

APPLICATION FOR NOMINATION TO THE 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: David Samuel Wainer III

Social Security No.: [REDACTED]

Florida Bar No.: 0082929

Date Admitted to Practice in Florida: 6/13/1996

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.

I am an attorney with Ford, Miller & Wainer, PA
1835 Third St. N.
Jacksonville Beach, FL 32250
904-390-1970

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]
Ponte Vedra Beach, FL 32082

22 years

I have lived in Florida all of my life.

[REDACTED]
dwainer@fordmiller.com

3. State your birthdate and place of birth.

[REDACTED]
Melbourne, Florida

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

Yes.

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

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

I am admitted to practice in the U.S. District Court for the Middle District of Florida since 1997.

I was admitted *pro hac vice* to the U.S. District Court for the Northern District of California in January 2017.

I was admitted *pro hac vice* to the State Court for Tennessee in April 2001.

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

No.

EDUCATION:

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

| <u>School</u> | <u>Dates</u> | <u>Degree</u> | <u>Standing</u> | <u>GPA</u> |
|--------------------------------------|--------------|-----------------|-----------------|------------|
| University of Florida College of Law | 1993-1995 | J.D with honors | top 40% | 3.3 |
| Florida State University | 1988-1992 | B.S. Finance | | 3.2 |
| University of North Florida | 1990 | none | | 4.0 |
| Florida State College Jacksonville | 1989 | none | | 4.0 |

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.

Sigma Alpha Epsilon fraternity 1990-1992 vice-president 1991-1992

EMPLOYMENT:

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

| <u>Employer/address</u> | <u>Position</u> | <u>Dates</u> |
|---|------------------|--------------|
| Ford, Miller & Wainer PA 1835 3rd St. N. Jacksonville Beach, FL 32250 | Attorney/Partner | 2001-present |

1301 Riverplace Blvd.
 Suite 600
 Jacksonville, FL 32207

| | | |
|--|--------------------|-----------|
| Ford & Miller, PA 6 E. Bay St. Suite 550 Jacksonville FL, 32202 | Associate Attorney | 1996-1998 |
|--|--------------------|-----------|

| | | |
|--|--------------------|-----------|
| P. Campbell Ford & Assoc., PA 6 E. Bay St. Suite 550 Jacksonville, FL 32202 | Associate Attorney | 1996-1998 |
|--|--------------------|-----------|

| | |
|---|-----------------|
| Baptist Medical Center, Jacksonville Law Clerk 901 San Marco Blvd. Jacksonville, FL 32207 | May-August 1995 |
|---|-----------------|

| | | |
|--|-------------------|------|
| McCormick Marketing, Inc d/b/a Haden Ham 408 Beach Blvd. Jacksonville Beach, FL 32250 | Assistant Manager | 1992 |
|--|-------------------|------|

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.

My practice is primarily commercial litigation. It really boils down to problem-solving for individuals and small businesses that are either under threat of litigation or may need to use litigation to achieve their goals. I do some personal injury on the plaintiff's side. I also do estate-planning and simple wills.

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 | <u>0</u> _____ % | | Civil | <u>100</u> _____ % |
| Federal Trial | <u>0</u> _____ % | | Criminal | <u>0</u> _____ % |

| | | | |
|----------------------|--------------|--------------|--------------|
| Federal Other | <u>1</u> % | Family | <u>0</u> % |
| State Appellate | <u>2</u> % | Probate | <u>0</u> % |
| State Trial | <u>97</u> % | Other | <u>0</u> % |
| State Administrative | <u>0</u> % | | |
| State Other | <u>0</u> % | | |
| TOTAL | <u>100</u> % | TOTAL | <u>100</u> % |

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

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

| | | | |
|--------------|----------|------------------------|------------|
| Jury? | <u>6</u> | Non-jury? | <u>20+</u> |
| Arbitration? | <u>3</u> | Administrative Bodies? | <u>0</u> |
| Appellate? | <u>5</u> | | |

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.

- a) Jax Utilities Management, Inc. v. Hancock Bank
District Court of Appeal of Florida First District
ID14-0664
Argued on March 24, 2015
Opposing counsel
Matthew Conigliaro
mconigliaro@cfiblaw.com
(813)223-7000
164 So. 3d 1266 (Fla. 1st DCA 2015)
- b) Lee May v. Octi-Dry Industries, Inc.
District Court of Appeal of Florida First District
1D09-1802
Argued on February 23, 2010

Opposing counsel
John Winnie
jswinnie@yahoo.com
(352) 692-1666
No opinion

- 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.

Yes. On March 16, 2021, Judge Maltz in St. Johns County entered an order in case number CA20-0862 granting a motion for sanctions after finding that my objections to notices of intent to serve subpoenas were not well-founded. The sanctions were resolved when I paid opposing counsel's fees related to the objection and the hearing.

- 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.*

- a) Jax Utilities Management, Inc. v. Capital Masonry, LLC
County Court, Duval County 2021-CC-3869

Lee E. Tomlinson
(813) 402-2880
lee.tomlinson@arlaw.com

Virgil T. Batcher
(813) 402-2880
tray.batcher@arlaw.com

- b) Timothy Beasley v. A-Team Semper Fi Flooring, LLC
County Court, Duval County 2020-SC-15520
No opposing counsel

- c) SD Services of Jacksonville, Inc. d/b/a A.S.A.P. Plumbing and Drain Cleaning Co. v.

Vernette Murray II d/b/a V.M. Services
County Court, Duval County 2019-CC-8604
No opposing counsel

- d) Christopher Araldi v. Tanna K. Hinshaw
County Court, Duval County 2018-CC-011649
Jeffery J. Sneed
Jeffrey.Sneed@libertymutual.com
(904) 701-6175
Paul Eakin
Paul@jaxfamilylaw.biz
(904) 247-6565
- e) Capps Land Management, Inc. v. Four-A Construction, Inc.
Circuit Court, Duval County 2013-CA-9067
Weinberg Wheeler Hudgins Gunn & Dial
Steven D. Gonzalez
Sgonzalez@wwhgd.com
Matthew Marrone
Mmarrone@wwhgd.com
(305)455-9500
- f) Michael and Nuwna Levy v. Deerwood Place VI Condominiums Association, Inc.
County Court, Duval County 2021-CC-009248
William Cobb
wcobb@cobbgonzalez.com
James Gonzalez
jgonzalez@cobbgonzalez.com
904-822-8001

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.*

- a) The Estate of Dean T. Langford
Circuit Court, St. Johns County, CP-21-0850
John Cole
jcole@gunster.com
Christine Sweet
csweet@gunster.com
(904) 354-1980
Clayton Miller

Clayton@Ivanlawgroup.com
(904) 395-2395

- b) The Honorable Ronnie Fussell v. David E. Murray, et al.
Circuit Court, Duval County, 2020-CA-5683
Helen Peacock Roberson
HRoberson@coj.net
904-255-7762
Wendy Mummaw
WMummaw@coj.net
904-255-5065
Alexander Ostrovsky
Alex.Ostrovsky@fnf.com
954-414-2105

- c) JWB Property Mgmt LLC v. Natalie Blocker and Andrew Blocker
County Court, Duval County, 2022-CC-8963
Joel Kelley
(904) 222-0829
JKelley@EdwardsEdwardsLaw.com

- d) Commercial Construction Group, Inc. v. Matthew Davis Fleming
Circuit Court, Duval County, 2017-CA-5877
Patrick Joyce
(904) 357-3660
pioyce@milamhoward.com

- e) Dolores Clark-McDonald v. HHH Motors 2, LLP
County Court, Duval County, 2021-cc-4681
Christopher Ritchie
(904) 791-9191
critchie@insurancedefense.net

- f) John Lock v. Gary Bongard
Circuit Court, Duval County, 2022-CA-3032
David Lampley
239-210-3680
Dlampley@dellutrilawgroup.com

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.

5 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.

N/A.

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?

N/A.

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.

- a) W.R. Townsend Contracting, Inv. v. Jensen Civil Construction, Inc.; I was an associate attorney for Townsend. The trial court, Judge Karen Cole in Duval County, dismissed our complaint with prejudice and we appealed. The opinion is 728 So. 2d 297 (Fla. 1st DCA 1999). This opinion has been cited 245 times in other opinions. The opinion of the First District Court of Appeal was only a slight variation of the brief that I drafted. After winning, we were not allowed to stay in the case as the parties on both sides wanted new counsel. It was my first experience that you can "win" but not really "win." The other attorneys involved were

P. Campbell Ford

cford@fordmiller.com

(904)390-1970

F. Alan Cummings

facummings@smithcurrie.com

Harry Thomas

(850) 893-3834

Hthomas0646@gmail.com

Diane Tutt

(954) 961-1400

dtutt@conroysimberg.com

- b) Jax Utilities Management, Inc. v. Hancock Bank, et al.

Case number 201 1-CA-0394, before Judge Wadell Wallace, Duval County I was lead counsel for Jax Utilities. Judge Wallace granted Hancock Bank's motion for summary judgment holding that my client, a contractor, did not have an equitable lien on undisbursed loan amounts even though the project had been substantially completed. In a case of first impression, the First District Court of Appeal, affirmed the trial court's decision. The amended opinion was six pages and held that a relatively recent statute extinguished equitable lien rights that had existed through case law for over forty (40) years. Even though I was not successful (and still do not agree with the outcome), this case changed law in the State of Florida. The other attorneys involved were

Jason Perkins

jperkins@carltonfields.com

(407) 244-8250

Matthew Conigliaro

mconigliaro@ctjblaw.com

(813)223-7000

Diane Cassaro

dcassaro@harrellandharrell.com

(904) 251-1111

c) Sonoc Company, LLC, et al v. B.B. McCormick & Sons, Inc.

Case number 2002-CA-2566 before Judge Michael Traynor in St. Johns County.

I was co-counsel for B.B. McCormick & Sons with Frank Upchurch. Sonoc is an entity owned by the Davis family in Jacksonville. The dispute centered around access rights to a property that straddled the St. Johns/Duval county lines through what is now Nocatee. The case settled at mediation primarily because Judge Traynor was sending "smoke signals" that if the parties made him decide, that no one was going to be particularly pleased with the outcome. The case had some unique features which, if either side was so inclined could have resulted in an appeal to the United States Supreme Court. This case was important as it dealt with property rights in an area which, seemingly overnight, went from very rural to developed. It helped to shape southern Duval and northern St. Johns counties. The other attorneys involved were:

Frank Upchurch

(904) 829-9066

fdupchurch@ubulaw.com

John Devault

(904) 353-0211

jdevault@bedellfirm.com

Kevin Cook

(904) 358 8300

kcook@orrcook.com

d) Bass v. Servpro Industries, Inc.

Case number 96 CA 2359 before Judge Charles Arnold, Duval County

Campbell Ford and I represented Ernest Bass against Servpro. The case was tried before a jury in Duval County in April 2005. It was significant to me as it was the first time that I had really represented the “little guy” and could see and appreciate the efforts of the large, corporate defendant to wear him down. It almost succeeded. That is not to say that large, corporate parties do not deserve justice or their day in court. An earlier judge in the case had granted summary judgment in favor of Servpro. It was appealed to the First District Court of Appeal, Bass v. Servpro Industries, Inc., 860 So. 2d 1006 (Fla. 1st DCA 2003). It was also a very complex trial in that the parties had been in a franchisor/franchisee relationship for over 20 years before the rift that resulted in the litigation. The other attorneys involved were

Campbell Ford

cford@fordmiller.com

(904) 390-1970

Matthew Sweeney

Msweeney@bakerdonelson.com

(615)726-5774

e) **Blumberg v. Blumberg**

Case number 2020-CP-0274 before Judge Thomas Beverly Duval County

I was lead counsel for Karen Blumberg in a case against her brother as the trustee of her father’s trust and personal representative of her father’s estate. The case centered around the interpretation of Florida Statute §732.609 (the “Ademption Statute”) as to the proper valuation of a piece of property that my client received prior to her father’s passing. There was no case law interpreting the Ademption Statute anywhere in the country (it is part of the Revised Uniform Probate Code) and we had to go back to the basics of statutory interpretation to make the argument to the Court. The stakes were very high for both sides both financially and emotionally. The parties filed cross-motions for summary judgment on the interpretation of the Ademption Statute. Judge Beverly granted our motion and the case resolved as a result of his ruling. The case was important as circuit court orders are now easily searchable through Lexis and Westlaw and there is now a Florida decision on the interpretation of the Ademption Statute. The other attorney involved was

Alessandro Apolito

aapolito@lippes.com

(904) 660-0020

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.

Please find the following:

- a) Plaintiff’s Memorandum of Law in Opposition to Defendant Alan Blumberg’s Motion for Partial Summary Judgment of which I was the primary author; and

- b) Plaintiff's Second Amended Motion for Summary Judgment, Michael and Nuwna Levy v. Deerwood Place VI Condominiums Association, Inc., County Court, Duval County 2021-CC-009248, which I authored.

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.

Yes. In September 2014 I submitted an application to the Seventh Circuit Judicial Nominating Commission for a Circuit Court position. I was not certified to the Governor's Office for consideration.

In August 2021 I submitted an application to the Seventh Circuit Judicial Nominating Commission for a County Court position. I was not certified to the Governor's Office for consideration.

In January 2023 I submitted an application to the Fourth Circuit Judicial Nominating Commission for Circuit Court and County Court positions. I was not certified to the Governor's Office for consideration for either position.

In August 2023 I submitted an application to the Fourth Circuit Judicial Nominating Commission for a County Court position. I was certified to the Governor's Office for consideration for the position.

In October 2023 I submitted an application to the Fourth Circuit Judicial Nominating Commission for a Circuit Court position. I was certified to the Governor's Office for consideration for the position.

- 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.

N/A.

- 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.

N/A.

- 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.

N/A.

- 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.

N/A.

- 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.

N/A.

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

No.

NON-LEGAL BUSINESS INVOLVEMENT

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

I am in a partnership with my brothers and my mother regarding timber rights to a piece of property owned by my mother in Brooks County, Georgia. Other than the agreement to split the proceeds,

there is no formal agreement as to structure. As the oldest son, and the one most involved with the property, I am the *de facto* manager. I do not intend to resign.

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.

No.

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.

No.

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.

I authored a letter to the editor which was published in the Wall Street Journal in approximately 2008. I do not recall the exact date.

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.

None.

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.

None other than Sunday school lessons at St. John the Divine Greek Orthodox Church in Jacksonville. I teach the high school class in what could best be described as “Applied Christianity.”

- 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.

No.

- 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.

I received the President’s Award as a Trailblazer from the Rhoda L. Martin Cultural Heritage Center on June 15, 2019.

I received the Pillar of Success Award from the Elim Project in January 2014.

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

Yes. BV. Approximately 2001.

- 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.

-Jacksonville Bar Association, approximately 1997 to the present

-Jacksonville Beach Bar Association, approximately 2008 to the present

-Construction Law Committee of the Florida Bar, approximately 2019 to the present

- 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.

-Descendants of the Signers of the Declaration of Independence, 1993 to the present

-Beaches Area Historical Society, Jacksonville Beach, 2008-2014, President 2010-2012

-Rhoda L. Martin Cultural Heritage Center, Jacksonville Beach. 2014 to December 2023.

-Florida State University Alumni Association

-Sigma Alpha Epsilon Fraternity Alumni Association

-Fiddler’s Marsh Homeowner’s Association board of directors 2005 2008; president 2005- 2008.

-St. John the Divine Greek Orthodox Church, Sunday school teacher 2007-present; director of Sunday school 2009-2021; Parish Council January 2024.

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.

No.

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

I have generally provided advice to the Beaches Area Historical Society in Jacksonville, Beach and the Jacksonville Beach Elementary Preservation Fund, Inc. d/b/a The Rhoda L. Martin Cultural Heritage Center ("JBEPF") in corporate matters regarding bylaws and developing and reviewing contracts for leasing their premises. I represented the JBEPF *pro bono* in Duval County case styled SunTrust Bank v. Jacksonville Beach Elementary Preservation Fund, Inc. Case number 2019-CA-1699.

45. Please describe any hobbies or other vocational interests.

I enjoy hunting deer and turkeys, reading (especially history and historical fiction), finding sharks' teeth on the beach, spending time in the yard, genealogy, travel to places historically significant to my family, and teaching Sunday school at St. John the Divine.

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.

[\(2\) Facebook](#)

[\(18\) David Wainer | LinkedIn](#)

FAMILY BACKGROUND

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

I have been married to [REDACTED] Wainer since April 28, 2001. She works part-time for the [REDACTED] receiving inventory. She also does free-lance data-entry work for [REDACTED] and free-lance check-writing and account management for the [REDACTED].

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] age [REDACTED] Junior at the [REDACTED] Her current address is [REDACTED]
[REDACTED]

[REDACTED] age [REDACTED] Freshman at [REDACTED] His current residential address is [REDACTED] His mailing address is [REDACTED]
[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.

Yes.

On or about August 25, 1990, I was attending a fraternity rush party at Florida State University in Tallahassee. As the party was winding down, I was in front of the fraternity house with a bottle of whiskey in my hand. Two undercover campus police officers approached me as to see my identification, which I gave to them. As I was 20 years old, I received a citation to appear before a university administrator, the charge being underage possession of alcohol. I saw the administrator as required and received a \$35 fine and was required to attend a class that dealt with the consequences of alcohol abuse. As I was not taken to a police station to be processed, there were no mug shots and I was never fingerprinted. Nothing else arose from the incident.

On or about June 4, 1994, I was playing basketball at the Sigma Alpha Epsilon fraternity house at the University of Florida in Gainesville, Florida. My playing partner and I were both members of the fraternity, he at UF and I at FSU. The fraternity chapter in Gainesville had been inactive for over a year as mandated by the University of Florida. A university police officer stopped and questioned my playing partner and me. We were both cited for trespassing and given a notice to appear before the Dean of Student Affairs. About a week later the Dean called to inform me that I did not have to appear, and that this episode would be a warning not to be found on that basketball court again. As I was not taken to a police station to be processed, there were no mug shots and I was never fingerprinted. Nothing further has arisen from the incident.

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.

My wife and I were plaintiffs in David Wainer III and [REDACTED], Circuit Court, [REDACTED] County. We alleged that the defendants failed to inform us about extensive termite damage to our home and concealed the damage prior to our purchasing it. The case was resolved at mediation.

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?

Yes. I represented Wendy I. Young in a limited capacity for a hearing in Brevard County in April 2008. She was not pleased with the results and reversed her credit card charge for our fees. Ford, Miller & Wainer sued her in small claims court in Duval County for the fees owed. She was successful in a motion to have the case removed to Indian River County and filed a counterclaim in circuit court case number 31-2012-CA-160. The court granted a motion to dismiss in October 2013.

I represented Raj Mody in 2016 in a breach of contract matter and withdrew from the case when irreconcilable differences arose between Mr. Mody and our firm (which was representing Mr. Mody and his father on a number of other matters). P. Campbell Ford sued Mr. Mody and his company for failing to pay attorney fees in county court for Duval County case number 2018- CC-6840. Mr. Mody counterclaimed and added me, individually, as a counterclaim defendant. I moved

to dismiss the claims against me as they were pleaded incorrectly and baseless. The case was resolved prior to trial.

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

No.

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

No.

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

No.

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

No.

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

No.

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

No.

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

I have timely filed my tax returns and have never had to pay a tax penalty.

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.

Part of my role as a Sunday school teacher is to make things that seem complex understandable. My experience as a teacher will assist me in explaining how our system works and why I would be constrained by the law to rule a certain way.

I am a student of history. I also read the writings of King Solomon in Proverbs. I understand the value of wisdom which is not the same as being "smart". You can be the "smartest" person in the room and be completely devoid of wisdom. Judges need wisdom to make just decisions. If selected to this position the people of this circuit will get a judge who seeks wisdom on a daily basis and appreciates the seriousness and solemnity of the position. Having practiced for over 27

years, I understand that in order for attorneys to adequately and fairly advise their clients they need a judge who consistently applies the law to the facts of each case and rules in a timely manner.

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 a 9th generation Floridian. Some of my mother's ancestors came to St. Augustine from Minorca in 1768 seeking a better life in the New World. I have lived in Florida all of my life, raised my children here and I have seen the positive and negative aspects of growth in this part of Florida. I believe that my appointment to the bench would be a bridge between the old and new in this seemingly ever-changing social landscape.

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.

- a) Honorable Howard Maltz
Seventh Judicial Circuit
Richard O. Watson Judicial Center
4010 Lewis Speedway, Ste. 344
Saint Augustine, FL 32084
smiller@circuit7.org
904-827-5600
- b) Honorable Adrian Soud
Fifth District Court of Appeal
300 S. Beach St.
Daytona Beach, FL 32114
SoudA@flcourts.org
904-534-7620
- c) Jack Schmidt
55 San Juan Drive
Ponte Vedra Beach, Florida 32082
██████████55@gmail.com
██████████4080
- d) Mark Arnold
91 San Juan Dr.
Ponte Vedra Beach, FL 32082

- ██████████512@gmail.com
██████████670
- e) L. Gale Lemerand
810 Fentress Court, Suite 130
Daytona Beach, FL 32117
██████████@lglmanagement.com
██████████5966
- f) R.C. Martin
3646 Chatsfield Ct.
Jacksonville, FL 32224
██████████@charlesmartinbooks.com
██████████9095
- g) Honorable Kenneth Janesk, II
Seventh Judicial Circuit
Richard O. Watson Judicial Center
4010 Lewis Speedway Ste 244
St Augustine, FL 32084-8637
mlapinski@circuit7.org
904-827-5654
- h) Honorable Rose Marie K. Preddy
7th Judicial Circuit Court
PO Box 758
Palatka, FL 32178-0758
dholmes@circuit7.org
386-329-0471
- i) Dean Sunas
169 Clearlake Dr.
Ponte Vedra Beach, FL 32082
██████████001@yahoo.com
██████████1131
- j) George Stavros
125 Deer Cove Dr.
Ponte Vedra Beach, FL 32082
██████████@gmail.com
██████████9449

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(1), 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 3^d day of January, 20 24.

DAVID S. WAINOR

Printed Name



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: \$0

Last Three Years: 2021 \$152,500 2022 \$162,500 2023 \$210,000

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: \$0

Last Three Years: 2021 \$152,500 2022 \$162,500 2023 \$210,000

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

Current Year-To-Date: \$0

Last Three Years: 2021 \$1,864 interest/dividends; 2022 less than \$2,000; 2023 less than \$2,500

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: 2021 \$1,864 interest/dividends; 2022 less than \$2,000; 2023 less than \$2,500

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: 2021 \$1,864 interest/dividends; 2022 less than \$2,000; 2023 less than \$2,500.

**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 2, 2024 was \$1,233,320.

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 \$ 100,000

ASSETS INDIVIDUALLY VALUED AT OVER \$1,000:

| DESCRIPTION OF ASSET (specific description is required – see instructions p. 3) | VALUE OF ASSET |
|---|----------------|
| Home at [REDACTED] | \$679,000 |
| 401 k managed by Empower Retirement | \$375,000 |
| Wainer Timber Partnership | \$15,000 |
| Raymond James Investment Account | \$78,520 |
| Cash | \$54,000 |
| | |

PART C – LIABILITIES

LIABILITIES IN EXCESS OF \$1,000 (See instructions on page 4):

| NAME AND ADDRESS OF CREDITOR | AMOUNT OF LIABILITY |
|--|---------------------|
| Provident Funding PO Box 5914 Santa Rosa, CA 95402 | \$53,580 |
| Subaru Motors Finance PO Box 71220 Philadelphia, PA 19176-6220 | \$14,600 |
| | |
| | |
| | |

JOINT AND SEVERAL LIABILITIES NOT REPORTED

ABOVE:

NAME AND ADDRESS OF CREDITOR

AMOUNT OF LIABILITY

| | |
|--|--|
| | |
| | |
| | |

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 |
|--|---|-------------------|
| Ford, Miller & Wainer, P.A. | 1835 Third St. N., Jacksonville Beach, FL 32250 | \$210,000 |
| Raymond James | 880 Carillon Parkway, St. Petersburg, FL 33716 | Less than \$2,500 |
| | | |

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 |
|-------------------------|---|-------------------|---------------------------------------|
| | | | |
| | | | |
| | | | |

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

| | BUSINESS ENTITY #1 | BUSINESS ENTITY #2 | BUSINESS ENTITY #3 |
|---|--------------------|--------------------|--------------------|
| NAME OF BUSINESS ENTITY | | | |
| 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.

STATE OF

FLORIDA COUNTY

OF DUVAL

Sworn to (or affirmed) and subscribed before me this 4th day of JANUARY 2024 by DAVID S. WAINER, II

(Signature of Notary Public—State of Florida)

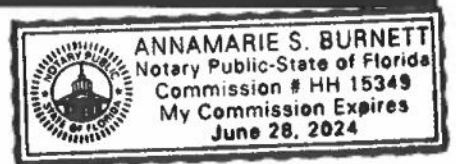
(Print, Type, or Stamp/Commissioned Name of Notary Public)

Personally Known OR Produced Identification _____

Type of Identification Produced _____

David S. Wainer, II

SIGNATURE



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:

- form:
- (1) The aggregate value of household goods and personal effects, as reported in Part B of this
 - (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 entirety 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: January 4, 2024

JNC Submitting To: Seventh Circuit

Name (please print): David S. Wainer, III

Current Occupation: Attorney

Telephone Number: 904-742-3791

Attorney No.: 082929

Gender (check one):

Male Female

Ethnic Origin (check one):

White, non-Hispanic

Hispanic

Black

American Indian/Alaskan Native

Asian/Pacific Islander

County of Residence: St. Johns County

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.

DAVID S. WADNER

Printed Name of Applicant



Signature of Applicant

Date: 1-3-2024



IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

KAREN S. BLUMBERG,
an individual,

CASE NO.: 2020-CP-0274
DIVISION: PR-B

Plaintiff,

vs.

ALAN J. BLUMBERG, individually and as
attorney-in-fact for Samuel L. Blumberg, as co-
trustee of the Second Amended and Restated Samuel
Blumberg Living Trust, and as Personal
Representative of the Estate of Samuel Blumberg,

Defendant.

_____ /

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT ALAN BLUMBERG'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW, Plaintiff, KAREN S. BLUMBERG (“Plaintiff”), by and through her undersigned counsel, and files this Memorandum of Law in Opposition to Defendant Alan Blumberg’s Motion for Partial Summary Judgment, and in support thereof states as follows:

1. At issue here is the timing of the valuation of a condominium (the “Condo”) given to Plaintiff (the natural daughter of Samuel Blumberg) by Samuel Blumberg (the “Grantor”) prior to his death in July 2019. Naturally, Plaintiff’s siblings, Defendant and Amy Deem, want a higher value placed on the Condo so that they can claim a greater share of the residuary assets of Grantor’s trust.

2. Both parties acknowledge that Florida Statutes §732.609 (the “Ademption Statute”) applies and are seeking a ruling by this Court on the interpretation of that statute.¹

¹ Plaintiff has also filed a Motion for Partial Summary Judgment that is scheduled to be heard by this Court next Tuesday, January 12, 2021.

3. The Ademption Statute states as follows:

Ademption by Satisfaction. Property that a testator gave to a person in the testator's lifetime is treated as a satisfaction of a devise to that person, in whole or in part, only if the will provides for deduction of the lifetime gift, the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or the devisee acknowledges in writing that the gift is in satisfaction. For purposes of part satisfaction, property given during the testator's lifetime is valued at the time the devisee came into possession or enjoyment of the property or at the time of the death of the testator, whichever occurs first.

Id.

Florida Statutes § 731.201 defines "devisee" as "a person designated in a will or trust to receive a devise." It is not necessary for the gift to be in the past in order for one to be a devisee.

4. It is undisputed that the Condo was given to Plaintiff during Grantor's lifetime. It is also undisputed that the Second Amended and Restated Samuel Blumberg Living Trust (the "Trust") provided for deduction of Plaintiff's share of the residual Trust of the lifetime gift. As a result of these two (2) undisputed facts, it is without question that the lifetime gift of the Condo to Plaintiff operated as an ademption by satisfaction of the Condo.

5. The question of ademption by satisfaction is not in dispute. As such, there is no need for the Court to interpret the first sentence of the Ademption Statute. The only issue remaining for this Court to construe is the second sentence of the Ademption Statute. The first clause of the second sentence is "(f)or purposes of part satisfaction." As the Condo was not the only thing being given to Plaintiff from the Trust, it is undisputed as well that the lifetime gift of the Condo operated as a partial satisfaction to Plaintiff. The remaining language of the second sentence of the Ademption Statute is "property given during the testator's lifetime is valued at the time the devisee came into possession or enjoyment of the property or the time of the death of the testator, whichever occurs first." It is undisputed that the property was given during Grantor's lifetime.

6. The only logical conclusion, according to the plain language of the Ademption Statute is that the Condo is to be “valued at the time (Plaintiff) came into possession or enjoyment of it or the time of Grantor’s death whichever occurs first.” Which happened first, Plaintiff coming into possession of or enjoyment of the Condo, or Grantor’s death?

7. Given the need to interpret and apply the Ademption Statute, there are additional undisputed facts, including the following, which must be considered in this case:

- Since Grantor purchased the Condo, Plaintiff has been in sole possession of it; *See* Affidavit of Karen S. Blumberg in Opposition to Defendant’s Motion for Summary Judgment;
- Since Grantor purchased the Condo, Plaintiff has had the full enjoyment of the Condo; Id.
- Since Grantor purchased the Condo no one other than Plaintiff has had possession or enjoyment of it; Id.
- After purchasing the Condo, Grantor never entered it until June 30, 2019. This was four (4) days after Defendant executed the deed for the Condo to Plaintiff. Id. In other words, Grantor never ever entered the Condo, much less possessed or enjoyed the Condo, only Karen did;
- At one point after Plaintiff’s mother passed away in 2018, Grantor wanted to move out of River Garden, where he was being cared for, to live with Plaintiff for four (4) months of the year. Plaintiff told the Grantor he could not live with her in the Condo and, therefore, he did not move into the Condo even though the Condo was owned by him; Id.
- After purchasing the Condo, Grantor never had a key or access to the secure parking

garage in the Condo; Id.

- After purchasing the Condo, Grantor spent \$10,000.00 updating the Condo for Plaintiff. Plaintiff determined the updates and declarations and directed the work; Id., and
- Since the purchase of the Condo by Grantor, Plaintiff has paid the expenses associated with it including, but not limited to, property taxes, condominium fees, maintenance, and insurance with the exception of insurance for the first-year Grantor owned it. Id.

8. The only evidence on the record and the only conclusion that can be reached is that Plaintiff had possession *and* enjoyment of the Condo the moment it was purchased by Grantor in 2016. Given the undisputed facts as to the timing of Plaintiff's possession and enjoyment of the Condo, it is not legally possible for this Court to grant Defendant's Motion.²

9. Defendant does not cite a single case or statute for the proposition that "possession or enjoyment," as used in the Ademption Statute, should be given anything other than its plain meaning. Rather, Defendant attempts to conflate "possession or enjoyment" with "dominion and control" in order to make the argument that Plaintiff did not have dominion or control until it was deeded to her, and that the Condo should be valued at the time title was conveyed to Plaintiff. This attempt by Defendant has no basis in the law and certainly, such an interpretation would be contrary to the plain language of the Ademption Statute.

10. In order for Defendant to be correct in his interpretation, the second sentence of the Ademption Statute would have to read as follows:

For purposes of part satisfaction, property given during the testator's lifetime is valued at the time the devisee came into ~~possession or~~

² The Ademption Statute only requires either "possession" *or* "enjoyment". Here, Plaintiff had both possession *and* enjoyment of the Condo.

enjoyment dominion and control which can only occur at the conveyance of the property to the devisee or at the time of the death of the testator, whichever occurs first.

11. Defendant relies on Schneider v. Shinn, 636 So. 2d 110 (Fla. 3d DCA 1994). In Schneider, the property at issue was conveyed just before the deceased's death. There is no indication in the opinion³ that the devisee had possession or enjoyment of the property at any time prior to the testator's death. In fact, the timing of the valuation was not the issue in the case at all. Rather, the issue was whether a mortgage on the property should be taken into account when arriving at a value. The words "possession or enjoyment" do not even appear in the 4-paragraph opinion. Additionally, it is clear from a prior opinion in the same case, Shinn v. Schneider, 549 So. 2d 194 (Fla. 3d DCA 1989), that the will in question specifically provided that the property in question was to be appraised when the property passed through the estate and the share in the residuary estate reduced according to the appraised value.

12. This Court should deny Defendant's Motion based on the plain language of the Ademption Statute. "While legislative intent controls construction of statutes in Florida, Griffis v. State, 356 So. 2d 297 (Fla. 1978), that intent is determined **primarily** from the language of the statute. S. R. G. Corp. v. Department of Revenue, 365 So. 2d 687 (Fla. 1978). The plain meaning of the statutory language is the first consideration." St. Petersburg Bank & Trust v. Hamm, 414 So. 2d 1071, 1073 (Fla. 1982) (emphasis supplied). "when the Court construes a statute, "we look first to the statute's plain meaning."" Fla. Convalescent Centers v. Someberg, 840 So. 2d 998 (Fla. 2003) (quoting Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996). "Furthermore, "(W)hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory

³ Plaintiff's claim is based on the undisputed fact that she had possession and enjoyment of the Condo, so it is unclear why this case is even cited as one that is analogous under the circumstances.

interpretation of and construction; the statute must be given its plain and obvious meaning.””
Florida Convalescent Centers at 1000 (quoting Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984) (citations omitted)). “Possession” and “enjoyment” should be given their plain meaning. *See e.g.* Commissioner v. Estate of Holmes, 326 U. S. 480, 486 (1946) (“enjoyment” and “enjoy”, as used in (the tax statutes), are not terms of art, but connote substantial present economic benefit rather than a technical vesting of title or estates.”).

13. Interestingly, while Defendant goes to great lengths to define “convey” and “voluntary conveyance”, as if those terms were used in the Ademption Statute when they are not, Defendant spends no ink on “possession” or “enjoyment,” the words actually used by the Florida legislature. This is understandable as Plaintiff clearly had both possession and enjoyment of the property and Defendant would be legally and factually fall on its face if it actually addressed the statutory expression that is before the Court.

14. Merriam-Webster's dictionary defines “possession” as “a) the act of having or taking in the control or b) control or occupancy of property without regard to ownership.” See www.merriam-webster.com/dictionary/possession. It is undisputed in this matter that, at all times relevant to these proceedings, Plaintiff was in sole possession of the Condo.

15. Merriam–Webster defines “enjoyment” as “a) the action or state of enjoying; or b) possession and use.” See www.merriam-webster.com/dictionary/enjoyment. It is undisputed that, at all times material to these proceedings, Plaintiff had sole enjoyment of the Condo. According to Merriam-Webster, an antonym of “enjoyment” is “nonpossession”. Id.

16. In his Motion, Defendant asserts that "plaintiff received possession and enjoyment of the value of the condo when the trust surrendered *dominion and control* of the condo to plaintiff on June 26, 2019." Defendant introduces its own non-statutory-based language in

“dominion and control” and then cites absolutely no law to support this proposition for the simple reason that there is none. As set forth *supra*, Plaintiff was in possession and enjoyment of the Condo on the date the Grantor purchased it.

17. As the only evidence is that Plaintiff had possession *and* enjoyment of the Condo when Grantor purchased it, based on the plain language of the Ademption Statute Defendant’s Motion must be denied.

Respectfully submitted this 4th day of January 2021.

FORD, MILLER & WAINER, P.A.

/s/ *David S. Wainer, III*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document is being served on January 4, 2021 via an automatic email generated by the Florida Court E-Filing Portal to:

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Counsel for Defendant

/s/ *David S. Wainer, III*

Attorney

IN THE COUNTY COURT OF THE
FOURTH JUDICIAL COURT, IN AND
FOR DUVAL COUNTY, FLORIDA

MICHAEL LEVY, an individual, and
NUWNA LEVY, an individual,

CASE NUMBER: 2021-CC-9248
DIVISION: CC-A

Plaintiffs,

v.

DEERWOOD PLACE VI CONDOMINIUMS
ASSOCIATION, INC., a Florida corporation,

Defendant.

PLAINTIFFS' RENEWED AND REVISED MOTION FOR SUMMARY JUDGMENT

COME NOW, Plaintiffs, MICHAEL LEVY and NUWNA LEVY ("Plaintiffs"), pursuant to Rules 1.510 (b) and 1.510 (c), Florida Rules of Civil Procedure, and move for entry of summary judgment in favor of Plaintiffs. The grounds on which this Motion is based, and the substantial matter of law intended to be argued with specificity and particularity follow:

Motion for Summary Judgment Standard

1. The law in Florida used to be that a Court may grant a motion for summary judgment, if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there was 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); *See, Aldridge v. Peak Property and Casualty Insurance*, 873 So.2d 499, 500 (Fla. 2nd DCA 2004); *Fiscel v. Wynns*, 667 So.2d 761, 764 (Fla. 1996).

2. The law in Florida used to be that a party is entitled to summary judgment in its favor if the pleadings, depositions, interrogatories, admissions, affidavits, and other material of record show that there is no genuine issue as to any material fact and that the moving party is

entitled to Summary Judgment as a matter of law. Fla. R. Civ. P. 1.510(c); *See, Estes v. Moilan*, 94 So.2d 362 (Fla. 1957); *Carolina Life Company v. DuPont*, 141 So.2d 624 (Fla. 1st DCA 1962).

3. However, all of that has significantly changed as a result of the Florida Supreme Court. On December 31, 2020, the Florida Supreme Court, on its own motion, amended Florida Rule of Civil Procedure, 1.510, effective May 1, 2021, to adopt the summary judgment standard articulated by the United State Supreme Court in *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986), and other federal case law.

4. This amendment was to align Florida’s summary judgment standard with that of the federal courts and of the super majority of states that have already adopted the federal summary judgment standard. *See, in re: Amendments to Florida Rule of Civil Procedure, 1.510*, 309 So.3d 192 (Fla. 2020).

5. The preceding statements of law regarding summary judgment in Florida have now been amended to follow Federal Rule of Civil Procedure 56(a), which requires summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”

6. Historically there have been three particularly consequential differences between the Florida summary judgment standard and the Federal summary judgment standard which briefly can be explained as follows:

First, “Florida courts [have] repeatedly declined to recognize the fundamental similarity between a motion for directed verdict and a motion for summary judgment.” Thomas Logue & Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgment*, 76 Fla. Bar J. Feb. 2002, at 20, 22. By contrast, the Supreme Court has held that the federal summary judgment standard “mirrors” the standard for a directed verdict. *Anderson*, 477 U.S. at 250. Although it recognized that there are procedural differences in the two motions (one is made before trial and the other during trial),

the Supreme Court concluded that “the inquiry under each is the same: 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.” *Id.* at 251-52, 1006 S.Ct. 2505.

*193 Second, since this Court’s decision in Holl v. Talcott, 191 So. 2d 40 (Fla. 1966), Florida courts have required the moving party conclusively “to disprove the nonmovant’s theory of the case in order to eliminate any issue of fact.” Logue & Soto, supra, at 24. By contrast, the Supreme Court has held that there is “no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent’s claim.” Celotex, 477 U.S. at 323. Rather, the Supreme Court explained that “the burden on the moving party may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325, 106 S.Ct. 2548. Upon motion and provided there has been an “adequate time for discovery,” the Supreme Court has held that summary judgment should be entered “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 that party will bear the burden of proof at trial.” *Id.* at 322, 106 S.Ct. 2548. In other words, under the federal summary judgment standard, “the extent of the moving party’s burden varies depending on who bears the burden of persuasion at trial.” Salo v. Tyler, 417 P. 3d 581, 587 (Utah 2018).

Third, Florida courts have adopted an expansive understanding of what constitutes a genuine (i.e., triable) issue of material fact. While the caselaw is not entirely uniform, a leading treatise characterizes the Florida standard this way: “[T]he existence of any competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the ‘slightest doubt’ is raised.” Bruce J. Berman & Peter D. Webster, Berman’s Florida Civil Procedure §1.510:5 (2020 ed.). By contrast, the Supreme Court has described the federal test as whether “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson, 477 U.S. at 248, 106 S.Ct. 2505. “If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Id.* at 249-50, 106 S.Ct. 2505. A party opposing summary judgment “must do more than simply show that there

is some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586, 106 S.Ct. 1348. More recently, the Supreme Court explained that “[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” Scott v. Harris, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So.3d 192-193 (2020).

7. The Court further stated:

We are persuaded that the federal summary judgment standard better purports with the text and purpose of Rule 1.510 and that adopting that standard is in the best interest of our state. As we said at the outset, our Rules of Civil Procedure are meant to “secure the just, speedy and inexpensive determination of every action.” Fla. R. Civ. P. 1.010. Yet Florida courts’ interpretation of our summary judgment Rule has unnecessarily failed to contribute to that objective. Overall and especially as to each of the key areas described above, the federal summary judgment standard is more rational, more fair, and more consistent with the structure and purposes of our Rules of Civil Procedure. (In re Amendments to Florida Rule of Civil Procedure 1.510, 309 So.3d 192-193 (2020) at 194).

8. The Court further stated:

The Supreme Court’s reasoning underlying the federal summary judgment standard is compelling: “One of the principal purposes of the summary judgment Rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.” (Citing, Celotex at 323-24).

9. Therefore, the amendment replaces the phrase, “no genuine issue” with the phrase of “no genuine dispute”, as to any material fact. The new Rule additionally states that the summary judgment standard provided for in this Rule shall be construed and applied in accordance with federal summary judgment standard articulated in Celotex Corp. v. Catrett, 477 U.S., 317, 106

S.Ct. 2548, 91 L.Ed.2d 265, (1986); Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 911 L.Ed.2d 202 (1986); and, Matsushita Elec. Indus. Co. v. Zenith Radio Corporation, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

10. In essence with the new Rule and underlying federal case law authority, the legal inquiries should be the same for both summary judgment and directed verdict. The Florida Supreme Court has previously interpreted Rule 1.510 to require the movant to disprove the non-movant's theory of the case and affirmatively address alleged facts, even if the ultimate burden of persuasion on those issues rest with the non-movant. However, federal courts historically have permitted the movant to simply point out the absence of evidence to support the non-movant's case. This in effect would require the movant to "prove a negative" very often with no evidence to point to.

11. Although Florida courts have applied a more expansive definition of "no genuine issues as to any material fact" for the purposes of Rule 1.510, Florida courts recognize issues of material fact with the existence of any competent evidence. This has prevented summary judgment even if the evidence is untrustworthy or trivial. Federal courts on the other hand require that such evidence be credible and substantial, not that a reasonable jury could return a verdict for the non-movant.

Applicable Law and Facts.¹

¹In Plaintiffs' response in Opposition to Defendant's Motion for Summary Judgment filed April 8, 2022, Plaintiffs alerted the Court to Florida case law which stood for the proposition that one should look to the square footage allocation in the declaration of condominium to resolve a dispute over unit boundaries. See Shores of Pam Club, LLC v. Shore of Pan. Club Resort Community Ass'n., Inc., 204 So. 3d 541 (Fla. 1st DCA 2016). However, in the instant matter, the square footage set forth in the Amendment to the Declaration, ostensibly calculated using the Perimetrical or Engineering Method, does not match up with measurements taken by Anthony Megas using that same method. See Second Affidavit of Anthony Megas dated November 3, 2022 filed in support of this motion. As the square footage amounts do not match, Plaintiff respectfully supports that it cannot be determined in this instant case.

12. “Condominiums and the forms of ownership interests therein are strictly creatures of statute.” Woodside VII, Condo. Ass’n v. Jahren, 806 So. 2d 452, 455 (Fla. 2002) (citing §§718.101-781.622, Fla. Stat. (2000); Winkleman v Toll, 661 So. 2d 102, 105 (Fla. 4th DCA 1995); Suntide Condominium Ass’n v. Division of Florida Land Sales & Condominiums, 463 So. 2d 314, 317 (Fla. 1st DCA 1984)). “Pursuant to section 718.104(2), a condominium is created by recording a declaration of condominium in the public records of the county where the land is located.” Id. (citing §718.104(2), Fla. Stat. (2000)).

13. “The declaration, which some courts have referred to as the condominium’s “constitution,” strictly governs the relationships among the condominium unit owners and the condominium association.” Id. “As explained by the court in Pepe v. Whispering Sands Condominium Ass’n, Inc., 351 So. 2d 755 (Fla. 2d DCA 1977):

A declaration of a condominium is more than a mere contract spelling out mutual rights and obligations of the parties thereto—it assumes some of the attributes of a covenant running with the land, circumscribing the extent and limits of the enjoyment and use of the property. Stated otherwise, it spells out the true extent of the purchased, and thus granted, use interest therein. Absent consent, or an amendment of the declaration of condominium as may be provided for in such declaration, or as may be provided by statute in the absence of such a provision, this enjoyment and use cannot be impaired or diminished.

Id. (quoting Pepe at 757-58 (footnotes omitted)). “Hence, because condominiums are a creature of statute courts must look to the statutory scheme as well as the condominium declaration and other documents to determine the legal rights of owners and the association.” Id. (citations omitted).

14. Fla. Stat. §718.104 (4) provides that

"The declaration must contain or provide for the following matters:
(e)... a graphic description of the improvements in which units are located and a plot plan thereof that, together with the declaration, are in sufficient detail to identify the common elements and each unit and their relative locations and approximate dimensions. ... The survey,

graphic description, and plot plan may be in the form of exhibits consisting of building plans, floor plans, maps, surveys, or sketches... A certificate of a surveyor and mapper authorized to practice in this state shall be included in or attached to the declaration or the survey or graphic description as recorded under s. 718.105 that the construction of the improvements is substantially complete so that the material, together with the provisions of the declaration describing the condominium property, is an accurate representation of the location and dimensions of the improvements and so that the identification, location, and dimensions of the common elements and of each unit can be determined from these materials.”

15. Fla. Stat. §718.109 provides:

“(A) description of a condominium parcel by the number or other designation by which the unit is identified in the declaration, together with the recording data identifying the declaration, shall be a sufficient legal description for all purposes.”

16. In contract interpretation, specific clauses take precedence over general clauses. See Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126 (Fla. 2000). “Moreover, when certain provisions of a contract appear to conflict, “it is a general principle of contract interpretation that a specific provision dealing with a particular subject will control over a different provision dealing only generally with that same subject.”” Williams-Paris v. Joseph, 329 So. 3d 775, 781 (Fla. 4th DCA 2021) (quoting Idearc Media Corp. v. M.R. Friedman and G.A. Friedman, P.A., 985 So. 2d 1159, 1161 (Fla. 3d DCA 2008)).

II. SUPPORTING FACTUAL POSITIONS

17. This motion is supported by factual positions stated and contained in discovery responses, pleadings and documents more specifically set forth below.

18. Plaintiffs purchased real property described as 4480 Deerwood Lake Parkway, Unit 243, Jacksonville, Florida 32216 (the “Property”), on approximately December 8, 2020.

19. The Declaration of Condominium of Deerwood Place VI Condominiums is (the “Declaration”) attached to the Deposition of the Corporate Representative of Deerwood Place VI Condominium Association, Inc. taken on February 14, 2022 (the “Corp. Rep. Depo.”) as Exhibit “2”. It was recorded in Official Records for Duval County on February 23, 2007, at Book 13831, Page 1356, *et seq.*

20. There is one amendment to the Declaration recorded in Official Records for Duval County on May 21, 2007 at Book 13992, Pages 16 - 23.

21. Section 3.1 of the Declaration states as follows:

3.1. Exhibit “A” - The legal description of the land submitted by this Declaration to the condominium form of ownership and a survey of the land showing all existing easements and a graphic description of the improvements in which Units are located and a plot plan thereof which together with the Declaration are in sufficient detail to identify the Common Elements and each Unit and their relative locations and approximate dimensions, and identification of each Unit by number so that no Unit bears the same designation as any other Unit. Upon substantial completion of a building and its appurtenant Common Elements, a surveyor’s certificate will be attached to Exhibit “A”.

22. The depiction of Plaintiff’s property in Exhibit “A” to the Declaration, in **two places**, shows a closet (the “Closet”) opening onto the Common Elements as part of Plaintiff’s Property.

23. In compliance with §718.104 (4)(e), page 39 of the Declaration contains the following certification:

“I hereby certify the condition that the construction of Building 2, Clubhouse and Maintenance Building, “Deerwood Place VI Condominium”, together with the common elements and common areas appurtenant to said buildings has been constructed so that the material together with the provisions of the Declaration describing the condominium property, is an accurate representation of the location and dimensions of the improvements, and that the identification, location, and dimensions of the common elements and of each unit

referenced above can be determined from these materials, pursuant to Chapter 718.104 (4)(e), Florida Statutes.”

24. Defendant has asserted in this action that the Declaration provides that “mechanical rooms” are within the definition of “Common Elements.” However, at no place in the Declaration, or anywhere else in Duval County Official Records for that matter, is there a drawing, sketch, rendering, diagram, or description of the Property, or of a similar Unit, which indicates that the Closet is part of the Common Elements and identifies the Closet as a “mechanical room” or belongs to anyone else but Plaintiffs. Further, Defendant admits that “mechanical room” is not defined. *See* Response to Interrogatory Number 10 of Defendant’s Unverified² Answers to Plaintiff Michael Levy’s First Set of Interrogatories (the “Answers to Interrogatories”).

25. While Defendant’s cite to the Declaration is not incorrect, the reliance on the general statement that mechanical rooms are part of the Common Elements is misplaced. Section 5.2 is a general statement whereas the floor plans showing the Closet as part of Plaintiffs’ Unit are specific. Pursuant to the law set forth in Volusia County v. Aberden and Williams-Paris v. Joseph, *supra*, the specificity of the floor plans control this issue.

26. Defendant relies on the Affidavit of Shelly Fine as if her personal belief has some bearing on what she conveyed to Plaintiffs. It does not as a matter of law.

27. According to Fla. Stat. §718.109, when Shelly Fine conveyed to Plaintiffs Unit 243, she conveyed the Unit as set forth in the Declaration, including the Closet as depicted in the Declaration.

28. Since Defendant has no legal claim to the closet in the Declaration, Defendant is attempting to direct the Court’s attention to a set of plans (the “plans”), which identify a closet as

² While titled “unverified”, Defendant subsequently provided a verification page for the answers to interrogatories.

a “mechanical room.” See Answers to Interrogatories and Defendant’s Answer and Affirmative Defenses. The plans clearly state that they are for Building 5. Defendant is the association of Building 2 as evidenced by page 39, of the Declaration. There is nothing before this Court to link the plans for Building 5 with Building 2. The plans are of absolutely no consequence.

29. Even if this Court were to consider the plans, which pursuant to Jahren, it cannot; it would not likely help Defendant. As noted above, the plans are not incorporated into the Declaration, nor are they recorded in Official Records. See Response to Interrogatory Number 12 of the Answers to Interrogatories. As such, the plans are rendered meaningless for determining ownership of the condominium property in question.

30. Finally, Defendant, in its Motion for Summary Judgment, asks this Court to rule in its favor based on "common sense." Defendant's notion of "common sense" requires this Court to do the following: a.) completely ignore parts of the Declaration or, without any supporting evidence, treat them as "scrivener errors"; b.) use evidence outside the Declaration contrary to Florida law; and c.) find that a general, undefined, term in the Declaration takes priority over two (2) specific diagrams which are not contradicted anywhere in the Declaration. This would run afoul of the law set forth in Jahren, Fla. Stat. §718.104, and Williams-Paris.

31. However, there is another way for this Court to use common sense and interpret the Declaration completely and consistently. Section 4.4 of the Declaration provides as follows:

Encroachments. In the event that any Unit shall encroach upon any of the Common Elements or upon any other Unit for any reason other than the intentional or negligent act of the Unit Owner, or in the event any Common Elements shall encroach upon any Unit, then an easement shall exist to the extent of such an encroachment so long as the same shall exist.

32. The HVAC system located in the Closet owned by Plaintiffs is owned by Defendant and services Common Elements. It is an encroachment of the Common Element on Plaintiffs' unit. According to the Declaration, Defendant has an easement to the extent of the encroachment so long as the encroachment exists. Such an interpretation by this Court would not render any portion of the Declaration to be meaningless, consistent with Florida law. *See Silver Shells Corp. v. St. Maaren at Silver Shells Condo Ass'n*, 169 So.3d 197, 204 (Fla. 1st DCA 2015) (“(A) cardinal principle of contract interpretation is that the contract must be interpreted in a manner that does not render any provision of the contract meaningless.”).

33. As set forth by the Florida Supreme Court in *Jahren*, the Declaration is the “constitution”, which controls the relationship between Plaintiff and Defendant. By extension, the Declaration also controls the extent of the Property. Pursuant to the evidence on file, including the Declaration, there is nothing to establish any basis of ownership of the Closet by Defendant. As such, Plaintiffs are entitled to judgment as a matter of law.

WHEREFORE Plaintiffs, MICHAEL LEVY and NUWNA LEVY, respectfully request that this Court enter Final Judgment granting Summary Judgment in favor of Plaintiffs, reserve jurisdiction to award attorney fees and costs, and grant any such and further relief this Court deems equitable and just.

Dated this 22nd day of November 2022.

FORD, MILLER & WAINER, P.A.

/s/ David S. Wainer III

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing document has been provided this 22nd day of November 2022 via email through the Florida Court E-Filing Portal to:

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