner will enhance your performance and persuasion, leading to the most effective representation of your client and most efficient use of judicial resources. Judge Smith will include specific examples of varying behavior patterns to give practical application to the concepts being discussed. The entire 50 minutes will be devoted to issues of ethics and professionalism.

2:15-3:05 Professionalism Committee presents Handshakes or Hand to Hand Combat: Dealing with Professionalism Challenges Outside the Courtroom by Thomas A. Zehnder, Penelope Perez-Kelly, Heather Pinder Rodriguez, and Liz McCausland

These panelists are all Larry Mathews Professionalism Award winners, who will discuss professionalism and ethical challenges that arise in the complex litigation arena including compliance with discovery and document requests, who gets to go first in depositions, how to deal with unreasonable people and avoid becoming one yourself, when does thorough discovery become unduly burdensome, dealing with deposition bullies, and the many other issues in business litigation that arise outside the watchful eye of the judge. The entire 50 minutes will be devoted to issues of ethics and professionalism.

3:05-4:00 Reception/Social Hour