Application for Nomination to the Seventh Circuit Court

Katherine Hurst Miller

APPLICATION FOR NOMINATION TO THE SEVENTH CIRCUIT COURT

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: Katherine Hurst Miller **Social Security No.:** [redacted]
Florida Bar.: 27946 **Date Admitted to Practice in Florida: 9/26/2006**

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.

Attorney, Wright & Casey, P.A.
340 North Causeway
New Smyrna Beach, Florida 32169
386-428-3311

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), and your preferred email address.

[redacted]
[redacted]
Place of residence since July 2006
Florida resident since July 2003
[redacted]
kmiller@surfcoastlaw.com

3. State your birthdate and place of birth.

July 2, 1981, at Walter Reed Army Medical Center, Washington, D.C.

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.

Florida September 26, 2006-present
Federal Middle District of Florida July 5, 2007-present
Federal Eleventh Circuit July 13, 2007-present
Federal Southern District of Florida April 11, 2008-present
Federal Northern District of Florida June 30, 2008-present
United States Supreme Court March 9, 2015-present

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

Yes, my maiden name was Katherine Jane Hurst from birth to marriage.
July 2, 1981-December 29, 2007

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 known, please request the same from such school).

Stetson University College of Law
1401 61st Street South, Gulfport, Florida 33707
Attended: August 2003-May 2006
Degree Conferred: Juris Doctor with Certificate of Concentration in Advocacy on May 13, 2006
Class Standing and GPA: Top 25% 37/171 3.235 GPA *Cum Laude*

Vanderbilt University
2101 West End Avenue, Nashville, Tennessee 37203
Attended: August 1999-May 2003
Degree Conferred: Bachelor of Arts with Honors in Art History on May 9, 2003
Class Standing and GPA: Top 10% 71/913 3.773 GPA *Summa Cum Laude*

7. EDUCATION, CONTINUED

Texas Tech University
2500 Broadway, Lubbock, Texas 79409
Attended: January 1998-May 1999
Degree Conferred: Non-Degree Study (attended during high school)
Class Standing and GPA: No standing provided 4.0 GPA

Lubbock High School
2004 19th Street, Lubbock, Texas 79401
Attended: August 1996-May 1999
Degree Conferred: High School Diploma
Class Standing and GPA: Top 5% 13/541 4.53 GPA

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.

Stetson Moot Court
Member, Spring 2005-Spring 2006
Team Member, National First Amendment Competition Team, Spring 2006
World Championship Team Member, Willem C. Vis International Competition Team, Spring 2005

Stetson Law Review
Member, Fall 2004-Spring 2006
Research Editor, Spring 2005-Spring 2006
Outstanding Editor Award Winner, Spring 2006
Speaker, Summer Scholarship Dinner, Summer 2005

Stetson Research Assistant
Assisted with faculty research, articles, and books, Summer 2004, Spring 2006

Stetson Teaching Assistant
Assisted with teaching, tutoring, and grading Advocacy class, Spring 2006

Stetson Admissions Representative
Spoke at events for admitted students and recruited at college fairs, Spring 2005-Spring 2006

8. HIGHER EDUCATION ORGANIZATIONS, CONTINUED

Stetson Teaching Fellow
Assisted with teaching and grading first year Research & Writing classes, Fall 2004-Fall 2005

Bay Area Legal Services
Legal Aid Pro Bono Volunteer, 2004

Children's Home Society of Florida
Family Visitation Volunteer, Fall 2003-Fall 2005

Phi Beta Kappa Alumni Association of Tampa
Member, Fall 2003-Spring 2006

Ingram Scholars
Vanderbilt civic and community service scholarship
As an Ingram Scholar, I volunteered with a number of Nashville community organizations and Vanderbilt student groups, including Kids & Computers, Aiding Inmate Mothers, Random Acts of Kindness, Our Kids Soup Sunday, Pruitt Public Library, Martha O'Bryan Center, Eating Disorder Task Force, Weekend of Service, T.J. Martell Foundation, United Cerebral Palsy of Middle Tennessee, and the Cumberland Science Museum
Scholar, Fall 1999-Spring 2003
Member, New Scholar Selection Committee, Spring 2000-Spring 2003
Facilitator/President, Fall 2002

Vanderbilt Reformed University Fellowship (RUF)
Presbyterian Campus Ministry
Member, Fall 1999-Spring 2003

Vanderbilt Order of Omega
Service and academic honorary for members of fraternities and sororities
Member, Spring 2002-Spring 2003
President, Fall 2002-Spring 2003

Alpha Omicron Pi Sorority, Nu Omicron Chapter
Member, Spring 2000-Spring 2003
Special Events Coordinator, Spring 2002-Spring 2003
Activities Chair, Spring 2001-Spring 2002

8. HIGHER EDUCATION ORGANIZATIONS, CONTINUED

Vanderbilt smART (formerly VERSES)
Student service organization volunteering with tutoring and arts programming at a public library
Member, Spring 2000-Spring 2003
Chair, Fall 2001-Spring 2002

Vanderbilt Student Association of Art and Art History
Club for Art History Majors and Minors
Member, Spring 2000-Spring 2003

Vanderbilt Residential Colleges Implementation Committee
University group overseeing start of residential college system at Vanderbilt
Member, Fall 2001-Spring 2003
Academic Services Co-Chair, Fall 2002-Spring 2003

Texas Tech University Museum
Lubbock Museum Docent
Volunteer for tours of traveling Vatican Art Exhibit, Summer 2002

Vanderbilt Arts and Science Council
Student group working with faculty and administration
Sophomore Representative, Fall 2000-Spring 2001

United Way of Lubbock
Lubbock-area non-profit organization
Annual Campaign Intern, Summer 2000
Board of Directors Member, 1998-1999

Vanderbilt Sarratt Arts Council
Committee to select and install art works on campus
Member, Fall 1999-Spring 2000

Vanderbilt Interhall Council
Student governmental organization
Dyer Dorm President, Fall 1999-Spring 2000

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 titles(s) and dates of employment. For non-legal employment, please briefly describe the position and provide a business address and telephone number.

Wright & Casey, P.A.
340 North Causeway, New Smyrna Beach, Florida 32169
Attorney, 2016-Present

Cobb & Cole, P.A.
149 South Ridgewood Avenue Suite 700, Daytona Beach, Florida 32114
Partner, 2013-2016
Associate, 2006-2012
Summer Associate, 2005

Stetson Federal Judicial Internship
Faculty Advisor Professor James Fox
Judge Mary Scriven
1401 61st Street South, Gulfport, Florida 33707
Intern, Spring 2006

Stetson Teaching Fellows
Professors Kelly M. Feeley and Brooke J. Bowman
1401 61st Street South, Gulfport, Florida 33707
Fellow, Fall 2004-Fall 2005

U.S. Attorney's Office, Middle District of Florida
400 North Tampa Street Suite 3200, Tampa, Florida 33602
Intern, Summer 2004

Tennessee Performing Arts Center
Nashville cultural center with multiple theaters
505 Deaderick Street, Nashville, Tennessee 37243
615-782-4000
Intern, Spring 2003

9. EMPLOYMENT, CONTINUED

Ceta Canyon United Methodist Summer Camp
Crossroads Junior High and Vision High School summer camps
37201 FM 1721, Happy, Texas 79042
806-488-2268
Volunteer Counselor, Summer 2002, Summer 2003, Summer 2004

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.

Current practice. I am a board-certified attorney practicing with Wright & Casey, an eight-attorney firm in New Smyrna Beach that handles transactions and litigation related to real estate. Our firm prides itself on combining a small-town feel with the highest quality legal services. Since 2016, I have focused in the areas of condominium and homeowner's association law, and I also handle civil litigation and appellate matters. In 2020, I became board certified by The Florida Bar and was the first attorney in Volusia County to obtain the Condominium and Planned Development Law certification. In 2022, I was invited to become a partner with the firm. My typical client is a condominium or homeowner's association with a volunteer board that needs assistance running the association in compliance with state and federal law. I spend a great deal of time interpreting Florida Statutes, reviewing and revising governing documents, and helping associations adopt new rules and regulations. I also deal with administrative agencies and engage in litigation and alternative dispute resolution on behalf of my clients. I have also had the privilege of helping a number of community association clients prepare for and recover from hurricane damage, using emergency powers, special assessments, loans, and governmental programs.

Prior practice. For the first ten years of my practice, I worked in the Daytona Beach office of Cobb & Cole, which was the largest civil firm in Volusia County. I was in the litigation department working on appeals, trials, mediations, depositions, and hearings. I got to work on small matters for my own clients and large matters for the firm's clients, including assisting with the briefing for a case that was argued before the U.S. Supreme Court on the first Monday in October, *Lozman v. City of Riveria Beach*, 133 S. Ct. 735 (2013). I represented a wide variety of clients, from small businesses to larger national companies. Many of those cases for larger clients involved insurance issues, whether insurance coverage, insurance agent defense, or insurance defense. I also had a small number of condominium and homeowner's association clients, all of whom followed me to Wright & Casey.

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	**4 %**	**Civil**	**98%**
Federal Trial	**5 %**	**Criminal**	**0%**
Federal Other	**0 %**	**Family**	**1%**
State Appellate	**7 %**	**Probate**	**1%**
State Trial	**80 %**	**Other**	**0%**
State Administrative	**4 %**		
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:

For the first ten years of my practice as a civil litigator at Cobb & Cole, I was in the courtroom more than in the past six years as a condominium and homeowner's association attorney at Wright & Casey.

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

Jury?	**3**	Non-jury?	**12***
Arbitration?	**4**	Administrative Bodies?	**1**
Appellate?	**16**		

***Does not include short foreclosure trials**

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.

13. APPEALS, CONTINUED
I substantially participated in the following appeals:

1. **Snowden v. Snowden**
   Jurisdiction and Case Number: Fifth District Court of Appeal 07-2543
   Date of Argument: 5/7/2008
   Opposing Counsel: Catherine G. Swain, cathy@swainpa.com, 386-258-1222
   Co-Counsel: Rhoda Bess Goodson (now deceased)
   Published Opinion: *Snowden v. Snowden*, 985 So. 2d 584 (Fla. 5th DCA 2008).

2. **Krell v. Dustin's Barbeque**
   Jurisdiction and Case Number: Fifth District Court of Appeal 09-1588
   Date of Argument: None
   Opposing Counsel: Self Represented
   Co-Counsel: Kelly Parsons Kwiatek, kelly.kwiatek@halifax.org, 386-425-4000
   Opinion: *Krell v. Dustin's Barbeque*, 41 So. 3d 232 (Fla. 5th DCA 2010)(PCA).

3. **Wipperfurth v. Hicks**
   Jurisdiction and Case Number: Fifth District Court of Appeal 09-4436
   Date of Argument: 3/22/11
   Opposing Counsel: Barbara Green, bg@caselawupdate.com, 305-773-5717
   Kenneth J. McKenna, kmckenna@dwklaw.com, 407-244-3000
   Anthony Sos, asos@dwklaw.com, 407-244-3000
   Co-Counsel: Bruce Hanna (now deceased)
   Robert T. Bowling, rbowling@bbins.com, 386-239-7200
   Kathy Weston, kweston@circuit7.org, 386-943-7060
   Published Opinion: *Wipperfurth v. Hicks*, 73 So. 3d 297 (Fla. 5th DCA 2011).

4. **Dietch v. Dietch**
   Jurisdiction and Case Number: Fifth District Court of Appeal 09-1712
   Date of Argument: None
   Opposing Counsel: Anna M. Jemjemian, anna.m.jemjemian@consulatehc.com, 407-215-4692
   Co-Counsel: Rhoda Bess Goodson (now deceased)
   Published Opinion: *Dietch v. Dietch*, 60 So. 3d 1073 (Fla. 5th DCA 2011)(citation opinion).

13. APPEALS, CONTINUED

5. **Goloubev v. Palm West Home Builders**
   Jurisdiction and Case Number: 09-1712
   Date of Argument: None
   Opposing Counsel: Self Represented
   Co-Counsel: Robert T. Bowling, rbowling@bbins.com, 386-239-7200
   Published Opinion: *Goloubev v. Palm W. Home Builders, Inc.*, 39 So. 3d 522 (Fla. 5th DCA 2010).

6. **Brown & Brown v. The School Board of Hamilton County, Florida**
   Jurisdiction and Case Number: Fifth District Court of Appeal 11-1122
   Date of Argument: 8/27/2012
   Opposing Counsel: Dennis Schutt, dschutt@jaxtrialattorneys.com, 904-737-3737
   Jeffrey D. Devonchik, jd@campionlawpa.com, 904-990-8400
   Co-Counsel: Bruce Hanna (now deceased)
   Robert T. Bowling, rbowling@bbins.com, 386-239-7200
   Published Opinion: *Brown & Brown, Inc. v. Sch. Bd. of Hamilton Cty., Fla.*, 97 So. 3d 918 (Fla. 5th DCA 2012).

7. **Brown & Brown v. The School Board of Putnam County**
   Jurisdiction and Case Number: Fifth District Court of Appeal 11-1271
   Date of Argument: 8/27/2012
   Opposing Counsel: Dennis Schutt, dschutt@jaxtrialattorneys.com, 904-737-3737
   Jeffrey D. Devonchik, jd@campionlawpa.com, 904-990-8400
   Co-Counsel: Bruce Hanna (now deceased)
   Robert T. Bowling, rbowling@bbins.com, 386-239-7200
   Opinion: *Brown & Brown v. Sch. Bd. Of Putnam Cty., Fla.*, 96 So. 3d 911 (Fla. 5th DCA 2012)(PCA).

8. **Reese v. Eddington**
   Jurisdiction and Case Number: Florida Fifth District Court of Appeal 12-3964
   Date of Argument: None
   Opposing Counsel: Self Represented
   Co-Counsel: Bruce Hanna (now deceased)
   Published Opinion: *Reese v. Eddington*, 111 So. 3d 268 (Fla. 5th DCA 2013)(citation opinion).

13. APPEALS, CONTINUED

9, 10, 11. Lapinski v. St. Croix Condominium Association, et al.

Jurisdiction and Case Number: Federal Eleventh Circuit 17-12872 (Lapinski I)
Jurisdiction and Case Number: Federal Eleventh Circuit 18-15157 (Lapinski II)
Jurisdiction and Case Number: Federal Eleventh Circuit 19-14524 (Lapinski III)
Date of Argument: None
Opposing Counsel: Self Represented
Co-Counsel: R. Brooks Casey, bcasey@surfcoastlaw.com, 386-428-3311
Counsel for other Defendant-Appellees: Charles Ian Nash, charlie@n-klaw.com, 321-984-2440
Jamie Ellen Seaman, seamanlaw@earthlink.net, 407-448-8144
Shelley Cridlin, cridlinlaw@gmail.com, 727-637-3618
Thomas R. Brown, III, rbrown@volusia.org, 386-736-5950
G. Clay Morris, cmorris@drml-law.com, 407-422-4310
Kenneth Van Wilson (now retired), kvwilsonfl@verizon.net, 941-504-5406
Michael A. Rodriguez, marodriguez@apopka.net, 407-703-1700
Frank Sonny Ganz, fganz@daytonalaw.com, 386-254-6875
Sarah Lane Metz, smetz@daytonalaw.com, 386-254-6875
Opinions: *Lapinski v. St. Croix Condo. Ass'n, Inc. et al.*, 739 F. App'x 519 (11th Cir. 2018)(unpublished); *Lapinski v. St. Croix Condo. Ass'n, Inc. et al.*, 777 F. App'x 463 (11th Cir. 2019)(unpublished); *Lapinski v. St. Croix Condo. Ass'n, Inc. et al.*, 815 F. App'x 496 (11th Cir. 2020)(unpublished).

12. Johnson v. Daytona International Speedway

Jurisdiction and Case Number: Florida Fifth District Court of Appeal 21-2154
Date of Argument: None
Opposing Counsel: Brian J. Lee, blee@forthepeople.com, 904-456-6816
Co-Counsel: R. Brooks Casey, bcasey@surfcoastlaw.com, 386-428-3311
Opinion: *Johnson v. Daytona International Speedway*, 341 So. 3d 331 (Fla. 5th DCA 2022)(PCA).

13. Posadas v. San Martin Petition for Writ of Prohibition

Jurisdiction and Case Number: Florida First District Court of Appeal 22-1006
Date of Argument: None
Opposing Counsel: David Willis, david@willislucaslaw.com, 904-270-8707
Jonathan B.B. Lucas, jonathan@willislucaslaw.com, 904-270-8707
Co-Counsel: Frank Rapprich, frapprich@surfcoastlaw.com, 386-428-3311
Opinion: Denied without published opinion.

13. APPEALS, CONTINUED

14. Hefley v. Maloy
Jurisdiction and Case Number: Florida Fifth District Court of Appeal 22-1003
Date of Argument: None
Opposing Counsel (representing himself): William M. Hefley, whefley@hefleylaw.com, 407-965-1190
Co-Counsel: Richard Wright, rwright@surfcoastlaw.com, 386-428-3311
Opinion: Dismissed as moot.

15. I also substantially participated in writing the answer brief for United Self Insured Services in Lampkin-Asam v. Volusia County School Board, et al., but I was uncredited as I sought admission to the court because of this case and was not yet admitted to the Eleventh Circuit.
Jurisdiction and Case Number: Federal Eleventh Circuit 07-12704
Date of Argument: None
Opposing Counsel: Self Represented
Co-Counsel: Bruce Hanna (now deceased)
Opinion: *Lampkin-Asam v. Volusia Cty. Sch. Bd. et al*., 261 F. App'x 274 (11th Cir. 2008)(unpublished).

16. I also substantially participated in drafting the answer brief and contesting jurisdiction in Corley v. Ocean Ritz of Daytona Condominium Association, but the appeal was in circuit court.
Jurisdiction and Case Number: Florida's Seventh Circuit 2009 10025 APCC
Date of Argument: None
Opposing Counsel Alex Costopoulous, alex@fantasyworldtimeshare.com, 407-396-8530
Stacy J. Ford, ford@litigationandappeals.com, 407-227-7016
Co-Counsel: Robert T. Bowling, rbowling@bbins.com, 386-239-7200
Opinion: Dismissed as non-final order not subject to appeal, as recorded in the Official Records of Volusia County, Florida, at Book 6485, Page 2084.

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.

1. **Ektabani et al. v. Las Brisas Homeowners Association Arbitration**
   DBPR Case No. 2022-04-2226
   Opposing Counsel: Asima Azam, azamlawandmediation@gmail.com, 407-349-1577

2. **Universal Property & Casualty Insurance Co. v. Ormond Surfside Management Corporation and Whitmire v. Ormond Surfside Management Corporation Arbitration**
   Consolidated Arbitration of Seventh Circuit Case Nos. 2019-32233-CICI and 2020-30176-CICI
   Opposing Counsel: Bryan Manno, bmanno@andreupalma.com, 561-354-9615
   Beth Allen, ballen@andreupalma.com, 561-354-9600
   Eric LaRue, eric@thelaruefirm.com, 407-455-4779

3. **Hefley v. Maloy Appeal**
   Florida Fifth District Court of Appeal Case No. 22-1003
   Opposing Counsel (representing himself): William M. Hefley, whefley@hefleylaw.com, 407-965-1190
   Co-Counsel: Richard Wright, rwright@surfcoastlaw.com, 386-428-3311

4. **Posadas v. San Martin Appellate Petition for Writ of Prohibition**
   Florida First District Court of Appeal Case No. 22-1006
   Opposing Counsel: David Willis, david@willislucaslaw.com, 904-270-8707
   Jonathan B.B. Lucas, jonathan@willislucaslaw.com, 904-270-8707
   Co-Counsel: Frank Rapprich, frapprich@surfcoastlaw.com, 386-428-3311

16. LAST SIX CASES TRIED TO VERDICT OR HANDLED ON APPEAL, CONTINUED

5. **Johnson v. Daytona International Speedway Appeal**
   Florida Fifth District Court of Appeal Case No. 21-2154
   Opposing Counsel: Brian J. Lee, blee@forthepeople.com, 904-456-6816
   Co-Counsel: R. Brooks Casey, bcasey@surfcoastlaw.com, 386-428-3311

6. **Grand Haven Homeowner's Association v. Brifman Trial**
   Flagler County Case No. 2017 35285 COCI
   Opposing Counsel: Self Represented

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.

1. **Blue Turtle Landscaping v. Heaps**
   Volusia County Case No. 2021 20215 CODL
   Mediator: Scott Cichon, scott.cichon@cobbcole.com, 386-255-8171 x 283
   Opposing Counsel: Matthew Peterson, mpeterson1986@gmail.com, 386-428-2464

2. **Universal Property & Casualty Insurance Co. v. Ormond Surfside Management Corporation**
   Seventh Circuit Case No. 2019-32233-CICI
   Opposing Counsel: Bryan Manno, bmanno@andreupalma.com, 561-354-9615
   Beth Allen, ballen@andreupalma.com, 561-354-9600

3. **Caribbean Condominium Management Association v. Colton Unit B-1 and Peck**
   Seventh Circuit Case No. 2019-31686 CICI
   Mediator: Terrence White, twhite@uww-adr.com, 386-253-1560
   Opposing Counsel: Jim McCrae, james.mccrae@hklaw.com, 407-244-1178

4. **In Re The Matter of Berrien H. Becks Sr. Revocable Trust**
   Seventh Circuit Case No. 2020 12922 PRDL
   Opposing Counsel: Mark Wall, mark.wall@hwhlaw.com, 813-221-3900
   Jarod Brazel, jarod.brazel@hwhlaw.com, 813-221-3900
   Michael Ivan, mike@ivanlawgroup.com, 904-395-2395
   Geddes D. Anderson, ganderson@murphyandersonlaw.com, 904-598-9282
   Sarah Hulsberg, shulsberg@murphyandersonlaw.com, 904-380-8080

17. LAST SIX CASES SETTLED, CONTINUED

5. **Grand Haven v. 5 Pelican Trust**
   Pre-Suit
   Mediator: MaryEllen Osterndorf, maryellen@osterndorflaw.com, 386-255-9171
   Opposing Counsel: Michael Kelton, mkelton@keltonlawpa.com, 386-259-4806

6. **United States v. Links South**
   Middle District of Florida Case No. 6:21-cv-1682-GAP-EJK
   Opposing Counsel: Yohance A. Pettis, Yohance.pettis@usdoj.gov, 813-274-6000

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, I have appeared in court approximately 5 times per month in the last six years. For the first ten years of my practice as a civil litigator at Cobb & Cole, I was in the courtroom approximately 5 to 10 times per month.

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.

1. **Clark Hotel v. Brown & Brown, jury trial in February 2010**
   Nineteenth Circuit Case No. 2006-010104 CA03
   Judge: Paul B. Kanarek (retired), kanarekp@gmail.com, [redacted]
   Co-Counsel: Bruce Hanna (now deceased)
   Opposing Counsel: Amy D. Boggs, aboggs@boggslawgroup.com, 727-954-8833
   A. Woodson Isom, woodyisom.law@gmail.com, 813-629-6388

   Any lawyer's first jury trial will feel significant at the time, but I learned so much procedural and substantive law from this one case that it remains significant for my professional development. We represented a large insurance agency defending an alleged failure to procure insurance for a beachfront hotel during the 2004 hurricane season. I was responsible for direct and cross examination of half of the lay witnesses, as well as most of the motion practice. The motions and preparation leading up to trial were substantial, and the trial lasted two weeks – only to end with a hung jury. After significant preparation, the case settled on the eve of re-trial.

2. **Aero Electronics v. Brown & Brown, bench trial November 2015**
   Eighteenth Circuit Case No. 05-2005-CA-019756
   Judge: John M. Harris, harrisj@flcourts.org, [redacted]
   Co-Counsel: Bruce Hanna (now deceased)
   Opposing Counsel: Stephen H. Price, sprice@cramerprice.com, 407-843-3300
   R. David deArmas: rda@cramerprice.com, 407-843-3300

   This case was my most significant bench trial, and the preparation leading up to trial was considerable over many years. We represented a large insurance agency that had been sued after insurance policy limits were insufficient to cover windstorm damage to a growing business. By the time of this trial, I had handled several insurance agent cases and taught a CLE on the matter. I was responsible for examining half of the witnesses, as well as much of the motion practice. We obtained a defense verdict, but the court denied our motion for fees. The judge was excellent and very timely in ruling, and opposing counsel were very skilled.

21. FIVE MOST SIGNIFICANT CASES, CONTINUED

3. Wipperfurth v. Hicks, appeal 2011 and re-trial 2012

Fifth District Court of Appeal Case No. 5D09-4436
Judicial Panel: Judges Jacobus, Evander, and Cohen
Seventh Circuit Case No. 05-2005-CA-019756
Judge: Terry Perkins, tperkins@circuit7.org, [redacted]
Co-Counsel: Bruce Hanna (now deceased)
Robert T. Bowling, rbowling@bbins.com, 386-239-7200 (appeal only)
Kathy Weston, kweston@circuit7.org, [redacted] (appeal only)
Opposing Counsel: Barbara Green, bg@caselawupdate.com, 305-442-0330 (appeal only)
Kenneth J. McKenna, kmckenna@dwklaw.com, 407-244-3000 (appeal and trial)
Anthony Sos, asos@dwklaw.com, 407-244-3000 (appeal and trial)

In addition to insurance agent defense, I also defended auto accident cases for out-of-state insurers. I have been fortunate to attend Florida Defense Lawyers Association conferences and to publish an article on Florida's dangerous instrumentality doctrine. (Attached at Tab 35). Because insurance defense cases overwhelmingly tend to settle, this is my only personal injury trial. This case involved an accident on I-4 where we represented the defendant, a commercial truck driver. This case was significant to me because I came in on the appeal and then tried the case in a re-trial.

The main issue on appeal was one of juror non-disclosure, and whether the judge applied the correct standard. The standard was not entirely clear from the case law, and we thought we could get, if not a favorable ruling, a clarification of the law. We got the clarification in the law, and because the judge had retired while the case was pending on appeal, we were remanded for a new trial. I was able to use the law I learned about juror non-disclosure to write a moot court problem for The Florida Bar's Orseck Moot Court Competition. (Attached at Tab 35).

In the re-trial, the judge and I were both new to the case, but the other lawyers had all tried the case before. Even so, there were a number of new issues that arose. The parties entered into a high-low agreement so that the jury's verdict did not result in another appeal. Everyone in the courtroom, from the counsel to the judge, was smart and skilled. I will also remember this trial because I was having a difficult pregnancy, including an emergency trip to the doctor during jury selection, and yet I was able to work through it, we presented a strong case, and every single person in the courtroom treated me with kindness and respect. I learned firsthand that fierce legal fights can be waged without any loss of courtesy.

21. FIVE MOST SIGNIFICANT CASES, CONTINUED

4. Gemini Association v. King, arbitration 2016-17, litigation 2017-18, mediation 2018
Seventh Circuit Case No. 2017 30551 CICI
Judge: Christopher France, cfrance@circuit7.org, [redacted]
DBPR Case No. 2016-04-4648
Arbitrator: David R. Slaton, dslaton@floridabar.org, 850-561-5845
Mediator: K. Judith Lane, jlane@uww-adr.com, 386-253-1560
Opposing Counsel: Matthew Shapiro, matthewshapiro@riceroselaw.com, 386-257-1222

When I left Cobb & Cole to join Wright & Casey, I stopped practicing insurance defense. I focused on condominium law as my main practice area. This was a case for a condominium association that started working with me at Cobb & Cole and came with me to Wright & Casey.

The issue in this case involved whether a condominium's rental restriction had to be contained in the recorded declaration or whether other language in the declaration allowed the condominium board to enact a rule regarding the length of rentals. The issue required an in-depth analysis of the language in the declaration as a matter of contract interpretation. After the arbitrator ruled against my client, we appealed the matter for a trial de novo in circuit court and obtained a favorable summary judgment ruling from the judge. Then, with another appeal looming, the parties settled at mediation. Often, the other side in a condominium case is self-represented, or represented by an attorney dabbling in condominium law, but the opposing counsel in this case was knowledgeable and reasonable. The mediator was also knowledgeable in condominium law. This ended up being one of my favorite condominium matters, and I have continued to represent this client in non-litigation matters.

5. United States v. Links South, federal litigation, advice and counsel 2021
Middle District of Florida Case No. 6:21-cv-1682-GAP-EJK
Judge: Gregory A. Presnell, chambers_flmd_presnell@flmd.uscourts.gov, [redacted]
Opposing Counsel: Yohance A. Pettis, yohance.pettis@usdoj.gov, 813-274-6000

This case is significant, not for the litigation, which settled right before I filed an answer for my client, but because it represents the behind-the-scenes work that I do advising and counseling condominium clients regarding compliance with state and federal law. Housing accommodation and discrimination claims make up an increasingly large part of my condominium practice. I would estimate that at least two or three times a week, a client calls or emails me needing assistance reviewing a request by a resident for an accommodation or modification for a claimed disability. Florida now has a statute that applies to housing accommodation requests and specifically applies to

21. FIVE MOST SIGNIFICANT CASES, CONTINUED

emotional support animals, but the federal Fair Housing Act is broadly written. Practitioners must interpret federal court opinions, agency regulations, and published agency guidance that changes with different presidential administrations. Many of my boards of directors, who are all volunteer homeowners, find it challenging to review Fair Housing Act requests and increasing condominium regulation. They need specialized legal advice on issues such as disability accommodation requests, rental restrictions, elections, special assessments, construction, and reserve account funding. Getting any of these issues wrong can have serious consequences, including giving rise to expensive litigation.

I wish that I had worked with this client from the initial accommodation request, but the condominium association came to me after the federal department of Housing and Urban Development (HUD) charged it with discriminating against a homeowner with disabilities. The homeowner had made an accommodation request to leave shoes in the condominium hallway outside the unit door, which the condominium association denied in accordance with its rules. A previous attorney for the condominium association had taken a strong stance opposing the request with the homeowner's attorney and the HUD investigator. The condominium association hired me for my knowledge of the Fair Housing Act and to defend against the U.S. Government in federal court. The condominium board members also relied upon me to help them explain the situation to other condominium unit owners and to give advice in the face of unflattering media coverage and threatening letters and emails. We settled the federal litigation working with the U.S. Attorney's Office to enter into a court-approved settlement that was acceptable to the homeowner. I now have the privilege of continuing to work with this condominium association on other legal matters, and the condominium board has referred nearby condominiums to work with me as well.

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.

***See* attached at Tab 22 for two recent writing samples.** I was the sole author of both samples, although the appellate brief was lightly edited by my co-counsel Mr. Casey and marked for tables by our paralegal.

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.

Fifth District Court of Appeal JNC, October 2022, not certified.
Fifth District Court of Appeal JNC, January 2021, not certified.
Fifth District Court of Appeal JNC, October 2020, not certified.

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.

None.

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.

None.

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.

None.

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.

None.

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.

None.

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.

None.

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.

None.

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 not engaged in any for-profit business, but I am a director on two not-for-profit boards.

The Museum of Arts and Sciences is a large regional museum in Daytona Beach with first-class collections. I am currently a member of the Board of Trustees and the Strategic Planning Chair. If appointed, I would seek to stay on the board in an appropriate capacity without any fundraising.

32. NON-LEGAL BUSINESS INVOLVEMENT, CONTINUED

St. Barnabas Episcopal School is a private school offering instruction PreK-8 in Deland. I am currently a member of the Board of Trustees and the Development Chair. If appointed, I would resign immediately as Development Chair, but I would seek to stay on the board in an appropriate capacity without any fundraising.

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.

None, other than unpaid board service listed in response to Questions 32 and 42.

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.

I would be unable to preside over any matters in which a party is represented by Wright & Casey for at least two years due to the conflict or appearance of conflict from a financial relationship.

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.

Author, *Historical Perspective on the Claim of Too Many Lawyers*, Florida Bar Young Lawyers Division blog, available at https://flayld.org/2017/01/historical-perspective-on-the-claim-of-too-many-lawyers/ (2017).

35. PUBLICATIONS, CONTINUED

Author, *Happy New Year*, Florida Bar Young Lawyers Division blog, available at https://flayld.org/2016/07/happy-new-year/ (2016).

Author, *Written Interview for Commission of Women*, Florida Bar Young Lawyers Division website, available at https://flayld.org/commission-on-women/interview-series/katherine-hurst-miller/ (2016).

Co-Author, *Defending the Non-Resident Car Owner*, Trial Advocate Quarterly (2012). *See* attached at Tab 35.

Author, *Robert Orseck Memorial Moot Court Competition Problems*, The Florida Bar (2011-13). *See* attached at Tab 35.

Author, *YLD News and Notes Articles*, Volusia County Bar Association Communicator (2009-10). *See* attached at Tab 35.

Author, *The Empty(ing) Museum: Why a 2001 Agreement between the United States and Italy Is Ineffective in Balancing the Interests of the Source Nation with the Benefits of Museum Display*, 11 Art Antiquity and Law 55 (2006). *See* attached at Tab 35. Please note this is a British publication, and the editors anglicized my spelling and punctuation to conform to their style preferences.

Author, *Recent Developments*, 35:2 Stetson L. Rev. 645 (2006); 35:3 Stetson L. Rev. 1093 (2006). *See* attached at Tab 35.

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.

I prepared the following reports:

Annual Report for The Florida Bar Annual Convention Committee for 2019, which is available at https://www.floridabar.org/the-florida-bar-journal/annual-reports-of-committees-of-the-florida-bar2018-2019/#Annual_Convention.

Annual Report for The Florida Bar Young Lawyers Division for 2017, which is available at https://www.floridabar.org/the-florida-bar-journal/annual-reports-of-sections-and-divisions-of-the-florida-bar-10/.

36. REPORTS, CONTINUED

I contributed to the following reports:

The Young Lawyers Division Who We Are Video in 2017, which is available at https://www.youtube.com/watch?v=UUY7SaqkCKc

The Report of The Florida Bar Special Committee on Gender Bias, which published a report and recommendations in 2017 that are available at https://www-media.floridabar.org/uploads/2017/06/Special-Committee-on-Gender-Bias-Report-2017.pdf

The Bar Admission part of the Vision 2016 Commission Report by The Florida Bar, published in 2013, revised in 2016, and available at https://www-media.floridabar.org/uploads/2017/04/vision2016full-final-report-ada.pdf

As President of The Florida Bar Young Lawyers Division, a board member of The Florida Bar Board of Governors, and a committee member of various Florida Bar committees such as the Standing Committee on Technology and the Rules of Judicial Administration Committee, I have also been part of groups that have made reports or suggested rule changes to legal procedures, but I did not personally prepare or contribute to those reports. The most significant rules that I can think of are the Military Spouse Rule, the Parental Leave Continuance Rule, and the rule changes to implement Marsy's Law.

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.

Presenter, Welcome to the Bar, Induction Ceremony, multiple locations and presentations at the Fifth District Court of Appeal, Daytona Beach, Florida on October 12, 2022 and October 4, 2017 and at the First District Court of Appeal, Tallahassee, Florida, on May 1, 2017. At this ceremony swearing in new lawyers, I represented The Florida Bar Board of Governors and welcomed new lawyers to the profession. The video from the 2022 ceremony is available at https://www.youtube.com/watch?v=yRZ9uxRe8Mg.

Panelist, Condominium Inspections and Reserves Legislation, Building Association Managers of Volusia, Daytona Beach, Florida, July 19, 2022. I was one of six panelists speaking about changes to the Florida Statutes affecting inspections and reserves, which the legislature enacted following the Champlain Towers collapse in South Florida. I am not aware of any recordings or press coverage.

37. SPEECHES, CONTINUED

Speaker, Condominium Board Certification Classes, Wright & Casey, multiple locations and dates 2017-22. These two-hour classes fulfill the statutory requirements for certification of new condominium board members. Our firm typically offers classes in conjunction with a community association management company, businesses that work with condominium associations, or in-house at a condominium association. Usually, we have three to five speakers, but I have taught the entire class myself on occasion. I speak on a wide variety of topics related to Florida Statutes Chapter 718 and the Federal Fair Housing Act. I am not aware of any recordings or press coverage.

Speaker, Homeowner's Association Board Certification Classes, Wright & Casey, multiple locations and dates 2017-22. These two-hour classes provide one way for a new homeowner's association board member to satisfy statutory requirements for certification. We typically offer classes in conjunction with a community association management company or businesses that work with homeowner's associations. Usually, I am one of three to five speakers, and I speak on a wide variety of topics related to Florida Statutes Chapter 720 and the Florida Marketable Record Title Act. Usually, the classes are not recorded and do not get press coverage, but a class was offered via Zoom on May 20, 2020, which was recorded. My topics for that class were emergencies, director obligations, and rights of owners. The video is available at https://www.youtube.com/watch?v=XbTLKFSRu04**.**

Welcome Speaker, Museum of Arts and Sciences, Leadership Daytona, Daytona Beach, Florida, October 15, 2021. I spoke for twenty minutes to the Leadership Daytona class regarding the museum, its collections and exhibits, and board service in the arts and cultural sector. I have also given brief welcoming remarks as President of the Board of Trustees at other Museum of Arts and Sciences events. The only press coverage I am aware of speaking at the Museum is when I thanked a donor at a dedication ceremony for the planetarium. https://www.ormondbeachobserver.com/photo-gallery/stellar-contributions-moas-names-planetarium-after-lohman-family.

Speaker, Condominium and Homeowner's Association Legislative Update, Building Association Managers of Volusia, Daytona Beach, Florida, August 17, 2021; August 20, 2019; September 18, 2018. I was one of two speakers discussing changes to the Florida Statutes that affect condominiums and homeowner's associations. I am not aware of any recordings or press coverage.

Speaker, Mock Trial Summer Camp, Stetson University, DeLand, Florida, June 21, 2021. I was one of a few local attorneys and judges who were invited to speak to high school students interested in law and debate. I spoke to the camp as a whole and then did some speed-mentoring sessions with small groups. I am not aware of any recordings or press coverage.

37. SPEECHES, CONTINUED

Speaker, CAM Matters YouTube Channel episode on pets and service animals, filmed on August 28, 2020. This YouTube Channel focuses on community association matters, and I was a guest giving twenty minutes of legal information on pets and service animals. The video is available at https://www.youtube.com/watch?v=oo1uuANo5jk.

Speaker, Yearly Educational Summit (YES) Course for Community Association Managers, Florida CAM Schools, multiple locations and dates, 2018-20. This class offers the continuing education credits that Community Association Managers need to keep an active license, and I spoke on various legal topics related to community associations. I am not aware of any recordings or press coverage.

Speaker, Robert's Rules of Order, multiple locations and presentations: the DeLand Rotary on May 28, 2020; the Southern States Management Board Member Conference on February 27, 2019; the Volusia Young Professionals Group on June 19, 2015; and the Junior League of Daytona Beach on September 17, 2013. I spoke for an hour or two on the topic of Robert's Rules of Order. I am not aware of any recordings or press coverage.

Speaker, Southern States Management Group Quarterly Classes, multiple locations and dates 2017-20. These classes are offered quarterly to condominium and homeowner's association board members who work with Southern States Management Group. Among other speakers from other industries, I spoke for about 30 minutes quarterly on various legal topics. Usually the classes were not recorded and did not get press coverage, but one class was offered via Zoom on April 29, 2020 and was recorded. My topic for that class was Coronavirus, Common Areas & Cancellation of Meetings. The video is available at https://www.youtube.com/watch?v=hCsrQZHi3zA.

Panelist, Post-Hurricane Insurance Roundtable, Building Association Managers of Volusia, Daytona Beach, Florida, November 12, 2019. I was one of six panelists speaking about the process of insurance claims for property damage before a group of property managers and representatives from related industries. I am not aware of any recordings or press coverage.

Panelist, Judicial Nominating Commission Training by the Executive Office of the Governor, Tallahassee, Florida, October 21, 2019. This training is a requirement for new members of judicial nominating commissions, and I spoke on a forty-minute panel on JNC rules and procedures based on my perspective chairing a circuit judicial nominating commission. The video is available at https://thefloridachannel.org/videos/10-21-19-judicial-nominating-commission-training/.

37. SPEECHES, CONTINUED

Panelist, An Inside Look at Judicial Appointments Under Governor DeSantis, Jacksonville Federalist Society Chapter, Jacksonville, Florida, August 22, 2019. I was one of three panelists, and I spoke about the application and interview process in the Seventh Circuit Judicial Nominating Commission. Media coverage of the event is available at https://www.jaxdailyrecord.com/article/the-marbut-report-advice-for-starting-on-path-to-the-bench.

Welcome Speaker, Annual Convention Judicial Luncheon, The Florida Bar, Boca Raton, Florida, June 27, 2019. As the Annual Convention Chair, I provided brief welcoming and closing remarks to a 1,000+ person audience at a luncheon with state of the judiciary presentation and awards from the Chief Justice, with the Governor as the featured speaker. The video is available at https://www.youtube.com/watch?v=JXSTWpXW1Zc.

Panelist, 2019 Professionalism Symposium New Lawyer Panel, Volusia County Bar Association, Daytona Beach, Florida, May 31, 2019. I spoke on two one-hour panels for lawyers new to the practice of law. I am not aware of any recordings or press coverage.

Moderator, Judicial Panel, Building Association Managers of Volusia (BAM), Daytona Beach, Florida, May 21, 2019. I moderated a panel of circuit and county judges speaking about Florida's courts to a group of property managers and representatives from related industries. I am not aware of any recordings or press coverage.

Speaker, Board Relations and Fiduciary Responsibility, multiple locations and presentations to the United Way of Daytona Beach on February 22, 2019, and to the Leadership Daytona Class on May 11, 2018. I spoke for forty-five minutes to a group of local leaders regarding fiduciary duties, ethics, and familiarity with Robert's Rules of Order. I am not aware of any recordings or press coverage.

Panelist, Estoppels and Transaction Fees Program, Building Association Managers of Volusia, Daytona Beach, Florida, February 20, 2018. I was one of three panelists speaking about the new estoppel statute to a group of property managers and representatives from related industries. I am not aware of any recordings or press coverage.

Speaker, Excellence in Leadership, Volusia Flagler Association for Women Lawyers, Daytona Beach, Florida, November 9, 2017. I was part of a series of events on excellence for my FAWL chapter. I spoke for an hour about lessons learned from a year leading The Florida Bar Young Lawyers Division. I am not aware of any recordings or press coverage.

37. SPEECHES, CONTINUED

Speaker, Past, Present, and Future of Women Lawyers, Brevard County Association for Women Lawyers, Melbourne, Florida, March 9, 2017. I was one of three dinner speakers, and I spoke about the future of women in the practice of law and specifically addressed some statistics and initiatives from The Florida Bar Young Lawyers Division. I am not aware of any recordings or press coverage.

Moderator, Cross-Generational Collaboration to Conquer Implicit Bias Panel Discussion with National Association for Women Lawyers, American Bar Association Mid-Year Meeting, Miami, Florida, February 3, 2017. I moderated a panel discussion regarding gender bias to a group of women attorneys and young attorneys. I am not aware of any recordings or press coverage.

Presenter, Young Lawyer Pro Bono Award, Florida Supreme Court Pro Bono Award Ceremony, Tallahassee, Florida, January 19, 2017. I presented the Young Lawyer Pro Bono Award to Jennifer Edwards. The video of the ceremony is available at https://wfsu.org/gavel2gavel/viewcase.php?eid=2408.

Speaker, Young Lawyers on Center Stage, Broward County Bar Association, Fort Lauderdale, Florida, September 15, 2016. I spoke regarding initiatives of The Florida Bar Young Lawyers Division and benefits for young lawyers and local bar associations. I am not aware of any recordings or press coverage.

Interviewee, Mentorship and Sponsorship for the Take an Hour Mentoring Project, Florida Bar Young Lawyers Division, filmed in Tampa, Florida, February 29, 2016. I was interviewed for a project promoting mentoring of young lawyers. Video clips are available at https://www.youtube.com/watch?v=myDMDvQQprY and https://www.youtube.com/watch?v=aP0gQpmoQMc&list=PLvin5ubiDBv5UghJcMoKzd_vc3RoJ6wH6&index=11.

Speaker, Young Lawyers Division Inaugural Address, The Florida Bar Annual Convention, Orlando, Florida, June 17, 2016. I spoke at the General Assembly setting forth some of the past accomplishments of the Young Lawyers Division and goals for the coming year. The video is available at https://www.youtube.com/watch?v=3h6I-LvulA0 Coverage of the Speech was in The Florida Bar News and is available at https://www.floridabar.org/the-florida-bar-news/miller-leads-the-yld/.

Speaker, Professionalism as You Begin Your Career, The Florida Bar Law Student Division, Orlando, Florida, June 15, 2016. The Young Lawyers Division President-Elect and I spoke at a meeting of students from all twelve of Florida's law schools regarding professionalism. I am not aware of any recordings or press coverage.

37. SPEECHES, CONTINUED

Interviewee, Legal Talk Network Podcast, June 21, 2016 and September 16, 2015. I was interviewed for a legal podcast regarding The Florida Bar Young Lawyers Division. Both recordings are available at https://legaltalknetwork.com/guests/katherine-hurst-miller/**.**

Speaker, Social Media: Litigation, Ethics, and You Presentation, Florida Alliance of Paralegal Associations Continuing Education Seminar, Daytona Beach, Florida, September 19, 2015. I spoke to a group of paralegals from around the state about legal issues related to social media. I am not aware of any recordings or press coverage.

Speaker, Young Lawyers Division Panel Presentation, The Florida Bar Voluntary Bar Leaders Conference, Multiple Locations, Florida, 2013, 2015, 2016. I spoke at annual conferences of local bar association leaders on panels regarding the activities and grant programs of The Florida Bar Young Lawyers Division. I am not aware of any recordings or press coverage.

Moderator, Preparing Your Opening Comments, Mentoring with the Masters Video Series, Florida Bar Young Lawyers Division and Upchurch Watson White & Max, Maitland, Florida, November 20, 2013. I spoke with a mediator in a video series designed to assist young lawyers preparing for mediation. The video is available at https://www.youtube.com/watch?v=g0mh_frLluo.

Speaker, Red Flags, Yellow Flags, and Green Flags at Your Condominium Class, Cobb & Cole, Daytona Beach, Florida, August 1 and 2, 2012. I presented a lunchtime seminar with a co-worker on some "dos and don'ts" for condominium managers and board members. I am not aware of any recordings or press coverage.

Moderator, Unraveling the Mysteries of the Judicial Nominating Commission Panel Presentation, Volusia-Flagler Association for Women Lawyers, Daytona Beach, Florida, Spring 2010. I moderated a panel of commissioners and judges talking about the steps in Florida's judicial nominations process to a group of local attorneys. I am not aware of any recordings or press coverage.

Speaker, The Empty(ing) Museum, Stetson Law Review Summer Scholarship Dinner, Tampa, Florida, Summer 2005. Every semester, one law review member presents to an audience of law review members, faculty, and students. I was selected, and presented my research from the article listed in response to Question 35. I am not aware of any recordings or press coverage.

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.

Speaker, Leadership Boot Camp Continuing Legal Education Course, Florida Bar Young Lawyers Division Affiliate Outreach Conference, Lake Buena Vista, Florida, January 16, 2017. I presented an hour of CLE, together with the President-Elect of the Florida Bar Young Lawyers Division, to a conference of young lawyer leaders. I gave the same presentation later that year to other local bar associations. PowerPoint slides are attached at Tab 38.

Welcome Speaker, Practicing with Professionalism Continuing Education Course, The Florida Bar, Online Version, filmed in Tallahassee, Florida, September 26, 2016. All newly admitted attorneys are required to take this one-day professionalism course. While I was President of the Young Lawyers Division, we filmed the first recording that could be viewed online instead of in-person. News that the course was available online for the first time can be found at https://www.floridabar.org/the-florida-bar-news/pwp-now-offered-online/. I gave opening remarks and information about The Florida Bar Young Lawyers Division. The course outline is attached at Tab 38.

Speaker/Co-Chair, Basic Insurance Law, Florida Bar Basic Skills Continuing Legal Education Course, Tampa, Florida, May 29, 2015. I presented an hour of CLE on insurance agent law, as well as invited a number of speakers and compiled the written course materials from the speakers. The course outline and my course materials are attached at Tab 38.

Moderator/Co-Chair, Basic Appellate Practice, Florida Bar Basic Skills Continuing Legal Education Course, Tampa, Florida, March 28, 2014. I gave welcoming and introductory remarks, arranged for all the speakers, and compiled the written course materials provided by the speakers. The course outline is attached at Tab 38.

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.

Professional Honors

Super Lawyer Recognition, Florida Super Lawyers, 2018-23.

Recipient, Philanthropist of the Year, Association of Fundraising Professionals Volusia/Flagler Chapter, 2022.

Honoree, National Philanthropy Day Champion, Museum of Arts and Sciences, 2022.

Honoree, Women in Business, *Daytona Beach News-Journal*, 2022.

39. HONORS, CONTINUED

Award of Appreciation, The Florida Bar Law Student Division, 2017.

Rising Stars Recognition, Florida Super Lawyers, 2013-16.

Honoree, 40 Under 40, *Volusia/Flagler Business Report*, 2013, 2015.

Nominee, Most Productive Board Member, Florida Bar Young Lawyers Division, 2013-15.

Recipient, Woman of the Year Award, Volusia-Flagler Association for Women Lawyers, 2014.

Recipient, Spirit of the League Award, Junior League of Daytona Beach, 2013.

Honoree, Leaders in the Law Award, Florida Association for Women Lawyers, 2012.

Law School Academic Honors

Recipient, E. Harris Drew Memorial Award, Stetson College of Law, 2006.

Inductee, National Order of Barristers, 2006.

Inductee, Phi Alpha Delta, Legal Honorary, 2006.

Recipient, Outstanding Law Review Editor Award, *Stetson Law Review*, 2006.

Honoree, Who's Who Among Students in American Universities and Colleges, 2006.

Recipient, Book Award, Highest Grade in Corporations Class, 2006.

Recipient, Book Award, Highest Grade in Administrative Law Class, 2005.

Recipient, Cite and Sourcer of the Month Award, *Stetson Law Review*, 2005.

Recipient, Frédéric Eisemann Award, First Place in Vis Moot Court Competition, 2005.

Dean's List, Stetson University College of Law Spring 2005, Fall 2005, Spring 2006.

Honor Roll, Stetson University College of Law Spring 2003, Fall 2004.

Recipient, Full Merit Scholarship, Stetson University College of Law, 2003-06.

College Academic Honors

Inductee, Phi Beta Kappa honorary, 2003.

Honors for Thesis in Art History, Vanderbilt University, 2003.

Recipient, Cooley Award for the highest Art History grade point average, Vanderbilt University, 2003.

39. HONORS, CONTINUED

Recipient, Dowling Award for Art History research, Vanderbilt University, 2003.

Selected, All-USA Academic Team Third Team, *USA Today*, 2003.

Inductee, Mortar Board Senior Academic Honorary, 2003.

Inductee, Order of Omega Greek Academic Honorary, 2002.

National Finalist, Harry S. Truman Scholarship, 2002.

Recipient, Nabers Prize for best undergraduate paper in the fields of classical archaeology, ancient art, and architecture, Vanderbilt University, 2002.

Nominee, Chancellor Heard Outstanding Community Servant Award, Vanderbilt University, 2002.

Nominee, Howard Swearer Award for Outstanding Student Humanitarian, Vanderbilt University, 2002.

Recipient, Alpha Omicron Pi Outstanding Sorority Member Award, Vanderbilt University, 2001.

Recipient, Chancellor Heard Outstanding Sophomore Sorority Member Award, Vanderbilt University, 2001.

Honorable Mention, Nabers Prize for best undergraduate paper in the fields of classical archaeology, ancient art, and architecture, Vanderbilt University, 2001.

Inductee, Gamma Beta Phi service honorary, 2000.

Inductee, Phi Eta Sigma freshman honorary, 2000.

Inductee, Alpha Lambda Delta freshman honorary, 2000.

Dean's List, Vanderbilt University, Fall 1999, Spring 2000, Fall 2000, Spring 2001, Fall 2001, Spring 2002, Fall 2002, Spring 2003.

Recipient, Ingram Scholarship to Vanderbilt University, 1999-2003.

Recipient, National Merit Scholarship to Vanderbilt University, 1999.

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

"AV" Rating since 2015.

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.

41. BAR ASSOCIATIONS, CONTINUED

The Florida Bar, Member, 2006-present.
Co-Chair, Special Committee on Mentoring, 2022-present.
Member, Appellate Practice Section, 2021-present.
Member, Real Property, Probate, and Trust Law Section, 2017-present.
Advisor, Lawyers Advising Lawyers Program, 2016-present.
Chair, Annual Convention Committee, 2018-19.
Member, Board of Governors, 2015-17.
Member, Various Bar Committees, 2013-22.

Volusia County Bar Association, Member, 2006-present.
Director, 2020-present.
Young Lawyers Division Representative, 2009-10.
Young Lawyers Division Representative-Elect, 2008-09.

American Inns of Court, Member, 2005-06, 2008-15, 2017-present.
Associate in Daytona Beach's Dunn Blount Inn, 2008-15, 2017-present.
Pupil in Tampa's Ferguson-White Inn, 2005-06.

The Federalist Society, Member, 2021-present.

Volusia-Flagler Association for Women Lawyers, Member, 2007-21.
President, 2010-11.
Vice President, 2009-10.
Member, Board of Directors, 2008-11.

Florida Association for Women Lawyers, Member, 2007-21.
Chapter Representative, 2011-12.

Seventh Circuit Judicial Nominating Commission, Member, 2012-20.
Chair, 2019-20.
Vice-Chair, 2018-19.

The Florida Bar Young Lawyers Division, Member, 2006-18.
President, 2016-17.
President-Elect, 2015-16.
Chair, Law School Deans Summit, 2017.
Chair, Various Board Committees, 2011-15.
Elected Circuit Representative on the Board of Governors, 2010-15.

41. BAR ASSOCIATIONS, CONTINUED

American Bar Association, Member, 2003-06, 2006-09, 2015-17.
Leader, District 11 at the Young Lawyer General Assembly, 2016-17.
Representative, District 11, 2015-17.

Florida Defense Lawyers Association, Member, 2013-16.

Stetson Lawyers Association, Advisory Committee Member, 2010-15.

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.

Museum of Arts and Sciences, Daytona Beach
Chair, Strategic Planning Committee, 2023-present.
President, 2020-22.
Treasurer, 2019.
Assistant Treasurer, 2018.
General Counsel, 2014-16.
Member, Board of Directors, 2014-present.

St. Barnabas Episcopal School, DeLand
Chair, Development Committee, 2021-present.
Chair, Long-Range Planning Committee, 2019-21.
Member, Board of Trustees, 2018-present.

St. Barnabas Episcopal Church, DeLand
Member, 2017-present.

Building Association Managers of Volusia County, Daytona Beach
Associate Member, 2017-present.

Junior League of Daytona Beach, Daytona Beach
Sustainer Member, 2016-present.
Co-Chair, Human Trafficking Committee, 2013-14.
Vice President of Finance, 2012-13.

42. OTHER ORGANIZATIONS, CONTINUED

Junior League of Daytona Beach, continued
Member, Board of Directors, 2011-13.
Parliamentarian, 2010-11.
Member, 2009-present.

Suddenly Joyful Global Missions, Daytona Beach
Treasurer, 2020-21.
Member, Board of Directors, 2020-22.

Volusia County Women Who Care, Daytona Beach
Member, 2020-21.

LPGA International Golf Club, Daytona Beach
Social Member, 2015-21.

Community Legal Services of Mid-Florida, Orlando
Member, Board of Directors, 2017-19.
Seventh Circuit Pro Bono Steering Committee, 2010-11.

Christ Presbyterian Church, Ormond Beach
Member, 2010-17.

Volunteers for Community Impact, Orlando
Member, Board of Directors, 2014-16.

American Heart Association, Volusia/Flagler Chapter, Ormond Beach
Member, Heart Ball Committee, 2009-11.

Volusia Young Professionals Group, Daytona Beach
Member, 2008-15.

Leadership Daytona, Daytona Regional Chamber of Commerce
Class XXXI Member, 2011.

Leadership Stetson, DeLand
Class IV Member, 2011.

42. OTHER ORGANIZATIONS, CONTINUED

Junior Achievement of Central Florida, Orlando
Volunteer, 2007-08.

Justice Teaching, Lakeland
Volunteer, 2006-08.

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.

Yes, the Junior League of Daytona Beach is an affiliate of the Association of Junior Leagues International, an organization supporting women, developing civic leadership, and providing community service opportunities. It is only open to female members. I have been a sustaining member since 2014, meaning that I pay reduced dues and my attendance is optional at meetings. I would like to continue as a sustaining member if selected to serve on the bench.

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

I provide pro bono work in the form of free legal advice to local area not-for-profits, including most significantly serving as pro bono counsel and general counsel to the Museum of Arts and Sciences from 2010-16.

I also regularly provide low bono and pro bono work to individuals through my law firm, most recently in 2022 providing pro bono assistance to a HBCU graduate whose diploma and transcript were held up in a years-long dispute over fees. We were able to negotiate a reduction in the fees and then apply institutional grant money to cover the remaining fees. The graduate was able to apply to medical school with her diploma and transcript.

I also served on the board of Community Legal Services of Mid-Florida from 2017-19 and worked on implementing the helpline to provide attorney-staffed telephone advice.

44. PRO BONO WORK, CONTINUED

In 2016-18, I also assisted Floridians who were survivors of Hurricanes Matthew, Irma, and Michael through the Florida Bar/ABA/FEMA Disaster Legal Services Program, and I had weekly meetings with the ABA/FEMA team overseeing Florida legal assistance following the disaster declarations for Hurricanes Hermine and Matthew in late 2016 and early 2017.

45. Please describe any hobbies or other vocational interests.

Going to museums, traveling to National Parks, reading, participating in Bible study, learning about American and world history, studying organizational leadership, and taking family walks with our yellow lab "Archie."

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.

No.

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

Facebook www.facebook.com/katherine.h.miller.9
Twitter https://twitter.com/daytonakate
LinkedIn www.linkedin.com/in/katherine-hurst-miller-6716a219/
Instagram https://www.instagram.com/daytonakate/

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.

48. FAMILY BACKGROUND, CONTINUED

Married
Arthur Christian "Chris" Miller
Judge, Volusia County Court
101 North Alabama Avenue, Suite C-337
DeLand, Florida 32724
386-626-6592
Date of marriage: 12/29/2007

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.

[redacted]

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.

Yes, I have made all required tax return filings. No, I have never had to pay a tax penalty or had a tax lien filed against me.

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.

In addition to my experience as lawyer advising clients, appearing in court, and engaging in the business of law, I have had several experiences in the community that would assist me in holding and defending judicial office.

71. EDUCATION AND EXPERIENCES, CONTINUED

I was privileged to serve two terms on the Seventh Circuit Judicial Nominating Commission, and I was elected Vice Chair in 2018-19 and Chair in 2019-20. My time serving on the JNC furthered my ability to think deeply about the role of judges, both practically and philosophically. I had the opportunity to speak with commissioners from other circuits and districts, and to consider the attributes we were all looking for in a great judge. In my eight years, our JNC made recommendations to fill approximately one-third of the seats in the Seventh Circuit. We vetted a wide variety of applicants from many different backgrounds. We listened to input from references and members of the community. In interviews, the commissioners and applicants discussed how to interpret texts, apply facts to law, and exercise discretion. I attended almost every investiture in the Seventh Circuit in the last 10 years, and, if I did not appear before the new judges for my clients' cases, I would observe the judges in court.

I have also had the opportunity to assist with a number of successful local campaigns for public office, including my husband's campaign in 2020 to keep a county judge seat to which he was appointed. Judges increasingly draw opposition, and I have seen three judges appointed during my time on the JNC lose in Seventh Circuit elections. I have watched as media organizations criticize judges for a single ruling or based on no ruling whatsoever. To be clear, I believe in holding judges accountable with elections, but it can be hard for judges doing great work in the day-to-day job to get their message out to voters with the restrictions on judicial campaigns. From being a sign waiver to a strategizer for multiple candidates, I learned how to campaign in local elections and how to connect with the public. I learned when a candidate should stick with a plan and take advice versus when it is time to pivot and trust one's own instincts.

For many reasons, I believe judges need to know and understand the community they serve. My extensive experience with legal and other not-for-profit organizations provided me with meaningful opportunities to know the lawyers and citizens of the Seventh Circuit. My leadership on the board of the Junior League opened my eyes to many needs in the community and the way individual volunteers and service organizations step in to fill these needs. My years leading the Museum of Arts and Sciences broadened my understanding of running a business, of holding a position of public trust, and of working with a group of community leaders. My board service at St. Barnabas Episcopal School taught me about making decisions not only to help my own child but also to empower other parents and families. Additionally, my time with The Florida Bar introduced me to excellent lawyers and judges throughout the state, and provided me with a front row seat to the governance of the legal profession. These different experiences provided me with leadership skills and a connection to the community that would enable me to run any courtroom in any division in the Seventh Circuit.

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.

I am principled and professional. I have profound respect for the rule of law and the Constitutional role of the courts. Judges occupy a unique position of public trust and must be careful never "to exercise will instead of judgment," as Alexander Hamilton wrote in *Federalist No. 78*. I have seen results-oriented judges and the harm they can cause to one party and to the entire judicial system. From my personal convictions and my professional experiences, I believe that judges must interpret the law with fidelity to the text. I strongly believe judges must not make law but must construe and apply the law as written. I would also work collegially with other judges, treat counsel and parties with respect, and serve the public. I would decide cases in a timely and thoughtful manner, and I would engage faithfully and professionally in the work of the courts for the next thirty plus years.

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. **R. Brooks Casey**
   Managing Partner, Wright & Casey
   340 North Causeway
   New Smyrna Beach, Florida 32169
   bcasey@surfcoastlaw.com
   386-428-3311

2. **Melissa Burt DeVriese**
   President and former General Counsel, Security First Insurance
   1001 Broadway Avenue
   Ormond Beach, Florida 32174
   mdevriese@securityfirstflorida.com
   202-285-1695

3. **Hon. Christopher A. France**
   Seventh Judicial Circuit
   1769 E. Moody Blvd., Bldg. 1
   Bunnell, Florida 32110
   cfrance@circuit7.org
   [redacted]

73. REFERENCES, CONTINUED

4. **Fr. Brian Garrison**
   Rector, St. Barnabas Episcopal Church
   Chairman, St. Barnabas Episcopal School Board
   319 W. Wisconsin Avenue
   DeLand, Florida 32720
   brian@stbarnabaschurchdeland.org
   386-717-1458

5. **Hon. Margaret W. Hudson (Retired)**
   Seventh Judicial Circuit
   101 North Alabama Avenue
   DeLand, Florida 32724
   doodle1098@gmail.com
   [redacted]

6. **Hon. Christopher Kelly**
   Seventh Judicial Circuit
   101 North Alabama Avenue
   DeLand, Florida 32724
   ckelly@circuit7.org
   [redacted]

7. **Hon. Paige Kilbane**
   Fifth District Court of Appeal
   300 S. Beach Street
   Daytona Beach, Florida 32114
   paigehardy0228@gmail.com
   [redacted]

8. **Michael A. Sasso**
   Partner, Sasso & Sasso
   1031 West Morse Boulevard #120
   Winter Park, Florida 32789
   masasso@sasso-law.com
   [redacted]

73. REFERENCES, CONTINUED

9. Michelle Suskauer
Partner, Dimond Kaplan & Rothstein
515 North Flagler Drive Suite P300
West Palm Beach, Florida 33401
michelle@dkrpa.com
[redacted]

10. R. Andrew Watts
Executive Vice President, Chief Financial Officer & Treasurer, Brown & Brown
Treasurer, Museum of Arts and Sciences
300 North Beach Street
Daytona Beach, Florida 32114
awatts@bbins.com
386-239-8811

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 20th day of January, 2023.

Katherine Hurst Miller — Printed Name

Katherine Hmiller — 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: $4,326.92

Last Three Years: $134,663.00 $97,222.00 $100,973.00

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: $4,326.92

Last Three Years: $134,663.00 $97,222.00 $100,973.00

3. State the gross amount of income or loses incurred (before deducting expenses or taxes)

Current Year-To-Date: $4,326.92

Last Three Years: $134,663.00 $103,222.00 $106,973.00

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.

Current Year-To-Date: $0

Last Three Years: $0 $6,000.00 cashed savings bonds $6,000.00 cashed savings bonds

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: $0

Last Three Years: $0 $6,000.00 cashed savings bonds $6,000.00 cashed savings bonds

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 January 9, 2023 was $ 692,510.

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 $ 78,000

ASSETS INDIVIDUALLY VALUED AT OVER $1,000:

DESCRIPTION OF ASSET (specific description is required – see instructions p. 3)	VALUE OF ASSET
Personal Residence, [redacted]	$290,000
Savings Account (Bank of America)	$18,560
Checking Account (Bank of America)	$22,450
Savings Bonds (U.S. Government Series EE and I)	$15,000
401K with Capital Group (Growth Fund of America, New Economy Fund, Washington Mutual Investors Fund)	$327,500
Roth IRA with Ameritas (Vanguard Diversified Value, Equity Index, International, and REI Portfolios and Fidelity VIP Contrafund Portfolios)	$113,000

PART C – LIABILITIES

LIABILITIES IN EXCESS OF $1,000 (See instructions on page 4): NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
Home Loan, Northpointe Bank, 3333 Deposit Dr NE, Grand Rapids, MI 49546	$172,000

JOINT AND SEVERAL LIABILITIES NOT REPORTED ABOVE: NAME AND ADDRESS OF CREDITOR	AMOUNT OF LIABILITY
N/A	

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
Wright & Casey	340 North Causeway, New Smyrna Beach, FL 32169	$134,663.00

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
N/A			

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

	BUSINESS ENTITY #1	BUSINESS ENTITY #2	BUSINESS ENTITY #3
NAME OF BUSINESS ENTTITY	N/A		
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.

Katherine Hurst Miller

SIGNATURE

STATE OF FLORIDA

COUNTY OF Volusia

Sworn to (or affirmed) and subscribed before me this 20 day of January 2023 by Katherine Hurst Miller

Megan E. Johnson

(Signature of Notary Public—State of Florida)

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

MEGAN E. JOHNSON
Commission # HH 142699
Expires July 11, 2025
Bonded Thru Troy Fain Insurance 800-385-7019

Personally Known ✓ *OR* Produced Identification _____

Type of Identification Produced _____

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: 1/20/2023

JNC Submitting To: Fifth District Court of Appeal

Name (please print): Katherine Hurst Miller

Current Occupation: Attorney

Telephone Number: [redacted] Attorney No.: 27946

Gender (check one): ☐ Male ☒ Female

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

County of Residence: Volusia

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.

Katherine Hurst Miller
Printed Name of Applicant

Katherine Hurst Miller
Signature of Applicant

Date: 1/20/2023

TAB 22

Miller Writing Samples

IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT, STATE OF FLORIDA

NANCY JOHNSON,

Appellant,

vs.

Case No.: 5D21-2154
LT Case No.: 2020-30379

DAYTONA INTERNATIONAL SPEEDWAY, LLC,

Appellee.
_____/

ANSWER BRIEF OF APPELLEE DAYTONA INTERNATIONAL SPEEDWAY, LLC

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STATEMENT OF THE CASE AND FACTS

Statement of the Case

This appeal reaches this Court pursuant to Florida Rule of Appellate Procedure 9.030(b)(1)(A). Appellant Nancy Johnson ("Johnson" and/or "Appellant") appeals the trial court's Summary Final Judgment, dated July 26, 2021, in favor of Appellee Daytona International Speedway ("Speedway" and/or "Appellee"). (R. 597-601)[1] Johnson also includes within her appeal a review of an earlier Order Granting Defendant's Motion for Partial Summary Judgment, dated February 2, 2021 (R. 368-69), and an Order Denying Plaintiff's Motion Continuance and to Reschedule Hearing, dated July 22, 2021. (R. 592-96)

Statement of the Facts

The facts of the case are not in dispute. Johnson brought suit after tripping and falling on a concrete walkway at the Daytona International Speedway while attending the Daytona 500. (R. 10, 20) Johnson alleged that the height difference at the joint between two parts of walkway was uneven, which constituted negligence on the part of the Speedway. (R. 10, 20)

[1] All references to the record on appeal as prepared by the Clerk of Court for Volusia County, Florida shall be (R. page number).

Partial Summary Judgment

The Speedway first obtained a partial summary judgment at a hearing on February 2, 2021 ("the Partial Summary Judgment") when the trial court found there was "no issue of material fact as to plaintiff's negligence claim that defendant failed to exercise its duty to warn." (R. 368) Appellee generally concurs with the presentation of the facts regarding the Partial Summary Judgment in Appellant's Initial Brief, and will not restate those facts. IB at 11-12.[2]

Summary Final Judgment

The Speedway then obtained a summary final judgment at a hearing on July 20, 2021 ("the Summary Final Judgment") when the trial court found the Speedway "did not, as a matter of law, fail to use ordinary care in maintaining the premises." (R. 600) Appellee disagrees with portions of the facts section of the Initial Brief relating to the Summary Final Judgment, specifically the Initial Brief's categorization of expert witness opinions and description of the trial court's exclusion of materials filed untimely. IB at 12-18. The facts section of this Answer Brief addresses the facts in and rulings on the

[2] All references to Appellant's Initial Brief shall be IB at page number.

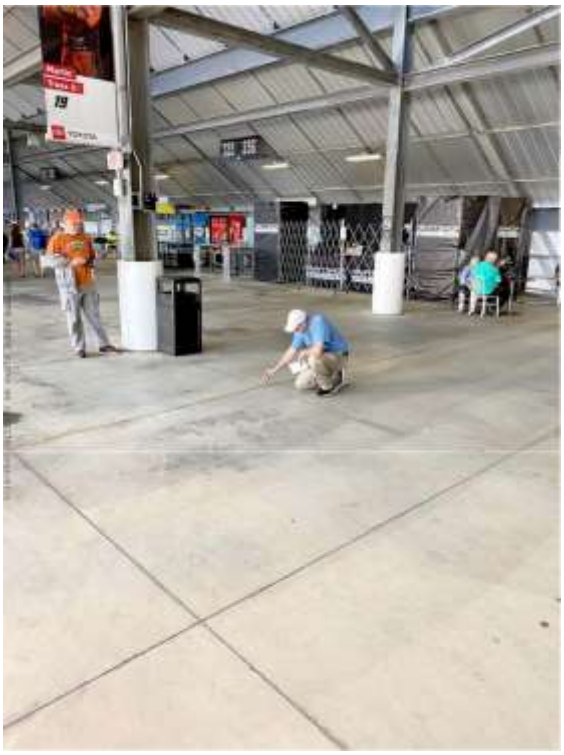
motion for summary final judgment, the response in opposition, the motion for continuance, and the objection to the continuance.

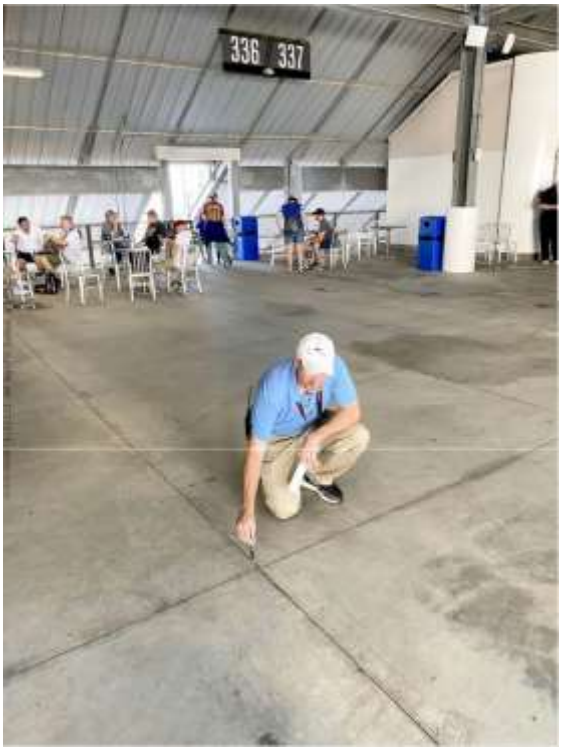
The Speedway moved for summary final judgment on March 18, 2021, on the issue of whether it failed to maintain the premises in a reasonably safe condition because the premises were complaint with Florida's building code. (R. 381-389) The Speedway filed its summary final judgment motion before a change in the summary judgment standard was to take effect, but acknowledged the change effective May 1, 2021 and argued it was "entitled to summary judgment under either standard." (R. 384, n. 1)

Evidence Supporting Appellee's Motion for Summary Final Judgment

In support of its motion for summary final judgment, the Speedway cited Johnson's deposition testimony, as well as affidavits from Eugenio Miguel, an on-site field adjuster for the Speedway; Paul Bender, the director of operations at the Speedway; and an expert witness architect, Dana Smith, who relied on his own measurements and professional surveyor measurements of the area where Johnson tripped and fell. (R. 382-84, 390-426) Miguel took photographs of the area where Johnson fell on the day that she fell. (R. 392-404)

His photographs, three of which are cut and pasted into this Answer Brief,[3] show the general area, the joint, and even a pen next to the joint for some idea of the height difference. (R. 400-404)





[3] The act of cutting and pasting into this Answer Brief appears to have added a thin white line across the vertical photos above, which does not appear in the photographs attached to Miguel's affidavit. (R. 400-404) Otherwise, the photographs are the same.

Smith's measurements showed that, between the two sections where Johnson tripped and fell, the height difference is, "in all instances less than one quarter of an inch" and "[i]n most places, the variance is less than one eighth of an inch." (R. 409) The Florida Accessibility Code for Building Construction at Section 303 allows variances in height that are less than one-quarter of an inch, and the area where Johnson fell was compliant with the Florida Accessibility Code for Building Construction. (R. 409-10)

Appellant's Materials Opposing Appellee's Motion for Summary Final Judgment

On July 6, 2021, Johnson filed a response in opposition to summary final judgment. (R. 445-565) The response in opposition contained responses to requests for admission and the deposition

transcript of the Speedway's expert. (R. 459-509) Although Johnson criticized the Speedway's expert's opinions, the expert was clear in his testimony regarding the measurements of the joint as having less than one quarter inch difference on either side of the joint. (R. 470-509) The response in opposition also contained an affidavit of David Zimmerman, an expert witness for Johnson with a background as a building inspector who reviewed the property records for the Speedway's grandstands constructed under a 2013 permit. (R. 511-12) Johnson's expert opined that there was a "change in elevation as great as ¼." (R. 514)

Johnson's expert also opined that he found a dangerous change in level because "when the plane of the east side of the joint is extended to the west, there is a 1" elevation variation within 5" of the joint." (R. 513) Johnson's expert illustrated how he measured by extending past the joint in the bottom photograph in the first page of his measurement photographs (R. 521) Johnson's expert suggested the area needed a ramp. (R. 514) Attached to the expert affidavit are a curriculum vitae, photographs, handwritten notes, the Florida Accessibility Code for Building Construction, and other property maintenance provisions. (R. 516-565) Johnson's expert did not provide any support for the notion that the Florida Accessibility Code

for Building Construction measures a plane five inches from the joint rather than measuring the difference between the height of the adjoining pieces of concrete at the joint.

Timing of Appellant's Response to Appellee's Motion for Summary Final Judgment and Appellant's Motion to Continue

The Speedway filed its motion for summary final judgment on March 18, 2021. In March and April 2021, Johnson's counsel refused to agree to hearing time available in June on Appellee's motion for final summary judgment.[4] (R. 571-576) The hearing was eventually scheduled for July 20, 2021. (R. 594)

With the hearing fourteen days away, Johnson filed her response in opposition to summary final judgment, as well as a motion for continuance on July 6, 2021. (R. 445-565, 566-67) The Speedway objected to the motion for continuance. (R. 568-591) The trial court heard the motion for continuance on July 14, 2021, and entered a detailed order denying the continuance and concluding that Johnson's counsel did not present a reasonable basis for the

[4] Johnson's appellate counsel is not the same attorney as her trial counsel. Appellate counsel has been professional and courteous at all times on scheduling matters, and no mention of Johnson's counsel is intended as criticism of appellate counsel.

summary judgment hearing to be rescheduled or continued. (R. 592-96).

Specifically, the trial court found that Johnson's counsel represented he wanted to take more discovery, (R. 593), but after he got more discovery, counsel continued to refuse to coordinate the hearing date. (R. 443, 576, 594) After the motion for summary judgment was set for hearing, Johnson's counsel only scheduled one deposition, which he cancelled the morning of the deposition. (R. 593-94) The trial court also found that Johnson's counsel's office represented he was out of town for a mandatory obligation the day of the hearing, but that the obligation was a seminar voluntarily scheduled after the summary judgment hearing was noticed. (R. 594) The trial court further found that the Speedway's counsel had scheduled the summary judgment hearing appropriately after Johnson's counsel "refused to cooperate." (R. 594)

Ruling on Appellee's Motion for Summary Final Judgment

On July 20, 2021, the trial court held the hearing on the Speedway's motion for summary final judgment. (R. 597) The trial court found that Johnson's July 6, 2021 response with affidavit and deposition in opposition to the summary final judgment was not timely served. (R. 600) The trial court also noted that, even if it had

considered the affidavit of Johnson's expert, his opinion was not based on the standards of measurement in the building codes upon which he relied. (R. 600, n. 7) The trial court found Johnson's expert's opinions were merely conclusory opinions and not reliable for raising an issue of material fact. (R. 600, n. 7)

The trial court granted summary judgment in favor of the Speedway "because the area at issue was compliant with the code requirements." (R. 600) The trial court found that the Speedway's expert "established that the vertical elevation change between the two walkway panels where the incident occurred were compliant with the requirements of Section 303 of the Florida Accessibility Code for Building Construction." (R. 600) The order and summary final judgment entered July 26, 2021 reflects that Appellee "did not, as a matter of law, fail to use ordinary care in maintaining the premises." (R. 600) The trial court also denied a motion for reconsideration filed by Johnson. (R. 626-775, 776)

SUMMARY OF ARGUMENT

This Court should affirm the Partial Summary Judgment, Order Denying the Motion to Continue, and the Summary Final Judgment because the trial court correctly determined the issues based on the evidence before it. The Partial Summary Judgment was proper

because the Speedway had no duty to warn of a difference in floor levels as a matter of Florida law. The trial court was well within its discretion in entering the Order Denying Plaintiff's Motion for Continuance and to Reschedule Hearing based upon Johnson's untimely evidence and lack of good cause for a continuance. The Summary Final Judgment was proper, whether or not Johnson's untimely evidence was considered, because there was no fact issue for trial on a duty to maintain where the height difference at the joint on the floor complied with the applicable building code.

ARGUMENT

Standard of Review

Summary Judgment

This appeal involves two rulings on two separate summary judgment motions; the Partial Summary Judgment was adjudicated in February 2021, and the Summary Final Judgment was adjudicated in July 2021. Both rulings are reviewed de novo. *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000). However, each summary judgment ruling used a slightly different standard.

On December 31, 2020, the Florida Supreme Court amended Florida's existing summary judgment standard in Rule 1.510 and

replaced it with the federal summary judgment standard. *In re Amendments to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192 (Fla. 2020). The rule was further revised on April 29, 2021, to add language expressly citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). *In re Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d 72, 80 (Fla. 2021).

The "new" Rule 1.150 is effective May 1, 2021, and "govern[s] the adjudication of any summary judgment motion decided on or after that date, including in pending cases." *Id.* at 77. Where the trial court has adjudicated the summary judgment motion prior to May 1, 2021, the appellate court applies the pre-amendment rule on appeal. *De Los Angeles v. Winn-Dixie Stores, Inc.*, 326 So. 3d 811, 813 n.3 (Fla. 3d DCA 2021); *Nembhard v. Universal Prop. & Cas. Ins. Co.,* 326 So. 3d 760, 764 (Fla. 3d DCA 2021). Conversely, where the trial court has adjudicated the summary judgment motion after May 1, 2021, the appellate court applies the current version of Rule 1.510 on appeal. 317 So. 3d at 72.

Motion for Continuance

This appeal also involves an order denying a motion to continue the summary final judgment hearing, and a ruling on a continuance is reviewed under the abuse of discretion standard. *Spolski Gen. Contractor v. Jett-Aire Corp. Aviation Mgmt.*, 637 So. 2d 968, 970 (Fla. 5th DCA 1994)(citations omitted). In reviewing a discretionary act by the trial court, "an appellate court must fully recognize the superior vantage point of the trial judge" and "apply the 'reasonableness' test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)

I. Premises Liability Duties.

In Florida, a landowner "owes two separate and distinct duties to business invitees: (1) to warn of concealed dangers which are or should be known to the owner and which are unknown to the invitee and cannot be discovered through the exercise of due care; and (2) to use ordinary care to maintain its premises in a reasonably safe condition." *Brookie v. Winn-Dixie Stores, Inc.,* 213 So. 3d 1129,

1131 (Fla. 1st DCA 2017) (internal quotations omitted). The two duties are independent of one another, and the breach of either will subject the landowner to liability. *Rocamonde v. Marshalls of Ma, Inc.*, 56 So. 3d 863, 865 (Fla. 3d DCA 2011).

An open and obvious condition that is not inherently dangerous triggers neither the duty to warn nor the duty to maintain the premises in a reasonably safe condition. As the First District Court of Appeal found in *Brookie*, "Obviously, in some cases, a property owner may in fact comply with both duties when an open and obvious condition does not trigger a duty to warn and the condition itself does not violate a property owner's duty to maintain the premises in a reasonably safe condition." 213 So. 3d at 1131.

The two duties – to warn and to maintain – were the subject of the Speedway's two motions for summary judgment. In granting both motions for summary judgment, the trial court agreed with the Speedway that it did not breach either duty. The Partial Summary Judgment held that the Speedway did not breach a duty to warn, (R. 368), and the Summary Final Judgment held that Speedway did not breach its duty to maintain the premises. (R. 599-600) As the trial court correctly ruled on both motions based on the evidence before

it, as well as on the motion to continue, this Court should affirm on all issues.

II. The Trial Court Properly Granted the Speedway's Motion for Partial Summary Judgment on the Duty to Warn.

Summary judgment is appropriate "if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c) (pre-May 2021 amendment)(cited by *Colantonio v. Moog*, 326 So. 3d 807, 809 (Fla. 5 DCA 2021)). The Speedway's Motion for Partial Summary Judgment, filed in October 2020 using the "old" summary judgment standard, focused on whether there was a duty to warn of a change in floor level. (R. 93-94) The trial court, relying on *Circle K Convenience Stores, Inc. v. Ferguson*, 556 So. 2d 1207 (Fla. 5th DCA 1990), correctly found that no there was no genuine issue of material fact and the Speedway had no duty to warn as a matter of law. (R. 368-69)

There is no duty to warn against an open and obvious condition which is not inherently dangerous. *Ramsey v. Home Depot U.S.A., Inc.,* 124 So. 3d 415, 417 (Fla. 1st DCA 2013); *Aaron v. Palatka Mall,*

L.L.C., 908 So. 2d 574, 577 (Fla. 5th DCA 2005). It is longstanding Florida law that a difference in floor levels does not, by itself, constitute a dangerous condition. *Hoag v. Moeller*, 82 So. 2d 138, 139 (Fla. 1955)(cited by *Casby v. Flint*, 520 So. 2d 281, 282 (Fla. 1988)). *See Bowles v. Elkes Pontiac Co.*, 63 So. 2d 769, 772 (Fla. 1952). *See also Earley v. Morrison Cafeteria Co. of Orlando,* 61 So. 2d 477, 478 (Fla. 1952) (affirming summary judgment against a plaintiff who tripped and fell on the edge of a mat because a "proprietor has a right to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses"). Only when there is an additional obstruction, poor lighting, an optical illusion, or some other unusual circumstance is there a duty to warn of a change in floor levels. *See Casby*, 520 So. 2d at 282; *Aaron*, 908 So. 2d at 578.

At the Speedway premises where Johnson fell, there was no evidence of an obstruction, poor lighting, or an optical illusion that caused Johnson to trip.[5] Rather, the evidence was simply that

[5] There was initially some confusion about whether Johnson fell near section 339 or 336 of the grandstands. The exact location of the fall was not a material fact for determination of the motion for partial summary judgment, and the evidence was so clear by the time of the motion for summary final judgment that it was no longer in dispute. (R. 383) When shown surveillance video footage at her deposition,

Johnson said she tripped on a change in level between cement joints when she was walking under the grandstands and looking at the concession area. (R. 92, 124) The premises was not crowded, it was daylight and well lit, and Johnson's view was not impaired. (R. 92, 124) After she tripped and fell, she easily identified the joint, which appeared to her to be an inch and a half difference of "uneven concrete." (R. 92, 130, 132-33) There is no duty to warn under these facts.

The Florida Supreme Court has held that changes in floor levels are so commonplace and well-known that there is no duty to warn of such common conditions. *See Casby v. Flint*, 520 So. 2d 281 (Fla. 1988). *See also Schoen v. Gilbert*, 436 So. 2d 75, 76 (Fla. 1983)(holding no one entering a premises can assume that the floors of all rooms in the same story have the same level). Claims based on a duty to warn of a change in floor level fail as a matter of law. *See Strickler v. Walmart, Inc.*, 2020 U.S. Dist. LEXIS 81482, at *19 (M.D. Fla. May 8, 2020)(distinguishing the duty to warn from the duty to maintain). The Initial Brief's reliance upon *Perlman v. Costco*

Johnson admitted to the location of the trip-and-fall in section 336, as shown in the transcript filed in support of the motion for partial summary judgment. (R. 183) The location of the fall was not disputed in the Initial Brief.

Wholesale Corp., a case involving a trip and fall over a pallet placed on the floor of a big box store, is not on all fours with the facts or procedure of this case. IB at 25 (citing 2020 U.S. Dist. LEXIS 109011, *1 (S.D. Fla. Jan. 3, 2020)). There, the federal court found a motion for summary judgment filed before the plaintiff's deposition was taken was premature and the record was too scant. *Id*. at *5. Further, the case involved an obstruction on top of the floor of an extremely crowded store. *Id*. at *3. A better comparison would be to failure-to-warn trip and fall cases where the plaintiff provided testimony that he or she tripped over a joint or even a crack in the floor.

The trial court looked to a similar case involving a joint in the pavement when it ruled on the Speedway's motion for partial summary judgment. (R. 368) In *Circle K Convenience Stores v. Ferguson* a joint in paved surfaces in a gas station parking lot was found to be one of those conditions that were "so open and obvious, so common and so ordinarily innocuous, that they can be held as a matter of law to not constitute a hidden dangerous condition." 556 So. 2d 1207, 1208 (Fla. 5th DCA 1990). In *Circle K*, this Court found the trial judge correctly directed a verdict for the landowners where the plaintiff stubbed her toe and suffered injuries after tripping over

a joint that was "not perfect." *Id*. This Court cited six Florida appellate trip and fall opinions, in addition to *Casby* and *Hoag*, for the proposition that, as a matter of law, uneven floors were ordinarily innocuous rather than inherently dangerous. *Id*. (citing *Schoen v. Gilbert*, 436 So.2d 75 (Fla. 1983); (other citations omitted).

In the years since the *Circle K* decision, this Court has repeatedly affirmed the legal position that uneven floor levels are obvious, not inherently dangerous, and do not trigger a duty to warn. *E.g., Gorin v. City of St. Augustine*, 595 So. 2d 1062, 1062 (Fla. 5th DCA 1992)(affirming summary judgment in a trip and fall off a curb). A pair of opinions in 2019 reinforce that uneven floor levels are not dangerous. In *Middleton v. Don Asher & Associates*, Judge Harris wrote an opinion finding the trial court correctly found no duty to warn over cracks and uneven pavement in a sidewalk trip and fall case. 262 So. 3d 870, 872 (Fla. 5th DCA 2019)(citations omitted)(but finding a fact issue on whether the property had been maintained in a safe condition). In *Contardi v. Fun Town, LLC,* Judge Lambert wrote an opinion affirming summary judgment in favor of a skating rink operator that there was no duty to warn of an unmarked change in elevation on the floor. 280 So. 3d 1114, 1116 (Fla. 5th DCA 2019)(also finding that there was no fact issue on the duty to

maintain the premises). *See also Kelley v. Sun Cmtys., Inc.,* 2021 U.S. Dist. LEXIS 928, at *7 (M.D. Fla. Jan. 5, 2021)(citing Florida case law for the proposition that changes in floor height and uneven flooring are not inherently dangerous).

At the Speedway's premises, the joint between the two sections of concrete was not dangerous, and it was obvious. The Speedway's motion for partial summary judgment notes that Johnson acknowledged in her deposition that the change in floor level that she claims to have tripped over was obvious and appeared to her to be an inch and a half height difference between the two slabs of concrete. (R. 125-26, 130, 132-33) The Speedway's motion also argued that she was looking at the concession stands rather than where she was going. (R. 124, 215-16) Johnson's response in opposition cited the same deposition testimony, but argued that looking at the concession stands did not mean she was not looking where she was going. (R. 219-20) The fact is that Johnson was looking at the concessions, so whether she was also watching the floor for a change in levels does not matter. It was obvious to her after she fell. (R. 92, 130)

It would be a departure from established law to find that a change in levels on a walkway on a clear, dry day would trigger a duty to warn. The case whose dicta was cited by the Initial Brief for the

proposition that the open and obvious doctrine is not a fixed rule, IB at 24-25, is a case about a jockey being injured on a dangerous condition with a negligently placed exit gap at a horseracing track. *Ashcroft v. Calder Race Course, Inc.,* 492 So. 2d 1309, 1311 (Fla. 1986). This Court has contrasted *Ashcroft* from flooring level cases like *Schoen* because a flooring level change is not inherently dangerous. *Dampier v. Morgan Tire & Auto, LLC*, 82 So.3d 204, 206-207 (Fla. 5th DCA 2012). Johnson could have expected a change in level, and a change in level is not dangerous. There is no duty to warn under the circumstances as a matter of law. The Partial Summary Judgment should be affirmed on appeal.

III. The Trial Court Properly Denied Johnson's Motion for Continuance.

The Speedway moved for summary final judgment in March 2021. (R. 381) Sixteen weeks after the Speedway filed its motion for summary final judgment and two weeks before the scheduled hearing on the motion for summary final judgment, Johnson filed a response in opposition to summary judgment and a motion for continuance of the hearing. (R. 445) Contrary to the assertion in Johnson's Initial Brief that her response in opposition was "struck," IB at 28, the

evidence attached to the response in opposition was not timely in accordance with Fla. R. Civ. P. 1.510, as amended.

Rule 1.510(c)(5) now requires, in relevant part, "at least 20 days before the time fixed for the hearing, the nonmovant must serve a response that includes the nonmovant's supporting factual position. . . ." If the Florida Supreme Court had not intended for the newly adopted provision that a response that included the nonmovant's supporting factual position at least twenty days before a hearing in 1.510(c)(5), it seems unlikely that the Court would have included it in the language added to the rule. While the implementation of the "new" rule made allowances for parties to amend filings for summary judgment motions that had been briefed but not decided at the time the Rule went into effect, IB at 17 (referring to *In re Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d at 78), no allowance is needed in this case. Johnson had not yet provided filings or briefing to amend at the time the Rule went into effect on May 1, 2021. Johnson's response to the motion for summary judgment was first filed on July 6, 2021. (R. 445-565)

Even before the change in the rule, there was a deadline for submitting evidence in opposition to summary judgment, and refusing to consider untimely evidence even under the old rule was

not an abuse of discretion. *Wolentarski v. Anchor Prop. & Cas. Ins. Co.*, 252 So. 3d 277 (3d DCA 2018)(citing *Deshazior v. Sch. Bd. Of Miami-Dade Cty, Fla.*, 217 So. 3d 151, 152 (Fla. 3d DCA 2017). The only way Johnson's evidence would have been timely under the rule in effect at the time that the trial court decided the Final Summary Judgment was if the trial court had granted the motion for continuance. The trial court correctly denied the motion for continuance, noting its problems in a detailed order signed July 22, 2021. (R. 592-96)

Ruling on a motion for continuance is within the sound judicial discretion of the trial court. *Cole v. Heritage Cmtys.*, 838 So. 2d 1237, 1238 (Fla. 5th DCA 2003) (finding no abuse of discretion in denying a continuance for trial). Specifically, ruling on a motion for continuance of a summary judgment hearing is discretionary, and "the trial court must be upheld if correct for any reason." *Spolski Gen. Contractor v. Jett-Aire Corp. Aviation Mgmt.*, 637 So. 2d 968, 970 (Fla. 5th DCA 1994)(citing *Terry v. Conway Land, Inc.*, 508 So. 2d 401, 403 (Fla. 5th DCA 1987)). The decision to grant a continuance of a summary judgment hearing rests within the discretion of the trial judge. *Id*. (citing Fla. R. Civ. P. 1.510(f) (indicating a judge "may order a continuance")).

In *Spolski*, this Court found no abuse of discretion in denying a continuance to give a party time to produce expert evidence in opposition to summary judgment. *Id*. A trial court does not abuse its discretion in granting a motion for summary judgment, despite the pendency of discovery, where the non-moving party has failed to act diligently in taking advantage of discovery opportunities. *See Vancelette v. Boulan S. Beach Condo. Ass'n, Inc.,* 229 So. 3d 398, 400 (Fla. 3d DCA 2017) (cited by *De Los Angeles v. Winn-Dixie Stores, Inc.*, 326 So. 3d 811, 812 (Fla. 3d DCA 2021)).

The cases cited by Johnson in the initial brief are inapplicable to the procedure of this case below. The cases referenced by Johnson deal with evidence presented for the first time at a motion for rehearing, and even those cases reinforce that a judge has discretion to grant or deny a motion for rehearing. IB at 29. *See Petrucci v. Brinson*, 179 So. 3d 398, 400 (Fla. 1st DCA 2015)(where counsel inadvertently failed to appear at summary judgment, court should have granted motion for rehearing). *See also Knowles v. JPMorgan Chase Bank, N.A.*, 994 So. 2d 1218, 1220 (Fla. 2d DCA 2008)(finding an affidavit filed with a motion for rehearing would have defeated summary judgment motion if it had been timely filed and remanded for the trial court to have a hearing on the motion for rehearing).

Johnson did file a motion for reconsideration. (R. 626-629) Importantly, however, Johnson did not file evidence for the first time in a motion for reconsideration – attached to the motion was her same response in opposition to summary judgment and a copy of the opinion in *In re Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d 72. (R. 631-775) Johnson's counsel filed evidence fourteen days before the summary judgment hearing, together with a motion for continuance. (R. 445-565, 566-67) This Court has determined that a party cannot "breathe life into a belated opposing affidavit by filing a motion for rehearing the summary judgment." *Jarrett v. Publix Supermarkets, Inc.*, 609 So. 2d 154, 154 n. 1 (Fla. 5th DCA 1992)(affirming summary judgment for the defendant in a slip and fall case where the plaintiff's affidavit in opposition to summary judgment was filed untimely). Therefore, Johnson should not be allowed to revive the evidence her counsel filed untimely in opposing summary judgment by filing a motion for reconsideration.

This case is factually comparable to *Vancelette v. Boulan S. Beach Condo. Ass'n, Inc.*, 229 So. 3d 398, 400 (Fla. 3d DCA 2017). In *Vancelette*, a plaintiff tripped and fell over a sidewalk curb. *Id*. at 399. The defendant developers, contractor, subcontractors, and

engineers moved for summary judgment. *Id*. Less than two weeks before the scheduled summary judgment hearing, the plaintiff moved for a continuance of the hearing. *Id*. at 400. The trial court denied the continuance, and the appellate court affirmed, holding "[a]bsent a non-moving party's demonstration of diligence, good faith, and the materiality of the discovery sought to be completed, a trial court cannot be faulted for denying a motion to continue a long-scheduled hearing on the motions for summary judgment." *Id*.

Here, as in *Vancelette*, the motion to continue was filed two weeks before a long-scheduled summary judgment hearing. (R. 566-67) Even more than in *Vancelette*, Johnson's counsel failed to act diligently or provide good cause for the continuance. Johnson's counsel did not say that the motion for continuance was to be able to timely present summary judgment evidence, although when he was offered the opportunity to move the hearing to proceed without the untimely evidence, he refused the opportunity. (R. 594)

Johnson's purported basis for continuing the hearing was that her counsel would be out of state and unavailable. (R. 567) However, the Court found at a hearing on the motion for continuance that Johnson's counsel had refused to coordinate the scheduling of the summary judgment hearing on at least two occasions in March and

April, at one point stating "I will not agree to setting a hearing on this at any time until we get further into discovery." (R. 593) At the end of April, after multiple attempts to coordinate a hearing and reminding Johnson's counsel of scheduling procedures in the Florida Bar Guidelines for Professional Conduct, the Speedway's counsel unilaterally scheduled the hearing on the motion for summary final judgment, which the trial court found to be appropriate. (R. 571-84, 594) Johnson's counsel scheduled only one deposition between the scheduling of the hearing and the date of the hearing, but Johnson's counsel's office cancelled the deposition the morning of the deposition. (R. 594)

Johnson's counsel then asked to move the summary judgment hearing and filed the motion for continuance on the basis that he would be out of town for a "mandatory obligation." (R. 585, 594) It turned out that the obligation was a seminar that Plaintiff's counsel voluntarily scheduled for the date of the hearing **after** the summary judgment hearing was set and not a "mandatory obligation" as represented. (R. 594) The evidence attached to Johnson's response in opposition to summary judgment was a deposition transcript from April and an expert affidavit dated June 11, 2021, so it pre-dated both the motion for continuance and the deadline to comply with

Rule 1.510 by quite some time. (R. 470, 515) When an attorney refuses to coordinate a hearing, cancels a deposition, waits until shortly before a long-scheduled hearing to move to continue the hearing, and actively misrepresents the circumstances of a "mandatory" obligation that purportedly conflicts with the hearing, the attorney cannot establish the diligence or good cause for continuance of a summary judgment hearing. Therefore, the denial of Johnson's motion for continuance was not an abuse of discretion.

IV. The Trial Court Properly Granted the Speedway's Motion for Summary Final Judgment.

The Speedway's motion for summary final judgment was properly granted under Florida's "new" summary judgment standard. Rule 1.510 adopts the federal standard, 309 So. 3d at 192; 317 So. 3d at 74, and federal courts provide guidance on what evidence is sufficient to defeat summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). A party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.,* 475 U.S. at 586. Summary judgment must be granted "against a party who fails to

make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

Because there were no facts upon which a jury could have found for Johnson to prove the Speedway breached its duty to maintain the premises, the trial court properly entered Final Summary Judgment in favor of the Speedway.

A. Granting Summary Final Judgment was appropriate because Johnson presented no timely opposing evidence.

The trial court properly entered Summary Final Judgment based on all the evidence that was timely submitted before the hearing on the motion for summary final judgment. As discussed *supra*, Johnson did not timely provide evidence in opposition to summary judgment. The trial court found there were no disputed material issues of fact raised by Plaintiff because Plaintiff's response in opposition, affidavit, and deposition were not timely served. (R. 600)(citing Rule 1.510(c)(5); *Wolentarski v. Anchor Prop. & Cas. Ins. Co.*, 252 So. 3d 277 (3d DCA 2018); *Ramsey v. Home Depot U.S.A, Inc.*, 124 So. 3d 415 (Fla. 1st DCA 2013)).

The undisputed evidence before the trial court was that Johnson tripped and fell on a joint in a concrete walkway, and that the joint was compliant with the Florida Accessibility Code for Building Construction. (R. 409-410) Florida courts have found that building code provisions are relevant in determining whether a defendant complied with the duty to maintain a commercial property. *E.g.*, *Holland v. Baguette, Inc.*, 540 So. 2d 197, 198 (Fla. 3d DCA 1989); *Parker v. Shelmar Prop. Owner's Ass'n*, 274 So. 3d 1219, 1221 (Fla. 5 DCA 2019). *See also Strickler v. Walmart, Inc.*, 2020 U.S. Dist. LEXIS 81482, at *19 (M.D. Fla. May 8, 2020)(citing Florida law and ADA guidance for the proposition that a change in level more than half an inch created a fact issue regarding the defendant's duty to maintain after a disabled customer tripped and fell). Specifically, compliance with building codes is sufficient for summary judgment in favor of the landowner for a change in flooring level. *Ramsey v. Home Depot U.S.A, Inc.*, 124 So.3d 415 (Fla. 1st DCA 2013).

The *Ramsey* court examined whether a wheel stop in the Home Depot parking lot was compliant with the applicable building codes. *Id*. at 418. Based on the affidavit provided by a licensed engineer affirming that the wheel stop was, in fact, code compliant, the trial and appellate courts found that there was no issue of material fact

as to whether the duty to maintain Home Depot's premises in reasonably safe condition was breached. *Id*. If the standard required property owners to maintain their premises in excess of what is required by the applicable building codes, by definition that would not be ordinary or reasonable care and would effectively transform the duty into one of insuring every invitees' safety.

Courts are clear that landowners do not have a duty to insure every invitees' safety. *See Rowden v. Target Corp.*, 2021 U.S. Dist. LEXIS 116025, at *9 (M.D. Fla. June 22, 2021)(citing *Ramsey*, 124 So. 3d at 418). In *Rowden*, District Court Judge Mizelle found that, without evidence of a violation of any law or code, there was no breach of the duty to maintain the premises in a reasonably safe condition. *Id*. "'The law does not require a proprietor of a public place to maintain his premises in such condition that an accident could not possibly happen to a customer.'" *Id*. at *10 (citing *Miller v. Shull*, 48 So. 2d 521, 522 (Fla. 1950)).

The Speedway's duty is not to insure that no patron ever falls; the duty is to maintain the premises in a reasonably safe condition. *See Brookie*, 213 So. 3d at 1131, 1134. Like the engineer in *Ramsey*, the Speedway's expert determined the area in question was compliant with building codes. (R. 410) The Speedway's expert

provided uncontroverted evidence that where Johnson tripped and fell, there was a height difference "in all instances less than one quarter of an inch" and "[i]n most places, the variance is less than one eighth of an inch." (R. 409) The Florida Accessibility Code for Building Construction at Section 303 allows variances in height that are less than one-quarter of an inch, so the area where Johnson fell was compliant with the Florida Accessibility Code for Building Construction. (R. 409-10) As a condition that was open and obvious, was not dangerous, and was code-compliant, the Speedway met its duty to maintain the premises in a reasonably safe condition.

Without timely evidence in opposition, there is no question that Johnson's unsupported allegations do not create a fact question preventing summary judgment. In entering the Summary Final Judgment, the trial court relied on evidence from the Speedway's expert that the vertical elevation change between the two walkway panels where the incident occurred were compliant with the requirements of Section 303 of the Florida Accessibility Code for Building Construction. (R. 600) The trial court correctly held, as a matter of law, that the Speedway did not fail to use ordinary care in maintaining the premises and that summary judgment was appropriate.

B. Granting Summary Final Judgment would be appropriate even if the trial court considered Johnson's untimely summary judgment evidence.

Even if the trial court had taken into consideration Johnson's untimely evidence in opposition to summary judgment, then the Speedway would still be entitled to Summary Final Judgment in its favor. Indeed, there is some indication that the trial court did consider Johnson's expert's opinions. A footnote in the Summary Final Judgment indicates the trial court determined that the expert's opinions "were not based upon the standards of measurement outlined in the codes upon which he relied. Rather, his opinions were merely conclusory, and thus not reliable for purposes of raising an issue of material fact." (R. 600, n. 1)

While Johnson's Initial Brief appears to argue that the old summary judgment deadlines and standards applied, this is not supported by the plain language of the "new" Rule 1.510, the two Florida Supreme Court opinions adopting the new rule, and case law since the new rule. IB at 29, 37-38. The new rule effective May 1, 2021, "govern[s] the adjudication of any summary judgment motion **decided on or after that date**, including in pending cases." *In re Amendments to Fla. R. Civ. P. 1.510*, 317 So. 3d at 77 (Fla. 2021);

De Los Angeles v. Winn-Dixie Stores, Inc., 326 So. 3d 811, 813 n.3 (Fla. 3d DCA 2021). As Final Summary Judgment was decided in July 2021, it is clear that the "new" standard applies. That standard is analogous to the directed verdict standard "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Dumigan v. Holmes Reg'l Med. Ctr., Inc.*, 2022 Fla. App. LEXIS 496, at *19 (Fla. 5th DCA Jan. 21, 2022)(citations omitted).

Under the "new" standard, the "mere existence of some alleged factual dispute" will not defeat summary judgment; the factual issue must be both **genuine** and **material**. *Anderson*, 477 U.S. at 247-48; *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87. An issue of fact is "material" if, under the applicable substantive law, it might affect the outcome of the case. *Hickson Corp. v. Northern Crossarm Co.*, 357 F. 3d 1256, 1259 (11th Cir. 2004)(citations omitted). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Id*. *See also Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87 (the nonmoving party must come forward with specific facts showing there is "a genuine issue for trial"). A trial court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it

is so one-sided that one party must prevail as a matter of law." *Hickson Corp.*, 357 F. 3d 1260 (citing *Anderson,* 477 U.S. at 251-52). A conclusory affidavit is insufficient to raise a genuine issue of material fact. *K.E.L. Title Ins. Agency, Inc. v. CIT Tech. Fin. Servs., Inc.*, 58 So. 3d 369, 369 (Fla. 5th DCA 2011)(cited by *Ramsey*, 124 So. 3d at 418).

In *Ramsey*, the parking lot wheel stop case discussed *supra*, the plaintiffs presented an expert's affidavit in opposition to summary judgment, but the trial and appellate courts found that the affidavit did not create an issue of material fact. *Id.* at 416, 418. The plaintiffs' expert averred that (1) Home Depot could have used five-foot instead of six-foot wheel stops; (2) that the use of wheel stops and concrete bollards in the accessible spaces was "redundant;" (3) that safer designs were available for the accessible spaces that completely eliminated the use of wheel stops; and (4) that the use of wheel stops in an accessible space does not provide a flat, even walking surface for disabled patrons. *Id.* at 418. Notwithstanding the ways in which the plaintiffs' expert found the parking lot could be made more safe, the court found that the plaintiff's expert's opinions were conclusory. *Id*. at 418. Both the trial and appellate courts found that this did not create a fact issue when compared with

the defense expert who opined that the wheel stops complied with building codes. *Id*. "Conclusory, general assertions do not create factual disputes necessary to avoid summary judgment." *Id*. (*citing K.E.L. Title Ins. Agency, Inc.*, 58 So. 3d at 369; *Valenzuela v. GlobeGround N. Am., LLC*, 18 So. 3d 17, 25 (Fla. 3d DCA 2009)).

The evidence at summary judgment in this case was so one-sided that it did not require submission to a jury. The Speedway's evidence was that there was a change in elevation at the joint where Johnson fell "in all instances less than one quarter of an inch" and "[i]n most places, the variance is less than one eighth of an inch." (R. 409) Photographs confirm this slight change in elevation was smaller than the tip of a pen. (R. 400-404) Johnson's own expert likewise found there was a "change in elevation as great as ¼." (R. 514) The two experts, measuring the same area, obtained nearly the same number, which is compliant with the building code. (R. 409, 553)

The Initial Brief criticizes the deposition testimony of the Speedway's expert for not knowing the point of origin of a survey he reviewed from a professional surveyor and for seeking clarification on Johnson's counsel's left and right descriptions when reviewing video footage and photographs. IB at 14-15 (citing R. 470-509). These are not genuine fact issues. The expert, who was an architect, read the

survey, took it into consideration as part of his expert opinions, and competently testified to his understanding of the survey. (R. 479) The left and the right side of the joint change when viewed from different angles, so the expert preferred to use "east, west, north, south" (R. 481, p. 45 l. 9-10) The issues raised by Johnson's counsel that the expert said "I don't know" are attempts to distract from the fact that the Speedway's expert testified repeatedly and harmfully to Johnson's case on the dispositive issue for a failure to maintain: the change in elevation was less than one-quarter of an inch, which is allowed by the Florida Accessibility Code for Building Construction. (R. 472, P. 7 L. 24; R. 472, P. 8 L. 6-9; R. 473, P.11 L. 19-24; R. 477, P. 29 L. 1-3; R. 480, P. 39, L. 18-20; R. 480, P. 41 L. 18-21; R. 489, P. 75 L. 15-20; R. 489 P. 76 L. 1-2) These are expert opinions based on facts and the building code. In contrast, the opinions from Johnson's expert in opposition to summary judgment are conclusory and inconsistent.

At first blush, Johnson's expert's opinions appear to be based on building codes, and his conclusions are different than the Speedway's expert. Upon closer inspection, it becomes clear that Johnson's expert is manipulating the data to manufacture a factual dispute issue that does not exist. Indeed, when Johnson's expert

measures the difference in height at the joint Johnson tripped over, his measurements match those of the Speedway's expert. Johnson's expert found there was a "change in elevation as great as ¼," and the Speedway's expert found a "change in height… in all instances less than one quarter of an inch." (R. 514, 409) A change in elevation vertically of one-quarter of an inch is compliant with the Florida Accessibility Code for Building Construction at Section 303. (R. 553)

To manufacture a fact issue, Johnson's expert takes an additional measurement, not at the joint, but at a distance five inches away. If he extends an imaginary plane from the east side of the joint by five inches westward, then the expert calculates a difference in height of one inch between the west side of the joint and the imaginary plane above it. (R. 513) One inch exceeds the quarter inch allowed by the Florida Accessibility Code for Building Construction at Section 303. (R. 553) But Johnson's expert's method of measuring is not supported by the Florida Accessibility Code for Building Construction, which is a **vertical** change in elevation, complete with an illustration. (R. 553)

303.2 Vertical. Changes in level of ¼ inch (6.4 mm) high maximum shall be permitted to be vertical.

The one-quarter inch **vertical** standard is the same standard in the Life Safety Code 7.1.6.2 and ASTM 5.2.2 cited by Johnson's expert. (R. 562, 563-64) The International Property Maintenance Code provisions provided by Johnson's expert are silent on changes in level. (R. 540-45) Thus, when looking at something other than a vertical change, Johnson's expert's affidavit is not based on the codes and is merely conclusory on the dispositive issue for a failure to maintain. (R. 513)

Johnson's expert's one-inch difference is a metaphysical difference, not a difference in real measurements. It is blatantly contradicted by the record – or by a ruler. No reasonable jury, viewing a photograph that shows the height difference of the joint to be less than the tip of a pen, (R. 401), and measured to be one-quarter of an inch or less, (R. 409, 423, 514), would genuinely find for Johnson. Because no reasonable jury could find anything other than a height difference of a one-quarter of an inch or less, which complies

with the Florida Accessibility Code for Building Construction, summary judgment in favor of the Speedway was proper.

Johnson's expert attempts to raise other issues, but they are also conclusory. When the expert recommends a ramp or a step, (R. 514), this is no different than the suggestions of how to improve the parking lot by the *Ramsey* expert, which were conclusory. The recommendations are also patently ridiculous for a change in height of one-quarter of an inch. An opinion that the joint was worn is conclusory and not supported in the multiple photos submitted by Johnson's expert. (R. 521-35) An opinion that there was cracking "north of the accident location" is not applicable to the accident location, (R. 514, 533), as there are no photographs of the accident location itself with cracks. (R. 394-404, 521-32) There is no evidence of cracking, deterioration, or anything other than a height difference that caused Johnson to trip. *See Kelley v. Sun Cmtys., Inc.*, 2021 U.S. Dist. LEXIS 928, at *8 (M.D. Fla. Jan. 5, 2021)(distinguishing a change in height from cracking or deterioration). In *Kelley*, the federal court looked a photograph of the subject area and granted summary judgment in favor of the landowner after a trip and fall on an uneven sidewalk, finding that the landowner's duty was to "mitigate unreasonable hazards on the property" and not "to foreclose

all risk that an invitee will injure himself during an inattentive moment." *Id*. at *10. *See Rowden v. Target Corp.*, 2021 U.S. Dist. LEXIS 116025, at *10. Like the court in *Kelley*, the trial court here had photographs showing that there was no cracking or deterioration at the accident location. Because Johnson failed to come forward with any evidence to submit to a jury that the Speedway failed to use ordinary care to maintain its walkway in a reasonably safe condition, the trial court properly determined that there were no genuine issues for trial.

CONCLUSION

For the foregoing reasons, the Speedway respectfully requests this Court affirm in all respects on the Partial Summary Judgment, the Order Denying the Motion to Continue, and the Summary Final Judgment below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 10, 2022, a true and correct copy of the ANSWER BRIEF OF DAYTONA INTERNATIONAL SPEEDWAY, LLC has been furnished by e-service by the Clerk of the Court by using the Florida Courts E-Filing Portal to: Appellate Counsel for Appellant, Brian J. Lee, Esquire, 76 South Laura Street, Suite 1100, Jacksonville, Florida 32202 at: blee@forthepeople.com.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, in accordance with Fla. R. App. P. 9.045(e), that the typeface used for Appellee's Answer Brief is Bookman Old Style, 14-point, in compliance with Fla. R. App. P. 9.045(b), and word count herein totals 8,358 words, in compliance with Fla. R. App. P. 9.210(a)(2)(B).

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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

GEMINI MANAGEMENT ASSOCIATION, INC.,

Plaintiff,

v.

FRANCES S. KING,

Defendant.

_____/

CASE NO.: 2017 30551 CICI
DIVISION: 31

PLAINTIFF/COUNTER-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

Pursuant to Fla. R. Civ. P. 1.510, Plaintiff/Counter-Defendant, GEMINI MANAGEMENT ASSOCIATION, INC. (Gemini Association), through its undersigned counsel, hereby files its Motion for Summary Judgment and Memorandum in Support, and states as follows:

1. In this case, Gemini Association filed suit and Frances S. King filed a counterclaim, with both parties asking for declaratory relief and alleging that there is a present need of a declaration from the Court whether unit owners, and particularly Ms. King, can lease a condominium unit at the Gemini Association condominium for less than one (1) year.

2. Through Rule 66 of The Rules We Live By, the board of directors of Gemini Association adopted a rule that leases must be for a minimum period of one year, and the validity of this rule is something that the Court can determine at the summary judgment stage. The pleadings, affidavits, and exhibits attached hereto and filed herein show that there is no genuine issue as to any material fact, and Gemini Association is entitled to a judgment as a matter of law. *Holl v. Talcott*, 191 So. 2d 40 (Fla. 1966); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

UNDISPUTED FACTS

3. Gemini Association is a condominium association and a Florida not-for-profit corporation, operating a condominium pursuant to Chapter 718, Florida Statutes. *See* Complaint at ¶ 3; Amended Answer at ¶ 3. *See also* Counterclaim at ¶ 6; Answer at ¶ 6.

4. Ms. King is an owner of a condominium unit at Gemini Association. *See* Counterclaim at ¶ 5; Answer at ¶ 5.

5. Gemini Association has a Declaration of Covenants and Restrictions, as recorded in Official Records Book 7446, Page 0045 of Volusia County, Florida. *See* Complaint at ¶ 7; Amended Answer at ¶ 7.

6. Section 5.3 of the recorded Declaration provides, in full:

> **"Reasonable regulations concerning the use of the units, appurtenances thereto, common elements and facilities may be made and amended from time to time by the Board of Directors of the Association; provided that copies of such regulations and amendments thereto shall be furnished by the Association to all unit owners, their families, visitors, guests, servants and agents, until and unless such regulations, rule or requirement be specifically overruled and cancelled in a regular or special meeting by the vote of owners holding a majority of the total votes."**

7. Other Declaration provisions reference leases or tenants, including address review and approval of proposed leases to "assure a community of congenial owners." *See* Declaration at §10.1. *See also* Declaration at § 5.1, 13.2.[1]

8. Gemini Association has Amended Articles of Incorporation, which are recorded at Official Records Book 7446, Page 0081 of Volusia County, Florida. *See* Complaint at ¶ 12; Amended Answer at ¶ 12.

[1] Please note that Section 13.2(e) of the Declaration references lender approval of any changes regarding leasing. This is a right which has been largely abrogated in Florida, and is not an issue in this litigation.

9. Article III, Section A of the Amended Articles of Incorporation provides, in part:

> **"The Association shall have the following powers… 2. A To make, establish and enforce reasonable rules and regulations governing the use of condominium property as said terms may be defined in the Declaration of Condominium."**

10. Pursuant to the board's authority to enact rules, Gemini Association has enacted rules, which are published to unit owners as "The Rules We Live By." The Rules We Live By was last updated in 2014. It is undisputed that the current Rules We Live By were in effect at the time Ms. King purchased her unit in 2014, and that as a new owner Ms. King was furnished with a copy of the rules. *See* Affidavit of Michele Dotterer at ¶¶ 5, 6, 9, attached to this Motion as Exhibit A.

11. It appears that Gemini Association has always had a rule regarding the length of rentals. Originally, the rules restricted rentals to one month or longer, then three months or longer, and finally the current rule restricts tenancies to twelve months or longer. *See* Affidavit of Michele Dotterer at ¶ 9, attached to this Motion as Exhibit A.

12. The current Rule 66 provides in full: "**Leases must be for a minimum period of one year. Additionally, units can only be leased once in any 12 month period.**" *See* Complaint at ¶ 16; Amended Answer at ¶ 16.

13. Currently, four of the 67 units in the Gemini Condominium are leased for a year or more. No unit is leased for less than a year. The Gemini Association manager as well as the Screening and Orientation Committee meet with all new owners and tenants, and provide them with copies of the condominium documents. *See* Affidavit of Michele Dotterer at ¶¶ 6,15, attached to this Motion as Exhibit A.

14. In early 2016, King sought to rent her condominium unit for a three-month period, and the Association president at the time sent King a letter enclosing the rules regarding renting and asking her to comply with the minimum one-year lease period. *See* Complaint at ¶ 16; Amended Answer at ¶ 16.

15. The Association offered to meet with King in the summer of 2016, but she did not attend any meetings and/or was unavailable to attend the meetings. *See* Complaint at ¶ 16; Amended Answer at ¶ 16.

16. While Ms. King was staying in her unit in July, the Gemini Association board called a special meeting and invited King to attend and discuss the issue. She did not attend and/or was unavailable to attend. Some 31 owners attended, and all 31 owners signed petitions in support of the current leasing rule with a minimum one-year lease period. *See* Affidavit of Michele Dotterer at ¶ 13, attached to this Motion as Exhibit A.

17. King submitted an application in August to rent her unit for a three-month term. King's application for a three-month rental was rejected in September for failing to comply with Rule 66. *See* Complaint at ¶ 19, Amended Answer at ¶ 19. *See also* Counterclaim at ¶ 10; Answer at ¶ 10.

18. King filed for condominium arbitration with the Department of Business and Professional Regulation, where she successfully argued that Rule 66 was invalid and that she lost rental income by cancelling her lease. The Association appealed the arbitrator's ruling for a trial de novo pursuant to Chapter 718, Florida Statutes, and Ms. King filed a counterclaim. *See* Complaint at ¶ 21; Amended Answer at 21. *See also* Counterclaim at ¶¶ 41, 42, Answer at ¶¶ 41, 42.

ARGUMENT

19. Florida law provides that as long as a board-enacted rule does not contravene either an express provision of a condominium's declaration or a right reasonably inferable therefrom, a reasonable rule will be found valid and within the scope of the board's authority. *Beachwood Villas Condo. v. Poor*, 448 So. 2d 1143, 1145 (Fla. 4th DCA 1984). Rule 66 does not violate an express provision of the Declaration and does not violate a right reasonably inferable from the Declaration. Further, Rule 66 is a reasonable exercise of the board's authority.

I. RULE 66 DOES NOT VIOLATE ANY EXPRESS PROVISION IN THE DECLARATION.

20. Gemini Association's Declaration expressly allows the board of directors to enact regulations concerning the "use" of the units and, in language unique to this association, it provides that unit owners may specifically overrule and cancel any regulation adopted by the board with a vote by a majority of the unit owners. *See* Declaration at §5.3.

21. Where declarations contain an express provision allowing the board to enact restrictions on "use" of the condominium, rental restrictions are allowed. In other words, rentals are a "use" of a unit. In *Beachwood*, supra, the court allowed rental restrictions in rules because the declaration allowed the adoption of rules "restricting the use and maintenance of the condominium units." 448 So. 2d at 1144 (Fla. 4th DCA 1984). When declarations allow the board to enact restrictions on use and set forth a procedure therefore, rental restrictions are allowed when that procedure is followed. *See Koplowitz v. Imperial Towers Condo*., 478 So. 2d 504, 505 (Fla. 4th DCA 1985) (finding condominium rentals were a "use of the property" under a plain language interpretation of the condominium documents, although a member vote was a required under the declaration).

22. There is nothing in the Gemini Association's Declaration that defines the length of time that condominium units can be leased. A rule placing a minimum length of time for rentals, such as Rule 66, does not violates any express provision of the Declaration and is consistent with the Declaration provision allowing the board to make "reasonable regulations concerning the use of the units."

23. Section 10.1 of the Declaration is the clearest reference to leasing, and it sets forth a procedure for review of tenant applications. If the Gemini Association adopted a rule that stated no leases would be permitted or a different review process was required, such a rule would directly contradict the express provision of Section 10.1. But as there are no provisions in the Declaration regarding the length of time of a lease, Rule 66 defining the minimum term of a lease does not conflict with any specific section of the Declaration.

II. RULE 66 DOES NOT VIOLATE ANY RIGHT INFERABLE FROM THE DECLARATION.

24. Gemini Association's Declaration contains references to leasing in Sections 5.1, 10.1, and 13.2(e), and unit owners have the right to lease their units. However, the right to lease is not an unrestricted right at the Gemini condominium. The Declaration itself places a restriction by expressly requiring that leases be approved using the procedure in Section 10.1. The Declaration further restricts rentals by allowing the board to enact regulations regarding the use of units in Section 5.3.

25. Because rentals are contemplated by the Declaration, a rule prohibiting rentals would be in conflict with the rights inferable in the Declaration. Rather than prohibiting rentals, Rule 66 allows rentals so long as they are a minimum of twelve months, consistent with the

express provision of the Declaration at Section 5.3 allowing the board to enact reasonable regulations concerning the use of the units.

IIA. One cannot infer an unrestricted right to rent simply because a declaration allows renting.

26. The mere fact that a declaration allows units to be rented does not mean that the right to rent is unrestricted. A recent decision by the Second District Court of Appeal is instructive on this issue of what rights can be inferred from the declaration. *Le Scampi Condominium Ass'n v. Hall*, 200 So. 3d 187 (Fla. 2d DCA 2016). An unrestricted right to rent for any length of time cannot be inferred simply because a declaration allows renting. *Id.* at 191.

27. In *Le Scampi*, the appellate court found that summary judgment should have been granted in favor of a condo association on rental restrictions in the association's rules. *Id*. The case began with a condominium arbitration over the same issue, where the arbitrator found that the rule restricting leases to more than one month was void ab initio and in conflict with a declaration that allowed leases. *See Le Scampi Condominium Association v. Hall*, Case No 2014-02-4966, Final Order (September 24, 2014) (Fla. DBPR Arb.). The case then came before the trial court, which also found the rule was in conflict with the declaration, but the appellate court reversed. 200 So. 3d at 188.

28. Judge Silberman, writing for the appellate court in *Le Scampi*, considered whether declaration language allowing leasing prohibited the association's board from enacting a rule requiring unit leases to be at least one month long and approved by the association. *Id*. at 189-90. The court looked to general contract law for the proposition that "when a contract is silent on a particular matter, courts should not impose contractual rights and duties on the parties under the guise of construction." *Id*. at 190 (citations omitted). Because the declaration did not grant an

unrestricted right to lease a unit, the opinion found held that a court cannot properly bestow such a right or keep the board from enacting reasonable restrictions. *Id*. The court held that "the provision [in the rules] which requires approval of the Association and prohibits unit rentals for a period of less than one month is ***not*** in conflict with the Declarations." *Id*. (emphasis added).

29. The instant case is highly analogous to *Le Scampi*. Like the Le Scampi Condominium Association declaration, Gemini's Declaration does not provide that the right to rent is unrestricted. The right to rent is present in both the Le Scampi Condominium Association and the Gemini Association declarations, but an unrestricted right to rent for any length of time is not present in either declaration. Like the erroneous arbitration ruling against Le Scampi Condominium Association, the arbitrator ruled against Gemini Association because he found that any restriction on the length of rental conflicted with a right inferred from the declaration. However, like the Le Scampi Condominium Association board, Gemini Association's board enacted a rule that does not conflict with a right inferable from the Declaration.

II.B. Declaration language controls an association's ability to restrict rentals.

30. Section 5.3 of Gemini's Declaration is unique in two ways. First, not all associations' declarations contain an express provision allowing the board to enact rules restricting unit use. Second, even in those declarations that allow the board to enact rules on use of the units, most declarations do not have a procedure for unit owners to overrule and cancel a rule. It is worth reviewing the holdings and the document language in Florida cases finding leasing rules valid or invalid.

31. Where declarations do contain an express provision allowing the board to enact restrictions on use of the condominium, rental restrictions are allowed. *See e.g., Beachwood Villas Condo v. Poor*, 448 So. 2d 1143, 1145 (Fla. 4th DCA 1984); *Koplowitz v. Imperial*

Towers Condo., 478 So. 2d 504, 505 (Fla. 4th DCA 1985); *Le Scampi Condominium Ass'n v. Hall*, 200 So. 3d 187 (Fla. 2d DCA 2016). Conversely, where declarations do not allow rules regarding condominium units, rental restrictions are not allowed. *See e.g., Mohnani v. La Cancha Condominium Association, Inc.*, 590 So. 2d 36 (Fla. 4th DCA 1991).

32. Here, Gemini Association has a Declaration provision in Section 5.3 that allows the board to place restrictions on unit use. The intent for the board to make rules is clear from Declaration Section 5.3 as well as Amended Article Section III(A). Therefore, the Gemini Association board had authority in the Declaration to enact Rule 66, and the rule should be allowed as in *Beachwood Villas*.

33. Section 5.3 of the Declaration also gives unit owners the right to overrule a board-adopted rule by majority vote of the unit owners. The right to overrule a board rule is a check and balance on the Board of Directors. This longstanding, recorded covenant of the Gemini Association provides that <u>any</u> rule enacted by the Board can be overridden by a majority of the owners at any time. While some condominium declarations require that restrictions on use or rentals be approved by a majority of unit owners prior to adoption, such as the declaration in *Imperial Towers Condominium*, the Gemini Association's Declaration provides that a majority of unit owners can overrule a rule after adoption.

34. Until and unless a non-conflicting rule is repealed by the board or overruled by majority vote of the unit owners using the procedure in Section 5.3 of the Declaration, the rule should be allowed to stand to reflect the wishes of the majority at the Gemini Association. Ms. King did not attend the Gemini Association's meetings regarding leasing and did not attempt to overrule the board rule using the procedure in Section 5.3.

35. The unique language of Section 5.3 distinguishes the facts at hand from those cases that hold that any restriction is inconsistent with a declaration that references renting. In *Neville v. Sand Dollar III, Inc.* Case No. 94-0452, Final Order (April 12, 1995) (Fla. DBPR Arb.), the arbitrator found there was no authority in the declaration for the board to place restrictions on unit use. Likewise, in *Richardson v. Jupiter Bay Condo. Ass'n, Inc*, Case No 02-4354, Final Order (July 3, 2002) (Fla. DBPR Arb.), the arbitrator found: "There is nothing in the declaration purporting to give the board the authority via vote or by amending the bylaws to pass substantive limitations on the right to rent the unit." There is no language in the Jupiter Bay declaration that would allow the board to adopt a regulation on the use of condominium units. An order on rehearing in that same case emphasized that the declaration did not contain any provision allowing the board to adopt rules on the use of the units or even setting out a process to screen tenants. *See Richardson v. Jupiter Bay Condo. Ass'n, Inc.,* Case No 02-4354, Final Order on Rehearing (August 26, 2002) (Fla. DBPR Arb.).[2]

36. The language of Section 5.3 also distinguishes this situation from the case of *Mohnani v. La Cancha Condominium Association, Inc.*, which is silent as to whether there was any provision of the declaration that would allow the board to adopt a rule on unit use. *See* 590 So. 2d 36 (Fla. 4th DCA 1991). The La Cancha declaration specifies that the board has the authority to enact rules on common amenities, but not rules regarding condominium units. Similarly, in *Reiss v. Siesta Dunes Condominium Association, Inc.*, Case No. 92-0148, Final

[2] It is worth noting that the *Richardson* arbitration opinion is cited favorably in the *Le Scampi Condominium Association* arbitration opinion, reasoning which was completely rejected by the Second District Court of Appeal in the *Le Scampi Condominium Association* appellate opinion. *Compare Le Scampi Condominium Association v. Hall*, Case No 2014-02-4966, Final Order (September 24, 2014) (Fla. DBPR Arb.) *with Le Scampi Condominium Association v. Hall*, 200 So. 3d 187, 190 (Fla. 2d DCA 2016).

Order (July 2, 1993) (Fla. DBPR Arb.), the arbitrator found the right of the unit owner to determine the length of the rental agreement could be inferred from the declaration. With the express provision in 5.3 of the Declaration allowing the board to adopt rules on use of units, a unit owner at the Gemini Condominium cannot infer an unrestricted right to lease their unit without some board rules.

37. Rule 66 does not conflict with the rights inferable in sections 5.1, 10.1, and 13.2(e) of the Declaration. Section 10.1 of the Declaration was not modified, and applications still require board approval.

III. RULE 66 IS REASONABLE

38. Rule 66 is reasonable and not arbitrary or capricious. There is no argument that the Rule unfairly targets Ms. King as the Rule was adopted long before she purchased her unit.

39. The test of whether a condominium association can adopt a rule "is reasonableness. If a rule is reasonable the association can adopt it; if not, it cannot. It is not necessary that conduct be so offensive as to constitute a nuisance in order to justify regulation thereof." *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. 4th DCA 1975). Reasonableness is also the standard for regulation contained in Section 5.3 of the Declaration, which states that the Gemini Association's board of directors may enact "reasonable regulations concerning the use of the units. . . ."

40. Rentals by the hour would be offensive to the residential condominium concept and unreasonably short, and yet a rule restricting rentals to ten year minimums would be difficult and unreasonably long. Finding a reasonable length somewhere in the middle for a rental restriction must bear some relation to the general condominium concept as well as the needs and wants of a specific association.

41. It is generally reasonable to have limits on renting units at a condominium. *See Seagate Condominium Ass'n v. Duffy*, 330 So. 2d 484, 487 (Fla. 4th DCA 1976) (finding rental restrictions are reasonable "to inhibit transiency and to impart a certain degree of continuity of residence and a residential character.") Rental restrictions for more than six months allow a condominium not to be classified as transient housing and incur the associated regulations on transient housing, taxation, and/or public accommodations under Americans with Disabilities Act. *See e.g.*, Fla. Stat. § 125.0104 (2016); Fla. Stat. § 212.03(1)(a) (2016); Fla. Stat. § 509.242 (2016); 42 U.S.C. § 12181(7) (2016). Multi-year rental restrictions are likely overly burdensome in a residential context, so as between six months and two years, twelve months is not an unusual amount of time for a residential lease.

42. Specifically at the Gemini Condominium, the Declaration contains the reasoning for rental restrictions in Section 10.1 of the Declaration – "to assure a community of congenial owners and thus protect the value of the units." At some point years before King purchased her unit and before the current board took office or purchased their units, the board of the Gemini Association thought it wise to increase the minimum length of rentals from one month to three months to twelve months. This is a luxury condominium in Ormond Beach, and it is understandable that a board seeking to preserve the residential character of the condominium decided not to allow short term, seasonal, or transient rentals that would turn the building from a community where people know their neighbors into more of a motel or condo-tel.

43. King's preferred rental length is three months, and in seeking to have a three-month rental approved, she attempts to replace the judgment of the board and other unit owners with her own judgment in how long rentals should be. Letting one person decide how long rentals should be – without a board vote to enact the rule or a unit owner vote to overrule the rule

– does not appear reasonable. The ability of a group of people who call the condominium home to make this decision is both more reasonable and more consistent with the governing documents of the Gemini Association.

44. Based upon the feedback received by the board and the thirty-one individuals signing in support of the twelve-month restriction, the community of owners likely would not support a three-month rental minimum, although King has not asked the board or membership for such a vote. Forcing a shorter rental period than the twelve months that many of these unit owners purchased under and rely upon will not "assure a community of congenial owners." *See* Declaration at § 10.1.

CONCLUSION

45. Because Rule 66 limiting rentals to twelve months does not conflict with an express provision of the Declaration, does not violate a right inferable from the Declaration, and is reasonable, the rule should be upheld and Ms. King should not be allowed to rent her unit for a three-month period.

WHEREFORE, based on the arguments set forth above, Gemini Association asks for the entry of summary judgment in its favor, a finding that Rule 66 is valid and reasonable in light of the Gemini Association's Declaration, a finding that prevailing party attorneys' fees should be awarded pursuant to Florida Statutes and the Declaration, and any such other relief this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic notice if registered in the Electronic Case Filing system, otherwise via U.S. mail delivery to Matthew C. Shapiro, Esquire, Rice Law Firm, P.A., 222 Seabreeze Blvd., Daytona

Beach, FL 32118, matthewshapiro@ricelawflorida.com and karenbuchanan@ricelawflorida.com on this 30th day of January, 2018.

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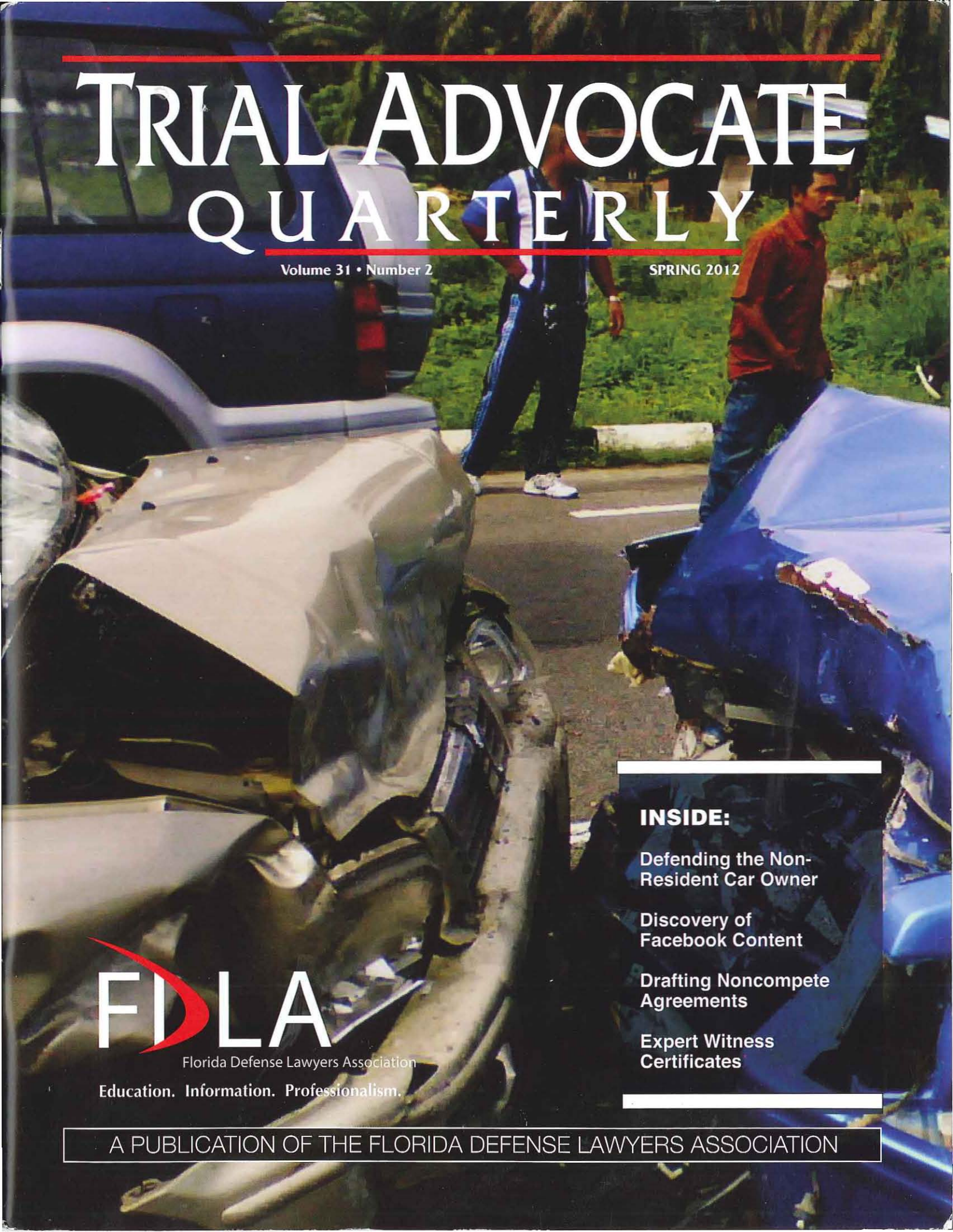
ATTORNEYS FOR PLAINTIFF

TAB 35

Miller Published Materials



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Defending the Non-Resident Car Owner:

When An Accident Occurs on a Florida Roadway, A Car Owner or Insurer Far Away May Be Left to Deal with the Consequences

By Bruce A. Hanna and Katherine Hurst Mller

Florida is unique in its adherence to the dangerous instrumentality doctrine as a means of holding automobile owners liable for accidents that happen in Florida, even if the owners themselves are non-residents. The following article summarizes the history of the doctrine in Florida and provides guidance for representing these out-of-state owners.

As most practitioners in the state know, Florida's dangerous instrumentality doctrine makes the owner of a motor vehicle vicariously liable for damages caused by the negligent operation of the vehicle by a permissive user.[1] But when the vehicle owner lives in another state and has, perhaps, never set foot in Florida, the application of the dangerous instrumentality doctrine can be confusing. Where a non-resident owner's auto policy was issued by a regional insurer doing no business in Florida, that confusion is compounded, and the insurer may find itself disadvantaged in making coverage and defense decisions without adequate knowledge of the parameters of Florida law. Although settled law in Florida, the dangerous instrumentality doctrine is unique and is likely to be unfamiliar to clients, claims adjusters, and attorneys in other states. This article examines the origins of and exceptions to the dangerous instrumentality doctrine, the important information non-resident clients need to know about the doctrine, and tips for defending a non-resident sued under the doctrine.

I. The Origins of the Dangerous Instrumentality Doctrine

The dangerous instrumentality doctrine was adopted by the Florida Supreme Court in 1920 in *Southern Cotton Oil Co. v. Anderson*.[2] Historically, under the English common law, the doctrine applied to hold masters responsible when their servants used firearms, boilers, and explosives, and was expanded under American jurisprudence to include trains and trolleys.[3] Likening the automobile to a locomotive or a trolley car, the Florida Supreme Court found that an automobile was a dangerous instrumentality and that a master who places his vehicle at his servant's disposal will be liable for any injury committed by the servant's negligence.[4]

The dangerous instrumentality doctrine is based on the concept that "one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation."[5] The doctrine imposes strict liability upon the owner of a motor vehicle by requiring that an owner who "gives authority to another to operate the owner's vehicle, by either express or implied consent, has a nondelegable obligation to ensure that the vehicle is operated safely."[6]

At the time of its decision, the court in *Southern Cotton Oil Co.* acknowledged that it was breaking with the holdings of other states in finding that an automobile was a dangerous instrumentality.[7] The court did so because it was persuaded that automobiles deserved the label of a dangerous instrumentality due to the large number of deaths that resulted from automobile accidents.[8] The purpose of the dangerous

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instrumentality doctrine is "to provide greater financial responsibility to pay for the carnage on our roads."[9] However, other states did not follow Florida once it applied the dangerous instrumentality doctrine to automobiles.[10]

In a more recent opinion, Florida's Second District Court of Appeal observed: "Florida is apparently the only state that [judicially] imposes strict vicarious liability on the owner of an automobile who entrusts it to another, and the doctrine has drawn its fair share of criticism."[11] The question of whether the owner was negligent in entrusting the vehicle to another, which is the critical issue in other jurisdictions, is of no concern in Florida. The dangerous instrumentality doctrine simply imposes "vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another."[12] In other words, the owner is liable solely and strictly by virtue of having given permission to another to operate it regardless of the reasonableness of that entrustment. Despite the criticism, the dangerous instrumentality doctrine has endured and even expanded in Florida.

Today, the doctrine even applies to out-of-state car owners who permit the operation of their motor vehicles in the state of Florida.[13] Thus, a motor vehicle owner in California who may never have left that state can find himself a defendant in a Florida courtroom for an accident caused by the negligence of one to whom he entrusted his car.[14]

II. Exceptions to the Dangerous Instrumentality Doctrine

In the absence of one of the well-defined and narrowly applied exceptions to Florida's dangerous instrumentality doctrine, an owner who authorizes someone else to operate his vehicle will be held liable for damages if the vehicle is not operated safely.[15] Both legislative and common law exceptions exist.

A. Legislative Exceptions

Companies that rent or lease cars to others are the most obvious exceptions to the list of owners who are held liable under the dangerous instrumentality doctrine. While the Florida Supreme Court added car rental and leasing companies to the list of owners who could be sued under the dangerous instrumentality doctrine in 1959,[16] the Florida legislature later adopted legislation that exempted leasing car companies from the dangerous instrumentality doctrine so long as the lessee maintained adequate liability insurance.[17] This was followed by a statute that limited the damages for rental car companies under the dangerous instrumentality doctrine.[18] The statute protecting car rental and car leasing companies was then preempted by federal legislation in the form of 49 U.S.C. § 30106,[19] commonly referred to as the Graves Amendment, which provided even greater protection for rental and leasing companies.[20] The Graves Amendment should be familiar to lawyers and insurers outside of Florida, particularly to those in New York, Rhode Island, and Connecticut, where it had a significant impact on vicarious liability statutes.[21]

Even though the Graves Amendment exempts car rental and leasing companies from liability for the operation of their vehicles by others, the Graves Amendment does not absolve car rental companies from Florida's financial responsibility laws requiring insurance.[22] As a result, one sometimes sees payments by the insurers for the car rental companies, who in turn bring claims against the car renter. Additionally, the Graves Amendment does not protect people who rent cars and let others borrow them. In a pair of recent cases involving rental cars that the renter let another driver use, the Florida Supreme Court and the Eleventh Circuit held both the driver and the renter responsible when the driver was involved in an accident.[23] In both cases, the insurance companies for the renter and the driver were also responsible notwithstanding policy language restricting coverage to cars "owned" or used "as a substitute for the owned auto."[24]

B. Common Law Exceptions

While the legislative exceptions to the dangerous instrumentality doctrine may be commonly known outside of Florida, the judicially created exceptions to the dangerous instrumentality doctrine are not as well-known. The exceptions are (1) the shop exception, (2) the theft or conversion exception, and (3) the bare naked title exception.[25] Florida courts have been extremely hesitant to create more than these three exceptions to this longstanding doctrine, in light of a Florida Supreme Court that has steadfastly rejected exceptions to the dangerous instrumentality doctrine.[26]

• The shop exception

An automobile owner who entrusts his vehicle to a repair shop and has no knowledge or control over the operation of the vehicle while in the shop is not liable for injuries caused by a mechanic's negligent operation of the vehicle.[27] As a result, a person who is injured by a mechanic's negligent operation of the owner's vehicle has a right to recover from the mechanic and the repair shop, but not from the car owner.[28] The Florida Supreme Court's analysis in formulating this exception is that a car owner lacks authority over the vehicle in a repair shop and often has no alternative when a repair is required than to take the vehicle into the shop.[29] As a policy matter, the repair shop, perhaps even more so than the vehicle

owner, will also have the means to use due care, insure against damage, and pay for any injury to a third party.[30] The shop exception has also been extended to a valet parking company under this same rationale.[31]

Because the basis for the shop exception is the owner's lack of authority and control over the vehicle, the shop exception applies "only to the vehicle's negligent use during servicing, service-related testing, or service-related transport of the vehicle."[32] The exception does not apply as the vehicle is being driven to or from the repair facility before or after service has been performed.[33] Perhaps because the owner arguably maintains "authority and control" over his vehicle, the shop exception does not apply when possession of an owner's vehicle is surrendered to a used car dealer for the purpose of a consignment sale.[34]

Parents, grandparents, ex-spouses, and even those who believed their cars had been sold may be surprised to find themselves embroiled in a Florida lawsuit.

• The theft or conversion exception

When a driver causes damages by negligently operating a vehicle that has been stolen or converted, the owner is, of course, not responsible.[35] Because the doctrine imposes vicarious liability only where damages are caused by one driving the car with the owner's permission, the theft or conversion exception is less an "exception" to the doctrine than a recognition of its applicability only under circumstances involving permissive use. At least one commentator viewed this exception as one of fairness, although views on the evenhandedness of the exception and the doctrine of dangerous instrumentality differ greatly.[36]

When a car has been obtained without the owner's initial consent, as in a stolen vehicle, there is no liability on the part of the owner for subsequent accidents, even if the car was stolen while unattended or unlocked.[37] Even where an owner grants the driver permission to operate the vehicle, a "conversion" can occur if the driver no longer has the owner's consent to operate the vehicle on public highways.[38] Thus, if a driver loses the consent of the owner any time before an accident, the owner is not responsible for the damages caused in the accident.[39] For example, there was no liability for the owner of a car that was permissively borrowed for two days but was involved in an accident on day twelve.[40]

It is important to be aware, however, that Florida courts have narrowly interpreted the conversion exception. For example, a court found that the exception did not apply to relieve the owner from liability where the owner permitted another to use it for a trip to the family farm but the permittee gave it to a third person who took it on a joyride.[41] Courts applying this exception seem to focus on the fact that consent was given more than the scope of that consent. If, the driver, for example, possesses the vehicle for any permitted use, then the owner "is liable for the negligent operation of it no matter where the driver goes, stops, or starts."[42]

• The "bare naked title" exceptio

If the title owner of a motor vehicle can establish that another person was the beneficial owner of the vehicle, then the title owner may be exempt from vicarious liability.[43] In a 1955 case involving an owner who had sold his car but had not yet signed over the title when the car was involved in an accident, the Florida Supreme Court explained for the first time that bare naked title could repose in one entity but beneficial ownership in another.[44] In a recent opinion, *Bowen v. Taylor-Christensen*, the Fifth District Court of Appeal used the bare naked title exception to find that an ex-husband did not have beneficial ownership in his ex-wife's vehicle.[45] In that case, the driver's ex-husband, who intended to make a gift to his ex-wife and subsequently relinquished all access, use, and control of the car immediately upon purchase, was not an "owner" of the car.[46] The case held "beneficial ownership of a vehicle is key to vicarious liability, and that the determination whether a title holder possesses mere naked title or is the beneficial owner of the vehicle hinges on the evidence concerning whether the title holder had control and authority over the use of the vehicle."[47]

As with the other exceptions, however, Florida courts have demonstrated a reluctance to broadly define or liberally apply the exception to relieve an owner of financial responsibility. As a result, courts will not find bare naked title if it can be shown that the title owner has any ability to control the vehicle. Indeed, courts have found the dangerous instrumentality doctrine applied where an older relative purchased a car for a younger relative to use and the older relative arguably possessed some ability to control the car, such as residing with the car owner or paying insurance on the car.[48]

III. Explaining the Dangerous Instrumentality Doctrine to a Non-Resident

Understandably, non-resident parents, grandparents, former spouses, and those under the impression they had sold their cars will be troubled to find themselves embroiled in a lawsuit in Florida. Similarly, regional insurers of these individuals who may not do business in Florida will be, at

least, puzzled at the prospect of defending a faultless insured and paying out policy proceeds in a jurisdiction the insured has never visited.

Because Florida is unique in its common law dangerous instrumentality doctrine, there is a significant risk of misunderstanding between a Florida attorney, for whom the doctrine is as fundamental as the law of gravity, and a non-resident motor vehicle owner or the owner's non-Florida insurer, for whom the doctrine is an oddity. As a result, the issue of owner liability should be analyzed and addressed as early and as thoroughly in the representation as possible. The simple language from Florida Standard Civil Jury Instructions is the appropriate starting point: *"A person who owns a vehicle and who expressly or impliedly consents to another's use of it is responsible for its operation."*[49]

Attorneys should make an effort to understand the law of the client's home state. If the client has any understanding of laws holding a car owner responsible for damage caused by a non-owner driver, it will be the law of their home state. Different states have taken a variety of approaches to the issue of owner liability. A few states, including New York and California, have codified something akin to the dangerous instrumentality doctrine, so the only barrier to explaining the dangerous instrumentality doctrine to individuals from these states is that Florida's doctrine is judicially created.[50]

In contrast, however, most states have completely rejected the dangerous instrumentality doctrine.[51] Some states favor the approach that liability attaches to the owner only when a driver is acting as the agent of the owner[52] or when an owner negligently entrusts the vehicle to the driver.[53] Other states find that if the owner had insurance, then the owner's insurance must provide coverage to a permissive driver who lacks insurance.[54] Finally, some states still apply the family purpose doctrine, an old rule that holds the owner of an automobile liable for damages when a family member is driving the owner's car, regardless of permission,[55] while others hold the owner responsible if the driver is a minor, whether a relative or not.[56]

Depending on the level of familiarity with Florida's dangerous instrumentality doctrine and the confusion with the law of their home state, clients may need more than a verbal discussion of the law. Having a standard memorandum or letter in the office explaining the doctrine could be useful to provide clients with a clear written account of the state of the law in Florida. This will save the practitioner the trouble of having multiple conversations with the same client, for example, on why negligent entrustment does not apply.

In addition to explaining Florida's dangerous instrumentality doctrine and contrasting it to the relevant law in the non-resident client's home state, the exceptions to the dangerous instrumentality doctrine should be explored at the early stages of a case in order for the non-resident client to advise whether any are arguably applicable. Without a good working understanding of the doctrine and its exceptions, the client cannot reasonably be expected to alert the attorney as to facts that may form the basis of a fundamental defense.

IV. Defending a Non-Resident Sued under the Dangerous Instrumentality Doctrine

Although the specific facts of each case will ultimately determine a defense strategy, certain considerations, such as jurisdictional challenges, potential liability defenses, and damages defenses have a more universal application. Because clients and plaintiffs frequently ask about alternative dispute resolution, this article also includes tips for negotiation, mediation, and arbitration.

A. Jurisdictional challenges

The non-resident client will naturally have questions about the authority of a Florida court to exercise personal jurisdiction where that client may have never set foot in the state or committed any actual act of negligence within the state. Accordingly, one of the first areas to analyze when defending a non-resident car owner is whether Florida has jurisdiction over the car owner.[57] In a case involving a non-resident owner, jurisdictional challenges are often the easiest, fastest, and most cost-effective way to avoid liability. Jurisdiction over a non-resident is determined using Florida's two-step jurisdictional analysis.[58] First, the complaint must allege sufficient jurisdictional facts to bring the action within the ambit of section 48.193, Florida Statutes; if it does, then there must also be sufficient minimum contacts to satisfy due process requirements.[59] Both steps must be satisfied for a Florida court to exercise personal jurisdiction over a non-resident defendant.[60]

The rule is "firmly established" in Florida that the consent of a vehicle's non-resident owner to another driver's use of the vehicle in Florida constitutes sufficient minimum contacts with the state to confer personal jurisdiction over the vehicle's owner.[61] The ability to sue and serve a non-resident car owner is made even clearer in section 48.171, Florida Statutes, which provides that Florida's Secretary of State can accept service of suit papers for any non-resident who operates a motor vehicle in Florida or who permits his motor vehicle to be operated within Florida.[62] Because permission to operate the vehicle is a requirement of the dangerous instrumentality doctrine as well as a condition for jurisdiction and substituted service in Florida, whether the owner consented to the driver's operation of the vehicle is a key area for challenging

jurisdiction. In addition, it is not only important for jurisdictional purposes that the owner consented to the driver's use of the vehicle but also, more specifically, that the owner expressly or impliedly consented to the driver's operation of the vehicle in Florida.

Jurisdiction must be challenged at the "first opportunity" in a lawsuit, usually by way of a motion to dismiss for lack of jurisdiction.[63] If service was made using substituted service through Florida's secretary of state, a motion to quash service is also warranted.[64] Assuming sufficient jurisdictional claims are alleged in the complaint, a motion to dismiss must be supported by an affidavit describing the lack of consent to operate the vehicle and the lack of minimum contacts with the state of Florida.[65] The plaintiff is allowed an opportunity to file a competing affidavit providing facts showing consent and minimum contacts.[66] Unless the plaintiff has frequent communications with the driver, the plaintiff is unlikely to provide a competing affidavit. If there are two competing affidavits, then the court will hold a limited evidentiary hearing to determine jurisdiction; if the defendant has provided the sole affidavit in the case, then the court can decide the matter without an evidentiary hearing.[67]

An ideal affidavit in support of a motion to dismiss would be one in which the owner describes, in straightforward but not overly detailed terms, how the driver obtained possession of the vehicle. Personal jurisdiction is most clearly absent when an out-of-state owner has not consented to the operation of his vehicle by the driver at all, although at least one case found there was no jurisdiction when an out-of-state owner consented to the operation of his vehicle by an out-of-state driver only in their home state.[68] If an out-of-state owner is dismissed or dropped from a case for lack of jurisdiction, the owner should expect that the dismissal to be without prejudice. If sufficient jurisdictional facts are discovered later in litigation, the owner may be added back as a party to the case. An out-of-state owner should also be aware that the plaintiff could also attempt to sue in the owner's home state, under the law of that state. Informing the court that the plaintiff is not entirely without recourse against the car owner and that the plaintiff can still attempt suit in another jurisdiction may also assist the court in granting your motion to dismiss for lack of jurisdiction.

B. Liability issues

If a jurisdictional challenge is unsuccessful, there may be other liability defenses. Some issues under the dangerous instrumentality doctrine may be presented by a motion for summary judgment,[69] while others require determination by a jury.[70] The defenses most amenable to being presented by way of motion for summary judgment are those relating to the exceptions to the dangerous instrumentality doctrine. If it appears that the non-resident owner has only bare naked title in the vehicle or took the vehicle to a shop for a repair at the time of the accident, then these are issues that typically could be presented with a summary judgment motion.[71]

A successful motion for summary judgment on the bare naked title exception will be accompanied by an affidavit or an excerpt from a deposition transcript from the owner describing in detail the sale or transfer of the car and the reasons that title did not transfer. Likewise, a successful motion for summary judgment on the shop exception will be accompanied by an affidavit or excerpt from a deposition transcript describing the repair shop, the repairs needed, any prior repairs provided by the same shop. On either the bare naked title exception or the shop exception, it is important that the motion and evidence filed in support of the motion demonstrate that the owner lacked control over the vehicle.

Because liability under the dangerous instrumentality doctrine is purely derivative, the same defenses that are available to the driver are also available to the car owner. These defenses include comparative negligence. Because the vehicle owner may assert the same defenses as the driver, a cooperative defense between the two is ideal. To the extent there are issues on which the driver and owner have different positions, such as the owner's right to indemnity from the driver, it is advisable to present those in a separate and later lawsuit after disposition of the initial claim.

C. Damages issues

In addition to jurisdictional challenges and liability defenses, a number of damages defenses are available to the non-resident motor vehicle owner. One such defense relates to statutory caps on damages payable by the motor vehicle owner.[72] The owner of a vehicle who is vicariously liable for the operation of the vehicle is liable up to $100,000 per person and $300,000 per occurrence for bodily injury and up to $50,000 for property damage.[73] If the permissive user of the motor vehicle is uninsured or has any insurance with limits less than $500,000 combined property damage and bodily injury liability, the owner's limits of liability increase by an additional $500,000 in economic damages only.[74] The additional liability of the owner for economic damages is to be reduced by amounts actually recovered from the permissive user and his insurance company.[75]

If the driver has insurance, the rules of priority of insurance payments are also favorable to the out-of-state car owner. In *Allstate Insurance Co. v. Fowler*, the Florida Supreme Court established a special rule of priority for paying for damages under the dangerous instrumentality doctrine.[76] The owner's insurance carrier is deemed primary, but only for the

first layer of coverage, which has limits of $10,000 per person and $20,000 per incident as required by the Financial Responsibility Act.[77] Above the minimum limits of financial responsibility, the order and priority of insurance in permissive use cases depend on whether the owner's insurance company also insures the driver.[78] If the owner's insurance company does not insure the driver and the owner has not committed active negligence, then the driver's policy provides the next layer of coverage before the owner's policy provides any more coverage.[79]

A person who is held vicariously liable for the negligence of another may seek indemnity from the actual tortfeasor under a theory of common law indemnity.[80] The owner's entitlement to indemnification from the driver is well settled and operates fairly mechanically in cases not involving insurance.[81] However, in situations in which an owner's insurance policy contains language broad enough to include the permissive driver within the definition of an "insured," an action for indemnity or subrogation will not likely be available to the insurer.[82] Similarly, under circumstances in which an owner's policy provides coverage to a permissive driver, it is almost certain that an insurer will not be allowed to bring a subrogation claim against the permissive driver pursuant to the prohibition against an insurer seeking subrogation against its own insured.

V. Alternative Dispute Resolution Strategies

Out-of-state clients and their insurers routinely ask when negotiation, mediation, or arbitration might assist in resolving their claim. Negotiation, of course, can take place at any time. Before attempting to negotiate a claim or admit any client liability for an accident, an attorney should undertake a full analysis of the facts of the case, the amount of damages the plaintiff seeks, and the caps that will apply to a non-resident car owner's claim. Non-resident clients and their insurers should be made aware of the fact that Florida courts typically require mediation prior to trial and that physical presence may be necessary at mediation. Depending upon the client's goals in the case, an early mediation might allow a non-resident car owner to get out of the case quickly, but there may be a cost premium to doing so. Generally speaking, arbitration is more helpful for car accident cases sounding in contract than for cases sounding in tort, and a Florida arbitrator is likely to provide no more assistance to an out-of-state automobile owner than a Florida court but a much narrower scope of appeal. Therefore, proceeding in court and with court-ordered mediation may be the best way to resolve a case involving the dangerous instrumentality doctrine that cannot be settled through pre-suit negotiation.

The unfairness of being sued so far away from home with laws so different than the home state is no defense when a non-resident's car is involved in an accident in Florida. Instead, a non-resident owner or out-of-state insurer will require competent legal advice on the dangerous instrumentality doctrine and its exceptions to defend the case in court or resolve the case outside of court.

Conclusion

Although rejected in most other jurisdictions, the dangerous instrumentality doctrine appears to be here to stay in Florida. By being knowledgeable about the doctrine and its exceptions, you can answer questions that are sure to arise when non-resident automobile owners and their insurers find themselves involved in a Florida lawsuit. The strategies and tips discussed in this article should assist you in explaining the dangerous instrumentality doctrine to the unfamiliar and in defending a non-resident sued under the doctrine.

1 *Fischer v. Alessandrini*, 907 So. 2d 569, 570-71 (Fla. 2d DCA 2005) (citing *Hertz Corp. v. Jackson*, 617 So. 2d 1051, 1053 (Fla.1993)). Although this article focuses on automobile accidents, Florida's dangerous instrumentality doctrine extends to motorized vehicles, including farm tractors, golf carts, trucks, buses, airplanes, and tow-motors. *See Rippy v. Shepard*, --- So. 3d ----, 237 Fla. L. Weekly S31 (Fla. Jan. 19, 2012) (citing *Meister v. Fisher*, 462 So. 2d 1071, 1071-72 (Fla. 1984); *Orefice v. Albert*, 237 So. 2d 142, 145 (Fla. 1970); *Eagle Stevedores, Inc. v. Thomas*, 145 So. 2d 551, 552 (Fla. 3d DCA 1962)). Go-karts, however, are not dangerous instrumentalities under Florida law. *Salsbury v. Kapka*, 41 So. 3d 1103, 1105 (Fla. 4th DCA 2010) (citing *Festival Fun Parks, LLC v. Gooch*, 904 So. 2d 542, 544-46 (Fla. 4th DCA 2005)).

2 86 So. 629, 636 (1920).

3 *See id.* at 631; A. Eugene Carpenter, Jr., Note, *The Dangerous Instrumentality Doctrine: Unique Automobile Law in Florida*, 5 U. Fla. L. Rev. 412, 413-14 (1952).

4 86 So. at 636.

5 Brent Steinberg, *The Graves Amendment: Putting to Death Florida's Strict Vicarious Liability Law*, 62 U. Fla. L. Rev. 795, 798 (2010) (citing *Kraemer v. Gen. Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990)).

6 *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000).

7 *S. Cotton Oil Co. v. Anderson*, 86 So. at 635-36 (finding "Some courts . . . hold that [automobiles] are not dangerous contrivances from which the public is entitled to the protection that would be afforded by the application of the rule governing the liability of the owner of a dangerous agency who permits it to be used by another. We cannot make that distinction.").

8 *Id.*

9 Steinberg, *supra* note 5, at 798 (citing *Kraemer v. Gen. Motors Acceptance Corp.*, 572 So. 2d 1363, 1365 (Fla. 1990)).

10 Sarah E. Williams, *Florida's Dangerous Instrumentality Doctrine*, 25 Stetson L. Rev. 177, 180 (1995) ("The great majority of states have held that automobiles are not dangerous instrumentalities under this theory of vicarious liability.").

11 *Fischer*, 907 So. 2d at 570. Criticism of the doctrine predates *Southern Cotton Oil Co. Cf.* Steinberg, *supra* note 5, at 799 ("As far back as 1916, critics questioned the doctrine's imposition of liability for damages to the master for offences done by a man's servant without his assent.").

12 *Rippy v. Shepard*, 2012 WL 143607 (Fla. Jan. 19, 2012) (citing *Aurbach* , 753 So. 2d at 62 (citing *S. Cotton Oil Co.*, 86 So. at 637)).

13 *Stevenson v. Brosdal*, 813 So. 2d 1046, 1048 (Fla. 4th DCA 2002) (finding jurisdiction over non-resident father who allowed son and daughter-in-law in Miami to use his car); *Young v. Young*, 382 So. 2d 355, 357 (Fla. 5th DCA 1980) (finding a non-resident was the owner of a vehicle because he was listed as the registered owner of vehicle even though he sold car to his brother and brother used it in Florida).

14 *Stevenson*, 813 So. 2d at 1047.

[15] *Aurbach*, 753 So. 2d at 62.

[16] *Susco Car Rental Sys. of Fla. v. Leonard*, 112 So. 2d 832, 835-36 (Fla.1959) (cited by Angela C. Mason, *The Graves Amendment: An End to Vicarious Liability for Rental and Leasing Companies in Florida?*, 28 Trial Advoc. Q. 17 (Spring 2009)).

[17] *See* § 324.021(9)(b)(1), Fla. Stat. *See also Rosado v. DaimlerChrysler Fin. Services Trust*, 1 So. 3d 1200, 1208 (Fla. 2d DCA 2009) (Altenbernd, J., dissenting) (explaining that the 1986 law provided no relief to rental car companies as opposed to long-term lessors).

[18] *See* § 324.021(9)(b)(2), Fla. Stat.

[19] The issue of preemption has been extensively analyzed by Florida's state and federal courts. *See Rosado*, 1 So. 3d at 1202 (citing *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11th Cir. 2008); *Dupuis v. Vanguard Car Rental USA, Inc.*, 510 F.Supp.2d 980 (M.D. Fla. 2007); *Garcia v. Vanguard Car Rental USA, Inc.*, 510 F.Supp.2d 821 (M.D. Fla. 2007); *Kumarsingh v. PV Holding Corp.*, 983 So. 2d 599 (Fla. 3d DCA 2008); *Tocha v. Richardson*, 995 So. 2d 1100 (Fla. 4th DCA 2008); *Vargas v. Enter. Leasing Co.*, 993 So. 2d 614 (Fla. 4th DCA 2008); *Karling v. Budget Rent A Car Sys., Inc.*, 2 So. 3d 354 (Fla. 5th DCA 2008)).

[20] The Graves Amendment provides, in relevant part:

> An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if--
> (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
> (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

49 U.S.C. § 30106(a) (cited by Kenneth J. Rojc, Karoline E. Kreuser, *End of the Road for Vicarious Liability*, 64 Bus. Law. 617, 619 (2009)).

[21] Steinberg, *supra* note 5, at 800.

[22] *See Vargas v. Enter. Leasing Co.*, 60 So. 3d 1037, 1042 (Fla. 2011).

[23] *Chandler v. Geico Indem. Co.*, 78 So.3d 1293, (Fla. 2011); *Garcia v. Geico General Ins. Co.*, 450 Fed. Appx. 870 (11th Cir. 2012).

[24] *See Chandler*, 78 So.3d at 1296-97;*Garcia*, 450 Fed. Appx. at 873.

[25] *Estate of Villanueva ex rel. Villanueva v. Youngblood*, 927 So. 2d 955, 958 (Fla. 2d DCA 2006) ("at this point, it appears that the supreme court has determined that the creation of any further exceptions to the dangerous instrumentality doctrine should be left to the legislature.").

[26] *See Ady v. Am. Honda Fin. Corp.*, 675 So. 2d 577, 582 (Fla. 1996) (Anstead, J., concurring) (explaining that the legislative exceptions were a result of the court's refusal to create an exception for leased vehicles). However, at least one court found alternate support for a finding that the dangerous instrumentality doctrine might not apply when the driver unforeseeably used the car for the purpose of intentionally inflicting injury using the car as a weapon. *Burch v. Sun State Ford, Inc.*, 864 So. 2d 466, 470-73 (Fla. 5th DCA 2004).

[27] *Castillo v. Bickley,* 363 So. 2d 792, 793 (Fla.1978) (citing *Bickley v. Castillo*, 346 So. 2d 625, 626 (Fla. 3d DCA 1977).

[28] *Cofty v. Smith*, 686 So. 2d 728 (Fla. 1st DCA 1997).

[29] *Michalek v. Shumate,* 524 So. 2d 426, 427 (Fla.1988).

[30] *Id.*

[31] *Id.*; *Baptista v. Enter. Leasing Co.*, 707 So. 2d 397, 398 (Fla. 3d DCA 1998); *Fahey v. Raftery,* 353 So. 2d 903, 904 (Fla. 4th DCA 1977).

[32] *Aircraft Logistics, Inc. v. H.E. Sutton Forwarding Co., LLC*, 1 So. 3d 309, 312 (Fla. 3d DCA 2009).

[33] *See, e.g., Michalek v. Shumate,* 524 So. 2d at 427; *Grilli v. Le-Bo Props. Corp.*, 553 So. 2d 352, 353 (Fla. 2d DCA 1989); *Lopez v. DeMaria Porche-Audi,* 395 So. 2d 199, 199 (Fla. 3d DCA 1981).

[34] *Estate of Villanueva ex rel. Villanueva*, 927 So. 2d at 957-61.

[35] *See Hertz Corp.*, 617 So. 2d at 1053 (Fla. 1993); *Susco*, 112 So. 2d at 835-36.

[36] *See* Todd Ladouceur, *Tort Law: Florida's Liability "Airbag" for Automobile Owners Hertz Corp. v. Jackson, 617 So. 2d 1051 (Fla. 1993)*, 46 Fla. L. Rev. 335, 345-46 (1994) (finding *Hertz* to be a "fair" decision). *See also* Williams, *supra* note 10, at 199 (finding *Hertz* to be an "unfair" decision); George N. Meros, Jr., *Toward a More Just and Predictable Civil Justice System*, 25 Fla. St. U. L. Rev. 141, 148 (1997-1998) (viewing the dangerous instrumentality doctrine as one of many laws that contributed to an "imbalance in the state's tort system").

[37] *Commercial Carrier Corp. v. S.J.G. Corp.*, 409 So. 2d 50, 52 (Fla. 2d DCA 1981).

[38] *Hertz Corp.*, 617 So. 2d at 1053-54.

[39] *See Martinez v. Hart*, 270 So. 2d 438, 439-440 (Fla. 3d DCA 1972). The question of whether a vehicle has been the subject of a conversion is a factual one based on the distinct circumstances of each individual case. *Ming v. Interam. Car Rental, Inc.*, 913 So. 2d 650, 654 (Fla. 5th DCA 2005).

[40] *Hertz Corp.*, 617 So. 2d at 1053-54.

[41] *Am. Fire & Cas. Co. v. Blanton*, 182 So. 2d 36, 39 (Fla. 1st DCA 1966).

[42] *Id. See also Chandler*, 78 So.3d 1298.

[43] *Aurbach*, 753 So. 2d at 62 (Fla. 2000) (cited by *Morales v. Coca-Cola Co.*, 813 So. 2d 162, 165 (Fla. 4th DCA 2002)).

[44] *Palmer v. R.S. Evans, Jacksonville, Inc.*, 81 So. 2d 635, 637 (Fla. 1955).

[45] *Bowen v. Taylor-Christensen*, 36 Fla. L. Weekly D1898 (Fla. 5th DCA Aug. 26, 2011).

[46] *Id.* In the two years after purchase of the vehicle, the driver's ex-husband "never had access to the car, never had any authority over the car, never had a key, never insured it, and never had it registered."

[47] *Id.* The dissent in *Bowen* voiced sharp disagreement over this issue. 36 Fla. L. Weekly D1898 (Torpy, J., dissenting).

[48] *See Metzel v. Robinson,* 102 So. 2d 385, 385-86 (Fla. 1958); *Marshall v. Gawel*, 696 So. 2d 937, 939 (Fla. 2d DCA 1997). *See also* Kansas R. Gooden, *What'cha Gonna Do Brother When Hulkamania Runs Wild on You?: A Practitioner's Guide to Section 322.09 of the Florida Statutes*, 21 St. Thomas L. Rev. 390, 419 (2009).

[49] Fla. Std. Jury Instr. (Civ.) 401.14(a).

[50] *See* Cal. Veh. Code § 17150 (West 2011); N.Y. Veh. & Traf. Law § 388 (McKinney 2011). Other states with statutory vicarious liability schemes include Idaho, Iowa, Oregon, Michigan, Minnesota, and Rhode Island. *See* Idaho Code Ann. § 49-2417(1) (cited by *Oregon Mut. Ins. Co. v. Farm Bureau Mut. Ins. Co. of Idaho*, 218 P.3d 391, 396 (Idaho 2009)); Iowa Code § 321.493(1)(a) (cited by *Zimmer v. Vander Waal*, 780 N.W.2d 730, 733 (Iowa 2010); Mich. Comp. Laws § 257.401(1) (cited by *Freed v. Salas*, 780 N.W.2d 844, 851 (Mich. 2009)); Minn. Stat. Ann. § 169.09(5)(a) (West 2011); R.I. Gen. Laws § 31-33-6 (2011).

[51] Case law from many states flatly rejects the idea that a car could be a dangerous instrumentality. *E.g., White v. Sims*, 201 S.W.2d 21, 24 (Ark. 1947) ("An automotive vehicle is not an inherently dangerous instrumentality"); *Graham v. Shilling*, 291 P.2d 396, 398 (Colo. 1955) ("an automobile not being in itself a dangerous instrumentality").

[52] States that require an agency or employment relationship to hold an owner liable for the acts of a permissive driver include: Connecticut, Delaware, Illinois, Indiana, Louisiana, Maine, Maryland, Missouri, Mississippi, Montana, New Hampshire, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. *See* Conn. Gen. Stat. Ann. § 52-183 (West 2011); *Lang v. Morant*, 867 A.2d 182, 186 n.12 (Del. 2005); *DuBois v. Rose*, 576 N.E.2d 1104, 1108 (Ill. 1991); *Harper v. Puckett*, 106 N.E.2d 116, 117 (Ind. 1952); *Sterling v. Allstate Ins. Co.*, 35 So. 3d 355, 358 (La. Ct. App. 2010); *Ashe v. Enter. Rent-A-Car*, 838 A.2d 1157, 1159-60 (Me. 2003); *Toscano v. Spriggs*, 681 A.2d 61, 66 (Md.1996); *Campbell v. Fry*, 439 S.W.2d 545, 549 (Mo. Ct. App. 1969); *Woods v. Nichols*, 416 So. 2d 659, 664 (Miss. 1982); *Ulrigg v. Jones*, 907 P.2d 937, 940 (Mont. 1995); *Chalmers v. Harris Motors*, 179 A.2d 447, 450 (N.H.1962); *Hall v. Enter. Leasing Co.-W.*, 137 P.3d 1104, 1108 (Nev. 2006); *Fu v. Fu*, 733 A.2d 1133, 1136 (N.J. 1999); *Bryant v. Gilmer*, 639 P.2d 1212, 1214 (N.M. Ct. App. 1982); *DeArmon v. B. Mears Corp.*, 325 S.E.2d 223, 228 (N.C. 1985); *Leonard v. N. D. Co-Op. Wool Mktg. Ass'n*, 6 N.W.2d 576, 578 (N.D. 1942); *McLaughlin v. Residential Commc'ns, Inc.*, 924 N.E.2d 891, 895 (Ohio 2009); *Moyer Car Rental, Inc. v. Halliburton Co.*, 610 P.2d 232, 236 (Okla. 1980); *Breslin by Breslin v. Ridarelli*, 454 A.2d 80, 82 (Pa. Super Ct. 1982); *Bannister v. Hertz Corp.*, 450 S.E.2d 629, 630 (S.C. Ct. App. 1994); *Johnson v. Attkisson*, 722 S.W.2d 390, 393 (Tenn. Ct. App. 1986); *N.Y. Plate Glass Ins. Co. v. Martines*, 184 P. 819, 821 (Utah 1919); *Dreher v. Budget Rent-A-Car Sys., Inc.*, 634 S.E.2d 324, 327 (Va. 2006);

Payne v. Kinder, 127 S.E.2d 726, 737 (W. Va. 1962); *Ruby v. Ohio Cas. Ins. Co.*, 155 N.W.2d 121, 125 (Wis. 1967).

53 Many states have a cause of action for negligent entrustment, including Alaska, Arkansas, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Montana, New Hampshire, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See Kalenka v. Infinity Ins. Cos.*, 262 P.3d 602, 610 (Alaska 2011); *Thomas v. Henson*, 459 S.W.2d 124, 126 (Ark. 1970); *Henderson v. Prof'l Coatings Corp.*, 819 P.2d 84, 90 (Haw. 1991); *DuBois v. Rose*, 576 N.E.2d 1104, 1108 (Ill. 1991); *Bailey v. State Farm Mut. Auto. Ins. Co.*, 881 N.E.2d 996, 1001 (Ind. Ct. App. 2008); *Sterling v. Allstate Ins. Co.*, 35 So. 3d 355, 358 (La. Ct. App. 2010); *Kassis v. Lease & Rental Mgmt. Corp.*, 950 N.E.2d 451, 456 (Mass. 2011); *Ulrigg v. Jones*, 907 P.2d 937, 940 (Mont. 1995); *Chalmers v. Harris Motors*, 179 A.2d 447, 450 (N.H.1962); *Hall v. Enter. Leasing Co.-W.*, 137 P.3d 1104, 1108 (Nev. 2006); *Kim v. Paccar Fin. Corp.*, 896 A.2d 489, 491 (N.J. Super. Ct. App. Div. 2006); *Bryant v. Gilmer,* 639 P.2d 1212, 1214 (N.M. Ct. App. 1982); *Haynie v. Cobb*, 698 S.E.2d 194, 198 (N.C. Ct. App. 2010); *Collette v. Clausen*, 667 N.W.2d 617, 621 (N.D. 2003); *McLaughlin v. Residential Commc'ns Inc.*,924 N.E.2d 891, 895 (Ohio 2009); *Green v. Harris*, 70 P.3d 866, 868 (Okla. 2003); *Mezyk v. Nat'l Repossessions, Inc.*, 405 P.2d 840, 842 (Or. 1965); *Bannister v. Hertz Corp.*, 450 S.E.2d 629, 630 (S.C. Ct. App. 1994); *Wilson v. Lewno,* 623 N.W.2d 494, 495 (S.D. 2001); *Ali v. Fisher*, 145 S.W.3d 557, 564 (Tenn. 2004); *Ruiz v. Guerra*, 293 S.W.3d 706, 721 (Tex. Ct. App. 2009); *Wilcox v. Wunderlich*, 272 P. 207, 213 (Utah 1928); *Barbagallo v. Gregory*, 553 A.2d 151, 151 (Vt. 1988); *Dreher v. Budget Rent-A-Car Sys., Inc.*, 634 S.E.2d 324, 327 (Va. 2006); *House v. Estate of McCamey*, 264 P.3d 253, 256 (Wash. 2011); *Clark v. Shores*, 499 S.E.2d 858, 860 (W. Va. 1997); *Siebert v. Wis. Am. Mut. Ins. Co.*, 797 N.W.2d 484, 492 (Wis. 2011); *Jack v. Enter. Rent-A-Car Co. of Los Angeles*, 899 P.2d 891, 894 (Wyo. 1995).

54 States, including Kentucky, have found liability for owners under the states' financial responsibility laws when the driver lacked insurance. *See McGrew v. Stone*, 998 S.W.2d 5, 5-6 (Ky. 1999). *See also State Farm Mut. Ins. Cos. v. AMCO Ins. Co.*, 621 N.W.2d 553, 560 (Neb. 2001); *McLaughlin v. Residential Commc'ns, Inc.*, 924 N.E.2d 891, 895 (Ohio 2009); *Moyer Car Rental, Inc. v. Halliburton Co.*, 610 P.2d 232, 236 (Okla. 1980).

55 *Young v. Beck*, 251 P.3d 380, 383 (Ariz. 2011). Versions of the family purpose doctrine are in effect in states including Arizona, Connecticut, Georgia, New Mexico, Nevada, South Carolina, and West Virginia. *See id.*; Conn. Gen. Stat. § 52-182 (cited by *Trichilo v. Trichilo*, 462 A.2d 1048 (Conn. 1983)); *Wingard v. Brinson*, 442 S.E.2d 485, 486 (Ga. 1994); *Bryant v. Gilmer*, 639 P.2d 1212, 1214 (N.M. Ct. App. 1982); *Arata v. Faubion*, 161 P.3d 244, 247-48 (Nev. 2007); *Bannister v. Hertz Corp.*, 450 S.E.2d 629, 630 (S.C. Ct. App. 1994); *Ward v. Baker*, 425 S.E.2d 245, 249 (W. Va. 1992).

56 States including Kansas and Kentucky have statutes making owners liable when permitting minors to operate their vehicles. Kan. Stat. Ann. § 8–222 (cited in *Yetsko v. Panure*, 35 P.3d 904, 906 (Kan. 2001)); Ky. Rev. Stat. Ann. § 186.590(3) (cited in State Auto. Ins. Co. v. Reynolds, 32 S.W.3d 508, 510 (Ky. Ct. App. 2000)).

57 Although not within the scope of this article, the issue of jurisdiction is also important in cases where an automobile insurer is being sued for benefits under its own policy. If the insurer does not write or deliver policies in Florida, and does not have agents or offices in Florida, then the insurer can argue there is no jurisdiction, pursuant to the holding of *Meyer v. Auto Club Insurance Ass'n,* 492 So. 2d 1314 (Fla. 1986). *Meyer* would apply to cases involving uninsured/underinsured motorists coverage and also personal injury protection cases under certain circumstances. Many Florida plaintiff's attorneys are not familiar with *Meyer* and will try to convince adjusters that an out-of-state insurance company is subject to being sued in Florida and required to pay benefits pursuant to the Florida statutory schemes.

58 *Doe v. Thompson*, 620 So. 2d 1004, 1005 (Fla. 1993).

59 *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989) (citations omitted).

60 *Carib-USA Ship Lines Bahamas Ltd. v. Dorsett*, 935 So. 2d 1272, 1275 (Fla. 4th DCA 2006) (quoting *Am. Fin. Trading Corp. v. Bauer,* 828 So. 2d 1071, 1074 (Fla. 4th DCA 2002)).

61 *Bill Holt Sales & Leasing, Inc. v. Cousins*, 904 So. 2d 502, 504 n. 3 (Fla. 1st DCA 2005) (citing *Sierra v. A Betterway Rent–A–Car, Inc.,* 863 So. 2d 358 (Fla. 3d DCA 2003); *Stevenson v. Brosdal,* 813 So. 2d 1046 (Fla. 4th DCA 2002)).

62 The statute provides, in relevant part:

> Any nonresident of this state, being the operator or owner of any motor vehicle, who accepts the privilege extended by the laws of this state to nonresident operators and owners, of operating a motor vehicle or of having it operated, or of permitting any motor vehicle owned, or leased, or controlled by him or her to be operated with his or her knowledge, permission, acquiescence, or consent, within the state . . . .

§ 48.171, Fla. Stat. Anecdotal evidence suggests, however, that Florida plaintiff's attorneys are more likely to attempt personal service on a non-resident car owner.

63 *Romellotti v. Hanover Amgro Ins. Co.*, 652 So. 2d 414, 414-15 (Fla. 5th DCA 1995) (citations omitted). *See also Babcock v. Whatmore*, 707 So. 2d 702, 704 (Fla. 1998) (finding that jurisdiction must be raised at the earliest opportunity and can be reviewed after a final disposition so long as the party challenging jurisdiction never waived its jurisdictional defense by seeking affirmative relief).

64 *See Gower v. Hemmerle*, 779 So. 2d 657, 658 (Fla. 5th DCA 2001).

65 *Peznell v. Doolan*, 722 So. 2d 881, 882 (Fla. 2d DCA 1998) (finding it is the plaintiff's burden to establish jurisdiction after the non-resident defendant files an affidavit contesting jurisdiction).

66 *Id.*

67 *Id.*

68 *Id.* at 883 (where the non-resident owner "did not consent to the operation of his motor vehicle in the State of Florida, nor did he have any knowledge that [the driver] would drive it here. . . . From the information available to the trial court, [the owner's] contacts with Florida were not only less than minimum, they were nonexistent.").

69 Where the facts are not in dispute, issues involving the dangerous instrumentality question are generally pure questions of law. *See Salsbury v. Kapka*, 41 So. 3d at 1104-1105. *See also Plattenburg v. Dykes*, 798 So. 2d 915, 917 (Fla. 1st DCA 2001).

70 Factual issues may preclude summary judgment and directed verdict. *Frank v. Wyatt*, 869 So. 2d 763, 764 (Fla. 1st DCA 2004).

71 *Plattenburg*, 798 So. 2d at 916-17; *Fought v. Mullen*, 609 So. 2d 726, 728 (Fla. 5th DCA 1992).

72 While the caps are available for both residents and non-residents alike under the dangerous instrumentality doctrine, these caps are not available for a Florida parent who signed his child's driver's license application. Under section 322.09, Florida Statutes, such a signer is liable for all actual damages. *See* Gooden, *supra* note 48, at 412.

73 § 324.021 (9)(b)(3), Fla. Stat.

74 *Id.*

75 *Id.*

76 480 So. 2d 1287, 1290 (Fla. 1986).

77 *Id.*; § 324.151, Fla. Stat. Most courts routinely apply the *Fowler* mandate regardless of whether the policy was issued to comply with the financial responsibility laws. The Florida Bar, *Florida Automobile Insurance Law* § 6.12 (7th ed. 2010).

78 For a good explanation of the rules of priority, *see* The Florida Bar, *Florida Automobile Insurance Law* § 6.44 (7th ed. 2010).

79 *Fowler*, 480 So. 2d at 1290.

80 *See Rosati v. Vaillancourt*, 848 So. 2d 467, 470-73 (Fla. 5th DCA 2003). An indemnitee is entitled to indemnification not only for the amount of a judgment or settlement, but also for attorney's fees and court costs. *Hiller Group, Inc. v. Redwing Carriers, Inc.*, 779 So. 2d 602, 604 (Fla. 2d DCA 2001).

81 *Am. and Foreign Ins. Co. v. Avis Rent-A-Car System, Inc.*, 401 So. 2d 855 (Fla. 1st DCA 1981); *Ins. Co. of North Am. v. King,* 340 So. 2d 1175 (Fla. 4th DCA 1976).

82 *See Ray v. Earl*, 277 So.2d 73, 76 (Fla. 2d DCA 1973); *Rosati v. Vaillancourt*, 848 So. 2d at 470-73. *See also Roth v. Old Republic Ins.Co.*, 269 So. 2d 3, 6 (Fla. 1972); *Quinlan Rental & Leasing, Inc. v. Linnel*, 484 So. 2d 630, 632 (Fla. 2d DCA 1986).

2011 ROBERT ORSECK MEMORIAL MOOT COURT COMPETITION

FACTS

Sunshine Beach, Florida, is a city of approximately 50,000 residents on Florida's East Coast. In the past several years, there has been a rise in drug crimes. Not only are illegal drugs trafficked through Sunshine Beach, but prescription pills are as well. At the same time, financial pressures on Sunshine Beach's governmental entities have caused a decrease in funding to the Sunshine Beach Police Department (the "SBPD"). While no layoffs have occurred, there is a hiring freeze in place and the department has shrunk in the past four years through attrition.

With the SBPD budget cuts, there was no longer the manpower to conduct multi-day surveillance with police officers. However, in 2009, SBPD received grant money to upgrade its technology and purchased 20 Global Positioning System ("GPS") Nano tracking devices to conduct surveillance. GPS Nano markets itself as a small, discrete real-time GPS tracker that affixes magnetically to the underside of any vehicle and will send satellite location data to a secure web-based server. A GPS Nano device will allow the recipient of the data to set "speed alerts" and "geo fences" that provide automatic email notifications each time the vehicle speeds, or goes outside of an approved driving area. A GPS Nano device will hold a charge for up to 30 days. GPS Nano devices are available for purchase over the internet, and they are popular with parents of teen drivers and law enforcement officers, alike.

The SBPD decided to use its first GPS Nano on a known drug trafficker, Johnny Johnson ("Johnson"). Johnson had been out of prison for three years and SBPD suspected that he had spent his time setting-up an elaborate prescription drug ring that sold Oxycodone and Xanex. In early summer of 2009, Sam Slowik, a local drug user, provided SBPD with information on Johnson in exchange for a plea deal. That information included Johnson's usual method of obtaining prescription pills: providing fake MRIs to drug users in Sunshine Beach, sending them to doctors' offices to show the MRI and obtain prescriptions, and driving them to pharmacies to exchange the written prescriptions for the prescription pills. In exchange, the drug users would keep a large number of the prescription pills.

At 3 a.m. on August 2, 2009, SBPD officer, Mark Mansion, was on duty when he saw Johnson's pickup truck in the public parking lot in front of Johnson's apartment. Mansion walked up to Johnson's truck, bent down, and attached a GPS Nano magnetically to the undercarriage of the truck. Mansion went back to police headquarters and synched his computer with the GPS Nano he just installed. Mansion also set up geo fences to automatically alert him if Johnson approached any of Sunshine Beach's eleven pharmacies.

From August 2 to August 19, the GPS Nano sent information about Johnson's locations every three minutes. Mansion did not log on to review any information about Johnson's locations in August. A later review of the stored GPS information showed that Johnson's truck traveled to several doctors' offices in South Florida in August, as well as many locations around Sunshine Beach, including grocery stores, the gym, a fenced-in location at Johnson's mother's address, Burger King, and the residences of several known drug users.

On the morning of August 20, Mansion received an email notification that Johnson's truck came into close proximity with a pharmacy. The afternoon of August 20, Mansion received a second email notification that Johnson's truck came into close proximity with another pharmacy. Mansion alerted patrol cars near the pharmacy, and Officers Natalie Norris and Roger Ryan quickly located Johnson's truck.

After following Johnson's truck, Officers Norris and Ryan saw Johnson fail to make a complete stop at a stop sign, and then pulled him over. When Johnson rolled down his window, Officer Ryan smelled the odor of marijuana. Officer Ryan then pulled Johnson out of his car, and Officer Norris conducted a search of his vehicle. Officer Ryan found 15 grams of marijuana in a clear plastic sandwich baggie on top of the center console, and five prescription pill bottles in the glove compartment. The bottles had five different patient names on them, none of which were Johnson. Each bottle contained between 60-65, 30mg Oxycodone pills.

Johnson was charged with felony trafficking of Oxycodone and misdemeanor marijuana possession. Johnson's attorney, Sam Smart, filed a motion to suppress the evidence claiming that the GPS tracking device was an illegal search and seizure. The prosecutor argued that the GPS tracking device was not a search or, alternatively, that the search was reasonable. After a short hearing, the judge denied the motion, finding that there was no search because the GPS device was installed on Johnson's vehicle in a public place and tracked Johnson's movements to pharmacies, which were also public places.

The case proceeded to trial. The trial appeared to proceed smoothly, with Mansion, Norris, Ryan, and Slowick all testifying. A technician who tested the drugs also testified, as did an expert on GPS tracking. The trial resulted in Johnson's conviction on all counts as charged, with the sentencing to take place at a later date.

After the trial, Johnson's attorney, Sam Smart, went to work on post-trial and sentencing related issues. Legal research was not going well, so Smart decided to search the jurors on Google, Myspace, and Facebook. To Smart's surprise, Amanda Brown and Charles Dickerson, two of the jurors, had Facebook pages with profiles that were open to the public. Smart thought everyone would have private profiles, but apparently he was mistaken.

Amanda Brown, Juror #1, had a Facebook status updated shortly after the trial that read: "Week of jury duty hell over." Charles Dickerson, Juror #2, had a Facebook page that revealed several children, including a son who was police officer in Georgia. One picture of Juror #2 and his son bore the caption "The good son ;)" and another said "Laying down the law." As Smart was looking at the Facebook page, Juror #2's son posted: "You scored one today for the good guys, dad!"

Although Smart found Juror #1's message aggravating, he was more interested in Juror #2. He thought he asked the jurors if they had relatives who were in law enforcement. Smart pulled out his notes from voir dire. The case had a panel of 20 prospective jurors (from among the 100 who had reported for jury duty and been pre-screened by the clerk of court). The 20 prospective jurors were all questioned by the judge, the prosecutor, and finally by Smart.

Smart's notes confirmed that he had asked the venire if any were related to a police officer. Only one man responded that his brother was a police officer in Pensacola. Smart then asked the venire "Anyone else?" Juror #2 and the rest of the jury pool were silent, and no follow-up questions were asked on the subject. Smart used a peremptory strike on the prospective juror whose brother was a police officer. Smart also used a peremptory strike on a woman because she gave him a bad look during jury selection. The prosecution used one peremptory strike on a woman who said she would have a hard time judging another human being, and three strikes on prospective jurors who thought that marijuana should be legalized. After these strikes, Juror #2 was selected, along with five others and an alternate.

Smart filed a post-trial motion for a juror interview and new trial based on Juror #2's nondisclosure. Smart argued that he would have used a peremptory strike on Juror #2. The prosecutor stipulated that the printouts were accurate printouts from Juror #2's Facebook page, but having a son who was a police officer in another state was not material. The prosecutor also argued that Smart could have researched Facebook immediately after voir dire instead of waiting until after the jury returned its verdict. After a lengthy hearing, the trial judge agreed with the prosecutor's arguments and denied both the request for a juror interview and a new trial. Johnson was subsequently sentenced to 15 years in prison based on the crimes he was convicted of and his prior record.

Smart filed an appeal on Johnson's behalf with the District Court of Appeal, questioning, 1) whether a GPS tracking device was an illegal search and seizure; and 2) whether Juror #2's nondisclosure should have resulted in a new trial. The appellate court affirmed without a majority opinion. There was also a strongly worded dissent finding that both issues had merit and should be addressed by the Florida Supreme Court.

Feeling confident about his case, but no longer in his own abilities, Smart has associated with you to represent Johnson and seek review from the Florida Supreme Court. After your jurisdictional brief, the Florida Supreme Court took the case and asked for a brief on the merits. Both state and federal law may be used to address the issues on appeal.

ISSUES ON APPEAL

The issues on appeal are as follows:

I. Whether the trial court erred by finding that the SBPD did not conduct a search when they attached and monitored a GPS tracking device on Johnson's truck without a warrant?

II. Whether the trial court erred in failing to grant a juror interview and/or new trial based on Juror #2's failure to disclose information?

The issues can be restated in your brief on the merits. Your discussion of both issues should include the standard of review and what relief Johnson should be afforded if he prevails on that issue.

When presenting oral argument, one team will argue for Johnson and the other team will argue for the State. One team member from each team will argue the first issue and the other team member will argue the second issue.

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COMPETITION PROBLEM FOR THE 2012 ROBERT ORSECK MEMORIAL MOOT COURT COMPETITION

Beachtown is the county seat and largest city in Sunshine County, the second largest county per-capita in the Florida Panhandle. According to the preliminary 2012 census estimates, 75,000 residents live in Beachtown. Although Sunshine County is predominantly a homogeneous and rural county, Beachtown is more eclectic. It is home to a small, liberal arts college that throughout the years has attracted a varied group of students, faculty, and other professionals who make Beachtown a diverse place to live. Beachtown thrives on tourism, which drives the local economy. In 2010 and 2011, Beachtown was ranked as one of the "Top Ten Places to Live" by Home & Health Magazine, one of the most widely distributed periodicals in the country. This recognition was welcome news, because in 2009, Sunshine County was listed in an essay titled "Places to Avoid: Twenty Discriminators" published by the Racial Equality League, a respected nationwide not-for-profit, based on employment and criminalization statistics. Since publication of the 2009 essay, the stated goal of the Sunshine County commissioners' office has been to improve the County's public image.

The Sunshine County School District is small but well-regarded. It consistently ranks as one of the top school districts in the Southeast United States. The school district is comprised of four elementary schools, North Elementary, South Elementary, West Elementary, and East Elementary, which sits just outside of Beachtown city limits. There is one middle school, Central Middle School, and one high school, Sunshine High School, which both sit in Beachtown.

In 2008, the Sunshine School District considered adopting uniforms for all elementary age school children, but the school board rejected uniforms in favor of adopting the following dress code, which was the first dress code the school board incorporated into its long-standing code of conduct:

1. Shorts, skirts, or dresses are acceptable if they reach the mid-thigh level or fingertip length.

2. All pants, shorts, and skirts must be properly sized and worn secured at the waist level. Baggy/saggy pants are not allowed.

3. Tops must be long enough to clearly overlap the belt line or stay tucked in during the course of the normal movement throughout the school day.

4. Bare midriff tops, halters, revealing tops, tank tops, muscle shirts, mesh clothing, see-through clothing, blouses or shirts with string straps are not allowed. Shirts must be at least 3 inches in width at the top of the shoulder. No cleavage is to be seen at any time.

5. Hats, headgear, or any headcovering are not allowed unless school administrators give prior permission.

6. No underwear is to be seen at any time.

7. Clothes or tattoos that show profanity, violence, sexually suggestive phrases or pictures, gang related symbols, alcohol, tobacco, drugs or advertisements for such products or other phrases or symbols deemed inappropriate by the administration will not be allowed.

8. Wearing apparel which tends to identify association with secret societies or gangs as prohibited in Florida Statues is not allowed.

9. Clothing which is not worn appropriately, is not properly fastened, or has rips/tears that are indecent will not be permitted.

10. School administrators have final authority to decide if clothing complies with district rules.

Occasionally from 2008 to 2011, a child would come to school wearing an offending garment, and the student would have to wait in the school office until a parent or guardian could provide acceptable clothing. But during this time, the school board did not receive a single complaint about the school dress code.

That changed near the end of the school year in spring 2011. For the first time, students at Eastern Elementary School and Central Middle School began wearing t-shirts that referenced and promoted certain religions. First, students who attended Sunshine Baptist Church wore t-shirts that read: "Sunshine Baptist Church Youth Group." Not to be outdone, students from Central Methodist Church wore t-shirts that read: "Central Methodist Church has the best youth group." Then, students who attended synagogue at Temple Beth Shalom wore t-shirts that read: "God loves Jews." Before year-end, students who attended the Community Mosque of Sunshine wore t-shirts that read: "Islam is a Beautiful Faith." Although the school board received a couple complaints, all was well through April 2011. During this time, the school board took no formal action, allowing students to wear the religious t-shirts. As Grace Wilkes, a prominent school board member, stated during a March 2011 "off-the-record" interview: "this harmless fashion trend will end as quick as it started."

In May 2011, however, the school board received at least two dozen parent complaints regarding religious t-shirts. The great majority of the complaints came from parents who were angry about three different t-shirts students recently began wearing. The first set of t-shirts read "There is no god," the second read, "Organized religion is the devil," and the third read, "Atheists Die In Hell." In June alone, the parent complaints doubled in numbers. Then, on the last day of school in 2011, five high school students who attended a non-denominational church showed up with t-shirts that read "Islam is of the Devil," and at 3:30 pm that same day, Grace Wilkes of the school board received an email from an anonymous email address ("ChurchvState@google.com"), which read, "stop supporting organized religion in schools or all students will pay the serious price!" Thankfully, before the t-shirt trend could become more heated, the school year ended.

Over the summer, several parents again brought up the issue of school uniforms. Eastern Elementary School Principal, Mark Rose, told the school board that uniforms would be too difficult to implement in such a short period of time, but asked the school board to consider adopting a policy banning religious t-shirts. At its July meeting, the school board briefly considered banning all apparel that mentioned or referred to any religion but instead decided to handle the matter in a less direct way. The school board adopted a policy, replacing #3 of the prior dress code with an amended #3 that read as follows: "All students must wear collared shirts in solid colors without text, such as polo-type, oxford, or woven dress shirts." On the same day, the school board also adopted a new #11 to the dress code, which read, "No clothing or accessory may denigrate or promote discrimination for or against an individual or group on the basis of age, color, disability, national origin, sexual orientation, race, religion, or gender." With these revisions to the dress code in place, the school board hoped that the t-shirt trend would not resume in the fall.

On the first day of the Fall 2011 semester, September 5th, five fourth grade students at Eastern Elementary came to school with "IIOTD" neatly embroidered on the sleeves of their polos. The embroidery was small, seemingly professionally done, and took up an approximate 1 inch square on the students' sleeves. An individual with 20/20 vision could read the text from no more than five feet away. The "IIOTD" lettering was not noticed by faculty until lunchtime. Halfway through the students' lunch, word spread that the "IIOTD" lettering stood for "Islam is of the Devil." Many students in the cafeteria became unsettled, and some students of varying faiths started chanting "We love Islam." Before the school-day ended, Mr. Rose pulled all the students who were wearing polos with IIOTD embroidery out of class, and he called the students' parents to bring a change of clothes. Parents of four of the students came and delivered plain polos, and their children changed clothes and were allowed to finish the school day with their peers. But Polly Price refused to come to the school and bring her son, Junior Price, a change of clothes. She complained over the phone that nothing was wrong with her son's polo. In turn, Mr. Rose demanded that Junior spend the afternoon in the principal's office. When Mrs. Price showed up that day to pick up her son, she warned Mr. Rose in person: "You have no right to punish my son based on his religion. Anyone do it again, I'll have their head."

The following morning, on the second day of the Fall 2011 semester, the five children who had worn the IIOTD polos came to class in plain polos that complied with the dress code. Each student's parent, however, including Polly Price, walked the children to school while wearing "Islam is of the Devil" t-shirts. A verbal sparring match broke out on school property between a parent wearing an "Islam is of the Devil" t-shirt and a Christian parent who believed the t-shirts were inappropriate and discriminatory. The spat resulted in some pushing but no punches. The police were called to break up the fight. No one pressed charges, but word of the altercation did reach the press. By lunch time, a news crew from Pensacola arrived at Eastern Elementary. The news crew interviewed consenting parents and ran a prime-time story on the dress code. While no arrests were made, no other physical altercations occurred, and no other schools in the county faced similar issues with respect to the dress code, the area around Eastern Elementary was a circus for the rest of the week. On Thursday morning, protestors for and against the "Islam is of the Devils" t-shirts gathered on an empty lot approximately 900 feet away from the school's property.

On Friday September 9, 2011, Mr. Rose contacted the Sunshine County School Board, which convened an emergency meeting that Saturday. In the end, the School Board attorney, John Jones, was asked to obtain an injunction prohibiting anyone who was wearing an "Islam is of the Devil" or "IITOD" shirt from coming near school property. First thing Monday morning, Mr. Jones filed a lawsuit against the five parents who had first walked their children to school while wearing "Islam is of the Devil" t-shirts and seeking a temporary and permanent injunction against anyone wearing an "Islam is of the Devil" or "IITOD" shirt from coming near school property. The parents hired an attorney, Dan Smith, who vigorously defended the case on the basis that the requested relief was far too broad and that both the children and the parents had a First Amendment right to wear clothing that reflected their honestly held religious beliefs. He also argued that an injunction from wearing certain clothing outside school property or at school-sponsored events was unreasonable and unenforceable; some homes were only a few yards from school property, and people residing in those homes could make their own decisions about what to wear. And he filed a counterclaim requesting a declaration from the Court that the school board violated the First Amendment rights of the parents' children by preventing them from wearing IIOTD polos under the policy against

wearing clothes that "denigrate or promote discrimination for or against an individual or group on the basis of age, color, disability, national origin, sexual orientation, race, religion, or gender."

The case was assigned to Chief Judge of the Circuit, William Aberforth, who allowed the case to proceed speedily. After a hearing on the school board's motion for temporary injunction, the judge put in place a limited temporary injunction that forbid the five parents from wearing "Islam is of the Devil" t-shirts to pick up or drop off children from school. In December 2011, Judge Aberforth held a full-day evidentiary hearing on the remaining claims, where he heard from school board members, school administrators, and parents. No students and no teachers testified, and parents and administrators provided conflicting versions of what was occurring at and near the schools.

After the hearing, the judge stated his ruling from the bench, finding there was "probably a good legal right" to preserve the peace both inside and outside the schools, there was no adequate remedy at law, and more than insignificant harm will arise absent injunctive relief, "especially with all the media attention distracting from the business of education." Judge Aberforth then entered a written order permanently enjoining anyone from wearing a shirt that explicitly compared any religion to the devil from coming within 1,000 feet of Sunshine County School Board property. Finally, Judge Aberforth denied the parents' counterclaim, stating vehemently that the school board had "all the right in the world to govern the dress and behavior of its students, and the First Amendment does not provide any child with the right to wear discriminatory clothing to a place of learning."

On behalf of Polly Price and the other four parents who had previously worn the "Islam is of the Devil" t-shirts, Mr. Smith filed an immediate appeal to the First District Court of Appeal. The order was certified by the District Court as passing on an issue of great public importance requiring immediate resolution by the Florida Supreme Court. The Florida Supreme Court decided to review the case, and asked the parties to provide briefs on the merits. Mr. Smith has associated with your team of experienced appellate practitioners to draft an initial brief and make the oral argument.

ISSUES ON APPEAL

Please draft the initial brief in the appeal of *Polly Price et al., Appellants v. Sunshine County School Board, Appellees*, Case No. 2012-01-01, in the Supreme Court of the State of Florida. All briefs will be written for the appellants. The two issues on appeal are as follows:

1. Whether permanent injunctive relief was properly granted by Judge Aberforth in enjoining anyone from wearing a shirt equating any religion with the devil from coming within 1,000 feet of school property;

2. Whether the school board violated the First Amendment rights of its students by preventing them from wearing IIOTD polos under the policy against wearing clothes that "denigrate or promote discrimination for or against an individual or group on the basis of age, color, disability, national origin, sexual orientation, race, religion, or gender."

The issues can be restated in your brief on the merits. All applicable standards of review should be addressed, as well as what relief the parents should be afforded if they prevail on that issue. State and federal case law, analogous statutes and administrative rules, as well as secondary sources, may be used as authorities in the brief. When presenting oral argument, one team will argue for the parents and the other team will argue for the school board. One team member from each team will argue each issue.

COMPETITION PROBLEM FOR THE
2013 ROBERT ORSECK MEMORIAL MOOT COURT COMPETITION

While most Tampa Bay Buccaneers fans remember October 16, 2011, as one of the few winning game days in a tough season, a few fans were not so lucky that day. During that balmy afternoon game, six cars parked in a row in Lot 15 of the stadium were burglarized. Passenger side windows were smashed; and wallets, purses, credit cards, and cash were stolen. All of the car owners filed reports with the Hillsborough Police Department. The police were unable to lift fingerprints off the cars, but were hopeful that they could catch the criminal(s) involved when the victims' credit cards were used.

Indeed, three stolen Visa credit cards were used at Walmart, Publix, and Target stores in Hillsborough County on October 17, 18, and 19 respectively. When the investigating police Detective, Jim Coffee, of the Hillsborough Police Department's Special Investigations Unit, viewed the surveillance video from Walmart, he thought he recognized the man using the credit cards as Stewart West.

Detective Coffee believed he recognized Stewart West because he had testified against Mr. West in a 2010 vehicle burglary case. In that case, Detective Coffee caught Mr. West breaking into a string of cars in broad daylight in a residential neighborhood in New Tampa. Mr. West, who was wearing gloves at the time, broke out passenger windows and stole several iPods, iPhones, Garmin GPS devices, and removable car stereo components from cars parked along one city street. Mr. West was convicted of several counts of burglary of a conveyance by a jury and sentenced by the judge to time served and probation.

Detective Coffee recalled that Mr. West had a lengthy rap sheet at the time of the 2010 arrest, and when Detective Coffee pulled an updated criminal history report, he saw several cases involving Mr. West. One case from 1997 involved a guilty plea to charges of fraudulent use of a credit card related to breaking into a race trailer at the infield garage at Daytona International Speedway during the day of the Daytona 500. The Visa credit card was used at a Target store across the street from the Speedway the day after the race. In that case, Mr. West pled guilty to burglary and fraudulent use of a credit card.

On December 16, 2011, Stewart West was arrested for the crimes that occurred on October 16-19, 2011, and charged with six counts of felony burglary of a conveyance and three counts of misdemeanor fraudulent use of a credit card. As the case headed toward trial, Mr. West offered to plea to one misdemeanor crime: using a credit card for a $78 purchase as captured on video at Walmart. Mr. West claimed that he found a wallet on the ground and used a credit card in the wallet to buy a few things he desperately needed. He offered to plea guilty to this crime and serve three months' time in county jail. However, Mr. West denied breaking into any vehicles and denied using any of the other credit cards.

After learning about Mr. West's plea offer and having a quick consultation with the prosecutor, Detective Coffee decided to obtain the historical cell site data from Mr. West's Verizon Wireless cell phone on the night of the Buccaneers' football game and each of the days that the stolen credit cards were used. Historical cell site information involves records that identify the cell

phone tower through which customer calls are handled, thereby identifying the location from which a call is made. Wireless phones constantly communicate with nearby cell towers, revealing approximate locations for the phones at any time. The wireless providers store the cell sites, together with other information from each outgoing and incoming call such as the calling number, the time, and the area code for the location. The information is automatically collected and maintained in most wireless providers' billing departments.

Detective Coffee issued and properly served an investigative subpoena on Verizon Wireless under subsection 934.23(4)(b), Florida Statutes (2011). The subpoena sought the historical cell site information from Mr. West's cell phone for the week of October 16, 2011. No court order or warrant was obtained by the Special Investigations Unit in connection with the issuance of the subpoena, nor was Mr. West notified by law enforcement authorities or Verizon Wireless that the records were being requested.

Although it took Verizon Wireless some time to produce information responsive to the investigative subpoena, Verizon Wireless's billing department produced a huge stack of paper showing the location of Mr. West's cell phone every minute on October 16-22, 2011. The Verizon Wireless billing records showed Mr. West's phone to be in the vicinity of Raymond James Stadium on the afternoon of October 16, 2011, although it could not precisely pinpoint him to Lot 15. The records did show Mr. West's phone to be in Wal-Mart on the morning of October 17, and Target on the afternoon of October 19. None of the records showed a location near Publix on October 18.

Detective Coffee provided this information to the prosecutor, who in turn handed it over to Mr. West's defense attorney as discovery in the case. Armed with evidence that Stewart West (or at least his cell phone) was near the scene of the burglaries and two of the three stores, the prosecutor rejected Mr. West's plea offer and did not make an offer.

Mr. West's defense attorney immediately moved to suppress the evidence. He filed a written motion and set a hearing, where he argued that the Fourth Amendment was implicated and a warrant was required before any cell phone data could be produced. At minimum, the attorney claimed, subsection 934.23(4)(a), Florida Statutes required a warrant or a court order instead of an investigative subpoena. Furthermore, he argued that the cell phone data, having been obtained improperly, must not be allowed into evidence at trial. The trial court judge denied the motion to suppress, and commented that although perhaps a court order should have been obtained, he would have granted the order because he saw reasonable grounds to believe the cell phone records were relevant, and did not violate Mr. West's expectation of privacy because the information provided by Verizon merely established Mr. West's cell phone location while in a public place.

After successfully defeating Mr. West's motion to suppress, the prosecutor filed a notice of intent to use similar fact evidence and properly provided a written statement that the State intended to introduce evidence of the 2010 car burglaries and the 1997 trailer burglary. Mr. West's defense attorney objected that these crimes were being offered merely to show the Defendant's propensity to break into vehicles. The prosecutor responded that the prior crimes were proper collateral crimes evidence, commonly referred to as Williams Rule evidence, used to show motive, plan, scheme, and identity of the defendant. The trial court looked at whether Mr. West committed the prior crimes, whether the prior crimes were sufficiently similar, when the prior crimes occurred, and whether it

would be too prejudicial to admit evidence of the prior crimes. After weighing these factors, the trial court judge ruled in favor of the State, allowing the introduction of evidence of the 2010 car burglaries and the 1997 trailer burglary, particularly commenting that since identity was an issue in the case, the prosecutor could use the prior crimes.

The case proceeded to trial in April 2012. Evidence of the prior crimes, as well as the cell phone data, were introduced into evidence at trial over defense objections. After thirty (30) minutes of deliberation, the jury convicted Mr. West of all charges, except the use of the credit card at Publix. The trial court judge sentenced Mr. West to time served on the misdemeanor crimes and consecutive terms of imprisonment on the felony crimes, resulting in a combined total prison sentence of thirty (30) years. Mr. West appealed his conviction, raising two (2) issues on appeal.

First, Mr. West's attorney argued that the Fourth Amendment was implicated and a finding of probable cause by a judge and a subsequent warrant was required before the historical cell phone data could be produced. By failing to obtain a warrant, the police illegally searched Mr. West's phone records to find his physical location, in violation of his Fourth Amendment rights.

Second, Mr. West's attorney argued that evidence of the 2010 car burglaries and the 1997 trailer burglary should not have been admitted. The prior crimes were not sufficiently similar, were remote in time, were highly prejudicial to Mr. West, and became a feature at trial.

The appellate court agreed with both of the Defendant's arguments on appeal. Judge Herbert Smith of Florida's Second District Court of Appeal wrote the majority opinion holding that there was a search under the Fourth Amendment which required a search warrant, or at least a court order, under subsection 934.23(4)(a), Florida Statues. He also held that the defense attorney's objections to the Williams Rule evidence had merit and that it was error to admit evidence of the prior convictions. The majority further concluded that neither error could be considered harmless. The majority opinion reversed and remanded the case for a new trial precluding the admission of the cell phone data or prior crimes. The opinion also certified the following question of great importance to the Florida Supreme Court: Whether a warrant establishing probable cause is necessary before law enforcement may seek historical cell site data.

Specifically, on the Fourth Amendment issue, Judge Smith found that obtaining a week's worth of locations, including public and private areas, implicated Fourth Amendment protections. Obtaining cell site information, at least for the extended period of time in this case, would require more than compliance with subsection 934.23(4)(b), Florida Statutes. The detective and the State should have obtained a warrant or court order establishing probable cause in order to obtain Mr. West's cell phone data. Judge Smith wrote, in relevant part:

> It does not appear that the State could have shown probable cause. It did not know what the historical cell phone data would reveal, whether it would show the defendant in private areas or only on public roadways. Cell phones are often used indoors, in private homes, in bedrooms, or in bathrooms. No person would invite the police to monitor his or her bedroom or bathroom every sixty

> seconds. The home, the bedroom, and the bathroom have the highest expectation of privacy – which the police here necessarily invaded.

The majority opinion continued:

> [a]lthough other courts have found differently, in light of *United States v. Jones,* ––– U.S. ––––, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), where the U.S. Supreme Court unanimously ruled that the governments installation of a GPS device and tracking of twenty-eight days worth of car movements was a search, we must find that the historical cell site information obtained in this case was a search, and the police search was not reasonable.

On the Williams Rule issue, Judge Smith held that the prior crime evidence was used to establish identity, which requires proof of substantial similarity between the past crimes and the current charges. In holding the trial court abused its discretion in admitting the similar crimes evidence, the majority stated:

> These crimes were not sufficiently similar, and there was no pattern that showed something special or unusual that pointed to the Defendant. Indeed, Detective Coffee did not suspect Mr. West until seeing him on videotape. And, the facts are not unique in nature nor do they establish a pattern so unusual to suggest the burglaries could have only been committed by Mr. West.

Conversely, a short dissenting opinion by Judge Alfred Adams distinguished historical data from real time searches:

> The police did not follow Mr. West around; they simply obtained past information to determine whether he was at the scene of the crime at the time of the crime. While it would have been more prudent to obtain a warrant, no warrant or showing of probable cause was necessary. Technology, especially in the hands of a third party, should be allowed to be put to good use catching known thieves. Although the majority opinion makes much of privacy issues in this case, if a person gives his cell phone provider access to his bedroom and bathroom, then the police should be invited into these spaces as well.

Judge Adams also would have found no error in admitting the prior convictions. He wrote:

> It is clear that Mr. West's prior convictions are evidence of relevant collateral crime evidence under Williams Rule. Mr. West's past criminal history shows him to be a burglar, who breaks into the same type of vehicles from the same window. The vehicles are relevant to establish a unique pattern and shows identification of the defendant.

> Unlike many burglars, who operate under cover of darkness, this burglar operates during the day time, wearing gloves, and when he is successful in stealing credit cards, also uses them during the daytime. These crimes were not too remote in time to be relevant, and were highly probative. Whether any prior crimes can be admitted under the Williams Rule is a highly individualized and factual inquiry, and, as the trial court made a proper inquiry, we should defer to that judge on the facts.

The State of Florida retained your firm as special counsel to assist the Attorney General's office and represent the State before the Florida Supreme Court. The Supreme Court of Florida accepted jurisdiction over the case, and asked for briefing on both issues on appeal. Both state and federal law, as well as secondary sources, may be used to address the legal issues. Cases and other authorities may also be used if desired to provide more information on the mechanics of recording, storing, and obtaining historical cell cite information.

ISSUES ON APPEAL

The only issues on appeal are as follows:

> **I. Whether the appellate court incorrectly held that obtaining historical cell site information was a search requiring a warrant or other showing of probable cause when there was no reasonable expectation of privacy in records held by a third party?**
>
> **II. Whether the appellate court erred in reversing the trial court's decision to allow in Williams Rule evidence when the prior convictions were similar, recent, and not unduly prejudicial?**

All briefs will be written as initial briefs by the Petitioner, the State of Florida. The issues can be restated in your brief on the merits. Your discussion of both issues should include the standard of review and what relief should be afforded if the State of Florida prevails on that issue.

When presenting oral argument, one team will argue for the State of Florida and the other team will argue for Mr. West. One team member from each team will argue the first issue, and another team member will argue the second issue.

COMMUNICATOR

Newsletter of the Volusia County Bar Association

August, 2009

Passing the Gavel

Philip J. Bonamo elected 80th President of the Volusia County Bar Association

The slate of officers and directors, as proposed by the nominating committee, was elected with unanimous approval of attending members at the July 31, 2009 membership meeting at Bethune-Cookman University. County Court Judge Mary Jane Henderson administered the oath of office to the newly elected officers and directors.

Plaques of appreciation were presented to outgoing President Robert A. Sanders, Jr., Directors Kelly Parsons, Drew Williams and Thomas Upchurch and YLD Representative Tiffany Adleman.

Newly appointed President Philip J. Bonamo received his J.D. from Stetson University College of Law and B.A. degree from the University of Florida. Prior to joining the law firm of Rice & Rose, he was a federal prosecutor for the United States Attorney's Office, Middle District of Florida. He also worked as an Assistant State Attorney for the State Attorney's Office, Seventh Judicial Circuit. During his tenure with the State Attorney's Office, President Bonamo handled and tried all types of criminal matters, including homicides, career criminal prosecution and complex white-collar/fraud cases. President Bonamo is Board Certified as a Criminal Trial Lawyer by the Florida Bar. He is admitted to practice in all Florida courts and in 2000 was admitted to the United States District Court, Middle District of Florida.

CLE Seminar: Foreclosure Defense

Friday, August 14, 2009 9:00 a.m. - 12:00 noon
747 Office Suites, 747 S. Ridgewood Avenue, Daytona Beach
3.0 hours (applied for) - $45.00 - boxed lunch provided
See back page to register.

Justice Teaching: Training Session with Justice R. Fred Lewis

Wednesday, August 19, 2009 ~~~~~ 2:00 - 5:00 p.m.
Museum of Arts & Sciences, 352 S. Nova Road, Daytona Beach

followed by 5:00 Cocktails Reception

Wednesday August 19, 2009 ~~~~ 5:00 - 7:00 p.m.
Museum of Arts & Sciences, 352 S. Nova Road, Daytona Beach
No charge for those who attend the training session, $10 per person for everyone else!

Page 3: What is Justice Teaching? See back page to register.

YLD Social at Ormond Wine

Friday, August 27, 2009 ~~~~ 6:00 p.m. - 8:00 p.m.

1108 W. Granada Blvd., Ormond Beach (next door to Houligan's)
Private Tasting - $10 per person

Page 5: YLD News & Notes See back page to register.

YLD NEWS AND NOTES

by Katherine Hurst Miller, YLD Representative

Welcome to the Young Lawyers Division (YLD) page of the *Communicator*. Our plan is to have the YLD page become a regular feature of the *Communicator*. Upcoming YLD events will be posted here, along with an article or two every month. Please check the YLD page regularly, share its contents with others, and contribute your own thoughts and ideas for the YLD with us.

WAIT! Do not turn the page because you think you are not a young lawyer! You are a member of the YLD if you are under the age of 36 or if you have been practicing in Florida for fewer than 5 years. There are over 100 attorneys eligible for YLD membership in the Volusia County Bar Association (VCBA). Are you one of them?

Even if you are not eligible for YLD membership, you still might find something of interest here. After all, YLD events are generally open to all members of the VCBA. We welcome the involvement of any lawyers, new or seasoned, in YLD programming. Learn with us, teach us, help us to become the next great generation of Volusia attorneys.

The unofficial motto of this year's YLD is "more value now." This means that the YLD is going to sponsor more lunch-and-learn CLE programs and more socials. In fact, the YLD is going to schedule an event every month until July 2010. "More value now" also means that we want to provide YLD members with the tools to make themselves more valuable to their employers and the legal community at large.

The legal market is currently as tough as any young lawyer, and maybe any seasoned lawyer, has ever encountered. As I think about the current environment for young lawyers, I am reminded of a church I once visited. Regardless of your religious beliefs, the church building would take your breath away. Soaring stone edifice. Intricate stained glass windows. Courtyards and gardens and gorgeousness. I was surprised to learn that construction began on the sanctuary the week the stock market collapsed in the Great Depression. Talk about bad timing. But there I was in 2000, enjoying the space with hundreds of others. The church founders persevered through a very tough time to create an enduring monument to their beliefs.

Despite what the cable news talking heads tell me, I do not think our current economic situation is on par with the Great Depression. But I do think that we can each take this tough time early in our careers to dream lofty goals, build strong foundations, and persevere to improve ourselves and our law practices. We can each be our own cathedrals of the law and begin to leave a lasting imprint on our legal community.

The YLD can help you as an attorney learn new skills, master strengths, network, and market yourself like no other organization. If you are not yet a member, we invite you to join by submitting a membership application, available on www.volusiabar.org. If you are a member, we encourage you to take advantage of all the benefits of membership: the monthly newsletter; meetings and CLE seminars; community service opportunities; and advertising and referral opportunities. It's going to be an exciting year for YLD members! We look forward to seeing you soon at our events.

SAVE THE DATE! YLD EVENTS

August 27	YLD Social at Ormond Wine Co.
September 18	Lunch & Learn CLE: Professionalism Speaker: Hon. Robert K. Rouse, Jr.
October 15	YLD Social – joint meeting with Young Professionals Group
November	Lunch & Learn CLE : Things I wish I knew as a Young Lawyer" Speaker: Philip J. Bonamo
December 18	Membership Drive Luncheon Speaker: The Florida Bar YLD President R.J. Haughey, II
RSVP:	volusiabar@bellsouth.net

YLD BOWLING FOR SCHOOL SUPPLIES!

Thank you to everyone who participated in the Bowling for School Supplies events. Your generosity yielded 20 boxes of school supplies for students of Galaxy Middle School and Holly Hill Middle School.

A special thank you to our sponsor, Christopher Dubois of LexisNexis. A donation of $1,000 enabled us to purchase additional school supplies for the students.

Chris can be contacted by phone (407) 690-7635 or email christopher.dubois@lexisnexis.com for more information about products and services.

LexisNexis®

COMMUNICATOR

Newsletter of the Volusia County Bar Association

September, 2009

Thomas Upchurch Appointed Elder Law Section Chair

Recently appointed by VCBA President Philip Bonamo, Thomas Upchurch will chair newly formed Elder Law. The Elder Law Section will promote ethical and professional standards, create service opportunities to educate the public, identify issues relevant to elder law, work to improve the laws that affect the elderly and offer continuing education seminars.

Mr. Upchurch received his B.A. in 1998 from Southern Methodist University and J.D in 2005 from Nova Southeastern University School of Law. He was admitted to The Florida Bar in 2005. Prior to joining the law firm of Every, Stack & Upchurch, Mr. Upchurch was an Assistant State Attorney for the Sixth Judicial Circuit. In addition to being a member of the Volusia County Bar Association, he is a member of the National Academy of Elder Law Attorneys, the Florida Academy of Elder Law Attorneys and the Florida Association of Criminal Defense Lawyers.

See back page to become a member of the Elder Law Section.

YLD LUNCH & LEARN SEMINAR

PROFESSIONALISM - JUDGES AND LAWYERS: A TWO-WAY STREET

An Overview of Professionalism Guidelines, Comparison & Contrast with Ethics Standards & Enforcement

Honorable Robert K. Rouse, Jr.

CLE APPROVED: 1.0 General Hour, 1.0 Professionalism Hour

September 18, 2009 - DeLand Courthouse - 11:45 a.m.

VCBA Member Price: $10.00 Nonmembers: $15.00 Boxed Lunch Provided
See back page to register.

25th ANNUAL PRO BONO AWARDS CEREMONY

Thursday, September 24, 2009

The Plaza Resort & Spa

600 N. Atlantic Avenue, Daytona Beach

6:00 p.m. Cocktail Reception -- 6:45 Dinner & Program
$15.00 person - see back page to register

Who are the award winners? See page 3 for a list of VCBA members that will be recognized at the banquet.

YLD NEWS AND NOTES

by Katherine Hurst Miller, YLD Representative

Professionalism differs from ethics in the sense that ethics is a minimum standard. . . while professionalism is a higher standard expected of all lawyers. Professionalism imposes no official sanctions. It offers no official reward. Yet, sanctions and rewards exist unofficially. Who faces a greater sanction than lost respect? Who faces a greater reward than the satisfaction of doing right for right's own sake? Interview with Harold G. Clark, Chief Justice, Supreme Court of Georgia from The Florida Bar's Henry Latimer Center for Professionalism Website (available at http://www.floridabar.org).

The distinction between ethics and professionalism was not always clear to me, until one of my law school professors drew an analogy to a house. According to Bobbi Flowers, the Wm Reece Smith Jr. Distinguished Professor at Stetson College of Law, "Your life as a lawyer is like a house. The Rules of Professional Conduct are like the walls of the house." Flowers taught that lawyers can choose where to live within that house. An ethical person, following the Rules of Professional Conduct, "will remain in the house (and the profession) but your life will be lived in the basement. It is still in the house but not very pleasant." She said that lawyers choosing to hold themselves to a higher standard by acting professionally, "will find your legal life is lived in the penthouse."

The contrast between a basement and a penthouse is stark to me. Native Floridians may not be that familiar with the basements, and may envision perfectly nice, finished spaces. Where I grew up in Texas, however, most basements were the dark, unfinished, storage spaces you crept into when a tornado threatened overhead. I would not want to live in that kind of basement. On the other hand, the penthouse seems like a pretty great place to live. There is a reason Barbie's bedroom is on the top floor of her "Dream House." Literally, there are benefits to living on an upper floor: the views might be better, street noise might be further away, ceilings might be higher, and privacy might be greater. But there are also hassles to living on an upper floor, the primary example being stair climbing.

These same benefits and hassles extend to the analogy. It is more difficult to live professionally than ethically. Many of the rewards of professional living are intangible. People may pass you by and never know - or never care - whether you are acting professionally in your work and life. But you will know.

I am a believer in zealous advocacy. But I am also a believer in professionalism. So, thanks to the lawyer who agrees to a ten-day deadline extension. Thanks to the lawyer who picks up the phone to call before sending me a scathing letter or an excoriating motion. Thanks to the lawyer who works with me to schedule a hearing - and who provides the earliest notice that the hearing can be cancelled. Thanks to the lawyer who will ride in the elevator with me after the contested proceeding. I know who you are. More importantly, so do you.

If you are interested in issues regarding ethics and professionalism, I hope that you will join us for the upcoming Lunch and Learn with Judge Robert K. Rouse on September 18 at the Deland Courthouse. Judge Rouse literally wrote the book on *Principles of Professionalism for Florida Judges*, and the Lunch and Learn should be a good opportunity for dialogue on professionalism in the bar and in the judiciary.

YLD EVENTS

September 18	Lunch & Learn CLE: Professionalism Speaker: Hon. Robert K. Rouse, Jr.
October 15	YLD Social – joint meeting with YPG
November 13	Lunch & Learn CLE "Things I wish I Knew as a Young Lawyer" Speaker: VCBA President Philip J. Bonamo
December 18	Membership Drive Luncheon Speaker: The Florida Bar YLD President R.J. Haughey, II

COMMUNICATOR

Newsletter of the Volusia County Bar Association

October, 2009

Joint Meeting - VCBA & VFAWL

Thursday, October 8, 2009

Survival Tips for Small Firms: How to Manage Your Overhead

Approved 1.0 CLE Credit Hour

presented by

Judith D. Equels
LOMAS Director

Jerry R. Sullenberger
LOMAS Practice Management Advisor

11:45 a.m. $15 per person
Halifax River Yacht Club, Daytona Beach

How can LOMAS help you? See page 5 for details! **See back page to register.**

Make a Difference Day: Food Frenzy Challenge!

Food drive to benefit Halifax Urban Ministries.

How much food can we donate? It all depends on you!

Are you up to the challenge?

HERE ARE SOME IDEAS TO GET YOU STARTED:

Challenge your partners and associates! *Who gains bragging rights?*

Challenge another law firm! *Who can collect the most food?*

State Attorneys vs. Public Defenders! *Do we have a throwdown?*

Solo & Small Firms - *Team up to make a difference!*

WANT TO HELP MAKE A DIFFERENCE? SEE FLYER FOR DETAILS!

Social for Young Lawyers & Young Professionals

Thursday, October 15, 2009

509 Seabreeze Blvd., Daytona Beach
6:00 - 8:00 p.m. $5.00 per person

PAGE 3: YLD NEWS & NOTES

YLD NEWS AND NOTES

by Katherine Hurst Miller, YLD Representative

Welcome to the new attorneys who learned last month that they passed the July 2009 Bar Exam! You may be feeling relieved. You may be feeling excited. You may also be feeling worried. Many new attorneys I know spend so much time worrying about the job they are doing that it gets in the way of their work. I've discovered that the only things worth spending your time worrying about are the things within your control.

Let's take off the table those things that may be beyond your control. What assignment you are given. Whether a client pays the bill. Whether budget cuts will impact you. While you cannot ignore these factors, worrying about things outside your control will lead you into a black hole that will suck up all your time and energy.

All of us can control the quality of the work that we do. A pleasant side effect of doing the highest quality work is that sometimes we get better assignments, clients who are more willing to pay, and supervisors who realize our value. But the real joy is knowing that you produce quality work. I find that the best recipe to improve quality is to pay attention to time and timing.

> ***Time.*** New attorneys have to put in the time learning law and procedure. Whatever it takes to get the job done right, learn it. It might mean reading and learning outside work hours or at your own expense. There might be no immediate payoff. But you have to put in the time to master the skills, and you will see a future benefit. I remember logging hours upon hours to prepare for my first deposition. It felt like I devoted way too much time to the task, but I was able to really wrap my mind around the facts and law of that case. I also wound up with a great deposition outline that has saved me time in preparing for subsequent depositions.
>
> ***Timing.*** Timing can be just as important as time. Start each project early enough to have time to complete it without being rushed, and, in the case of written work, time to proofread. In the book *7 Habits of Highly Effective People*, author Steven Covey encourages people to "put first things first." He separates tasks into four categories: (1) urgent and important; (2) urgent but not important; (3) not urgent but important; and (4) not urgent and not important. Covey argues that most people spend far too much time working on those tasks that are not urgent and not important. My observation is that many lawyers spend a good portion of their time scrambling on urgent tasks. In contrast, a highly effective person will have conquered the urgent tasks and will spend most of his or her time operating in the sphere of not urgent but important. Working on important but not urgent tasks is the perfect scenario for getting high quality work done.

I have one more recommendation for new attorneys who want to improve the quality of their work. Learn from everyone you can. Obviously, other attorneys you work with can be teachers and mentors. Opposing counsel can also be good resources for new techniques or approaches. Judges and clients can shape the way you think about the law. Finally, one of the best ways to learn the real-world practice of law is to welcome the advice of legal assistants and paralegals at your office, who may have years of experience in the legal field and know how things really get done. Only you - not your boss, not your opposing counsel, and not your assistant - are responsible for the work you do. But if you don't learn from those around you, your legal education will have stopped at the doors of your law school. And there is so much more to learn out there. Welcome to the practice of law! Welcome to producing your highest quality work!

Contact YLD Representative Katherine Hurst Miller
386-254-6304 katherine.miller@CobbCole.com

SAVE THE DATE! YLD EVENTS

November 13: Lunch & Learn CLE "Things I wish I Knew as a Young Lawyer"
Speaker: VCBA President Philip J. Bonamo

December 18: Membership Drive Luncheon
Speaker: The Florida Bar YLD President R.J. Haughey, II

COMMUNICATOR

Newsletter of the Volusia County Bar Association
November, 2009

ELDER ABUSE & EXPLOITATION: A ROUNDTABLE DISCUSSION

A lunchtime seminar for Volusia County Elder Law attorneys.

Telltale signs of elder abuse & exploitation.

What can be done to improve the process?

Who should attorneys contact to report elder abuse?

What signs should attorneys look for in their clients?

Wednesday, November 4, 2009 11:45 a.m. – 1:00 p.m.
747 Office Suites, 747 S. Ridgewood Avenue, Daytona Beach

FREE CLE CREDIT! 1.50 General and 1.50 Elder Law Certification Hours (Approved)

RSVP: volusiabar@bellsouth.net $10 boxed lunch available

YLD LUNCH & LEARN SERIES

BEING A YOUNG LAWYER: THINGS I WISH I KNEW BACK THEN . . .

presented by VCBA President Philip J. Bonamo

Issues facing new attorneys that they don't teach you in law school.
Law office management - the importance of the office environment and its dynamics.
Difference between ethics and professionalism.

Friday, November 13, 2009 11:45 a.m. - 1:00 p.m.
747 Office Suites, 747 S. Ridgewood Avenue, Daytona Beach

FREE CLE CREDIT! 1.0 General, 1.0 Ethics Hours (Approved)

RSVP: volusiabar@bellsouth.net
Boxed lunch available - $10.00 VCBA members, $15.00 non-members

2010 COURT HOLIDAYS

January 1	New Year's Day
January 18	MLK Jr., Birthday
February 15	Presidents Day
April 2	Good Friday
May 31	Memorial Day
July 5	Independence Day
September 6	Labor Day
September 9	Rosh Hashanah
November 11	Veterans Day
November 25 & 26	Thanksgiving
December 24	Christmas

January CLE Seminar

Show Me the Money!

Essentials of Executing a Judgment

Friday, January 22, 2010
9:00 a.m. - 12:00 noon
747 S. Ridgewood Avenue

RESERVE A SEAT: volusiabar@bellsouth.ent

YLD NEWS AND NOTES

by Katherine Hurst Miller, YLD Representative

I recently read the *Harry Potter* books. Yes, that is right. The books about boy wizard. And not only did reading the books occupy every second of my free time and improve my ability to talk to middle schoolers, it also gave me surprise moments of enlightenment about life - and even, on occasion - about law.

In *Harry Potter and the Order of the Phoenix*, the fifth book (or the fifth movie, for those of you who are slightly less nerdy), 15 year old Harry appears before a wizarding court. Harry stands accused of violating the law against underage use of magic in the presence of non-wizards. What really struck me about the scene was not how rich it was in imaginative details, which *Harry Potter* fans should be used to, but rather how foreign the court proceedings were.

The court had a name that was unfamiliar, the Wizengamot. Apparently leading the Wizengamot were three interrogators, who served in the combined role of prosecutor and judge. Defending Harry was a witness for the defense, although that witness surprisingly called another witness to testify. And the trial concluded with a vote of fifty members who observed the proceedings, a majority of whom voted to clear Harry of the charges, which resulted in his acquittal. The scene is further complicated by the fact that the head interrogator appears bent on ignoring procedure in order to convict Harry.

The scene was nothing like any court proceeding I have witnessed. It made me wonder if the general public is just as confused by our legal system as I was by the wizarding legal system in *Harry Potter and the Order of the Phoenix*. I wondered if we as lawyers have a duty to the general public to make the legal system less foreign.

The Preamble to the Florida Rules of Professional Conduct states, in relevant part, that "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system." Other states and the American Bar Association use this language, too. Young lawyers, with one foot planted in their former non-lawyer lives and one foot planted in the legal profession, are in a unique position to assist the public's understanding of the legal system.

There are many simple ways that lawyers can help the public understand and have confidence in the justice system. For example, give your clients simple explanations of legal events. Also, act courteously to pro se opponents and speak to them without using legal-ese. Additionally, be willing to talk about your area of law to non-lawyers, but don't exceed the bounds of your knowledge and don't inadvertently create an attorney-client relationship. This applies to a casual conversation as much as giving a presentation to a group or publishing legal content online.

In conclusion, I would encourage the young lawyers to help the public understand and have confidence in the legal system, and leave the mystery to *Harry Potter*. If you are interested in speaking to others about the law, please contact the VCBA, Justice Teaching, or the Florida Bar Speakers Bureau.

Contact YLD Representative Katherine Hurst Miller
386-254-6304 katherine.miller@CobbCole.com

KELLY PARSONS NAMED TO THE FLORIDA BAR YOUNG LAWYERS BOARD

Kelly Parsons is a real lawyer's lawyer. She not only represents her clients, but she also represents all local young lawyers to The Florida Bar. Ms. Parsons, a litigation associate at the law firm of Cobb Cole, recently joined The Florida Bar's Young Lawyers Division Board of Governors. Ms. Parsons is the representative for the Seventh Judicial Circuit, an area that includes Volusia, Flagler, Putnam, and St. Johns counties.

The Board of Governors oversees the operation of the Young Lawyers Division, which has over 21,000 young lawyer members. The Young Lawyers Division provides a full and complete program of activities and projects designed to be of interest and assistance to new lawyers, and encourages young lawyers to engage in activities in the best interest of the legal profession.

Ms. Parsons is a native of Daytona Beach, who returned to the area after graduating from Syracuse University and Florida State College of Law. She focuses her practice at Cobb Cole on labor and employment law as well as intellectual property litigation. Ms. Parsons is active in her local community, and serves as President of the Daytona Beach Young Professionals Group.

William M. Chanfrau Jr., a partner at the law firm of Chanfrau & Chanfrau and a former young lawyer representative for the Seventh Judicial Circuit, believes Ms. Parsons is well-qualified to serve on the Board of Governors. "I think Ms. Parsons is a hard worker with an excellent reputation inside and out of the legal community. She has the ability to be a leader in the Young Lawyers Division and will represent this area very well."

COMMUNICATOR

Newsletter of the Volusia County Bar Association

JANUARY, 2010

Elder Law Section CLE Seminar

Elder Care Services in Volusia County

(CLE Approved: 1.0 general hours)

presented by
Gail Camputaro, Executive Director,
Council on Aging of Volusia County

Update on Guardianship Procedures
What services are available in Volusia County?
Learn how to recognize personality and/or behavior changes in your client.

Wednesday, January 13, 2010
Council on Aging , 160 North Beach Street, Daytona Beach
(parking lot in back of building off Palmetto Avenue)

11:30 – 1:00 p.m.
complementary buffet lunch available at 11:30 a.m.
CLE seminar begins at 12:00 noon

RSVP: volusiabar@bellsouth.net

CLE Seminar

SHOW ME THE MONEY!

Essentials of Executing a Judgment

(CLE Approved: 3.5 general hours)

presented by

Hon. William A. Parsons
Essentials of an Enforceable Judgment

K. Judith Lane, Esquire
Discovery in Aid of Election

Friday, January 22, 2010
747 Office Suites,
747 S. Ridgewood Avenue, Daytona Beach

9:00 a.m. - 12:00 noon

RSVP: volusiabar@bellsouth.net

~Bench & Bar Reception~

A new bar event combining the Traditions Dinner and the Judicial Reception

A celebration of the Volusia County legal community honoring 50 year members of the bar, recognizing members of the judiciary and providing an opportunity for VCBA members to meet, greet and connect!

Thursday, January 28, 2010
6:00 p.m.- 9:00 p.m.

Museum of Arts & Sciences ~ 352 S. Nova Road, Daytona Beach

VCBA member price $20.00
RSVP Online! Go to www.volusiabar.org, click on Register or email volusiabar@bellsouth.net

Sponsored by:

Upchurch Watson White & Max MEDIATION GROUP

Florida LAWYERS MUTUAL INSURANCE COMPANY® CREATED BY THE FLORIDA BAR Lawyers Professional Liability Protection

VRC VOLUSIA REPORTING COMPANY COURT REPORTING • VIDEOCONFERENCING

BARRY UNIVERSITY DWAYNE O. ANDREAS SCHOOL OF LAW

YLD NEWS AND NOTES

by Katherine Hurst Miller, YLD Representative

By now, you may have seen state and national news coverage about attorneys and judges using Facebook and other social networking sites. From the Florida Bar looking at applicants' Facebook pages to the Philadelphia Bar Association disciplining an attorney for having a third party "friend" a witness under false pretenses, Facebook is a new frontier for lawyer ethics. Last fall, Facebook became an issue for judges as well when the Florida Judicial Ethics Advisory Committee issued an opinion that judges should not be "friends" with attorneys via Facebook or other social networking sites.

Florida Judicial Ethics Advisory Committee Opinion Number 2009-20 advises that including lawyers among the judge's Facebook "friends" would violate the Judicial Canon of Ethics if the lawyers appear in front of the judge. Canon 2B states: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." Opinion Number 2009-20 went on to advise that it was acceptable for judges to set up pages for their campaigns and for attorneys to be "fans" of the judge's campaign.

Interestingly, South Carolina's Advisory Committee on Standards of Judicial Conduct also issued an opinion about judicial use of Facebook in October. The South Carolina Advisory Committee Opinion Number 17-2009 found that a judge could be a member of Facebook and could "friend" law enforcement officers. The opinion did not specifically address attorneys.

The two states' ethics opinions generated national media coverage in the printed press and the online world. Articles and blogs on judicial Facebook-ing ranged from supportive to dismissive. Much focus centered on whether there is a generational divide between those who participate in social media and those who do not. Younger lawyers and judges may have different opinions about the use of Facebook than their older counterparts.

I do not have any opinion on whether attorneys and judges should be Facebook "friends." I have a Facebook profile, but I have never attempted to become a "friend" or "fan" of a judge. I do, however, have Facebook "friends" that I have not spoken to in person since the third grade. So "friends" is a pretty loose term.

If you are looking for a Facebook "friend," might I suggest that, instead of asking a judge to be your "friend," you become "friends" with the Young Lawyers Division of the Volusia County Bar Association? Our Facebook page is an easy – and ethical – way to stay connected with our upcoming events and with other young lawyers.

Even if you do not want to be Facebook "friends" with the Young Lawyers Division, we hope that you will continue to come to our events. We have a great Spring schedule, and I promise not to use any more "air quotes" about being your "friend."

To "friend" the YLD, you need to be a registered user of Facebook. Once logged in, from any page you can do a search for "Volusia County Bar Association YLD." Click on the link "Request to Join." If you have any problems, please contact Katherine Hurst Miller, the administrator of the YLD's Facebook page.

Contact YLD Representative Katherine Hurst Miller
386-254-6304 katherine.miller@CobbCole.com

COMMUNICATOR

Newsletter of the Volusia County Bar Association

FEBRUARY, 2010

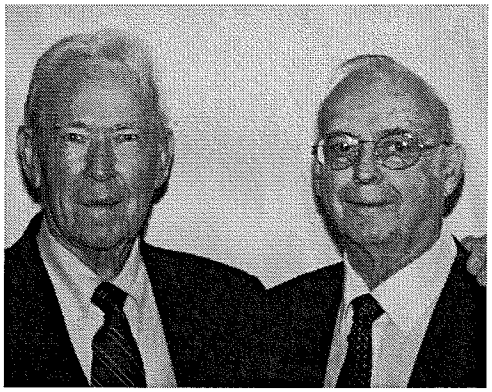
Bench & Bar Reception Highlights

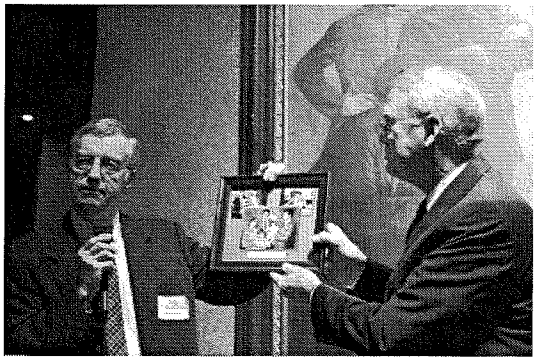
The Bench & Bar Reception turned out to be the nicest (and largest) event in many years. 161 bar members, judges and guests gathered at the Daytona Museum of Arts and Sciences for a cocktail reception and dinner. Chief Judge Walsh introduced the members of the judiciary and recognized Judge Kim Hammond for his years of service.

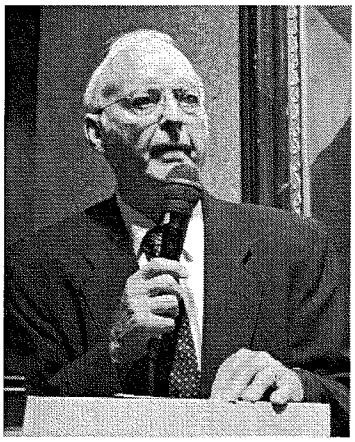
President elect Kathryn Weston honored 50 year member Bernard Strasser. YLD Representative Katherine Hurst Miller announced the VCBA Barristers' Scramble will now be the YLD Barristers' Scramble. The golf tournament, a fundraiser to benefit PACE Center for Girls, will be held on May 21, 2010.

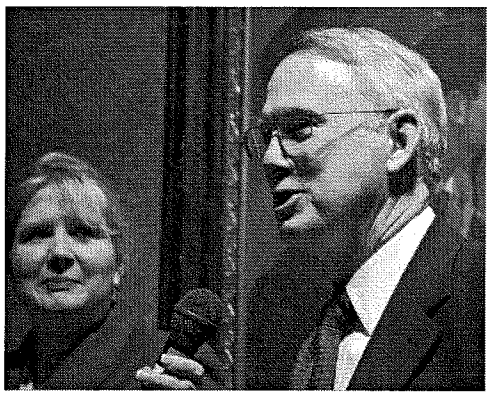
The generous sponsors, Barry University, Florida Lawyers Mutual Insurance Company, Upchurch Watson White & Max, and Volusia Reporting Company helped make the night a success. (Contact information for all sponsors is available by calling the VCBA office).

It was great night to socialize, meet the judges, make new connection. It's good to be a VCBA member!









SHARE YOUR IDEAS FOR FUTURE BAR EVENTS!

Have an idea for a community service project, CLE seminar or social event? Tell us about it!

Contact: **President Elect Kathryn Weston** (Kathryn.weston@cobbcole.com) **VCBA office** (volusiabar@bellsouth.net)

YLD NEWS AND NOTES

by Katherine Hurst Miller, YLD Representative

"They Had A Dream Too" is the title of an inspiring video featuring young leaders of the civil rights movement. I found it on the internet at www.theyhadadreamtoo.org a couple of months ago while searching for materials to present in speaking to an elementary school class. Please go online and watch the twenty-eight minute clip. You will love this video, and I encourage you to share the video with someone this month, African-American History Month.

You can also be proud of the young lawyer connection in "They Had A Dream Too." The video includes interviews with people who were young lawyers during the 1960s and 1970s and was produced by the Texas Young Lawyers Association. Last month, Kelly-Ann Clarke, the Chair of the ABA Young Lawyers Division and a member of the Texas group that created "They Had A Dream Too," spoke at a conference in Tampa. Ms. Clarke encouraged involvement in young lawyer organizations, including local, state, and national bar associations. The fact that young lawyers can create a video about the important civil rights work of young people is a celebration of the accomplishment of youth. Not to mention the video won an Emmy, which is quite impressive.

Even though the VCBA YLD has not won any Emmys, we are off to a wonderful beginning in 2010. We have new members and a new event to celebrate. Recently the VCBA Board of Directors voted to turn the annual golf tournament over to the Young Lawyers Division as a fundraiser for a local organization. On May 21, 2010, the YLD Scramble will be held at LPGA to benefit the PACE Center for Girls. Please consider if you are able to help plan, sponsor, or participate in the golf tournament. The News & Notes section will contain updates on the event throughout the spring. I hope to see you at the YLD Scramble.

I also hope that you will take Kelly-Ann Clarke's advice and become more involved in young lawyer organizations. You are welcome to talk to me about the VCBA YLD. Talk to Matthew Welch and Kelly Parsons about their involvement in the Florida Bar Young Lawyer Division's Board of Governors, or talk to Maja Sander about her work with the ABA's Young Lawyer Division. We will not remain young lawyers forever, but the connections we make and the skills we learn now will last throughout our careers. Who knows? Our accomplishments could one day be the inspiration for others.

Contact YLD Representative Katherine Hurst Miller
386-254-6304 katherine.miller@CobbCole.com

May 21, 2010

YLD BARRISTERS' SCRAMBLE

Golf Tournament at LPGA to benefit the PACE Center for Girls

Tournament is open to all VCBA members!

COMMUNICATOR

Newsletter of the Volusia County Bar Association

APRIL, 2010

BANKRUPTCY CLE SEMINAR

presented by Stacey A. Eckert, Esquire and Walter J. Snell, Esquire

The Automatic Stay
Chapter 7 Liquidation - Chapter 11 Reorganization
Chapter 13 Wage Earner Reorganization

Friday, April 9, 2010 ~ 9:00 a.m. - 12:00 noon

Daytona Beach Airport Banquet Room - Free parking in short term lot

VCBA Member Price $45.00 - includes 8:15 a.m. breakfast buffet

CLE Approved: 3.0 general, 2.5 business litigation certification hours
RSVP: volusiabar@bellsouth.net

MEMBERSHIP LUNCHEON

Jesse Diner
The Florida Bar President

Adele H. Stone
The Florida Bar Foundation President

Sponsored by

FIFTH THIRD BANK

Tuesday April 13, 2010 ~ 11:45 a.m. - 1:00 p.m.

Halifax River Yacht Club, Daytona Beach

VCBA Member Price - $15.00
RSVP: volusiabar@bellsouth.net

VICTIM'S RIGHTS WEEK 2010

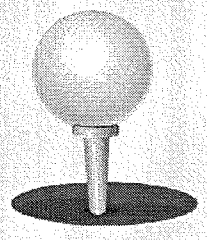
A Candlelight Breakfast

Guest Speaker
Hon. Raul Zambrano

Monday, April 19, 2010
8:00 a.m.

Indigo Lakes Golf Club
Daytona Beach

Contact Jennifer Beckwith
356-255-6573, ext 2414
or jenniferb@clsmf.org



SAVE THE DATE!

May 21, 2010

YLD Barristers' Scramble
at LPGA to benefit
PACE Center for Girls

Remembering Bill Sherman
Page 5

YLD NEWS AND NOTES

by Katherine Hurst Miller, YLD Representative

Last month, Sandra Bullock received two acting awards. You may have seen her accept her Best Actress Academy Award for her work in *The Blind Side* with an adorably funny and sincere speech. The self-effacing acceptance speech started with a great line: "Did I really earn this or did I just wear y'all down?" She then thanked and joked with all the women who had been nominated alongside her for an Oscar.

The night before the Academy Awards, Sandra Bullock "won" a Golden Raspberry Award as the Worst Actress in *All About Steve*. Rather unusually, she accepted the Razzie in person. Her speech had Razzie founder John Wilson gushing to Entertainment Weekly magazine: "If you are going to win a Razzie, then that's the way to do it and have fun with it. I wish there were more people with that combination of self-deprecation and guts."

The reason that I mention Sandra Bullock in the *YLD News and Notes* is that, aside from her legal connection to movies like *A Time to Kill*, I am fascinated by the fact that she had a best performance recognized on the heels of a worst performance. Alternating moments of winning and losing are something that will happen to a young lawyer. The lawyer loses a hearing, then wins the next hearing, and the cycle repeats itself.

As an attorney, you will alternate between brilliant performances, disappointing performances, and performances somewhere in the middle. And frustratingly, some brilliant performances will go unrecognized while some disappointing performances will occur in the public eye. You will watch opposing counsel succeed where you had the better argument or were better prepared. Conversely, you will prevail at times when your case was weaker. I have three tips for young lawyers to weather the ups and downs that are bound to occur in your career.

First, talk openly to more senior attorneys about the highs and lows that can occur in the practice of law. Perspective comes with distance, and many young lawyers do not yet have the distance to place wins and losses in their proper perspective. A deal that falls through or an adverse ruling may feel like the end of the world, but more experienced attorneys can help you learn from the disappointments as much as the successes.

Second, try your best with every task in every case. If your effort level is consistently high, you may find yourself more trusted by clients and colleagues than if you had won every case. I remember a case where I was assigned to review a stack of faxes between the other party and his employer, which was not a glamorous assignment. But when I really scrutinized the faxes, I noticed that the fax letterhead showed correspondence, not with the employer, but with a family member posing as the employer. That case ended rather abruptly and favorably for my client. And I earned trust with my senior partner that carries forward, whether I win or lose the next case.

Finally, take a page from Sandra Bullock's book, and accept criticism and acclaim with the same spirit of humility and sense of humor. You are the same person after winning that you are after losing. You have the right to celebrate your best performance, but do not forget the lessons learned in your worst performance, too. Both should carry forward with you as valuable experience. Indeed, Sandra Bullock joked in some interviews about placing both the Razzie and the Oscar on her mantle. "They'll sit side by side in a nice little shelf somewhere," she said, "The Razzie maybe on a different shelf . . . lower."

Contact YLD Representative Katherine Hurst Miller 386-254-6304 katherine.miller@CobbCole.com

YLD Launches Speaker's Bureau for Community Outreach Project

Volusia County Bar Association's Young Lawyer's Division has developed a new speaker's bureau designed to target and assist high school and undergraduate college students interested in the practice of law. The purpose of this project is to present issues and information that, as relatively young attorneys, will be beneficial to students as they plan for law school and a legal career. The goal is to discuss matters that go beyond the basic concerns of GPA, LSAT Score and involvement at school. Topics will include:

- Billable Hours and Time Management Expectations (Quality of Life Issues);
- Employment Trends and Salary Expectations;
- "Big Law" vs. a Regional or Local Practice;
- General Practice vs. Specialization (Pros and Cons of Both);
- Student Loans and the Impact of Debt on Employment Decisions; and
- A Law Degree without a Legal Career (Pros and Cons).

As part of this new program, students will be able to contact the VCBA and they will be connected to a local attorney who will respond to specific questions about law school or the practice of law. The first presentation was held on March 30 at Stetson University with plans in place to reach out to other colleges in Volusia County. For the high school presentation, a series of classroom meetings will take place at Atlantic High School's Academy of Law & Government beginning in August.

Interested in participating? Contact attorney Michael Woods at Michael.Woods@Cobb.Cole.com

COMMUNICATOR

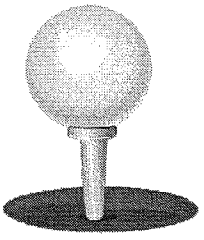
Newsletter of the Volusia County Bar Association

MAY, 2010

VCBA BOARD NOMINATIONS

The Nominating Committee will soon convene to consider nominations for open positions on the VCBA Board. Directors serve a term of three years. The slate of nominees will be voted upon at the Annual Election Meeting scheduled for Friday, July 30, 2010.

Those interested in being nominated for a position on the board should contact President-elect Kathryn D. Weston by phone 386-323-9276 or email kathryn.weston@CobbCole.com.



15th Annual YLD Barristers' Scramble

to benefit PACE Center for Girls

Friday, May 21, 2010

8:00 a.m. putting contest, 9:00 a.m. shotgun start

See insert to register!

ELDER LAW CLE SEMINAR

Friday, May 28, 2010

Daytona Beach Airport Banquet Room

(Free parking in short term lot)

9:00 a.m. - 12:00 noon

Come early for the 8:30 breakfast buffet!

CLE Credit: 3.00 general hours (APPLIED FOR)

Lawyers Liability Insurance: Everything You Need to Know!

YLD Lunch & Learn Seminar (CLE approved: 1.0 general hours)

Friday, June 11, 2010 ~ 11:45 - 1:00 p.m.

747 Office Suites, 747 S. Ridgewood Avenue, Daytona Beach

Drug Court Graduation Ceremony

Keynote Speaker: Chief Justice Peggy A. Quince

May 11, 2010 ~ 2:00 p.m. at ERAU - Willie Miller Center

Contact Molly Justice 386-943-7074 mjustice@circuit7.org

YLD NEWS AND NOTES

by Katherine Hurst Miller, YLD Representative

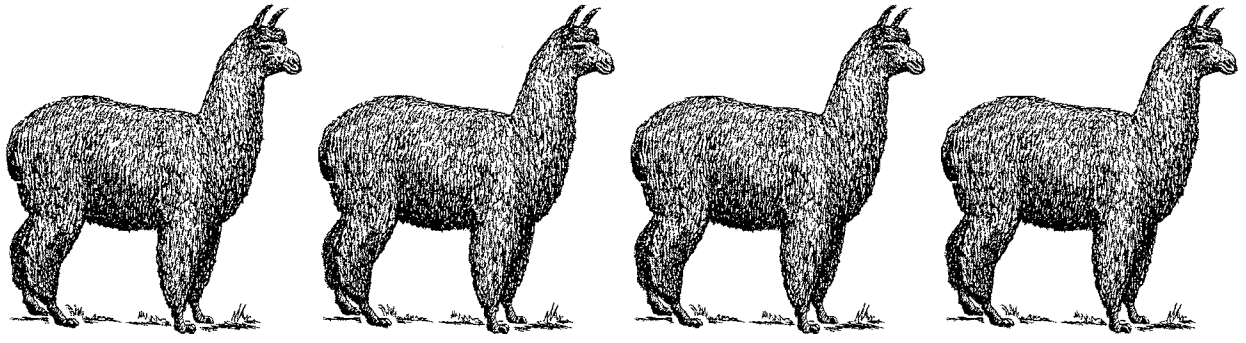
Work-gym-home. I've driven the route so many times I could probably make it from work to gym to home safely even with my eyes closed. Last month, however, I saw something eye-opening on the drive. I saw an alpaca. Actually, a herd of alpacas! Never before had I noticed the animals grazing in a field by the side of Tomoka Farms Road. Driving past the otherworldly creatures, I wondered how on earth I had missed alpacas in Daytona Beach? And what else was I missing?

In general, inexperience may cause us to miss that which should stand out. At first, I likely missed the alpacas because I was looking for street signs and landmarks to help me learn the way. The analogy extends to the young lawyer. When we first begin to practice law, we do not know what we do not know. Is opposing counsel's request reasonable? Is my response sufficient? Is there a statute that applies to my case? The young lawyer is so busy answering the basic questions that he or she cannot recognize the unusual.

Later on, routine may cause us to overlook something out of the ordinary. By the time I could drive my car on virtual autopilot, I stopped looking out of the window altogether. Many of us are creatures of habit. We miss out on new opportunities because we have fallen into a routine that resembles a rut. We drive the same streets, eat the same meals, and file the same motions day after day. We find something that works well, and we latch onto it without any variation or improvement.

Inexperience and routine can be overcome with knowledge and attention to detail. In fact, the rules of professional conduct demand such consideration. The first rule within the Florida Rules of Professional Conduct is a rule regarding competence. Rule 4.1-1 provides in part: "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." While the young lawyer may be nervous about his or her competency in undertaking a new task, legal knowledge is only one of several factors that make up competence. Even routine assignments need to be performed with skill, thoroughness, and preparation.

Young lawyers can miss a lot of things, apparently even alpacas. Hopefully, young lawyers can get to a place of experience but not rush into a routine. By applying legal knowledge, skill, thoroughness, and preparation to each and every task, a young lawyer can drastically reduce the risk that he or she is overlooking something important. Those same skills may even help us in our lives outside of work. It is time to stop and smell the alpacas. Or something less potent.



Alpaca Images Courtesy of Wikimedia

Contact YLD Representative Katherine Hurst Miller 386-254-6304 katherine.miller@CobbCole.com

COMMUNICATOR

Newsletter of the Volusia County Bar Association

JULY, 2010

COMMITTEE PROPOSES SLATE OF NOMINEES

The Volusia County Bar Association's Nominating Committee, chaired by President Elect Kathryn D. Weston, has announced the following proposed candidates to serve on the VCBA board. Candidates will be presented and voted upon at the annual election meeting. Nominations will also be accepted from the floor at that time.

President **Kathryn D. Weston** Cobb Cole	President Elect **Karen Foxman** Rice & Rose	Treasurer **Sebrina Slack** Landis Graham French
Secretary **R. Brooks Casey** Wright & Casey	YLD Rep. **Carly Fishpaugh** Heebner Baggett Upchurch & Garthe	YLD Elect **Michael Kelton** Paul & Elkind
Director 2010-13 **Michael Ciocchetti** Doran Sims Wolfe Ansay Kundid & Birch **Wendy Mara** Snell Legal **Bethany Schonsheck** Hassell Moorhead & Carroll	Director 2009-12 **Kenneth Bohannon** Kenneth Bohannon PL **Michael Slick** Buckmaster & Dupont **Michael Woods** Cobb Cole	Director 2008-11 **Corey Bundza** Bundza Wagner & Rodriguez **Darrell Brock** Darrell Brock **Robert Elton** Robert W. Elton PL

ANNUAL ELECTION MEETING

Induction of Officers & Directors

Sponsored by Regions Bank

Friday, July 30, 2010 ~ 11:45 a.m. - 1:00 p.m.
Halifax River Yacht Club, 331 South Beach Street, Daytona Beach

$10.00 VCBA members, $15.00 non-members

SEE BACK PAGE FOR REGISRATION INSTRUCTIONS

MEET THE CANDIDATES!

Judicial Candidate Forum

Friday, July 23, 2010 ~ 5:30 p.m.

Daytona Beach Airport Banquet Room
See back page for registration instructions

Cash Bar Cocktail Reception immediately following.

Volusia County Court Judge	7th Circuit Judge Group 3	7th Circuit Judge Group 5	7th Circuit Judge Group 10
Judge Mary Jane Henderson Robert A. Sanders, Jr.	Matt Foxman George Pappas	Dennis Craig Marc Dwyer Ed Haenftling, Jr. Joe Horrox Sid Nowell John Selden	Scott DuPont Don Holmes Eric Neitzke

YLD NEWS AND NOTES

by Katherine Hurst Miller, YLD Representative

When I was a little girl, I attended a school where the students wore uniforms. I remember well the benefits of uniforms, chief among them being how easy it was to decide what to wear in the morning before school. But for all the benefits of uniforms, I thought they were embarrassing. Especially the dress uniform. Especially how the dress uniform was required for field trips. Especially wearing the dress uniform on a field trip when there were kids from other schools wearing very cool street clothes, like acid wash jeans and hyper-color tee shirts.

I must not have been the only student at my school who was embarrassed because I remember the principal telling us what a privilege it was to wear the uniform. He told us, too, that the school was proud of us and the way we wore the uniform. We were ambassadors for our school, easily identifiable on field trips and after-school snack trips to the Dairy Queen. And the privilege of wearing the uniform and serving as an ambassador meant that we had an obligation to represent the school in the best light possible. Long after I stopped wearing a school uniform, the idea of wearing a uniform to represent a larger group stayed with me.

I have worn the Young Lawyer Division uniform this year with a lot of pride. It has been an absolute joy to get to plan for the young lawyers and represent the young lawyers to the rest of the bar. As I rotate off my term as the Young Lawyer Division Representative, I want to say thank you to the young lawyers, the seasoned lawyers, the judges, the attorneys at my firm, the bar association board of directors, and especially our bar association's executive director for making my job so fun and easy. (Not to be confused with "cheap and easy," which is how I like to describe our inexpensive Lunch and Learn CLE programs. Those are scheduled to continue in the fall, by the way.)

I can put down the mantle of the young lawyer representative to the bar, but I believe that a lawyer can never stop representing the legal profession to the general public. Of course, we wear our lawyer uniforms in courtrooms and client conferences, but we also wear lawyer uniforms in our daily lives. The way we act to our neighbors, our friends, our business acquaintances, and even the people we encounter in restaurants and shops can create impressions of the entire profession. We can continue to perpetuate stereotypes about stressed-out lawyers, about sneaks and sharks, and about bottom-feeders and bulldogs; or, we can be a credit to our profession using our individual talents and character traits.

One of my favorite things is when people first find out that I am a lawyer. The most common reaction is "You're too nice to be a lawyer." I respond to those who think I am too nice to be a lawyer by reconciling the perceived niceness with the skills I actually use as a lawyer. I tell people that I research my cases thoroughly and then make the best argument I can on behalf of my clients. I fight when it really matters, but I try to be nice and professional at all times.

I am not the only attorney who gets a reaction when I reveal my lawyer identity. I know some wonderful lawyers in town who coach youth sports, and the athletes and their parents are surprised to learn that the cool coach is actually a brainy attorney. But who better to create a strategies to resolve a legal issue than someone who can create a winning strategy on the field? I am grateful to the lawyer-coaches out there who show the athletes and their parents what wonderful, encouraging people attorneys can be. The lawyer-coaches are just one example of the great impression local attorneys are making on members of the community in a non-legal capacity.

I hope that you wear your lawyer uniform with pride. It is a uniform that can mark you as someone who is able to make a difference at an important time in someone's life. It is a uniform that, with your care, will last the rest of your professional life. And, it is a uniform that, if the entire team takes care, will be an honor to continue to wear in the community. Nothing embarrassing about it.

Katherine was recently sworn in as President of VFAWL. She can be contacted by phone 254-6304 or email katherine.miller@cobbcole.com.

THE EMPTY(ING) MUSEUM:

Why a 2001 Agreement between the United States and Italy is Ineffective in Balancing the Interests of the Source Nation with the Benefits of Museum Display

Katherine Jane Hurst*

I. INTRODUCTION

With American museums struggling to keep and grow their antiquities collections in recent years, the golden age of the museum has come to an end.[1] Court decisions and international treaties that favour source nations[2] over good faith purchasers[3] have continually eroded museums' abilities to collect ancient artefacts.[4]

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* Research Editor, *Stetson Law Review*, J.D. Student Stetson University College of Law. I would like to thank Professors Jennifer AnglimKreder, Brooke Bowman and the Barbara Tsakirgis, as well as the editors of the *Stetson Law Review*.

1 See e.g. Jane Engle, 'Museum News: Cost of Culture Rising across the Country', *L.A. Times* E06 (Oct. 18, 2003) (discussing the loss of Government support for museums); Thomas Maier, 'Picking Up the Pieces: Nations Fight to Recover a Past They Say Was Plundered', *Newsday* B29 (May 23, 1995) (quoting Ashton Hawkins, the general counsel for the Metropolitan Museum of Art, as saying "'[w]e just don't give it back because somebody says it came from somewhere else. If we did that[,] museums would be empty in 20 years.'").

2 Professor John H. Merryman has defined a 'source country' as a nation where supply exceeds demand for antiquities. John H. Merryman, 'Two Ways of Thinking about Cultural Property', (1986) 80 *Am. J. Intl. L.* 831, 832. Merryman categorises Mexico, Egypt, Greece, and India as source nations: *ibid.* Conversely, 'market nations' are countries where demand exceeds supply, such as France, Germany, Japan, Switzerland, and the United States: *ibid.*

3 For a discussion of the term good faith purchaser, see *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts*, Inc., 917 F.2d 278, 294-295 (7th Cir. 1990).

4 See e.g. Unidroit Convention on Stolen or Illegally Exported Cultural Objects (24 July 1995) http://www.unidroit.org/English/implant/i-95.htm (granting rights to source countries) [hereinafter UNIDROIT]; UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (14 Nov. 1970) http://ww.unesco.org/culture/laws/1970/ html eng, (generally favouring source countries) [hereinafter UNESCO]; *U.S. v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999) (returning a bowl to Italy); *U.S. v. McClain*, 545 F.2d 988 (5th Cir. 1977) (holding that United States courts can recognise source countries' ownership laws).

In an attempt to balance the interests of source countries with the benefits of museum preservation and display, the United States has entered into bilateral agreements with individual nations to impose import restrictions on the import archaeological materials.[5] In 2001, to combat the specific problem of illegal excavation of Italian antiquities, the United States signed an agreement with Italy that offers increased enforcement of import restrictions in exchange for long term loans of Italian artefacts, called the 'Agreement between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy' (the 'Agreement').[6] As the Agreement is scheduled to be renewed in 2006, this Comment offers a timely analysis of the Agreement's implementation and effectiveness in the context of other legal and international remedies. While long-term international loans provide a compromise between the rights of the true owner of an artwork and the benefits of museum display, such loans can be effective only if implemented correctly.

This Comment examines the effectiveness of the Agreement that was designed to balance the interests of the source nation with the benefits of museum display. Part II provides a history of the illegal trade in Italian artefacts.[7] Part III discusses different approaches to this balancing act through legal decisions, international treaties, and bilateral agreements.[8] Part IV traces the development of the Agreement and critically reviews its implementation.[9] Part V proposes certain changes necessary to make the US-Italy loan programme favourable to United States interests.[10] Part VI arrives at the conclusion that, although no measure has adequately protected museum ownership of artworks, long-term loans, if implemented correctly, could benefit United States museums and museum-goers.[11]

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5 See below § III C (discussing various agreements with Bolivia, Cambodia, Cyprus, El Salvador, Guatemala, Honduras, Italy, Mali, Nicaragua and Peru).

6 Agreement between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy (19 Jan. 2001) http://exchanges.state.gov/culprop/itfact.html [hereinafter Agreement].

7 Below § II.

8 Below § III.

9 Below § IV.

10 Below § V.

11 Below § VI.

II. THE ILLEGAL TRADE IN ITALIAN ARTEFACTS

Italy, by virtue of geography and history, is a source country for archaeological artefacts from many different civilisations, from Greek to Etruscan, Roman to Byzantine.[12] The demand for these many items has created an antiquities market that involves various participants. [13] This section follows artefacts on a typical route from Italian soil to an American museum.

While the legal trade in antiquities most often begins with items already in collections, the illicit trade usually starts with underground treasure hunters.[14] Digging in or near an official site,[15] illegal excavators, known as *tombaroli*,[16] quickly dig through

12 Sue J. Park, 'The Cultural Property Regime in Italy. An Industrialized Source Nation's Difficulties in Retaining and Recovering Its Antiquities', (2002) 23 *U. Pa. J. Intl. Econ. L.* 931, 935.

13 John E. Conklin, *Art Crime* 7 (Praeger Press, 1994).

14 Andrew Slayman, 'Italy Fights Back', 51 *Archaeology* 43 (1998). Legally-traded antiquities most often originate in private collections, having been discovered long ago: Alexi S. Baker, 'Archaeology, Selling the Past: *United States v. Frederick Schultz*', http://www.archaeology.org/online/features/schultz/collectors.html (22 Apr. 2002). In the twentieth century, many source countries made it national policy to vest ownership of antiquities with the government. See below note 44 (citing such an Italian law, passed in 1939). Some countries occasionally give permission to remove more recently excavated items as a reward for archaeological success: Baker, at http://www.archaeology.org/online/features/schultz/collectors.html. These items, however, are either of a lesser quality than would be shown in a museum or are duplicative of an artifact already on display in a museum: *ibid.*

15 Elizabeth Wilkerson, University of Virginia A&S Online, 'Underground Tale Told', http://asweb.clas.virginia.edu/asmagazine/x4689.xml (12 Dec. 2001). Such illegal excavations are possible because many archaeological dig sites are open only during the summer months, when western professors take time away from teaching classes to lead excavations; for example, Northern Illinois University, The Sicilian Archaeological Field School, http://dig.anthro.niu.edu/fldschl/ (accessed 5 July 2005) (providing a schedule for an archaeological dig in Sicily); During the winter, these sites, many of which are in the poorer, rural areas of Italy, are left with very little protection. Alexander Stille, 'Head Found on Fifth Avenue', *New Yorker* 58, 60 (24 May 1999). Additionally, many of the boundaries of such sites reflect modern, rather than ancient, geography, so that digging just beyond the borders of the official site can be fruitful for treasure hunters. Slayman, above, note 14 at 43.

16 *Ibid.* Tombaroli is a recently-coined word in Italian for tomb-robbers: *ibid.* It comes from the word tomba, Italian for tomb. *Oxford English Dictionary*, 225 (Debora Mazza, ed., Berkley 2nd edn 1997). The fact that a specific Italian word, *tombaroli*, describes those persons who loot ancient sites provides one indication of the magnitude of the problem: Slayman, above, note 14 at 43.

soil to locate large, valuable antiquities.[17] The *tombaroli* use little of the precision that archaeologists employ,[18] and, if caught, they face fines and imprisonment from the *Carabinieri Tutela Patrimonio Artistico* (the '*Carabinieri*').[19] Often, the biggest foes of the *Carabinieri* are not the *tombaroli* or their dealers but the severe economic conditions that make looting lucrative in poor rural areas.[20] The *Carabinieri* must recover stolen artefacts before they leave Italy, for the only recourse the *Carabinieri* may take against foreign owners is through legal action in the country of importation.[21]

Discoveries by the *tombaroli* make their way out of the country via local dealers, smuggling networks, and inattentive or corrupt customs officials.[22] Most artefacts that leave Italy pass over the mountainous Swiss border, where national laws give artworks a private Swiss title after a five-year stay in Switzerland.[23] After Switzerland, antiquities find their way to western countries; in the United States, this often means importation to New York City.[24]

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17 *Ibid.* at 44. The irresponsible excavation techniques of the *tombaroli* can result in destruction of other archaeological evidence: *ibid.*

18 Cristina Ruiz, The Art Newspaper.Com, 'My Life as a Tombarolo', http://www.theartnewspaper.com/news/article.asp?idart=4890 (Mar. 2001).

19 Park, above, note 12, at 939. The Carabinieri are a special Italian police unit, which enforces laws regarding art thefts and clandestine excavations *ibid.* The Carabinieri achieved success in the arrests of two prominent art dealer-smugglers: the 1997 arrest of Giocomo Medici, mastermind of exportation, and in the 1998 investigation of Vincenzo Cammarata, Sicilian expert in illegal excavation. Slayman, above, note 14, at 45.

20 *Ibid.* at 43. In Sicily, where the agricultural economy has been in rapid decline in the postwar era, jobless men are often forced to choose between lying in bed during the winter months or digging for profit near archeological dig sites. Stille, above, note 15, at 60.

21 Slayman, above, note 14, at 44.

22 *Ibid.* at 44. The dealers and other middlemen are known as ricettatore, which translates into receivers: Ruiz, above, note 18; *Oxford English Dictionary*, *op. cit.* note 16, at 181.

23 Slayman, above, note 14, at 44. The Swiss border is a convenient route for transmitting illegally-excavated artefacts, as the mountainous border and the less-than-stringent enforcement by customs agents facilitate the removal of ancient works of art *ibid.* at 44. Not surprisingly, 'the old Swiss private collection' has become a favourite depository for smugglers and a choice source for dealers *ibid.* While it currently takes only five years to gain title under Swiss law, legislation may soon extend this time period to 30 years: Gaia Regazzoni, 'The Beginning of the End', The Art Newspaper.Com http://www.theartnewspaper.com/news/article.asp?idart=9752 (Aug. 2002). Whether the 30-year time period will reduce the number of illegally-traded antiquities remains to be seen; already *ricettatore* forge the paperwork that shows the antiquities to have been in Switzerland for five years. *Ibid.* Faking a 30-year stay would seem to be just as easy, and thus the extension is unlikely to solve the problem.

24 Slayman, above, note 14, at 44.

The illegal trade in antiquities also requires the sustained popularity and social value of art objects.[25] Scholars often are the first to assign value to certain genres of art.[26] Museums that acquire artefacts continue to increase their value with research, restoration, display, and publicity.[27] Auction houses create publicity for art while influencing the predominate tastes in art and driving up prices in the art market with head-to-head bidding.[28] Collectors, too, bear much of the blame for the illegal trade in art because, in purchasing antiquities, they create the market for ancient art and unintentionally fund illegal excavation.[29]

The illegal trade in antiquities is not a new problem, having been called the world's second oldest profession,[30] nor is it a small problem, second only to drug trafficking in generating money on the black market.[31] Whatever the motive, people have moved treasures from one point to another for centuries, but, with the contemporary views of precise archaeology and cultural property,[32] removing art objects

25 Conklin, above, note 13, at 21, 33, 35, 38, 44.
26 *Ibid.*, at 44.
27 *Ibid.*, at 33.
28 *Ibid.*, at 38. In head-to-head bidding, auction participants bid against one another for possession of the auctioned works. Michael Kimmelman, 'A City's Heart Misses a Beat', *NY Times* E1 (16 May 2005). In contrast, sealed-envelope bidding shields bidders from one another: *ibid.* While head-to-head bidding creates competition and demand for works, sealed-envelope bidding raises prices in the art market. *Ibid.* Museums more often are in competition for and in receipt of items auctioned in head-to-head bidding. *Ibid.*
29 Conklin, above, note 13 at 21.
30 Karl Ernst Meyer, *The Plundered Past* (Atheneum Press, 1973) 132. When Lord Elgin removed the Parthenon Marbles in what is now considered by some to be one of the most infamous cases of cultural looting, he was neither the first nor the last to take another culture's property for his own interests: see William St Clair, *Lord Elgin and the Marbles* (Oxford University Press, 1983); Theodore Vrettos, *The Elgin Affair: The Abduction of Antiquity's Greatest Treasures and the Passions It Aroused* (Arcade Publishing, 1997). From ancient Romans to post-Second World War Soviets, military victors have seized art and used the spoils of war as trophies: *The Recovery of Stolen Art: A Collection of Essays* (Norman Palmer ed., Kluwer Law Intl. and Institute of Art and Law, 1998). Similarly, tourists, both ancient and modern, have bought art in their travels and removed it to their home countries: Karen D. Vitelli, 'Introduction', in *Archaeological Ethics* 18, note 2 (Karen Vitelli ed., AltaMira Press, 1996).
31 Meghan A. Sherlock, 'A Combined Discovery Rule and Demand and Refusal Rule for New York: The Need for Equitable Consistency in International Cases of Recovery of Stolen Art and Cultural Property', 8 *Tul. J. Intl. & Comp. L.* 483, 485 (2002) (citing Leah E. Eisen, 'The Missing Piece: A Discussion Piece: A Discussion of Theft, Statutes and Limitation, and Title Disputes in the Art World', (1991) 81 *J. Crim. L. & Criminology* 1067, 1068. Lisa J. Borodkin, 'The Economics of Antiquities Looting and a Proposed Legal Alternative', 95 *Colum. L. Rev.* 377, 377-378 (1995).
32 Merryman has defined cultural property as "objects of artistic, archaeological, ethnological[,] or historical interest . . . ". Merryman, above, note 2, at 831. *Contra* Lisa J. Borodkin, above, note 31, at 379-380 (noting there is no fixed definition of cultural property).

from their source countries has become increasingly controversial.[33] Additionally, with the advent of the Internet, millions of people can now see legitimately-discovered antiquities that remained in their source countries.[34] However, many works smuggled through the illegal trade make their way into western museums, where they are properly cleaned by experts, catalogued by scholars, and displayed for the general public.[35] If it were not for a history of tolerating some form of trade in antiquities, many American museums' collections would be drastically smaller.

Strong arguments exist for allowing some form of trade in newly discovered antiquities. Traditional reasons for allowing the illegal trade to persist rely mainly on the attention items will receive at the end destination of the trade, the museum.[36] First, there is the contention that American museums are providing global exposure of world heritage.[37] That is, Greco-Roman heritage belongs not only to Italy but also to all western civilisation, and display in the United States is as appropriate as display in Italy.[38] Additionally, American museums

33 Patty Gerstenblith, 'The Public Interest in the Restitution of Cultural Objects', 16 *Conn. J. Intl. L.* 197, 199 (2001). "Until at least the middle of the 19th century, it was probably not that easy to tell the looters and the archaeologists apart.": *ibid.* While archeologists in the past were often glorified treasure hunters seeking riches, today's archaeologists are as concerned with learning about past cultures as with discovering their treasures. Julian Richards. BBC History Trail. Birth of Archaeology http://www.bbc.co.uk/history/lj/archaeologyl j/origins 07.shtml (Feb. 2002). The archaeology of today is a precise, painstaking process of sifting through layers of soil, giving burned pieces of wood almost the same scrutiny as an intact piece of pottery. E.g. Brian M. Fagan, 'The Adventure of Archaeology' (Natl. Geographic Socy. 1989) (discussing the history and current methods used in archaeological excavations).

34 Advocates have also suggested that the Internet could be used to create a registry of art. For example, Katherine Jane Hurst, Presentation, 'The Empty(ing) Museum', Tampa Fla. ((8 Jun. 2005). (The Hon. Chris A. Altenbernd, panelist, recommended the creation of a widely accessible international databank. An example of such an online registry is the International Art and Antiques Loss Register, a for-profit British corporation. Ashton Hawkins, Richard A. Rothman, and David B. Goldstein, 'A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art', 64 *Fordham L. Rev.* 54, note 26 (1995).

35 James Cuno. 'Museums and the Acquisition of Antiquities', 19 *Cardozo Arts & Ent. L.J.* 83, 84 (2001). Nevertheless, antiquities have often lost their original context by the point they are being cleaned, catalogued, and displayed in museums. Gerstenblith, above, note 33, at 199.

36 *Ibid.*, at 205-206.

37 *Ibid.*, at 206. Professor Patty Gerstenblith from DePaul University College of Law counters this traditional line of reasoning by arguing that the limited number of cities in the United States with major museums does not increase the global exposure of artworks. *Ibid.*

38 E.g. John H. Merryman, 'Keynote Cultural Property, International Trade, and Human Rights', 19 *Cardozo Arts & Ent. L.J.* 51, 55 (2001) (questioning the concept of nationality and asking "[i]s a gold platter made in Greece, but found in Sicily, Greek or Italian or both?")

spend more on the restoration and exhibition of Italian artefacts than many Italian museums, particularly the regional museums located near excavation sites in rural parts of Italy.[39] Etruscan, Greek, and Roman antiquities, many of which cannot be publicly displayed, fill Italian museums.[40] In contrast, American museums can prominently exhibit a work of even minor importance.[41] Furthermore, scholarly study in western museums can regain much of the cultural context lost by sloppy excavation techniques, as used by the *tombaroli*.[42] Finally, there is a tradition of accepting that museums display works acquired from all over the world.[43]

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39 Maier, above, note 1, at B29. Some argue that collectors have preserved ancient artefacts that would have been destroyed in their source country. *Ibid.*; Michael J. Kelly, 'Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restitutio in Integrum and Possessio Animo Ferumni/Lucrandi', 14 *Dick. J. Intl. L.* 31, 51-52 (1995) (extending the benefits of western restoration to Medieval and Renaissance works of art by writing "Church robbers reasonably argue that the paintings they steal end up in the hands of people far more ready and able to care for them than the church").

40 See Jerome M. Eisenberg, 'Stop the Rot: Museum Storage & the Destruction of Archaeological Collections', 14 *Minerva* 1, 1 (July/Aug. 2004) (available at http://minervamagazine.com/news/#1). Italian museums often have large warehouses where items sit largely un-archived. *Ibid.* For example, the collection of ancient vases in Italy's National Archaeological Museum is in such a state of disrepair that the designs and names of the artists on the vases are unrecognisable. *Ibid.* One statistic calculated that, in 1997, over 1.5 million objects were on display in Italian warehouses but more than 7 million remained in warehouses. Andrea Boggio, 'From Protections to Protection: Rethinking Italian Cultural Heritage Policy', 24 *Colum.-VLA J.L. & Arts* 269, 281 (2001).

41 Paul M. Bator, 'An Essay on the International Trade in Art', 34 *Stan. L. Rev.* 275, 299 (1982). "Is it not better for a Greek vase to be seen and studied and published in an American museum that to sit, unwanted and functionally invisible, in the basement of an Italian museum?" *Ibid.*

42 See John H. Merryman, Art Wars: International Art Disputes, 31 *N.Y.U. J. Intl. L & Pub. Pol.* 1, 10 (1998) (writing that "museums exist to acquire and conserve cultural objects for study and display.")

43 Maier, above, note 1, at B29.

44 Conklin, above, note 13, at 161-162. In 1939, the Law for the Protection of Things of Artistic and Historical Interest made it illegal to trade in newly-discovered antiquities. Law for the Protection of Things of Artistic and Historical Interest 1089 (1 June 1939) (confirmed in Legislative-Decree 490 (29 Oct. 1999)). The Italian Government, under Mussolini, created the Law for the Protection of the Things of Artistic and Historical Interest under the prevailing culture of the time, seeking to make modern Italy the successor to the ancient Roman Empire. Slayman, above, note 14, at 44. Under this law, archaeological artefacts belong to the Italian Government unless they were in a private collection before 1902. *Ibid.* This law was applied in *US v. An Antique Platter of Gold*, 184 F.3d at 134, because under the *McClain* doctrine (*US v. McClain* 545 F.2d at 988 at 999, 5th Cir. 1977), US courts recognise the validity of other countries' national ownership laws and return objects to the overseas Governments. *Ibid.* However, the rewards for finding coins, pottery, and statuary still heavily outweigh the consequences: a single coin may be sold for $1,000, whereas the maximum jail sentence for looting antiquities is six months and is rarely enforced. Conklin, above, note 13, at 161-162.

Because the illegal trade in antiquities has affected the country[44] so severely, Italy has some of the oldest laws for the protection of cultural property. Unfortunately, the stringent laws of the source country may also contribute to the illegal trade.[45] The strict Italian law and its enforcement abroad have another flaw.[46] Instead of balancing Italy's right to have control over its artefacts with the advantages of museum display, the law simply gives back the artefacts, stripped of their value, to Italy.[47] Therefore, artworks that are seized are doubly cursed, deprived of both the cultural knowledge that would have derived from careful excavation and the knowledge that would have come from museum scholarship.[48] Thus, the legal remedy is inadequate in dealing with the problems of illegal excavation because of its 'either-or' result: either Italy should have the artefacts or American collectors should have them.[49] A creative and yet obvious compromise has emerged as the Italian Government and American museums have agreed to share works using long-term loans.[50]

III. INTERNATIONAL CONVENTIONS, CASES AND BILATERAL AGREEMENTS

While looting has occurred for centuries, efforts to stop looters have a much shorter history. To combat the illegal trade in antiquities, international treaties, cases, and bilateral agreements have all attempted to balance the interests of source countries with the benefits of museum display.

A. International Conventions

International conventions can provide a united approach to the problem of the illegal trade in antiquities as multiple nations agree to unified provisions protecting artefacts.[51] However, to be truly effective, the provisions of the treaties must be practical, powerful, and yet

45 Stephen Vincent, 'Stealth Fighter', *Art & Auction* 63, 64 (Mar. 2002). As the supply of available antiquities dwindles, the demand remains the same, so prices rise accordingly. *Ibid.* Then, the financial gain increases for those who successfully smuggle goods out of a source country. *Ibid.*

46 Slayman, above, note 14, at 47.

47 *Ibid.*; Law for the Protection of Things of Artistic and Historical Interest, 1089.

48 Slayman, above, note 14, at 47.

49 *Ibid.*

50 *Ibid.*

51 Lawrence M. Kaye, 'Art Wars: The Repatriation Battle', 31 *N.Y.U. J Intl. L. & Pol.* 79, 84 (1998).

52 See Nina R. Lenzner, 'The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?' 15 *U. Pa. J. Intl. Bus. L.* 469, 471 (1994) (discussing the shortcomings in the UNIDROIT and UNESCO Conventions).

enforceable.[52] Furthermore, even the strongest treaty is only as effective as its signatory nations allow it to be.[53] The Hague, UNESCO and UNIDROIT Conventions reveal some advantages and disadvantages of international treaties in dealing with the illegal art trade.[54]

The first international agreement to protect art from plundering and to prevent illegal trade was the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, created in 1954.[55] This Convention controlled thefts and exports of cultural property during military occupation.[56] One of the strengths of the Hague Convention was that it provided a definition for the term 'cultural property'.[57] The Convention also had a protocol for behaviour for occupying nations.[58] Furthermore, with 118 signatory countries to date, the Convention has been widely accepted.[59] However, England and the United States, two of the world's major military powers and art importers, have not yet signed the Hague Convention, so it is somewhat limited in its applicability.[60] The scope of the Convention is also limited because it does not consider the peacetime trade in antiquities.[61]

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53 *Ibid.*

54 *Ibid.*

55 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 36 Stat. 2279, Art. 1, 249 U.N.T.S. 215, 242.

56 *Ibid.* The Hague Convention has most recently been invoked in the Persian Gulf War in 1991 and the War on Terrorism in Iraq in 2003, in which there were concerns about the contents of the Iraqi National Museum. Karin E. Borke. 'Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2001', 13 *DePaul-LCA J. Art & Ent. L.* 381, 386 (2003).

57 Hague Convention, Art. II: "For the purposes of the present Convention, the term "cultural property"shall cover, irrespective of origin or ownership:

a. movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

b. buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

c. centres containing a large amount of cultural property as defined in subparagraphs (a) and (b), to be known as 'centres containing monuments.'" *Ibid.*

58 *Ibid.* at Art. X.

59 Hague Convention, List of Signatories, http://erc.unesco.org/cp/convention.asp?KO=13637&language=E (accessed July 20, 2005.)

60 *Ibid.*

61 Borke, above, note 56, at 386.

In 1970, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) also agreed the terms of a Convention to protect international cultural heritage.[62] While the Hague Convention focused on wartime thefts of art, the UNESCO Convention focused on peacetime thefts.[63] At the time the UNESCO Convention was drafted, trade of stolen Holocaust-era artworks was a newly emerging problem.[64] The UNESCO Convention's method of combating this problem was to establish international co-operation by defining cultural property[65] and by enforcing the laws of individual nations' regarding the import and export of cultural property.[66] Because the UNESCO Convention relies so heavily upon its signatory nations to define cultural property and to enforce import and export restrictions, the Convention is only as strong as its individual member nations.[67] While a great many source nations have signed the UNESCO Convention, until recently only a small number of market nations had agreed to sign the Convention.[68] The United States was a notable exception, having signed the UNESCO

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62 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, Oct.12-Nov. 14 1970, 823 U.N.T.S. 231, 232 [hereinafter UNESCO Convention]; Jodi Patt, Student Author, The Need to Revamp Current Domestic Protection for Cultural Property, 96 *Nw. U. L. Rev.* 1207, 1219 (2002).

63 Jennifer Sultan, Student Author, Combating the Illicit Art Trade in the European Union: Europol's Role in Recovering Stolen Artwork, 18 *Mw. J Intl. L. & Bus.* 759, 772 (1998).

64 Kaye, above, note 51, at 84.

65 UNESCO, above, note 4, at Art. 2. Cultural Property is property designated by a signatory nation as having importance in the fields of "archaeology, prehistory, history, literature, and science." *Ibid.* The UNESCO Convention also designates eleven possible categories for cultural property: rare collections and specimens of fossils, animals, plants, and minerals; historical property, including military, scientific, and technological history; products of archaeological excavations; products from dissembled artistic, historical, or archeological sites that have been dissembled; antiquities, including coins, that are more than 100 years old; ethnological property; artistic property; rare writings, including books and manuscripts; stamp collections; photographic and cinemagraphic archives; and furniture and musical instruments more than one hundred years old. *Ibid.* (cited in Patt, above, note 62, at 1220).

66 UNESCO, above, note 4, at Art. 7.

67 See Ian M. Goldrich, 'Balancing the Need for Reparation of Illegally Removed Cultural Property with the Interests of Bona Fide Purchasers: Applying the UNIDROIT Convention to the Case of the Golden Phiale', 23 *Fordham Intl. L.J.* 118, 138 (1999) (arguing that the effectiveness of the UNESCO Convention is hampered by the disparity in laws in signatory nations, such as the case of where it may be illegal to export an antiquity from one signatory country but legal to import the same antiquity into another signatory country).

68 UNESCO, above, note 4, States Parties, (available at http://www.unesco.org/culture/laws/1970/html_eng/page3.shtml). The United Kingdom, Japan and Switzerland have all signed up to the Convention in recent years, and The Netherlands has announced its intention to do so.

Convention and in 1983 adopted the Cultural Property Implementation Act to implement the Convention.[69]

The International Institute for the Unification of Private Law, Unidroit, drafted the Convention on Stolen or Illegally Exported Cultural Objects in 1995.[70] This Convention was designed to rectify some of the problems in the UNESCO Convention and addresses issues that the UNESCO Convention does not mention, such as illegal excavation.[71] The Unidroit Convention also has substantive law, including the requirement that a possessor, even a *bona fide* purchaser, must return stolen artefacts.[72] The broader scope and stricter requirements of the Unidroit Convention make it even less appealing than the UNESCO Convention to market nations.[73] Consequently, market nations have been slow to sign the Unidroit Convention.[74]

B. Cases

American courts became another battleground in the cases disputing the ownership of antiquities as between true owners and good faith purchasers in the 1980s and 1990s. Various legal approaches have tried to balance the interests of true owners and good faith purchasers of artworks, including the flexible interpretation of the running of time under the relevant statutes of limitation period[75] which may provide for a discovery rule,[76] a statutory notice provision[77] or a demand and refusal rule.[78] Under

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69 19 U.S.C. § 2600 (2000) (available at http://exchanges.state.gov/culprop/97-446.html).

70 Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally exported Cultural Objects, 23 June 1995 34 I.L.M. 1322.

71 Lyndel V. Prott, *Commentary on the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects 1995* 15 (1997, Institute of Art and Law). In 1984, UNESCO approached UNIDROIT with a project to remedy the UNESCO Convention, resulting in the Unidroit Convention. *Ibid.*

72 Unidroit, above, note 4.

73 *Ibid.*

74 *Ibid.*

75 See *O'Keefe v. Snyder*, 416 A.2d 862 (N.J. 1980).

76 See *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp 1374 (S.D. Ind. 1989), aff'd. 917 F.2d 278 (7th Cir. 1990) (applying the discovery rule).

77 See 19 U.S.C. § 2600 (codifying the statutorily required notice). Another example of the statutory notice provision is the European Union Cultural Objects Law. Hawkins *et al.*, above, note 33, at 64. Under that law, certain art objects unlawfully removed from one EU member state and imported into another member state can be returned to the original state. Somewhat akin to the demand and refusal rule, the source nation must first request that the artwork be returned and then may sue to have the item returned. *Ibid.* However, a good faith purchaser must be compensated by the source nation if either the request or the suit is successful. *Ibid.*

78 See Alexandre A. Montagu, 'Recent Cases on the Recovery of Stolen Art: The Tug of War Between Owners and Good Faith Purchasers Continues', 18 *Colum. VLA J.L. & Arts* 75 (1993) (discussing all four approaches).

the demand and refusal rule as applied by the courts of New York, a cause of action for replevin runs from the time a true owner first requests the return of the item.[79] Such a rule favours true owners as it does not consider the length of time that the item was missing or the efforts (or lack of) of the owner in publicising or recovering his loss.[80] However, finding a better, more balanced legal approach has proven difficult, particularly in the case of international disputes over objects of cultural importance.[81]

When US courts decide disputes over antiquity ownership, the question becomes whether the source nation can prove that it is the true owner.[82] In civil cases, finding that the artefact was recently excavated, stolen or imported generally means that it will be returned to the source country.[83] In criminal cases, such findings may on occasion have the additional consequence of landing the person who smuggled the artefact in jail.[84] In *United States v. McClain*, the court found that the illegal exportation of artworks under the law of the source nation constitutes theft and requires that the artwork be returned to its source country.[85]

In *Autocephalous Greek Orthodox Church v. Goldberg*, the Republic of Cyprus and the Greek Orthodox Church sued for the return of four sixth-century mosaics, removed from a church in northern Cyprus at some point in the late 1970s.[86] The Government of Cyprus and the Church publicised the theft, once it became known, and sent

79 In *Solomon R. Guggenheim Foundation v. Lubell* 569 N.E.2d 426, 428-429 (1991). New York's highest court applied the demand and refusal requirement in an action to reclaim stolen or missing artworks: *ibid.* The Court in this frequently-cited case made its decision in part on public policy grounds, finding that in New York particularly, as a major center for the arts, the burden of locating stolen art should rest with the good faith purchaser rather than the true owner: *ibid.*

80 Montagu, above, note 78, at 76.

81 Ashton Hawkins, Richard A. Rothman & David B. Goldstein, above, note 33, at 77. As scholars have commented, "It is easy to critique [the demand and refusal rule], flawed as it is on grounds of policy, precedent, and pragmatism. It is less easy to develop an alternative approach that balances the legitimate interests of the innocent art theft victims – the former owner and the good faith purchaser": *ibid.* (emphasis added).

82 E.g. *Republic of Croatia v. Trustee of Marquess of Northhampton*, 203 A.D.2d.167, 167-168 (N.Y. App. Div. 1st Dept. 1994) (stating reasons for the return of artefacts in a landmark case in the international trade of art).

83 E.g. *Autocephalous Greek Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 717 F. Supp. 1374, 1378 (S.D. Ind.), aff'd. 917 F.2d 278 (7th Cir. 1990) (ordering the return of stolen artefacts to the source country).

84 E.g. *US v. Schultz*, 178 F.Supp.2d 445 (S.D.N.Y. 2002), aff'd. 333 F.3d 393 (2d Cir. 2003) (sentencing a smuggler of illegal goods to 33 months in prison).

85 545 F.2d at 999.

86 717 F. Supp. 1374, 1378 (S.D. Ind.). The mosaics once covered the apse of the Kanakaria church in the north of Cyprus, an area held by Turkish militants since 1974. *Ibid.* at 1378-1379. With the militant Turkish invasion, the local Greek populace was 'enclaved' and religious leaders had to flee to safety in the south of Cyprus, leaving churches defenceless against looters: *ibid.*

information to leading museums around the world.[87] Around the same time, an American art dealer had purchased the mosaics for resale and contacted several interested museums.[88] A curator for the Getty Museum contacted Cypriot authorities, who in turn contacted United States customs officials.[89] After requesting the return of the mosaics, the Republic of Cyprus and the Greek Orthodox Church filed a replevin suit in Indiana, where they were awarded ownership of the mosaics.[90] The dealer appealed, arguing that the Republic of Cyprus did not have a right to possess the mosaics because the church that housed them had been taken over by a *de facto* Turkish Government.[91] However, the appellate court found that an unrecognised government could not supplant the rights of a legitimate country's ownership of antiquities.[92] On other grounds, the court affirmed the lower court's holding that the dealer had acquired no title to the stolen mosaics.[93]

87 *Ibid.* at 1379.

88 *Ibid.* at 1380. A European art dealer offered the mosaics, mounted on a flat surface, to an American art dealer who specialised in eighteenth and nineteenth century European art: *ibid.*

89 *Ibid.* at 1390. The Getty Museum in Los Angeles has its own conflicted relationship with the illegal trade in antiquities. 'Getty Sticks with Antiquities', *The Art Newspaper* 1 (July-Aug. 1996). Established only in the 1970s, the Getty avidly collected unprovenanced items in its early years to quickly build its antiquities collection: *ibid.* at 17. In 1995, Getty officials announced that the museum would only buy antiquities that came from old, established private collections: *ibid.* However, the following year, the museum accepted a donation which included antiquities that were likely to have been stolen: *ibid.* at 1. Then, in 1999, the Getty returned a vase and two sculptures, one of which came from the 1996 donation, to Italy. Andrew Slayman, 'Getty Returns Italian Artifacts', 52 *Archaeology* 3 (May/June 1999). In May 2005, Marion True, the Museum's Greco-Roman curator, was indicted by an Italian court for conspiring to import Italian antiquities but has not been brought to trial. Elisabetta Povoledo, 'Trial of Curator at the Getty Postponed by Italian Court', *NY Times* E3 (19 Jul. 2005).

90 717 F. Supp. at 1397-1400. Replevin has three elements: (1) that the plaintiff has a right to possession of the property, (2) that the property has been detained unlawfully, and (3) that the defendant wrongfully possesses the property: *ibid.*

91 917 F.2d at 291. The Turkish Government had issued decrees that it owned all property in Northern Cyprus, including 'movable antiquities': *ibid.*, at 291-292.

92 *Ibid.*, at 292-293. In such cases, under Indiana state law, the limitation period for the return of stolen objects will run from the date when the true owner, through the exercise of due diligence, could reasonably be expected to have established the location of the object and the identity of the possessor: *ibid.*, at 291. In this case, the limitation period began to run early because the Church had publicised the theft and had done all it could to make potential purchasers aware of the true ownership of the mosaics: *ibid.*

93 *Ibid.*, at 293 (writing "[the lower court's] extensive (and quite interesting) discussion of Swiss law, as well as Goldberg's lengthy attack thereon, need not be reviewed."). The court, in dicta, added that it was not trying to restrict the international art market but that art purchasers should make formal background searches of both the seller and the artwork itself before purchasing: *ibid.*, at 294. The court, in dicta, added that it was not trying to restrict the international art market but that art purchasers should make formal background searches of both the seller and the artwork itself before purchasing. *Ibid.* at 294.

When courts apply the ownership laws of the source country, the scales of justice again bend in favour of the true owner. Many countries have laws stating that certain objects are State-owned.[94] Egypt has such a law, which the Second Circuit applied in *US v. Schultz*.[95] In *Schultz*, an artefact smuggler, who was also a well-known art dealer, had attempted to sell recently-excavated antiquities as part of a collection from a fictitious English estate to avoid triggering Egyptian ownership laws.[96] The smuggler was convicted of conspiring to receive stolen property, fined $50,000, and sentenced to 33 months in jail.[97] The appellate court affirmed this decision, and held that, in any consideration of the meaning of the term 'stolen property', the National Stolen Property Act applied the term in accordance with foreign patrimony laws.[98]

It is partly as a result of the outcome of many court cases, which frequently favour source countries, that many disputes settle. In 1993, the Metropolitan Museum of Art settled with the Turkish Government over a collection of gold and silver bowls, jewellery, and other art objects known as the Lydian hoard.[99] Turkey again reached a settlement agreement in 1998 with a private collector over a 1,600-piece collection of ancient coins that were probably discovered near Emali, Turkey.[100]

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94 See above, note 44 (discussing the Italian law vesting ownership of all antiquities in the State).

95 333 F.3d 393 (2d Cir. 2003), cert denied 2004. The Egyptian 'Law 117' deems artefacts excavated and removed from Egypt after 1983 to have been stolen from their rightful owner, the Egyptian Government. *Ibid.* at 395-396. The National Stolen Property Act recognises such foreign ownership laws in the United States. *Ibid.*

96 *Ibid.* at 396. Schultz and co-conspirator Jonathon Tokeley-Parry created the 'Thomas Alcock Collection', even going so far as to design fake labels to look like they were made in the 1920s. *Ibid.* Parry also 'restored' a sculpture using a technique popular in the 1920s, when Egyptian antiquities were at the height of popularity in the United States and Great Britain. *Ibid.* He drilled a large hole in the face, permanently damaging the figure: Baker, at http://www.archaeology.org/online/features/schultz/collectors.html.

97 *Ibid.* at 399.

98 *Ibid.* at 401-407 (citing U.S. v. McClain, 545 F.2d at 995).

99 Maier, above, note 1, at B29. The Metropolitan Museum of Art admitted no fault in the settlement, and its chief lawyer released a statement that read: "We have a very high responsibility to our own collection and to our own public and everything that we collect." *Ibid.*

100 Turkey, Ministry of Culture and Tourism, Treasure of the Century: History of the Emali Coins http://www.kultur.gov.tr/portal/arkeoloji_en.asp?belgeno=6092 (accessed 15 July 2005). Turkish peasants discovered the Greek coins, and it was well known among locals in the region that the coins were sold to a Turkish antiquities dealer. *Ibid.* The peasants were arrested, the coins were tracked down, and the Turkish Government sued for their return. *Ibid.* Rather than go to trial, the American coin collectors returned their collection. *Ibid.*

When the source country cannot prove that the antiquity came from within its borders, only then does the object remain with the purchaser.[101] This result occurs, for example, when an ancient civilisation occupies the same land as several modern countries, such as the Roman and pre-Columbian empires.[102] In *Republic of Lebanon v. Sotheby's*,[103] the country of Lebanon sued the art auction house after it advertised for sale a fourteen-piece collection of Roman silver dating from the fourth century A.D., which was valued at 70 million dollars.[104] However, Croatia and Hungary intervened in the suit, with each country claiming that the artefacts were illegally excavated from within their borders.[105] Because none of the countries could establish ownership of the silver, the court found in favour of the auction house and relieved it and the owner of the silver from any liability.[106]

Conflicting claims by modern nations are not always required, as in the criminal case of *US v. Swetnam*[107] and the the accompanying civil case of *Government of Peru v. Johnson*.[108] While in the criminal case, the defendant was indicted for importing ancient pre-Columbian Peruvian artefacts,[109] the defendant was not liable in the civil case because Peru could not establish in the civil case that the artefacts were discovered within its modern boundaries.[110]

However, even Greek art, which is spread throughout the Mediterranean, has on occasion been successfully reclaimed by its source countries.[111] In *United States v. An Antique Platter of Gold*,[112]

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101 Patty Gerstenblith, Museums, the Market, and Antiquities, University of Chicago Cultural Policy Workshop http://culturalpolicy.uchicago.edu/workshop/gerstenblith.html (2 Mar. 2002).

102 E.g. *Republic of Lebanon v. Sotheby's*, 167 A.D.2d 142, 144-145 (S.D.N.Y. 1990) (finding that Roman antiquities could have come from more that one possible modern country); *Government of Peru v. Johnson*, 720 F.Supp. 810, 815 (C.D. Cal. 1989) (finding that Peru could not prove that particular pre-Columbian antiquities came from within its borders).

103 167 A.D.2d 142 (N.Y. App Div 1st Dept. 1990).

104 *Ibid.*, at 143. The court noted that Sotheby's had taken the precaution of notifying 29 countries, each a part of the Roman Empire in the fourth century A.D., of the impending sale. *Ibid.*

105 *Ibid.*, at 142; Kaye, above, note 51, at 83.

106 *The Republic of Croatia v. The Trustee of the Marquess of Northampton 1987 Settlement*, 203 A.D.2d 216, 216 (NY App. Div 1 Dept 1994).

107 Indictment CR 88-914 RG (C.D. Cal 1988)

108 720 F. Supp. 810, 812 (C.D. Cal. 1989) aff'd sub nom, *Government of Peru v. Wendt*, 933 F.2d 1013 (9th Cir. 1991).

109 Jessica L. Darraby, 1 *Art, Artifact, and Architecture Law* § 6:117 (2004).

110 *Government of Peru*, 720 F. Supp. at 815.

111 Italy, Greece, and Turkey have all reclaimed Greek artefacts. The Getty Museum in Los Angeles returned a Greek terracotta cup to Italy after research revealed it had been illegally excavated. BBC News, 'Getty Museum Returns Stolen Art', http://news.bbc.co.uk/1/hi/world/europe/273618.stm (6 Feb. 1999). With the help of the FBI, Greece

US Customs officials seized an exquisite golden phiale, or bowl, that was being imported into the United States.[113] Although the phiale itself is incredibly detailed, scholars know nothing of the bowl's place of excavation.[114] Rumour linked it to the Morgantina region of Sicily, where it was purchased for resale by *tombaroli* and art dealers.[115] Taking the usual route for illegally-excavated artefacts leaving Italy,

111 cont. was able to reclaim artefacts which had been legally excavated, placed in a Greek museum, but stolen from that museum and imported into Miami. Hellenic Ministry of Culture, 'Stolen Antiquities from Corinth Returned to Greece', http://www.culture.gr/2/21/211/21104m/e211dm07.html (22 Jan. 2001). In Turkey, where there are more Greek cities than in Greece and more Roman towns than in Italy, efforts have also been made to reclaim antiquities. Dominique Schwartz, ABC Foreign Correspondent, 'Turkey-Stolen Antiquities', http://www.abc.net.au/foreign/stories/s300313.htm (24 Sept. 1996). See above, note 100 (for a discussion of Turkey's efforts to reclaim the Emali coins).

112 991 F. Supp. 222, 224 (S.D.N.Y. 1997), aff'd, 184 F.3d 131 (2d Cir. 1999).

113 991 F. Supp. at 227. See generally Andrew L. Slayman, 'Case of the Golden Phiale', 51 *Archaeology* 36, 38 (10 Apr. 2002). Found somewhere in the vicinity of the ancient city of Morgantina, on the Island of Sicily, the large bowl features three concentric rings of carefully hammered acorns around a centre ring of beechnuts. In the outermost band, bees alternate with the acorns. The Greek poet Hesiod referred to the two together as representing "the earth's 'victual in plenty.'" *Ibid.* at 36. In the centre of the bowl is a large round bulge that symbolises the omphalos, the Greek word for the earth's belly button, and "for this reason the vessel is known as a phiale mesomphalos." *Ibid.* An inscription of a few Greek words declares the bowl's weight and dedication to the gods by an artist named Achyris. *Ibid.* Based on the shape of the letters of the inscription, an epigrapher dated the bowl to approximately 300 B.C.E. *Ibid.* at 36-38.

114 *Ibid.* What other works of art may have been nearby, no one but the original robber knows. *Ibid.* at 38. In 1980, Professor Giacomo Manganaro of the University of Catania visited an acquaintance, a known Sicilian tombarolo named Vincenzo Pappalardo, who had found a giant golden bowl during his illegal excavations. Peter D.C. Mason, 'US Court Orders Forfeiture of Sicilian-Greek Gold Platter' (1998) III *Art Antiquity and Law*. Pappalardo sought authentication of the spectacular vessel to facilitate selling it to an art collector. *Ibid.* Although Professor Manganaro was unable to verify the authenticity of the bowl at that time, he did not report his visit to authorities, and instead conducted his own research on Greek tablets from a nearby site in Sicily and a similar golden phiale owned by the Metropolitan Museum. *Ibid.* Some reports indicate that Professor Manganaro later contacted Pappalardo to inform the tombarolo that he thought the bowl was a Greek original based upon the inscription on the phiale in a Doric Greek dialect. *An Antique Platter of Gold*, 991 F. Supp. at 224 (citing Report of Information for Testimonial Evidence of Giacomo Manganaro at 1-3; Government Statement Pursuant to Rule 3(g) at ¶¶ 1, 2; Steinhardt Statement in Opposition to Plaintiff's Statement Pursuant to Rule 3(g) at ¶¶ 1, 2).

115 *Ibid.* at 224-225. Pappalardo sold the phiale to the collector and antiquities smuggler Vincenzo Cammarata in exchange for artworks valued at approximately $20,000. Mason, above, note 114. Cammarata also contacted international art dealers, including Robert Hecht, who had gained notoriety in his large sales of antiquities, particularly in the much-contested Euphronios Krater now owned by the Metropolitan Museum. Slayman, above, note 113, at 38. Cammarata ended up selling the bowl to William Veres, who maintained at that time that the work was a nineteenth-century reproduction but guaranteed its authenticity in a later sale to a New York dealer. *Ibid.* at 39.

the bowl was smuggled through Switzerland by an international art dealer and into an American private collection.[116] For a few years, the phiale quietly remained in the private collection, but in 1995, at the behest of the Italian Government, Customs agents obtained the phiale and took its owner to court for false statements on the Customs form and for breaking Italy's Law for the Protection of Things of Artistic and Historic Interest.[117] At trial in 1997, the court granted summary judgment for the United States, finding that information was falsified on customs documents and Steinhardt could not avail himself of an innocent owner defence.[118] The court first examined the customs forms that accompanied the phiale on its travel from Switzerland to the United States.[119] Finding that a violation had occurred when the person who transported the phiale listed its origin as Switzerland rather than Italy, the court concluded the phiale had entered the country illegally.[120] Furthermore, the court held that Steinhardt could not use an innocent owner defence because he, as a sophisticated art patron, should have known about the provenance of the phiale, excluding any possibility that he had bought the object in good faith.[121]

The collector fought the ruling, and several museums filed *amicus* briefs supporting him.[122] The Archaeological Institute of America, in contrast, filed a brief in support of the court's findings.[123] On appeal in 1999, the Second Circuit affirmed the lower court's

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116 *Ibid.* Through the circuitous route described above, in 1991 the phiale landed in the collection of retired New York financier Michael Steinhardt, who wired 1.2 million dollars to a Swiss bank and sent his art dealer to Switzerland to collect the work, which was recorded on the customs forms to be estimated at $250,000 and from a fake collection describes as "Penisi/ Pappalardo, Lausanne." *Ibid.* The Metropolitan Museum happily agreed to authenticate the work at no charge for Steinhardt, one of their largest donors, and discovered that the gold in the bowl was 99% pure. *Ibid.* One report indicated that Steinhardt tried to sell the phiale to the Metropolitan Museum. Frederika Randall, 'Land of Mafia – and Mosaics', *The Wall Street Journal* late edn A24 (29 June 1999).

117 *An Antique Platter of Gold*, 991 F. Supp at 226.

118 *Ibid.* at 227.

119 *Ibid.* at 229.

120 *Ibid.* at 229, note 28.

121 *Ibid.* at 233. The court found, "Steinhardt's experience as an art collector . . . and the fact that, in the purchase agreement, he provided for the risk of seizure that eventually occurred, both detract from his claim of innocence." *Ibid.*

122 Manus Brinkman, 'The Causes of Illicit Traffic in Cultural Property, Protecting Cultural Heritage' http://www.culturalheritage.com/Section1/brinkman.asp (accessed 15 July 2005). The museums argued that the case was threatening the ability of US museums to collect and exhibit objects due to recognition of sweeping foreign cultural patrimony laws. *Ibid.*

123 Slayman, above, note 113, at 41.

decision.[124] The appellate court did not look to Italian law but instead focused on the application of the National Stolen Property Act (NSPA).[125] Steinhardt appealed to the Supreme Court,[126] which declined to hear his case, and on 11th February 2000, US Customs returned the phiale to Italy in a special ceremony.[127] Even though the Italian Government has regained possession of the phiale, it can never regain the context lost by illegal excavation.[128] However, American museums and scholars are now deprived of the opportunity to examine the phiale and learn additional information from careful laboratory analysis.[129]

C. Bilateral Agreements Involving the United States

The Cultural Property Implementation Act allows the US State Department the ability to restrict and even bar the entry of certain categories of archaeological material.[130] In some respects, the bilateral agreements are more important than treaties or cases in

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124 *An Antique Platter of Gold*, 184 F.3d at 132.

125 *Ibid.* at 134. According to *Archaeology* magazine, "the court left hanging the question whether objects claimed by foreign countries under their patrimony constitute stolen property under NSPA." Mark Rose, 'Steinhart Loses Appeal', 52 *Archaeology* 18, 18 (1999). Contra Ann Brickley, 'McClain Untarnished: The NSPA Shines Through the Phiale Controversy', 10 *DePaul-LCA J. Art & Ent. L.* 315, 341 (2000) (finding "The Second Circuit's decision not to consider Italian concepts of property under the NSPA is not a refusal to apply the NSPA in cases of civil forfeiture.")

126 Cert. denied, 528 U.S. 1136 (2000).

127 'US Customs Service, Worth More than its Weight in Gold: U.S. Customs Returns Stolen Million Dollar "Phiale" to Italy', http://www.customs.gov/news/ news13/htm (accessed Mar. 27, 2002).

128 Stille, above, note 15, at 69. As Alexander Stille points out, "Ripped from their context and smuggled out of the country, with their origins camouflaged in order to make them salable, antiquities lose much of their meaning and value." *Ibid.*

129 'US Customs Service', above, note 127. It is unlikely that the Italian Government will allow the Phiale to travel back to the United States, as research revealed no instances in which US museums have been able to display works of art that were stolen from and then returned to Italy.

130 19 U.S.C. § 2601 (2000). The source country, which must be a signatory of the 1970 UNESCO Convention makes a request with the state department for an import restriction. Marilyn Phelan, 'A Synopsis of the Laws Protecting Our Cultural Heritage', 28 *New Eng. L. Rev.* 63, 98 (Fall 1993). The President must approve the request, and then the only items that can be legitimately imported are those accompanied by a certificate that exportation did not violate the source country's laws. *Ibid.* The president also puts together and considers the recommendations of the Cultural Property Advisory Committee. US State Department, The President's Cultural Property Committee, http://exchanges.state.gov/culprop/committee.html (16 June 2004). Appointed by the President, the eleven-person committee consists of archaeologists, anthropologists, cultural property experts, museum directors and representatives of the general public. *Ibid.*

striking a blow against the illegal art trade.[131] However, the agreements can be limited because they are often important not for any real concern over illegal trade, but for the presence of an additional diplomatic tool to improve relations with the source country.[132] Italy requested and was granted such a ban in 2001, joining countries such as Bolivia,[133] Cambodia,[134] Cyprus,[135] El Salvador,[136] Guatemala,[137] Honduras,[138] Mali,[139] Nicaragua,[140] and Peru[141] with which the United States also had such agreements.[142] Many of the bilateral agreements focus on pre-Columbian artefacts.[143] In fact, the only agreements that cover Greco-Roman-type antiquities are the agreements with Italy and Cyprus.[144]

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131 Park, above, note 12, at 949. These agreements are able to tailor to the types of artefacts most exported from the individual source nations. *Ibid.* at 952. Perhaps the strongest feature of the Cultural Property Implementation Act is that the ban on importation extends to entire classes of artefacts regardless of the method of import. Slayman, above, note 14, at 47.

132 *Contra* Chauncey D. Steele, 'The Morgantina Treasure: Italy's Quest for Repatriation of Looted Artifacts', 23 *Suffolk Transnational. L. Rev.* 667, note 175 (2000) (arguing, before the Agreement was adopted, that a bilateral agreement would address the problem of illegal trade). However, since 2001, Italy and the United States have been important allies to one another; this strong relationship recently chilled with the shooting of an Italian negotiator in Iraq and the kidnapping of a Muslim cleric in Italy. MSNBC, 'Kidnap Drama Chills U.S.-Italian Relations', http://www.msnbc.msn.com/id/8432147/ (1 July 2005).

133 Import Restrictions on Archaeological and Ethnological Materials from Bolivia, 66 Fed.Reg. 236, 63490 (2001).

134 Import Restrictions on Archaeological Materials from Cambodia, 68 Fed. Reg. 183, 55000 (2003).

135 Import Restrictions on Pre-Classical and Classical Archaeological Material Originating in Cyprus, 67 Fed Reg. 139, 47447 (2002).

136 Import Restrictions on Archaeological Material from El Salvador, 52 Fed.Reg. 34, 61416 (1987).

137 Import Restrictions on Archaeological Artifacts from Guatemala, 62 Fed. Reg. 192, 51771 (1997), extended 67 Fed. Reg. 189, 61259 (2002).

138 Import Restrictions on Archaeological Material Originating in Honduras, 69 Fed. Reg. 51, 12267 (2004).

139 Import Restrictions on Archaeological Artifacts From Mali, 62 Fed. Reg. 184, 49594 (1997), extended 67 Fed. Reg 183, 59159 (2002).

140 Import Restrictions on Archaeological Material From the Pre-Hispanic Cultures of the Republic of Nicaragua, 65 Fed. Reg. 208, 64140 (2000).

141 Import Restrictions on Archaeological and Ethnological Materials From Peru, 62 Fed. Reg. 112, 31 713 (1997), extended and amended, 67 Fed. Reg. 109, 38 877 (2002).

142 Import Restrictions on Archaeological Material Originating in Italy and Representing the Pre-Classical, Classical, and Imperial Roman Periods, 66 Fed. Reg. 15, 7399 (2001). The agreement with Italy is among the broadest of the agreements, covering a wide variety of objects. Karen E. Borke, 'Searching for a Solution: An Analysis of the Legislative Response to the Iraqi Antiquities Crisis of 2003', 13 *DePaul-LCA J. Art. & Ent. L.* 381, 415-416 (Fall 2003).

143 Above, note 133, 135-138, 141.

144 Agreement, above, note 6. An agreement with Greece may follow. Mark Rose, 'Greek-U.S. Proposition', 55 *Archaeology* 3 (May/June 2002).

While international treaties deal with illegal excavation, looting and transport on a wide, global scale,[145] case law addresses these same issues on an individual, case-by-case basis.[146] Neither the treaties nor the cases provide a consistent approach that can be used and enforced throughout the United States. Therefore, bilateral agreements seem to be the best method for the United States to address the import of illegally-excavated materials from across the globe.

IV. THE AGREEMENT

In 2001, representatives from the United States and Italy created a bilateral agreement, with original copies in both English and Italian, designed to restrict the import of Italian antiquities into the United States.[147] The document bears the hefty title of 'Agreement between the Government of the United States of America and the Government of the Republic of Italy Concerning the Imposition of Import Restrictions on Categories of Archaeological Material Representing the Pre-Classical, Classical and Imperial Roman Periods of Italy'.[148] Indeed, the Agreement itself is a strongly worded restriction on archaeological materials from the ninth century B.C.E. to the fourth century C.E., requiring the United States to return any such materials imported after the signing of the agreement.[149] Under the Agreement, restricted materials may enter the United States only if accompanied by an Italian export permit or other documentation demonstrating that they left Italy prior to the 2001 Agreement.[150] In exchange, Italy promised to impose stricter punishments for looters, develop tax incentives to support legitimate excavations, and strengthen support among other European nations to protect Italian cultural patrimony.[151]

One particular measure of the Agreement seemed to benefit American museums. Article II (E) states:

> The Government of the Republic of Italy agrees to use its best efforts to encourage further interchange through: 1. promoting agreements for long-term loans of objects of archaeological or artistic interest, for as long as necessary, for research and education, agreed upon, on a case by case basis, by American and Italian museums or similar institutions, to include: scientific and technological

145 Unidroit, above, note 4; UNESCO, above, note 4.
146 Above, note 82-129.
147 Agreement, above, note 6.
148 *Ibid.*
149 *Ibid.* at Art. II.
150 Daniel W. Eck, Patty Gerstenblith, & Marilyn Phelan, 'International Cultural Property', 36 *Intl. Law.* 607, 610 (2002)
151 Agreement, above, note 6 at Art. II.

> analysis of materials and their conservation; comparison for study purposes in the disciplines with material already held in American museums or institutions; or educational presentations of special themes between various museums or academic institutions...[152]

With the promise of increased enforcement and shared antiquities, the Agreement seemed to offer incentives for both Italian and American interests.

However, although the 2001 Agreement has made little visible impact in stemming the tide of artefacts out of Italy, its opponents began chafing soon after its implementation.[153] Critical mostly of the increased efforts to return illegally-excavated works back to Italy, detractors claimed that Maria Kouroupas, the American director of the Cultural Property Advisory Committee, "supported by archaeologists, journalist allies, and government policy[,] has successfully hijacked American foreign policy on cultural policy."[154] Many dealers, collectors, and museum officials support a free trade in antiquities, which, they claim, would eliminate clandestine digging.[155] According to this group, an open market offers, "incalculable benefits, ranging from the preservation of objects in private and public collections, where they are safe from looters or even fanatical governments, to the promotion of cultural understanding between nations."[156] But, for a country whose soil recently contained the artefact, dealing with the auction house and treasure hunters may be an anathema.[157]

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152 *Ibid.*

153 Vincent, above, note 45 at 63.

154 *Ibid.* Dealers have particular dislike for archaeologists, specifically the Archaeological Institute of America, which the dealers claim "[has] adopted the increasingly polemical view that the activities of the antiquities trade are irremediably, even morally wrong." *Ibid.* at 65.

155 *Ibid.* at 63. Michael Ainsley, advocate of an open market and former chairman of Sotheby's, has claimed that the auction houses would offer a valuable tool in the free market sale: the ability for a country to buy back its heritage. Michael Ainsley, Address, Art, Public Policy, and Art Education, Nashville, TN (2 Apr. 2002). Some countries, such as China, have purchased back their cultural heritage from auction houses. Spencer P.M. Harrington, 'China Buys Back Its Past', *Archaeology Online* http://www.archaeology.org/online/news/china4.html (11 May 2000). The Chinese Government spent 4 million dollars on three ancient sculptures stolen from the Summer Palace more than 100 years ago. *Ibid.* The objects were auctioned by Sotheby's and Christie's in Hong Kong. *Ibid.*

156 Vincent, above, note 45, at 63.

157 Hugh Eakin, 'Debating Illegal Archaeology', *Art News Online* http://www.artnewsonline.com/pastarticle.cfm?art_id=1400 (Sept. 2003) (quoting Malcolm Bell, the American head of excavations in Morgantina, Sicily, as saying, "'... in the end, there can be no compromise on questions of the market. Looted antiquities are illegal; their export is illegal.'")

The Agreement seemed to strike a balance between the benefits of museum display and the rights of the Italian Government. However, almost two years passed between signing the Agreement and holding roundtable discussions with Italian officials and American museum curators.[158] The resulting 'US-Italy Long-Term Loan Guidelines' reveal the limitations of this proposal.[159]

First, the loans are limited as to their length.[160] The guidelines state, "[u]nder Italian law, loans of objects solely for display purposes are still limited to a one-year loan period."[161] Exhibits must have a 'significant' research or educational component to be eligible for longer loans, and, even then, American institutions will have to apply for temporary export licences, granted on a case-by-case basis.[162] The incorporation of this additional component attempts to take advantage of the argument that artefacts receive better treatment in American museums than in Italian museums.[163] Under the current provisions of the Agreement, the items on loan could receive scientific analysis and preservation care in American museums. However, conservation departments, which would have to undertake much of the analysis and care of loaned items, are often overburdened and understaffed, even in US museums.[164] The requirement of adding a research or educational component to receive a loan longer than one year requires a large commitment from an American museum, which might want to focus its conservation efforts on the pieces in its permanent collection.

Second, "[f]unding... will be the responsibility of the U.S. and Italian institutions involved."[165] In other words, neither the Government of Italy nor that of the United States, the two signatories to the Agreement, has committed itself to financing the international loans.[166] Many museums have faced increased financial pressure, and cash donations have decreased since 11th September 2001.[167] Museums have been deaccessioning artworks to generate funds to

158 Stephen W. Clark, Cultural Property Update, ALI-ABA 140 (2003).
159 Guidelines: Loans of Archaeological Material Under the 2001 U.S.-Italy Memorandum of Understanding, Limitations on Loans for Research, Education and Exhibition (available at http://exchanges. State.gove/culprop/itloangl.html).
160 *Ibid.*
161 *Ibid.*
162 *Ibid.*
163 Bator, above, note 41, at 299.
164 Clark, above, note 158, at 143.
165 Guidelines: Loans of Archaeological Material Under the 2001 U.S.-Italy Memorandum of Understanding, above, note 156.
166 *Ibid.*
167 E.g. Evan Walker, 'Archaeology Sunk at Seaport Museum', *Archaeology Online*, http://www.archaeolog_y.org/online/features/seaport/ (29 July 2004); Martha Hostetter, 'Flailing after 9/11', *Gotham Gazette* http://www.gothamgazette.com/article/20011201/1/67 (Dec. 2001).

add to their permanent collection.[168] Even then, more and more auctioned pieces are selling to wealthy private donors who may or may not donate the works to a museum.[169] Museums are much less likely to take on the additional costs of financing a touring exhibit when they are under such financial pressures.[170]

Third, many of the potential exhibits have actually been committed to museums in countries other than the United States.[171] A State Department website offers 22 travelling exhibits available to American museums from the Italian Cultural Ministry.[172] Of these, eight are "already active and scheduled", but none of the exhibits is scheduled for display in the United States.[173] Furthermore, some of the exhibits were created and exhibited in foreign countries before the signing of the Agreement, demonstrating that the Long-Term Loan portion of the Agreement was not really a concession by the Italian Government.[174] American museums, rather than Japanese and Chinese museums, should benefit from a bilateral agreement between the United Statesand Italy.

If American museums are fighting a losing battle in the courtroom to keep their permanent antiquities collections, they can take very little consolation in the offer of loaned items as contained in the Agreement. Any benefit offered by the Agreement is undermined by the brevity of the loans, the increased burden of developing additional components to loans, the potentially high financial costs of the loans, and the fact that the same loans are going to other museums in non-signatory nations. Unless the Agreement's drafters reword provisions to become more favourable to museums in the United States, the exhibition spaces in American museums that currently house Italian antiquities may soon be emptied with no long-term loans to replace the missing items.

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168 David R. Gabor, 'Deacessioning Fine Art Works: A Proposal for Heightened Scrutiny', 23 *UCLA L. Rev.* 1005, 1005 (1989) (defining deaccessioning as "the removal of objects from an existing art collection by sale or transfer. It may be a cash sale, direct exchange in kind ... or a trade for dissimilar objects"); see also Patty Gerstenblith, 'Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public', 11 *Cardozo J. Intl. & Comp. L.* 409, 421 (2003) (discussing the necessity of and the risks in deaccessioning museum artworks).

169 *Ibid.* at 420.

170 *Ibid.*

171 Ministero per i Beni e le Attivita Culturali: Direzione Generale per i Beni Archaeoloci, Integrated Project Italy-USA (3 May 2005) (available at http://exchanges.state.gove/culprop/itexhib.html).

172 *Ibid.*

173 *Ibid.*

174 *Ibid.*

V. PROPOSED ALTERNATIVE

A. Changing the Current Agreement

An effective reworking of the Agreement would require the following: multi-year long-term loans without additional curatorial requirements, funding assistance from both Governments, priority of Italian-developed exhibits to American museums, and the ability for US museums to loan out their current antiquities collections without the fear of seizure.

First, the Agreement should either eliminate provisions which restrict the length of time for the loans or create provisions for longer term loans. The duration of the loans that is specified in the current Agreement hampers the Agreement's effectiveness. By extending the time that loaned items can travel out of Italy for exhibition, the Agreement could have more flexibility and less red tape. Presently, American museums seeking loans for more than one year must apply for special permits from the Italian Government.[175] Dealing with any government entity can be a complex and time-consuming process, but the Italian Government has a reputation for slowness.[176] Any future drafts of the Agreement should allow loans that fit the purposes of the Agreement to extend more than one year without all the governmental red tape. With loans that extended five or ten years, perhaps American museums would be more willing to spend their money and their time repairing and studying loaned artefacts.

Because the Agreement currently requires the addition of an educational or research component to apply for loans longer than one year,[177] an exhibit that was primarily for display or entertainment purposes would not be allowed to leave Italy for more than one year. The display of Italian artefacts, even for the sake of display alone, has some inherent benefit in sharing culture. As it now stands, American museum visitors gain little exposure to the problem of illegal excavation because legally-excavated materials

175 Guidelines: Loans of Archaeological Material Under the 2001 U.S.-Italy Memorandum of Understanding, Limitations on Loans for Research, Education and Exhibition (available at http://exchanges.State.gove/culprop/itloangl.html).

176 See Jennifer M. Anglim, 'Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and Other Chattels', 45 *Harv. Intl. L.J.* 239, 300-301 (2004) (ironically describing Italian courts as 'the Italian torpedo' for the long, often unreasonable, delays between the time when suits are filed and when cases are decided).

177 Guidelines: Loans of Archaeological Material Under the 2001 U.S.-Italy Memorandum of Understanding, Limitations on Loans for Research, Education and Exhibition (available at http://exchanges.State.gove/culprop/itloangl.html).

remain in Italy and illegally-excavated materials quickly return to the source country. Even a single piece of art loaned for a long time can generate publicity and interest in reducing the problems associated with illegal excavation. An entire exhibit with the theme of illegal excavation could continue to increase sympathy and interest among the American public.

Second, the Agreement should contain measures to provide for financial assistance for undertaking exhibits. Currently, neither the US nor the Italian Government has committed funding to enforce the Agreement. Funding would serve two purposes: quantifying the commitment of the two Governments to the Agreement in dollars and euros as well as assisting smaller museums with publicity, display and restoration costs.

Third, any agreement that America signs should make American interests a priority. When museums in China or Japan receive a greater benefit than American museums from a bilateral agreement between the United States and Italy, the Agreement has missed its intended beneficiaries. If the Agreement could offer Italian-planned exhibits first to American museums, then the Agreement would have more of a visible impact in its two signatory countries. Currently, none of the 22 Italian-proposed loans is scheduled at US museums, although many of the proposals were being created during the Agreement's development.[178] One of the easiest ways to improve the Agreement's effectiveness would be to allow American museums the first chance to host already-developed exhibits. American museums should also not only be the first to see Italian exhibits, but they should be involved in developing the loans.

Fourth, the items covered by the Agreement that are already in American museums should be exempted from seizure. Antiquities from Italian museums are not the only artefacts that could make a transatlantic journey. If antiquities in American museums could be indemnified for travel to Italy, then those artefacts could regain some lost context with display next to similar Italian items. Further, if antiquities currently in American museums could be protected from repatriation efforts, American museums could then be more vigilant about discovering the provenance of the items they already own.[179] The Agreement, as it stands, has no provisions for loaning Italian works in American museums back to museums in Italy.[180]

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178 Ministero per i Beni e le Attivita Culturali: Direzione Generale per i Beni Archaeoloci, Integrated Project Italy-USA (May 3, 2005) (available at http://exchanges.state.gove/culprop/itexhib.html).

179 Merryman, above, note 42 at 10.

180 Agreement, above, note 6.

If a new version of the Agreement could indemnify Italian antiquities in American museums and grant them immunity from seizure, then these artefacts could travel back to Italy for temporary or long-term exhibits. This way, more legally-discovered artefacts could sit side-by-side with their illicit counterparts for study and could regain some of their cultural context.

B. Applying the Proposed Alternative to Current Problems

Reworking the Agreement with the suggested changes will affect active archaeological dig sites and artefacts in Italy. The golden bowl in *United States v. An Antique Platter of Gold* is not the only antiquity to come out of the soil in or near the archaeological site at Morgantina, Sicily.[181] The legally-excavated items go to the nearby Aidone Museum, while illegally-excavated items may go to private collections and museums in the United States.[182]

In 1981, Archaeologist and Director of Excavations at Morgantina, Malcolm Bell, returned to Sicily for the summer digging season and heard about a magnificent 'silver service' illegally unearthed in his absence from the site.[183] That very year, the Metropolitan Museum bought part of a fifteen-piece set of highly decorated silver bowls, ladles, and horns, images of which were published in the Museum's catalogue in 1984, the same year that curators displayed in the gallery.[184] The catalogue describes the set as "some of the finest Hellenistic silver known from Magna Graecia."[185] When Bell

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181 Andrew L. Slayman, 'The Morgantina Hoard', 51 *Archaeology* 40, 40 (1998). While Director at Morgantina, American Professor Malcolm Bell had often encountered tomb robbers, both in person and in their disturbance of the soil layers. *Ibid.*

182 *Ibid.*

183 *Ibid.*

184 Vincent, above, note 45, at 63. The silver set includes three deep bowls, which have different rosette patterns. *Ibid.* Perhaps the most unique piece in the group is the platter with the image of the sea monster Scylla. Dietrich von Bothmer, *A Greek and Roman Treasury* 56 (Metropolitan Museum of Art Press, 1984). The monster assumes the form of the upper half of a woman with serpents and dogs below the waist. *Ibid.* Above her head, Scylla holds a boulder and waits for a ship to sail close enough to hurl the stone. *Ibid.* She is heavily ornamented with bracelets, jewellery, and a skirt made of giant fish fins. *Ibid.*

185 *Ibid.* at 54. 'Magna Graecia' is defined as "the coastal region of Italy colonized by the Greeks." *Oxford Classical Dictionary* 912, (3rd edn S. Hornblower and A. Spawforth, eds, Oxford U. Press, 1996). By listing the source of the silver as Magna Graecia rather than a specific location in Sicily or Italy, it is more or less apparent that the works were not properly documented upon excavation, indicating that they were illegally excavated. Karl Ernst Meyer, *The Plundered Past* 132 (Atheneum Press, 1973). Much of the Metropolitan Museum's collection reads the same, and, as the curator of the Cleveland Museum once observed, "'Unless you are naïve or not very bright, you would have to know that much ancient art is stolen.'" *Ibid.* at 123.

saw the silver in 1987, he remembered the rumours of the silver service, and immediately called the Italian Government and wrote to the Museum, asking for the provenance of the objects and requesting the Museum to let him examine the objects.[186] The Metropolitan Museum ignored Bell.[187] Stille writes that ten years later, "the Italian government presented the Metropolitan Museum with the testimony ... of *tombaroli* which seemed to indicate that the silver had been looted from Morgantina."[188] However, the Museum and its general counsel refused to accept the statements made by tomb robbers as truth and retained the pieces of silver in the Metropolitan Museum's collection.[189]

Italian officials, believing none of the stories about the provenance of the items, asserted that the silver must have come from illegal excavations in Sicily and granted Bell permission to excavate in areas where evidence of looting existed.[190] Bell and a team of archaeologists found the walls of an ancient Greek house and layers of soil turned upside down from careless digging.[191] Most of the digging stopped at the floor of the house, but two deep holes extended further into the ground and probably contained the two instalments of silver now in the Metropolitan Museum's possession.[192] In these holes, Bell found only two coins, an ancient Sicilian coin dating from 216 B.C.E., which established the *terminus ante quem*,[193] and one an Italian coin dating from 1978, which indicated that the tomb robbers had broken into the house after that date.[194] Because of the historical evidence, Bell believes that Greek refugees hid the silver in the ground after the fall of Syracuse to the Romans in a sack in 212/211 B.C.E.[195]

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186 Stille, above, note 15, at 63.
187 *Ibid.* at 63, 64.
188 *Ibid.* at 64.
189 Walter V. Robinson, 'Italy Calls N.Y. Museum's Prized Collection Stolen'. *Boston Globe* A1 (17 Apr. 1998). The museum had bought the hoard from art dealer Robert Hecht, who claimed that he bought the pieces from a Lebanese family who "owned the works for decades". *Ibid.* at A18. The Metropolitan Museum has maintained this story even though it sounds suspiciously similar to the background of the Euphronios Krater, which also came from a Lebanese family who also "owned the work for decades." *Ibid.* at A18.
190 Slayman, above, note 174, at 40-41.
191 Stille, above, note 184, at 67.
192 *Ibid.*, at 67.
193 *Ibid.* Literally, the boundary from which, or the date at which the treasure was originally buried. *Ibid.*
194 *Ibid.*
195 *Ibid.* Syracuse was a leader in silversmithing in the ancient Greek world, and many of its residents fled to the nearby town of Morgantina after the Romans seized the city. *Ibid.* The original owner of the bowls and cups likely buried the treasure to hide it from looters, a method effective in the Hellenistic world but not in the modern age of treasure hunters with metal detectors. *Ibid.* at 68.

The Morgantina Hoard has provoked responses from all sides but answers from none. The Italian Government has repeatedly requested the return of the silver hoard.[196] On the other hand, the Morgantina Silver Hoard has gained more visibility and publicity than if it had been discovered legally and remained in Sicily. Instead of display in the local and impoverished Aidone Museum, the silver has received proper care and scholarly study at the Metropolitan Museum.[197] In the Metropolitan Museum, curators have treated the silver as a set, and have properly guarded the display, so that none of the pieces was stolen, a common fate in the overstuffed Italian museums.[198] Furthermore, through Bell's additional excavations, the silver has been able to regain much of its original context.[199]

A long-term loan between the Metropolitan Museum and Italy would ensure that the works belong to Italy but receive the scholarly attention they deserve at the Metropolitan Museum. With open communication between Italy and the Metropolitan, more information could be uncovered about the silver. Without fear of losing the antiquities, the Metropolitan Museum could properly investigate the origins of the silver, and eventually return the items to Italy after they have been seen and appreciated by millions of museum visitors.[200] Without fear that the museum would keep other items, Italy could loan other works from the Morgantina excavations to the Metropolitan Museum to be exhibited alongside the silver in the gallery. The Metropolitan Museum could develop that second loan from the start and then research the items, properly displaying and learning from the silver and other works from Morgantina as a unit. In summary, the potential benefits to both the Italian Government and US museums are substantial.

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196 Robinson, above, note 189, at A1. General Roberto Conforti, the head of the Carabinieri, spoke on behalf of his country, saying, "I am sad and bitter about this. How can such a renowned museum keep such items in the face of such strong evidence?" *Ibid.* Stille agrees, poignantly writing, "In order to justify its acquisition the Met must maintain that it cannot determine where the silver came from, thereby reducing it to a generic artifact from somewhere in the Mediterranean. The silver vessels have become mere art objects –beautiful but mute – stripped of their history." Stille, above, note 15, at 69.

197 von Bothmer, above, note 184, at 54. Malcolm Bell and the Italian authorities have requested that the items return to the local museum. Richard A. Wertime, 'Morgantina Memoir', 47 *Archaeology* 50, 52 (1994).

198 Stille, above, note 15, at 69.

199 *Ibid.*, at 68-69.

200 The 2004 annual report of the Metropolitan Museum indicated that four and a half million visitors went to the museum that year. Phillipe de Montebello & David E. McKinney, *Report from the Director and the President, in The Metropolitan Museum of Art, One Hundred Thirty-fourth Annual Report of the Trustees for the Fiscal Year July 1, 2003 through June 30, 2004* 4 (2004) (available at http://www.metmuseum.org/annual report/2003_2004/pdf/03-report-from-director.pdf).

VI. CONCLUSION

The Agreement, signed in 2001, is not without flaws that have become apparent by 2006. It requires American museums to provide research, education, and funding. The Agreement also gives American museums the exact same exhibits as those that tour to museums in nations without any such agreement. Finally, it makes no provision for indemnifying Italian works in American museums so that they can travel back to Italy in their own exhibits.

Nevertheless, a bilateral agreement is the best way to balance the ownership rights of the Italian Government with the benefits of display in an American museum. As the Agreement is scheduled for renewal this year, its drafters should revisit some of the problematic provisions and make them more beneficial to American interests. With just a few changes, this Agreement could become a model for long-term international loans.

STETSON LAW REVIEW

LOCAL GOVERNMENT LAW SYMPOSIUM

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RECENT DEVELOPMENTS

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broad. At this point, it is unclear what type of juvenile curfew ordinance, if any, would not be too broad, because the Court was primarily concerned with the limitation on otherwise lawful activities carried out with parental approval.

RESEARCH REFERENCE

- 10A Fla. Jur. 2d *Constitutional Law* § 313 (Westlaw database updated Jan. 2006).

Bridget Remington
Visiting Instructor of Legal
Research and Writing

Constitutional Law: First Amendment—Signs and Billboards

Solantic, LLC v. City of Neptune Beach,
410 F.3d 1250 (11th Cir. 2005)

City ordinances that restrict certain signs but allow others based on the messages conveyed are content-based restrictions on free speech and are subject to a strict scrutiny analysis. Traffic safety and aesthetics are not compelling governmental interests capable of withstanding a strict scrutiny analysis. Additionally, the failure to include specific timeframes for the determination on a sign permit will act as an unconstitutional prior restraint on protected speech.

FACTS AND PROCEDURAL HISTORY

The City of Neptune Beach regulated signs within the City through the Neptune Beach Code of Ordinances, Section 27, Article XV (Sign Code). The Sign Code was designed to protect the City aesthetic, as well as to ensure that a driver's attention was not diverted by visually distracting signs. The Sign Code required all signs to have a permit before installation, and signs could not be designed to move, have the illusion of movement, or contain lights that moved, flashed, or flickered. Some signs were exempted from these regulations, including, but not limited to, time-temperature-date signs, government signs, private parking signs,

holiday decorations, and temporary signs such as real estate signs and grand opening banners.

Solantic, LLC, a company that operated emergency medical care centers, installed an Electronic Variable Message sign (EVMC sign) outside its Neptune Beach medical care center. The EVMC sign electronically displayed information about Solantic's products and services, as well as messages that generally offered health-related advice. Solantic had obtained an electrical permit from the City to install the sign but did not apply for a sign permit. The same month it installed the sign, Solantic received notice from the City that it had violated the Sign Code.

The City held a hearing on Solantic's alleged violation of the Sign Code and directed Solantic to cure the violation by doing all of the following: (1) obtain a sign permit; (2) modify the sign so that it would change messages no more than once a day; (3) modify the sign so that it would not blink, flash, or scroll; and (4) control the sign only from the medical care center's premises. Solantic applied for a sign permit but did not change the timing of the sign's message display, resulting in a continuation of the flashing and changing messages.

Later that year, the City again notified Solantic that it was not in compliance with the Sign Code and the City held another hearing on the issue. The City levied a fine of $25 a day for each of the three violations Solantic had not cured. Solantic filed an appeal of the decision with the City, which was subsequently denied. Solantic then sued the City in state circuit court, and the City removed the case to federal court in the Middle District of Florida.

Solantic argued that the Sign Code violated the First Amendment, as an unconstitutional content-based restriction on speech and as an unlawful prior restraint. Solantic sought a declaratory judgment and an injunction against enforcement of the Sign Code. Solantic also moved for a preliminary injunction, which the district court denied because Solantic had not shown a likelihood of success on the merits. The district court reasoned that the Sign Code's prior restraint of speech was a content-neutral time, place, and manner restriction that was constitutional. Solantic filed an interlocutory appeal of the denial of the preliminary injunction.

ANALYSIS

In determining the constitutionality of a sign code, the first step a court must take is to determine whether the regulations are content-based. *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1251 (11th Cir. 2004). The determination is important as it will govern the character of review that will be applied to the regulation. Content-based regulations are subjected to a strict scrutiny review, while content-neutral regulations will be reviewed under the time, place, and manner standard. The Eleventh Circuit Court of Appeals determined whether the Sign Code was content-based or content-neutral, following the analysis set forth in two similar cases: *Metromedia, Inc., v. City of San Diego*, 453 U.S. 490, 516 (1981) (a plurality opinion followed by all circuits except for the Third Circuit, finding that exemptions for religious signs, time and temperature signs, government signs, and political signs amounted to a content-based criteria for permitting), and *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569 (11th Cir. 1993) (holding that regulations allowing flags only if they represented a governmental entity was an impermissible content-based regulation). Using the *Metromedia* and *Dimmit* standards, the court found that the Sign Code's exceptions rendered the Code a content-based restriction of free speech. The court noted several hypothetical incongruities the exceptions created, such as the fact that a homeowner could install a large flashing neon arrow and "Parking in Back" sign, but could not place a traditional yard sign reading "Support Our Troops" on his or her own property. Because some signs were extensively regulated while others were exempt from regulation based on the message the sign conveyed, the Sign Code was a content-based restriction on speech.

Determining that the Sign Code was content-based, the court applied strict scrutiny to determine whether the Sign Code was narrowly tailored to accomplish its proffered interests. *Burk*, 365 F.3d at 1251. To survive a strict scrutiny analysis, the regulation must advance a compelling governmental interest in the least restrictive manner possible. *Perry Educ. Assn. v. Perry Loc. Educators Assn.*, 460 U.S. 37, 45 (1983). The Eleventh Circuit held that aesthetics and traffic safety have never been found to be compelling governmental interests necessary to survive strict scrutiny. These interests have been found to be "'substantial,' but

not 'compelling.'" *Metromedia*, 453 U.S. at 507–508; *Dimmit*, 985 So. 2d at 1570. The court found that there was no explanation for how the Sign Code was supposed to improve motorist safety or protect the City's asserted aesthetic interests by restricting some signs and exempting others based on content. The court again pointed to the incongruities within the messages permitted by the Sign Code: that the aesthetics and the distraction levels were no different between an exempted government sign flashing "Support Your City Council" and a private citizen's unpermitted "Support Our Troops" sign. Thus, the court found the Sign Code was an unconstitutional limit on free speech.

In addition, the court found that the Sign Code's failure to impose time limits for permitting decisions was an invalid prior restraint on speech and an independent reason for declaring the Sign Code unconstitutional. Time limits on permit review are required for content-based restrictions on free speech. *Freedman v. Maryland*, 380 U.S. 51, 52 (1965). To meet this requirement, sign regulations must include a specific timeframe for approval or denial of a permit. *Café Erotica of Fla., Inc. v. St. Johns County*, 360 F.3d 1274, 1282 (11th Cir. 2004). The Sign Code did not impose any time limits for determinations on permits, and thus officials could use a "pocket veto" to deny an application the content of which they did not like. The court described this restriction as the specific type of prior restraint that the First Amendment intended to preclude.

Because the facts were straightforward, the question before the court was one of pure law, and because the constitutional challenge was facial rather than as applied, the court did not confine its opinion to a likelihood of success on the merits. Instead, the court noted the likelihood of success on the merits and reversed the district court's ruling and remanded the case.

SIGNIFICANCE

Solantic reinforces the Eleventh Circuit's decision in *Dimmitt*. A city's sign ordinance may be stricken down as an unconstitutional content-based restriction on free speech when it includes exceptions that allow government or religious or other private entities to install signs based on content when others may not. Content-based restrictions on free speech are subject to strict scrutiny and the regulations governing such speech must be nar-

rowly drawn to achieve compelling state interests. Aesthetics or general traffic safety will not pass muster in this regard. Additionally, sign ordinances must specify a time frame for officials to make a decision granting or denying sign permits. The failure to impose time limits creates an invalid prior restraint on speech.

RESEARCH REFERENCES

- 16B C.J.S. 2d *Content-Based Restrictions* § 827 (Westlaw database updated Nov. 2005).
- Daniel R. Mandelker, *Free Speech Issues in Sign Regulation*, ALI-ABA 159 (Aug. 22–24, 2002) (available in Westlaw ALI-ABA database).

Katherine Jane Hurst

Constitutional Law: Religious Freedom—RLUIPA

Konikov v. Orange County,
410 F.3d 1317 (11th Cir. 2005)

A zoning regulation requiring a special exception use permit to operate a religious organization within a residential zone will violate the equal terms requirement of the Religious Land Use and Institutionalized Persons Act (RLUIPA) if non-religious groups that meet with similar frequency and community impact are not also required to obtain a same special exception use permit. The requirement of the special exception use permit does not in itself violate RLUIPA, provided the activities of religious organizations are treated on equal footing with comparable non-religious gatherings, and religious activities are not completely precluded by the permit requirements.

FACTS AND PROCEDURAL HISTORY

Rabbi Joseph Konikov lived in a residentially zoned (R-1A) neighborhood in Orange County. As the leader of a Chabad (a Judaic movement), Konikov held regular meetings at his home on Friday nights and Saturday mornings. Konikov also occasionally hosted Torah classes and other gatherings to celebrate religious holidays.

STETSON LAW REVIEW

CENTER FOR EXCELLENCE IN ADVOCACY SYMPOSIUM

ARTICLES

Citizenship in a Time of Repression
Michael Traynor

Taking the Bitter with the Sweet: A Law of War Based Analysis of the Military Commission
Geoffrey Corn

An International Perspective on Terrorism
Stanislav L. Tkachenko

Necessity, Political Violence and Terrorism
John Alan Cohan

WILLIAM REECE SMITH, JR. DISTINGUISHED LECTURE IN LEGAL ETHICS

Taking Liberties with Justice—The Legal Landscape in Britain Post September 11th
Christopher Sallon

COMMENTS

National Security and the Victims of Immigration Law: Crimes of Violence after *Leocal v. Ashcroft*
Kathryn Harrigan Christian

When "May" Means "Shall": The Case for Mandatory Liquidated Damages under the Federal Wiretap Act
Ian K. Peterson

RECENT DEVELOPMENTS

VOLUME 35 SPRING 2006 NUMBER 3

APPELLATE PROCEDURE

Appellate Procedure: Written Opinions

R.J. Reynolds Tobacco Co. v. Kenyon,
882 So. 2d 986 (Fla. 2004)

Florida Rule of Appellate Procedure 9.330(a) allows an appellant to request a written opinion after receiving a per curiam affirmance but does not require the district court of appeal to issue a written opinion.

FACTS AND PROCEDURAL HISTORY

R.J. Reynolds Tobacco Co. (Reynolds) appealed after losing a tobacco litigation case, and the Second District Court of Appeal responded by issuing a per curiam affirmance (PCA). Reynolds moved for rehearing, rehearing en banc, certification, and issuance of a written opinion under Florida Rule of Appellate Procedure 9.330(a). The Second District denied all the motions without further explanation. Reynolds then filed a petition in the Florida Supreme Court for all writs jurisdiction. The Court dismissed the petition.

ANALYSIS

The Supreme Court examined Rule 9.330(a), which it had amended to read: "to allow a litigant to request, as part of a motion for rehearing, that a district court of appeal issue an opinion in a case where that court has issued a decision without opinion." *Amends. to Fla. R. of App. P.*, 827 So. 2d 888, 889 (Fla. 2002). Reynolds argued that the amendment was meaningless if it gave an appellant the right to request a written opinion from the appellate court but still allowed the district court to deny the request and preclude further review. Therefore, Reynolds sought review of the PCA as an abuse of discretion.

The Court found that amended Rule 9.330(a) does not require a district court to issue a written opinion when none is necessary. Further, the amendment does not disturb the precedent that when a district court has issued a PCA, the Supreme Court does not have jurisdiction to review the decision. The Court cited several cases in which it held that petitions for extraordinary writs,

including all writs petitions, could not circumvent the Supreme Court's lack of jurisdiction to review per curiam affirmances. The amended Rule 9.330(a) now allows for an appellant to request a written opinion from the district court issuing a PCA, but it does not require the district court to issue an opinion or grant the Supreme Court jurisdiction to review the PCA.

Therefore, Reynolds was not able to seek review of the Second District's PCA under abuse of discretion, or any other standard. In dismissing this case, the Supreme Court specifically stated that it would dismiss all future extraordinary writ petitions for review of a district court's denial of a request for written opinion.

SIGNIFICANCE

R.J. Reynolds is important because it affirms the fact that the Supreme Court does not have jurisdiction to review a PCA, even under the revised Rule 9.330(a). Under *Reynolds*, practitioners may request a written opinion of a district court, but they have no recourse if the district court denies the motion. In other words, Rule 9.330(a) provides a right for a party to request a written opinion, but it does not create a right to obtain the opinion.

RESEARCH REFERENCES

- Arthur J. England, Jr., *PCAs in the DCAs: Asking for Written Opinion from a Court That Has Chosen Not to Write One*, 78 Fla. B.J. 10 (Mar. 2004).
- Steven Brannock & Sarah Weinzierl, *Confronting a PCA: Finding a Path around a Brick Wall*, 32 Stetson L. Rev. 367 (2003).
- Jack R. Reiter, *Common Law Writs: From the Practical to the Extraordinary*, 80 Fla. B.J. 32 (Feb. 2006).

Katherine Jane Hurst

TAB 38

Miller Course Materials

1

GENERAL ASSEMBLY & BOOTCAMP

FLORIDA YOUNG LAWYER LEADERSHIP TRAINING

Katherine Hurst Miller AND Zack Zuroweste

2

GENERAL ASSEMBLY SPONSOR

3

THE FLORIDA BAR YOUNG LAWYERS DIVISION

- Our mission is to inspire and empower young lawyers to succeed, to advance the legal profession, and to serve their communities.
- All lawyers under age 36 and new Florida Bar members for the first 5 years in good standing are automatically members.
- Over 25,000 members.
- Governed by 60 person young lawyer board.
- Oversee new lawyer continuing education, affiliate outreach, Florida Bar communication with young lawyers.

4

THE FLORIDA BAR YOUNG LAWYERS DIVISION

- Who we are video

5

THE FLORIDA BAR YOUNG LAWYERS DIVISION

- Question: Why did we make a video?
- Answer:

6

THE FLORIDA BAR YOUNG LAWYERS DIVISION

- Question: Why did we make a video?
- Answer:

7

WHOLE APPLES VS. SLICED APPLES 599 So. 3d 10 (Fla. 5th DCA 2013).

- In a study published in 2013, a group of researchers at Cornell University's Food and Brand lab studied apple consumption.
- They compared how many apples were eaten in school cafeterias when the apples were served whole and when the apples were served sliced.

VS.

8

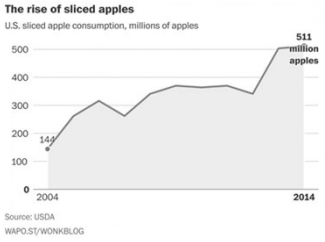
WHOLE APPLES VS. SLICED APPLES

- Initial study found that fruit consumption increased by 60% when apples were served sliced.
- Follow up study found more than 70% increase in fruit consumption.
- "Even the simplest forms of inconvenience affect consumption." - David Just, study author

VS.

9

WHOLE APPLES VS. SLICED APPLES



10

WHOLE APPLES VS. SLICED APPLES

- The percentage of students who ate more than half increased by 73% at schools that served pre-sliced fruit.
- The percentage of student who wasted half or more decreased by 48% at schools that served pre-sliced fruit.

11

WHOLE APPLES VS. SLICED APPLES

KEY TAKEAWAYS APPLICABLE TO YOUNG LAWYER ORGANIZATIONS

- Even superficial barriers can be significant.
- "The only way to grow is through innovation." -Mark Seetin, Director of the U.S. Apple Association

VS.

12

WHAT DO YOUNG LAWYERS WANT

- Feel relevant
- Feel welcome
- Be appreciated
- Put their knowledge and skills to work
- Do good
- Distinguish from the competition
- Find balance
- Not to be underestimated
- Try new things without the risk
- Be mentored/be a mentor
- More time
- Have fun
- Get unique opportunities
- Develop relationships
- Financial security
- Financial success
- Access to information

13

BARRIERS VS. INNOVATION

- Barriers
  - "I don't know what you do."
  - "I've never heard of you."
  - "I don't know who to contact."
  - "I don't know how to contact you"
  - "Your programs aren't helpful to me."
  - "I don't want to hang out with lawyers outside work."
  - "I don't have enough money."
  - "I don't have enough time."
  - "I have time, but there's nothing for me to get involved in
  - "I have time and there's something for me to do, but it is inconvenient."

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BARRIERS VS. INNOVATION

- Innovation
  - Try new things
  - Free
  - Reduced cost
  - Worth the cost
  - Offer a "value add"
  - Friendly
  - Ease of joining
  - Tell people what you do
  - Tell people what you do again
  - Tell people how you do what you do
  - Tell people why you do what you do
  - Use technology

15

HOW THE FLORIDA BAR YLD CAN HELP YOU INNOVATE

- Fund your current projects
- Inspire your future projects
- Receive awards
- Increase your social media presence
- Connect with your local YLD board members
- Connect with young lawyers across the state
- Connect with law students across the state
- Invite Katherine, Zack, and your local YLD board members to speak
- Offer experiences young lawyers cannot get anywhere else
- Feel informed

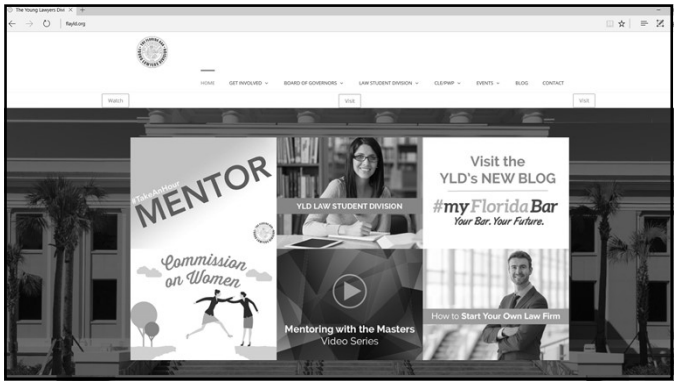
16

www.flayld.org

- Best place to get information about the YLD
- Get involved – information for Affiliates
- List of our board members
- Law student division website links
- Continuing Legal Education info
- Events
- Blog
- How-to videos

17

18



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FLORIDA BAR YLD EDUCATION

- Practicing with Professionalism
- Continuing Legal Education Basic Skills Courses –
  - Appellate Practice
  - Trial Practice
  - Criminal Law
  - Settlement & ADR
  - Debtor/Creditor & Bankruptcy
  - Labor & Employment
- Webinars
- Law Student Division

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FLORIDA BAR YLD ADVOCACY

- Communications
  - Website
  - Newsletter
  - Blog
  - Meeting Reports
  - Social Media

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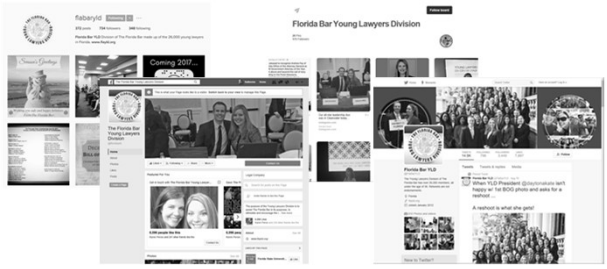
FLORIDA BAR YLD SOCIAL MEDIA
#MyFloridaBar #FLAYLDAOC #LWW



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FLORIDA BAR YLD ADVOCACY

- Communications
  - Website
  - Newsletter
  - Blog
  - Meeting Reports
  - Social Media
- Legislative Affairs - Constitutional Revision Commission
- Diversity
- Commission on Women
- Quality of Life
- Technology
- Transition to Practice

23

www.StartMyFloridaLawFirm.com

- We wanted a website that would help lawyers transition from law school or big firm or government practice to successfully running their own firm.
- We looked for a website like this, and we couldn't find one.
- So we created one.
- With detailed info and links on a wide variety of topics to consider.
- Won national award from the ABA.
- Companies want to be listed on the website.

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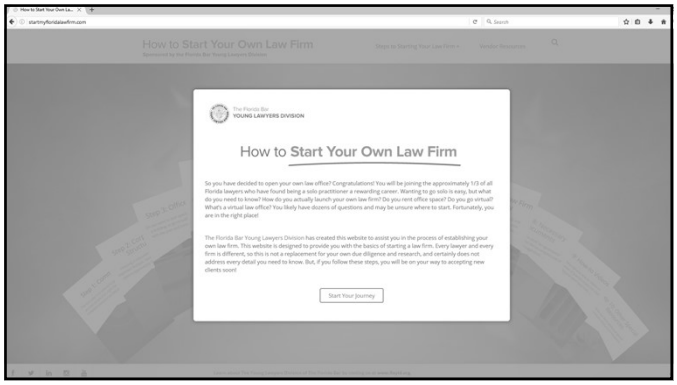

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FLORIDA BAR YLD ADVOCACY

- Certified Legal Intern Rule change
- Access to Justice issues
- Lawyer referrals/matching
- Technology and entry-level work
- Incubators and low-bono
- Number of young lawyers
- Number of subjects tested on the bar exam
- Treatment of women & minorities in the profession
- Study of millennial lawyers in the workforce

27

FLORIDA BAR YLD SERVICE

- Affiliate Outreach Conference
- Annual Convention
- Awards
- Lawyers Advising Lawyers

28

www.LawyersAdvisingLawyers.com

- The Florida Bar and the YLD had a program to connect lawyers with a question in a substantive practice area to lawyers with knowledge in this area.
- But we didn't advertise it very well.
- Hidden away on The Florida Bar's website.
- Now it has its own website, a link on the YLD website, and a link from the front page of The Florida Bar website.

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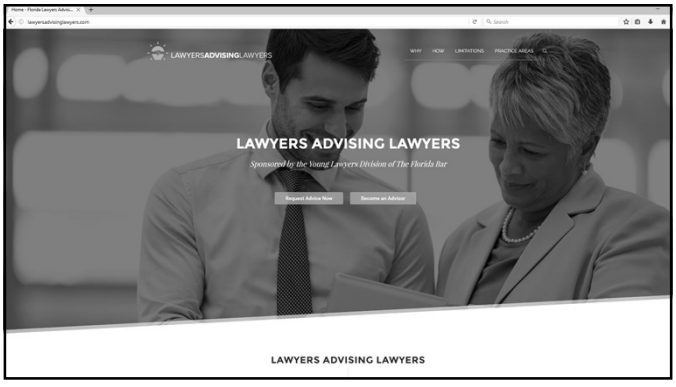

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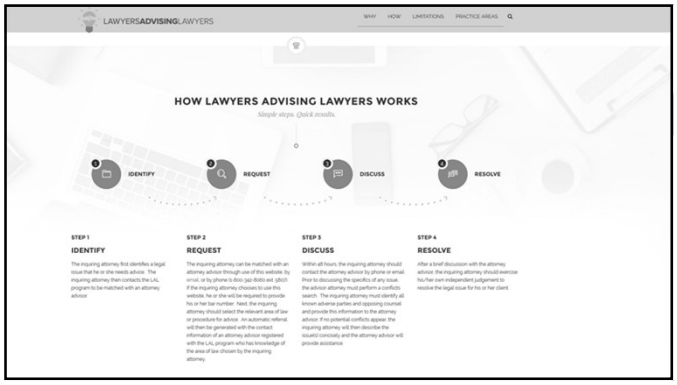

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FLORIDA BAR YLD SERVICE

- Affiliate Outreach Conference
- Annual Convention
- Awards
- Lawyers Advising Lawyers
- Pro Bono
- Moot Court
- Local Bar Affiliates

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BREAKING DOWN BARRIERS FOR OUR AFFILIATES

- An affiliate is an organization, not a person. The YLD defines Affiliate as "Any (1) young lawyer organization, or (2) young lawyer component of any bar association in the Florida legal profession in which membership is dedicated to the cause of young lawyers."
- To become a recognized Affiliate of The Florida Bar YLD, you must certify that your organization fits into one of these two categories. Please sign the certification page and provide the requested contact information to the Local Bar Affiliates Chair. The YLD board will then vote to approve your organization as an Affiliate at an upcoming board meeting.
- Affiliates Chairs Margaret Good and Celia Thacker

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YLD AFFILIATE PROGRAMS

- Affiliate-specific communications
- Grants & Idea Bank
  - "Morning/Afternoon at the Courthouse" and "Professionalism Roundtable"
  - "Holidays All Year Long" and "Community Engagement"
  - "Diversity/Women's Initiative"
  - "Health and Wellness"
- Awards
  - Affiliate Awards
  - Individual Awards
- "Raising the Bar" Community Service Day with the Florida Bar Young Lawyers Law Student Division
- The Florida Bar Voluntary Bar Center and Annual Conference

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ABA AFFILIATE PROGRAMS

- National conferences
  - Funding to attend conferences
- Affiliate-specific communications
- Project database
- Sub-grants
  - Public Service Awards will not exceed $1,000 per subgrant
  - Member Service Awards will not exceed $500 per subgrant
- Bar leader toolkit
- ABA YLD Chair Anna Romanskaya
- District 11 Representative Austin Thacker

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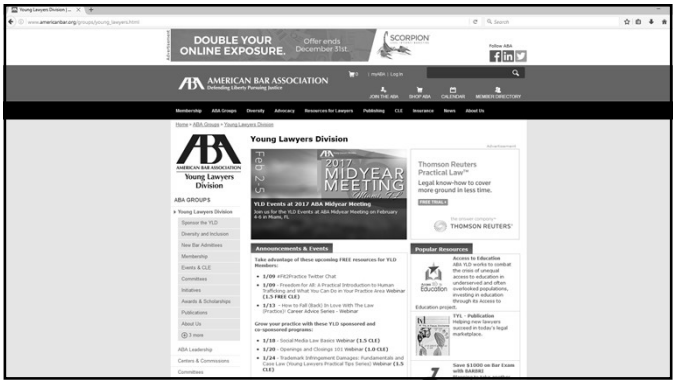

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AFFILIATE OUTREACH CONFERENCE

- Friday
  - 4 pm General Assembly & Bootcamp
  - 7 pm Dinner & Fireworks at EPCOT
- Saturday
  - 7 am 5k Fun Run
  - 8 am Character Breakfast
  - 9 am Grant Presentations – with budget > $40,000
  - 12:30 pm Awards Luncheon
  - 4 pm Monorail Pub Crawl
- 2 members of your affiliate are eligible for reimbursement up to $400 each
- AOC Chairs Valerie Barnhart and Alex Palermo

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CONTACT US

YLD President Katherine Hurst Miller kmiller@surfcoastlaw.com
YLD President-Elect Zack Zuroweste zz@persantelaw.com

Check out our websites
www.flayld.org
www.startmyfloridalawfirm.com
www.lawyersadvisinglawyers.com

Follow us on social media

39

PWP Online Program

1. 8:30 a.m. – 8:45 a.m.
   Intro
   YLD President

2. 8:45 a.m. – 10:45 a.m. (120 minutes)
   Professionalism/Ethics
   The Henry Latimer Center on Professionalism

3. 10:45 a.m. – 10:50 a.m. (5 minutes)
   Quiz/Interactive Monitoring

4. 10:50 a.m. – 12:00 p.m. (50 minutes)
   YLD Panel

5. 12:00 p.m. – 12:30 p.m. (30 minutes)
   The Florida Bar Disciplinary System

6. 12:30 p.m. – 12:35 p.m. (5 minutes)
   Quiz/Interactive Monitoring

7. 12:35 p.m. – 12:45 p.m. (10 minutes)
   PRI

8. 12:45 p.m. – 1:35 p.m. (50 minutes)
   Florida Lawyers Assistance

9. 1:35 p.m. – 1:50 p.m. (15 minutes)
   Pro Bono/Access to Justice/Mentorship

10. 1:50 p.m. – 2:05 p.m. (15 minutes)
    The Florida Bar and The Florida Bar Young Lawyers Division

11. 2:05 p.m. – 3:55 p.m. (50 minutes)
    Judicial Panel

Total minutes 350 excluding introduction (Seven 50-minute hours)

The Florida Bar Continuing Legal Education Committee and the Young Lawyers Division present

Basic Insurance Law 2015

COURSE CLASSIFICATION: BASIC LEVEL

May 29, 2015

Live Presentation

Course No. 1867R

THE FLORIDA BAR

PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLER CREDIT

(Maximum 8.5 hours)

General ..... 8.5 hours Ethics ..... 0.0 hours

CERTIFICATION CREDIT

(Maximum 0.0 hours)

..... 0.0 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar *News*) you will be sent a Reporting Affidavit (must be returned by your CLER reporting date) or a Notice of Compliance which confirms your completion of the requirement according to Bar records (does not need to be returned). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be BASIC.

YOUNG LAWYERS DIVISION

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Gordon Glover, Ocala — President-elect
Valerie Barton Barnhart, Ft. Lauderdale — CLE Co-Chair
Christian George, Jacksonville — CLE Co-Chair

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John Miller, Cape Coral
Miguel Roura, Tampa
Tanaz Salehi, Plantation
Mark Shapiro, Miami
Josh Webb, Tampa

CLE COMMITTEE

Michael S. Bloom, Hollywood — Chair
Terry L. Hill — Director, Programs Division

For a complete list of Member Services visit our web site at www.floridabar.org.

LECTURE PROGRAM

8:00 a.m. – 8:15 a.m.	**Late Registration**
8:15 a.m. – 8:30 a.m.	**Welcome/Opening Remarks** *Rob Batsel, Ocala*
8:30 a.m. – 9:20 a.m.	**Insurance Coverage and Reading the Policy** *Tom Bishop, Jacksonville*
9:25 a.m. – 10:15 a.m.	**Insurance Agents and Brokers** *Katherine Hurst Miller, Daytona Beach*
10:15 a.m. – 10:30 a.m.	**Break**
10:30 a.m. – 11:20 a.m.	**Insurance Defense and the Tripartite Relationship, Including Ethics** *John Miller, Cape Coral* *Miguel Roura, Tampa*
11:25 a.m. – 12:15 p.m.	**Auto Insurance** *Tanaz Salehi, Plantation*
12:15 p.m. – 1:25 p.m.	**Lunch (On Your Own)**
1:25 p.m. – 2:15 p.m.	**Property and Casualty Insurance** *Lashawnda Jackson, Orlando*
2:20 p.m. – 3:30 p.m.	**Professional Liability Coverage** *Josh Webb, Tampa*
3:30 p.m. – 3:45 p.m.	**Break**
3:45 p.m. – 4:35 p.m.	**Negotiating and Settling with and Insurance Company, Including Ethics** *Woody Isom, West Palm Beach*
4:40 p.m. – 5:30 p.m.	**Insurance Bad Faith** *Mark Shapiro, Miami*
5:30 p.m.	**Adjourn**

INSURANCE AGENTS AND BROKERS

By

Katherine Hurst Miller
Daytona Beach

INSURANCE AGENT LAW OUTLINE
Katherine Hurst Miller

I. INSURANCE AGENT IS DIFFERENT THAN INSURANCE COMPANY

A. Insurance Company/ Insurer

1. Florida Insurance Code Chapters 624-628 applies to insurance companies and various parts of insurance industry
2. 624.03 “Insurer” includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance or of annuity.
3. Usually, but not always see "Insurance Company" in the name
4. Ex. State Farm, All State, Nationwide, Progressive, GEICO, Farmers, USAA, Ace, Chubb, Zurich, Aetna Health, Blue Cross/Blue Shield, United Healthcare, Travelers, Florida Family, Universal, Citizens, Tower Hill, Security First, Lloyds of London
5. Admitted/Authorized Insurers – regulated by State of Florida Office of Insurance Regulation http://www.floir.com/
6. Non-admitted Insurers – not regulated by State of Florida

B. Insurance Agent

1. Florida Statute Chapter 626 applies to Agents
2. 626.015 (2) “Agent” means a general lines agent, life agent, health agent, or title agent, or all such agents, as indicated by context. The term “agent” includes an insurance producer or producer, but does not include a customer representative, limited customer representative, or service representative.
3. 626.015 (18) “Unaffiliated insurance agent” means a licensed insurance agent, except a limited lines agent, who is self-appointed and who practices as an independent consultant in the business of analyzing or abstracting insurance policies, providing insurance advice or counseling, or making specific recommendations or comparisons of insurance products for a fee established in advance by written contract signed by the parties. An unaffiliated insurance agent may not be affiliated with an insurer, insurer-appointed insurance agent, or insurance agency contracted with or employing insurer-appointed insurance agents.
4. Agent Information available from the State of Florida Division of Insurance Agent and Agency Services http://www.myfloridacfo.com/division/agents/

C. Types of Insurance Agents

1. Licenses
    a. Property & Casualty
        i. General Lines 2-20
        ii. Personal Lines 20-44
        iii. Surplus Lines 1-20
        iv. Customer Representative 4-40
    b. Life, Health, including Variable Annuity 2-15
        i. Health only 2-40
        ii. Life including variable Annuity 2-14

c. Title 4-10
d. Warranty
    i. Home Warranty 2-51
    ii. Service Warranty 2-52
    iii. Motor Vehicle Warranty 2-53
e. Bail Bond 2-34, 2-35, 2-37
f. Other
    i. Managing General Agent (MGA)

2. Relationship to Insurance Company/Insured
    a. The distinction between an insurance agent and an insurance broker is important, because acts of an agent are imputable to the insurer, and acts of a broker are imputable to the insured. *See Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1045 (Fla. 2008).
        i. Insurance policy bound? *Almerico v. RLI Ins. Co.*, 716 So. 2d 774, 781 (Fla. 1998)("insurer will be bound by the agent's action unless the insured knew or was put on notice of inquiry as to limitations on the agent's actual authority").
        ii. Misstatements in application form void policy? *Gen. Ins. Co. v. Ramanovski*, 443 So. 2d 302, 304-05 (Fla. 3d DCA 1983)("since it was the insurer's agent who failed to include [material information] on the renewal application, no ground supports a denial of coverage under the subject policy.").
        iii. Policy delivered to insured? *Reliance Ins. Co. v. D'Amico*, 528 So.2d 533, 534 (Fla. 2d DCA 1988) (delivery of an insurance policy to an insurance agent constitutes delivery to the insured for all purposes).
        iv. Coverage rejected? *Travelers Ins. Co. v. Quirk*, 583 So. 2d 1026 (Fla. 1991) (independent insurance agents are agents for the insurance companies they are licensed to represent and are not agents of the insured for purposes of rejecting UM coverage).
        v. Insurer cancellation valid? *Cat 'N Fiddle, Inc. v. Century Ins. Co.*, 213 So. 2d 701, 707 (Fla. 1968)(agent's authority to keep insurance in force is not authority to effect cancellation).

    b. Insurance Agent/Captive Agent
        i. “Insurance agent” is generally one who is contractually obligated to work for and solicit insurance on behalf of a specific insurance company. *Amstar Ins. Co. v. Cadet*, 862 So. 2d 736, 740 (Fla. 5th DCA 2003)(citations omitted).

    c. Insurance Broker/Independent Agent
        i. “Insurance broker” is one who solicits insurance orders from the general public and is not bound by contract to work for or solicit insurance for any particular insurance company. *Amstar*

Ins. Co. v. Cadet, 862 So. 2d 736, 740 (Fla. 5th DCA 2003)(citations omitted).

ii. In the absence of special circumstances, the broker will be considered the agent of the insured as to matters connected with the application and the procurement of the insurance, despite the fact that the broker receives his or her compensation from the insurer….. However, an independent insurance agent can be the agent of the insurance company for one purpose and the agent of the insured for another. *Amstar Ins. Co. v. Cadet*, 862 So. 2d 736, 740 (Fla. 5th DCA 2003)(citing *Glynn v. New Hampshire Insurance Co.*, 578 So. 2d 36 (Fla. 4th DCA 1991). *Steele v. Jackson Nat. Life Ins. Co.*, 691 So. 2d 525, 527 (Fla. 5th DCA 1997)).

d. Managing General Agent/ Surplus Lines Agent/ Broker/ Wholesaler/ Underwriter

i. Managing general agent "represented various insurance companies and acted as a liaison between independent insurance agents and the insurance companies." *Cent. Ins. Underwriters, Inc. v. Nat'l Ins. Fin. Co.*, 599 So. 2d 1371, 1371-72 (Fla. 3d DCA 1992).

ii. Only this category has access to non-admitted insurers

iii. Time involved to get a policy from a non-admitted insurer

D. Lawsuits

1. No breach of insurance policy claims against insurance agent/broker/wholesaler.
2. No failure to pay under insurance policy.
3. No attorneys fees per Fla. Stat. § 627.428(1).
   a. "Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had."
   b. Look to Insurance Company First, Then Look to Insurance Agent
      i. *Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061 (Fla. 2001).
      ii. In 2001 the Florida Supreme Court found that insured could not simultaneously bring claim against insurance company and insurance agent and that if he successfully maintained claim against insurance company, insured was judicially stopped from pursuing his insurance agent. *Id.* at 1063.

iii. In *Blumberg*, the plaintiff sued his insurance company seeking coverage for stolen baseball cards worth an estimated $100,000.00 and covered by a property insurance policy. *Id*. at 1062-63. The action claiming the existence of coverage proceeded to trial and resulted in a jury verdict in favor of the plaintiff in the amount of $25,000.00. *Id*. at 1063. This award was insufficient to beat the insurer's offer of judgment, and the plaintiff settled and dismissed the claim prior to the entry of a final judgment. *Id*. The plaintiff then sued his insurance agent claiming the agent negligently failed to procure insurance. *Id*.

iv. The Supreme Court of Florida found that the limitations period for the negligence action against the insurance agent did not accrue until the insurance company proceeding was final. *Id*. at 1065.

v. Nevertheless, the Supreme Court of Florida determined that the insured was barred by judicial estoppels from bringing a claim against his insurance agent. The opinion states the facts of the case were "exactly the type of scenario for which the judicial estoppel doctrine was intended." *Id*. at 1066. The court refused to allow the insured to "make a mockery out of justice by asserting inconsistent positions" in his suit against the insurance company (where he claimed that coverage existed and prevailed) and the suit against the insurance agent (where he claimed that coverage did not exist). *Id.* The *Blumberg* court concluded that "[t]he courthouse should not be viewed as an all-you-can-sue buffet, in which litigants can pick and chose which verdicts they want and which they do not." *Id*. at 1067.

4. …But Insurance Agent is not the guarantor of all uninsured losses
    a. General principle is that the agent or broker should not be placed in the position of being the guarantor of the sufficiency of the customer's coverages.
    b. *See Murphy v. Kuhn*, 660 N.Y.S.2d 371, 375 (N.Y. 1997) "Insurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status."

E. Insurance Agent Duties
1. Scope of duties.
   Whether an agent is under a duty to perform any particular function depends on the proof of the agent's undertaking and relationship with the insured. *Adams v. Aetna Cas. & Sur. Co.*, 574 So.2d 1142, 1156 (Fla. 1st DCA 1991).

2. Failure to Advise
    a. "As a general proposition, an insurance agent has no duty to advise the insured as to the insured's insurance coverage needs. Furthermore, the general rule of no duty to advise clients about their insurance needs is

equally applicable to insurance brokers." *Tiara Condo. Ass'n, Inc. v. Marsh, USA, Inc.*, 991 F. Supp. 2d 1271, 1280 (S.D. Fla. 2014)(internal quotations and citations omitted).

b. One BIG exception. "Although the court has not been able to locate any Florida case directly on point, there is a well-developed body of case law throughout the country which establishes an exception to the general rule of no duty to advise. The exception becomes operative when an insurance broker encourages and engages in a 'special relationship' with its client, thereby triggering an enhanced duty of care to advise the client about the amount of coverage prudently needed to meet its complete insurance needs." *Tiara Condo. Ass'n, Inc. v. Marsh, USA, Inc.*, 991 F. Supp. 2d 1271, 1280 (S.D. Fla. 2014)(internal quotations and citations omitted).

c. Special relationship factors from *Tiara Condo. Ass'n, Inc. v. Marsh, USA, Inc.*, 991 F. Supp. 2d 1271, 1281-82 (S.D. Fla. 2014)
   i. Length and depth of relationship.
      - *Indiana Restorative Dentistry, P.C. v. Laven Ins. Agency, Inc.*, 27 N.E.3d 260, 265 (Ind. 2015)("All special relationships are long-term, but not all long-term relationships are special.").
   ii. Representations by the broker about its expertise.
      - Where the agent held itself out as having expertise in a given field of insurance being sought by insured, and the insured relied on that expertise. *E.g. Meridian Title Corp. v. Gainer*, 946 N.E.2d 634 (Ind.Ct.App. 2011); *Warehouse Foods, Inc. v. Corporate Risk Mgmt. Serv.*, 530 So.2d 422 (Fla. 1st DCA 1988).
   iii. Representations by the broker about the breadth of the coverage obtained.
      - Where the agent misrepresented the nature of the coverage being offered or provided, and the insured justifiably relied on that representation in selecting the policy. *See Fitzpatrick v. Hayes*, 67 Cal. Rptr. 2d 445, 452 (Ct. App. 1997).
      - In addition, if a broker falsely represents that a policy has been approved, he may become liable for negligent misrepresentation. *See, e.g., Meltsner v. Aetna Casualty & Ins. Co.*, 177 So. 2d 43 (Fla. 3d DCA 1965).
   iv. Extent of the broker's involvement in the client's decision making about its insurance needs.
      - Where the agent voluntarily assumed the responsibility for selecting the appropriate insurance policy for the insured (by express agreement or promise to the

insured), *see e.g. Harts v. Farmers Ins. Exchange*, 461 Mich. 1, 597 N.W.2d 47, 51–52 (1999);

v. Information volunteered by the broker about the client's insurance needs.

vi. Payment of additional compensation for advisory services.

- Where the agent or broker exercised broad discretion to service the insured's needs, and received compensation above the customary premium paid for the expert advice provided, *see e.g., Sintros v. Hamon*, 148 N.H. 478, 810 A.2d 553 (N.H.2002).

d. Whether an insurance broker shared a "special relationship" with its client is a question of fact for the jury.

3. When an insured reasonably relies upon an agent's claimed expertise and advice, liability may be based upon the agent's failure to properly advise the insured as to coverage. *Warehouse Foods, Inc. v. Corporate Risk Mgmt. Services, Inc.*, 530 So. 2d 422, 424 (Fla. 1st DCA 1988).

a. Advice may include

i. An explanation of the coverage it was providing and to advise of any changes to the insurance policy. *Wachovia Ins. Services, Inc. v. Toomey*, 994 So. 2d 980, 987 (Fla. 2008).

ii. The availability and desirability of higher limits, depending on the scope of the agent's undertaking. *Adams v. Aetna Cas. & Sur. Co.*, 574 So. 2d 1142, 1155 (Fla. 1st DCA 1991)(citing *Seascape of Hickory Point Condo. Ass'n* v. *Assoc. Ins. Services, Inc.*, 443 So. 2d 488 (Fla. 2d DCA 1984); *Woodham v. Moore*, 428 So. 2d 280 (Fla. 4th DCA 1983)).

iii. A broker, who is not to blame for the failure to obtain coverage, may become liable for damages if he fails to inform his principal that the requested insurance has not been procured. *DeMarlor v. Foley Carter Ins. Co*., 386 So. 2d 22, 23 (Fla. 2d DCA1980).

F. Failure to Procure

1. Florida law requires an agent to use reasonable skill and diligence to obtain insurance coverage which is "specifically requested or clearly warranted by the insured's expressed needs." *Warehouse Foods, Inc. v. Corporate Risk Management Services, Inc.*, 530 So. 2d 422, 423-24 (Fla. 1st DCA 1988); *Sheridan v. Greenber*g, 391 So. 2d 234 (Fla. 3d DCA 1981); *Caplan v. LaChance*, 219 So. 2d 89 (Fla. 3d DCA 1969).

a. Specifically requested

b. Clearly warranted

c. No such thing as fully insured, full coverage, full insurance, etc.

2. An insurance agent who agrees or undertakes to procure certain insurance coverage owes his principal a duty to procure the insurance within a

reasonable time. *CSC Realty Partners, Inc. v. Gallagher-Cole Assocs., Inc.*, 699 So. 2d 844, 844 (Fla. 3d DCA 1997)(citing *deMarlor v. Foley Carter Ins. Co.*, 386 So. 2d 22, 23 (Fla. 2d DCA 1980)).

II. CAUSES OF ACTION AGAINST INSURANCE AGENTS

A breach of these duties may subject the broker to liability in both contract and tort. *Nu-Air Mfg. Co. v. Frank B. Hall & Co. of New York*, 822 F.2d 987, 997 (11th Cir. 1987)

A. Negligence

1. Breach a common law duty

2. Money doesn't matter if insured relied. "An insurance agent who voluntarily, without consideration or expectation of remuneration or reward, agrees to procure a policy is liable for damages that result from his failure to do so." *Klonis for Use & Benefit of Consol. Am. Ins. Co. v. Armstrong*, 436 So. 2d 213, 217 (Fla. 1st DCA 1983)

3. Expert Testimony
   a. Standard of care
   b. There is only one Florida case about when an expert was necessary in a failure to procure case. Out-of-state cases indicate that expert testimony is required in some, but not all, failure to procure insurance cases. *AMH Appraisal Consultants, Inc. v. Argov Gavish P'ship*, 919 So. 2d 580, 581 (Fla. 4th DCA 2006)("insurance agent expert testimony necessary to find an insurance agent negligent for failing to interpret an insurance policy.").
   c. But watch out for the expert that wants to talk about legal duties!

4. Comparative Negligence
   a. Reading policy. An insured also has a duty to use reasonable care in obtaining insurance coverage, including by learning and knowing the contents of its insurance policy. *Reliance Ins. Co. v. D'Amico*, 528 So.2d 533, 535 (Fla. 2d DCA 1988); *Miles v. AAA Ins. Co.*, 771 So.2d 607, 608 (Fla. 3d DCA 2000).
   b. Reading notices. Insureds "must take responsibility for their own failure to read and respond to the enclosed notices." *Hartford Ins. Co. of the Midwest v. Atkinson*, 623 So.2d 549 (Fla. 2d DCA 1993)(citing *Marchesano v. Nationwide Property & Casualty Ins. Co.*, 506 So.2d 410, 413 (Fla.1987)).
   c. Burying head in sand.

B. Breach a Contractual Duty

1. Principles of contract law apply – meeting of the minds, sufficient definiteness, etc. A request to obtain insurance falls short of a contract to obtain or supply insurance. *Neida's Boutique, Inc. v. Gabor & Co.*, 348

So.2d 1196, 1197 (Fla. 3d DCA 1977)(citing *Leonard Taylor Jewelers, Inc. v. Hartnett, Inc.*, 222 So.2d 243 (Fla.3d DCA 1969)).

C. Breach of Fiduciary Duty
    1. An insurance agent owes a fiduciary duty to an insured. *Wachovia Ins. Services, Inc. v. Toomey*, 994 So. 2d 980, 987 (Fla. 2008); *Randolph v. Mitchell*, 677 So. 2d 976, 978 (Fla. 5th DCA 1996).
    2. A fiduciary relationship is based on trust and confidence between the parties where confidence is placed by one party and trust accepted by the other. *Taylor Woodrow Homes Florida, Inc. v. 4/46-A Corp.*, 850 So. 2d 536, 540 (Fla. 5th DCA 2003)(citing *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002)).
    3. Fiduciary duties for insurance agent may include a duty to inform and explain the coverage it was providing and advise of changes to an insurance policy. *Wachovia Ins. Services, Inc. v. Toomey*, 994 So. 2d 980, 987 (Fla. 2008).

D. Professional Malpractice – Probably not
    1. Generally Florida Supreme Court has used a definition of professional profession that requires at least a four-year college degree as a minimum criteria for a license. *See Garden v. Frier*, 602 So. 2d 1273, 1277 (Fla. 1992); *Pierce v. AALL Ins. Inc.*, 531 So. 2d 84, 88 (Fla.1988); *Hardy Equip. Co., Inc. v. Travis Cosby & Associates, Inc.*, 530 So. 2d 521, 522 (Fla. 1st DCA 1988).

    2. Since no degree in any field is required to sell insurance, one could conclude that an insurance agent is not a professional for purposes of the professional malpractice statute of limitations.

    3. In *Tiara Condominium Ass'n, Inc. v. Marsh & McLennan Co., Inc.*, 607 F.3d 742, 749 (11th Cir. 2010), the Eleventh Circuit certified the following question to the Florida Supreme Court:

        DOES AN INSURANCE BROKER PROVIDE A "PROFESSIONAL SERVICE" SUCH THAT THE INSURANCE BROKER IS UNABLE TO SUCCESSFULLY ASSERT THE ECONOMIC LOSS RULE AS A BAR TO TORT CLAIMS SEEKING ECONOMIC DAMAGES THAT ARISE FROM THE CONTRACTUAL RELATIONSHIP BETWEEN THE INSURANCE BROKER AND THE INSURED?

    4. In *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399, 400 (Fla. 2013), Florida Supreme Court did away with economic loss rule that bars claims for both negligence and breach of contract.

    5. So stick with the general rule.

E. Causation
    1. An essential element of negligent procurement in Florida is that the plaintiff would have secured an equivalent policy and would have prevailed on a claim under the other policy at trial. *D.R. Mead & Co. v. Cheshire of Florida, Inc.*,

489 So. 2d 830, 831 (Fla. 3d DCA 1986)(cited by *Cronin v. Washington Nat. Ins. Co.*, 980 F.2d 663, 668 (11th Cir. 1993)).

2. Generally available. In an failure to procure insurance case, the insured "must show by a preponderance of evidence. . . that such coverage was generally available in the insurance industry when agent obtained coverage for plaintiff; agent may defend by showing such insurance was not generally available, or would not have been available to plaintiff." *Morgan Intern. Realty, Inc. v. Dade Underwriters Ins. Agency, Inc.*, 524 So. 2d 451, 452 (Fla. 3d DCA 1988) (citing *Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.*, 739 P.2d 239 (Colo.1987)).

F. Damages

1. Insurance agent steps into the shoes of the insurer to pay an uninsured loss. *Commercial Ins. Consultants, Inc. v. Frenz Enterprises, Inc.*, 696 So. 2d 871, 873 (5th DCA 1997).

2. The measure of damages in a failure to procure case is the amount that would have been paid had the insurance coverage been in place. *See Mondesir v. Delva*, 851 So. 2d 187, 189 (Fla. 3d DCA 2003)(tort); *Duncanson v. Service First, Inc.*, 157 So. 2d 696, 699 (3d DCA1963)(contract).

3. Money paid by the plaintiff is insufficient proof of damages without showing that it "actually would have been covered [under the policy] if insurance had been obtained." *Capell v. Gamble*, 733 So. 2d 534, 535 (1st DCA 1998).

4. Damages generally reduced by any coverage agent did obtain. *See Klonis for Use and Benefit of Consol. Am. Ins. Co. v. Armstrong*, 436 So. 2d 213, 216 (Fla. 1st DCA 1983).

5. Formula
    a. What would have been covered under the policy that would have been in place but for the alleged breach of contract or negligence or breach of fiduciary duty of insurance agent,
    b. less what was actually recovered for the same loss under the existing insurance policy in place,
    c. less any deductible that would have been part of a properly acquired policy, and
    d. less any premium that would have been part of a properly acquired policy.

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Basic Appellate Practice

COURSE CLASSIFICATION: BASIC LEVEL

March 28, 2014

One Location:

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THE FLORIDA BAR

PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

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LECTURE PROGRAM

March 28, 2014

8:30 a.m. – 8:45 a.m.	**Welcome**
8:45 a.m. – 9:35 a.m.	**Introduction to Appellate Practice: Rules, Jurisdiction, and Preservation of Error** *Steven Brannock, Tampa*
9:35 a.m. – 10:25 a.m.	**What is Appealable?** *Matt Conigliaro, Tampa*
10:25 a.m. – 10:40 a.m.	**Break**
10:40 a.m. – 11:30 a.m.	**Preparing for An Appeal** *Ceci Berman, Tampa*
11:30 a.m. – 12:20 p.m.	**Criminal Appeals** *Wesley Heidt, Daytona Beach*
12:20 p.m. – 1:30 p.m.	**Lunch on your own**
1:30 p.m. – 2:30 p.m.	**Briefwriting** *A View from the Bar: Robert Biasotti, St. Petersburg* *A View from the Bench: Hon. Edward C. LaRose, Tampa*
2:30 p.m. – 2:45 p.m.	**Break**
2:45 p.m. – 3:45 p.m.	**Oral Argument** *A View from the Bench: Hon. Stevan Northcutt, Tampa* *A View from the Bar: Robert Taylor Bowling, Daytona Beach*
3:45 p.m. – 4:45 p.m.	**The Opinion Is Out - Now What?** *Andrew Manko, Tallahassee* *Courtney Brewer, Tallahassee*
4:45 p.m.	**Adjourn**